

**INDIAN CLAIMS COMMISSION  
PROCEEDINGS**



(2009) 22 ICCP

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**Reports**

Sakimay First Nation  
Treaty Land Entitlement Inquiry

Opaskwayak Cree Nation  
Streets and Lanes Inquiry

Paul First Nation  
Kapasiwin Townsite Inquiry

Blood Tribe / Kainaiwa  
Big Claim Inquiry

Saulteau First Nation  
Treaty Land Entitlement and Lands in Severalty Inquiry

Sandy Bay Ojibway First Nation  
Treaty Land Entitlement Inquiry

**Response**

Response of the Minister of Indian Affairs and Northern Development to the  
Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry Report



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**INDIAN CLAIMS COMMISSION PROCEEDINGS**

A PUBLICATION OF

**THE INDIAN CLAIMS COMMISSION**



(2009) 22 ICCP

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## FROM THE CHIEF COMMISSIONER

This is the 22<sup>nd</sup> volume of the *Indian Claims Commission Proceedings* to be published. I am pleased to present it on behalf of the Commissioners of the Indian Claims Commission. The volumes includes six inquiry reports, and one letter of response to the Commission's previous completed inquiry.

The first report on the Sakimay First Nation Treaty Land Entitlement inquiry, dated February 2007, relates the history, analysis, and findings on the inquiry. The specific Claim was accepted for negotiations during the course of inquiry by Canada, and thereuuafter the Commission concluded its inquiry at the request of the Sakimay First Nation.

In the second inquiry report on the Opaswayak Cree Nation Street and Lanes Inquiry, dated February 2007, the ICC made no findings, given that First Nation withdrew the two claims.

The third inquiry report on the Paul First Nation Kapasiwing Townsite Inquiry, dated February 2007, relates the history, analysis and findings of the inquiry. The ICC panel recommended that the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiations under Canada's Specific Claims Policy.

The fourth inquiry on the Blood Tribe/Kainaiwa Big Claim Inquiry, dated March 2007, made three recommendations: one, that the Claim for the Big Claim land constituting the reserve not be accepted; two that the claim that the 1882 Nelson survey established the Blood Tribe reserve claim be accepted for negotiations and three, that the date of the first survey for the Blood Tribe be accepted as 1882.

The fifth report, dated April 2007, deals with the Salteau First Nation Treaty Land Entitlement and Severalty claims. The First Nation asked the Commission to end its inquiry before the parties had agreed to a a joint statement of issues, foreseeing that the minister would accept the claims for negotiation.

In the sixth report on the Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry, dated June 2007, the Commission recommended that this claim not be accepted for negotiations.

Finally, included in the volume is the letter of response from the Minister of Indian Affairs and Norther Development pertaining to the Sandy Bay

FROM THE CHIEF COMMISSIONER

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Ojibway First Nation Treaty land Entitlement Inquiry report. The Minister accepted the Commission's recommendation.

Renée Dupuis, C.M., *Ad.E.*  
Chief Commissioner



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## ABBREVIATIONS

AC	Appeal Cases
ANQ	Archives nationales du Québec
BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
CA	Court of Appeal
CAM	Conseil Attimatek-Montagnais
CLSR	Canada Lands Surveys Records
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DOJ	Department of Justice
DSGIA	Deputy Superintendent General of Indian Affairs
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
LAC	Library and Archives Canada
NA	National Archives of Canada
Ont. CA	Ontario Court of Appeal
OR	Ontario Reports
PC	Privy Council
QB	Court of Queen's Bench
QVIDA	Qu'Appelle Valley Indian Development Authority
RSC	Revised Statutes of Canada
SAGMAI	Secrétariat des activités gouvernementales en milieu amérindien et inuit

## ABBREVIATIONS

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Sask QB	Saskatchewan Court of Queen's Bench
SC	Statutes of Canada
SCB	Specific Claims Branch
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SGIA	Superintendent General of Indian Affairs
SProvC	Statutes of the Province of Canada
WWR	Western Weekly Reports

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*Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

FISHING See also TREATY RIGHT – HARVESTING

*Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

*Eel River Bar First Nation: Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3

GATHERING See TREATY RIGHT – HARVESTING

HARVESTING

*Athabasca Denesuliné (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Athabasca Denesuliné (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177

*Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3

*Joseph Bighead, Buffalo River, Waterhen Lake, and Flying Dust First Nations: Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

**HUNTING** See also TREATY RIGHT – HARVESTING

*Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

**MEDICAL AID**

*Roseau River Anishinabe First Nation: Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3

**MINERALS**

*Blood Tribe/Kainaiwa: 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3

*Blood Tribe/Kainaiwa: 1889 Akers Surrender – Mediation* (Ottawa, August 2005), reported (2008) 21 ICCP 3

*James Smith Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005) reported (2008) 20 ICCP 3

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*Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

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**TRUST FUND** See BAND

**TRUTCH REVIEW** See BRITISH COLUMBIA

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# **INDIAN CLAIMS COMMISSION**

## **SAKIMAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY**

### **PANEL**

Commissioner Alan C. Holman (Chair)  
Commissioner Jane Dickson-Gilmore  
Commissioner Sheila G. Purdy

### **COUNSEL**

For the Sakimay First Nation  
Ron S. Maurice

For the Government of Canada  
Vivian Russell

To the Indian Claims Commission  
John B. Edmond / Diana Kwan

**FEBRUARY 2007**



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## **SUMMARY**

### **SAKIMAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Sakimay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, February 2007), reported (2009) 22 ICCP 3.

*This summary is intended for research purposes only.  
For a complete account of the inquiry, the reader should refer to  
the published report.*

**Panel:** Commissioner A.C. Holman (Chair), Commissioner J. Dickson-Gilmore,  
Commissioner S.G. Purdy

**Treaties** – Treaty 4 (1874); **Treaty Land Entitlement** – Amalgamation – Policy;  
**Saskatchewan**

#### **THE SPECIFIC CLAIM**

In 1984, the Sakimay First Nation's treaty land entitlement (TLE) claim was rejected by the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND). The First Nation completed further research and re-submitted the claim in 1997. Following the rejection of this submission in 2002, the First Nation requested that the Indian Claims Commission (ICC) review its rejected specific claim. In September 2003, the ICC accepted the request for inquiry. At issue in this inquiry is whether the First Nation has an outstanding treaty land entitlement.

#### **BACKGROUND**

The Sakimay First Nation is a Cree-speaking nation located east of Regina, Saskatchewan, near the community of Grenfell. Today's Sakimay First Nation is a combination of the Sakimay or Mosquito Band and the Little Bone Band. Historically, the Sakimay Band was part of the Fort Ellice Band led by Waywayseecappo, who signed Treaty 4 in 1874 on behalf of the Fort Ellice Band. Following the signing, Sakimay and his followers were paid treaty annuities with Waywayseecappo and were listed under his payroll.

In 1875, W.J. Christie travelled to Fort Ellice and Qu'Appelle to meet with the treaty bands to select reserves. Christie later reported that a few of the families that

were part of Waywayseecapo's Band had settled at the Round and Crooked Lakes on the Qu'Appelle River and did not wish to move. As a result, a reserve for Sakimay (Mosquito) was originally surveyed in 1876 on the north shore of Crooked Lake; however, the survey of the southern boundary was never completed, and the reserve was never confirmed. In 1881, a separate payroll was created for the Sakimay Band, and Indian Reserve (IR) 74 was surveyed for the Band on the south side of Crooked Lake. After Sakimay's death in 1881, the Band split into two groups. One group, led by Yellow Calf, occupied the south side of the reserve, while the other, led by Shesheep, occupied the north side of the reserve. IR 74A, consisting of 1,651.2 acres on the north side of Crooked Lake, was set aside in 1884 after a re-survey of the area. The two groups had separate paylists until 1883, when they were recombined under one payroll. In 1889, additional lands were added to this reserve and its size was confirmed as 3,584 acres.

By 1887, the Sakimay First Nation had developed close ties with the Little Bone Band, which occupied IR 73A, near the Sakimay reserve. Little Bone and his followers were paid annuities under the Sakimay payroll from 1887 on. By 1907, the Department of Indian Affairs acknowledged that the two bands had amalgamated, an arrangement it formalized. A surrender of the Little Bone reserve resulted.

#### **ISSUES**

What is the date of first survey for the Sakimay First Nation? What are the appropriate paylists to use for determining the Sakimay First Nation's treaty land entitlement population? Should Little Bone and his followers be counted with the Sakimay First Nation for the purpose of calculating its treaty land entitlement? If Little Bone or any of his followers were counted elsewhere for purposes of treaty land entitlement, does that preclude such individuals from being included in the Sakimay First Nation population for TLE purposes? What is the Sakimay First Nation's population for Treaty land entitlement purposes? Does the Sakimay First Nation have an outstanding treaty land entitlement?

#### **OUTCOME**

The specific claim was accepted for negotiation by Canada in September 2006. The Sakimay First Nation accepted this offer and requested the ICC conclude its inquiry, which the ICC did by issuing a declaration on February 21, 2007.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.



**ICC Reports Referred To**

*Gamblers First Nation: Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3.

**Treaties and Statutes Referred To**

*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).

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85.

**COUNSEL, PARTIES, INTERVENORS**

R.S. Maurice for the Sakimay First Nation; V. Russell for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.



# PART I

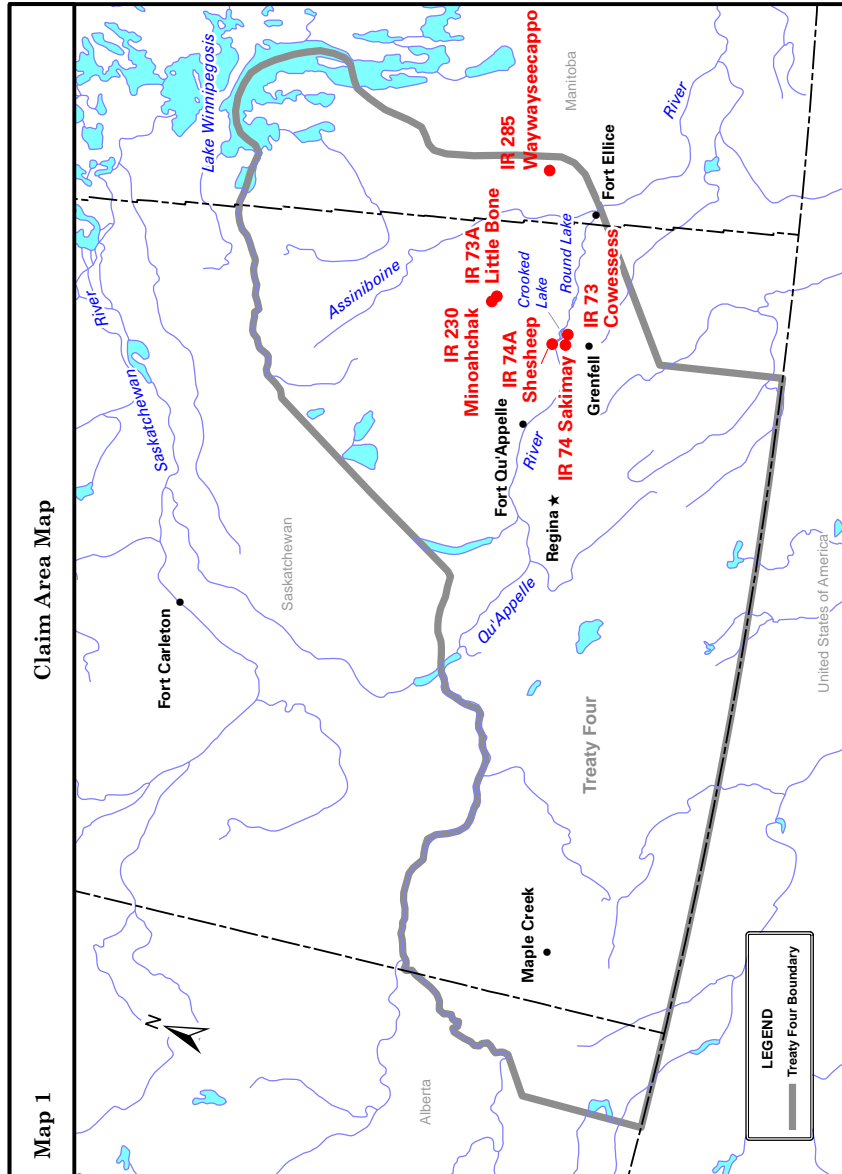
## INTRODUCTION

The Sakimay First Nation is a Cree-speaking nation located east of Regina, Saskatchewan, near the community of Grenfell. In the early 1980s, the Sakimay First Nation submitted a claim to the Minister of Indian Affairs alleging an outstanding treaty land entitlement (TLE) under Treaty 4. This claim was originally rejected in 1984. After completing further research, the First Nation re-submitted the TLE claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) in 1997. This claim was rejected in 2002. In 2003, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim. The ICC accepted the request for an inquiry in September 2003.

This TLE claim is intricately connected to the First Nation's history. The modern-day Sakimay First Nation is a combination of the Sakimay or Mosquito Band and the Little Bone Band. Sakimay or Mosquito was Chief of a band that received annuity payments with Waywayseecappo's Band for six years following the conclusion of Treaty 4. A reserve for Sakimay was originally surveyed in 1876 on the north shore of Crooked Lake; however, the survey of the southern boundary was never completed, and the reserve was never confirmed. In 1881, a separate payroll was created for the Sakimay Band and Indian Reserve (IR) 74 was surveyed for the Band on the south side of Crooked Lake. Also in 1881, Sakimay passed away. After his death, the Sakimay Band split into two groups. One group, led by Yellow Calf, occupied the south side of the reserve, while the other, led by Shesheep, occupied the north side of the reserve. IR 74A, consisting of 1,651.2 acres on the north side of Crooked Lake, was set aside in 1884. In 1889, additional lands were added to this reserve and its size was confirmed as 3,584 acres.

By 1887, the Sakimay First Nation had developed close ties with the Little Bone Band, which occupied IR 73A on Leech Lake, near the Sakimay reserve. The Department of Indian Affairs acknowledged that the two bands had

INDIAN CLAIMS COMMISSION PROCEEDINGS



informally amalgamated and, in 1907, proceeded to formalize the amalgamation. A surrender of the Little Bone reserve resulted.

#### MANDATE OF THE COMMISSION

The mandate of the Indian Claims 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 the claim was already rejected by the Minister.”<sup>1</sup> This Policy, outlined in DIAND’s 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.<sup>2</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

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 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.<sup>3</sup>

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1 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.

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

3 *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

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## PART II

### HISTORICAL BACKGROUND

#### TREATY 4, 1874

On September 15, 1874, Treaty 4 was concluded between the Dominion of Canada, represented by Commissioners Alexander Morris and David Laird, and a group of “Cree, Saulteaux and other Indians” at Qu’Appelle Lakes.<sup>4</sup> As with the other “numbered treaties,” Treaty 4 sought to assert the Crown’s title to certain areas of land, providing Aboriginal people with some protection from advancing immigration and settlement<sup>5</sup> in exchange for an area of approximately 194,000 square kilometres (or 75,000 square miles) in what is now southern Saskatchewan.<sup>6</sup> The Aboriginal signatories were promised annuities of five dollars per person, as well as schools, agricultural assistance, and the establishment of reserves. Reserves were to be selected by the Crown

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; 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.<sup>7</sup>

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<sup>4</sup> *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), 5 (ICC Exhibit 1a, p. 25).

<sup>5</sup> *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 Exhibit 1a, p. 26).

<sup>6</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint), 77 (ICC Exhibit 1c, p. 3). Treaty 4 also extends into Manitoba and Alberta; however, the majority of the treaty area is within Saskatchewan. At the time of treaty, Saskatchewan was part of the North-West Territories.

<sup>7</sup> *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 Exhibit 1a, p. 26).

Treaty 4 was signed by 13 Chiefs and headmen who represented over 3,000 Cree and Saulteaux Indians.<sup>8</sup> After concluding treaty negotiations at Qu'Appelle Lakes, Commissioners Morris and Laird proceeded to Fort Ellice, arriving on September 19, 1874. They met with a "Band of Saulteaux Indians, who make their headquarters at Fort Ellice"<sup>9</sup> and had remained at Fort Ellice instead of going to Qu'Appelle Lakes for treaty negotiations. Not all the Indians of the Fort Ellice area were present but, on September 21, 1874, Waywayseecappo and one headman accepted the terms of Treaty 4 on their behalf. Commissioner Morris wrote:

We proposed to them to give their adhesion to the Qu'Appelle Treaty, and surrender their claim to lands, wherever situated, in the North West Territories, on being given a Reserve and being granted the terms on which the Treaty in question was made. We explained fully these terms and asked the Indians, to present to us their chief and headmen. As some of the band were absent whom the Indians desired to be recognized as head-men, only the chief and one head man were presented.<sup>10</sup>

The Fort Ellice Band was led primarily by Waywayseecappo, but also included several other bands. One of these bands was led by Sakimay ("Shake-ma" or "Mosquito"). Following the signing of Treaty 4, Sakimay and his followers, along with the other bands, were paid treaty annuities under Waywayseecappo's payroll.<sup>11</sup>

#### **WAGNER'S SURVEY OF A RESERVE FOR SAKIMAY, 1876**

In July 1875, W.J. Christie was appointed by order in council to travel to Fort Ellice and Qu'Appelle to obtain adhesions to Treaty 4, pay annuities, and to meet with the treaty bands in order to select reserves.<sup>12</sup> With respect to the location of future reserves, Christie was subsequently advised to consider future settlement, the proposed route of the railway, and the agricultural and hunting needs of the Indians.<sup>13</sup> Furthermore, Christie was instructed to seek consent to group some of the bands together on one reserve.<sup>14</sup>

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8 Joan Holmes, "Sakimay First Nation, The Origins of the Little Bone / Ouchaness First Nation and Its Affiliation with First Nations in the Qu'Appelle Valley," July 2004, 10 (ICC Exhibit 8a, p. 10).

9 Alexander Morris, Lieutenant Governor, NWT, to the Secretary of State for the Provinces, October 17, 1874, Library and Archives Canada (LAC), RG 10, vol. 3614, file 4063 (ICC Exhibit 1a, p. 40).

10 Alexander Morris, Lieutenant Governor, NWT, to the Secretary of State for the Provinces, October 17, 1874, LAC, RG 10, vol. 3614, file 4063 (ICC Exhibit 1a, pp. 40–41).

11 Treaty annuity payroll for "Wawasecapow's Band," 1875, LAC, RG 10, vol. 9412, pp. 41–43 (ICC Exhibit 1b, pp. 182–83).

12 Order in Council PC (unknown), July 9, 1875, LAC, RG 10, vol. 3742, file 29200 (ICC Exhibit 1a, pp. 50–53).

13 J.S. Dennis, Surveyor General, Memorandum dated July 13, 1875, LAC, RG 10, vol. 3622, file 5007 (ICC Exhibit 1a, pp. 57–59).

Christie arrived at Fort Ellice on August 24, 1875, and stayed until August 29, 1875.<sup>15</sup> On October 7, 1875, Christie reported:

7. Wawasecappo's Band (58 families) wanted their Reserve at the head of the Bird Tail Creek, but as that locality is included in the limits of Treaty No. 2, no decision could be given until the Department had been consulted on the subject. A few families belonging to this band have been settled for nine or ten years at the Round and Crooked Lakes on the Qu'Appelle River about 60 miles from Fort Ellice, and as they have made considerable improvements there do not wish to be removed. As we saw no serious objection to this, their wishes were acceded to, and instructions given to Mr. Wagner [surveyor] accordingly. There are seven families now living at these lakes.<sup>16</sup>

Christie later provided instructions to William Wagner, Dominion Land Surveyor (DLS), to "commence the Survey of Indian Reserves under Treaty No. 4 as follows ... Mosquito – Round & Crooked Lakes, Qu'Appelle River 60 miles from Fort Ellice."<sup>17</sup>

In August 1876, Wagner surveyed a reserve totaling 4,691 acres (or 7.33 square miles) for the Sakimay Band on the north side of the Qu'Appelle River and Crooked Lake.<sup>18</sup> In his field notes, Wagner observed that Sakimay (whom he also referred to as Mosquito)

is not a chief but belongs to the Band of Wa-was-a-cappo. At the Payments made in 1875 Mr. Indian Commissioner Christie, in consideration of having houses erected at the head of Crooked Lake, River Qu'appelle, granted to this Mosquito and to his nearest relatives about 25 to 30 in number, a small reserve of Seven Square Miles.<sup>19</sup>

Wagner also indicated that Sakimay was not satisfied with the reserve as he expected "more of his friends to join" and that he wanted "his Reserve Extended to the South and to embrace both sides of the River."<sup>20</sup> In his report to the Minister of the Interior dated February 19, 1877, Wagner wrote that

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14 [A.E. Meredith, Deputy Minister of the Interior,] to W.J. Christie, July 15, 1875, LAC, RG 10, vol. 3622, file 5007 (ICC Exhibit 1a, p. 63).

15 W.J. Christie to E.A. Meredith, Deputy Minister of Interior, September 9, 1875, LAC, RG 10, vol. 3622, file 5007 (ICC Exhibit 1a, pp. 70–73).

16 W.J. Christie and M.G. Dickieson to the Minister of the Interior, October 7, 1875, LAC, RG 10, vol. 3625, file 5489 (ICC Exhibit 1a, p. 85).

17 W.J. Christie to William Wagner, September 17, 1875, LAC, RG 10, vol. 3625, file 5489 (ICC Exhibit 1a, p. 74).

18 Canada Lands Surveys Records (CLSR) SK Plan B964, "Indian Reserve Treaty No. 4, Sha-ke-ma – Mosquito, Crooked Lake on River Qu'Appelle," William Wagner, DLS, August 1876 (ICC Exhibit 7a).

19 CLSR SK Field book FB 719, "Field Notes of Survey of Indian Reserves, Treaty No. 4, Sha-ke-ma – Mosquitoe, (Shesheep I.R. 74A)," August 1876, William Wagner, DLS, p. 26 (ICC Exhibit 7b, p. 29).

20 CLSR SK Field book FB 719, "Field Notes of Survey of Indian Reserves, Treaty No. 4, Sha-ke-ma – Mosquitoe, (Shesheep I.R. 74A)," August 1876, William Wagner, DLS, p. 27 (ICC Exhibit 7b, p. 30).

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Mosquito's "idea of [the] extent of [the] Reserve differed materially with the reality (he wished to have it 40 miles along the River) but after I had explained to him the situation and seeing me determined to go on with the work he yielded and was reasonable."<sup>21</sup>

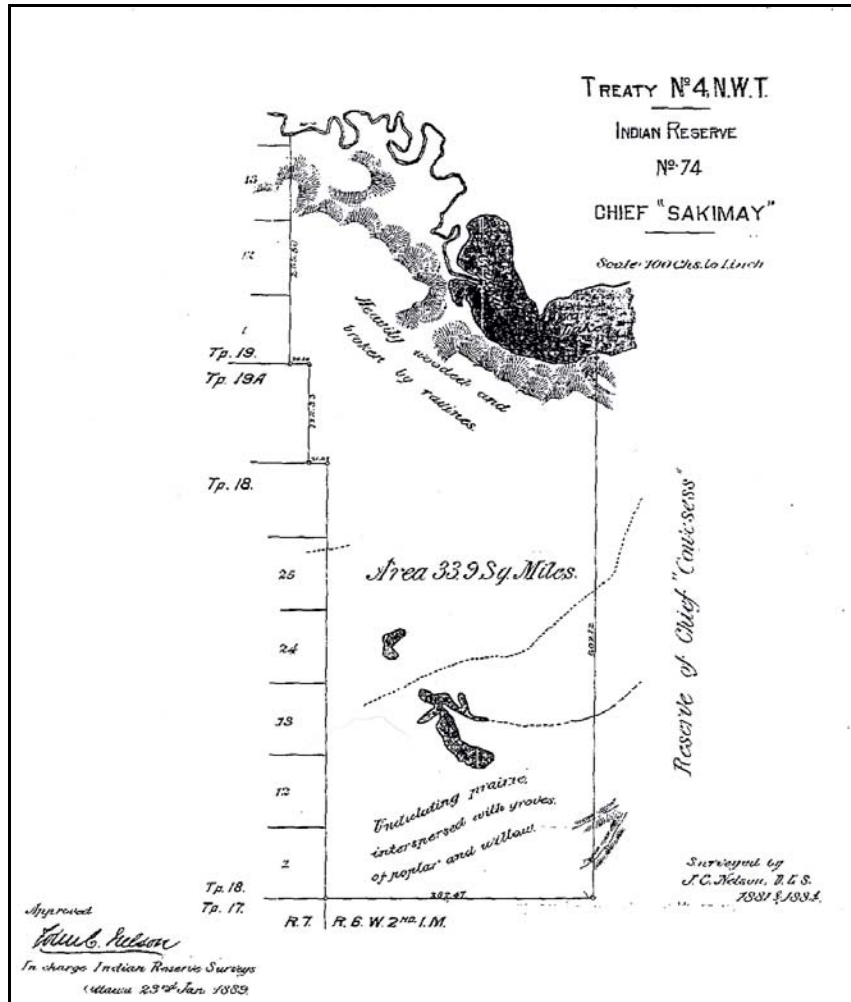
#### SEPARATE PAYLISTS FOR SAKIMAY, 1881

From 1875 to 1881, the Sakimay Band was paid under the Waywayseecappo treaty annuity payroll. In 1881, separate treaty annuity paylists were drawn up for the Waywayseecappo and Sakimay Bands.<sup>22</sup> That same year, a further division occurred. The Sakimay Band split into two groups after the death of Sakimay himself.<sup>23</sup> Subsequently, one group, led by Yellow Calf, collected annuities at Crooked Lake,<sup>24</sup> while the other, led by Shesheep, was paid at Fort Ellice.<sup>25</sup>

In 1881, 49 people were paid treaty annuities with Yellow Calf ("Sa Ka may" payroll), and 81 were paid with Shesheep ("Mosquito" payroll), for a total of 130.<sup>26</sup> A table showing the "Number of Indians in the North-West Territories and their whereabouts on the 31st December, 1881," published in the 1881 *Annual Report of the Department of Indian Affairs*, also numbers the "Mosquito" Band at 130 members, 75 being "on Reserve" and 55 "Hunting in District."<sup>27</sup> In 1883, these two groups recombined under one payroll.<sup>28</sup>

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- 21 William Wagner, DLS, to the Minister of the Interior, February 19, 1877, LAC, RG 88, vol. 300, file 0644 (ICC Exhibit 1a, p. 174).
- 22 ICC, *Gamblers First Nation: Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3 at 29.
- 23 Anne Seymour, "Treaty Land Entitlement Review: Sakimay First Nation," draft report prepared for Specific Claims Branch, Vancouver, October 2001, edited by Eric Wolfhard, Richard Yen, and Dr John Hall, January 2002, p. 16 (ICC Exhibit 3b, p. 16).
- 24 Treaty annuity payroll for "Sa Ka may's Band," August 8, 1881, LAC, RG 10, vol. 9415, p. 58 (ICC Exhibit 1b, p. 376).
- 25 Treaty annuity payroll for "Mosquito's Band," August 3, 1881, LAC, RG 10, vol. 9415, p. 79 (ICC Exhibit 1b, p. 375).
- 26 Treaty annuity payroll for "Sa Ka may's Band," August 8, 1881, LAC, RG 10, vol. 9415, p. 58 (ICC Exhibit 1b, p. 376); Treaty annuity payroll for "Mosquito's Band," August 3, 1881, LAC, RG 10, vol. 9415, p. 79 (ICC Exhibit 1b, p. 375).
- 27 Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 56–57 (ICC Exhibit 1a, pp. 224–25).
- 28 Treaty annuity payroll for "Sakimay's Band," October 10, 1883, LAC, RG 10, vol. 9416, p. 48 (ICC Exhibit 1b, p. 379).
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INDIAN CLAIMS COMMISSION PROCEEDINGS



**NELSON'S SURVEY OF THE SAKIMAY RESERVES (IR 74 AND IR 74A),  
1881 AND 1884**

In 1881, John C. Nelson, DLS, was instructed to survey a new reserve for the Sakimay (Mosquito) Band on the south side of the Qu'Appelle Valley.<sup>29</sup> A collection of Nelson's surveys, published by Order in Council in 1889, confirms that he surveyed IR 74 for the Sakimay (Mosquito) Band in 1881.<sup>30</sup> It is not clear how much land was initially surveyed in August 1881 because Nelson's survey book includes the modifications he made in his re-survey of the reserve in February 1884. The accompanying sketch in his book indicates that an area of 33.9 square miles (21,696 acres) was ultimately surveyed for the Band.<sup>31</sup>

In May 1882, Indian Agent A. McDonald reported that he had encountered some difficulty with Mosquito's Band because a portion of the group

didn't wish to receive assistance from the Government, and prevented those who so desired from taking same. After some talking I came to the following settlement. Those who did not wish to take assistance from the Government were to stay at one end of the reserve and those who did were to remain at the other, but the reserve was not to be divided. The wood was to be common to both. I promised them at their request a mile square on the opposite side of the lake [the location of the reserve originally surveyed by Wagner]. This is where they have their huts and have been living for a long time. I trust that my action in this matter will have approval.<sup>32</sup>

In order to fulfill the government's promise of a reserve north of Crooked Lake, Nelson completed a new survey of the original Sakimay reserve in February 1884 and named it Shesheep IR 74A.<sup>33</sup> This survey was conducted over much of the same area surveyed for the band by Wagner in 1876. On February 8, 1884, Nelson reported:

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- 29 John Nelson, DLS, to Indian Commissioner, report dated January 10, 1882, LAC, RG 10, vol. 3573, file 154, pt. 2 (ICC Exhibit 1a, p. 252).
- 30 Canada, Order in Council PC 1151, May 17, 1889, DIAND, Indian Lands Registry, Instrument no. 4000, 28 (ICC Exhibit 1a, pp. 511–14). For survey book notes for Sakimay, see John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, pp. 31–32).
- 31 John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, p. 32).
- 32 A. McDonald, Indian Agent, Qu'Appelle Agency, to the Superintendent General of Indian Affairs, May 9, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 205 (ICC Exhibit 1a, p. 259).
- 33 CLSR SK Plan 180, "Treaty No. 4, N.W.T. Plan of Indian Reserve No. 74a at Crooked Lake for part of the Band of Chief Mosquito (Sakimay) under Shesheep." J.C. Nelson, DLS, February 1884 (ICC Exhibit 7r). John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, pp. 34–35). Plans confirmed by: Order in Council PC 1151, May 17, 1889, DIAND, Indian Lands Registry, Instrument no. 4000, pp. 26–28 (ICC Exhibit 1d, pp. 31–35).
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INDIAN CLAIMS COMMISSION PROCEEDINGS

TREATY No 4, N.W.T.

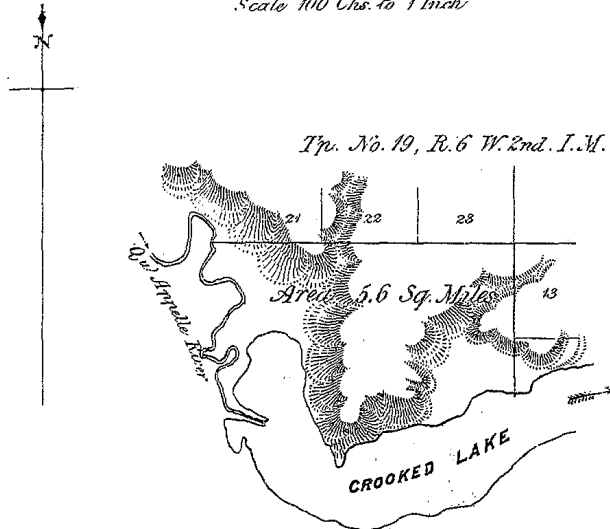
INDIAN RESERVE

No 74 A

At Crooked Lake

"SHEESHEEP'S" BAND

Scale 100 Chs. to 1 Inch



Approved

*J. C. Nelson*

In Charge Indian Reserve Surveys

Ottawa 23rd. Jan. 1889

Surveyed by ...

J. C. Nelson D. L. S.

in 1884

Note:- In 1889, sec. 14, fractional secs. 10  
11 & 15 were added to the above reserve  
as originally surveyed

I have the honor to enclose herewith a rough sketch showing my survey of a small reserve, on the North side of Crooked Lake, covering the houses and gardens belonging to “Sheesheep” Old “Asseinboine” and other members of the Band of the late Chief “Seckimay” or the “Mosquito” whose reserve proper lies on the south side of the lake, and who have hitherto declined to accept any assistance from the government, as they prefer to subsist more by hunting and fishing, and raising potatoes and other vegetables, in accordance with their own recognised methods, in which they seem to have been to some extent successful, for they showed me some pits of very excellent potatoes.

...

The area of land in this Reserve is about two square miles. Its Eastern boundary was formerly run by Mr. Waggoner, D.L.S.; the lake the river and the Northern boundaries have been surveyed by me during the past few days and the Indians are perfectly satisfied.<sup>34</sup>

Nelson refers to an area of about two square miles, but his field notes provide a more precise measurement of 2.58 square miles (1,651.2 acres).<sup>35</sup> A note on Plan 5967-28 CLSR SK, however, indicates that additional lands were added to the reserve in 1889,<sup>36</sup> which explains why Nelson’s published 1889 description of IR 74A, as well as Plan T1037 from February 1884, refer to an area of 5.6 square miles or 3,584 acres.<sup>37</sup>

In April 1884, the Department of Indian Affairs sent the plan of the “proposed Reserve” to the Department of the Interior for registration:

The proposed Reserve added to the original one on the South side of the Lake will not exceed in area the quantity of land to which the whole Band is entitled under Treaty. It appears that a promise was made these Indians that owing to the fact of their having houses and cultivated lands on this proposed Reserve the same would be granted to them.

Will you be good enough to have the necessary entry made in your maps & other records of the Reserve in question.<sup>38</sup>

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- 34 John C. Nelson, DLS, to Edgar Dewdney, Indian Commissioner, February 8, 1884, DIAND, file 673/30-5-74A (ICC Exhibit 1a, pp. 363–64).
- 35 CLSR SK Field book FB 104, “Field Notes of Survey of the Boundaries of Indian Rese. No. 74a, for the part of the Band of Chief “Mosquito” (Sakimay) under “Sheesheep,” surveyed in February 1884 by John C. Nelson, DLS, p. 15 (ICC Exhibit 7q, p. 12).
- 36 CLSR SK Plan 5967-28, “Plan of Township No. 19, Range 6 West of Second Meridian,” surveyed by R.C. McPhillips, DLS, October 1881 and July 1884 (ICC Exhibit 7s).
- 37 John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, pp. 34–35). Confirmed by Order in Council PC 1151, May 17, 1889, DIAND, Indian Lands Registry, Instrument no. 4000, pp. 26–28 (ICC Exhibit 1a, pp. 31–35). See also: CLSR SK Plan T1037, “Treaty No. 4, N.W.T. Plan of Indian Reserve No. 74a at Crooked Lake for part of the Band of Chief Mosquito (Sakimay) under Shesheep,” J.C. Nelson, DLS, February 1884 (ICC Exhibit 7p).
- 38 Department of Indian Affairs to A.M. Burgess, Deputy Minister of the Interior, April 17, 1884, no file reference available (ICC Exhibit 1a, p. 397).
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Indian Commissioner Dewdney later recognized that the newly reserved lands had “been held by that portion of Mosquito’s Band for over thirty years.”<sup>39</sup>

The two reserves, IR 74 (containing at least 21,696 acres as of 1881) and IR 74A (containing 3,584 acres as of 1889), provided the Sakimay Band with reserve land totaling 25,280 acres. On May 17, 1889, the reserves of Sakimay (IR 74 and 74A) were confirmed by Order in Council PC 1151.<sup>40</sup> The reserves were subsequently withdrawn from the operation of the *Dominion Lands Act* by Order in Council PC 1694, dated June 12, 1893.<sup>41</sup>

#### NELSON’S SURVEY OF LITTLE BONE RESERVE, 1884

Prior to its amalgamation with the Sakimay Band in 1907 (particulars of which follow), the Little Bone Band occupied its own reserve, IR 73A, on Leech Lake. Little Bone (also known as “Ouchaness” or “Okanis”) was the half-brother of Cowessess (“Ka-wezauce” or “Little Child”),<sup>42</sup> an original signatory to Treaty 4.<sup>43</sup> Although Little Bone was not a signatory to the treaty himself, sources suggest he was one of the Saulteaux leaders who was represented at treaty by Cowessess. From 1874 through 1880, Little Bone and his followers were included on the Cowessess payroll.<sup>44</sup> In 1880, Little Bone received annuities at Fort Ellice, apart from Cowessess, who was paid at Maple Creek, although both groups were still listed on the same payroll.<sup>45</sup> In 1881, Little Bone and his followers (a total of 33) started receiving annuities on a separate payroll from Cowessess.<sup>46</sup>

On May 29, 1883, Indian Agent McDonald asked the Indian Commissioner “to have a Surveyor sent up to Leech Lake [or Crescent Lake]”<sup>47</sup> to survey a

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- 39 Department of Indian Affairs, draft letter to A.M. Burgess, Deputy Minister of the Interior, October 17, 1884, DIAND, file 673/30-5-74A (ICC Exhibit 1a, pp. 411–12).
- 40 Order in Council PC 1151, May 17, 1889, DIAND, Indian Land Registry, Instrument no. 4000 (ICC Exhibit 1a, pp. 511–14); and John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, pp. 31–35).
- 41 Order in Council PC 1694, June 12, 1893, DIAND, Indian Land Registry, Instrument no. 1151-6 (ICC Exhibit 1a, pp. 519–23).
- 42 John C. Nelson to E. Dewdney, Indian Commissioner, February 14, 1884, LAC, RG 15, vol. 310, file 68071 (ICC Exhibit 1a, p. 365).
- 43 *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), 5 (ICC Exhibit 1a, p. 25).
- 44 A. McDonald, Indian Agent, to the Indian Commissioner, August 6, 1885, LAC, RG 10, vol. 3575, file 256 (ICC Exhibit 1a, p. 475); Treaty annuity payroll for “Cow we cess Band,” 1875, LAC, RG 10, vol. 9412, p. 67 (ICC Exhibit 1b, p. 2); see also Joan Holmes, “Sakimay First Nation, The Origins of the Little Bone / Ouchaness First Nation and Its Affiliation with First Nations in the Qu’Appelle Valley,” July 2004, p. 5 (ICC Exhibit 8, p. 5).
- 45 Treaty annuity payroll for “Cowecess Band,” August 2, 1880, LAC, RG 10, vol. 9414, pp. 41–3 (ICC Exhibit 1b, pp. 14–15).
- 46 Treaty annuity payroll for “Okanee (Little Bone) Leech Lake,” 1881, LAC, RG 10, vol. 9415, p. 55 (ICC Exhibit 1b, p. 491).
- 47 McDonald referred to the May 29, 1883, correspondence in a subsequent letter: A. McDonald, Indian Agent, Qu’Appelle Agency, to the Indian Commissioner, August 29, 1883, LAC, RG 10, vol. 3537, file 256 (ICC Exhibit 1a, p. 308).

reserve for Little Bone. As he reported in July of that year, “Little bone [sic] of Leech Lake” had himself “applied for a reserve at that point.” McDonald continued: “he and his father have always lived there. ... They number thirty-seven souls. The reserve has been approved of, and the boundaries will be established as soon as possible.”<sup>48</sup> A letter written by McDonald on August 29, 1883, noted a “complaint made by Oucheness or Little Bone about his Reserve at Leech Lake,” because the Saskatchewan Homestead Company was claiming that they had “purchased this land [Little Bone’s Reserve] from the Government.”<sup>49</sup> In November 1883, McDonald again reported on Little Bone’s claim that settlers were encroaching on reserve land. He wrote that Little Bone made efforts to secure land for himself and his followers after the signing of Treaty 1 in 1871 by marking the territory with mounds of earth.<sup>50</sup> After investigating the complaint, McDonald wrote:

On the morning of the 1st Inst. “Little Bone” brought me to the mounds made by him, eleven or twelve years since, Mr. Setter & I examined the place where the earth was removed and we are of opinion that his statement is correct.<sup>51</sup>

Indian Commissioner Edgar Dewdney forwarded this information to the Department of Indian Affairs in Ottawa on November 8, 1883.<sup>52</sup>

A letter dated November 13, 1883, from Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), to the Deputy Minister of the Interior, reveals that the department accepted McDonald’s view regarding Little Bone’s assertion. Vankoughnet wrote: “Little Bone occupied it [the land at Leech Lake] long before the Treaty was made, and the Reserve was given him there at the time of the Treaty. ... No doubt the Saskatchewan Homestead Co. can be arranged with by giving them additional land at some other point in lieu of the Indian land referred to.”<sup>53</sup> Vankoughnet then suggested to the Indian Commissioner that he “send Nelson at once to fix the boundaries.”<sup>54</sup>

48 A. McDonald, Indian Agent, Qu’Appelle Agency, to the Superintendent General of Indian Affairs, July 6, 1883, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, 73 (ICC Exhibit 1a, p. 305).

49 A. McDonald, Indian Agent, Qu’Appelle Agency, to the Indian Commissioner, August 29, 1883, LAC, RG 10, vol. 3537, file 256 (ICC Exhibit 1a, p. 308).

50 A. McDonald, Indian Agent, Treaty No. 4, to the Indian Commissioner, November 6, 1883, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 321–22).

51 A. McDonald, Indian Agent, Treaty No. 4, to the Indian Commissioner, November 6, 1883, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 322–23).

52 L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), refers to this correspondence in a letter to A.M. Burgess, Deputy Minister of the Interior, November 13, 1883, LAC, RG 10, vol. 3575, file 256 (ICC Exhibit 1a, p. 335).

53 L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister of the Interior, November 13, 1883, LAC, RG 15, Series D-II-1, vol. 310, file 68071 (ICC Exhibit 1a, pp. 337–39).

An account provided in 1918 by a settler named Frank Baines confirmed the attendance of a surveyor in 1884:

White settlers came to Crescent Lake during the summer of 1883. They found a band of about twenty or thirty adult Indians on the Okanese Indian Reserve ...  
... A surveyor was sent up in January 1884 from the Indian Department and he showed very plainly that the white men were trespassers. This surveyor had with him a map showing that these Indians were living there and growing potatoes in 1860. The Indian Chief, Little Bones had seen the lake dry twice, indicating that they had been there at least fifty or sixty years prior to 1883.<sup>55</sup>

Plan 181 CLSR SK shows the “proposed” reserve for Little Bone as surveyed by John C. Nelson in January 1884.<sup>56</sup> By the end of January, the Minister of the Interior approved a decision which favoured Little Bone’s Band over the Saskatchewan Homestead Co., but required the exchange of one section of the reserve that had been “occupied by homesteaders before that notification that it was claimed by the Indians was received” by the Department of the Interior.<sup>57</sup>

On February 14, 1884, Nelson reported on his survey of the reserve boundaries:

“Ochaniss” or the Little Bone, half brother to Chief Cowesess at Crooked Lake, and followers numbering forty five souls have been for several generations back, in possession of a certain point of land on the east side of Leech Lake, shown on the accompanying plan of my survey illustrating this report.

...

From as far back as 1879 the Little Bone was led to believe by Mr. Agent McDonald that he would be granted a Reserve at the place he was located, namely Leech Lake, and early in 1882 by authority from the Department he was definitely promised his reserve and was told that it would be surveyed for him in the fall of that year. The quantity of land to be set aside, was explained to him, viz: – one square mile for each five Indians.

In the summer of 1882 seeing an influx of settlers, and prospecting parties in the neighbourhood of his reserve, or rather the land which he desired to have set aside as a reserve, he became alarmed at the white man’s encroachments as he called it, and came down to Fort Qu’Appelle, to the Indian Office, when a paper

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54 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, November 13, 1883, LAC, RG 10, vol. 3575, file 256 (ICC Exhibit 1a, p. 341).

55 Frank Baines to Thomas MacNutt, Member of Parliament, October 21, 1918, DIAND, file 673/30-5-73A, vol. 1 (ICC Exhibit 1a, p. 653).

56 CLSR SK Plan 181, “Treaty 4 Survey of a ‘Proposed’ Reserve for Little Bones Band at Leech Lake or Crescent Lake,” surveyed in January 1884 by John C. Nelson, DLS (ICC Exhibit 7o).

57 A.M. Burgess, Deputy Minister of the Interior, to the Minister of the Interior, January 23, 1884, LAC, RG 15, Series D-II-1, vol. 310, file 68071 (ICC Exhibit 1a, pp. 352–53). Marginalia indicates that the Minister approved the Deputy Minister’s recommendation.



was given him wherein was set forth this claim to the Reserve at Leech Lake and calling upon settlers and land seekers, to respect his claim. This paper was emanating from the Indian Office, was countersigned by the Indian Commissioner.

With the above facts in view, as well as that of the Saskatchewan Homestead and Land Company having acquired part of the tract claimed by the Indians, I proceeded to Leech Lake to make the survey.<sup>58</sup>

Nelson also requested that Little Bone Band be allowed to retain the north half of the section claimed by the homesteaders,<sup>59</sup> but that request was eventually denied by the department.<sup>60</sup>

The following year, however, some questions were raised as to whether sufficient land had been surveyed for Little Bone. On February 26, 1885, Samuel Bray, Chief Surveyor for the Department of Indian Affairs, wrote the Deputy Minister:

I beg to draw your attention to the area of this Reserve 10 <sup>9</sup>/<sub>10</sub> sq. miles or 6976 acres. Mr. Nelson in his letter of 14th Feby. 1884 (file 505) states that Little Bone's Band numbers 45 souls; according to the provisions of Treaty No. 4 the above area is probably for this number of people, as although in excess of the actual area (5760 acres) required, the excess is probably to provide for marshes &c. &c. but Mr. Agent McDonald in his Tabular Statement for the same year (ending June 30, 1884) states that Ouchaness' or Little Bone's Band numbers 37 males and 36 females, a total of 73, it would therefore appear that the Band is entitled to 9344 acres or about 10,000 acres to allow for marshes &c. &c. and that their present Reserve is too small by about 3000 acres.<sup>61</sup>

No changes were made, however; Nelson's description of Little Bone's reserve (IR 73A), published in 1889, indicates that the completed survey provided 10.9 square miles (6,976 acres) of land for Little Bone's Band.<sup>62</sup> As with IR 74 and 74A, the survey of IR 73A was confirmed by Order in Council PC 1151, dated May 17, 1889, and the IR 73A lands were withdrawn from the operation of the *Dominion Lands Act* by Order in Council PC 1694, dated June 12, 1893.<sup>63</sup>

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58 John C. Nelson, February 14, 1884, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 365–67).

59 John C. Nelson, February 14, 1884, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 372–73).

60 Hayter Reed, Acting Assistant Indian Commissioner, to the Indian Agent, Indian Head, June 2, 1884, LAC, RG 10, vol. 3575, file 256 (ICC Exhibit 1a, pp. 403–4).

61 Samuel Bray, Chief Surveyor, Department of Indian Affairs, to the Deputy Minister of Indian Affairs, February 26, 1885, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 452–53).

62 John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, pp. 29–30).

63 Order in Council PC 1151, May 17, 1889, DIAND, Indian Land Registry, Instrument no. 4000 (ICC Exhibit 1a, pp. 511–14); Order in Council PC 1694, June 12, 1893, DIAND, Indian Land Registry, Instrument no. 1151-6 (ICC Exhibit 1a, pp. 519–23).

**AMALGAMATION OF SAKIMAY BAND AND LITTLE BONE BAND, 1907**

As early as 1885, Department of Indian Affairs officials acknowledged the close ties between the bands in the vicinity of Crooked Lake (including Sakimay) and the Little Bone Band.<sup>64</sup> As previously mentioned, Little Bone was the half brother of Cowessess,<sup>65</sup> whose band resided on IR 73, adjacent to Sakimay IR 74.<sup>66</sup> Government agents had previously encouraged the Little Bone Band to transfer to Crooked Lake and establish itself alongside the Cowessess Band.<sup>67</sup>

In 1887, Little Bone and his followers received annuities under the Sakimay paylist.<sup>68</sup> A table published in the Indian Affairs *Annual Report* for 1888 indicates that the Little Bone Band was “Now amalgamated with Sakimay and other bands.”<sup>69</sup> Although no formal amalgamation had been made, subsequent department correspondence referred to the shared use of IR 74, 74A, and 73A.<sup>70</sup> On June 30, 1906, Matthew Millar, Indian Agent for the Crooked Lakes Agency, reported the following on “Sakimay Band, No. 74”:

Reserve. – This reserve is on the west side of the north half of Cowessess reserve, and bounded on the north by the Qu'Appelle valley and Crooked lake, a small part of the reserve (No. 74A) being on the north side of the river. The area of this reserve is 25,280 acres. These Indians also have the Little Bone reserve (No. 73A) 40 miles north, containing 6,796 acres.

...

Population. – The band has a population of 158.<sup>71</sup>

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- 64 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, July 31, 1885, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 472–73).
- 65 John C. Nelson to E. Dewdney, Indian Commissioner, February 14, 1884, LAC, RG 15, vol. 310, file 68071 (ICC Exhibit 1a, p. 365).
- 66 John Nelson, *Descriptions and Plans of Certain Indian Reserves in the Province of Manitoba and the North-West Territories, 1889* (1889) (ICC Exhibit 1d, p. 25).
- 67 Joan Holmes, “Sakimay First Nation, The Origins of the Little Bone / Ouchaness First Nation and Its Affiliation with First Nations in the Qu'Appelle Valley,” July 2004, p. 27 (ICC Exhibit 8, p. 27).
- 68 Treaty annuity paylist for “Sakimay’s Band,” July 15, 1887, LAC, RG 10, vol. 9420, pp. 62–64 (ICC Exhibit 1a, pp. 385–87).
- 69 Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 281 (ICC Exhibit 1a, p. 504).
- 70 J.P. Wright, Indian Agent, Crooked Lake Agency, to the Superintendent General of Indian Affairs, July 25, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30 1899*, 142 (ICC Exhibit 1a, p. 546); J.P. Wright, Indian Agent, Crooked Lake Agency, to the Superintendent General of Indian Affairs, July 27, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30 1900*, 149 (ICC Exhibit 1a, p. 561); Magnus Begg, Indian Agent, Crooked Lake Agency, to the Superintendent General of Indian Affairs, July 31, 1901, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30 1901*, 144 (ICC Exhibit 1a, p. 568).
- 71 Matthew Millar, Indian Agent, Crooked Lake Agency, to the Superintendent General of Indian Affairs, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30 1906*, 127–28 (ICC Exhibit 1a, p. 585).

In March 1907, the Chief Accountant of the Department of Indian Affairs, Duncan Campbell Scott, wrote a memorandum to the DSGIA acknowledging the de facto amalgamation of Little Bone Band with Sakimay Band and recommending their formal amalgamation, as well as the surrender for sale of the Little Bone reserve. He wrote:

I beg to present the following facts with reference to Little-Bones Reserve at Leech Lake. All the members of this Band but two families reside on Sakimays Reserve and are paid on the pay list of that Band. They were transferred seemingly without authority of the Department in 1887 and have since been there paid. As it seems desirable to establish a surrender of the Reserve I have been looking into precedents for this action, the peculiar position being that nearly the whole population of the Band is residing on another Reserve, sharing equally with the owner of that Reserve in all membership rights.

... [T]he best way would be to carefully trace the original members of Little Bones' Band in Sakimays [*sic*] Band, and after such information is obtained take a surrender from all the Indians found to belong to Little Bones [*sic*] Band. After that obtain an agreement between Sakimays and Little Bones Bands for the amalgamation of their lands and money. I would suggest that Inspector Graham be authorized to take such a surrender, and also to carry out the amalgamation.<sup>72</sup>

Scott's recommendation was approved, and on March 22, William M. Graham was "authorized to take a surrender of the Little Bone Reserve, at Leech Lake, from all the Indians found to belong to Little Bone Band, on forms enclosed, and after surrender has been executed, ... to obtain an agreement from the Sakimay and Little Bone Bands, for the amalgamation of their lands and moneys."<sup>73</sup>

On July 6, 1907, a meeting was held on the Little Bone reserve, attended by five adult male band members, three of whom voted in favour of the surrender.<sup>74</sup> On July 9, 1907, another meeting was held on the Sakimay reserve, where the bands voted in favour of amalgamation.<sup>75</sup>

At a meeting held at the Leech Lake reserve on July 17, Graham reported that only two of six male members of Little Bone over the age of 21 were

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72 Duncan Campbell Scott, Accountant, Department of Indian Affairs, memorandum to the DSGIA, March 19, 1907, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 588–89).

73 Frank Pedley, DSGIA, to William M. Graham, Inspector of Indian Agencies, March 22, 1907, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, p. 591).

74 "Minutes of Meeting of Little Bone band of Indians," Leech Lake, Little Bone Reserve, July 6, 1907, Saskatchewan Archives (SA), R-E3692, file: Crooked Lakes Indian Reserves (ICC Exhibit 1a, p. 602).

75 "Minutes of Meeting of the joint bands Sakimay and Little Bone," Sakimay Reserve, July 9, 1907, SA, R-E3692, file: Crooked Lakes Indian Reserves (ICC Exhibit 1a, p. 612); Agreement between the Owners of Sakimays and Little Bone reserves, July 9, 1907, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 613–14).

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“resident on the reserve” and they “were much opposed to the surrender,” but that the remaining four “members of the Band who had been residing on Sakimay Reserve agreed to surrender after a great deal of talk.” He continued:

The Indians of Little Bone’s Band number about 30 souls in all. The Indians signing the surrender thought they should receive \$150.00 for each member of the Band. I promised them \$40.00 and said I would make their request known to the Department. I do not think it would be wise to pay them \$150.00 each. I should be glad to have a cheque from you for \$1200.00 so that I would make this payment on my return from Fishing Lake late in August.

I held a meeting with the Indians of Sakimay’s Band on the reserve on the 9th of July. After explaining to the Band fully the object of the meeting, they agreed unanimously to admit the Little Bone Indians on the condition that the Band will participate in the benefits that will accrue from the sale of the Little Bone Reserve after the Department deduct the usual amount for land management and the Indians of Little Bone Band receive \$40.00 each.<sup>76</sup>

The surrender was confirmed by Order in Council PC 1904, dated August 31, 1907.<sup>77</sup>

On November 28, 1908, Graham paid \$40 to each of 19 Little Bone band members, under six band tickets.<sup>78</sup> When Graham reported this payment two days later, he noted “that the majority of the Indians of this Band accepted the money here yesterday, and I have sent word to those Indians residing at Leech Lake to come across to File Hills to get their money. File Hills is about the same distance from Leech Lake as Crooked Lake Agency is.”<sup>79</sup> Graham also stated that the two families still resident at Leech Lake, the families of Peepeeche and his brother Kinistino, were opposed to the surrender of the reserve.<sup>80</sup> There is no evidence on record that those families accepted payment.

#### SAKIMAY RESERVES AFTER AMALGAMATION

The Sakimay and Little Bone Bands formally amalgamated in 1907, and the Little Bone reserve (IR 73A) was surrendered for sale. In June 1909, a

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76 W.M. Graham, Inspector of Indian Agencies, Qu’Appelle Inspectorate, to the Secretary, Department of Indian Affairs, July 17, 1907, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 616–17).

77 Order in Council PC 1904, August 31, 1907, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, p. 620).

78 Paylist for “Leech Lake Little Bone Band Paid at Crooked Lake Agency,” November 28, 1908, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, p. 630).

79 W.M. Graham, Inspector of Indian Agencies, Qu’Appelle Inspectorate, to the Secretary, Department of Indian Affairs, November 30, 1908, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, p. 631).

80 W.M. Graham, Inspector of Indian Agencies, to the Secretary, Department of Indian Affairs, June 6, 1908, LAC, RG 10, vol. 3578, file 505 (ICC Exhibit 1a, pp. 627–29).

portion of the Little Bone reserve was offered for sale by public auction (excluding N ½ section 35 and E ½ section 34), but only a small amount of the land was sold.<sup>81</sup> Eventually, some of the unsold portions were exchanged in 1966 for provincial lands that were reserved as Minoahchak IR 230 for the Sakimay First Nation,<sup>82</sup> and the remaining unsold portions were returned to reserve status in 1977.<sup>83</sup> In 1989, the Little Bone IR 73A was renamed Little Bone IR 74B, and Minoahchak IR 230 was renamed Minoahchak IR 74C.<sup>84</sup> Currently, Little Bone IR 74B and Minoahchak IR 74C belong to the Sakimay First Nation.

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81 Department of Indian Affairs, Memorandum “re Little Bones, Leech Lake or Crescent Lake reserve,” March 21, 1921, no file reference available (ICC Exhibit 1a, p. 661).

82 Sakimay Band, Band Council Resolutions dated October 31, 1966 (ICC Exhibit 1a, pp. 668–69) and March 15, 1967, no file reference available (ICC Exhibit 1a, pp. 670–71); Order in Council PC 1968-540, March 21, 1968, DIAND, Indian Lands Registry, Instrument no. 1428 (ICC Exhibit 1a, pp. 672–75).

83 Sakimay Band, Amendment of Surrender, February 15, 1977, DIAND, Indian Lands Registry, Instrument no. 57564 (ICC Exhibit 1a, pp. 676–81); Order in Council, PC 1978-507, February 23, 1978, DIAND, Indian Lands Registry, Instrument no. 57564 (ICC Exhibit 1a, pp. 682–84).

84 Sakimay Band, Band Council Resolution, September 29, 1989, DIAND, Indian Lands Registry, Instrument no. 129779 (ICC Exhibit 1a, pp. 685–86).

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## PART III

### ISSUES

By agreement of the parties, the Indian Claims Commission was asked to inquire into the following issues.

- 1 What is the date of first survey for the Sakimay First Nation?<sup>85</sup>
- 2 What are the appropriate paylists to use for determining the Sakimay First Nation's treaty land entitlement population?<sup>86</sup>
- 3 Should Little Bone and his followers be counted with the Sakimay First Nation for the purpose of calculating its treaty land entitlement?
- 4 If Little Bone or any of his followers were counted elsewhere for purposes of Treaty land entitlement, does that preclude such individuals from being included in the Sakimay First Nation population for TLE purposes?
- 5 What is the Sakimay First Nation's population for treaty land entitlement purposes?
- 6 Does the Sakimay First Nation have an outstanding treaty land entitlement?

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<sup>85</sup> The parties agreed that the date of first survey is 1881 for Sakimay and 1884 for Little Bone.

<sup>86</sup> The parties agreed that the 1881 payroll is the appropriate payroll for Sakimay, and that the 1884 is the appropriate one for Little Bone.

## PART IV

### PROCEDURAL HISTORY

The Sakimay First Nation originally submitted its TLE claim to the Specific Claims Branch in 1997. This claim was rejected in 2002, leading to a request for the ICC to conduct an inquiry in 2003. The ICC accepted this request in September 2003.

The parties finalized the statement of issues for the inquiry in February 2004 and agreed that the claim centred on one key question, which was whether 28 members of the Little Bone Band could be counted with Sakimay for TLE purposes. During a planning conference in February 2004, the parties agreed that information regarding the affiliations of the Little Bone Band was missing from the record and that the inquiry could benefit from additional research. To this end, the parties proceeded with a joint research project facilitated by the ICC.

The parties selected Joan Holmes as the researcher, and her project was completed by the end of July 2004. The parties met again to discuss her findings, which showed that Little Bone was properly affiliated with Sakimay. Canada acknowledged these conclusions, but was concerned as Little Bone's 28 members had been counted with another First Nation to validate its TLE. However, the late Dr John Hall, Canada's Specific Claims representative, was prepared to recommend double counting, since a mistake had been made, so that Sakimay would not be prejudiced by Canada's TLE policy.

The parties also agreed to proceed with a staff visit and community session. The staff visit took place at the end of July 2004, and a community session was scheduled for September 2004. During the staff visit, interviews with the Elders were recorded on a DVD, and "willsay" statements summarizing their information were prepared after the visit.

Shortly before the community session, Richard Kaye, one of the Elders scheduled to provide evidence, passed away. During a conference call held in October 2004, the parties agreed that the information contained in the willsay statements agreed with both the documentary record and the research

completed by Joan Holmes. Canada did not object to including the willsay statements or the DVD of the staff visit as part of the record of inquiry. As a result, the community session was cancelled.

The parties also agreed that the First Nation would submit written submissions without Canada making responding submissions. The First Nation's submissions were received on October 18, 2004.<sup>87</sup>

In 2005, the claim was reviewed by the Claims Advisory Committee (CAC), part of the Specific Claims Branch. The committee recommended additional research into the "questionables" category of Sakimay's proposed TLE population number.

Conference calls and meetings facilitated by the ICC were held to try to finalize the population number. By the end of June 2006, the parties believed they had exhausted the research, and the First Nation requested that Canada proceed through the CAC. Canada agreed, and stated it would recommend acceptance of Sakimay's claim.

The CAC review process was completed by the end of August 2006, and a letter of acceptance from the Minister's office was sent to the First Nation by the end of September 2006.<sup>88</sup> Accordingly, the Commission issued a declaration on February 21, 2007, concluding this inquiry.<sup>89</sup>

---

87 Written Submissions on Behalf of the Sakimay First Nation, October 18, 2004.

88 Michel Roy, Assistant Deputy Minister, DIAND, to Chief Lindsay Kaye, Sakimay First Nation, September 18, 2006 (ICC file 2107-42-01, vol. 4), reproduced as Appendix A to this report.

89 ICC Declaration, dated February 21, 2007. This order is reproduced as appendix B to this report.

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## PART V

### CONCLUSION

This inquiry is concluded as follows:

SINCE the specific claim has been accepted by the Minister for negotiation and the First Nation has requested that this inquiry be closed, and since the panel hearing this inquiry finds there are no longer any matters to be inquired into,

THIS COMMISSION THEREFORE DECLARES AS FOLLOWS:

The inquiry into this specific claim is hereby concluded.

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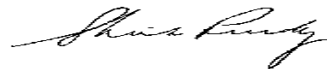
FOR THE INDIAN CLAIMS COMMISSION



Alan C. Holman (Chair)  
Commissioner



Jane Dickson-Gilmore  
Commissioner



Sheila G. Purdy  
Commissioner

Dated this 21st day of February, 2007.



# APPENDIX A

## GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM



Indian and Northern  
Affairs Canada

Affaires indiennes  
et du Nord Canada

Assistant Deputy Minister

Sous-ministre adjoint

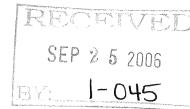
Ottawa, Canada  
K1A 0H4

**WITHOUT PREJUDICE**

SEP 18 2006

B8260

Chief Lindsay Kaye  
Sakimay First Nation  
P.O. Box 339  
GRENFELL SK S0G 2B0



Dear Chief Kaye:

On behalf of the Government of Canada, and pursuant to the 1998 Treaty Land Entitlement authority, I am pleased to accept for negotiation the Sakimay First Nation's Treaty Land Entitlement Claim.

For the purposes of negotiations, the Government of Canada accepts that the Sakimay First Nation has sufficiently established under the 1998 Treaty Land Entitlement authority that there is an outstanding treaty land entitlement of 1024 acres. The assessment of this claim is based on a comprehensive review of the known facts of the claim as contained in the 2002 report by Anne Seymour, entitled "Treaty Land Entitlement Review: Sakimay First Nation", and the 2006 "Addendum to the Sakimay Treaty Land Entitlement Report" by the Specific Claims Branch.

Canada will request that the Province of Saskatchewan participate in the negotiations. If the Sakimay First Nation is prepared to proceed with negotiations on the basis outlined in this letter, the next step in the claims process which will be followed hereafter for negotiations includes finalizing the joint negotiating protocol, development of a settlement agreement, conclusion of the agreement, ratification of the agreement and finally, implementation of the agreement.

All negotiations are conducted on a "Without Prejudice" basis. All communications, oral, written, formal or informal are made with the intention of encouraging settlement of the dispute between the parties only and are not intended to constitute admissions of fact or liability by any party.

.../2

Canada

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INDIAN CLAIMS COMMISSION PROCEEDINGS

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- 2 -

In the event that a final settlement is reached, the Government of Canada will require a full and final release from the Sakimay First Nation on every aspect of this claim, ensuring that the claim cannot be reopened, as well as an appropriate indemnity. Canada will also require that your legal counsel provide a Certificate of Independent Legal Advice with respect to the claims and Settlement Agreement.

Ms. Mary Hyde, Senior Policy Advisor, and Shelly Pikowicz, who has been designated the Negotiator for Canada on this claim, are prepared to meet with representatives of the Sakimay First Nation to outline the basis for Canada's position. Mary Hyde and Shelly Pokowicz and can be reached at (819) 953-7673 and (819) 953-1987 respectively.

Before incurring negotiation costs, including legal costs, I encourage you to obtain information, details, and procedures for loans under the Native Claimants Loan Program by contacting:

Mr. Tony Richard, Director of Finance  
Administration and Funding Services Directorate  
Indian and Northern Affairs Canada  
Room 1305  
OTTAWA ON K1A 0H4

Telephone: (819) 997-9757      Fax: (819) 994-0273.

If the Sakimay First Nation is agreeable to entering into negotiations on the basis stated in this letter, I would ask you to provide a Band Council Resolution to this effect to:

Ms. Sheila Parry, Director  
Negotiation Directorate  
Specific Claims Branch  
Indian and Northern Affairs Canada  
Room 1610  
OTTAWA ON K1A 0H4

Telephone: (819) 994-7440      Fax: (819) 953-9618.

.../3

SAKIMAY FIRST NATION – TREATY LAND ENTITLEMENT INQUIRY

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- 3 -

Finally I wish to advise you that this letter is written on a "Without Prejudice" basis and should not be considered an admission of fact or liability by Canada. Technical defences such as limitations periods, strict rules of evidence or the law of laches, have not been considered in the review of your claim. However, in the event this claim becomes the subject of litigation, the government reserves the right to plead these and all other defences available to it. Please be advised, as well, that our government files are subject to the *Access to Information Act* and the *Privacy Act*.

I send my best wishes and trust that a fair and just resolution to this claim can be achieved through a negotiated settlement.

Yours sincerely,



Michel Roy  
Assistant Deputy Minister  
Claims and Indian Government

c.c.: Ron Maurice, Legal Counsel, Sakimay First Nation  
Tony Richard, Director of Finance, Administration and Funding

---

# APPENDIX B

## DECLARATION

### Sakimay First Nation Treaty Land Entitlement Inquiry

### Première Nation de Sakimay Enquête sur les droits fonciers issus de traité

#### DECLARATION

On April 30, 1997, the Sakimay First Nation ("the First Nation") submitted a specific claim to the Minister of Indian Affairs and Northern Development ("the Minister") with respect to their treaty land entitlement claim.

On January 11, 2002, the Minister rejected this claim for negotiation.

By letter dated July 16, 2003 and a Band Council Resolution dated July 10, 2003, the Council requested that this Commission conduct an inquiry into this claim.

On September 9, 2003, this Commission accepted this request.

The inquiry into this claim proceeded. A joint research project was completed in July 2004, and a community session was scheduled to take the evidence of Mr. Raymond Acoose and Mr. Richard Kaye in September 2004. Mr. Kaye passed away just before the community session. The parties then agreed to proceed with written submissions, and the First Nation provided their submissions on October 18, 2004.

Canada agreed to review the First Nation's written submissions. Further research was conducted into the claim by both parties.

#### DÉCLARATION

Le 30 avril 1997, la Première Nation de Sakimay (« la Première Nation ») a présenté une revendication particulière au ministre des Affaires indiennes et du Nord canadien (« le ministre ») concernant ses droits fonciers issus de traité.

Le 11 janvier 2002, le ministre a rejeté cette revendication aux fins de négociation.

Par une lettre du 16 juillet 2003 et une résolution du conseil de bande datée du 10 juillet 2003, le conseil a demandé à la Commission d'enquêter sur cette revendication.

Le 9 septembre 2003, la Commission a accepté cette demande.

La Commission a mené son enquête sur la revendication. Un projet de recherche conjoint a pris fin en juillet 2004, et une audience publique communautaire, au cours de laquelle M. Raymond Acoose et M. Richard Kaye devaient témoigner, a été prévue pour septembre 2004. M. Kaye est décédé juste avant l'audience publique. Les parties ont alors convenu de présenter des mémoires; la Première Nation a déposé le sien le 18 octobre 2004.

Le Canada a accepté d'examiner le mémoire de la Première Nation. Les parties ont effectué des recherches supplémentaires sur la revendication.

SAKIMAY FIRST NATION – TREATY LAND ENTITLEMENT INQUIRY

By letter of September 18, 2006, the Minister offered to accept the claim for negotiation.

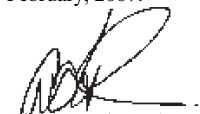
By letter of October 17, 2006, the First Nation advised the Commission that the claim had been accepted for negotiation and that it would not be necessary to proceed with the remaining steps of the inquiry.

SINCE the specific claim has been accepted by the Minister for negotiation by letter of September 18, 2006, and the First Nation has advised that the offer will be accepted, the panel hearing these inquiries finds that there are no longer any matters to be inquired into.

THIS COMMISSION THEREFORE ORDERS AS FOLLOWS:

The inquiry into this specific claim is hereby concluded.

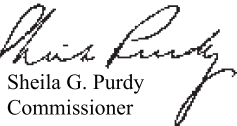
At Ottawa, Ontario, this 21<sup>st</sup> day of February, 2007.



Alan C. Holman (Panel Chair)  
Commissioner



Jane Dickson-Gilmore  
Commissioner



Sheila G. Purdy  
Commissioner

Dans une lettre du 18 septembre 2006, le ministre a offert d'accepter la revendication aux fins de négociation.

Dans une lettre du 17 octobre 2006, la Première Nation a informé la Commission que la revendication avait été acceptée aux fins de négociation et qu'il n'était pas nécessaire de poursuivre l'enquête.

PUISQUE la revendication particulière a été acceptée par le ministre aux fins de négociation dans une lettre datée du 18 septembre 2006 et que la Première Nation a annoncé qu'elle accepterait l'offre, le comité saisi de l'enquête constate qu'il n'y a plus matière à enquête.

LA COMMISSION DÉCLARE DONC CE QUI SUIT :

L'enquête sur la revendication particulière précitée est par la présente close.

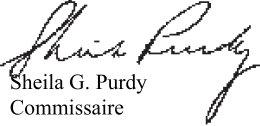
Fait à Ottawa (Ontario) le 21 février 2007.



Alan C. Holman (président du comité)  
Commissaire



Jane Dickson-Gilmore  
Commissaire



Sheila G. Purdy  
Commissaire





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# **INDIAN CLAIMS COMMISSION**

## **OPASKWAYAK CREE NATION STREETS AND LANES INQUIRY**

### **PANEL**

Commissioner Daniel J. Bellegarde (Chair)  
Commissioner Alan C. Holman  
Commissioner Sheila G. Purdy

### **COUNSEL**

For the Opaskwayak Cree Nation  
Paul B. Forsyth

For the Government of Canada  
Vivian Russell

To the Indian Claims Commission  
John B. Edmond

**FEBRUARY 2007**



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## **SUMMARY**

### **OPASKWAYAK CREE NATION STREETS AND LANES INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Opaskwayak Cree Nation: Streets and Lanes Inquiry* (Ottawa, February 2007), reported (2009) 22 ICCP 41.

*This summary is intended for research purposes only.  
For a complete account of the inquiry, the reader should refer  
to the published report.*

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman,  
Commissioner S.G. Purdy

**Treaties** – Treaty 5 (1876); **Reserve** – Proceeds of Sale – Streets and Lanes;  
**Compensation** – Damages; **Band** – Trust Fund; **Manitoba**

#### **THE SPECIFIC CLAIMS**

In September 1976, The Pas Band (now the Opaskwayak Cree Nation) submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that the streets and lanes delineated in the subdivision of land surrendered in 1906 from Indian Reserve (IR) 21A to establish The Pas townsite had been alienated without adequate compensation. The claim also alleged improper use of \$2,000 of the Band's capital funds to clear trees and brush from the streets and lanes in the surveyed subdivision. The claim was rejected by the Minister of Indian Affairs in June 1977, and the rejection was confirmed in June 1978. The portion of the claim relating to the use of band funds for clearing the streets and lanes was rewritten and submitted by the First Nation in May 1986. The claim was again rejected by DIAND in 1994. In June 2002, the Opaskwayak Cree Nation asked the Indian Claims Commission (ICC) to conduct inquiries into the two claims and, in September 2002, the ICC notified the First Nation and Canada of its intention to conduct an inquiry. A planning conference was held in December 2002, after which Canada conducted new research into both claims. As a result of the new facts established in that research, the Opaskwayak Cree Nation acknowledged that there was no basis for either specific claim and withdrew the two claims from the ICC inquiry.

**BACKGROUND**

In August 1906, The Pas Band surrendered 500 acres in IR 21A to the Crown for railway and townsite purposes. The land was subdivided into lots to create the townsite of The Pas, and the lots were sold at public auction. Some of the streets and lanes were cleared of trees and brush in 1912 to enhance the value of the adjacent lots. A Band Council Resolution and an order in council authorized the use of \$2000 of the Band's funds to defray the costs of this clearing, but, as research conducted during the ICC inquiry demonstrated, no band funds were actually used for this purpose. The streets and lanes shown in the subdivision survey were transferred to the town of The Pas by order in council in September 1916. Research conducted during the ICC inquiry concluded that compensation would not normally be paid for streets and lanes and that no compensation was owing to the Opaskwayak Cree Nation.

**ISSUES**

Was there an expenditure of \$2000 from the Band's capital account used to clear the lands comprising streets and lanes? Did Canada permit or cause the streets and lanes to be alienated without adequate compensation?

**OUTCOME**

The ICC made no findings. Prior to the completion of the inquiries, the two specific claims were withdrawn by the Opaskwayak Cree Nation when supplementary research conducted in the course of the inquiry effectively removed the basis for the claims.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Treaties and Statutes Referred To**

*Treaty 5* (1876); *Indian Act*, RSC 1906, c. 81; *The Manitoba Boundaries Extension Act*, SC 1912, c. 32; *An Act to provide for the Further Extension of the Boundaries of the Province of Manitoba*, SM 1912, c. 6; *An Act to incorporate The Town of The Pas*, SM 1912, c. 93; *Dominion Lands Act*, RSC 1906, c. 55; *Land Titles Act*, RSC 1906, c. 110; *Manitoba Supplementary Provisions Act*, RSC 1906, c. 99; *The Municipal Act*, RSM 1902, c. 116.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994) 1 ICCP 171–85.

**Counsel, Parties, Intervenors**

P.B. Forsyth for Opaskwayak Cree Nation; V. Russell for the Government of Canada; J.B. Edmond to the Indian Claims Commission.





# PART I

## INTRODUCTION

### BACKGROUND TO THE INQUIRY

This is a report about an Indian Claims Commission (ICC) inquiry which concluded when the claimant, the Opaskwayak Cree Nation, withdrew its claims. Research conducted during the ICC's planning conference stage had demonstrated that no claim existed.

The Opaskwayak Cree Nation (OCN, formerly The Pas Band) has reserve land in northern Manitoba, about 630 kilometres (392 miles) northwest of Winnipeg and close to the Saskatchewan border. The reserve is not a single block of land but consists of 17 separate parcels, varying in size from 10 to 5,200 acres, designated as Indian Reserve (IR) 21 and 21A to 21P. The most populated of these settlements are located in and around the town of The Pas. The First Nation's membership totals about 4,600, and approximately 2,800 live on reserve.<sup>1</sup>

On September 17, 1976, The Pas Band submitted a claim to the Office of Native Claims of the Department of Indian Affairs and Northern Development (DIAND), relating to the alienation without adequate compensation of streets and lanes delineated in the subdivision of land surrendered in 1906 from IR 21A to establish The Pas townsite.<sup>2</sup> The claim also alleged improper use of \$2,000 of the Band's capital funds to clear trees and brush from the streets and lanes in the surveyed subdivision. After research and legal review by departmental staff, the claim was rejected by letter from the Minister of Indian Affairs on June 30, 1977. After a second review of the facts in the claim, the rejection was confirmed by letter dated June 20, 1978.

The portion of the claim relating to the use of band funds for clearing the streets and lanes was rewritten and submitted to the Specific Claims Branch

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<sup>1</sup> Opaskwayak Cree Nation website: [www.opaskwayak.mb.ca/history.php](http://www.opaskwayak.mb.ca/history.php), accessed October 20, 2005.

<sup>2</sup> Kenneth P. Regier, Regier, Stewart, Barristers and Solicitors, to Jean T. Fournier, Executive Director, Office of Native Claims, September 17, 1976, with report, "The Pas Band of Indians – Claim Respecting Streets and Lanes in the Town of The Pas," by Treaty and Aboriginal Rights Research Centre of Manitoba (TARR Manitoba), August 27, 1976 (ICC Exhibit 2a).

(SCB), the successor to the Office of Native Claims, on May 9, 1986. According to its usual procedures, SCB reviewed the First Nation's research and produced its own report in October 1990. The First Nation undertook to do additional research on the issue and made substantial changes to the SCB report: a second draft, dated August 1992, was resubmitted. According to a memorandum to file in DIAND records, Canada verbally informed the First Nation in a conference call on May 24, 1994, that the streets and lanes claim was not accepted for negotiation.<sup>3</sup> Although there are references to a rejection letter dated August 5, 1994, neither Canada nor the First Nation was able to locate it. Both parties, however, agreed that the 1986 claim submission was rejected.

On June 18, 2002, Chief Frank Whitehead, Opaskwayak Cree Nation, asked the Indian Claims Commission to undertake a review of the two claims relating to both the improper alienation of the land covered by the streets and lanes and the use of band funds for clearing on the surrendered land.<sup>4</sup> By letter dated September 27, 2002, the Commission notified the First Nation and Canada of its intention to conduct an inquiry into the matter.<sup>5</sup>

#### MANDATE OF THE COMMISSION

The mandate of the Indian Claims 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 the claim was already rejected by the Minister."<sup>6</sup> This Policy, outlined in DIAND's 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.<sup>7</sup> The term "lawful obligation" is defined in *Outstanding Business* as follows:

- 
- 3 Kathleen Kerr, Negotiating Analyst, Specific Claims West, Memorandum to file, June 1, 1994 (ICC Exhibit 9a, p. 78).
  - 4 Chief Frank Whitehead, Opaskwayak Cree Nation, to Indian Claims Commission, June 18, 2002, and Opaskwayak Cree Nation Band Council Resolution No. 02-104, June 20, 2002 (ICC file 2106-14-1, vol. 1).
  - 5 Phil Fontaine, Chief Commissioner, Indian Claims Commission, to Chief Frank Whitehead, Opaskwayak Cree Nation, September 27, 2002 (ICC file 2106-14-1, vol. 1).
  - 6 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.
  - 7 Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *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 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.<sup>8</sup>

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<sup>8</sup> *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

## PART II

### HISTORICAL BACKGROUND

The Indians of The Pas Band (now known as the Opaskwayak Cree Nation) adhered to Treaty 5 on September 7, 1876, Chief John Constant and four councillors signing on behalf of the Band. Under the terms of this adhesion, the Band was entitled to receive “a reserve on both sides of the Saskatchewan River at the ‘Pas,’” the size to be determined according to a formula of 160 acres per family of five.<sup>9</sup>

In 1883, Indian Reserve 21A containing 1,599.19 acres was surveyed by Dominion Land Surveyor W.A. Austin at the junction of the Pasquia and Saskatchewan Rivers in partial fulfillment of the treaty promise. This location had many advantages – excellent water transportation routes, pockets of good soil, and extended hours of sunshine during the growing season; good fishing; marshlands that sustained a variety of wild fowl; and a surrounding boreal forest, which supplied timber, large game animals, and fur-bearing species. It had long been the location of fur traders and missionaries, and it was also the site of an established Indian settlement. Surveyor Austin reported:

At this place a narrow strip of land, averaging about a half mile in width, was laid out, including all the good land that the Indians pointed out and that could be found. The rear of this portion is an extensive swamp, with a heavy moss bed from 1 to 2 feet in depth, under which, at this season of the year in places it was frozen. This swamp has scattered spruce and tamarac over it, with some pitch pines and birch; the sub-soil in some places vegetable deposit and in others sand. This portion might be easily drained, there being a good fall of from 10 to 50 feet to the marshes and river, within the distance of 20 or 30 chains.

The timber is not generally large, and is principally poplar, spruce, tamarac, with birch and some willow.

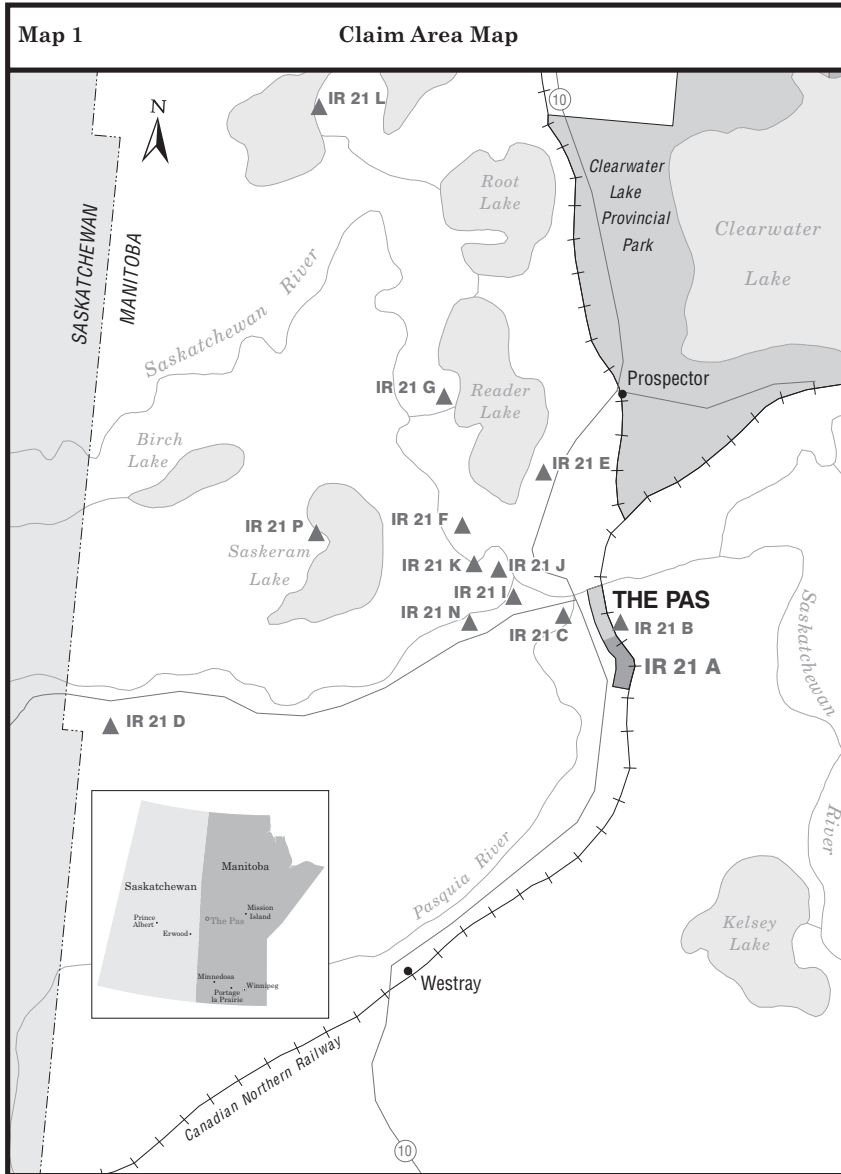
The land, class 1 and 2 on the front, and class 3 along the rear, the rear lines running nearly all through swamp, and enclosing all the available land.

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<sup>9</sup> *Treaty No. 5 between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians* (Ottawa, Queen's Printer, 1969), 10–11.

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OPASKWAYAK CREE NATION – STREETS AND LANES INQUIRY



Here 1,559.19 acres were given to the Band. Also a quarter section (160 acres) was laid out on the same side of the river, about 50 chains below the north-east corner of this portion of the Reserve.

The Hudson Bay Company have a station here, known as The Pas or Fort Defiance. The former word is a corruption of the Indian word "O'bah," signifying, "it is narrow" or "the narrows," on account of the whole of the Saskatchewan waters running through one channel at this point.

The Church of England Mission Society have had a mission here for over 40 years. At present it is under the supervision of the Revd. Mr Reader; in fact before the Indians were resident here they built their first house and church, the remains of which only are visible.

There are some 19 houses on this portion of the Reserve, nearly all of which have small gardens attached to them.<sup>10</sup>

In June and July 1905, Canadian Northern Railway officials informed the Department of Indian Affairs that the railway was planning to extend its line from Erwood on its Prince Albert line, northerly to the Saskatchewan River, and would require approximately 72 acres of The Pas Indian Reserve for right of way and station ground purposes.<sup>11</sup> At the request of the Assistant Indian Commissioner, the local Indian Agent estimated the value of the land required by the railway and reported that the only place on the reserve suitable for station grounds was a high and dry spot where the Indians' houses were located:

the only part of the Reserve on the south side of the Saskatchewan River suitable for Station grounds is where their trial line of survey crosses the river. It contains from 50 to 70 acres and is the only dry, clear, and habitable portion of the Reserve on this side of the River. On it there are 30 occupied Indian dwellings, the agents [sic] residence, and Govt Schoolhouse.

This piece of land is at the lowest calculation worth fifty dollars (\$50.00) per acre exclusive of the value of the improvements thereon.

The remaining 14 or 15 hundred acres on this side is composed of muskeg swamp, hay meadows and ridges of scrubby timber and would be worth from twenty five cents to five dollars per acre according to location.<sup>12</sup>

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10 W.A. Austin, P.L.S., C.E. and D.L.S., Gloucester, to Superintendent General of Indian Affairs, April 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31st, 1883*, pt 1, 162 (ICC Exhibit 1a, p. 17).

11 Munson, Allan, Laird and Davis, Solicitors, Canadian Northern Railway Co., Winnipeg, to David Laird, Indian Commissioner, Winnipeg, June 22, 1905, and Chief Engineer, Canadian Northern Railway, Winnipeg, to Munson, Allan, Laird and Davis, July 5, 1905, Library and Archives Canada (LAC), RG 10, vol. 3561, file 81, pt 31 (ICC Exhibit 1a, pp. 24–25).

12 Joseph Courtney, Indian Agent, The Pas, to David Laird, Indian Commissioner, Winnipeg, August 3, 1905, LAC, RG 10, vol. 3561, file 81, pt 31 (ICC Exhibit 1a, p. 34).

The correspondence between the railway company and the department was limited to the right of way and station grounds. On May 31, 1906, however, S.R. Marlatt, the Inspector of Indian Agencies at Portage la Prairie, recommended that the Indians be asked to surrender the northern 500 acres of IR 21A at the spot where the railway intended to locate its station. Marlatt had already received several applications from people interested in purchasing land in that vicinity and it was his opinion that this location would become an important terminal; if the surrendered land was subdivided into streets, lots, and lanes, as required for a townsite, the Band would realize a substantial sum of money.<sup>13</sup>

On August 21, 1906, Chief Antoine Constant, Headmen David Cook and Norman Lathlin, and seven others signed a surrender document, agreeing to cede the required 500 acres in IR 21A to the Crown. The surrender contained some specific stipulations regarding the disposition of particular areas, but otherwise the land was to be sold for the benefit of the Band:

TO HAVE AND TO HOLD the same unto His said Majesty THE KING, his Heirs and Successors forever, in trust, to *sell* the same 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.

And upon the further condition that all moneys received from the *sale* thereof, shall, after deducting the usual proportion for expenses of management, *and compensation for Indian improvements and cash payment to Indians, be placed to our credit and Interest paid thereon in the usual way.*

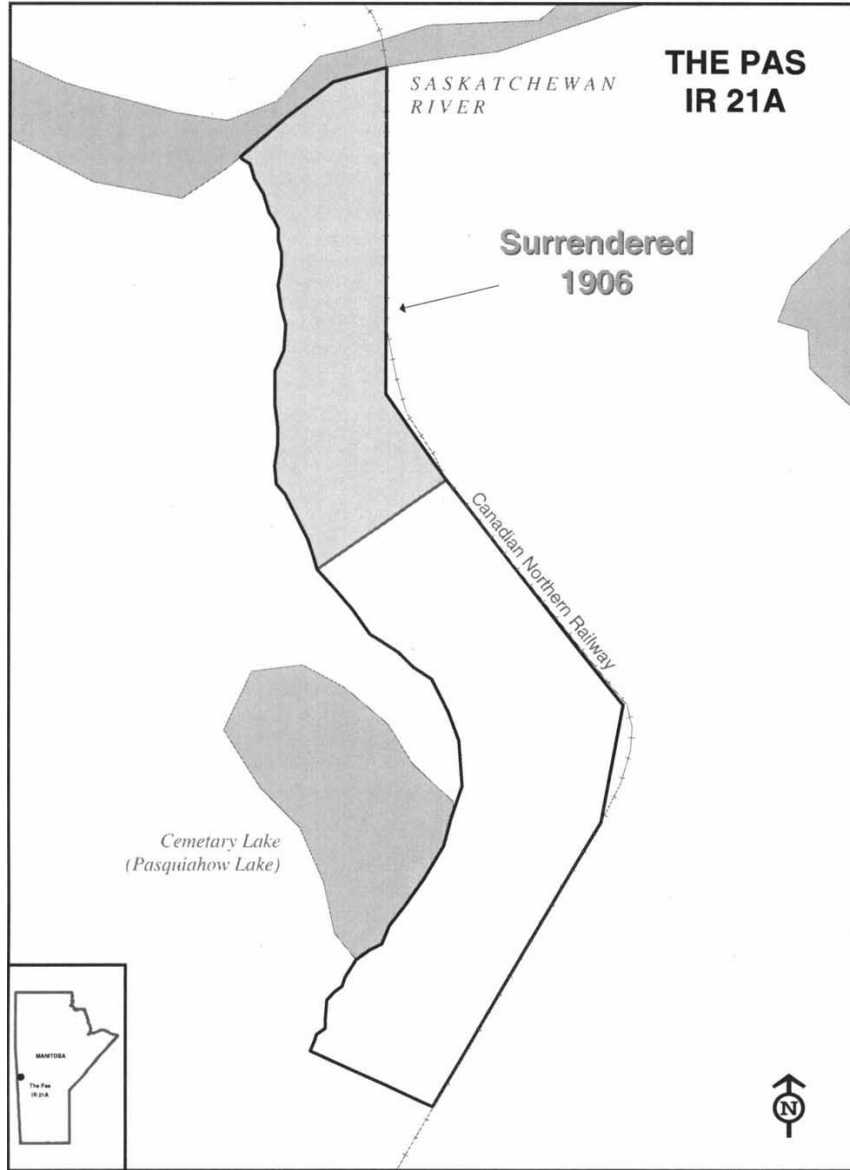
And WE, the said Chief and Principal men of the said *The Pas Band of Indians* do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the *sale of the said portion of land and disposition of the moneys arising therefrom.*

*Providing that not less than ten percent of the monies realized from the sale of land surrendered be distributed pro rata to members of our Band and that the Department of Indian Affairs advance us a sum sufficient to pay for improvements now made on said surrendered land by individual members of our Band now resident on said surrendered land and that the sum so advanced shall be repaid to the Department of Indian Affairs out of monies realized from the sales of said land surrendered.*<sup>14</sup>

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13 S.R. Marlatt, Inspector of Indian Agencies, Portage la Prairie, to David Laird, Indian Commissioner, Winnipeg, May 31, 1906, LAC, RG 10, vol. 3561, file 81, pt 31 (ICC Exhibit 1a, pp. 39–41).

14 The Pas Band, Surrender for Sale to the Crown, August 21, 1906, LAC, RG 10, vol. 3561, file 81, pt 31 (ICC Exhibit 1a, pp. 60–73). The passages in italics represent handwritten additions to the standard form of surrender.





The surrender was accepted by Order in Council on November 6, 1906.<sup>15</sup> (On January 24, 1910, the Chief and principal men of The Pas Band signed an amendment to the original surrender agreement to increase the *pro rata* distribution of the land sale money from 10 per cent to 25 per cent, and this amendment was accepted by Order in Council on February 14, 1910.<sup>16</sup>)

In his report on the taking of the 1906 surrender, Inspector Marlatt stated that he no longer favoured the subdivision and sale by auction of individual lots, and that he now considered it would be more advantageous to the Band if the land were sold in a block by public tender “and let the purchasers make a survey to suit themselves.”<sup>17</sup> There is no response to this suggestion on file, but if it was considered at all, it was rejected. The northerly and westerly section of the surrendered land was subdivided by J.K. McLean, DLS, in August 1907. Plan 846 (registered under NLTO [Neepawa Land Titles Office] Plan 426 at Neepawa on December 11, 1912<sup>18</sup>), shows 592 lots and notes that all the streets are 66 feet wide and the lanes 16 ½ feet wide.<sup>19</sup> Between 1908 and 1911, 425 of these lots were sold, some by auction in June 1908 and others by application to the department.<sup>20</sup>

In 1911, the remaining easterly and southerly portions of the surrendered lands were subdivided by H.B. Proudfoot, DLS. His plan of survey, CLSR 1900, was registered under NLTO Plan 508 at Neepawa, and shows 1,063 lots, with all the streets being 66 feet wide and lanes 16 ½ feet wide.<sup>21</sup>

#### **CLEARING STREETS AND LANES IN THE PAS TOWNSITE PRIOR TO SALE**

On December 12, 1911, Surveyor Proudfoot wrote to Department of Indian Affairs (DIA) Headquarters to suggest that the various streets and avenues in the subdivision at The Pas be cleared of the standing timber before the lots were put on the market. He stated that people had asked “if permission would

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- 15 Order in Council, November 6, 1906, DIAND, Indian Land Registry, Instrument no. 17604 (ICC Exhibit 1a, p. 85).
  - 16 The Pas Band, Amendment to Surrender Agreement, January 24, 1910, DIAND Land Registry, Instrument no. 17604 (ICC Exhibit 1a, pp. 145–48) and Order in Council, February 14, 1910, LAC, RG 10, vol. 4025, file 292,870-1A (ICC Exhibit 1a, p. 155).
  - 17 S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, September 25, 1906, LAC, RG 10, vol. 3566, file 82, pt 31 (ICC Exhibit 1a, pp. 75–76).
  - 18 John H. Weisgerber, Appraisal Adviser, Public Works and Government Services Canada, to Vivian Russell, Legal Counsel, Specific Claims, DIAND Legal Services, April 27, 2004, p. 13 (ICC Exhibit 10A, p. 13).
  - 19 Canada Lands Surveys Records (CLSR) Plan 846, “Plan of the Town Plot of The Pas on Block A of the Indian Reserve on the Saskatchewan River, NWT,” surveyed by J.K. McLean in 1907 (ICC Exhibit 7d).
  - 20 John H. Weisgerber, Appraisal Adviser, Public Works and Government Services Canada, to Vivian Russell, Legal Counsel, Specific Claims, DIAND Legal Services, April 27, 2004, p. 14 (ICC Exhibit 10a, p. 14). See also Fred Fischer, Indian Agent, The Pas, to Secretary, DIA, April 12, 1912, NA, RG 10, vol. 6719, file 128A-7-1 1 (ICC Exhibit 1a, p. 191).
  - 21 CLSR Plan 1900, “Plan of the Subdivision of Block 30 and Blocks 42 to 85 Inclusive in the Town Plot of The Pas, Manitoba,” surveyed by H.B. Proudfoot in 1911 (ICC Exhibit 7d).

be given to remove the timber and clearing of the streets for the timber itself or if there is any likelihood of the same being let by tender.”<sup>22</sup> In turn, Headquarters informed the local Indian Agent, Fred Fischer, that it was thought desirable to have some of the streets cleared “to a width of 40 feet, that is to say 20 feet on each side of the centre line” and that the timber taken off the land should be more than sufficient to pay for the clearing:

Please take this matter up with the view to having this work done. You may call for tenders by advertisement in the local papers; but the work is not to be proceeded with until sanctioned by this Department.<sup>23</sup>

Surveyor Proudfoot submitted a plan showing the main streets to be cleared which he estimated to contain 22,638 lineal feet, and the other secondary streets totalling 66,939 lineal feet.<sup>24</sup> Someone at the department later estimated that there were approximately 108 acres to clear,<sup>25</sup> which is nearly equal to the area of all the streets (main and secondary) to their full width of 66 feet.

On March 18, 1912, the Chief Surveyor at the DIA urged the Deputy Minister to follow through with Proudfoot’s suggestion regarding clearing the streets, estimating that the costs should not exceed \$10 per acre, or about \$1,080 for the 108 acres, if the parties doing the work were also given the timber that was removed. He also was concerned there be no delay:

I think this work should not be let by regular tender as the delay would be too great. I beg to recommend that if the work is approved that Agent Fischer be instructed to let the work by the job to one or more persons who will actually do the work. He should endeavour to let it at as low a rate as the work can be done in the neighbourhood. This work if done at all should be attended to without delay.<sup>26</sup>

Surveyor Proudfoot submitted another plan showing the main and secondary streets that needed to be cleared. In his covering letter, he considered that the timber on the proposed roads was too small to be of much value and estimated that it would cost \$714 to clear the primary roads and \$1,312 to

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22 H.B. Proudfoot, The Pas, to J.D. McLean, Assistant Deputy and Secretary, December 12, 1911, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 165).

23 J.D. McLean, Assistant Deputy & Secretary, to Fred Fischer, Indian Agent, The Pas December 22, 1911, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 167).

24 H.B. Proudfoot, The Pas, to J.D. McLean, Assistant Deputy & Secretary, January 11, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 171).

25 Marginalia (unidentified author) on letter from Fred Fischer, Indian Agent, to Secretary, DIA, February 27, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 174).

26 Samuel Bray, Chief Surveyor, to Deputy Minister of Indian Affairs, March 18, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 176).

clear the others, for a total of \$2,026.<sup>27</sup> He also estimated that the value of the lots would increase from \$56,060 to \$91,730 if the streets and lanes were cleared before the lots were put up for auction.<sup>28</sup> Chief Surveyor Bray agreed that the clearing would enhance the value of the lots, although perhaps not to the extent estimated by Proudfoot, and recommended that the department incur the expense of the clearing – a suggestion that was marked “approved” and “immediate.”<sup>29</sup>

On the following Monday (March 25, 1912), a letter was drafted to Agent Fischer, instructing him to have the streets and lanes cleared by reliable people, the costs to be no more than \$20 per acre plus the timber they remove. If he could not “let the work by jobs,” he was to hire his own gangs to make the clearings. However, according to the marginalia on this document, this letter was not sent because there was some disagreement among departmental officials about whether or not a Band Council Resolution (BCR) was required before an order in council authorized an expenditure from the capital account.<sup>30</sup> On April 4, 1912, Headquarters instructed Fischer to obtain the requisite BCR and to explain to the Band that the value of the lots would be greatly enhanced because of this work.<sup>31</sup>

At about this time, the boundaries of the Province of Manitoba were extended north to Hudson Bay. Provincial legislation accepting the boundary extension was assented to and came into force on April 6, 1912; Dominion legislation was assented to on April 1, 1912, and brought into force on May 15, 1912.<sup>32</sup> The area of The Pas reserves was now part of the Province of Manitoba and no longer within the federal District of Keewatin (a part of the Northwest Territories).

At the same time, the town of The Pas was incorporated by legislation assented to on April 6, 1912, that specifically transferred all the surrendered land from IR 21A, including the streets and lanes, to the town:

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- 27 H.B. Proudfoot, Ottawa, to J.D. McLean, Assistant Deputy & Secretary, March 18, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, pp. 177–78).
- 28 “The Pas, Keewatin [sic] District, Schedule Showing Value of Lots Before And After Improvements, Survey of 1911,” attached to H.B. Proudfoot, Ottawa, to J.D. McLean, Assistant Deputy & Secretary, March 18, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, pp.179–82).
- 29 Samuel Bray, Chief Surveyor, to Deputy Minister of Indian Affairs, with marginalia, March 21, 1912, H.B. Proudfoot, Ottawa, to J.D. McLean, Assistant Deputy & Secretary, March 18, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 183).
- 30 J.D. McLean, Assistant Deputy & Secretary, DIA, to Fred Fischer, Indian Agent, The Pas, March 25, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, pp. 184–85).
- 31 J.D. McLean, Assistant Deputy & Secretary, DIA, to Fred Fischer, Indian Agent, The Pas, April 4, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 187).
- 32 *The Manitoba Boundaries Extension Act*, SC 1912, c. 32 (ICC Exhibit 6b); *An Act to provide for the Further Extension of the Boundaries of the Province of Manitoba*, SM 1912, c. 6 (ICC Exhibit 6c).

1. All that certain territory on block A of the Pas Indian reserve, on the Saskatchewan River, in the Province of Manitoba, comprising blocks numbered from (1) to thirty (30), both inclusive, blocks thirty-three (33) to eighty-five (85), both inclusive, blocks A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P and S, also blocks 15a, 16a, 65a, 75a, 76a, 78a, 79a, and 82a, *and all streets and lanes contiguous to said blocks*, and also Mission Island, and the lands occupied by the Hudson's Bay Company, the English Church Mission and the Canadian Northern Railway, all as shewn on a plan of survey made by J.K. McLean, D.L.S., dated A.D. 1907, and on file in the Department of Indian Affairs at Ottawa, is hereby created a town corporation, under his name of 'The Town of The Pas,' with all the powers and privileges set forth in "The Municipal Act."<sup>33</sup>

On April 12, 1912, Fischer reported that The Pas band members were all away hunting and were not expected to return until at least the middle of May. According to marginalia on this document, the Chief Surveyor asked the department's accountant if there was another way to proceed so that this work should be done with "the least possible delay." The accountant, Frederick H. Paget, replied that it might be possible to use funds from the Band's interest account until the proper authority could be obtained:

The amount can be advanced provided authority is afterwards obtained when Band passes resolution – an Order-in-Council will be necessary when the Band passes resolution. In the meantime under the circumstances the amount can be advanced from Interest a/c to be refunded later on. FHP. 23/4/12<sup>34</sup>

Bray forwarded this information to the Deputy Minister on April 23, 1912, seeking approval to proceed. This request was denied on the basis that a BCR should be obtained before work began.<sup>35</sup>

It was not until May 21 that Agent Fischer managed, with considerable difficulty, to get the requisite BCR from the Chief and Council:

I must say I had a great deal of trouble to obtain this release. David Cook one of the Councillors refused to sign the release and did all in his power to prevent the others from doing so, I was obliged to have a second meeting and a good deal of argument to obtain the result.<sup>36</sup>

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33 *An Act to Incorporate The Town of The Pas*, SM 1912, c. 93 (ICC Exhibit 10b, pp. 155–56). Emphasis added.

34 Fred Fischer, Indian Agent, The Pas, to Secretary, DIA, April 12, 1912, with marginalia, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 190).

35 Samuel Bray, Chief Surveyor, to Deputy Minister, April 23, 1912, with marginalia, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 192).

36 Fred Fischer, Indian Agent, The Pas, to Secretary, DIA, May 21, 1912, LAC, RG 10, vol. 4056, file 386990, (ICC Exhibit 1a, p. 196).

The BCR of The Pas Band, signed by Chief Antoine Constant and two councillors on May 21, 1912, requested “that a sum not exceeding Two Thousand Dollars, be paid out of money standing to the credit of this Band, for the purpose of Clearing the streets in the townplot of The Pas.”<sup>37</sup> On June 6, 1912, Order in Council PC 1912-1548 authorized the disbursement:

On a memorandum dated 31st May, 1912, from the Acting Superintendent General of Indian Affairs, stating that a resolution has been passed by the Indians of the Pas band, Manitoba, in favour of an expenditure of \$2000 being made from their capital on the work of opening up streets through the surrendered portion of their reserve which was surveyed into a townplot last season.

The Minister recommends, as the work when completed would be of permanent value to the band, that, under section 90 of the Indian Act, authority be given for the expenditure thereon of the sum above mentioned from the capital at the credit of the Pas band, which amounts to \$19,053.66.<sup>38</sup>

Section 90 of the 1906 *Indian Act* reads as follows:

90. The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle for band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital.<sup>39</sup>

Although previous correspondence indicated that officials in Ottawa wanted the streets cleared of timber as soon as possible, it was a full month after receiving the proper authorities that any further action was taken. On July 4, 1912, the Deputy Superintendent General of Indian Affairs (DSGIA), Frank Pedley, asked the Surveys Branch to inform him about what was required to open up the streets and lanes at The Pas.<sup>40</sup> W.R. White, an employee in the Surveys Branch, replied<sup>41</sup> that a decision had been made to hire contractors to clear but not grub (i.e., not remove the roots) approximately 125 acres of streets, either by contract (with band members

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37 The Pas Band, Band Council Resolution, May 21, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 197).

38 Order in Council PC 1912-1548, June 6, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 202).

39 *Indian Act*, RSC 1906, c. 81 (ICC Exhibit 6a, p. 32).

40 Deputy Superintendent General of Indian Affairs (DSGIA) to Surveys Branch, July 4, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 203).

41 W.R. White to Deputy Minister, July 9, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, pp. 204–05).

employed where possible) or by day labour, with two gangs of men working under capable foremen.

On July 19, 1912, Pedley wrote to Robert Rogers, the Superintendent General, with a proposal on how to proceed:

An Order in Council has been passed of which I enclose a copy, authorizing the expenditure of \$2000.00 being made from the Capital Funds of the Pas band of Indians, Manitoba, for opening up streets through the surrendered portion of their reserve, which was surveyed into townplots last season.

I would recommend that this work be done by day labour, employing two gangs of men under a competent foreman, one gang to work from the northerly end and the other from the southerly end of the townplot, Indians to be employed as labourers in so far as this is possible; the foreman to be paid \$2.50 per day, the labourers at current rates, which will be about \$2.00 per day.

If you approve, will you kindly name someone who might be employed as foreman for this work?<sup>42</sup>

According to the marginalia on this document (which is difficult to read), the Minister did not approve Pedley's suggestion, and no action was taken (the last of the notations is by Samuel Bray, Chief Surveyor, dated August 16, 1912: "No Action accordingly.")<sup>43</sup>

A search of the Band's trust funds, both in the handwritten ledgers and the published accounts included in the annual reports of the Department of Indian Affairs, found no debit of \$2000 or any other disbursements for street clearing work in either the capital or interest accounts.<sup>44</sup>

There is at least one reference in the documents which seems to indicate that the town of The Pas may have been responsible for clearing the streets and lanes, not the department or any other third party. In June 1912, the Department of Indian Affairs instructed surveyor D.F. Robertson to examine the survey posts in The Pas townsite. In a memorandum dated September 18, 1912, Robertson reported that street-clearing activities in the town had disturbed some of the original survey posts:

The lots are now properly posted and posts marked according to the numbers shown on the blue print enclosed with the instructions and all posts well driven into the ground.

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42 Frank Pedley, DSGIA to Mr Rogers, July 19, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 206).

43 Various marginalia on memo from Frank Pedley, DSGIA, to Mr. Rogers, July 19, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1a, p. 206).

44 Brad Morrison, "The Indian Claims Commission, Opaskwayak Cree Nation, Streets and Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure," August 18, 2003, paras. 92–97 (ICC Exhibit 9a).

*The men working for the town in clearing some of the streets and ditching* had apparently not been warned against disturbing the posts and a considerable number of the posts had to be reset. I have written to the town clerk, calling his attention to this in order that these men might be cautioned by him and in that way avoid if possible any further disturbance of these posts.<sup>45</sup>

#### **JURISDICTION OVER STREETS AND LANES IN THE PAS TOWNSITE**

On July 4, 1914, David Clapp, the solicitor for the town of The Pas wrote to the Secretary of the Department of Indian Affairs asking if the streets, avenues, and lanes in the original townsite of The Pas had ever been transferred to the province.<sup>46</sup> J.D. McLean, the Assistant Deputy and Secretary, replied that a formal transfer was not necessary:

In reply I would say that no formal transfer of streets, avenues and lanes is made by the Department, as the filing of the plan showing same is considered a sufficient dedication thereof.<sup>47</sup>

McLean did not provide any rationale, but legislation in force at the time indicates that there is merit to the statement. When the 1907 subdivision was made, The Pas was in the Northwest Territories and the appropriate legislation was the *Dominion Lands Act*. According to section 79 of the 1906 Act, streets and lanes in towns and villages were deemed public highways<sup>48</sup> and section 86.1 of the *Land Titles Act* of the same year required that subdivision surveys be registered.<sup>49</sup> With the extension of the boundaries of the Province of Manitoba in 1912, the 1906 *Manitoba Supplementary Provisions Act* would apply to the streets and lanes in The Pas, given that it was now part of the Province of Manitoba. That legislation specifically stated that roads were vested with the province once the survey was confirmed:

s. 7 All road allowances in townships surveyed and subdivided, and all road allowances set out on block lines surveyed, in the Province shall be vested in the Crown in the right of the Province; and it is hereby declared that all road allowances in townships heretofore surveyed and subdivided, and all road allowances set out on block lines heretofore surveyed in the Province, shall be

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45 Donald E. Robertson, DIA, The Pas, to "Sir," September 18, 1912, LAC, RG 10, vol. 4058, file 392,837 (ICC Exhibit 1a, pp. 217–18). Emphasis added.

46 David Clapp, Town Solicitor, to Secretary, DIA, July 4, 1914, LAC, RG 10, vol. 6720, file 128A-7-1G (ICC Exhibit 1a, p. 322).

47 J.D. McLean, Assistant Deputy and Secretary, to David Clapp, Town Solicitor, The Pas, July 13, 1914, LAC, RG 10, vol. 6720, file 128A-7-1G (ICC Exhibit 1a, p. 323).

48 *Dominion Lands Act*, RSC 1906, c. 55, s. 79, as quoted in ICC Exhibit 4a, p. 5.

49 *Land Titles Act*, RSC 1906, c. 110, as quoted in ICC Exhibit 4a, p. 5.

deemed to have become the property of the Crown in the right of the Province upon the confirmation of the survey.<sup>50</sup>

Finally, under the province's *Municipal Act*, "[t]he possession of every public road, street, bridge, lane, square or other highway, in a city, town, village or rural municipality, shall be vested in the municipality ..."<sup>51</sup>

At this time, J.K. McLean's 1907 survey was registered with the Neepawa land office but Proudfoot's 1911 survey was not.<sup>52</sup> In 1915, the town expressed serious concerns with the original survey of The Pas townsite, especially with regard to the streets and lanes and wanted the Department of Indian Affairs to do a new survey to rectify the problems:

I am sorry that your Department is not prepared to give the town a correct survey of lots which you have placed upon the market and from which you have realized great sums of money. No one here is sure of the dividing line between the lots and when the town is re-surveyed, as it must be before long, some of the very large buildings here will be partly on other people's land and either must be removed or a purchase made. This fact is known to the Registrar, Mr. J.B. Cain and I understand that he is determined sometime or other to refuse to register any of the lands in The Pas and compel a re-survey. The Town Engineers, who are very experienced surveyors and have had to go over the roads and streets report to the Council from time to time that the original survey is defective in every respect. Your Dominion Land Surveyors may have been experienced in field work but they evidently do not know anything about laying out a town-site. Their location of the roads and streets here show even a novice that they had never done that kind of work before.<sup>53</sup>

The department did not agree to a resurvey until 1919 but, in the meantime, despite the fact that it believed that the title to the streets and lanes was already vested in the province, an Order in Council was passed on September 19, 1916, confirming that fact.<sup>54</sup>

In 1919, J.D. McLean, Assistant Deputy and Secretary of Indian Affairs, wrote to the District Land Registrar at Neepawa, Manitoba, to say that there would be an amendment to the September 19, 1916, Order in Council to reflect some "minor changes [which] were made in the streets and lanes in

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50 *Manitoba Supplementary Provisions Act*, RSC 1906, c. 99, s. 7, as quoted in ICC Exhibit 4a, p. 6.

51 *Municipal Act*, RSM 1902, c. 116, s. 664.

52 McLean's survey was registered on March 12, 1912. It would appear that Proudfoot's survey was not registered until 1920 (see letter from J.A. Shearer, District Registrar, Neepawa, to Clerk of the Privy Council, December 13, 1920, LAC, RG 10, vol. 4026, file 292,870-1C [ICC Exhibit 1a, pp. 443-44]).

53 David Clapp, Town Solicitor, The Pas, to J.D. McLean, Assistant Deputy and Secretary, May 4, 1915, LAC, RG 10, vol. 6719, file 128A-7-1 1 (ICC Exhibit 9a, p. 173, transcript and copy in ICC Exhibit 1a).

54 Order in Council, September 19, 1916, DIAND Land Registry, Instrument no. 16392 (ICC Exhibit 1a, pp. 355-57).



the final plan of a portion of the town plot recently registered in your office under No. 508.”<sup>55</sup> Consequently, Order in Council PC 1921-42 was issued on January 10, 1921, ordering the streets and lanes shown on the registered plans be transferred to the town of The Pas.<sup>56</sup>

No money was ever paid to The Pas Band for the purchase of surrendered land making up streets and lanes in the town of The Pas.

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55 J.D. McLean to J.A. Shearer, District Registrar, Neepawa, Manitoba, December 25, 1920, LAC, RG 10, vol. 4026, file 292,870-1C (ICC Exhibit 1a, p. 445).

56 Order in Council PC 1921-42, January 10, 1921, DIAND Land Registry, Instrument no. 16404 (ICC Exhibit 1a, pp. 449–50).

## PART III

### ISSUES

According to a draft dated February 6, 2003, the issues to be considered in the inquiry were:

#### **Alleged Wrongful Alienation of the Streets and Lanes**

- 1 Did Canada permit or cause the streets and lanes to be alienated without adequate compensation:
  - a) contrary to the provisions of the *Indian Act*
  - b) contrary to the terms and conditions of the surrender of 1906, or,
  - c) contrary to the statutory and/or fiduciary duties owed by Canada to the First Nation?
- 2 If yes, is the First Nation entitled to be compensated for the streets and lanes land by Canada?

#### **Alleged Wrongful Expenditure of \$2,000 for Clearing of the Streets and Lanes**

- 3 Was there an expenditure of \$2,000 from the Band's capital account used to clear the lands comprising the streets and lanes?
- 4 If yes, was the expenditure of \$2,000 from the Band's capital account to clear the streets and lanes lands,
  - a) contrary to the provisions of the *Indian Act*;
  - b) contrary to the terms and conditions of the surrender of 1906; or,
  - c) contrary to the statutory and/or fiduciary duties owed by Canada to the First Nation?
- 5 If yes, does Canada owe any compensation or damages to the First Nation resulting from the \$2,000 expenditure?<sup>57</sup>

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<sup>57</sup> "Draft Statement of Issues," Indian Claims Commission, Second Planning Conference Summary, February 7, 2003, revised March 5, 2003 (ICC file 2106-14-1, vol. 1, app. 2).

## PART IV

### THE INQUIRY

#### THE \$2,000 EXPENDITURE

In order to understand what happened with the part of the claim relating to the alleged expenditure of \$2,000 to clear streets and lanes in The Pas townsite, it is necessary to know something about how this claim was researched and reviewed in the past.

In the early 1970s, the federal government began to fund native organizations to research and develop land claims. In Manitoba, the Treaties and Aboriginal Rights Research (TARR) Centre was established to research and develop land claims for First Nations in that province. In 1974, the Department of Indian Affairs established the Office of Native Claims (ONC) to receive and review these claims and to make recommendations as to their validity.

On September 17, 1976, the legal firm of Regier Stewart forwarded a “Claim Respecting Streets and Lanes in the Town of The Pas,” which had been written on behalf of The Pas Band. In his covering letter, Mr Kenneth Regier made a point of saying that this was the first claim forwarded to ONC from Manitoba, and that he expected that it should take “no longer than four weeks to assess same as to whether or not there is a prima facie case so that negotiations can be entered into and funding arranged.”<sup>58</sup>

The claim submission that accompanied Mr Regier’s letter dealt with both the improper alienation of the streets and lanes (discussed below) and the alleged improper use of the Band’s capital funds to establish the streets and lanes:

The first mention of streets and lanes occurs in 1912. On May 21, 1912 the Chief and Councillors of The Pas Band signed a release by which a sum not exceeding \$2,000.00 was to be paid out of monies standing to the credit of the Band for the

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58 Kenneth P. Regier, Regier, Stewart, Winnipeg, to Jean T. Fourier, Executive Director, Office of Native Claims, Ottawa, September 17, 1976 (ICC Exhibit 2a, p. 1).

purpose of clearing the streets in the town plot of The Pas (Document 5). Interestingly in an accompanying letter the Indian Agent reported that he had a great deal of trouble to obtain the release. This was understandable since the Band's credit at the time was only \$19,053.66. (Document 5) .<sup>59</sup>

In the Summary of Facts in the 1976 claim submission, the First Nation stated:

2. The available documents showed that The Pas Band paid for at least most of the cost of establishing the streets and lands [*sic*] – on the other hand there was no evidence of any cost sharing by The Town of The Pas. This second point cannot be more definite because some of the files of the Department of Indian Affairs and Northern Development are missing;<sup>60</sup>

The First Nation concluded from the available evidence that the Band had “paid the entire cost of establishing the streets and lanes from its funds.”<sup>61</sup>

Upon receipt of the First Nation's claim submission, the Office of Native Claims undertook its own review; its research findings were set out in a report dated January 17, 1977. This report did not consider the legality of the use of the Band's capital funds for road clearing, but rather attempted to demonstrate that the value of the lots was enhanced by the clearing of the streets and lanes to an amount greater than the \$2,000 expenditure and, therefore, the First Nation had suffered no damage.<sup>62</sup>

The Minister of Indian Affairs, Warren Allmand, wrote to the First Nation's solicitor on June 30, 1977, rejecting the claim. An attached report gave some further details about the enhanced value of the lots, but also included some information about the jurisdiction of those particular lands passing to the province before the First Nation had authorized the expenditure:

In the interim, between April 4, 1912 – (the date of issuance of instructions to obtain band consent for clearing streets and lanes), and May 21, 1912 (the date the Band approval was given), the Manitoba Boundaries Extension Act came into force on May 14, 1912 [*sic*]. Therefore, jurisdiction over the streets and lanes of The Pas, passed from the Crown in the Right of Canada to the Province of Manitoba.<sup>63</sup>

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59 TARR Manitoba, “The Pas Band of Indians – Claim Respecting Streets and Lanes in the Town of The Pas,” September 17, 1976, p. 3 (ICC Exhibit 2a, p. 7). The documents referred to can be referenced in ICC Exhibit 1a, pp. 196–97.

60 TARR Manitoba, “The Pas Band of Indians – Claim Respecting Streets and Lanes in the Town of The Pas,” September 17, 1976, pp. 9–10 (ICC Exhibit 2a, p. 13).

61 TARR Manitoba, “The Pas Band of Indians – Claim Respecting Streets and Lanes in the Town of The Pas,” September 17, 1976, pp. 9–10 (ICC Exhibit 2a, p. 14).

62 [ONC, author unknown], “Report, The Pas Surrender 1906,” January 17, 1977, pp. 11–12 (ICC Exhibit 3a, pp. 11–12).

Minister Allmand's rejection of the expenditure aspect of the streets and lane claim referred to the jurisdictional issue:

It is my understanding that the Band believes compensation is owed them because \$2000 of Band funds were used to clear streets and lanes in unsold areas of the townplot. Since, as the attached report outlines, title to the streets and lanes passed to the Province of Manitoba in 1912, I am advised that the Department may not have had authority to clear the streets and lanes. However, the available evidence suggests that the \$2000 which the Band authorized should be expended on clearing streets and lanes was recouped with profit as a result of the increased value it gave to the lots. Therefore, it is my preliminary view that to the extent that the \$2000 was recovered by subsequent sales that no damages are owing arising from the actions taken by the Government in this matter. Nevertheless, I would suggest that in consultation with the Office of Native Claims, you may wish to make a further assessment as to whether the Band suffered financially as a result of this expenditure.<sup>64</sup>

Following a review of some specific aspects relating to the improper alienation part of the claim with which the First Nation had taken issue, J. Hugh Faulkner, Mr Allmand's successor as Minister of Indian Affairs, wrote to the Band's solicitors. With respect to the expenditure for clearing of streets and lanes in 1912, Minister Faulkner stated that he had reviewed the position taken by his predecessor and shared his views.<sup>65</sup>

On September 1, 1978, the ONC produced yet another report on the issues of the expenditure for clearing streets and lanes. The main purpose of this paper was to address the question of whether the expenditure was proper in light of the timing of the *Manitoba Boundaries Extension Act*. It did refer to the related provisions in the *Indian Act*, but once again the research performed focused on the enhanced value of the lots. According to an analysis of 61 lots sold in 1914, the actual value received for these lots was \$7,519 above the valuation placed on the lots prior to the clearing. Because the \$2,000 expenditure was totally recouped, it concluded that "regardless of whether or not there was authority in the provisions of the Indian Act to authorize the expenditure there can be no claim, as no damages were incurred."<sup>66</sup>

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63 [No author, no date], "The Pas Band Claim to the Streets and Lanes of the Town of The Pas," p. 4, report attached to letter from Warren Allmand, Minister of Indian Affairs, to Kenneth P. Regier, June 30, 1977 (ICC Exhibit 4a, p. 7).

64 Warren Allmand, Minister of Indian Affairs, to Kenneth P. Regier, June 30, 1977, p. 2 (ICC Exhibit 4a).

65 J. Hugh Faulkner to Gavin M. Wood, Regier, Stewart Barristers and Solicitors, Winnipeg, June 20, 1978, p. 2 (ICC Exhibit 4b, p. 2).

66 ONC, "\$2000 Expenditure for Clearing Streets and Lanes," September 1, 1978, pp. 1–2 (ICC Exhibit 3b, pp. 1–2).

In May 1986, the First Nation submitted a revised claim concerning the \$2,000 component of The Pas Band streets and lands claim. This claim alleged that the expenditure was unlawful because it was not authorized by section 90 of the 1906 *Indian Act*, that Canada could not excuse its actions because the expenditure was recouped through advanced value, and, “when the actual historical records are taken into account, the projected increase in land sales prices did not occur.”<sup>67</sup> This latter allegation was based on work which added to the research of the 61 sales made in 1914, taking into consideration those sales which had been cancelled in subsequent years and sold years or decades later at lower prices.<sup>68</sup>

It has been the practice of the Specific Claims Branch to ensure that the facts in First Nation claim submissions are accurate, a step referred to as “confirming research.” A draft report was completed in October 1990, which specifically did not draw any conclusions from the facts:

This draft historical report presents the historical facts which are known at this time concerning the above noted claim. Other historical facts may subsequently be found to be relevant to this claim that are not included in this draft historical report. This draft historical report does not draw any conclusions concerning the facts presented nor does it constitute a Government of Canada position on this claim.<sup>69</sup>

This report was sent to the TARR Centre where it was substantially revised and finalized in a second draft dated August 1992.<sup>70</sup> The revised report, along with draft legal and factual questions relating to the expenditure of band funds for street clearing, was submitted to Specific Claims West (SCW) Branch by Opaskwayak’s acting Chief, Frank Whitehead, on October 14, 1992. The allegation was the same as that in 1986:

It appears clear to us that the authorization of the expenditure of Band funds to clear the streets & lanes at The Pas was beyond the authority set out in the Indian Act. As well, and perhaps just as significantly, the stated benefit which Indian Affairs used to justify the expenditure, ie. increased value of the lots, did not materialize.<sup>71</sup>

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67 Vic Savino, Savino & Company, Barristers and Solicitors, Winnipeg, to Bob Goudie, Director, Specific Claims Branch, May 9, 1986, p. 7 (ICC Exhibit 2c, p. 7).

68 Vic Savino, Savino & Company, Barristers and Solicitors, Winnipeg, to Bob Goudie, Director, Specific Claims Branch, May 9, 1986, pp. 5–6 (ICC Exhibit 2c, pp. 5–6).

69 SCB, “The Pas Streets and Lanes Claim,” October 1990, p. 1 (ICC Exhibit 3c, p. 1).

70 “The Pas Indian Band Streets and Lanes Claim: Expenditure of Band Funds for Street Clearing,” 1st Draft, Specific Claims Branch, October 1990; 2nd Draft, TARR Centre August 1992 (ICC Exhibit 2e).

71 Frank Whitehead, Acting Chief, Opaskwayak Cree Nation, to Alan Tallman, Assistant Negotiator, SCW, Vancouver, October 14, 1992, p. 2 (ICC Exhibit 1a, p. 540).

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In a conference call on May 24, 1994, Canada verbally informed the First Nation that the streets and lanes claim “was not accepted for negotiation.”<sup>72</sup> In July 2002, the Public Information Status Report of the Specific Claims Branch indicated that the claim was rejected by letter dated August 4, 1994,<sup>73</sup> but an extensive search by both Canada and the First Nation failed to locate any written notification or explanation of the rejection.

As the second stage of the inquiry process, it has been the practice of the Indian Claims Commission to bring the parties together at a planning conference to try to reach agreement on the issues to be considered and to set dates for other stages of the inquiry. That first planning conference for the Opaskwayak streets and lanes claim was set for December 18, 2002, and, in preparation for it, staff in the Claims Unit of Manitoba DIAND re-examined the research conducted during the various claim submissions and reviews, and discovered that no one had ever checked the trust accounts to confirm that the First Nation’s capital funds were in fact used to pay for the clearing of the streets and lanes. A preliminary look at these records failed to find any deduction in this regard:

Following a review of all the basic documentation, it was noticed, in connection with the \$2,000 expenditure claim, that a most fundamental archival source had not been researched – Indian Band Trust Accounts. A cursory review of the capital and interest accounts of The Pas for 1912 and immediate surrounding years was then conducted, and no disbursement(s) were evident in connection with street clearing for the 1906 surrendered lands of IR 21A. It appears that all previous activity on the \$2,000 expenditure claim between Canada and the First Nation had been premised on the notion that capital monies had indeed been spent because historical documentation had revealed that such an expenditure had been authorized by band council resolution and by an order-in-council.<sup>74</sup>

Canada undertook to conduct new research on the alleged wrongful expenditure of \$2000 from band funds. Initially, this research was to be limited in scope, but it was later decided that it should be expanded so that it would meet the needs of both the First Nation and the ICC inquiry:

During the February 7, 2003 planning conference, Canada had indicated that its research on the \$2,000 street clearing expenditure would be limited in scope. The

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72 Kathleen M. Kerr, Negotiating Analyst, SCW, Memorandum to file, June 1, 1994, p. 2 (ICC Exhibit 9a, p. 78).

73 INAC, Public Information Status Report, Specific Claims Branch, Opaskwayak Cree Nation (Band 315): [www.aic-inac.gc.ca/ps/clm/pis\\_e.pdf](http://www.aic-inac.gc.ca/ps/clm/pis_e.pdf), accessed July 2002.

74 Brad Morrison, Claims Analyst, INAC (Manitoba Region), Land Entitlement and Claims Implementation Office (LECIO), “The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure,” August 18, 2003, para. 18 (ICC Exhibit 9a).

research effort, however, ended up being much more thorough and elaborate in nature. The Claims Unit of LECIO, Manitoba DIAND decided to conduct an extensive investigation in order to produce a comprehensive research report which would be of use to OCN in re-examining the \$2,000 claim. The other objective of the Manitoba DIAND research endeavour was to render a report which could be filed as an exhibit and be taken into consideration by the ICC should the \$2,000 claim proceed to formal inquiry. Given the foregoing intentions, research done in a superficial manner would not have sufficed.<sup>75</sup>

Records researched in this study included archival records of the Department of Indian Affairs (RG 10) and the Department of the Interior (RG 15) in the Library and Archives Canada; The Pas Band capital and interest trust accounts from 1910 to 1921 in both the handwritten ledgers and the published versions in the annual reports of the Department of Indian Affairs; records of the provincial government held at the Manitoba Archives; newspaper records; and The Pas town council minutes held at the Sam Waller Museum in The Pas.<sup>76</sup>

As well as the fact that all previous research failed to include the trust accounts, this review found that two other important documents were either overlooked or their importance not recognized. One was the July 19, 1912, memorandum from DSGIA Frank Pedley to Robert Rogers, Minister of Interior. The text of this memo referred to the Order in Council that had been passed authorizing the expenditure of \$2,000 from the capital funds of The Pas Band, and it recommended how the work should proceed. The marginalia, however, indicated that the Minister disapproved of Pedley's suggestions, writing "No" on the memorandum; the memo was returned to Pedley with the instructions, "No Action," and it then made its way through the bureaucratic channels until it reached the Survey office where Samuel Bray, Chief Surveyor, commented "No action accordingly."<sup>77</sup>

The second document was the surveyor's report from this period, which indicated that the clearing of the streets and lanes was being conducted by town employees:

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75 Brad Morrison, Claims Analyst, INAC (Manitoba Region), LECIO, "The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure," August 18, 2003, para. 23 (ICC Exhibit 9a).

76 Brad Morrison, Claims Analyst, INAC (Manitoba Region), LECIO, "The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure," August 18, 2003, paras. 25–36 (ICC Exhibit 9a).

77 Frank Pedley, DSGIA, to Mr Rogers, July 19, 1912, LAC, RG 10, vol. 4056, file 386990 (ICC Exhibit 1, p. 206); Brad Morrison, Claims Analyst, INAC (Manitoba Region), LECIO, "The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure," August 18, 2003, paras. 62–63 (ICC Exhibit 9a).

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The men working for the town in clearing some of the streets and ditching had apparently not been warned against disturbing the posts and a considerable number of the posts had to be reset. I have written to the town clerk, calling his attention to this in order that these men be cautioned by him and in that way avoid if possible any further disturbance of these posts.<sup>78</sup>

The conclusion, therefore, was that previous research had missed important documents and that there was no evidence that any First Nation's money was spend to clear the streets and lanes:

99. Because of the foregoing oversights, past research on the \$2,000 expenditure claim went off on a tangent. Research efforts and energies were directed towards the nebulous area of land valuation to refute the mistaken notion that the money was, indeed spent, and that it was recouped through the subsequent surrendered land sales.
100. A review of the Departmental trust account records; departmental annual reports; the July 19, 1912 Pedley/Rogers memo; ancillary RG 10 information, newspaper accounts and Town records, support the conclusion that no \$2,000 expenditure was paid or spent on the clearing of streets and lanes in The Pas. No evidence was found supporting the payment or spending of \$2,000 from The Pas Band's capital account for the clearing of streets and lanes.<sup>79</sup>

Because of this research, Opaskwayak First Nation passed a BCR on September 13, 2004, withdrawing the part of the claim dealing with the \$2,000 expenditure for streets and land clearing from the ICC inquiry:

AND WHEREAS, as a result of supplementary research undertaken on the \$2000 expenditure issue, it has been adequately demonstrated that, although the \$2000 expenditure was authorized by both The Pas (OCN) Council and federal Privy Council of the day, these funds were not withdrawn from The Pas (OCN) Trust Funds for this purpose;

AND WHEREAS, the findings of this supplementary research effectively remove the basis for that portion of the "Streets and Lanes" claim dealing with the \$2000 expenditure by our First Nation for street and lane clearing in the 500 acre portion of IR #21A surrender [sic] for sale in 1906;

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78 Extract from report of Donald F. Robertson, DLS, The Pas, LAC, RG 10, vol. 6719, file 128A-7-11 (ICC Exhibit 9a, p. 153).

79 Brad Morrison, Claims Analyst, INAC (Manitoba Region), LECIO, "The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure," August 18, 2003, paras. 99–100 (ICC Exhibit 9a).

NOW THEREFORE BE IT RESOLVED that we, the Chief and Council of the Opaskwayak Cree Nation do hereby withdraw that portion of The Pas Streets and Lanes specific claim currently before the Indian Claims Commission that deals with the \$2000 expenditure of First Nation funds for the purpose of clearing the streets and lanes in the 500 acre portion of Indian Reserve #21A surrendered for sale in 1906.<sup>80</sup>

#### **WRONGFUL ALIENATION OF STREETS AND LANES**

The claim submitted to the Office of Native Claims in 1976 alleged that the conveyance of the streets and lanes to the town of The Pas in 1916 was invalid because no compensation was paid, contrary to the terms of the *Indian Act*, the 1906 surrender, and/or other statutory or fiduciary duties owed by Canada.<sup>81</sup> The Minister of Indian Affairs rejected the claim by letter dated June 30, 1977, on the grounds that (a) the *Indian Act* empowered the Crown to subdivide the surrendered land into townplots; (b) that when the subdivision survey was registered at the Land Titles Office in 1908 the streets and lanes became public highways under the *Dominion Lands Act* and as such were no longer considered unsold surrendered lands; and, (c) as a result of the subdivision, “the Band gained considerably more financially from the sale of individual lots in the town, than would have been the case had the entire surrendered area been sold as one block.”<sup>82</sup> The First Nation’s legal counsel objected to some of the details in the report on which Minister Allmand’s rejection was based,<sup>83</sup> and the department reassessed the claim and upheld the rejection. This part of the claim was not subject to any further review before Opaskwayak Cree Nation brought it to the ICC in 2002.

During the ICC inquiry, however, John H. Weisgerber, an appraisal advisor, employed by Public Works and Government Services Canada (PWGSC), carried out research to set the alienation of the Opaskwayak streets and lanes in historical context. He completed his work in April 2004. Mr Weisgerber thoroughly investigated current and past practices regarding the dedication (i.e. transfer to the local municipality) of streets and lanes in subdivisions. For this he was able to use land immediately adjacent to The Pas townsite –

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80 Opaskwayak Cree Nation BCR 04-067, September 13, 2004, (see: Appendix B). The covering letter from Chief Frank Whitehead to John B. Edmond, Commission Counsel, ICC, is dated September 10, 2004, but the letter and attachment were not provided to the ICC until it was faxed to Marcelle Marion, Associate Counsel, ICC by Vince Sinclair, OCN, on November 15, 2004 (ICC file 2106-14-1, vol. 3).

81 TARR Manitoba, “The Pas Band of Indians – Claim Respecting Streets and Lanes in the Town of The Pas,” September 17, 1976, p. 10 (ICC Exhibit 2a, p. 14).

82 Warren Allmand, Minister of Indian Affairs, to Kenneth P. Regier, Regier, Stewart, Barristers & Solicitors, Winnipeg, June 30, 1977, pp. 1–2 (ICC Exhibit 4a, pp. 1–2).

83 Kenneth P. Regier, Regier, Stewart, Barristers & Solicitors, Winnipeg, to Warren Allmand, Minister of Indian Affairs, July 29, 1977 (ICC Exhibit 2b).

The Pas Centre and The Pas Annex were two subdivisions abutting on the eastern boundary of the surrendered 500 acres, which were developed and sold in 1912–13. The research showed that, “under municipal and land titles legislation of the time, upon registration of a plan, the streets and lanes of a subdivision were dedicated to public use. Title to streets and lanes vested in the Province, while possession and by-law making power was exercised by the relevant municipal authority.”<sup>84</sup>

Mr Weisgerber also looked at the history of the marketing activity for developed land in the townsite established on the surrendered land, in The Pas Centre and The Pas Annex and in Minnedosa, Manitoba (located on the line of the Canadian Pacific Railway and incorporated as a town in March 1883), as well as for undeveloped land near those locations. Among his findings were:

- subdivision was a common response to railway construction in smaller communities in the early 1900s;
- “the economic climate in Canada, the Province of Manitoba and The Pas was positive during the early 1900’s” which, “combined with the anticipation of railway construction to The Pas, created a favorable environment for subdivision activity”;
- “Subdivision activity at The Pas was consistent with market behavior in other communities”;
- the development of The Pas Centre and The Pas Annex in 1913 demonstrated the “high expectations regarding the future growth potential in the community”;
- “the subject 500 acre subdivision had a significantly greater potential for future revenue achievement” because its location was superior to that of The Pas Centre and The Pas Annex;
- “The subdivision activity that occurred on the subject 500 acres in the early 1900’s was also timely for the community. ... The early demand for the lots was strong”;

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<sup>84</sup> John H. Weisgerber, Public Works and Government Services Canada (PWGSC), “Historical Market Analysis Research Report, Opaskwayak Streets and Lanes Claim,” April 2004, p. 20 (ICC Exhibit 10A). See also Brad Morrison, “The Pas Annex and The Pas Centre Land Titles and Statute Information” (ICC Exhibit 10a).

- “in the late 1880's and early 1900's, there appeared to be a large variance between the value of undeveloped land and the potential revenue that could be obtained by subdividing undeveloped land.”<sup>85</sup>

The final conclusions of the research were that no claim existed:

Based on an analysis of the information contained in the body of this report, it is the opinion of the writer that:

- The Crown acted in the best interests of The Pas Band in its decision to subdivide the 500 acres.
- Streets and lanes were properly dealt with at the time of subdivision.
- Compensation is not owing to The Pas Band for the value of the Streets and Lanes.<sup>86</sup>

On December 6, 2004, the Opaskwayak Cree Nation passed a Band Council Resolution withdrawing the wrongful alienation portion of the streets and lanes claim from the ICC inquiry:

AND WHEREAS, as a result of supplementary research undertaken on the wrongful alienation, the streets and lanes would not normally be dealt with separately and compensation received for same;

AND WHEREAS, the findings of this supplementary research effectively remove the basis for that portion of the “Streets and Lanes” claim dealing with the wrongful alienation of land within the 500-acre portion of IR #21A surrendered for sale in 1906;

NOW THEREFORE BE IT RESOLVED THAT we, the Chief and Council of the Opaskwayak Cree Nation, do hereby withdraw that portion of The Pas Street and Lanes [sic] specific claim currently before the Indian Claims Commission that deals with the wrongful alienation of land within the 500-acre portion of Indian Reserve #21A surrender [sic] for sale in 1906.<sup>87</sup>

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85 John H. Weisgerber, PWGSC, “Historical Market Analysis Research Report, Opaskwayak Streets and Lanes Claim,” April 2004, pp. 25–26 (ICC Exhibit 10a). Some findings are paraphrased.

86 John H. Weisgerber, Appraisal Adviser, PWGSC, to Vivian Russell, Legal Counsel, Specific Claims, DIAND Legal Services, April 27, 2004 (ICC Exhibit 10a, p. ii).

## PART V

### CONCLUSION

For nearly two decades, the members of the Opaskwayak Cree Nation were under the mistaken impression that Canada had erred in its treatment of the streets and lanes in the part of the town of The Pas which had formerly been Indian reserve land. Because of the thorough supplementary research conducted by Canada after the First Nation asked the Indian Claims Commission to review the rejection of the claim, Opaskwayak Cree members are now satisfied that departmental officials acted properly in all aspects of the transactions, and a long-standing grievance has been resolved. Paul Forsyth, legal counsel for the First Nation throughout the inquiry proceedings, made this clear in a letter thanking the ICC:

The Historical Market Analysis Research Report prepared for Canada by Mr. Weisgerber, in respect to the “wrongful alienation” and the Historical Research Report earlier prepared for Canada by Brad Morrison in respect of the “\$2,000 expenditure”, were thorough, reasonable and convincing in the manner by which they addressed issues of concern raised by the First Nation with respect to these components of the Specific Claim.

Opaskwayak Cree Nation and the writer would like to thank the Indian Claims Commission, and in particular, Mr. Brandt [*sic*], for the efforts which enabled the issues in our Specific Claim to be fully considered and examined. If the initial rejection of the Specific Claim by Canada had been, and had been seen by us to be, the result of such a thorough review, we may not have felt the need to involve the Indian Claims Commission.<sup>88</sup>

We too commend Mr Morrison and Mr Weisgerber, along with all the staff who assisted them, for their excellent research reports.

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87 Opaskwayak Cree Nation BCR 04-029 dated December 6, 2004, (see: Appendix C). The covering letter from Chief Frank Whitehead, OCN, to John B. Edmond, Commission Counsel, ICC is dated November 23, 2004, but the ICC did not receive a copy of either the letter or the BCR until it was faxed to them on January 17, 2005. See ICC file 2106-14-1, vol. 4.

88 Paul B. Forsyth, Taylor McCaffrey LLP, Barristers & Solicitors, to Marcelle M. Marion, Associate Legal Counsel, Indian Claims Commission, January 31, 2005 (ICC file 2106-14-1, vol. 4).

INDIAN CLAIMS COMMISSION PROCEEDINGS

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This claim illustrates how important thorough, accurate research is in the land claim process. As Mr Morrison pointed out, “[w]hether the expenditure actually occurred is a key element in the historical sequence of events and is a cornerstone of the claim,”<sup>89</sup> so it is remarkable to us that so much research could take place on the \$2,000 expenditure portion of this claim without the trust accounts ever being consulted. We suggest, therefore, that Canada develop a list of critical documents for each type of claim being researched; the appropriate list could then be shared with First Nations’ researchers so that this particular error might be avoided in the future.

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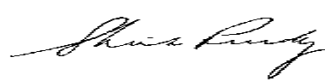
FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde (Chair)  
Commissioner



Alan C. Holman  
Commissioner



Sheila G. Purdy  
Commissioner

Dated this 21<sup>st</sup> day of February 2007

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<sup>89</sup> Brad Morrison, Claims Analyst, INAC (Manitoba Region), LECIO, “The Indian Claim Commission, Opaskwayak Cree Nation, Streets & Lanes Inquiry, Research Report – \$2,000 Streets & Lanes Expenditure,” August 18, 2003, para. 19 (ICC Exhibit 9a).

# APPENDIX A

## DECLARATION

### Opaskwayak Cree Nation: Streets and Lanes Inquiry

### Nation crie d'Opaskwayak: enquête relative aux rues et aux ruelles

#### DECLARATION

On September 17, 1976, what is now the Opaskwayak Cree Nation, then known as The Pas Band, submitted a specific claim to the Minister of Indian Affairs and Northern Development alleging alienation, without adequate compensation, of streets and lanes on reserve land surrendered in 1906 and subdivided to form part of the town of The Pas. The claim also alleged improper use of \$2,000 of the Band's capital funds to clear the streets and lanes.

The claim was rejected June 30, 1977. The claim relating to misuse of band funds was revised and resubmitted as a separate claim in 1986 and again in 1992. On May 24, 1994, the First Nation was notified verbally that this claim would not be accepted for negotiation.

#### DÉCLARATION

Le 17 septembre 1976, l'actuelle Nation crie d'Opaskwayak, alors connue sous le nom de Bande de The Pas, a présenté au ministre des Affaires indiennes et du Nord canadien une revendication particulière dans laquelle elle fait valoir qu'on a aliéné, sans indemnisation convenable, des rues et ruelles se trouvant sur des terres de réserve cédées en 1906 et subdivisées pour former une partie de la municipalité de The Pas. Il y est aussi allégué qu'une somme de 2 000 \$ des fonds de capital de la bande a été utilisée pour déboiser les rues et ruelles.

Cette revendication a été rejetée le 30 juin 1977. La portion relative à la mauvaise utilisation des fonds de la bande a ensuite été revue et présentée séparément en 1986 et à nouveau en 1992. Le 24 mai 1994, la Première Nation a été avisée verbalement que cette revendication ne serait pas acceptée aux fins de négociation.

INDIAN CLAIMS COMMISSION PROCEEDINGS

By letter dated June 18, 2002, followed by a Band Council Resolution dated June 20, 2002, the First Nation requested that this Commission conduct an inquiry into both claims.

On September 27, 2002, the Commission agreed to conduct an inquiry as requested.

Planning conferences were held in 2002 and 2003. On February 7, 2003, Canada proposed to conduct additional research on both aspects of the claim.

On August 26, 2003, Canada submitted a report on the alleged expenditure from band funds, which demonstrated that, although authorization had been given to debit the Band's account, no band funds were actually spent on clearing the streets and lanes on the surrendered land. By Band Council Resolution dated September 13, 2004, the Council withdrew this claim from the inquiry.

On May 3, 2004, Canada submitted its Historical Market Analysis research report, which demonstrated that the transfer of the streets and lanes in The Pas townsite to the Crown in right of the Province of Manitoba and dedicated to the Town of The Pas, without compensation to the Opaskwayak Cree Nation, was reasonable and lawful. By Band Council Resolution dated December 6, 2004, the Council withdrew this claim from the inquiry.

Since the Opaskwayak Cree Nation has withdrawn both claims from the inquiry, the Commission finds that there are no longer any matters to be inquired into.

Dans une lettre datée du 18 juin 2002, suivie d'une résolution du Conseil de bande datée du 20 juin 2002, la Première Nation a demandé à la Commission de faire enquête sur les deux revendications.

Le 27 septembre 2002, la Commission a accepté de tenir une enquête tel que demandé.

Des séances de planification ont eu lieu en 2002 et en 2003. Le 7 février 2003, le Canada a proposé de procéder à des recherches supplémentaires sur les deux aspects de la revendication.

Le 26 août 2003, le Canada a présenté un rapport sur les dépenses présumées faites dans les fonds de la bande, lequel démontre que, même si une autorisation a été donnée de débiter le compte de la bande, on n'a pas vraiment utilisé les fonds pour déboiser les rues et ruelles sur les terres cédées. En vertu d'une résolution du Conseil de bande datée du 13 septembre 2004, le Conseil a donc retiré cette revendication de l'enquête.

Le 3 mai 2004, le Canada a présenté son rapport d'analyse de marché historique, qui démontre que le transfert des rues et ruelles du territoire de la municipalité de The Pas en faveur de la Couronne du chef de la province du Manitoba, pour l'usage de la municipalité de The Pas, sans indemniser la Nation crie d'Opaskwayak, était raisonnable et légal. Au moyen d'une résolution du Conseil de bande datée du 6 décembre 2004, le Conseil a donc retiré cette revendication de l'enquête.

Puisque la Nation crie d'Opaskwayak a retiré les deux revendications, la Commission conclut qu'il y a lieu de conclure l'enquête.



OPASKWAYAK CREE NATION – STREETS AND LANES INQUIRY

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THE COMMISSION THEREFORE  
ORDERS AS FOLLOWS:

The inquiry into these specific claims is  
hereby concluded.

At Ottawa, Ontario, this 14<sup>th</sup> day of  
February, 2006.



Daniel J. Bellegarde, Panel Chair  
Commissioner



Alan C. Holman  
Commissioner

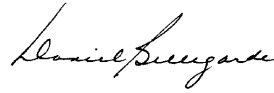


Sheila G. Purdy  
Commissioner

EN CONSÉQUENCE, LA COMMISSION  
DÉCLARE DONC :

Que l'enquête sur ces revendications  
particulières est close.

Fait à Ottawa, Ontario, le 14 février 2006.



Daniel J. Bellegarde, président du Comité  
Commissaire



Alan C. Holman  
Commissaire



Sheila G. Purdy  
Commissaire

# APPENDIX B

## BAND COUNCIL RESOLUTION, SEPTEMBER 13, 2004

### OPASKWAYAK CREE NATION BAND COUNCIL RESOLUTION



*Chronological Number: 04-067  
Dated This 13<sup>th</sup> Day of September, 2004.*

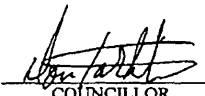






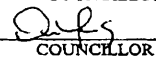
AT A DULY CONVENED MEETING of Chief and Council held in the Council Chambers on Opaskwayak Cree Nation Reserve No. 21E;

WHEREAS, the Opaskwayak Cree Nation (OCN) is currently involved in an Indian Claims Commission review and assessment of the "Streets and Lanes" specific claim that concerns 1) the alienation without compensation to OCN of land used for streets and lanes within the 500 acre parcel at Indian Reserve # 21A surrendered for sale in 1906 and 2) a \$2000 expenditure from The Pas (OCN) funds for the purpose of clearing the streets and lanes in the surrendered portion of IR # 21A;

AND WHEREAS, as a result of supplementary research undertaken on the \$2000 expenditure issue, it has been adequately demonstrated that, although the \$2000 expenditure was authorized by both The Pas (OCN) Council and federal Privy Council of the day, these funds were not withdrawn from The Pas (OCN) Trust Funds for this purpose;

AND WHEREAS, the findings of this supplementary research effectively remove the basis for that portion of the "Street and Lanes" claim dealing with the \$2000 expenditure by our First Nation for street and lane clearing in the 500 acre portion of IR # 21A surrender for sale in 1906;

NOW THEREFORE BE IT RESOLVED that we, the Chief and Council of the Opaskwayak Cree Nation, do hereby withdraw that portion of The Pas Streets and Lanes specific claim currently before the Indian Claims Commission that deals with the \$2000 expenditure of First Nation funds for the purpose of clearing the streets and lanes in the 500 acre portion of Indian Reserve # 21A surrendered for sale in 1906.

 COUNCILLOR	_____	_____
 COUNCILLOR	CHIEF	_____
 COUNCILLOR	_____	 COUNCILLOR
 COUNCILLOR	COUNCILLOR	 COUNCILLOR
 COUNCILLOR	_____	_____
	COUNCILLOR	COUNCILLOR
	 COUNCILLOR	

A Quorum of Opaskwayak Cree Nation Chief and Council Consists of Five (5).

# APPENDIX C

## BAND COUNCIL RESOLUTION, DECEMBER 6, 2004



OPASKWAYAK CREE NATION BAND COUNCIL RESOLUTION

Chronological Number: 04-029  
Dated This 6<sup>th</sup> Day of DECEMBER, 2004

AT A DULY CONVENED MEETING of Chief and Council held in the Council Chambers on Opaskwayak Cree Nation Reserve No. 21E;

WHEREAS the Opaskwayak Cree Nation (OCN) is currently involved in an Indian Claims Commission review and assessment of the Streets and Lanes specific claim that concerns 1) the alienation without compensation to OCN of land used for streets and lanes within the 500 acre parcel at Indian Reserve #21A surrendered for sale in 1906, and 2) a \$2,000 expenditure from The Pas (OCN) funds for the purpose of clearing the streets and lanes in the surrendered portion of IR #21A;

AND WHEREAS, as a result of supplementary research undertaken on the wrongful alienation, the streets and lanes would not normally be dealt with separately and compensation received for same;

AND WHEREAS, the findings of this supplementary research effectively remove the basis for that portion of the "Streets and Lanes" claim dealing with the wrongful alienation of land within the 500-acre portion of IR #21A surrendered for sale in 1906;

NOW THEREFORE BE IT RESOLVED THAT we, the Chief and Council of the Opaskwayak Cree Nation, do hereby withdraw that portion of The Pas Street and Lanes specific claim currently before the Indian Claims Commission that deals with the wrongful alienation of land within the 500-acre portion of Indian Reserve #21A surrendered for sale in 1906.

  
COUNCILLOR

  
CHIEF

COUNCILLOR

  
COUNCILLOR

COUNCILLOR

COUNCILLOR

  
COUNCILLOR

  
COUNCILLOR

  
COUNCILLOR

COUNCILLOR

COUNCILLOR

COUNCILLOR

COUNCILLOR

A Quorum of Opaskwayak Cree Nation Chief and Council Consists of Five (5).

## APPENDIX D

### CHRONOLOGY

#### OPASKWAYAK CREE NATION: STREETS AND LANES INQUIRY

- 1     Planning conference                     Winnipeg, December 18, 2002  
  Winnipeg, February 7, 2003  
  Winnipeg, July 3, 2003
- 2     Content of formal record  
       The formal record of the Opaskwayak Cree Nation: Streets and Lanes Inquiry consists of the following materials:
  - Exhibits 1–10 tendered during the inquiry

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

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# **INDIAN CLAIMS COMMISSION**

## **PAUL FIRST NATION KAPASIWIN TOWNSITE INQUIRY**

### **PANEL**

Commissioner Daniel J. Bellegarde (Chair)  
Commissioner Alan C. Holman  
Commissioner Sheila G. Purdy

### **COUNSEL**

For the Paul First Nation  
Ranji Jeerakathil

For the Government of Canada  
Douglas Faulkner

To the Indian Claims Commission  
John B. Edmond/ Diana Kwan

**FEBRUARY 2007**



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## **SUMMARY**

### **PAUL FIRST NATION KAPASIWIN TOWNSITE INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Paul First Nation: Kapasiwin Townsite Inquiry* (Ottawa, February 2007), reported (2009) 22 ICCP 85.

*This summary is intended for research purposes only  
For a complete account of the inquiry, the reader should refer to  
the published report.*

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman,  
Commissioner S.G. Purdy

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender – Disposition; **Indian Act** –  
Surrender; **Fiduciary Duty** – Pre-surrender – Post-surrender – Minerals;  
**Compensation** – Criteria; **Alberta**

#### **THE SPECIFIC CLAIM**

The Paul First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of the surrendered lands. This claim was partly validated and accepted for negotiation on July 10, 1998. Negotiations subsequently broke down, and the First Nation asked the Indian Claims Commission (ICC) to hold an inquiry into compensation criteria. The Commission agreed to conduct an inquiry into compensation criteria as well as the rejected aspects of the claim in October 2001.

On June 2, 2000, the First Nation submitted another claim for the same lands, challenging the validity of the 1906 surrender. Canada rejected that claim in July 2003, on the grounds that it did not reveal a lawful obligation on the part of the Crown to the First Nation. At the request of the First Nation, the ICC agreed to incorporate the surrender claim into the ongoing inquiry.

#### **BACKGROUND**

The ancestors of the Paul First Nation adhered to Treaty 6 at Edmonton in 1877, when Chief Alexis signed the adhesion. About half his band lived at Wabamun, on the east shores of White Whale Lake, under the leadership of Headman Ironhead. Eventually,

the department recognized this group of Stoney people as a separate band, and after Peter Ironhead's death in 1887, Paul assumed leadership and the Band became known as Paul's Band. In 1890, the Sharphead Band surrendered its reserve, and about 70 members of the Sharphead Band went to live with the Paul Band.

Two reserves were surveyed for the Band on the shores of White Whale Lake: Indian Reserve (IR) 133A and IR 133B. IR 133B, which was the much smaller of the two, was the Band's primary fishing station, with access to both the lake and Moonlight Bay. The Band also used a wagon trail through IR 133B, as a way of travelling north to Ste Anne. Chief Paul remained as Chief until 1901, when he was deposed by the department. The Band remained without a Chief until May 1906, when David Bird became Chief.

The reserves were a short distance from Edmonton and had been noted for their fine sand beaches. In addition, there was a marl deposit on IR 133A. On June 20, 1906, the band members voted to surrender the marl deposit, to be leased for their benefit.

In late 1905, it became obvious that the Canadian Northern Railway (CNR) was approaching from Edmonton and would likely pass through the Paul Band Reserves. The department advised the railway that it could not enter the reserve until it had received permission and had paid for both the right of way and any other damage that the band members would suffer.

There was also interest in IR 133B from local real estate companies because of the fine sand beaches. Shortly after the marl surrender, the Agent reported that he had been asked by the band members about the advisability of surrendering IR 133B. James Gibbons held a meeting of the band and determined that it was willing to grant the surrender, for the purpose of establishing a railway townsite or a resort community. On September 11, 1906, the Paul Band voted to surrender IR 133B. There are 10 names on the surrender document; it is fairly certain that nine voted in favour of the surrender, with one opposed. Two days later, on September 13, 1906, Chief David Bird and Indian Agent Gibbons swore the Affidavit of Surrender. One of the oral terms of the surrender, as reported by the Surveyor, J.K. McLean, was that the fine sand beach was to be reserved from sale.

A lengthy correspondence between the department and the CNR began, with Crown officials asking repeatedly for assurances from the railway that it would build a railway station on the surrendered lands. The CNR had not yet received permission from the Railway Commission for its right of way, but indicated that as soon as it had permission it would take up the matter of the station. In the meantime, it asked the department to reserve lands from sale, both for the right of way and for a station.

In 1908, the Grand Trunk Pacific Railway (GTPR) received permission for a right of way through the Paul Band's IR 133A and through the surrendered lands.

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However, the GTPR did not consider building a station on the surrendered lands, sometimes known as the Kapasiwin Townsite, because, it claimed, the grade was too steep. It located a station about a mile west of the surrendered lands, across the narrows that connected Moonlight Bay to White Whale Lake. The GTPR did eventually build a summer station.

The Crown held the first sale of lots in May 1910, after the GTPR had built its rail line. The CNR asked that a block of land be reserved from sale for a possible station. Forty-two lots of a total of 161 sold, all at or slightly above the upset price.

In July 1911, the CNR acknowledged that the Railway Commission had refused permission for its proposed rail line. The CNR line was moved to the north.

The second sale of lots was held in June 1912, at the same time as the Crown was selling lots from the Paul Band's surrender of a portion of land at and near the Duffield townsite on the much larger IR 133A. The Crown put up 357 lots at Wabamun; 49 lots sold, again at or above the upset prices. Several of the sales were later cancelled because the buyers failed to make the required payments.

In 1913, Alberta incorporated the Village of Wabamun Beach, later renamed Kapasiwin. In 1931, the village council wrote to the Department of Indian Affairs and requested that the department transfer the streets and lanes within the village to the Province of Alberta. Included within that transfer, in 1932, was Wapumeg Avenue, which had been surveyed between the beach and the beachfront lots, and the beach itself. The village then applied to the province for the closure of Wapumeg Avenue. The province did as requested, and at the same time granted an easement to each beach owner of all the land between the owner's lot and the water's edge, effectively preventing public access to the beach.

From 1912 to 1936, the Crown did not sell any more of the surrendered lands, and in 1936 returned all the land east of Burntstick Avenue to reserve status. During the 1950s, there were sporadic sales of lots west of Burntstick Avenue; some surrendered lands are still unsold.

The transfer of the road allowances and the subsequent transfer of the beach are part of the accepted claim for negotiation, as is the Crown's management of land sales from 1912 to 1936, and are not a part of this inquiry.

## **ISSUES**

Was the surrender of IR 133B void for not having included an oral term regarding the beach? Did the surrender meet the requirements of the *Indian Act*? Was there a breach of the Crown's fiduciary duty with regard to the surrender, both in failing to meet the requirements and in a failure to follow its own policy? Did the Crown fail to reserve the mines and minerals underlying IR 133B from sale? Did the Crown

properly manage the sales of the lots on IR 133B, particularly with regard to the establishment of a railway station. What are the proper compensation criteria?

**FINDINGS**

The panel finds that the surrender of IR 133B was valid, in that it met the terms of the *Indian Act*. The panel concludes that, although the documentation of the vote was minimal, the circumstances show there was the required majority of a majority of eligible electors, called at a meeting for the purpose of surrender, and that the vote met the test as set out in *Cardinal*. The panel also finds that there was no breach of fiduciary duty on the part of the Crown in the taking of the surrender. With regard to the Band's access to the beach, the panel concludes that the oral term regarding the reservation of the beach was a reservation from sale, not from surrender, and that it had been incorporated into the surrender and respected by the Crown until 1932.

The panel finds that there had been no failure on the part of the Crown to follow its own policy regarding surrenders, as there was no written policy in place at the time.

The panel concludes that the Band had intended to surrender the mines and minerals, and that the surrender met the test set out in *Apsassin*, whereby a surrender includes all interests in land unless there is a specific exclusion.

The panel finds that the Band had been well informed about the potential of the surrendered lands for use either as a resort community or as a railway station, and that, although both the Band and the Crown did what it could to encourage the railway to build a station, the fact that it did not happen was not a breach of fiduciary duty on the part of the Crown.

The panel finds that there was no breach of fiduciary duty by the Crown in its management of the lot sales between 1906 and 1912; that it did what a reasonable, prudent fiduciary would do in the circumstances; and that it acted in what it reasonably concluded were the best interests of the Band in the management of the sale.

With regard to compensation criteria, although the claim was accepted initially on that basis, the parties did not provide sufficient legal argument that would have allowed consideration of this issue in this inquiry.

**RECOMMENDATION**

That the claim of the Paul First Nation regarding the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Chippewas of Sarnia v. Canada (Attorney General)*, [2000] 51 OR (3d) 641 (CA); *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 25 OR (3d) 654 (CA); *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 SCR 508 (sub nom. *Cardinal*); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

**ICC Reports Referred To**

*Kahkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Duncan's First Nation Inquiry, 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Moosomin First Nation: 1909 Reserve Land Surrender* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

**Treaties and Statutes Referred To**

*Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1886, c. 43.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171.

**COUNSEL, PARTIES, INTERVENORS**

R. Jeerakathil for the Paul First Nation; D. Faulkner for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.



# PART I

## INTRODUCTION

### BACKGROUND TO THE INQUIRY

The ancestors of the Paul First Nation adhered to Treaty 6 at Edmonton in 1877, when Chief Alexis signed the adhesion. About half his band lived at Wabamun, on the east shores of White Whale Lake under the leadership of Headman Ironhead. Eventually, the department recognized this group of Stoney people as a separate band, and after Peter Ironhead's death in 1887, Paul assumed leadership and the band became known as Paul's Band. Two reserves were surveyed for them on the shores of White Whale Lake: Indian Reserve (IR) 133A and IR 133B. The latter, IR 133B, which was much smaller, was the Band's primary fishing station.

On September 11, 1906, with the Canadian Northern Railway (CNR) approaching, the Paul Band voted to surrender IR 133B for the purpose of selling lots, either as a resort community or as a railway townsite. A full historical background to the First Nation's claim is found at Appendix A to this report.

The Paul First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of the surrendered lands.<sup>1</sup> This claim was partly validated and accepted for negotiation on July 10, 1998.<sup>2</sup> Negotiations subsequently broke down, and the First Nation asked the Indian Claims Commission (ICC) to hold an inquiry into compensation criteria.<sup>3</sup> In October 2001, the Commission agreed to conduct an inquiry into compensation criteria as well as the rejected aspects of the claim.

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1 Jerome Slavik, Ackroyd, Piasta, Roth and Day, to Michel Roy, Department of Indian Affairs and Northern Development (DIAND), June 4, 1996, submitted to the Minister of Indian Affairs and Northern Development (ICC Exhibit 2b, pp. 1–23).

2 John Sinclair, Associate Deputy Minister, DIAND, to Chief Wilson Bearhead, Paul Band, July 10, 1998 (ICC Exhibit 4a, pp. 1–2).

3 Jerome Slavik, Ackroyd, Piasta, Roth and Day, to Jim Prentice and Dan Bellegarde, ICC, March 28, 2001 (ICC file 2108-14-2).

On June 2, 2000, the First Nation submitted another claim, challenging the validity of the surrender in 1906.<sup>4</sup> Canada rejected that claim in July 2003, on the grounds that it did not reveal a lawful obligation on the part of the Crown to the First Nation.<sup>5</sup> At the request of the First Nation, the ICC agreed to incorporate the surrender claim into the ongoing inquiry. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B of this report.

### MANDATE OF THE COMMISSION

The mandate of the Indian Claims 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 the claim was already rejected by the Minister.”<sup>6</sup> This Policy, outlined in the Department of Indian Affairs and Northern Development’s 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.<sup>7</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

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 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.<sup>8</sup>

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4 Statement of Claim Respecting the Wrongful Surrender of Paul Band Reserve Lands, prepared by Jerome Slavik, Ackroyd, Piasta, Roth and Day, submitted to the Minister of Indian Affairs and Northern Development, April 2000 (ICC Exhibit 2c, pp. 1–33).

5 Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Francis Bull, Paul First Nation, July 16, 2003 (ICC Exhibit 4d, p. 1).

6 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.

7 Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereinafter *Outstanding Business*).

8 *Outstanding Business*, 20, reprinted in (1994) 1 ICPP 179.



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.<sup>9</sup>

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<sup>9</sup> *Outstanding Business*, 20, reprinted in (1994) 1 ICCP 180.

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## PART II

### THE FACTS

#### ADHESION TO TREATY 6 AND FORMATION OF RESERVES

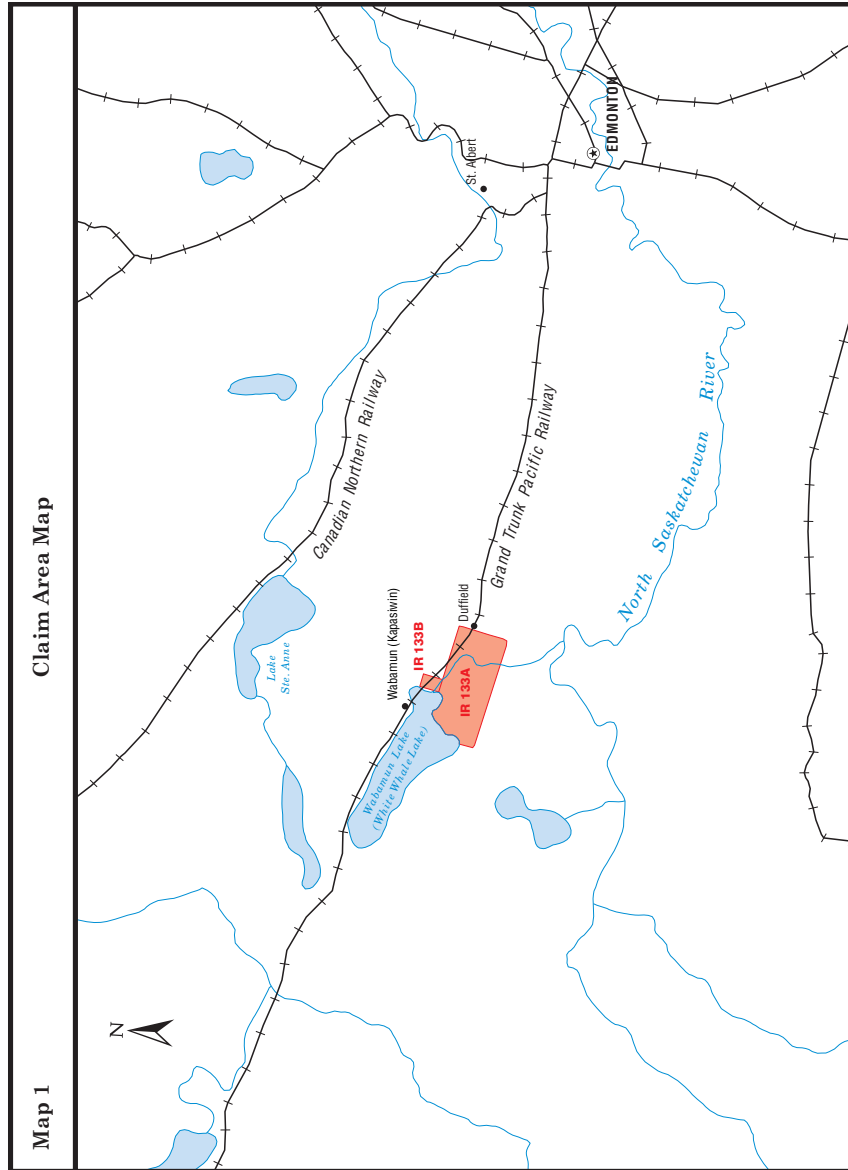
In 1877, the ancestors of the Paul Indian Band, under the leadership of Chief Alexis, adhered to Treaty 6. About half the members of the band, along with one of the headmen, Ironhead, lived on the shores of Wabamun Lake (also known as White Whale Lake). In 1886, under the leadership of Peter Ironhead, they were recognized as a separate band and received their own treaty annuity payroll. After Ironhead's death in 1886, Paul became Chief, and the band was referred to as either Paul's Band or the White Whale Band.

In 1890, about 70 members from the Sharphead Band moved to Wabamun Lake. In 1891, a fishing station and reserve were surveyed for members of both the Paul and Sharphead Bands living at Wabamun. Surveyor John C. Nelson surveyed reserves 133A and 133B adjacent to each other. IR 133A was the Band's main reserve, where most of the band lived, and was approximately 31.7 square miles in size. In comparison, IR 133B, the fishing station, was much smaller –approximately 635 acres, or a little under a square mile.

The band used IR 133B primarily as a fishing station, although the band also used it for camping, and used the wagon trail through IR 133B to travel north to Ste Anne. The band pursued a traditional way of life that included hunting, trapping, and fishing; at the same time, members began to raise stock. Although the reserve was only 30 miles from the growing frontier city of Edmonton, it was considered to be relatively isolated.

Chief Paul remained leader until 1901, when he was deposed by the department because he had slaughtered cattle on the reserve without the approval of the Indian Agent. At that time, the Band had three headmen – Simon, Reindeer, and David Yellowhead (also known as David Bird). The department did not approve of the election of a new Chief until May 1906, although in 1903 the Band attempted to elect Didymus Burntstick as Chief.

PAUL FIRST NATION – KAPASIWIN TOWNSITE INQUIRY



**EVENTS PRECEDING THE 1906 SURRENDER**

Even before the summer of 1906, it became obvious that the railways were steadily pushing their way west, and the Paul Band's reserves, almost due west of Edmonton, were on the most likely routes. In November 1905, Inspector J.A. Markle of the Edmonton Agency reported that the CNR had begun grading a line between Edmonton and the reserve, and expected that the line would pass near to a marl deposit ("Marl" is a general term for mineral precipitates) on the White Whale Reserve. Seven months later, the Indian Agent, James Gibbons, wrote to his superiors that construction work was progressing rapidly and it was likely the rail line would cross about nine miles of the reserve. In response, Secretary J.D. McLean wrote that the company had not yet filed right of way plans, and the department's policy was that the railway company could not begin construction on a reserve until the right of way had been arranged. The same day, McLean notified the CNR that it should file its plans officially and provide an offer for the right of way and damages. The CNR's response was that it would be done very shortly. Soon afterward, Agent Gibbons wrote to Ottawa to say his estimate of the compensation for the land needed by the railway was \$25 per acre, since land values were rising, and he did not think the Indians would settle for less.

On June 20, 1906, after two days of discussion, the Band voted to surrender for lease all the deposits of marl and sand on IR 133A. In his reporting letter to the department about the marl surrender, Inspector Markle stated that some band members had asked him whether or not a surrender of the reserve north of the prospective rail line and a portion of the reserve within Township 53 (IR 133B) would be wise if the railway were located on those parts of the reserve. Markle declined to give an answer, but noted in his letter that the reserve was well adapted for summer residences and that the Indians seemed to be aware of the fact.

A few days later, on June 27, 1906, Markle wrote to the Indian Commissioner that the CNR had projected a line through the reserve, to cross the narrows of the lake. He suggested it might be in the Indians' interest to surrender a portion of the reserve.

Local real estate companies also expressed an interest in the coming rail line and the reserve. Edmonton realtor A.W. Taylor noted that once the rail line was built, the Indians would need to cross the track often and there would be little of the reserve left north of the track. He also wrote to the department that the Chief would consent to a sale of the reserve. Taylor offered to help find a purchaser.

On July 31, 1906, the Secretary of Indian Affairs, J.D. McLean, wrote to Indian Agent Gibbons that an application had been made for a part of the Paul reserve, and he asked him to speak with the Indians to determine their wishes. Accordingly, Gibbons met with the Band on August 14, 1906. He reported back that the Indians were willing to surrender the land on condition that it be put up for sale as a townsite or resort. He stated that there were only two or three Indians living on IR 133B, in shacks, and he did not think they would ask for compensation. He recommended that if the department thought it was a good idea, it should forward the forms of surrender and ask for Surveyor McLean to make the necessary surveys. J.K. McLean was already on his way to resurvey the reserve boundaries as a result of the earlier marl surrender.

On August 30, 1906, McLean wrote to the department to say that he had almost finished surveying the boundaries. Two days later, the Deputy Superintendent General, Frank Pedley, authorized Indian Agent Gibbons to take a surrender of IR 133B. That same day, September 1, 1906, the Superintendent instructed McLean to begin surveying the reserve into lots; as well, he wrote to the CNR to ask when the department might receive the plans for the right of way. Again, the Canadian Northern Right of Way Agent responded that the plans would be filed as soon as possible.

On September 6, 1906, Surveyor McLean wrote to the department that he was able to do very little until Gibbons arrived, because there was opposition from some of the Indians and he did not want to do more until after the surrender.

#### **SURRENDER OF INDIAN RESERVE 133B**

On September 11, 1906, nine members of the Paul Band signed a surrender of IR 133B. The document bears the “X” marks of six male band members, including Chief David Bird, Paul, and Didymus, as well as the signatures of David Peter, Baptiste Peter, and John Rain. The name “Reindeer” also appears on the document, but it is not accompanied by his mark. Indian Agent James Gibbons, Farmer A.E. Pattison, Surveyor J.K. McLean, and his assistant, W.R. White, witnessed the signatures. There is no information about whether an interpreter was present.

There is no record of the vote taken or of a voters list. Seven out of the nine signatories to the surrender received annuities as “men” on the Paul Band’s July 20, 1906 payroll. The remaining two, Baptiste Peter and Enoch Bird, were not paid as men until several years later. Baptiste Peter was first

paid as a man on his own ticket on the 1908 payroll. Enoch Bird, the son of Chief David Yellowhead, was first paid as a man on his own ticket in 1909.

Chief David Bird and Agent Gibbons swore the Affidavit of Surrender before Justice of the Peace J.B. Butchard on September 13, 1906, in Wabamun, Alberta. Interpreter James Foley witnessed their signatures.

Gibbons did not report to Ottawa about the meeting, and there are no minutes of what transpired at the surrender meeting. Elders were not able to provide much oral history about the surrender of IR 133B. They do not recall having been told by their parents and grandparents about any meetings or votes to surrender or sell the land. However, some understood that the land was leased or loaned, rather than sold.

Surveyor McLean, however, was able to provide some detail. On September 17, 1906, J.K. McLean wrote to Secretary J.D. McLean, acknowledging the department's previous instructions to subdivide IR 133B and reporting on his progress in the subdivision survey. He also reported that at the surrender meeting, it had been decided that the beach was to be reserved from being sold.

His second letter of the same day reported that during the survey he had discovered a small burying ground, one that he did not think the Indian Agent had known about. He reported that the band members who had used the burying ground had been at the surrender and, with the exception of Reindeer, had signed the surrender document. McLean stated that at the meeting, Reindeer had refused either to speak or to sign. McLean also reported that when he was running survey lines, Reindeer's teepee was on one of the street lines; and before he could assist him in lowering it, Reindeer had run out and cut it on each side, from top to bottom. The graves discovered on IR 133B were relocated at the mission on IR 133A. The Order in Council accepting the surrender of IR 133B is dated September 27, 1906.

Newspaper advertisements appearing in late 1906 show there were a number of townsites being established along the shore of White Whale Lake. They were portrayed as summer resorts, with fine sand beaches. The advertisements also noted that the coming CNR line would make the lake a short journey from Edmonton.

In February 1907, J.K. McLean forwarded his completed survey report, noting that he expected the beach lots to sell well, but that the remainder of the lots depended on the establishment of a railway station on the town plot.

McLean's survey included two rights of way, one for the CNR and one for the Grand Trunk Pacific Railway (GTPR), which had also notified the department of its intent to build through the Paul Band's Reserve. McLean

stated that it would be good to come to an agreement with the railway companies about the building of a station before the lots were sold.

#### **CANADIAN NORTHERN RAILWAY**

For five years, from shortly before the surrender in September 1906 until the summer of 1911, the Department of Indian Affairs and the CNR corresponded about whether the railway intended to build a station on the surrendered lands of IR 133B. The department's position was that it would be in the best interests of the Paul Band to have a station on the CNR line, since it would raise property values and be the focal point for a townsite; the railway's repeated position was that it did not yet have permission from the Railway Commission for the right of way, but that it would confirm its position with the department as soon as possible. In the meantime, the CNR asked that the department reserve certain lands from sale on its behalf and contested the price the department had put on the land it required from the Paul Band's reserve.

The CNR applied for a right of way through the Wabamun Reserves on October 13, 1906. Assistant Secretary S. Stewart informed the company that the lands for the right of way were valued at \$25 per acre, which the company stated was too high.

Almost a month later, on November 7, 1906, Stewart first broached the subject of placing a station with the CNR on the newly subdivided Wabamun town plot. Stewart informed the CNR's Right of Way Agent, C.R. Stovel, that the Indian Agent was looking into the matter of the valuation, and that it was desirable to locate the station on the reserve.

From that point, the department and the CNR began corresponding about the placement of a station on the townsite. On November 10, 1906, Agent Gibbons wired the department with information that contractors for the CNR were ready to begin construction on the reserve. Immediately, the department informed the railway company that it required a deposit of \$5 per acre from the CNR for the right of way. The CNR paid the deposit on November 13, 1906.

On December 1, Secretary McLean wrote to C.R. Stovel, stating that the department might be prepared to accept a lower price for the right of way and implying that the lower price was connected to the CNR's locating a station on the reserve. Stovel replied on December 12, 1906, that he was taking the matter up with the company's engineering department.

On December 31, 1906, agents for the CNR submitted a proposal to Frank Pedley, the Deputy Superintendent General for Indian Affairs. The CNR requested that the department place 320 acres of land, half the amount of

land surrendered, in its hands; in return, the company would arrange for the survey and sale of the lots. The company would retain \$5,000 for its services and expenses and proposed that once this sum had been paid, the gross proceeds of sales would be divided equally between the department and the company. The department rejected the proposition.

In June 1907, the department again brought up the subject of the station with the CNR. That year, Stovel replied that the railway could not arrive at a decision until it had its plans approved by the Railway Commission. In fact, the CNR's right of way plans were not approved until two years later, in June 1909. However, by the time the Canadian Northern's plans were approved, the company reported to the department that construction was halted because the location of the GTPR interfered with the CNR line through the reserves. Nothing would be decided that year about the establishment of a station ground.

As a result, Chief Surveyor Bray recommended that the department notify the CNR that the department could no longer hold the right of way through IR 133B, and that the department advise the CNR that it intended to sell the town lots without referring to the proposed station. In response, the CNR wrote on November 4, 1909. It requested that the land for the right of way be reserved from sale and inquired about the price for the land. Superintendent McLean wrote back and asked again about the company's plans for a railway station.

The CNR replied on January 26, 1910, that the lands requested by the company included station grounds, but that nothing definite had been decided. Although the department requested "definite assurance" regarding the company's intentions before agreeing to reserve the lots from the upcoming sale (held in May 1910), it agreed to reserve Block 23 from sale without any definite statement from the company about its plans for a station on the surrendered lands.

The CNR's plans for the company's main line west of Edmonton were not approved by the Minister of Railways until November 1910, after the first sale of lots at Wabamun, and then it was with a stipulation that the CNR lines could not pass between GTPR lines and townsite.

The next summer, in July 1911, Surveyor J.K. McLean informed the Department of Indian Affairs that the CNR had abandoned its plans for a railway through the Paul Band's former reserve and instead was building farther north. The department immediately wrote to the CNR and, in August 1911, C.R. Stovel of the CNR confirmed that the railway was no longer planning to build a rail line through Wabamun. Stovel regretted there had been a delay in notifying the Department of Indian Affairs.



### **GRAND TRUNK PACIFIC RAILWAY**

During this same period, the Canadian Northern's main competitor, the GTPR, did receive permission from the Railway Commission to build a rail line through the Wabamun reserves. The GTPR officially applied for its right of way on December 21, 1906, and the company's plans were approved on May 20, 1907. Eight months later, in January 1908, the department consented to the railway's right of way through an order in council.

However, shortly after the Order in Council was issued, Surveyor J.K. McLean reported to the department that although the GTPR was running its rail lines through 133B, the railway was not planning to build a station at Wabamun because the grades were too steep. Instead, the railway was planning to build a station about a mile farther west, across the narrows of Moonlight Bay, on land that was not part of IR 133B.

The Paul Band continued to work toward the establishment of a railway townsite. In July 1908, Inspector Markle reported to the Indian Commissioner that the Band was willing to grant the GTPR a quarter interest in the Wabamun townsite if the railway company would build a station on the southeast side of Moonlight Bay, on the surrendered lands of IR 133B. The GTPR's response to the department was that this was not possible, owing to the steep grades.

The GTPR line became operational sometime before 1912; the exact date is uncertain. It appears that although the railway company did not build a fully functional station, it did build a summer platform.

### **SALE OF LOTS AT THE KAPASIWIN TOWNSITE, 1910**

Finally, in the fall of 1909, after much correspondence with the railway companies, the department decided to move toward selling the Wabamun town plot and instructed Surveyor J.K. McLean to reopen any lines that had grown over and to replace any missing survey posts. In February 1910, McLean wrote to the department that the sale should be delayed until after the CNR had decided whether it was planning to locate a station on the surrendered lands; however, in the spring of 1910, Deputy Superintendent Frank Pedley decided to proceed with the sale.

By that time, the GTPR had laid its track across the surrendered lands. The only lots put up for sale in May 1910 were those south of the GTPR's line and west of the surveyed Burntstick Avenue. The lands north of the already built rail line and east of Burntstick – including Lot 23, which was reserved for the CNR – were not offered for sale.

On April 4, 1910, the department instructed the King's Printer to run the sale advertisements in eight Western newspapers. As well, the agency made

extra efforts to publicize the auction on the day before and the day of the sale. Inspector Markle submitted vouchers to the department for the posting of 200 notices on May 10 and the distribution of 1000 handbills on the day of sale. Large advertisements were also placed in the *Edmonton Journal* and *Edmonton Daily Bulletin* on the morning of the sale.

The sale did not go as well as the department had hoped. The Record of Sale shows that of the 161 parcels put up for auction, only 42 parcels were sold. Of the 42 sale transactions, 32 were made at the upset prices, with the remaining 10 sales slightly above those prices. Almost all the sales were for the beachfront property south of the railway. Afterward, there was some concern that one of the conditions of sale might have restricted the number of lots sold. The department had stipulated that within one year, each purchaser had to erect a building worth at least \$300.

#### **INTERIM PERIOD BETWEEN AUCTIONS, MAY 1910 – JUNE 1912**

Following the auction in May 1910, inquiries regarding the unsold Wabamun townsite lots continued to trickle in. The majority of those asking were informed that the lands were not on the market at the present time.

In 1911, Block 13 of the town plot (south of the railway) was sold to the Alberta Sunday School Association. The department sold the block for \$293, or \$100 per acre (less than half the upset price of \$625). The sale followed a letter that the General Secretary of the association had written to Inspector Markle, in which he stated that he had been speaking about the land with the Superintendent of Indian Affairs, Frank Oliver. The next day, the band council passed a resolution offering to sell the land to the association for \$100 per acre, on condition that the department use the money to buy one hundred sacks of flour – to be distributed equally among the members of the Band.

#### **SECOND SALE OF LOTS, JUNE 1912**

In the summer of 1911, Surveyor J.K. McLean visited IR 133A to conduct surveys in connection with the Duffield Townsite and the surrounding farmlands on the eastern side of the reserve. McLean asked Pedley about what was to be done of the lands at IR 133B surrendered in 1906. In a memorandum to the department, Surveyor McLean noted the scheduled auction for the Duffield townsite lands and suggested it would be a good idea to sell the Wabamun townsite plots at the same time, since they were on the same reserve.

McLean's correspondence indicates that Crown officials no longer considered there to be any reasonable prospect of a railway station, but noted that some very nice cottages had been built on the beach and that the area had become popular with Edmonton day trippers. It was also noted that a summer station had been built by the GTPR. McLean expected that the rest of the beach lots would sell, as would some of the lots farther away from the lake, because the beach had been reserved for the use of all.

The department offered 357 lots for sale at Wabamun on the same terms as the lots sold in 1910, except that the purchaser was not required to erect a building worth at least \$300 within a year of purchase.

The Record of Sale shows that 49 parcels were sold at the 1912 auction, for a total of \$5352.00. Thirty-one of the sales were for most of the remaining beach lots. All but four of these lots sold above their upset prices – some lots selling for as much as four times the upset price. In addition, 18 inland lots were sold, mostly at or slightly above their upset prices. Many of the 1912 sales, especially those for the beach lots north of the railway, were later cancelled because the buyers failed to fulfill their purchase contracts, some paying nothing after the initial deposit.

#### **INCORPORATION OF VILLAGE OF WABAMUN BEACH (KAPASIWIN), 1913**

On October 25, 1913, the Alberta legislature passed an act to incorporate the Village of Wabamun Beach on part of the Wabamun town plot. The village included the land south of the Grand Trunk Pacific right of way and west of Burntstick Avenue, and also included the road allowances, the streets, and the beach fronting Wabamun Lake. Later, the village was renamed the Village of Kapasiwin Beach. (Although the legislation stated specifically that the village included the roads, road allowances and the beach "as far as it had been granted by the Crown," these were not transferred until 1932, when the federal government transferred them to the Province of Alberta.)

#### **TRANSFER OF STREETS AND LANES TO ALBERTA, 1932**

On December 9, 1931, the village council of Kapasiwin wrote to the Secretary of Indian Affairs and requested the transfer of the streets and lanes within the village to the Province of Alberta. As requested, the streets and lanes south of the railway and west of Burntstick Avenue were transferred to the Province of Alberta by Order in Council PC 278 on February 5, 1932. The transferred streets and lanes included the beach and Wapumeg Avenue – the road

allowance J.K. McLean had surveyed between the beachfront lots and the beach.

The village then applied to the province for the closure of Wapumeg Avenue, along the beach. The province did as requested and closed the road allowance, at the same time granting an easement to each beach lot owner of all the land between the owner's lot and the water's edge. The Sunday School Association later reported that in 1932 a fence had been erected by the beach lot owners at the rear of all the beach lots, running the full length of Gibbons Avenue – from the railway to the southern boundary of Block 1. The combined effect of the fence and the easement was to grant a private beach to the owners along the waterfront. This action also closed off access to the beach for all inland lot owners, except for a small public area at the north end of the village.

In 1936, the Crown returned all the unsold surrendered lands east of Burntstick Avenue to reserve status – a total of 420 acres, or almost two-thirds of the lands that had been surrendered 30 years earlier.

In 1996, the Paul First Nation submitted a claim to the Minister of Indian Affairs alleging mismanagement of the sales of the surrendered lands. This claim was partly validated and accepted for negotiation on July 10, 1998. Among the parts of the claim that had been accepted were the failure of the Crown to sell lots between 1912 and 1936, and the transfer of the beach and the road allowances to Alberta in 1932.

## PART III

### ISSUES

#### **2000 Claim – Paul Indian Band Claim – 1906 Surrender of the Kapasiwin Townsite Lands**

- Issue 1** Was the surrender of the Kapasawin Townsite, in 1906, void because the Crown did not include in the surrender a term that 150 feet of beach and a street would be reserved from the surrender or the sale?
- Issue 2** Did the Department fail to follow the *Indian Act* and its own Departmental policies?
- (a) Did they fail to comply with s. 49 of the *Indian Act*?
    - (i) Was the surrender meeting properly called?
    - (ii) Did the majority of male members take part in the surrender meeting?
    - (iii) Was the surrender assented to by a majority of eligible voters?
    - (iv) Was the affidavit valid?
  - (b) Did the Department fail to follow its own policy?
  - (c) If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?
- Issue 3** Did the Crown breach its fiduciary duty to the Band by failing to reserve the minerals and any mines from the surrendered lands?
- Issue 4** Did the Crown breach any pre-surrender fiduciary duty, as follows:
- (a) Did the Crown ensure that the Band adequately understood the surrender?
  - (b) Did the Crown engage in tainted dealings to influence the surrender vote?

- (c) Did the Crown fail to protect the Band from a “foolish, improvident and exploitative” surrender?
- (d) Did the Crown take extra caution in light of the Band having ceded or abnegated its decision-making powers?
- (e) A result of any of the allegations set out in Issue 2?

**1996 Claim – Paul Indian Band – Mismanagement Claim**

- Issue 1** Did the Crown wait four years after the surrender before selling the land and did this result in lower value being received because of lost speculative value?
- Issue 2** Did the Crown proceed with the sale despite knowing that a railway station would not be built and that this was one of the original purposes of the surrender, i.e., to have a railway community, and did the Crown fail to consult with the Band with respect to this?
- Issue 3** Did the Crown fail to properly advertise the sale?
- Issue 4** Did the Crown unilaterally change the terms of the sale by adding a term that a residence would have to be constructed within 1 year, contrary to the surrender agreement and without Band consent?
- Issue 5** Did the Crown hold a second sale in 1912 without consent of the First Nation at the same time as the sale of the Duffield townsite?
- Issue 6** If any of Issues 1–5 is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the First Nation?
- Issue 7** Which compensation criteria should apply in the determination of the Mismanagement Claim? (In respect of this issue, Canada notes content of July 10, 1998, letter of acceptance.)

## PART IV

### ANALYSIS

#### **SURRENDER OF THE KAPASIWIN TOWNSITE, 1906**

The first two issues in this inquiry require the panel to consider the legal regime imposed by the *Indian Act* for the surrender of reserve land.

#### **Issue 1: Validity of Surrender**

- 1 Was the surrender of the Kapasiwin Townsite, in 1906, void because the Crown did not include in the surrender a term that 150 feet of beach and a street would be reserved from the surrender or the sale?**

For the panel to make a finding on this issue, a number of points must be assessed. First: was reserving the beach an oral term of the surrender? And if so, was it to have been reserved from the surrender or was it to have been reserved from the sale? Second, what did happen with the beach? If the record sets out that the beachfront was either surrendered or sold, was that a breach of the surrender, and when did it occur? Third, if the panel finds that reserving the beach from either surrender or sale was an oral term of the surrender and that the Crown failed to reserve the beach, either from surrender or sale, was the breach so fundamental that the entire surrender should be voided.

There is very little on the written record that deals with any discussions that might have taken place either at the surrender meeting or during the months leading up to the surrender. There was no mention of the beach in a report sent by Indian Agent Gibbons to headquarters<sup>10</sup>, in which he stated that “the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite or resort

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<sup>10</sup> James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them.”

The surrender document itself does not mention that the beach was to be reserved, either from surrender or sale,<sup>11</sup> nor is there anything about the beach in the Surrender Affidavit.<sup>12</sup> The only written information we have comes from the Surveyor, J.K. McLean. In a letter dated six days after the surrender document, he wrote that during the surrender meeting “it was decided ... to reserve the Beach from being sold, a width of about 150 feet along the Lake including a street to be reserved from sale by the Department....”<sup>13</sup> McLean’s survey documents setting out the townsite show that the beachfront lots do not extend to the water’s edge, reserving the beach for common use.<sup>14</sup>

The sales of the beachfront lots in 1910 did not include the foreshore. McLean wrote of the beachfront being “reserved in common”<sup>15</sup> when he wrote to the Deputy Minister in 1912.

The beach was part of the road allowance acreage transferred to the province in 1932.<sup>16</sup> At that time, the village of Wabamun Lake applied to Alberta for the closure of Wapumeg Avenue (the street running along the beachfront) as well as the closure of several of the road allowances leading to the beach.<sup>17</sup> The province issued the order in 1935 and granted an easement to each beachfront owner, granting each owner exclusive access.<sup>18</sup>

### *Positions of the Parties*

The First Nation has argued both the law of fiduciary duties and contract law – the “meeting of the minds” that is required for a contract to form – and has taken two positions with regard to the beach:

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- 11 Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229–30).
  - 12 Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 250).
  - 13 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).
  - 14 J.K. McLean, Plan of the Townplot of Wabamun on Indian Reserve No. 133B (ICC Exhibit 7i).
  - 15 J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).
  - 16 Order in Council PC 278, February 5, 1932, DIAND, Indian Lands Registry, Reg. No. 11627 (ICC Exhibit 1a, p. 626).
  - 17 Abbott and McLaughlin, Barristers and Solicitors, to T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, January 9, 1932, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 624).
  - 18 Order 7486, Board of Public Utility Commissioners for the Province of Alberta, February 28, 1935, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 645–46).



- first, that the beach was to have been reserved from the surrender itself, and
- second, that if not from the surrender, it was to have been reserved from the sale of the lands.

Counsel for the Paul First Nation argued that as a result of the transfer of the beachfront to Alberta, the “Band lost the use of a significant portion of its own fishing station, as access to the entire beach was now restricted,”<sup>19</sup> and that this would not have happened if the department had respected the oral term and included it in the surrender. Counsel described the Crown’s omission as no “mere technical breach,”<sup>20</sup> and argued that the result was a surrender that did not incorporate the intentions of the Band.

The First Nation argues that the reservation of the beach was an oral term that was not incorporated into the surrender document, and as such was a fundamental condition to the surrender, such that the Band would not have voted to surrender had the Crown not agreed to the condition.<sup>21</sup> As a result of the failure of the Crown to incorporate the term into the written surrender agreement, the First Nation argues that the surrender should be voided “because there was no meeting of the minds in the surrender document.”<sup>22</sup> The First Nation also argues that the failure to incorporate the oral term into the written surrender is a breach of fiduciary duty on the part of the Crown, and that because the standard of conduct expected from a fiduciary is very high, “to the extent that this is not done, the transaction is void.”<sup>23</sup> The First Nation has also argued that it does not matter whether the reservation was from the surrender or from the sale, “because we are not sure whether the native people would have appreciated the difference.”<sup>24</sup>

Canada argues that the beach was to be reserved from sale, but not from the surrender, since the beachfront “was a significant feature in improving the value of adjoining town lots”<sup>25</sup> and that reserving the beach for the Band’s “continued use as a fishing station ...would have been totally incompatible with their desire to sell the lots for profit.”<sup>26</sup> Canada argues that the breach

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19 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 16.

20 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 16.

21 ICC Transcript, May 12, 2005, p. 130 (Ranji Jeerakathil).

22 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 19.

23 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 19.

24 ICC Transcript, May 12, 2005, p. 124 (Ranji Jeerakathil).

25 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 22.

26 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 22.

occurred in the post-surrender management of the lots, not at the time of surrender.

***Panel's Findings***

The first part of this issue that must be decided is whether the beach was to have been reserved from the surrender and retained only for the use of the First Nation; or whether it was to have been surrendered, but reserved from sale.

There is little on the written record that answers the question unequivocally. In Agent Gibbons' letter following the August meeting, he makes no reference to the beach, but does state clearly that the purpose of the surrender was to provide lots "for a townsite or resort."<sup>27</sup> Only Surveyor McLean's letter mentions the beach, and he is specific that the decision was "to reserve the Beach from being sold."<sup>28</sup>

Had the beach been reserved from the surrender, the First Nation could have continued to use it as a fishing station. However, Canada's argument that such a reservation would have defeated the purpose of the surrender makes sense. Allowing the beach to be surrendered but not sold would preserve access for the First Nation so that, for instance, the Band could launch small boats; and it would have provided a common area for all to use. Had the Band retained the beach solely for its own use, it is doubtful that there would be many buyers, or that they would pay the upset prices. The Crown would have known this; and if the goal of the surrender were to provide lots for either a townsite or a resort, as Gibbons stated in his August letter, then it does not make sense that the Crown would have managed the surrender in a way that would have made it more difficult to sell the beach lots and almost impossible to sell any of the back lots to buyers attracted to the beach.

Therefore, J.K. McLean's statement that the beach was to have been reserved from sale makes sense, and it is doubtful that a surveyor of McLean's experience would have confused the concepts of surrender and sale. We find then that the reservation of the beach was an oral term of the surrender and that the Band's intention was to reserve the beach from sale.

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27 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

28 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240-41). See also J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

The next part of this issue to be decided is whether the Crown's failure to incorporate the term into the written surrender was sufficient to render the surrender void.

The First Nation has argued that since the document did not reflect the Band's intention, there was no "meeting of the minds," and therefore the surrender was void. However, the record shows that Canada did reserve the beach from sale until 1932. In 1931, the Village of Wabamun wrote asking for the transfer of the streets and lanes so that it could make improvements.<sup>29</sup> Canada responded to the request with Order in Council PC 278 in 1932.<sup>30</sup> Although the Order in Council did not specify that the beach was to be transferred, on the map attached to it is a notation that "Wapumeg Avenue includes all the land and beach to the edge of the water."<sup>31</sup> The result was that Canada transferred the beach and the road allowances to the province without a reservation that the beach remain public property and therefore accessible to First Nation people as well as the immediate cottage owners and the general public. We find that until 1932, Canada was acting in accord with what must have been the Band's intention for the surrender to have made any sense for them. Accordingly, we find that in spite of the fact the oral term was not incorporated into the written surrender, the Crown abided by the term for 26 years until the transfer of the beachfront and the rights of way to the province of Alberta. We will not comment on the transfer, because it is part of the accepted claim between Canada and the First Nation.

The Crown's failure to insert into the surrender document the oral term reserving the beach from sale, was not a fundamental breach of the surrender since the intentions of the Band were met at that time and continued to be met for decades. The First Nation did receive many of the benefits that both it and the Crown foresaw as the result of the surrender, including the right to use the beach until 1932.

Accordingly, we conclude that the Paul Band's surrender of the Kapasiwin Townsite in 1906 was not void, because the Crown did observe the oral term of the surrender and, until 1932, reserved the beach from sale.

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29 Abbott and McLaughlin, Barristers and Solicitors, Edmonton, to Secretary, DIA, December 9, 1931, LAC, RG 10, vol. 3371, file 11A-7-1, pt 1 (ICC Exhibit 1a, pp. 620–21). There is nothing in the letter to indicate why this was taking place in 1931, but it is probable that the Village was aware that until the Natural Resources Transfer Agreement (NRTA), 1930, most Crown lands in Alberta were under the control of the federal government. After passage of the NRTA, only the "streets and lanes" of villages on surrendered reserve land remained under the control of the Dominion and had to be transferred separately.

30 DIAND, Indian Lands Registry, Reg. No. 11627 (ICC Exhibit 1a, p. 626).

31 Land Titles Office, North Alberta Land Registration District, Plan 4722AQ, "Plan of the Townplot of Wabamun on Indian Reserve No. 133B at the East End of Wabamun (White Whale) Lake," surveyed by J.K. McLean, Dominion Land Surveyor, 1906 (ICC Exhibit 7k).

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**Issue 2: Department's Adherence to *Indian Act* and Departmental Policies**

- 2 Did the Department fail to follow the *Indian Act* and its own Departmental policies?**
- (a) Did they fail to comply with s. 49 of the *Indian Act*?**
    - (i) Was the surrender meeting properly called?**
    - (ii) Did the majority of male members take part in the surrender meeting?**
    - (iii) Was the surrender assented to by a majority of eligible voters?**
    - (iv) Was the affidavit valid?**
  - (b) Did the Department fail to follow its own policy?**
  - (c) If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?**

**Adherence to *Indian Act***

Taken as a whole, this issue asks the panel to determine whether the statutory regime set out in the *Indian Act* was followed, and if not, the consequences of the Crown's failure to abide by the requirements set out in the *Indian Act*.

Section 39 of the 1886<sup>32</sup> *Indian Act* prohibits the direct sale of land to third parties and sets out the statutory requirements of surrender. It is reproduced below in its entirety:

39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions: —

- (a) 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; but no Indian shall be entitled to vote

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32 Although the parties agreed during the oral hearing that the *Indian Act* in effect at the time of the surrender was the *Indian Act*, RSC 1906, c. 81, it was not proclaimed into law until January 31, 1907. Accordingly, the Act in effect is the *Indian Act*, 1886, c. 43, as amended. The surrender provisions of the two Acts are numbered differently, but do not differ in substance.

or be present at such council unless he habitually resides on or near and is interested in the reserve in question;

- (b) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; before some judge or a superior, county or district court, stipendiary magistrate or justice of the peace, or in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, 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; and 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.<sup>33</sup>

Although the Act is specific about the requirement for an affidavit to be signed by both the Crown and the First Nation, there is nothing in the Act that specifies the nature or the form of the surrender agreement itself. There is also nothing in the Act that requires the Crown to keep records of either the proceedings of the surrender meeting, a voters list, or a statement of the recorded vote.

The purpose of the requirements is to ensure that the surrender is a “voluntary, informed, communal decision.”<sup>34</sup>

The first observation we must make is that there is very little written documentation of this surrender. There are no minutes of the surrender meeting, no record of who attended – either on behalf of the First Nation or the Crown – no evidence of an interpreter, and no recorded vote. We have a surrender document with its nine signatures or marks, and a sworn Affidavit of Surrender. We can be reasonably certain that the Surveyor, J.K. McLean, attended the meeting because of his statement regarding the condition that the beach be reserved from sale,<sup>35</sup> as well as his later memorandum confirming the reservation.<sup>36</sup> It is also likely that each of the 10 band members, listed by

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33 *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1898, c. 34, s. 3.

34 *Chippewas of Sarnia v. Canada (Attorney General)*, [2000] 51 OR (3d) 641 (CA) at para. 20.

35 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).

36 J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

name on the surrender itself, attended the meeting, as did Indian Agent James Gibbons.

We shall consider each of the requirements set out in the statute in turn.

***Was the Surrender Meeting Properly Called?***

The First Nation argues that it is not clear when the surrender meeting took place. It cites the August 15th correspondence from Agent Gibbons in support of the proposition that the meeting actually took place on August 14th. In his letter, Gibbons wrote:

... I held a conference with the Indians of Paul's Band on the 14th instant with the object of ascertaining whether or not they were favourable to surrendering the Broken Sections 1,6, and 12, forming the North West corner of their Reserve.

I found that the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite or resort should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them.<sup>37</sup>

Other evidence the First Nation cites is a Band Council Resolution passed almost two years later, on July 28, 1908, which cites the date of the surrender meeting as August 14, 1906.<sup>38</sup> The First Nation has also argued that whether the band members had sufficient notice of the meeting is more important than the form of the notice. Sufficient notice, it has stated, can be inferred from the number of members who attended; that "if most of the eligible voters attended, notice can, in essence, be presumed sufficient."<sup>39</sup>

Canada has argued the same presumption: that voter turnout is a measure of sufficiency of notice,<sup>40</sup> but that "[i]t is impossible to determine from the available records the precise number of eligible adult male voters in the Band, or how many of them attended the surrender meeting."<sup>41</sup> Canada has also argued that the evidence is clear that the surrender meeting took place in September, not August, relying on the Agent's report of the meeting held in August and the correspondence between Surveyor McLean and the department.

We find that the evidence is clear that the surrender meeting took place on September 11, 1906. Agent Gibbons' report of August 15, 1906, said nothing

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37 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

38 DIAND, Indian Lands Registry, Reg. No. 11629, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 349).

39 Written Submission on Behalf of the Paul First Nation, February 7, 2005, p. 22.

40 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

41 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

about whether a vote had been taken – only that he had held a conference with the band members and they were “willing to surrender.”<sup>42</sup> He also asked the department to forward the Form of Surrender and to instruct McLean to make the necessary surveys. The Deputy Superintendent General, Frank Pedley, sent the required surrender document to Gibbons on September 1, 1906. The same day, J.D. McLean, Secretary of Indian Affairs, sent a telegram to J.K. McLean, the Surveyor, instructing him to subdivide a portion of the reserve. This correspondence indicates that the surrender had been contemplated, but also had not yet been taken. Confirming the intention of that correspondence are two letters in August. The first is from Surveyor McLean to Secretary McLean, in which the Surveyor stated, “Mr. Gibbons the Agent informs me, that there is some prospect of a further surrender at that Reserve.”<sup>43</sup> The second is from the Secretary to David Laird, the Indian Commissioner, in which he wrote “that there is a proposal to be made to have a portion of the White Whale Lake Indian reserve surrendered.”<sup>44</sup> Both these letters suggest very strongly that in August 1906 the surrender was still only a proposal. What is most convincing to us, however, is the Surveyor’s letter of September 6, 1906.

In that letter, McLean stated that he “completed the resurvey of the outlines of the White Whale Lake Indian Reserve”<sup>45</sup>; but with regard to the subdivision he had been asked to plot, he could not complete the survey “until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed.”<sup>46</sup> McLean was an experienced surveyor and would have been well aware of the legal status of the land he was surveying. If the surrender meeting had been held before September 6, when McLean wrote his letter, it is highly probable that he would have known that status.

Further, there is no requirement in the *Indian Act* that the surrender document be signed on the same date as the vote. The First Nation stated that if, in fact, that had happened, it would have been “fatal to the surrender as the surrender document itself was not assented to by a majority of the Indians, at a meeting called for that purpose as required by section 49 of the *Indian*

42 James Gibbons, Indian Agent, to Secretary, DIA, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-Y-1, pt 1 (ICC Exhibit 1a, p. 216).

43 J.K. McLean, Dominion Land Surveyor, Edmonton, to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 218).

44 Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, August 26, 1916, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 219).

45 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 226).

46 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

*Act.*<sup>47</sup> The *Indian Act* does not require that the band members assent to the surrender document; it requires that they assent to the surrender itself.<sup>48</sup> Had the band members voted on a day earlier than September 11, 1906, but signed the surrender on that day, it would have been valid. Nevertheless, the correspondence indicates that the vote had not taken place by September 6, 1906, and that, on the balance of the evidence, it took place on September 11, 1906.

Unfortunately, the Elders who testified at the community session could not offer any information about a meeting. Robert Rain, for instance, when questioned by Commissioner Holman, was very clear that his grandmother had never said anything to him about a meeting.<sup>49</sup> Nevertheless, the correspondence indicates that a meeting took place and the surrender document was signed on September 11, 1906; and the Affidavit of Surrender of two days later, September 13, states clearly that the surrender was taken at a meeting called for that purpose.<sup>50</sup>

After considering all the evidence available to us, we conclude that a properly called surrender meeting, for the purpose of deciding upon a surrender, was held on September 11, 1906.

***Did the Required Number of People Agree to the Surrender?***

To establish whether the required number of people agreed to the surrender we must consider two questions:

- Did the majority of male members take part in the meeting?
- Was the surrender assented to by a majority of eligible voters?

Both Canada and the First Nation have argued that the sufficiency of notice of the surrender meeting can be inferred from its attendance; if a majority of members attended, then, presumably, notice was sufficient. It is not difficult to see how this argument can quickly become circular, so it is necessary to consider the evidence that exists.

Unfortunately, there is almost no documentary evidence within the written historical record and nothing from the community session that would aid the panel in determining whether a majority of the male members of the Band

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47 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 24.

48 *Indian Act*, RSC 1886, c. 43, s. 39(a).

49 ICG Transcript, October 13, 2004 (ICG Exhibit 5a, p. 18, Robert Rain).

50 Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICG Exhibit 1a, p. 238).



did, in fact, attend the surrender meeting, and if they did, whether a majority of those attending voted in favour of surrender. The historical documents do not contain minutes of the surrender meeting, a voters list, or a tabulation of the actual vote taken at the meeting.

Nine band members signed the surrender document, with one space left blank for Reindeer, who was known to be opposed to the surrender.<sup>51</sup> Two of the names, those of Baptiste Peter and Enoch Bird, do not appear on the most recent payroll for the Band, that of July 1906.<sup>52</sup>

The First Nation has argued that “the band list is the best evidence of eligible voters,”<sup>53</sup> and that the reason the two named men did not appear on the payroll was because they were too young and, therefore, ineligible to vote.<sup>54</sup> The First Nation also stated there was clear evidence from the community session “that provides [there] was evidence of the hunting practices of this nation,”<sup>55</sup> and that at the time of year, many of the male members of the Band “were, in fact, gone from the reserve in the fall.”<sup>56</sup>

Canada takes the position that the payroll “is clearly not conclusive”<sup>57</sup> in that it does not provide the information which the *Indian Act* requires: that of being 21 and habitually resident and interested in the reserve.<sup>58</sup> Canada also disputes the First Nation’s contention that both Enoch Bird and Baptiste Peter were too young to vote and has taken the position that both were eligible but, for some reason, were still paid as members of their fathers’ families. The only evidence Canada has with regard to Peter is his appearance on the 1908 payroll in his own name, with the notation “M. from No. 10”<sup>59</sup>; at that time, he was listed on his ticket with his wife, who came from No. 43.<sup>60</sup> Canada says the evidence for Enoch Bird is better: he appears in his own name on the 1909 payroll, with the notation beside his father’s name, “boy as man No. 71.”<sup>61</sup> Canada argued that further research uncovered a copy of the Indian

51 J.K. McLean, Dominion Land Surveyor, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 242).

52 Paul Band Treaty Annuity Paylists, July 20, 1906, LAC, RG 10, vol. 9439, pp. 692–99 (ICC Exhibit 1b, pp. 27–34).

53 ICC Transcript, May 12, 2005, p. 142 (Ranji Jeerkathil).

54 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 27.

55 ICC Transcript, May 12, 2005, p. 150 (Ranji Jeerakathil).

56 ICC Transcript, May 12, 2005, p. 150 (Ranji Jeerakathil).

57 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

58 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 27.

59 Paul Band Treaty Annuity Paylists, July 11, 1908, LAC, RG 10, vol. 9441, pp. 700–7 (ICC Exhibit 1b, pp. 39–42). The expression “M from No. 10” means that his father was #10, Peter, although by 1908, Peter had died, because #10 was noted as “Peter’s widow, Emma.” Before 1908, he would have received his payment as a member of Peter’s family and would have been listed on the payroll as a Boy. The listing as a Boy says nothing about his age, only that he was a son in the family and had not yet established his own family.

60 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 28. Similarly to Baptiste Peter, the reference to #43 is an indication that Baptiste Peter’s wife was a daughter of #43.

61 Paul Band Treaty Annuity Paylists, July 11, 1908, LAC, RG 10, vol. 9442, pp. 704–11 (ICC Exhibit 1b, pp. 43–46).

Record, which showed Bird had been born in 1879 and was therefore 27 at the time of the surrender. Canada also stated that although there were deficiencies in the record, it was apparent “that both Peter and Bird were at the meeting; that they were accepted by the Chief and other Headmen as being eligible to vote; that the Indian Agent present would have no interest in having such a vote set aside because a valid objection could be made concerning the eligibility of individuals whom he had permitted to vote,”<sup>62</sup> and that the circumstances made it more likely both men were eligible than not.

Canada asserted that the First Nation has failed to prove that the majority of male members had not attended the meeting, or “that a majority of those present failed to vote in favour of the surrender, or that any improper voters signed the surrender document”.<sup>63</sup>

The First Nation has taken the position that with the historical record as deficient as it is, the Crown must prove that its officials complied with the surrender requirements set out in the *Indian Act*.<sup>64</sup> When questioned during the oral hearing about the lack of records, counsel for Canada stated that the Crown was obligated only to follow the law. Counsel conceded that Canada did not know how many people were at the meeting or how many voted against it, but argued that the men who signed the surrender swore it was assented to by a majority of the Band.<sup>65</sup>

In our experience, it is not unusual for the documentation of early surrenders to be inadequate to prove definitively that a majority of the voting band members attended a surrender meeting and that a majority of that number voted in favour of the surrender. Our approach to this problem is informed by the mandate of this Commission. The Indian Claims Commission is mandated to review specific claims that have been rejected by the government, on the basis of Canada’s Specific Claims Policy, which puts the burden of proof on the claimant band to establish a breach of the Crown’s lawful obligations. *Outstanding Business* states that the amount of compensation offered in an accepted claim “will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant.”<sup>66</sup> It is necessary in this claim, therefore, to examine the available evidence, much of it circumstantial, in order to decide whether the

62 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 30.

63 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 29. Note that Canada uses the expression “Form of Surrender.” We have chosen to use the term “surrender document” throughout the report.

64 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 29.

65 ICC Transcript, May 12, 2005, pp. 187–89 (Douglas Faulkner).

66 *Outstanding Business*, 31, reprinted in (1994) 1 ICCP 171 at 185.

Paul Band has established that the surrender was invalid for lack of the required majority vote.

We are also mindful that at the Indian Claims Commission we encourage the parties to work as collaboratively as possible. For instance, the issues are set down only after there is agreement from both Canada and the First Nation that they cover the claims which are in dispute before the parties, and that the issues set the parameters of the inquiry. As a result, we expect both parties to bring forward the best evidence available to aid the panel in making determinations about the issues they have set together. Where there are gaps in our understanding of the historical facts, we look to both parties, not only the First Nation, to present their best arguments in the circumstances and to aid us in our understanding of what happened.

The 1886 *Indian Act* does not require documentation setting out the names of the voters attending the surrender meeting or a record of the vote for and against a surrender. The requirement is that a majority of the male band members who assent to the surrender be the full age of 21, habitually reside on or near the reserve, and are interested in the reserve. This requirement is a mandatory precondition for the validity of a surrender. As Justice Killeen stated in *Chippewas of Kettle and Stony Point*:

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* ... it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender.<sup>67</sup>

The Commission has relied on this statement of law in previous inquiries when discussing the mandatory and directory surrender requirements of the *Indian Act*.<sup>68</sup>

Moreover, the statutory preconditions for a valid surrender vote have been interpreted as requiring what has been termed the “double majority.” This requirement was stated for the first time by the Supreme Court in the case commonly known as *Cardinal*.

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<sup>67</sup> *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 25 OR (3d) 654 at 685 (Ont. Ct. Gen. Div.), addendum (1996) 31 OR (3d) 97 (CA). For our purposes, s. 49(1) of the 1936 *Indian Act* referred to here is the equivalent of s. 39(1) of the 1886 Act.

<sup>68</sup> ICC, *Kahkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 69; ICC, *Duncan's First Nation Inquiry, 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 194.

The issue in *Cardinal* was whether the 1908 surrender of the Enoch Band's Reserve No. 135 was valid. A majority of the male members of the band eligible to vote had attended the meeting, and a majority of those attending the meeting had voted in favour of surrender. That number, however, did not amount to a majority of all male members of the band. Both at trial and at appeal, the Federal Court upheld the surrender as being valid. The Enoch Band appealed to the Supreme Court of Canada. Writing for the Court, Justice Estey stated that the surrender was valid and that the proper way to construe s. 49 of the 1906 *Indian Act*<sup>69</sup> was as requiring a relative double majority:

Thus, when read together, the requirement is that there be a meeting of eligible members of the band and that in attendance at that meeting, there must be a majority of male members of the full age of twenty-one.

... the common law expresses again the ordinary sense of our language that the group viewpoint is that which is expressed by the majority of those declaring or voting on the issue in question. Thus, by this rather simple line of reasoning, the section is construed as meaning that an assent, to be valid, must be given by a majority of a majority of eligible band members in attendance at a meeting called for the purpose of giving or withholding assent.<sup>70</sup>

In the circumstances of this claim, where the documentary evidence of a valid majority vote is found in the Affidavit of Surrender, it is instructive to examine the language of the affidavit and confirm, at least, that the affiants were in a position to swear to the truth of their statements. Chief David Bird attested that "the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present."<sup>71</sup> In the same affidavit, Indian Agent James Gibbons declared that a majority of male band members of 21 years of age assented to the surrender. Both signatures were witnessed by John Foley, and both declarations were sworn before a Justice of the Peace. Given Chief Bird's long tenure as Chief of the Paul Band, we have no reason to question his knowledge of the voters' ages or their other circumstances, such as habitual residence and interest in the reserve.

The relevant paylists for the Paul Band are unreliable for determining whether Baptiste Peter and Enoch Bird were old enough to vote. The lists were

69 It has been noted before, but it should be stated again at this point, that the 1906 surrender of IR 133B of the Paul Band in September 1906 took place under the 1886 *Indian Act*, since the 1906 consolidation had not yet been proclaimed into law. Since the wording of s. 39 of the 1886 Act is almost identical to that of the 1906 Act, differing only in the list of men who might swear the affidavit, where the Court refers to s. 49, it is equally applicable to s. 39 of the Act in force during this surrender.

70 *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 SCR 508 at 516-17.

71 Affidavit of Surrender, Paul's Band, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 238).

designed to track annual treaty payments made to band members. They list each head of household by name and number, spouses (if any), and genders of any children. The ages of children are not listed. Since it was not common for single people, other than widows or widowers, to live alone, most men took their own ticket numbers at the time they established families. They may have been older or younger than 21 at the time, and the payroll does not tell us that. The first records of Baptiste Peter and Enoch Bird on the paylists of 1908 and 1909, respectively, coincide with notations that each had taken a spouse and that each had been listed previously as a member of his father's household, identified by its ticket number. Because of the additional research showing that Mr Bird was 27 in 1906, we are satisfied that he was an eligible voter. As for Mr Peter, we rely on Chief Bird's sworn statement that all the men who voted were of the required age, and we conclude that Mr Peter, too, was likely of age.

We conclude that the consent of the Paul Band to the surrender was valid and that the First Nation has not established its claim that a majority of band members eligible to vote did not attend the surrender meeting, or that a majority of those who attended did not vote in favour of the surrender.

### *Was the Affidavit Valid?*

The Affidavit of Surrender is one of the requirements set out in the Indian Act. During this period in Canadian history, the Crown had written a standard form affidavit, to which the Agent would add the particulars of the surrender.

The First Nation argues that the affidavit is so sparse that it cannot save its own irregularities, much less any other inconsistencies, such as the requirement for the double majority we have already discussed.<sup>72</sup> Among the deficiencies, counsel for the First Nation listed the lack of a stated date for the meeting, the lack of an identified official present for the taking of the surrender vote, and the lack of correct commissioning of the surrender document. It was sworn before a Justice of the Peace, J.B. Butchard, whereas, according to the First Nation, it should have been sworn before one of the officials listed in s. 39(b) eligible to swear the affidavits in Manitoba or the North-West Territories. The First Nation also states that the affidavit swears to information that Chief David Bird would have known to be incorrect: that all the persons assenting to the surrender were over the age of 21. As discussed above, the First Nation has taken the position that both Baptiste Peter and Enoch Bird were not old enough to vote.

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<sup>72</sup> Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 30.

Canada disputes the First Nation's contention about both Baptiste Peter and Enoch Bird, and regards the deficiencies with respect to the date and the name of the official taking the surrender vote to be "irrelevant omissions."<sup>73</sup> Canada states that both Bird and Peter were at the meeting and they were accepted by the Chief and the other headmen as being eligible to vote. Canada also submits that swearing the affidavit before a Justice of the Peace was perfectly acceptable.

We must agree with Canada on this question in all respects, first, because the sworn Affidavit of Surrender is only a reflection of the agreement set out in the surrender document. We have found earlier that it is probable that Enoch Bird and Baptiste Peter were old enough to vote. Certainly, since they signed the surrender document, there can be no disagreement that the Chief and other signatories to the document accepted both men as Principal Men, having a rightful place in the gathering. The date of the vote is not required on the Affidavit of Surrender. As for the failure of the Indian Agent or other official to place his name on the document, again this is a minor, technical breach that cannot overturn what is an otherwise valid surrender. The Affidavit of Surrender is completely in agreement with the surrender document and the events that had transpired to date.

There is also no question that a Justice of the Peace was one of the individuals able to swear the affidavit. At this point it is worth repeating that section of the *Indian Act*:

39. (b) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, before some judge or a superior, county or district court, stipendiary magistrate or justice of the peace, or in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories 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; and 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.<sup>74</sup>

One of the rules of statutory interpretation is that statutes are not to be given a meaning that would result in an absurdity. In this case, we understand

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<sup>73</sup> Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 30.

<sup>74</sup> *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1898, c. 34, s. 3.

that the specific officials listed for Manitoba and the North-west Territories are in addition to those already enumerated. Omitting those officials would result in an absurdity, because it would mean that the affidavits could be sworn before only one person, and that person would have been in Winnipeg. It makes no sense to interpret the section to mean that in more populated areas of Canada, more people would have been available; and in less populated areas, fewer. Surely the objective was to make it easier, not more difficult, to get the affidavit sworn in the less populated areas of the country.

We conclude, then, that Chief Bird and Agent Gibbons' swearing of the Affidavit of Surrender before a Justice of the Peace met the requirements set out in the *Indian Act* and that the affidavit itself is valid.

#### **Did the Department Follow Its Own Policy?**

The argument that the department failed to follow its own policy was brought forth by the First Nation and deals with a policy set out in 1914 by Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs. It is entitled "Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves."<sup>75</sup>

It sets out in some detail how surrenders are to be taken and includes requirements to keep voters lists and a record of those who vote on a surrender. The memorandum is very clear about how to call the surrender meeting and how much notice should be given. It requires that an interpreter be present. It requires the official taking the surrender to report to Ottawa in some detail about how, when, and by whom the surrender was granted.

It can be seen immediately that the memorandum is a restatement of the requirements of the *Indian Act*, but with additional instructions to the agents to ensure documentation of the assent to surrender.

The First Nation has argued that Duncan Campbell Scott's interpretation of the *Indian Act* requirements, as set out in his memorandum, are reasonable.<sup>76</sup> The First Nation also argued that, given the Commission's previous statements about the interpretation to be given to Scott's memorandum, the events of the Kapasiwin Townsite surrender show "a marked departure from the terms of the Memorandum."<sup>77</sup> The First Nation recited a number of failures of the Crown to abide by these guidelines, leading to a conclusion that the circumstances of the surrender "are so severely

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75 Duncan C. Scott, *Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves*, Ottawa, May 15, 1914, LAC, RG 10, vol. 7995, file 1/34-1.0 (ICC Exhibit 1a, p. 552).

76 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 31.

77 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 33.

inadequate that there is no way a fiduciary can be said to have discharged any duty whatsoever to the Paul Band.”<sup>78</sup>

Canada’s position is straightforward: the date of the surrender is 1906; the date on the memorandum is 1914. “The Band’s submissions do not disclose how local Indian Agents were supposed to have foreseen the details set out in the memo.”<sup>79</sup>

The argument can probably be made that Scott wrote his instructions because of departmental concern over surrenders for which documentation was lacking. Nevertheless, we must agree with Canada that this issue can be determined solely by looking at the dates of the transactions. The guidelines were not in place in 1906. Officials of 1906 cannot be held to a standard set out eight years later. The Commission has used these guidelines before and has found them useful, but that was with regard to a surrender taken from the Duncan’s First Nation in 1928, 14 years after the publication of the guidelines.<sup>80</sup>

As a result, we must conclude that there was no failure of the Crown to follow a policy that was not in effect in 1906 or for several years to come.

### **Did the Crown Breach Any Legal or Equitable Duty?**

**If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?**

We have answered none of the questions in either Issue 2(a) or Issue 2(b) in the affirmative. As a result, we find that the Crown met the statutory requirements of the *Indian Act* in the taking of the surrender of IR 133B in 1906. As a consequence, we do not find there has been any breach of either a legal or an equitable duty owed by Canada to the First Nation.

### **Issue 3: Crown’s Fiduciary Duty to the Band**

**3 Did the Crown breach its fiduciary duty to the Band by failing to reserve the minerals and any mines from the surrendered lands?**

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78 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 34.

79 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 31.

80 ICC, *Duncan’s First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53.



Both Canada and the First Nation agreed that, during the 1906 discussions about IR 133B, there was no discussion of either minerals or mineral rights. Earlier that year, in June, the First Nation had surrendered marl deposits on 133A to the Crown, for lease. “Marl” is a general term for mineral precipitates, which in the case of the Paul Reserve were largely calcium carbonate and would have been useful in the building and brick-making industries of a century ago. It does not appear from the record before us that there were any marl deposits on 133B, the surrendered lands.

This, then, is primarily a legal question. Without knowing whether the mineral rights to the reserve land had any value, were they surrendered along with the rights to the surface in 1906? And if they were, should the Crown have reserved them from sale?

The First Nation cites the marl surrender of 1906 on 133A as evidence that the Crown knew there were potentially valuable minerals in the area and that it was a breach of the Crown’s fiduciary duty to fail to reserve the rights.<sup>81</sup> Canada argues that, based on *Apsassin*, it was not a breach of the Crown’s duty for the minerals to have been surrendered along with the surface rights in 1906. Both parties relied on *Apsassin* in support of their positions.

In *Apsassin*, the surrender of mineral rights was central to the dispute between the Beaver Band and the Crown in 1945. When the Band surrendered IR 172 for sale to the Director of the *Veterans’ Land Act* (DVLA), nothing specifically had been said about mineral rights, even though mineral rights had been the subject of a surrender for lease five years earlier. When the DVLA subsequently sold the former reserve land to returning veterans, it transferred the mineral rights to them as well. When oil and gas was later found in that area, the veterans and their families owned the rights and were paid royalties. The Blueberry River and Doig River sued the Crown, arguing that the mineral rights should not have been part of the surrender or, at the least, that they should have been retained by the Crown and either sold or leased separately for the benefit of the Band.

The majority and minority opinions given by Justices Gonthier and McLachlin respectively, disagree on the first issue: whether the mineral rights were included in the surrender. Justice McLachlin, writing for the minority (which on this issue is in dissent), agreed with the First Nations that the mineral rights could not have been surrendered for sale in 1945 because previously, in 1940, they had been surrendered for lease. Justice Gonthier, however, decided that the mineral rights had been surrendered for sale in

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81 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 39.

1945, regardless of the earlier lease in 1940. He stated that although both the Crown and the First Nations had relied on common law property principles, he preferred to work from what he stated as his principle of the intention-based surrender:

In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists ... then the Band members' intention should be given legal effect.<sup>82</sup>

Justice Gonthier then turned to the wording of the 1945 surrender agreement, which had been signed by some band councillors, as well as the Chief, and concluded:

Since this instrument effected the surrender of certain land forming a "reserve", it is reasonable to conclude that the term "Reserve", as used in the surrender instrument, was intended to have the same meaning as the term "reserve" in the *Indian Act*. ... s. 2(j) of the Act defines "reserve" as an unsurrendered tract of land including the "minerals ... thereon or therein". Therefore, the 1945 surrender included the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals. On this basis, I must respectfully disagree with McLachlin J.'s assertion that the surrender document was silent concerning the mineral rights.<sup>83</sup>

In *Apsassin*, the 1945 surrender being contested had been taken pursuant to the 1927 *Indian Act*, whereas the Paul Band surrender was taken under the 1886 Act. The wording of the two sections is slightly different, but does not differ in the iteration of what is included within the meaning of the word "reserve." In 1906, at the time of the Paul surrender, the reserve included "all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon and therein."<sup>84</sup>

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82 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 6, (sub nom. *Apsassin*), Gonthier J.

83 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 10, (sub nom. *Apsassin*), Gonthier J.

84 *Indian Act*, RSC 1886, c. 43, s. 2(k).

Following Justice Gonthier’s reasoning, then, the surrender of the Kapasiwin Townsite in 1906 by the Paul Band included the mineral rights to the 635 surrendered acres.

For the minerals to have been reserved, we would need evidence that the reservation was either a written or an oral term of the surrender. Unlike the oral term reserving the beach from sale, there is nothing in the record to indicate an intention on the part of the Paul Band to reserve any mineral interests on 133B from surrender. We must conclude, then, that the Band intended to surrender its entire interest in 133B, without any reservation.

Accordingly, we find that there is no breach of fiduciary duty on the part of the Crown for having failed to reserve the minerals from the 1906 surrender of IR 133B.

**Issue 4: Crown’s Pre-Surrender Fiduciary Duty**

**4 Did the Crown breach any pre-surrender fiduciary duty, as follows:**

- (a) Did the Crown ensure that the Band adequately understood the surrender?**
- (b) Did the Crown engage in tainted dealings to influence the surrender vote?**
- (c) Did the Crown fail to protect the Band from a “foolish, improvident and exploitative surrender?”**
- (d) Did the Crown take extra caution in light of the Band having ceded or abnegated its decision-making powers?**
- (e) As a result of any of the allegations set out in Issue 2?**

The listed sub-issues are the benchmarks suggested by the majority and minority judgments in *Apsassin* and, together with the nature of the fiduciary duty, have been used by the Indian Claims Commission many times as a reliable method of measuring whether the conduct of the Crown in the period leading up to a surrender of reserve land met the standard of a prudent fiduciary. They measure whether the assent given by the band to a surrender was voluntary, to use Justice Gonthier’s words, “full and informed,”<sup>85</sup> expressing the band’s intention; or whether it was only an expression of the Crown’s desire for surrender.

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<sup>85</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 4, (sub nom. *Apsassin*), Gonthier J.

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***Did the Crown Ensure that the Band Adequately Understood the Surrender?***

The First Nation's position is that it is Canada's responsibility to show that it did not breach its fiduciary duties to the Paul Band at the time of surrender, particularly because, it alleges, in the early part of the 20th century Canada had a policy of encouraging surrenders from Indian reserves for the purpose of settlement.

As support for its proposition that the Crown failed to ensure the Band adequately understood the surrender, the First Nation has cited the short period of time between when the surrender was first discussed by the department, in a July 31, 1906, letter from Secretary McLean to the Indian Agent, until the surrender itself, a period of about only six weeks. The First Nation argued the "time frame could not have been sufficient to inform the Band about a complicated surrender, of land and *minerals*, for sale in town plots and based on the approaching railway."<sup>86</sup> The First Nation cited Agent Gibbons' letter of August 15, 1906, as being "suspect" because although he reported that the majority of the Band was willing to grant the surrender, he neglected to add that there was opposition.

The First Nation bases much of its contention that the Band did not understand the details of the surrender on two letters written early in September by the Surveyor J.K. McLean. Both are repeated here. On September 6, five days before the surrender meeting, J.K. McLean wrote to J.D. McLean in Ottawa:

I have to state that I have completed the re-survey of the outlines of the White Whale Lake Indian Reserve.

With regard to the subdivision into Town Lots of 133 B about to be surrendered, I am only able to re-run the roads laid out on the outside by the Dept. of Interior and run the line between the two ranges until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed. I also wish to consult him regarding the size of the Lots and other matters.

If he does not reach here this evening I will go to the Agency and see him tomorrow and then to Edmonton for provisions, iron-posts, money and anything else needful on the survey returning with him Monday.<sup>87</sup>

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<sup>86</sup> Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 41 (emphasis in the submissions).

<sup>87</sup> J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, Vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 226).

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Then, six days after the surrender, McLean wrote again, stating:

In subdividing Indian Reserve 133B into town Lots I find that a small Indian Burying Ground occupies a prominent position on one or two of the most valuable Lots. Its existence was not mentioned at the meeting when the surrender was taken, nor do I think it was known to Mr. Agent Gibbons. It appears that the Indians who lives on 133B always refused to use the regular Burying Ground at the Mission, which is on 133A.

Those who had used the small ground were present at the meeting and signed the surrender excepting one named Reindeer. The latter is a Headman very old and feeble and refused to sign or speak. I think however he feels aggrieved, as a few days ago his tepee was on one of the street lines and before we could offer to assist in lowering it he rushed out and cut it on each side from top to bottom.

The bodies will have to be moved as their remaining where they are will be a prominent eyesore in the Town Plot and greatly depreciate the value of a number of Lots.<sup>88</sup>

The First Nation says these letters are important because they demonstrate the short period of time in which the Agent had time to inform the Band of the consequences of surrender – time when, it appears, he was not physically on the reserve. The Band argues the resurvey of the reserve is important because it shows that the band members were not fully informed of the boundaries of their reserve and stated that “[A]t a time when a surrender of that very same reserve was contemplated, this is a disturbing proposition, as the Band did not know exactly what it was giving up.”<sup>89</sup>

The First Nation cites McLean’s second letter as evidence that there was not a full discussion at the surrender meeting since, had there been, presumably both McLean and Gibbons would have known that there was a burial ground on the site.

In oral argument, counsel for the First Nation argued that the historical documents also show that the impetus for the surrender did not come from the Band but from Edmonton real estate agents; and that in response to inquiries made to the department in Ottawa about the beach on the Paul Reserve, “the Crown simply took this as another opportunity to advance settlement policy and moved ahead with surrender as opposed to ... really evaluating it.”<sup>90</sup> The First Nation discounts Inspector Markle’s letter of June 26, 1906, in which Markle reports that he had been asked by some band members for his opinion about whether it was wise for the Band to surrender

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88 J.K. McLean, Dominion Land Surveyor, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 243).

89 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 43.

90 ICC Transcript, May 12, 2005, p. 164 (Ranji Jeerakathil).

land that would have been adjacent to the projected railway. The First Nation says that it was “simply a question for advice.”<sup>91</sup>

The First Nation also cited the evidence of several Elders at the community session who stated that the land was only leased or loaned, but not sold.<sup>92</sup>

Canada cites several of the same documents but, understandably, from a different point of view. In particular, Canada cites the letter from Inspector Markle, in which he states that the band members asked him about the advisability of surrender, and in which he reports “that the Indians seemed very aware that the fishing station area would be valuable once the railway arrived,”<sup>93</sup> as evidence that the surrender was “a proposal of the band itself.”<sup>94</sup> Canada also cites the Band’s involvement in the marl surrender in June and argues that, given the marl surrender, the re-marking of the reserve boundaries, and the examination of the lands proposed to be surrendered, there was a considerable Crown presence discussing the Kapasiwin Townsite surrender with band members.<sup>95</sup> Canada refutes the position that there was much opposition within the Band to the surrender, citing McLean’s letter of September 6, 1906, which stated that “some of the Indians are opposed”<sup>96</sup> and arguing that “differences of opinion among Band members is commonplace as it is in any other community.”<sup>97</sup> Where the First Nation argued that the surrender had been rushed, Canada stated it had been talked about by band members over a period of three months, not six weeks.

Before beginning any discussion of whether there had been a breach of Canada’s duty to the First Nation at the time of the 1906 surrender, it is a good idea to set out some of the parameters of the Crown’s fiduciary duty to First Nation peoples with regard to the surrender of their reserves. The Indian Claims Commission has dealt with the issue of fiduciary duty in many previous inquiries, and it is not necessary to review the established case law in detail. In the first of the Aboriginal fiduciary duty cases, *Guerin*,<sup>98</sup> Justice Dickson (as he was at the time) described the fiduciary duty as being “that of utmost loyalty to his principal.”<sup>99</sup> It was also in *Guerin* that Justice Wilson first articulated the duty to preserve and protect a band’s interest in its reserve,

91 ICC Transcript, May 12, 2005, p. 166 (Ranji Jeerakathil).

92 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 44. The Elders cited were Mary Rain, Louise Bird, Violet Poitras, Lloyd Saulteaux, and Mike Rain.

93 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 37.

94 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 39.

95 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 37.

96 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

97 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 38.

98 *Guerin v. The Queen*, [1984] 2 SCR 335.

99 *Guerin v. The Queen*, [1984], 2 SCR 335 at 389, per Dickson J.

when she stated “that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands’ interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands’ interests from invasion or destruction.”<sup>100</sup>

*Apsassin*, discussed earlier in relation to the requirements for surrender under the *Indian Act*, remains the only case in which the Supreme Court has specifically considered the Crown’s pre-surrender fiduciary duty to First Nation peoples. In *Apsassin*, Justice Gonthier stated that the Band had given its full and informed consent to the 1945 surrender of IR 172, but went on to say:

... 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.<sup>101</sup>

In Justice McLachlin’s minority decision, she stated that “[g]enerally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second ‘peculiarly vulnerable’ person”<sup>102</sup> and went on to say:

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. ... 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.<sup>103</sup>

Justice McLachlin also confirmed that there is a “duty to prevent an exploitative bargain” in taking a surrender. When she considered the regime for surrender of an Indian reserve, she held that it struck a balance between “two extremes of autonomy and protection”<sup>104</sup> because the *Indian Act* required both the band and the Crown to consent to a surrender. The Crown’s “consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation.”<sup>105</sup>

100 *Guerin v. The Queen*, [1984] 2 SCR 335 at 349–50, per Wilson J. Justices Dickson and Wilson wrote concurring judgments, in which Dickson J wrote for a majority of four and Wilson J wrote for a minority of three.

101 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 14, (sub nom. *Apsassin*), Gonthier J.

102 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 38, (sub nom. *Apsassin*), McLachlin J.

103 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 38, (sub nom. *Apsassin*), McLachlin J.

104 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

105 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

... 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.<sup>106</sup>

Nevertheless, in the case of the Beaver Band in *Apsassin*, according to Justice McLachlin, the evidence in that case did not support the Band's claim that it had abnegated its decision-making power to the Crown.

Thus, it is critical in assessing the Crown's pre-surrender fiduciary duty to determine whether the band was the true decision-maker. If not, then the Crown would be required to take considerable caution in exercising the power ceded to it by the band.

In considering whether the members of the Paul Band were fully informed about the surrender and were aware they were giving up IR 133B, it does appear from the written historical record that the band members who met with Agent Gibbons and Inspector Markle were aware of two important facts: first, that the railway was coming westward and was approaching the boundaries of the Paul Reserve; and second, that the reserve was the site of a very fine sand beach that would make IR 133B marketable either for a townsite or for a resort site. At the time of the marl surrender, in June 1906, Inspector Markle reported that the band members had spoken to him about whether it would be wise to surrender the land, and he had not given them a definite answer. It is clear, however, that there was discussion about the surrender, because he reported that the Indians were aware they had one of the best spots on the lake. It is also clear that outsiders were visiting the reserve and discussing the value of the land for sale to third parties. Edmonton real estate agent A.W. Taylor wrote to the department in early July 1906, describing how the approaching railway would bisect the reserve and how the Indians would have to travel across the track, "which to them is objectionable."<sup>107</sup> In that letter, Taylor also stated that "Bird the Chief would consent in a sale of the portion we have mentioned,"<sup>108</sup> and that he had met with some band members recently.

From J.K. McLean's letter of September 17, 1906, following the surrender meeting, it is clear there had been an earlier discussion of the impact of

106 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

107 A.W. Taylor, Edmonton, to Superintendent General, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).

108 A.W. Taylor, Edmonton, to Superintendent General, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).



surrendering the beach, since it is likely that at the surrender meeting the band members and the Agent agreed to reserve the beach from sale. The only way in which that term of surrender makes sense is if there had been a discussion of the band members' desire to retain access to the beach while at the same time making the beachfront lots attractive to prospective owners.

We are aware that several of the Elders questioned the intention of the Band in 1906. For instance, Robert Rain stated that his grandmother, Emily Rain, "hadn't heard of anybody giving up or surrendering that land."<sup>109</sup> Mary Rain, Robert's sister, confirmed what their grandmother had said, that the land had been stolen.<sup>110</sup> Florence Bird, daughter-in-law of Chief David Bird, who had been present at the surrender, stated that the land had only been leased.<sup>111</sup> However, it is clear from the documentary record that the Paul Band knew of the value of this part of their reserve and that it had value for them if it was developed into town or resort lots.

We also know from the historical record that the Band was actively involved in making decisions about various lots. For instance, in July 1908, shortly after the GTPR's application to cross the reserve had been approved, the band council passed a resolution that "by vote of the majority of its voting members"<sup>112</sup> it authorized the Superintendent General to enter into an agreement with the railway to place and operate a station within the surrendered lands. Similarly, in 1911, the Paul Band resolved that the Sabbath School Association could buy several lots for a sum equal to one hundred dollars per acre, and further, that the Band wished that part of the proceeds would be used to buy flour.<sup>113</sup> Notwithstanding the fact that once the land had been surrendered to the Crown, the Band Council Resolutions were legally ineffective in disposing of the land, the fact that the Band was aware of and eager to participate in the disposition of the land is evidence that they had intended to surrender IR 133B for sale. It is also obvious that the surrender and disposition of the land were discussed several times by the band members in the presence of Crown agents. There is no evidence that at any time the Band questioned the validity of the surrender.

The Band's understanding of a proposed surrender can also be gleaned from past experiences with surrenders of reserve land. In the case of the

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109 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 12, Robert Rain).

110 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 24, Mary Rain).

111 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 37, p. 40, Florence Bird).

112 Paul Indian Band, Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Reg. No. 11629, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 349).

113 Paul Indian Band, Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386,155 (ICC Exhibit 1a, p. 462).

leadership of the Paul Band, there were two previous surrenders that involved some of the same band members. In 1897, the Sharphead reserve was surrendered unanimously by band members who were moving to Wabamun Lake. Nine names appear on the Sharphead voters list – Simon, John Sharphead, Onisemass, David Yellowhead (also known as David Bird), Isaac Sharphead, Mr John, John Paul, and John and Alexis Rain.<sup>114</sup> In the June 1906 marl surrender for lease, six names appear on the surrender document – Chief David Bird, Paul, Didymus, Luke, Thomas James, and Peter Ironhead.<sup>115</sup> The surrender document for the September 1906 surrender of IR 133B contains nine signatories – David Bird, Paul, Didymus, Isaac Sharphead, Thomas James, David Peter, Baptiste Peter, John Rain, and Enoch Bird.<sup>116</sup>

It would appear then that David Bird voted for the 1897 Sharphead surrender and was most certainly present and voting at the other two surrenders. Isaac Sharphead voted for the 1897 surrender and was most likely present and voting at the September 1906 surrender. Paul, Didymus, and Thomas James were most likely present and voting at the June and September 1906 surrenders. The core leadership of the Paul Band in 1906 included Chief Bird, former Chief Paul, Didymus, Thomas James, and Isaac Sharphead, all of whom had previous experience with surrenders and would have understood the process and the consequences of surrendering reserve land.

Taken together, the evidence favours a finding that the band members understood what they were doing and that the department informed them that the lots would be sold and would no longer be part of the reserve. The surrender happened relatively quickly, but it must be remembered that the community was small and it would not have been difficult for the Agent or any of the other Crown officials to have discussed the surrender with most or all of the band members who were eligible to vote. We know from the historical record that the surrender was discussed for at least three months, from mid June until mid September, and, we presume, not only by the band members when the Agent was present, but also among themselves. Our conclusion, therefore, is that the Band adequately understood the terms and consequences of the surrender and that the Crown officials ensured they did.

<sup>114</sup> List entitled members still living of Sharphead's Band, transferred from Wolf Creek to White Whale Lake, attached to letter from A.E. Forget, Indian Commissioner, to Secretary, Department of Indian Affairs, December 9, 1897, LAC, RG 10, vol. 3912, file 111,777-1 (ICC Exhibit 1a, pp. 112-5).

<sup>115</sup> Surrender Document, June 20, 1906, DIAND, Indian Lands Registry, Reg. No. 14133 (ICC Exhibit 1a, pp. 191-96).

<sup>116</sup> Surrender Document, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229-35).

***Did the Crown Engage in Tainted Dealings to Influence the Surrender Vote?***

In many ways, the heart of the fiduciary duty analysis is determining whether or not the Crown engaged in tainted dealings to influence the surrender vote. Almost by definition, a fiduciary cannot be loyal and faithful to the interests of its beneficiary if it is acting to undermine the beneficiary's decision-making authority, with the result that it would be unsafe to rely on the Band's understanding and intention.

The First Nation cited the haste with which the surrender was taken as evidence of tainted dealings. Since we have found that the band members had adequate time to consider the surrender, we do not find this to constitute tainted dealings.

The First Nation has also alleged that the manner in which three of the band members "signed" the surrender document is evidence of tainted dealings. Counsel argued that Baptiste Peter, Enoch Bird, and John Rain "were not able to sign their own names, but were portrayed as doing so in order to add validity to a suspect surrender."<sup>117</sup> In particular, the First Nation cited the fact that at other times (the Duffield Townsite surrender, the disposition of lands to the Sabbath School Association) these members "signed" with their mark, an X, meaning they were illiterate. In written submission, the First Nation went so far as to describe this as "fraudulent activity"<sup>118</sup>; but in oral argument, it stated that by fraud, the First Nation really meant tainted dealings.<sup>119</sup> The First Nation also cited the fact that outsiders, such as the Edmonton real estate agents and the provincial government, appeared to know about the surrender and to treat it as a "done deal" before the surrender meeting was actually held.

Canada's position is quite straightforward: that the written record does not support any of the First Nation's arguments, and that with regard to the allegations of fraud, these are pure speculation.<sup>120</sup>

We have little judicial authority guiding us to determine what Justice Gonthier meant when he stated that "tainted dealings" would have made him reluctant to approve the surrender in *Apsassin* if he thought that, because of them, it was unsafe to rely on the Band's understanding and intention. However, the Commission has frequently considered the question of what

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117 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 46.

118 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 28.

119 ICC Transcript, May 12, 2005, p. 173 (Ranji Jeerakathil).

120 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 39.

constitutes tainted dealings. This analysis from the *Moosomin Inquiry* sets out what that panel thought Justice Gonthier meant:

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.' 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 made it unsafe to rely on the band's decision as an expression of its true understanding and intention.

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 J.A. 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 (the) fiduciary obligation that Gonthier J was not required to make in the context of *Apsassin*. 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.<sup>121</sup>

From this passage, we can see that there are a number of factors which the Commission has considered in determining whether there are tainted dealings in the relationship between the Crown and the Paul Band. Did Canada fail to properly manage competing interests? Did Canada apply undue influence? Did it undermine the Band's decision-making autonomy? If so, is there a finding of tainted dealings that undermine the Band's understanding and casts doubt on its intention? Or, on the other hand, did Crown officials such as Indian Agent Gibbons act conscientiously?

<sup>121</sup> ICC, *Moosomin First Nation: 1909 Reserve Land Surrender* (Ottawa, March 1997) reported (1998) ICCP 8, 183, citing *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

One of the factors that we consider to be important, but which neither party argued, is the role of the approaching railway in this surrender. Months before the surrender, it was apparent to everyone, including the Paul band members, that the railway would soon come to the edge of the Paul Reserve, and it was assumed that the railway would cross the reserve.

Under the 1886 *Indian Act*, railways had a privileged position within the ranks of private companies, since they were accorded the right to take land for railway purposes, subject to Crown consent.<sup>122</sup> In that way, there was no risk that either private individuals or Indian reserves would stand in the way of what was at that time one of the pre-eminent exercises in nation building. In order for the railway to gain access to reserve lands, the affected band members could surrender land; or, under s. 35 of the Act, the railway could apply to take the land, with the obligation to pay compensation. The *Indian Act*, as amended, states:

s. 35: No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements thereon.<sup>123</sup>

When railway companies “took” or, in effect, expropriated land, they took only what was necessary for the right of way and sometimes a station or siding. During this period, the Department of Indian Affairs often encouraged surrenders of reserve land to accommodate townsites, thinking that the economic benefits of the nearby town would be beneficial to the nearby reserve.<sup>124</sup> As well, as the Edmonton real estate agent A.W. Taylor noted, a

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122 The relevant statutes are the *Railway Act*, SC 1903, c. 58, and the *Indian Act*, RSC 1886, c. 43, s. 35 (as amended by SC 1887, c. 33, s. 5).

123 *Indian Act*, RSC 1886, c. 43, s. 35 (as amended by SC 1887, c. 33, s. 5). Note that if a 99-foot-wide strip had been “taken” or expropriated by the railway, it would revert to reserve status once it was no longer being used for railway purposes, which over the long run is the significant difference between railway takings and surrenders for railway purposes.

124 Frank Oliver, Canada, House of Commons, Debates, March 30, 1906 (ICC Exhibit 1a, 179–82).

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railway that crossed a reserve often meant hardship to the band – not only because the Indians themselves had to find a way to cross the railway, but also it because if it wasn't fenced, their cattle could easily be killed by trains. We do not know whether the possibility of expropriation was discussed with the Paul band members before the surrender; but it is inconceivable that the departmental officials of the era did not know that if the Band did not surrender, the railway could take reserve land, subject to Crown consent. Knowing that, it must have seemed at the time that a surrender for a townsite on what was accepted by everyone as a prime piece of real estate was a better idea than a 99-foot-wide strip taken down the middle of IR 133B.

What appears to us is that the Crown saw an opportunity that would benefit the Paul Band: by surrendering a relatively small portion of the reserve, the Band could gain income, retain access to Moonlight Bay, and potentially gain an economic benefit both from access to the railway itself and from the presence of the settlers in the townsite. Departmental officials knew there was growing interest in Wabumun Lake among the people of Edmonton because newspapers were beginning to print stories about successful developments such as Silver Beach, near the Paul Reserve.

Nothing that the First Nation has cited in the record – the knowledge by outside parties of the potential surrender,<sup>125</sup> uncertainty about the date of the surrender meeting arising from Agent Gibbons' statement in August 1906 that he had held a conference with the Indians,<sup>126</sup> and the Band Council Resolution passed by the Band in July 1908, which states the date of the surrender was August 14, 1906<sup>127</sup> – strikes us as being evidence of tainted dealings. Further, there is no explanation of why the three men would sign their names themselves in one situation and make a mark in another. Both methods of assent are valid; questions regarding the method used arise when other evidence exists to support an allegation of fraud.

There is nothing in the record to show that the Crown agents applied pressure or undue influence on the Band. When Surveyor J.K. McLean attended at the reserve at the beginning of September to survey the townsite, he reported that he had only done part of the work because he knew there was some opposition.<sup>128</sup> Although it is clear McLean expected the band

125 A.W. Taylor, W.S. Weeks Company to Superintendent, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1 (ICC Exhibit 1a, pp. 203–4).

126 James Gibbons, Indian Agent, Edmonton Agency to Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1 (ICC Exhibit 1a, p. 216).

127 Consent of Band, Paul's Indian Band, July 28, 1908, DIAND, Indian Lands Registry, Reg. No. 17325 (ICC Exhibit 1a, p. 349).

128 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

members to grant the surrender, he did not continue his survey work until the surrender had been taken. The correspondence indicates that the band members were the first to propose a surrender and that Crown officials discussed it with them. Earlier that year, when Agent Gibbons wrote to headquarters of the imminent arrival of the railway, the departmental response was to ensure that no work could begin on the reserve “until the right of way has been arranged for.”<sup>129</sup>

There is also no evidence that the Crown was acting on behalf of others, such as the railways or prospective purchasers of the land. In short, the Crown acted as a good fiduciary should have under the circumstances; with the railway coming, the Crown sought to get as good a deal as it could for the Band, knowing that regardless of what it did, the railway could almost certainly take the land it needed.

Our conclusion that the Crown did not engage in tainted dealings to influence the surrender vote means that the Band’s intention, as evidenced by the surrender document, was to grant the surrender.

***Did the Crown Fail to Prevent the Band from a “Foolish, Improvident and Exploitative” Surrender?***

The First Nation focused on the Band’s use of the Kapasiwin beach as a fishing station and argued that the surrender “should not have been attempted unless very clear benefits were apparent.”<sup>130</sup> Counsel for the First Nation stated that what really happened was that the Band gave up the fishing station, but “received almost nothing in return” because the surrender was “based on pure speculation of the railway coming through and a station being built.”<sup>131</sup>

Canada argued that, on the contrary – with the coming of the railway, access to markets, the arrival of settlers, and the interest by Edmontonians in the beach areas – the members could and did perceive the “very probable benefit” of the surrender. Canada also stated that given the *caveat* in *Apsassin*, the surrender should “be viewed from the perspective of the Band at the time.”<sup>132</sup> As well, Canada argued, rather than speculation, it was a reasonable expectation that the CNR would pass near the beachfront at Kapasiwin and that a station would be located on the townsite.

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129 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, CNR, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, C.N., (ICC Exhibit 1a, p. 188).

130 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 47.

131 ICC Transcript, May 12, 2005, p. 174 (Ranji Jeerakathil).

132 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

We agree with Canada. This is not a case in which the Crown knew or ought to have known that the long-term interests of the First Nation were best served by retaining the land, particularly since the band members had expressed interest in surrender. The band members appear to have been well aware that they had possession of a property that was potentially valuable to others, not only to themselves. They did not lose land access to Moonlight Bay for several years, until they lost access to the beach; and they always retained access to the bay by water, through the narrows –although it can fairly be said that travel by water would have been a greater distance and would have taken more time.

It is clear from the evidence presented by the Elders at the community session that giving up exclusive rights to the beach once it was transferred to the province in 1932, and to IR 133B, made it more difficult to travel north. Several Elders, among them Mary Rain<sup>133</sup> and Louise Bird,<sup>134</sup> said the beach was an important trail to Ste Anne, and it is likely that this was another reason the band members wanted to retain access to the beach and negotiated that the beach be reserved from sale as a condition of the surrender in 1906.

Although the outcome of the railway building was not what had been anticipated by either party, it must not be forgotten that the CNR first approached the reserve and the GTPR actually built the line (only to be swallowed up by the CNR several years later). It is a fact that a railway was coming and did come; and although it did not build a permanent station, the GTPR did build a summer station so that beachgoers from Edmonton could have easy access to the public beach. The townsite did not emerge as had been anticipated, but the beachfront lots did sell – and at the upset prices that had been established. All surrenders entail some amount of uncertainty, given that only hindsight is 20-20, but at the time, knowing what they knew, Crown officials did a good job of reading what was likely to happen and turning the foreseeable future into a benefit for the First Nation. The First Nation has argued there was “clear evidence” that no station would be established, but the record shows the Canadian Northern did not admit this to the department until July 1911, when it abandoned its plans to run a rail line through what had been IR 133B. By that time the Railway Commission had approved the plans of Canadian Northern’s main competitor, the GTPR, and Canadian Northern was forced to move north.

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133 ICC Transcript, October 13, 2004 (Exhibit 5a, p. 25, Mary Rain).

134 ICC Transcript, October 13, 2004 (Exhibit 5a, p. 48, Louise Bird).



We agree with Canada “that from the perspective of the Band members at the time, as required by *Apsassin*, it is submitted that the surrender of the fishing station did not appear to be ‘foolish, improvident or exploitative’”<sup>135</sup>:

It is submitted that it is a reasonable conclusion ... with the coming of the railroad, the opening up of the land to settlers and Edmontonians, the access to markets for their agricultural products, and the apparent high value of the fishing station as a resort, that it appeared to the members that it was of very probable benefit to the Band to take advantage of the set of circumstances and get as much money as possible for 133B. The value of the land as a resort town appeared to the Band to exceed its value as a fishing station, in the circumstances as they knew them at the time of the surrender.<sup>136</sup>

We conclude that the surrender of IR 133B was neither foolish, improvident, nor exploitative; and as a result, there was no duty upon the Crown to refuse to consent to it.

***Did the Crown Take Extra Caution in Light of the Band Having Ceded or Abnegated Its Decision-making Powers?***

We have taken the liberty of restating this issue somewhat, because the threshold question that must be answered is whether the Band ceded or abnegated its decision-making power. Accordingly, the issue we are addressing would best be stated as: Did the Band cede or abnegate its decision-making powers, and if so, did the Crown take extra caution in exercising its discretion?

Again, the First Nation and Canada have taken opposing positions, the First Nation arguing that in 1906 the leadership of the Paul Band was uncertain; Canada taking the position that the Band had strong leadership, both in its Chief, David Bird, and in its headmen, and therefore did not cede power to the Crown.

The First Nation cited two facts: first, that Chief Paul himself had been deposed in 1901 after a conflict with the farming instructor over the unapproved slaughter of a heifer; and second, that the Band did not have its full complement of headmen.

Canada’s position is that although the department was slow to recognize the Band’s wishes for its own leadership, and although it agrees that not all the approved positions for headmen had been officially filled, it does not mean

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135 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

136 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

the Band was without leadership. Canada cites the active correspondence between the Agent on site and headquarters about individuals selected for leadership positions, and, perhaps more importantly, the ongoing, if unofficial, role played by former Chief Paul.

This aspect of the fiduciary relationship is not as simple as determining whether a band has leadership, since it is quite possible that in the absence of formal leadership a band remains capable of exercising decision-making authority. Although bands had little autonomy under the *Indian Act*, on the question of a surrender of reserve lands they were required under the Act to make the final decision by means of a majority vote. However, a band could be incapacitated at the time of exercising decision-making power on such an important question if that band, for example, lacked effective leadership. As the panel stated in the Kahkewistahaw surrender:

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.<sup>137</sup>

In such a case, where the band lacks decision-making capability, the Crown’s actions will be scrutinized closely because it is now subject to the highest standard of a fiduciary. As was stated in *Apsassin*, the Crown exercising decision-making power or discretion in the surrender process must do so with “loyalty and care” and “solely for the benefit of the vulnerable party.”<sup>138</sup>

It is also possible that in the absence of leadership, a fiduciary can (and often does) make the correct decision and act in the best interests of the beneficiary. It is not whether a beneficiary has ceded power that determines if a breach has occurred, but whether the fiduciary acts properly in the exercise of the ceded power.

In this case, as in *Apsassin*, we find that the decision to surrender was not one that was made by the Crown and ratified by the Band. It should not be forgotten that the Band broached the subject of surrender to the Crown. It does not appear that undue influence was applied to band members to ensure

137 ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 87.

138 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 38 (sub nom. *Apsassin*), McLachlin J.

a surrender vote, and there is no evidence that the Crown was considering the interests of others ahead of those of the Band.

What we see from the record, including the evidence provided by the Elders at the community session, is a competent and capable band, with good leadership and an appreciation of the value of a unique piece of property. As a result, we find there was no need for Crown officials to have used extra caution in the taking of the surrender of IR 133B.

***Did the Crown Breach Any Pre-surrender Fiduciary Duty as a Result of Any of the Allegations Set Out in Issue 2?***

We find that throughout the surrender process, both in the months preceding the surrender and in the taking of the surrender itself, the Crown acted as a prudent, reasonable fiduciary. As a result, we find there has been no breach of the Crown's pre-surrender fiduciary duty.

**MISMANAGEMENT CLAIM**

Issues numbered one through six of the Mismanagement Claim are essentially findings of fact from which the panel is to draw conclusions about whether the Crown breached its post-surrender fiduciary duty to the Paul First Nation.

These issues centre on the conduct of the Crown in the years immediately following the surrender and whether the Crown acted in the best interests of the Band in its conduct of the sales of the land. As they have been framed, the first five issues essentially require findings of fact by the panel; Issue 6 requires a conclusion by the panel about whether any of the findings of fact create a lawful obligation on the part of Canada.

**Paul First Nation's Position**

The Paul First Nation starts from the position that the Band's intention in 1906 was to surrender land for the purpose of providing a railway townsite. The First Nation also argues that the department's plans were contingent upon the establishment of both the rail line and a station<sup>139</sup> – and from there it follows that, before selling any of the lots, the Crown ought to have waited until either of the railways had given a commitment to building a station. Alternatively, it argues, if the Crown had intended to sell the lots regardless of whether a railway station was built, it ought to have sold them immediately after taking the surrender, in order to capture whatever speculative value might have

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139 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 54.

existed at that time.<sup>140</sup> According to the First Nation, the Crown flip-flopped<sup>141</sup> in adopting a strategy for selling the townsite lots: first deciding to wait for the railway to confirm its intentions, and then deciding to sell the lots without that confirmation. It says that once the Grand Trunk Railway had stated it did not want to build a station at Kapasiwin (because of the grade), and once the CNR had stated it had not received permission from the Railway Commission for a rail line through Kapasiwin, the Crown should have returned all unsold land to the Paul Band.

The First Nation states that the Crown mismanaged the sales of the lots in two ways. First, it did not advertise the sales widely enough. And second, in the advertisements Canada referred to the lots as being “specially adapted for the building of summer residences.”<sup>142</sup> According to the First Nation, neither of these advertising methods was in accordance with the Band’s intent at the time of the surrender.

When the lots were sold in 1910, one of the terms of sale was a requirement that within a year the purchaser build a residence worth at least \$300.<sup>143</sup> According to the First Nation, this is evidence of the Crown’s mixed strategy: the condition was “arguably consistent” with the strategy of selling the lots for a townsite, but was “inappropriate in the context of a forced sale by the Department without confirmation that a station would be built.”<sup>144</sup> As evidence of the failure of the strategy, the First Nation cites the facts that the condition was waived for several of the purchasers of the lots bought in 1910, and dropped for the sales in 1912.

The First Nation also cites the timing of the 1912 sales as further evidence of the Crown’s breach of fiduciary duty. The Crown sold some of the Kapasiwin lots at the same time it was selling lots in Duffield, a townsite that had been surrendered by the First Nation from the much larger IR 133A. Duffield was not on the lake. Much of the land in that surrender was agricultural land, meant to be sold to farmer settlers. By holding the 1912 sales of the Kapasiwin Townsite lots at the same time as the sales of approximately 600 lots in Duffield, the First Nation says, the prices for the Kapasiwin lots were depressed.

140 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, pp. 59–60.

141 ICC Transcript, May 12, 2005, p. 242 (Ranji Jeerakathil).

142 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 62, citing *Edmonton Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

143 *Edmonton Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

144 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 64.

### **Canada's Position**

Canada's position is that at all times during the years between the surrender and the sales of the lots in 1912, the Crown acted with the "ordinary diligence' of a fiduciary, seeking the best monetary recovery for its beneficiary,"<sup>145</sup> and that the duty of the Crown in transactions of this kind is "not a standard of perfection."<sup>146</sup>

Canada argued that the almost four-year period between the date of surrender and the date of the first sales of the land was not a breach of fiduciary duty, but was instead "the time required for the railways to conclude and construct their plans, a matter beyond the control of the Crown"<sup>147</sup>; and that the Crown had been persistent in seeking railway commitments toward building a station. Canada also argued that after the surrender, the Crown continued to have reasonable grounds to believe that a railway station would be built on the surrendered lands: the CNR before the 1910 sales, and the GTPR before the 1912 sales.

In response to the First Nation's contention that the Crown had a duty to consult with the First Nation after the surrender, Canada's position is that the words of the surrender "did not reserve unto the Band any entitlement to consultation or veto over the actions of the Crown."<sup>148</sup> Canada also argued that the terms and conditions of the sale, as well as the means to advertise the sale, were solely within Canada's discretion, so long as Canada used the ordinary diligence of a fiduciary in exercising its duties to the Band. In short, Canada has argued that from 1906 to 1912 "the Crown acted with ordinary, if not greater, diligence in seeking to obtain the best return on the First Nation's surrendered land sales."<sup>149</sup>

### **Post-Surrender Fiduciary Duties**

The duty the Crown owes to First Nations that have surrendered reserve land to Canada, either for sale or for lease, can be found in *Guerin v. The Queen*,<sup>150</sup> the first case in which the Supreme Court of Canada declared that the Crown owed fiduciary duties to First Nations.

In this part of the inquiry we are being asked to consider the Crown's post-surrender fiduciary duty, and *Guerin* remains the most authoritative case to date. It is important to remember that in the post-surrender context, a band

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145 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 65.

146 ICC Transcript, May 12, 2005, p. 252 (Douglas Faulkner).

147 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 66.

148 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 67.

149 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 70.

150 *Guerin v. The Queen*, [1984] 2 SCR 335.

generally does not retain control over the disposition of the interests it has surrendered. At that point only the Crown holds the decision-making power, according to the discretion granted to it in the surrender document – whether it be to lease on specific terms, as was the case in *Guerin*, or to sell, as was the case for the Paul Band.

The essential facts of *Guerin* are that the Musqueam Band surrendered 162 acres of land to Canada, on the understanding that they would be leased for use as a golf club under the terms and conditions that had been presented to the band council and discussed at the surrender meeting. The surrender document stated that the Crown took the land “in trust to lease the same” on the terms and conditions that it deemed most conducive to the welfare of the Band. More than a decade later, the Band learned that the terms and conditions of the lease were different from and inferior to the agreed-upon terms.

In writing about the fiduciary duty of the Crown to the bands and the *sui generis* nature of the Indian interest in reserve land, Justice Dickson (as he then was) wrote several passages that are particularly appropriate to the situation of any band that has surrendered land to the Crown – either for lease or for sale, and in the particular circumstances where there were oral terms that had not been incorporated into the written document. He stated:

When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians’ behalf.<sup>151</sup>

Justice Dickson also stated that although the fiduciary obligation was not a trust, it was “trust-like in character”<sup>152</sup> so that, “as would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band.”<sup>153</sup> In the case of a surrender, the Crown must do whatever is set out in the surrender document. In the surrender of IR 133B, the “trust-like” obligations of the Crown can be found in the wording of the surrender document:

... in trust to sell the same 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.<sup>154</sup>

151 *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, Dickson J.

152 *Guerin v. The Queen*, [1984] 2 SCR 335 at 386, Dickson J.

153 *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, Dickson J.

154 Surrender Document, IR 133B, Paul Indian Band, DIAND, Indian Lands Registry, Reg. No. 11633, (ICC Exhibit 1a, pp. 229–35).

Later in his judgment, Justice Dickson expanded on the relationship between what the Band had understood to be the oral terms of the agreement and the written terms of the surrender. In Musqueam’s case, there had been several meetings at which surrender terms were discussed. Two decades later, several members of the band council were able to give *vive voce* evidence of those terms at trial. Justice Dickson stated that the trial judge had “found that the Crown’s agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable.”<sup>155</sup> Justice Dickson also noted that the surrender did not make reference to the oral terms, but he went on to say:

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown’s conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown’s agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.<sup>156</sup>

The standard of care of the Crown in its fiduciary relationship with the band has been described by the Supreme Court of Canada several times. In *Wewaykum Indian Band v. Canada*, Justice Binnie described the standard as that of “ordinary prudence,”<sup>157</sup> also as “reasonably and with diligence,”<sup>158</sup> and cited Justice McLachlin’s statement in *Apsassin* that “the duty on the Crown as fiduciary was ‘that of a man of ordinary prudence in managing his own affairs.’”<sup>159</sup> From these descriptions, we know that the standard of care expected from the Crown in its dealings with the Paul Band are those of a diligent, reasonable, prudent “ordinary” man. Perhaps the most important part of the description is that of the “ordinary” man managing his own affairs – so that the Crown must not do less for the Paul Band than it would attempt to do for itself.

Once a surrender for sale has been taken, the signatories have agreed that the land is surrendered in trust to the Crown, to sell upon terms that the

<sup>155</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J.

<sup>156</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J.

<sup>157</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 93.

<sup>158</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 94.

<sup>159</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 94, citing *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 104, (sub nom. *Apsassin*), McLachlin J.

Crown deems to be best for the band. The surrender document also spells out how the proceeds are to be distributed.

At this point, the band is trusting implicitly that the Crown will do what it has agreed to do. As a result, the fiduciary duty of the Crown is enhanced because the Crown has been granted absolute discretion and must act only in the band's interest. The Crown is held to a high standard of the fiduciary duty. Once the land is surrendered, the band no longer has any ability to make decisions about the property unless the Crown wants to change the terms of the sale or lease agreed to by the Crown and the First Nation, in which case it must come back to the band for permission to do so.

We have stated that the Crown is held to a high standard of duty, but it should not be characterized as an impossibly high standard. As fiduciary, the Crown is expected to be diligent, reasonable, and prudent in acting in the best interests of the fiduciary, but not perfect. The Crown may make mistakes, or may even exercise bad judgment, as long as, at the time, it was attempting, in good faith, to act in the best interests of its beneficiary, which in this case was the Paul Band. This is the standard the Crown had to meet during the post-surrender period from 1906 to 1912.<sup>160</sup>

### **Issue 1: Sale of Land and Value Received**

#### **1 Did the Crown wait four years after the surrender before selling the land and did this result in lower value being received because of lost speculative value?**

The first part of this question can be answered with a simple yes. It is obvious from the events that it was almost five years from the surrender in September 1906 to the date of the first sales of the lots, in May 1911.

There is no way of knowing whether the length of time between the surrender and the first sales resulted in a "loss of speculative value." Canada has argued that the First Nation has not presented any evidence on the presence of speculators in the area or of whether they would have purchased land for a higher price in 1906 than in 1911. The First Nation was not clear in exactly what it meant by the term "loss in speculative value." Presumably, the Crown ought to have adopted one of two strategies in dealing with the surrendered lands: either the Crown should have sold the land immediately to

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<sup>160</sup> It would also be the measure of the post-surrender conduct of the Crown from 1912 onward, but since Canada has already accepted that it has breached its post-surrender duties to the Paul Band for the years 1912 to 1938, this analysis is confined to the time frame and events leading up to the second sale of town lots.



capture speculative value; or the Crown should have waited until it had an absolute commitment from one of the railway companies to build a station on the Kapasiwin lands.

One of the concerns we have with this argument is that because these two strategies are not alternatives that can be adopted as events unfold, it would require the Crown to know beforehand which of the two would be the more successful. Another significant problem is that the argument assumes that the Crown, as a prudent fiduciary, should engage in speculative land sales on behalf of the beneficiary. It is difficult to meld the concepts of speculation and the standard of care of a prudent, reasonable fiduciary.

The idea also presumes that buyers would have paid more for the lots immediately after the surrender than they would have four years later. Although not as many of the lots sold as perhaps both the Crown and the Band would have preferred, those that did sell sold for the upset price, indicating that the appraisal of their value had been reasonable. The First Nation did not bring forth evidence that there was a speculative market in 1906, or evidence of buyers who were willing to pay a premium price for lots on the assumption that the building of a railway station would increase the value of those lots. In fact, had there been speculative buyers willing to do just that, surely a prudent fiduciary would have held on to the lots so that the First Nation would benefit from any increase in value that occurred as a result of the railway. We find that this latter strategy is the one the Crown adopted, and that it was not until after the second sale that it became known that there would be no permanent railway station.

As a result, we conclude that although the Crown did wait four years until selling the first of the lots at the Kapasiwin Townsite, there was no evidence that the Band lost any speculative value as a result of the four-year gap between surrender and sale.

## **Issue 2: Sale of Land and Railway Station**

- 2 Did the Crown proceed with the sale despite knowing that a railway station would not be built and that this was one of the original purposes of the surrender, i.e., to have a railway community, and did the Crown fail to consult with the Band with respect to this?**

Until 1911, the CNR stated repeatedly that it intended to build a station on the surrendered land. It is also clear that some of the delay was due to the

railway's preference for getting land as cheaply as possible. As an example, in November 1906, only two months after the surrender, when the CNR was attempting to negotiate a lower price than had been specified, the Agent wrote forcefully about why the price was not excessive, stating that "in fixing a price to be asked for the right of way our concern is solely for the Indians' interest."<sup>161</sup> When the department wrote several days later to the CNR, stating it would accept a lower price, it was in relation to the establishment of a siding.<sup>162</sup>

Repeatedly, the CNR assured the department that it was taking up the matter of the siding.<sup>163</sup> By early 1908, the department had been promised several times that the decision about a station was forthcoming – and its correspondence with the railway indicated a growing level of frustration.<sup>164</sup> That February, the CNR told the department it was its intention to "extend our line through the Indian Reserve early in the Spring."<sup>165</sup>

The department continued to receive inquiries from the public about when the lots would be put up for sale. Finally, in 1910, the Crown informed the CNR that the townsite lots would be put up for auction and that some would be reserved from sale if the CNR gave its commitment that it would build a station.<sup>166</sup> In return, the CNR stated, it was not possible to give a commitment as the department wished, but would prefer that some lots be reserved.<sup>167</sup> The department did so.

At the same time, the GTPR had received permission to build a line through the reserve. Departmental officials were concerned that two lines and

161 William Black (for the Indian Agent, absent on duty) to Secretary, Department of Indian Affairs, November 20, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, pp. 274–75).

162 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railways, December 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 280).

163 C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, December 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 281); Davidson and McRae, General Agents, Canadian Northern Railway, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, December 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 283–84); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, January 17, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 288); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, June 27, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 310); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, July 13, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 311); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, July 13, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 325).

164 Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to MacKenzie & Mann, Canadian Northern Railway, January 17, 1908, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 328).

165 D.D. Mann, Office of the Vice President, Canadian Northern Railway, to J. D. McLean, Secretary, Department of Indian Affairs, February 13, 1908, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 331).

166 Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway, February 1, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 391).

167 C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, February 16, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 394).

two stations would not be in the best interests of the Paul Band, since this prospect had the potential to slice up the town lots into small, unsaleable areas, particularly those that would end up bounded on two sides by the railway. The department was aware that the GTPR was planning to build its station a mile west of the surrendered lands and continued to negotiate with the CNR.

It is not necessary to detail every piece of correspondence between the railways and the Crown during the four years after the surrender. The story the communications tell is clear. The Crown was doing its best to secure agreement from the CNR that a station would be built. The CNR stalled and was less than forthcoming about its situation. It is possible – hindsight being as good as it always is – that the Crown ought to have negotiated with the GTPR for a station and perhaps even played one railway off against the other. However, that did not happen.

It wasn't until the summer of 1911, and only because the department wrote to the CNR stating that it had been informed of the refusal,<sup>168</sup> that the CNR acknowledged it had abandoned the prospective line through the surrendered lands.<sup>169</sup> In response to the department's inquiry, the CNR told the Department of Indian Affairs that its routing had been refused.

There remained the possibility that with the CNR no longer able to run a rail line through the reserve, the GTPR might build a station since it already had a summer platform, even though the GTPR had stated earlier that the grade was too steep for a station. Indeed, the Alberta Sunday School Association offered to lobby GTPR officials, since it was believed there would be sufficient traffic through the area to warrant the station.<sup>170</sup>

What must also be remembered is that the purpose of the surrender was not only to provide lots for a townsite. From the beginning, one of the stated purposes of the surrender was for resort lots. The Indians were aware they had valuable lakefront property with a good beach. Most of the beachfront lots sold in the first auction. The value of the beachfront lots did not depend entirely on a station, as long as there was a rail line and at least a whistle stop.

We find that the Crown was not aware that the railway station was not going to be built. At all times leading up to the first sale in 1910, the CNR continued to assure departmental officials that the plan was being actively pursued. We

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168 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway, August 9, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 492)

169 C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 496).

170 J.A. Markle, Inspector, to J.D. McLean, Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, pp. 463–64).

also find that although a railway townsite was one of the original reasons for surrender, it was not the only reason and may not have been the most important reason for surrender. Both the department and the Band were aware that people from Edmonton were interested in the lots for resort and pleasure purposes.

The question of consultation, then, did not arise, since at all times the department was acting according to the intention of the Band at the time of surrender. The Band intended to surrender IR 133B for two purposes: for both a railway townsite and a resort community. There was no change in circumstances that would have given the Crown any reason to go back to the Band to say that plans had changed. This is not a situation like that faced by the Musqueam Indian Band in *Guerin*, where lease terms were discussed and approved by the Band and then ignored by the Crown. In the case of the Paul Band, the Crown appeared to be doing its best to sell the land for the benefit of the Band, for the best price possible, and under the best circumstances. It must be remembered that there was correspondence from members of the public to the department asking when the lots would be put on the market. We can therefore presume the department had every reason to believe that the lots would sell.

After considering the joint purpose of the surrender, both for a townsite and for a resort, and after evaluating the correspondence between the Crown and the CNR, we conclude that the Crown acted to fulfill the purpose of the surrender.

### **Issue 3: Advertising of Sale**

#### **3 Did the Crown fail to properly advertise the sale?**

The historical record shows that the efforts made by departmental officials were the same as those made for other surrendered reserve lands. A comparison of the newspaper notices for the IR 133B lands<sup>171</sup> and those for the Moosomin, Thunderchild, Grizzly Bear, and Lean Man reserves,<sup>172</sup> for instance, show virtually the same text and the same prominence on the page. The advertisements were placed in major Western newspapers during the weeks leading up to the sale and were supplemented with handbills and flyers.<sup>173</sup> When the department learned that the 1910 sale was not widely known, it took the reasonable steps of placing an advertisement – one

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171 *Edmonton Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

172 *Edmonton Daily Bulletin*, May 2, 1910, (ICC Exhibit 1a, p. 426).

containing very large type – on the morning of the sale.<sup>174</sup> Inspector Markle’s statement three days after the sale – that “although it was regularly advertised I soon learned that many did not know of the sale”<sup>175</sup> – indicates that there might have been a problem, but we cannot infer that the fault was the Crown’s. Nor is there evidence before us to indicate that the Crown fell short of ordinary diligence in advertising the sale. As a result, we must conclude that the Crown properly advertised the sale.

#### **Issue 4: Terms of Sale**

#### **4 Did the Crown unilaterally change the terms of the sale by adding a term that a residence would have to be constructed within 1 year, contrary to the surrender agreement and without Band consent?**

On this issue, we find that there was no evidence to indicate whether the Crown ever discussed with the Band the requirement that a residence be constructed within one year of sale. We cannot say that the requirement for a building was contrary to the surrender agreement, because the agreement stipulated only that the Crown was to “sell ... upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare ...”<sup>176</sup> There is no indication that the building restriction was for any purpose other than to deter speculators who would do nothing but hold the land and then sell it later for a higher price.

It is also true that Inspector Markle remarked three days after the first sale that the restriction had been a hindrance,<sup>177</sup> and that the Crown dropped the condition for the second sale in 1912. We find that is evidence not that the Crown had breached its fiduciary duty; but that once advised there was a problem, it had moved to resolve that problem. We find the dropping of the restriction is evidence that the Crown was mindful of its duty to the Band and took steps to fulfill it. We also note that when the condition was dropped for the 1912 sale, there was no pickup in sales, although that might also have been due to the certainty then that neither railway would build a full station.

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173 Handbill, “Auction Sale of Wabamun Town Lots,” May 11, 1910, LAC, RG 10, vol. 6670, file 110A7-2 (ICC Exhibit 1a, p. 448).

174 *Edmonton Daily Bulletin*, May 11, 1910 (ICC Exhibit 1a, p. 441).

175 J.A. Markle, Inspector, Alberta Inspectorate to Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 444–45).

176 Surrender Agreement, IR 133B, Paul Indian Band, Indian Lands Registry, Reg. No. 11633, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 229–30).

177 J.A. Markle, Inspector, Alberta Inspectorate to Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 444–45).

It must be remembered that the standard is that of an ordinary, prudent, reasonable person, who is acting in the best interests of the beneficiary. It does not require the Crown to have made perfect decisions, all the time.

Again, we find there was no need to seek the consent of the Band, because there is simply no evidence to suggest that this term was in any way a material change from what might have been discussed at the surrender meeting. On the contrary, the restriction on the sale appears to have been a reasonable term of sale for vacant land, one which officials determined was conducive to the Band's welfare, given that one of the stated purposes of the surrender was the development of a resort town.

The surrender document agreed to by the Band is clear that the Crown was given the authority over the sale and the dispersion of the proceeds on behalf of the Band. Consultation with the Band was not warranted, because the Crown did not intend to alter any of the terms of the surrender document. As a result, we must conclude that the Crown did not unilaterally change a term of the surrender.

#### **Issue 5: Second Sale, 1912**

**5 Did the Crown hold a second sale in 1912 without consent of the First Nation at the same time as the sale of the Duffield Townsite?**

The simple answer to the question posed is yes, since the sale took place at the same time as the Duffield sale, and since there is no evidence that the Crown consulted the Band before the 1912 sale. As we have stated earlier, however, there was no reason for departmental officials to have consulted the Band about the second sale of the lots.

#### **Issue 6: Breach of Legal or Equitable Duty**

**6 If any of the issues 1–5 is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the First Nation?**

At this point it is useful to summarize our findings on the issues as they were presented to us.

In Issue 1, we were asked two questions: first, did the Crown wait four years after the surrender before selling the land? Second, did this result in a

lower value being received by lost speculative value? We answered yes to the first question, and no to the second.

In Issue 2, we were asked two questions. First, did the Crown proceed with the sale despite knowing a railway station would not be built? Second, did the Crown fail to consult with the Band as a result of this knowledge? We answered no to the first: that the Crown did not know a railway station would not be built. For the second, we found that under the conditions of sale in the surrender document, the Crown was not obligated to go back to the Band, because the surrender had a dual purpose of providing land for both a townsite and a resort.

On Issue 3, we were asked whether the Crown failed to advertise the sale properly. We said no.

On Issue 4, we were asked whether the Crown unilaterally changed the terms of the sale by adding a condition that the purchaser of the lot build within a year of purchase, contrary to the surrender and without consent. We found that there was nothing in the surrender document that precluded such a condition of sale, nor was it a material change; therefore, there was no obligation on the part of the Crown to return to the Band.

On Issue 5, we were asked whether the Crown held the second sale in 1912 at the same time as the Duffield sale, without the consent of the Band. Again, we found that there was nothing in the surrender document that precluded holding the sale at that time, and therefore there was no obligation on the part of the Crown to return to the Band to seek permission. We have found no evidence in the post-surrender period, from 1906 to 1912, that at any time the Crown acted except in the best interests of the Paul Band. The Crown may not have succeeded as both parties anticipated, but that does not mean there was a breach of duty. As we have said before, the ordinary, reasonable, prudent fiduciary does not have to be perfect.

#### **Issue 7: Compensation Criteria**

- 7 Which compensation criteria should apply in the determination of the Mismanagement Claim? (In respect of this issue, Canada notes the content of the July 10, 1998, letter of acceptance.)**

With respect, we decline to answer this question or deal with this issue. This aspect of the inquiry deals with those aspects of the claim that were accepted for negotiation by Canada. Those negotiations are in abeyance, pending

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completion of this inquiry. Although this inquiry was initially accepted in part as an inquiry into compensation criteria, the subsequent rejected claim into the surrender of IR 133B became the focus of the parties' efforts and of the inquiry. Apart from making brief arguments about the legal principles applying to compensation generally, the parties did not support their arguments by showing us the evidence in the record that would have been required in an inquiry into compensation criteria.



## PART V

### CONCLUSIONS AND RECOMMENDATION

We therefore recommend to the parties:

**That the claim of the Paul First Nation regarding the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiation under Canada's Specific Claims Policy.**

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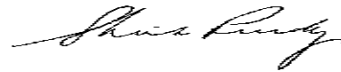
FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commissioner (Chair)



Alan C. Holman  
Commissioner



Sheila G. Purdy  
Commissioner

Dated this 21st day of February, 2007



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# **APPENDIX A**

## **HISTORICAL BACKGROUND**

### **PAUL FIRST NATION KAPASWIN TOWNSITE INQUIRY**

**INDIAN CLAIMS COMMISSION**

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### INTRODUCTION

The Paul First Nation<sup>1</sup> submitted a Specific Claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of Wabamun Indian Reserve (IR) 133B, surrendered by the Paul First Nation on September 11, 1906. This reserve is located west of Edmonton, on the shores of Wabamun Lake (also known as White Whale Lake), in central Alberta. This claim was partially validated and accepted for negotiation on the basis of an outstanding lawful obligation with respect to the transfer of the streets and lanes in 1932<sup>2</sup>. The First Nation and Canada entered into negotiations, which subsequently broke down over compensation criteria and other issues. The Indian Claims Commission (ICC) agreed to conduct an inquiry into compensation criteria, as well as the rejected aspects of the claim, in October 2001.

On June 2, 2000, the Paul First Nation submitted a further claim challenging the validity of the surrender of IR 133B. This claim was rejected in July 2003, and the Commission subsequently agreed to conduct an inquiry into the rejected surrender claim as well.

For clarity, it should be noted that the First Nation surrendered land at the eastern end of the adjacent reserve, Wabamun IR133A, for the Duffield townsite and surrounding farmlands in 1911. A specific claim arising out of those events has already been settled and does not form part of this inquiry.

### BACKGROUND

On August 23 and 28, 1876, the Government of Canada, represented by Treaty Commissioner Alexander Morris, signed Treaty 6 with “the Plain and Wood Cree and the other Tribes of Indians” living in what are now the central portions of Saskatchewan and Alberta.<sup>3</sup> Treaty 6 promised to “lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians.”<sup>4</sup> Furthermore, the treaty states that these “reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty’s

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1 The Paul First Nation is referred to in the historical documentation by a number of designations, including Ironhead’s Band, White Whale Lake Band, Wabamun Band, Paul’s Band, the Paul Band, and Paul Indian Band.

2 John Sinclair, Assistant Deputy Minister, Claims and Indian Government, to Chief Wilson Bearhead, Paul Band, July 19, 1998 (ICC Exhibit 4a).

3 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen’s Printer, 1964), 1–2 (ICC Exhibit 1a, pp. 2–3).

4 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen’s Printer, 1964), 3 (ICC Exhibit 1a, p. 4).

Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.”<sup>5</sup>

The ancestors of the Paul First Nation entered into Treaty 6 through an adhesion to that treaty signed by Chief Alexis at Edmonton on August 21, 1877.<sup>6</sup> Alexis’s band of Stoney people lived at Lac Ste Anne, north of Edmonton, though it appears that one of Alexis’s headmen, Ironhead, actually resided at Wabamun Lake along with “about one half” of the Alexis Band.<sup>7</sup> Ironhead’s group was initially treated by the Department of Indian Affairs as part of the Alexis Band, but they eventually won recognition as a separate band and received their own payroll under Peter Ironhead in 1886.<sup>8</sup> After Ironhead’s death in 1887, Paul assumed leadership of the Band.<sup>9</sup> Thereafter, it was often referred to in departmental correspondence as Paul’s Band or the White Whale Lake Band. Beginning in 1890, the Band’s membership was substantially increased by the movement of approximately 70 Sharphead band members to Wabamun Lake.

### Survey of IR 133A and 133B

The Department of Indian Affairs knew that fishing was very important to the livelihood of the Paul First Nation.<sup>10</sup> When discussing a future reserve for the First Nation, Indian Commissioner Hayter Reed emphasized the importance of securing a fishing station for its use. In a letter to the Deputy Superintendent General of Indian Affairs (DSGIA), dated December 29, 1890, he noted, in reference to an attached sketch, that

[a]t point B in [Township] 52, [Range] 4, W. 5th I.M. there is a spot particularly well adapted to form a fishing station, and as I regard its possession as of great importance to secure what will form no small proportion of the Indians food

- 5 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen’s Printer, 1964), 3 (ICC Exhibit 1a, p. 4).
- 6 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen’s Printer, 1964), 10–11 (ICC Exhibit 1a, pp. 11–12).
- 7 George A. Simpson, Indian Reserve Survey, to Superintendent General of Indian Affairs (SGIA), December 1, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 110 (ICC Exhibit 1a, p. 16).
- 8 Donna Gordon, “Paul’s Band: A History of Its Land,” prepared for Treaty and Aboriginal Rights Research of the Indian Association of Alberta (TARR/IAA), May 1981, p. 3 (Exhibit 2a, p. 3).
- 9 Extract from report of Charles de Cazes, Indian Agent, March 31, [1890], Library and Archives Canada (LAC), RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 74); Donna Gordon, “Paul’s Band: A History of Its Land,” prepared for Treaty and Aboriginal Rights Research of the Indian Association of Alberta (TARR/IAA), May 1981, p. 3 (Exhibit 2a, p. 3).
- 10 See, for example, George A. Simpson, Indian Reserve Survey, to SGIA, December 1, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 110 (ICC Exhibit 1a, p. 16); T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, October 26, 1885, LAC, RG 10, vol. 3717, file 22550-2 (ICC Exhibit 1a, p. 54).

supply, I would request authority, in the event of the survey failing to include it in the Reserve proper, to have it surveyed, with a view to its being set apart as a fishing station for the Band.<sup>11</sup>

The department authorized the Commissioner on January 12, 1891, to have a fishing station “at the point ‘B’ marked in the sketch enclosed in your letter” set apart for Paul First Nation.<sup>12</sup> This sketch has not been located, and it is unclear whether the particular spot recommended by Reed was actually in township 52 as he stated (on the western portion of the future IR 133A) or further north in township 53, where a fishing station known as IR 133B was later surveyed.

In late 1891, surveyor John C. Nelson arrived at Wabamun Lake to “make a survey of the reserve and fishing station for the members of Chief Alexis’ band, to whom a reserve had not yet been allotted.”<sup>13</sup> Indian Reserves 133A and 133B (directly adjacent to one another) contained 32.7 square miles in townships 52 and 53, ranges 3 and 4, west of the 5th meridian, both with a significant frontage along the eastern shore of the lake. IR 133B was set aside as a fishing station for the Band, and it is located adjacent to the northwest corner of IR133A, in township 53, ranges 3 and 4,<sup>14</sup> along the southeastern portion of Moonlight Bay.<sup>15</sup> Surveyor Nelson’s survey report of IR 133A noted that “the Indians are settled near the centre of the easterly half of the Reserve.”<sup>16</sup>

IR 133A and 133B were set aside “for Indian purposes” and withdrawn from the operation of the *Dominion Lands Act* by Order in Council 1633 on June 16, 1892.<sup>17</sup> These lands are usually referred to as the Wabamun reserves, although departmental correspondence also refers to them as the White Whale Lake reserves. Indian Commissioner A.E. Forget later referred to the reserve at Wabamun Lake as a “joint reserve” set apart for both Paul’s and

- 11 Hayter Reed, Indian Commissioner, to DSGIA, December 29, [1890], LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 78–79).
- 12 Unidentified author and recipient, January 12, 1891, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 81–82).
- 13 John C. Nelson, In Charge, Indian Reserve Surveys, to SGIA, December 16, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 206 (ICC Exhibit 1a, p. 93).
- 14 Natural Resources Canada, Plan 294 CLSR AB, “Survey of the Boundaries of Indian Reserves (Stony) Nos. 133a & 133b at White Whale or Mirror (Wabamun) Lake for the band of Chief Alexis,” surveyed by John C. Nelson, DLS, 1891 (ICC Exhibit 7a).
- 15 Department of Environment, Parks and Protected Areas Division, Province of Alberta, “Plan showing Wabamun Lake Provincial Park,” October 19, 1999, in Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 6; see also Natural Resources Canada, Plan 294 CLSR AB, “Survey of the Boundaries of Indian Reserves (Stony) Nos. 133a & 133b at White Whale or Mirror (Wabamun) Lake for the band of Chief Alexis,” surveyed by John C. Nelson, DLS, 1891 (ICC Exhibit 7a).
- 16 John C. Nelson, In Charge, Indian Reserve Surveys, to SGIA, December 16, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 207 (ICC Exhibit 1a, p. 94).
- 17 Order in Council PC 1633, June 16, 1892, Department of Indian Affairs and Northern Development (DIAND), Indian Lands Registry, Instrument no. L10979 (ICC Exhibit 1a, pp. 101–2).



Sharphead's bands, and he noted that "about one half of the Reserve, or say 16 square miles" was set aside "on account of Sharphead's Band."<sup>18</sup>

### **Land Use**

Although the First Nation lived all along the shoreline of the lake, Elder Mary Rain explained the particular importance of the IR133B and Moonlight Bay area to the First Nation for fishing:

Yes. I think that's the easiest place they fish, when it's windy, when it's stormy. It's not – not like the big lake. The big lake, there's a lot of waves in there. But that's a small little area lake. So they fish more around there, around that Moonlight Bay.<sup>19</sup>

In addition to its importance as a fishing station, IR 133B was also used for a number of other activities. Elder Violet Poitras explained:

And Moonlight Bay was one of the important places, like, that's how come it got the name – she was saying Kapasiwin, like a camping spot. They camped there, and that's how it got that name Kapasiwin. We used to camp there. And then they settle there. They had cabins there. They lived there, and they fished in the lake there. They hunted. They trapped. They did – they lived off the lake there by Moonlight Bay before the railway track and before the railway track was built.<sup>20</sup>

A wagon trail, which Elder Mike Rain described as their "main road," also ran through IR 133B to Lac Ste Anne and the Alexis reserve, and the area was an important camping spot along this trail.<sup>21</sup>

The oral history suggests that the reserve was used at different times throughout the year for a variety of traditional activities. During the community session, Elder Louise Bird explained the First Nation's seasonal fishing patterns and use of the reserve:

MS. PURDY: And you were talking about how people fished all winter, I think you said. They would fish in the summertime. Did they also fish in the fall season as well?

MRS. BIRD: In the fall season was the best because that's when the fish spawn. And in the wintertime they fish out ice fishing. And in the summertime, the – they were hard to catch. They weren't spawning. They were way out in the deep. My dad used to say that. So if you – if they did go out fishing, it was just like three, four fish. That's enough for the family to eat. In the fall time, that's when the fish spawned

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18 A.E. Forget, Indian Commissioner, to the Secretary, Department of Indian Affairs, December 9, 1897, LAC, RG 10, vol. 3912, file 111777-1 (ICC Exhibit 1a, p. 113).

19 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 26, Mary Rain).

20 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 78, Violet Poitras).

21 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 12–13, William Rain).

and they caught a lot of fish. Then they dried them up. They cut them up and, like, they smoked them up and they dry them and just like dry meat. And they just put them away for the winter. And then the springtime too, there was – in the springtime they trapped muskrats, beavers, everything.<sup>22</sup>

Other oral and documentary evidence suggests that some band members would have been absent from the reserves in the fall for hunting, although the evidence is conflicting and inconclusive.<sup>23</sup> The only contemporary document that mentions the absence of band members from their reserve is a letter to the department written in 1910 by Surveyor J.K. McLean, referring to the remaining Wabamun reserve, IR 133A. He explained that “the band is made up of Stonies and Crees, most of them being part of the old Wolf Creek Band. The Stonies are hunters and usually go in the fall to the [mountains] to hunt, while some of the Crees do a little farming.”<sup>24</sup>

Members of the Paul First Nation continued to rely mainly on their traditional pursuits of hunting and fishing for their livelihood, although they also planted gardens and began to take up cattle raising and some agriculture, beginning around 1900.<sup>25</sup> In his annual report for 1902, Indian Agent James Gibbons reported that they were “hunters, at which they make a fair living, besides they live on the banks of White Whale Lake, which is teeming with pike and whitefish and wild-fowl.”<sup>26</sup> In July 1904, Gibbons reported that “[h]unting and fishing are the main sources of their livelihood, cattle-raising comes next, and farming follows quite a bit behind and in a small way.” He explained that they were too far from markets to sell their crops, and that in any case, “[w]ith whitefish at their doors and fur-bearing animals at hand, they are prosperous.”<sup>27</sup>

22 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 60, Louise Bird).

23 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 28, Mary Rain; p. 39, Florence Bird; pp. 47, 50, 60–61, Louise Bird; p. 84, Violet Poitras; pp. 94–95, Mike Rain); see also Diary, A.E. Pattison [farm instructor], December 1920, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 577–81); H.S. Woollard, Farm Instructor, to unidentified recipient, November 1921, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 584–85); H.S. Woollard, Farm Instructor, to unidentified recipient, December 1921, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 586–87); James Kerr, Farm Instructor, to unidentified recipient, September 1934, LAC, RG 10, vol. 10409, file Shannon Box 30, pt B (ICC Exhibit 1a, pp. 642–43).

24 J.K. McLean to Mr Scott, November 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 458).

25 James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 12, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 158 (ICC Exhibit 1a, p. 118).

26 James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 8, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 147 (ICC Exhibit 1a, p. 139).

27 James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 27, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 157 (ICC Exhibit 1a, p. 159).

### Leadership

As stated before, Paul assumed leadership of the First Nation after the death of Ironhead in 1887 and retained that official role until 1901, when he was deposed from office. An Order in Council, dated September 12, 1901, states:

On a report dated 4th September, 1901 from the Superintendent General of Indian Affairs, stating that it has been represented to him by the Indian Commissioner for Manitoba and the North West Territories that Chief Paul, of the White Whale Lake Band, Edmonton Agency, North West Territories, is incompetent to hold the position of Chief for the reason that he has killed cattle on the reserve without authority and endeavoured to get his Indians to act in a like manner. He also used abusive language to the Agent for punishing a trader who sold liquor to the Indians and encouraged the trader to return to the Reserve during the absence of the Agent. At the beginning of haying he left the reserve on a visit to Morley, taking a number of young men with him.

The Minister recommends as such conduct must have a very bad effect upon the Indians of the band and thus retard their progress, that under Section 75 of the Indian Act ... Chief Paul be deposed and that he be declared ineligible to hold office for three years.<sup>28</sup>

On the recommendations of farmer W.G. Blewett and Indian Agent James Gibbons, Indian Commissioner David Laird recommended to the department that no new chief be elected to take Paul's place.<sup>29</sup> At the time, there were three recognized headmen: Simon, Reindeer, and David Yellowhead (also known as David Bird).<sup>30</sup> Following Paul's removal from office, the First Nation pushed for the appointment of a new chief.

On July 15, 1903, Assistant Indian Commissioner J.A. McKenna informed the department: "I am advised by the Agent at Edmonton that the Indians of Paul's band at a meeting held in his presence elected Didymus Burntstick as Chief in succession to the deposed Paul."<sup>31</sup> McKenna advised that unless the Indian Agent had received authority for the election, Burntstick "cannot be recognized as Chief."<sup>32</sup> In response, DSGIA Frank Pedley confirmed that "the

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28 Order in Council PC 1762, September 12, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 134).

29 W.G. Blewett, Farmer, Edmonton Agency, to the Indian Agent, Edmonton Agency, August 5, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 130); James Gibbons, Indian Agent, Edmonton Agency, to unidentified recipient, August 12, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 131); David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 19, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 132).

30 Treaty annuity payroll, "Paul's Band paid at White Whale Lake," July 25, 1901, LAC, RG 10, vol. 9434 (ICC Exhibit 1b, pp. 8–9). See tickets no. 25 (Simon), no. 28 (David Yellowhead), and no. 41 (Reindeer).

31 J.A. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, July 15, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 143).

32 J.A. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, July 15, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 143).

Department did not authorize Agent Gibbons to hold the election referred to.”<sup>33</sup> The First Nation had asked that the department appoint the same man as headman a few years earlier, but the request seems not to have been approved, as Didymus Burntstick was not designated as a headman on the paylists and never received the extra annuity associated with that position.<sup>34</sup>

At the end of 1903, the First Nation asked the Secretary, through Indian Agent Gibbons, “if it is the intention of the Department to authorize them to elect a Chief to succeed Paul, deposed.”<sup>35</sup> The Indian Agent was instructed to direct his communication to the Indian Commissioner instead, but there is no record of any further reply to this question.<sup>36</sup> Paul apparently complained to the department in 1905 “of some interference with or disregard of his rights as chief or headman.”<sup>37</sup> In response, Indian Commissioner David Laird informed the Secretary that there were two headmen in the band, David Yellowhead and Reindeer (Simon having died in 1904). No further response to Paul’s complaint is on record.<sup>38</sup>

Commissioner David Laird reported to the Secretary in May 1906 that

since the deposal of Chief Paul, White Whale Lake Band, Edmonton Agency, the Indians have repeatedly requested that another Chief be appointed in his place. The matter was brought to my attention by Mr. Inspector Markle after his last inspection of the Agency, and also by the Agent, and they recommend that David Bird be now appointed Chief of that Band. They say that they can testify to his sobriety and honesty, and that in their opinion if he is appointed, he will have a good influence over the Band.<sup>39</sup>

Laird concluded that “[u]nder the circumstances I would recommend that Bird be appointed Chief of the above Band for an indefinite period.”<sup>40</sup> This recommendation was approved, and David Yellowhead (also known as David

33 Frank Pedley, DSGIA, to the Indian Commissioner, July 21, 1903, LAC, RG 10, vol. 3940, file 121698-10, Reel C-10165 (ICC Exhibit 1a, p. 145).

34 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, November 23, 1900, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 121); Treaty annuity paylists, Paul’s Band, 1901–1910, LAC, RG 10, vols. 9434–43 (ICC Exhibit 1b). See ticket no. 22 (Didymus Burntstick).

35 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, December 3, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 151).

36 Frank Pedley, DSGIA, to James Gibbons, Indian Agent, Edmonton Agency, December 14, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 152).

37 Frank Pedley, DSGIA, to the Indian Commissioner, August 31, 1905, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 173).

38 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, September 12, 1905, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 175).

39 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 2, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 183).

40 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 2, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 183).

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Bird) signed the declaration of office with his “X” on May 25, 1906, and was appointed Chief of the Band.<sup>41</sup> The form, witnessed by agency interpreter John Foley, includes the Indian Agent’s statement that the declaration was “interpreted to him in my presence in the Cree language, which he understood.”<sup>42</sup> Following Bird’s appointment, the recognized leadership of the Paul First Nation included Chief David Bird and Headman Reindeer.

At a meeting with the Band in June 1906, J.A. Markle, the Inspector of Indian Agencies, was pressed to appoint “Ex-Chief” Paul and David Peter as “minor chiefs” or councillors. Inspector Markle noted:

Mr. Farmer Pattison stated that he would like to see both of these Indians holding these positions, because Paul had a great deal of influence with a section of the band and David Peter because he not only had a good deal of influence with a section, too, but he spoke and understood English and would be of considerable use as an interpreter, if given the position referred to.<sup>43</sup>

There is no record of the department’s response to this request.

### **Lead-up to Surrender of IR 133B**

On November 4, 1905, Inspector J.A. Markle reported that “[t]he Canadian Northern Railway Co. are now grading a line between the reserve and Edmonton” and would likely pass very close to a rich deposit of marl<sup>44</sup> on the Wabamun reserve.<sup>45</sup> Seven months later, on June 3, 1906, Indian Agent James Gibbons reported that “construction work is rapidly approaching Paul’s reserve on the line of the Canadian Northern railway,” and that the railway would cross approximately nine miles of the reserve.<sup>46</sup> Secretary J.D. McLean replied on June 13, 1906, that right of way plans had not yet been filed by the company and that “[t]he Department has made it a rule that no work of construction is to be commenced in any Indian Reserve, until the right of way

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41 J.D. McLean, Secretary, Department of Indian Affairs, to the Indian Commissioner, May 10, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 184); Declaration of “David Yellowhead, called also David Bird,” May 25, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 248).

42 Declaration of “David Yellowhead, called also David Bird,” May 25, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 248).

43 J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, pp. 201–2); see also J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, pp. 199–200).

44 Marl is a “white to gray accumulation on lake bottoms caused by precipitation of calcium carbonate (CaCO<sub>3</sub>) in hard water lakes. ... While it gradually fills in lakes, marl also precipitates phosphorus, resulting in low algae populations and good water clarity. In the past, marl was recovered and used to lime agricultural fields.” See online: [www.dnr.state.wi.us/org/water/fhp/lakes/under/glossary.htm](http://www.dnr.state.wi.us/org/water/fhp/lakes/under/glossary.htm) (accessed September 15, 2004).

45 Extract of letter from J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, November 4, 1905, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 177).

46 James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, June 3, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 185).

has been arranged for.”<sup>47</sup> The same day, Secretary McLean notified C.R. Stovel, the Right of Way Agent for the CNR, that “[i]n order to prevent any possible delay in your work of construction, it would be well to file the usual plan, duly certified by the Chief Engineer of Railways and Canals, together with your offer of the sum you are willing to pay for the right of way and damages.”<sup>48</sup> Stovel replied that the plans would be forwarded “very shortly.”<sup>49</sup> On June 16, 1906, Agent Gibbons reported that he valued the lands needed for the CNR right of way at \$25 per acre, up from his initial valuation of \$15 per acre, explaining that local land values were increasing and that “[t]he Indians would not be satisfied with less.”<sup>50</sup> There is no record of any discussions between the Crown and the First Nation with regard to this right of way.

Four days later, on June 20, 1906, the Paul First Nation signed a surrender for lease of “all those mines, deposits, beds, veins and seams of marl and sand lying under or on the surface of the Paul’s Indian Reserve.”<sup>51</sup> The surrender was confirmed by Order in Council on July 19, 1906.<sup>52</sup> (This surrender is not at issue in this inquiry.) On June 26, 1906, Inspector Markle reported that “about two days were taken up to secure this surrender,” during which a number of issues were discussed, including a resurvey of the reserve boundaries that season.<sup>53</sup> Markle explained that he promised to have the survey made because “neither Mr. Pattison [the farming instructor] or the Indians were sure as to where the boundary line is at various points.”<sup>54</sup> Within the same report, he noted:

I was asked for an opinion as to whether it would be wise for the band to surrender that portion of the reserve that lies north of the projected line of railway together with that portion of the reserve within township No. 53, providing the railway company build on the projected survey. I did not give the Indians a definite answer to the question for several reasons. Should the railway locate on the

47 [J.D. McLean], Department of Indian Affairs, to James Gibbons, Indian Agent, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 186).

48 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 188).

49 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, June 16, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 189).

50 James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, June 16, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 190).

51 Surrender for Lease, June 20, 1906, DIAND, Indian Lands Registry, Reg. No. X14133 (ICC Exhibit 1a, p. 191).

52 Order in Council, July 19, 1906, DIAND, Indian Lands Registry, Instrument no. X14133 (ICC Exhibit 1a, pp. 207–8).

53 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, pp. 198–99).

54 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 199).

projected line and you think it advisable to secure this surrender[,] it is my opinion that it can be secured. That portion within township 53 is well adapted for summer residences, one of the best spots on the lake[,] and the Indians seem to be aware that it is valuable for this reason.<sup>55</sup>

On June 27, 1906, Markle reported to the Indian Commissioner that the CNR had surveyed a line through the Wabamun reserve, and “it is thought that it will be graded, if not ironed, this season to the northern shore of the Lake.”<sup>56</sup> The line was projected to run through the northern part of the reserve (IR133A) and then turn northwards through IR133B before crossing the narrows of the lake. In this regard, he noted that “one of the Indians stated that it might be in their interests to surrender that portion of the reserve which will lie north of the railway and the portions of sections within townships No. 53.”<sup>57</sup>

Shortly thereafter, on July 5, 1906, Edmonton realtor A.W. Taylor wrote to the Superintendent General of Indian Affairs, Frank Oliver, regarding the proposed CNR line through “Powell’s” reserve. He explained:

The railway divides the reservation leaving a strip upon the East side of ½ mile on the North, which means that the Indians will constantly have to travel across the track, which to them is objectionable, and especially so as the land to the North will contain only a small acreage.

Bird the Chief would consent to a sale of the portion we have mentioned and they are anxious to find out if such an arrangement would meet with the approval of your department.

We came across some members of this band a few days ago, and as the writer for many years was associated with the Indian Department, he undertook to lay this matter before you. We would point out that if your Inspector would place a value upon the land in question, we would be in a position to find you and the Indians a purchaser.<sup>58</sup>

J.D. McLean replied to Taylor on July 16, 1906, stating that, “as the Canadian Northern Railway has not yet filed its plan, showing the proposed right of way across the Reserve, the Department is not, at present, in a position to deal with the matter.”<sup>59</sup>

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55 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 200).

56 J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 201).

57 J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 201).

58 A.W. Taylor, W.S. Weeks Company, Edmonton, to SGIA, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).

On July 31, 1906, Secretary McLean informed Indian Agent Gibbons that “an application has been made to the Department for a portion of Indian Reserve 133A and B.” He explained that the application was for the “Broken Sections 1, 6 and 12, forming the North West corner of Indian Reserve on Lake Wabamun, containing about 550 acres,” a description that corresponds to the location of IR 133B. McLean instructed Gibbons to “report, as early as possible whether this land is occupied by the Indians and whether there are any improvements thereon, and if not would the Band be willing to surrender the land to be sold for their benefit.”<sup>60</sup>

As instructed, Agent Gibbons held a meeting with members of the Band to ascertain their views on the proposed surrender. He reported on August 15, 1906:

I have the honor to inform you that in compliance with the request conveyed in your letter above referred to I held a conference with the Indians of Paul's Band on the 14th instant with the object of ascertaining whether or not they were favorable to surrendering the Broken Sections 1, 6 and 12, forming the North West corner of their Reserve.

I found that the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite or resort should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them.

The location may be considered unoccupied and unimproved as the two or three living in shacks on it make no claim for compensation.

If it be decided by the Department to accede to this proposition, and I would strongly recommend it should, it might be well to send the Form of Surrender as soon as convenient, and to instruct Mr. McLean, who is about due there, to make the necessary surveys.<sup>61</sup>

News of the proposed surrender travelled quickly. C.W. Cross, Attorney General for Alberta, wrote to the Deputy Minister of the Interior three days after the meeting, asking how the sale of “the Indian Section at White Whale Lake, which I understand the Indians are prepared to sell[,] is to be handled.”<sup>62</sup> Dominion Land Surveyor J.K. McLean, who was on his way to Paul's reserve to resurvey the reserve boundaries, wrote to the Secretary on

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59 J.D. McLean, Secretary, Department of Indian Affairs, to W.S. Weeks Company, July 16, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 206).

60 J.D. McLean, Secretary, Department of Indian Affairs, to James Gibbons, Indian Agent, July 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 210).

61 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

62 C.W. Cross to W.W. Cory, Deputy Minister of the Interior, August 17, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 217).

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August 18, 1906, saying that “Mr. Gibbons the Agent informs me that there is some prospect of a further surrender at that Reserve,” and he asked that additional survey posts be put at his disposal.<sup>63</sup> He wrote to the department again on August 30, 1906, stating that the Wabamun reserve boundary survey was almost completed, and that he planned to leave for Edmonton on September 9 or 10 “unless otherwise instructed.”<sup>64</sup>

On September 1, 1906, DSGIA Frank Pedley authorized Indian Agent Gibbons to take a surrender of IR 133B.<sup>65</sup> On the same date, Surveyor McLean was instructed to “[s]ubdivide portion of White Whale Lake reserve proposed to be surrendered, 133 B.”<sup>66</sup> Also on that date, the Secretary wrote to the CNR Right of Way Agent, C.R. Stovel, to inquire “when we may expect a copy” of the right of way plans.<sup>67</sup> Stovel replied that the plans would be filed “at the earliest date possible.”<sup>68</sup>

On September 6, 1906, Surveyor McLean reported that “[w]ith regard to the subdivision into Town Lots of 133 B about to be surrendered, I am only able to re-run the roads laid out on the outside by the Dept. of Interior and run the line between the two ranges until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed.”<sup>69</sup>

### **Surrender of IR 133B**

Nine members of Paul’s band signed a surrender document for the surrender of IR 133B. This document is undated, although the surrender affidavit was dated September 13, 1906. The surrender document reads as follows:

Know all Men by these Presents, THAT WE, the undersigned Chief and Principal men of Paul’s Band Number 133A resident on our Reserve at White Whale Lake, known as 133A and B, in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN

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- 63 J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 218).
  - 64 J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, August 30, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 221).
  - 65 Frank Pedley, DSGIA, to James Gibbons, Indian Agent, September 1, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 222).
  - 66 J.D. McLean, Secretary, Department of Indian Affairs, to J.K. McLean, Dominion Land Surveyor, September 1, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 223).
  - 67 Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, September 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 224).
  - 68 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, September 4, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 225).
  - 69 J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

LORD THE KING, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in the White Whale Lake Indian Reserve in the Province of Alberta containing by admeasurement Six Hundred and Thirty-Five acres be the same more or less and being composed of all that portion of land situate at the northwest corner of the White Whale Lake Indian Reserve aforesaid, known as Indian Reserve No. 133B, being composed of a part of projected Section Six, Township Fifty-Three, Range Three, and parts of projected Sections One and Twelve, Township Fifty-Three, Range Four, All west of the Fifth Meridian.

TO HAVE AND TO HOLD the same unto His said Majesty THE KING, his Heirs and Successors forever, in trust to sell the same 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.

AND upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our credit and the interest thereon paid to us and our descendants annually or semi-annually as to the Department of Indian Affairs may seem best in our interests.<sup>70</sup>

The document bears the X marks of six male band members, including Chief David Bird, Paul, and Didymus, as well as the signatures of David Peter, Baptiste Peter, and John Rain. The name “Reindeer” also appears on the document but is not accompanied by his mark. The document is witnessed by Indian Agent James Gibbons, A.E. Pattison, Surveyor J.K. McLean, and his assistant W.R. White.<sup>71</sup> No information is available to indicate whether an interpreter was present.

Seven of the nine signatories to the surrender received annuities as “men” on the Paul Band’s July 20, 1906, payroll. The remaining two, Baptiste Peter and Enoch Bird, were not paid as men until later years. Baptiste Peter was first paid as a man on his own ticket on the 1908 payroll, along with one woman.<sup>72</sup> The note beside his mother’s ticket, where he was previously paid, states “B[oy] now M[an].”<sup>73</sup> No further information is available regarding Baptiste Peter’s age at the time of the 1906 surrender. Enoch Bird, the son of Chief David Yellowhead, was first paid as a man on his own ticket in 1909, along with one woman.<sup>74</sup> The note beside his father’s name states, “Boy as man No. 71.”<sup>75</sup> The Registered Indian Record for Enoch Bird notes that he was born in

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70 Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229–30).

71 Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 231).

72 Treaty annuity payroll, Paul’s Band, July 11, 1908, LAC, RG 10, vol. 9441 (ICC Exhibit 1b, p. 42). See ticket no. 70 (Baptiste Peter).

73 Treaty annuity payroll, Paul’s Band, July 11, 1908, LAC, RG 10, vol. 9441 (ICC Exhibit 1b, p. 39). See ticket no. 10 (Peter’s widow, Emma).

1879, which would make him 26 or 27 years of age at the time of the 1906 surrender.<sup>76</sup>

The surrender affidavit, dated September 13, 1906, was signed by Chief David Bird and Indian Agent James Gibbons, and it was sworn before a Justice of the Peace in Wabamun, Alberta. Agency interpreter John Foley witnessed the affidavit.<sup>77</sup>

There is little oral history surrounding the surrender of IR 133B. The Elders do not recall hearing about any meetings or votes to surrender or sell the land.<sup>78</sup> However, some understood that the land was leased or loaned rather than sold.<sup>79</sup> At the community session, Elder Mary Rain repeated the Stoney word that her grandmother used to describe what had happened to the land and explained that it meant “the land was loaned.”<sup>80</sup> It is unclear how the idea of a lease originated, although Elder Mary Rain recalls that Indian Agent Bristow gave them this information.<sup>81</sup> Elder Lloyd Saulteaux recalled that his grandfather, Joe House, told him about the lease while fishing. “And he started telling us, you know, he said that in my time I wouldn’t be able to see this land, he told me. I was young. He said, But you will if you look after yourself. You’ll see that day, he said. When the lease ends, he told me. And I said, What lease? It was new to me. And he started telling me, Well Kapasiwin is leased for 99 years.”<sup>82</sup>

Violet Poitras, the great-granddaughter of Didymus Burntstick, heard from her father that Moonlight Bay was where the Burntsticks lived and that, one day, Didymus Burntstick was told to “get out of that land.”<sup>83</sup> She explained:

He just said the – they had to move from there when they were living there. When my grandpa and them were living there – this is probably before the time my dad was born, my grandpa – that would be Didymus Burntstick – when they were living there, they had to move from there. So that must have been before the railroad track went through there. Maybe that’s why they were told to move. I don’t know.

74 Treaty annuity payroll, Paul’s Band, July 10, 1909, LAC, RG 10, vol. 9442 (ICC Exhibit 1b, p. 46). See ticket no. 71 (Enoch Bird).

75 Treaty annuity payroll, Paul’s Band, July 10, 1909, LAC, RG 10, vol. 9442 (ICC Exhibit 1b, p. 44). See ticket no. 28 (David Yellowhead).

76 Registered Indian Record for Enoch Bird, DIAND, Genealogical Unit, Indian Register, Paul Band (ICC Exhibit 1f).

77 Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 238).

78 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 11, 16–18, William Rain; p. 24, Mary Rain; pp. 50, 65–67, Louise Bird; p. 89, Violet Poitras; p. 96, Mike Rain).

79 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 25, 32, 35, Mary Rain; p. 40, Florence Bird; p. 82, Violet Poitras; p. 94, Mike Rain; p. 103, Lloyd Saulteaux).

80 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 35, Mary Rain; p. 36, Francis Bull).

81 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 25, Mary Rain).

82 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 102–3, Lloyd Saulteaux).

83 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 76–77, 79, Violet Poitras).

They didn't say anything about why they had to move. They just said KA OTE AN A MOKE (Phonetic) they took the land back. We have to go. That's all he said. I wish he would have said more.<sup>84</sup>

When asked who told Didymus Burntstick to leave, Ms Poitras explained: "Well, the only thing my dad used to say was ... the white people came there and told them to get out."<sup>85</sup> She did not recall her father telling her anything about her grandfather, Didymus Burntstick, or the Band signing a surrender document.<sup>86</sup>

### **Reports on the Surrender**

On September 13, 1906, Agent Gibbons returned the signed surrender document to the department, with no further account of the surrender meeting.<sup>87</sup> The documentary record contains no indication of any voters list or any record of the surrender vote. In a letter to Inspector Markle, dated October 24, 1906, Agent Gibbons commented with regard to the surrendered land: "This is in respect to beach, scenery and situation the most desirable site on the Lake and should[,] and I think will, net the Indians a pot of money. So you see we are embarked in the real estate business, and will have the red flag out for some time."<sup>88</sup>

Surveyor J.K. McLean wrote two letters to the department on September 17, 1906, which offer more detail about the meeting and what was discussed. The first letter, addressed to Secretary McLean, acknowledged the department's previous instructions to subdivide IR133B and reported on his progress in the subdivision survey.

I beg to acknowledge receipt of telegram instructing me to subdivide Indian Reserve 133 B into town Lots. The surrender was not completed until the 11 Inst[ant] and in the meantime I ran the outside streets. I have commenced the subdivision into town lots of about one half the Reserve[,] leaving the balance of 320 acres as Blocks, with the streets located.

The whole of that portion to be subdivided into town lots is covered with a thick growth of poplar about 3 inches in diameter or with a heavy growth of willow. ... The most of the Lots are good, specially those along the Lake which are very fine. I may say from a fairly intimate knowledge of the Lake that this is by far the finest town plot site to be found. Some 1/4 sections outside the Reserve have been subdivided, but on none of them are the Lots as fine as on 133 B.

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84 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 82, Violet Poitras).

85 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 88, Violet Poitras).

86 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 89, Violet Poitras).

87 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, September 13, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 239).

88 James Gibbons, Indian Agent, to Mr. Markle, October 24, 1906, LAC, RG 10, vol. 10416, Shannon Box 56(a) (ICC Exhibit 1a, p. 259).

It was decided at the meeting with the Indians when the surrender was given to reserve the Beach from being sold, a width of about 150 feet along the Lake including a street to be reserved from sale by the Department, such width or widths to be decided by myself when making the survey.<sup>89</sup>

The second letter, addressed to DSGIA Frank Pedley, reported the discovery of a burial ground within the surrendered plot and the reaction of Headman Reindeer to the surrender:

In subdividing Indian Reserve 133 B into town lots I find that a small Indian Burying Ground occupies a prominent position on one or two of the most valuable lots. Its existence was not mentioned at the meeting when the surrender was taken, nor do I think it was known to Mr. Agent Gibbons. It appears that the Indians who lived on 133 B always refused to use the regular Burying Ground at the Mission which is on 133 A.

Those who had used the small ground were present at the meeting and signed the surrender excepting one named Reindeer. The latter is a Headman very old and feeble and refused to sign or speak. I think however he feels aggrieved, as a few days ago his tepee was on one of the street lines and before we could offer to assist in lowering it he rushed out and cut it on each side from top to bottom.<sup>90</sup>

The graves were eventually relocated to the mission property on IR133A.<sup>91</sup>

#### **Order in Council PC 1931, September 27, 1906**

On September 20, 1906, Prime Minister Wilfrid Laurier, on behalf of the Superintendent General of Indian Affairs, submitted the surrender of IR133B to the Governor in Council for approval.<sup>92</sup> The confirming Order in Council, dated September 27, 1906, reads as follows:

On a memorandum, dated 20th September, 1906, from the Superintendent General of Indian Affairs, submitting a surrender, in duplicate, made on the 11th day of September, 1906, by Paul's Band of Indians, No. 133a, of a parcel of land (described in the surrender) comprising an area of six hundred and thirty-five acres of their reserve, known as the White Whale Lake Reserve, numbered 133a and 133b, near Edmonton, in the Province of Alberta, the said surrender having been made with a view to the land covered thereby being sold for the benefit of the band.

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89 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).

90 J.K. McLean, Dominion Land Surveyor, to Frank Pedley, DSGIA, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 242).

91 Voucher, March 14, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 294).

92 Wilfrid Laurier, for SGLA, to Governor General in Council, September 20, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 295).

The Minister recommends, the surrender having been duly authorized, executed and attested in the manner required by the 39th section of the Indian Act, that the same be accepted by the Governor in Council, under the provisions of the said section ...<sup>93</sup>

Section 39 of the 1886 *Indian Act* sets out the following statutory requirements for a valid surrender:

39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:-

- (a) 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; but 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.
- (b) 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 one 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 Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, 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; and 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.<sup>94</sup>

### **Report on the Subdivision Survey**

Surveyor J.K. McLean completed the subdivision survey of IR 133B on October 12, 1906,<sup>95</sup> and made his report of the season's surveys to the department on October 27, 1906. With regard to surveys carried out at the "White Whale Lake Reserves," he stated:

The boundaries of these reserves having become obliterated were re-newed and will prevent encroachments by settlers who are becoming numerous in the neighbourhood.

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93 Order in Council PC 1931, September 27, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 250).

94 *Indian Act*, RSC 1886, c. 43, s. 39 (amended by SC 1898, c. 34, s. 3) (ICC Exhibit 6a, pp. 20–21).

95 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, October 12, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 255).

Reserve No. 133 B was surrendered by the Indians while I was there, and was subdivided into townlots according to the desire of the Indians.

These lots are situated at the east end of White Whale or Wabamun Lake with a fine view of the lake. There is also a fine sand beach along the front. It is expected that these lots will sell quickly to parties who desire to visit the lake during the summer. By railway, they are about forty miles from Edmonton. The Canadian Northern Railway will run through both these reserves, and is now graded to within about three miles of the east boundary of 133 A.<sup>96</sup>

Newspaper advertisements appearing in late 1906 show that a number of townsites were being established along the shore of White Whale Lake. These townsites were portrayed as summer resorts, and advertisements emphasized the “glorious beach of fine sand” and the coming CNR line, which would make the lake a short two-hour journey from Edmonton.<sup>97</sup>

Surveyor McLean forwarded the official plan of the “Townplot of Wabamun” to the department on February 26, 1907, along with valuations. He again noted that the lots fronting on the lake “would sell readily for use [sic] as a summer resort,” but the sale of the remainder of the lots “depends entirely upon a Railway station being located on the town plot.”<sup>98</sup> By this time, the Grand Trunk Pacific Railway had also notified the department of its intent to build through the Paul Band’s reserve (discussed in more detail below), and both rights of way appear on the plan prepared by Surveyor McLean.<sup>99</sup> He recommended that the lots be sold by auction in Edmonton, stating, “it would be well if possible to come to some arrangement with the Railway Companies regarding a station or siding before the Lots are sold.”<sup>100</sup>

McLean later reported to Frank Pedley that the only “Indian improvements” on the surrendered town plot were “a log shack 20' x 20' with pole and sod roof, floored, and two windows, value \$25.00,” belonging to

96 J.K. McLean, Dominion Land Surveyor, to SGIA, October 27, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 261).

97 “Silver Beach, New Summer Resort on White Whale Lake – Glorious Beach and Glorious Park,” *Edmonton Bulletin*, September 7, 1906, p. 4 (ICC Exhibit 1a, p. 227); see also advertisement, “Silver Beach, White Whale Lake,” *Edmonton Bulletin*, September 10, 1906, p. 6 (ICC Exhibit 1a, p. 228); advertisement, “Whitewood Sands Summer Resort Lots,” *Edmonton Bulletin*, September 11, 1906, p. 8 (ICC Exhibit 1a, p. 236); advertisement, “Silver Beach: The Best Beach on White Whale Lake,” *Edmonton Bulletin*, October 2, 1906, p. 3 (ICC Exhibit 1a, p. 253); Advertisement, “White Whale Beach,” *Edmonton Bulletin*, October 2, 1906, p. 2 (ICC Exhibit 1a, p. 254); copy of advertisement for “Wabamun Beach,” in *Kapasiwin: A History of Alberta's First Incorporated Summer Village*. ([Kapasiwin, Alta], 1987), 5 (ICC Exhibit 8a, p. 5).

98 J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 290).

99 J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 290); Natural Resources Canada, Plan 767 CLSR AB, “Plan of the Townplot of Wabamun on Indian Reserve No. 133B at the East End of Wabamun (White Whale) Lake,” surveyed by J.K. McLean, DLS, 1906 (ICC Exhibit 7i).

100 J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 291).

Didymus Burntstick.<sup>101</sup> This dwelling was located near the beach, about halfway between the northern and southern boundaries of the old reserve. Elder Violet Poitras recalled hearing that her great-grandfather, Didymus Burntstick, was told that he had to move, without explanation.<sup>102</sup> McLean made no mention of any other dwellings or improvements, although Agent Gibbons had previously reported that there were “two or three living in shacks” there.<sup>103</sup>

**Proposed CNR Right of Way through IR 133B, 1906–11**

As noted before, the CNR applied for a right of way through the Wabamun reserves on October 13, 1906.<sup>104</sup> At that time, the company’s right of way plans had not yet been approved by the Railway Commission. On October 24, 1906, Assistant Secretary S. Stewart informed the company that the lands for the right of way were valued at \$25 per acre,<sup>105</sup> a valuation the company found “unreasonably excessive.”<sup>106</sup>

In a letter written to the Right of Way Agent, C.R. Stovel, on November 7, 1906, Assistant Secretary Stewart first broached the subject of placing a station on the newly subdivided Wabamun town plot. He informed Stovel that the Indian Agent was looking into the matter of the valuation and continued:

I beg to inform you that this Department has laid out a number of lots near the lake, at the northwest end of the reserve. It is of course very desirable that [the] station should be located within the portion subdivided. I shall be obliged if you will ascertain and inform me whether your Company will arrange to place the station as desired by this Department.<sup>107</sup>

On November 10, 1906, Agent Gibbons wired the department to inform it that contractors for the CNR were ready to begin construction on the Wabamun reserves.<sup>108</sup> The company was immediately informed that it could

101 J.K. McLean to Frank Pedley, DSGIA, March 8, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 292). The dwelling was located on Block 4, lot 8.  
 102 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 82, Violet Poitras).  
 103 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).  
 104 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, October 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 256).  
 105 S. Stewart, Assistant Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, October 24, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 258).  
 106 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to S. Stewart, Assistant Secretary, Department of Indian Affairs, October 31, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 263).  
 107 S. Stewart, Assistant Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 7, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 265).



not proceed until a deposit of \$5 per acre was made “on account of right of way.”<sup>109</sup> The requested deposit was paid by the CNR on November 13, 1906.<sup>110</sup>

On December 1, Secretary McLean wrote to C.R. Stovel stating that the department might be prepared to accept a lower price for the right of way. He continued: “In this connection I beg to refer you to letter ... relating to the location of a station by your Company on that portion of the said Reserves which has been recently sub-divided into town lots. I shall feel obliged if you will consider the matter, and inform me of what the Company is prepared to do.”<sup>111</sup> Stovel replied on December 12 that he was “taking this matter up with Our Engineering Department and when in a position to do so, will communicate with you further.”<sup>112</sup>

On December 31, 1906, agents for the CNR submitted a proposal to DSGIA Frank Pedley for the “exploitation of a townsite at White Whale Lake, Alberta, on the Indian Reserve at that place.” The CNR requested that the Department of Indian Affairs place a 320-acre parcel of land (half the block surrendered) under the company’s control, in return for which the company would arrange for the survey and sale of lots within the townsite. For their services, the company would retain \$5,000 for the expenses of “plotting, surveying and registration of plans,” and “[a]fter such reimbursement the gross proceeds of sales shall be divided equally between the department and the company.”<sup>113</sup> Chief Surveyor Samuel Bray’s review of the proposal noted that the company’s costs were significantly more than what the department would likely spend for surveying and selling the entire 635 acres.<sup>114</sup> The proposal was apparently rejected, as there is no further mention of it in the historical record.

Mr Bray’s report, dated January 4, 1907, also noted:

The Canadian Northern Railway Company have applied for a station ground within the said block. It is to be assumed that they intend to establish a station there; I believe, however, that the Company is at liberty to move their station if they find it is

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108 James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, November 10, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 266).

109 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 267).

110 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, November 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 271).

111 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, December 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 280).

112 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, December 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 281).

113 Davidson and McRae, General Agents, Canadian Northern Railway Company, to Frank Pedley, DSGIA, December 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 283–84).

114 Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 285).

in their interest to do so. If the Station should not be established within the block the value of the lots will necessarily be depreciated.<sup>115</sup>

Bray recommended that “[t]he establishment of a station may properly be included in the negotiations for the purchase of the Right of Way.”<sup>116</sup> The matter of a station was brought up again with the CNR in June 1907.<sup>117</sup> On July 18, 1907, Stovel replied to inform the department that “[w]e cannot arrive at a decision in this matter until such time as we get our plans approved” by the Railway Commission.<sup>118</sup> In fact, the CNR’s right of way plans were not approved until two years later, in June 1909.<sup>119</sup> At that time, although the plans were approved, the company reported to the department that construction was halted “owing to the G.T.P. [Grand Trunk Pacific] location interfering with our line through the reserve,” and that nothing would be decided that year regarding the location of a station on the Wabamun reserve.<sup>120</sup>

Chief Surveyor Samuel Bray then recommended that the department notify the CNR that “the Right of way through the said 133B can no longer be held for them and that it is intended to sell the various town lots without reference to their proposed location.”<sup>121</sup> Stovel wrote on November 4, 1909, to request that “[p]ortions of Lots and blocks required by this Company for right of way purposes” be reserved from any sale. He also asked what price would be required by the department to “convey title for this right of way to this Company.”<sup>122</sup> McLean replied that “before quoting price for this Right of way ... this Department would like to be informed regarding your intention towards establishing a station on the town plot. It is noticed that a number of lots are taken in block 23. It is presumed that they are for that purpose.”<sup>123</sup>

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- 115 Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 285).
- 116 Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 286).
- 117 Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Pacific Railway Company, June 19, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 309).
- 118 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, July 18, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 311).
- 119 Extract from a letter from J.K. McLean to Frank Pedley, DSGIA, June 12, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 363).
- 120 W.H. Moore, Secretary, Canadian Northern Railway Company, to the Assistant Deputy Superintendent, Department of Indian Affairs, August 23, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 370).
- 121 S. Bray, Chief Surveyor, Department of Indian Affairs, to the Deputy Minister, October 1, 1909, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 372).
- 122 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, November 4, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 380).
- 123 Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 18, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 382).

Stovel replied on January 26, 1910, that the lands requested by the company included station grounds, but that “nothing definite has been decided regarding work west of Edmonton.”<sup>124</sup> Although the department requested “definite assurance” regarding the company’s intentions before agreeing to reserve the lots from the upcoming sale (which was held in May 1910), it was eventually agreed to reserve Block 23 from sale without any definite statement from the company.<sup>125</sup>

In November 1910, following the first auction sale of the Wabamun town plot, the CNR’s plans for its main line west of Edmonton were approved by the Minister of Railways, “with the stipulation that the line must not pass between the Grand Trunk Pacific line and the townsites of the same company.”<sup>126</sup> On July 31, 1911, Surveyor J.K. McLean informed the department that “[t]he Canadian Northern Railway Co. have abandoned that part of their line through the Wabamun Indian Reserve and are now building further north about 12 miles.”<sup>127</sup> On August 18, 1911, the CNR Right of Way Agent formally confirmed the company’s abandonment of the right of way.<sup>128</sup>

### **Construction of the Grand Trunk Pacific Railway Line through IR 133B**

During this same period, the Grand Trunk Pacific Railway Company (GTPR) established its railway line through the Wabamun reserves. The GTPR officially applied for a right of way on December 21, 1906.<sup>129</sup> The plans were approved by the Railway Commission on May 20, 1907,<sup>130</sup> and the department consented to the right of way by Order in Council on January 8, 1908.<sup>131</sup> Surveyor J.K. McLean informed the Deputy Minister on January 14, 1908, that

124 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, January 26, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 388).

125 Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, February 1, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 391); C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, February 16, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 394); Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, April 20, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 419).

126 “Approves C.N.R. Line to the Yellowhead,” *Edmonton Bulletin*, November 7, 1910, p. 6 (ICC Exhibit 1a, p. 457).

127 J.K. McLean to J.D. McLean, Secretary, Department of Indian Affairs, July 31, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 485).

128 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 18, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 496).

129 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to the Secretary, Department of Indian Affairs, December 21, 1906, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 282).

130 Board of Railway Commissioners for Canada, Order No. 3040, May 20, 1907, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 303).

131 Order in Council PC 36, January 8, 1908, DIAND, Indian Lands Registry, Instrument no. 17325 (ICC Exhibit 1a, p. 323).

the GTPR had declined to place a station on the Wabamun town plot, stating that doing so was impossible “on account of steep gradients.”<sup>132</sup> Instead, the company placed a station about a mile west, across the bay from the reserve. On March 6, 1908, Assistant Secretary Stewart forwarded the right of way valuation to the Grand Trunk Pacific Railway Company. The total valuation for the right of way within IR133B amounted to \$1,954 and included only the value of each lot crossed by the railway.<sup>133</sup> The valuation did not include any streets, lanes, or beachfront because the department did not intend “to make any sale of any portion of the streets.”<sup>134</sup> The GTPR forwarded payment for its right of way on March 14, 1908,<sup>135</sup> but it is not known when the company began construction on the reserve.

On July 31, 1908, Inspector Markle reported to the Indian Commissioner that “[t]he Paul’s Band of Indians expressed a willingness to give the Grand Trunk Pacific Railway Company a quarter interest in their town site on the shore of White Whale Lake providing the railway company will agree to locate and operate a station within the said area of land.”<sup>136</sup> A Band Council Resolution dated July 28, 1908, reads as follows:

We, the undersigned Chief and Principal Man of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as ‘The Paul’s Reserve’ do by these presents, certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose, according to the rules of the Band, and held in the presence of the Indian Agent for the locality on the 28th day of July, 1908, authorized The Honourable The Superintendent General of Indian Affairs to enter into an agreement with The Grand Trunk Pacific Railway Company for the placement and operation of a Station on its new line of railway and within Sec. 6, T’p. 53, R’ge 3 and West of the 5th.I.M. which portion of section was surrendered by our said Band on or about the 14th day of August, 1906, and on the further condition that if the said Grand Truck Pacific Railway Company agreeing to locate ing [sic] and operating a station on the said Sec. 6 herein described that the Honourable The Superintendent General of Indian Affairs has the full consent of our said Band to give to the Grand Trunk Pacific Railway Company one block of land – about three acres, more or less, for station grounds,

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- 132 J.K. McLean, Department of Indian Affairs, to the Deputy Minister, January 14, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, pp. 326–27); also J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, September 1, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 354).
- 133 S. Stewart, Assistant Secretary, Department of Indian Affairs, to D’Arcy Tate, Assistant Solicitor, Grand Trunk Pacific Railway Company, March 6, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, pp. 334–36).
- 134 J.D. McLean, Secretary, Department of Indian Affairs, to D’Arcy Tate, Assistant Solicitor, Grand Trunk Pacific Railway Company, August 31, 1907, no file reference available (ICC Exhibit 1a, p. 316).
- 135 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to the Secretary, Department of Indian Affairs, March 14, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 339).
- 136 J.A. Markle, Inspector, to the Indian Commissioner, July 31, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 350).

and, in addition, every fourth block of the subdivisions as made by Mr. J.K. McLean during the season of 1906 within Sections 6 and 1, T'p 53 and Ranges 3 and 4, and for so doing this shall be The Honourable Superintendent Generals sufficient authority.<sup>137</sup>

The resolution is signed by Chief David Bird and “principal man” Paul with their X marks, and witnessed by Agency interpreter John Foley, Inspector Markle, and Indian Agent Urbain Verreau.<sup>138</sup>

Indian Commissioner David Laird forwarded the Band Council Resolution to the department, commenting, “I do not know what the terms of the surrender are, but I may say that I regard it as a mistake to locate a townsite or railway station on a small surrendered area of an Indian Reserve.”<sup>139</sup> Secretary McLean replied to Commissioner Laird that “in reply to an enquiry made some time ago[, ] this Department has been informed by the Grand Trunk Pacific Company that it is practically impossible, on account of steep gradients[, ] to put a station in the town-plot laid out on the Indian Reserve No. 133B, otherwise the Company would willingly put a station there.”<sup>140</sup> Laird relayed this message to Markle, instructing him to “inform the Indians accordingly.”<sup>141</sup>

The Grand Trunk Pacific line became operational sometime before 1912, although the exact timing is uncertain.<sup>142</sup> Although the documentary evidence does not indicate that a fully functioning station was established on the Wabamun townsite, it appears that some kind of platform and station house were eventually placed there. Kapasiwin residents named it “Webster’s Crossing,” after the Immigration Agent William J. Webster, one of the beach lot purchasers and the first mayor of the village.<sup>143</sup>

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137 Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Instrument no. 11629 (ICC Exhibit 1a, p. 349).

138 Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Instrument no. 11629 (ICC Exhibit 1a, p. 349).

139 David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 14, 1908, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 351).

140 J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, September 1, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 354).

141 Indian Commissioner to J.A. Markle, Inspector of Indian Agencies, September 8, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 355).

142 J.K. McLean to J.D. McLean, Secretary, Department of Indian Affairs, August 24, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 498).

143 *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 71-72, 89, 115 (ICC Exhibit 8a, pp. 71-72, 89, 115); see also Bradley J. Favel, “An Analysis of the Paul Band Specific Claim, Mismanagement of the Sale of Reserve 133B, The Wabamun Townsite Lots,” prepared for the Specific Claims Branch, October 31, 1997, 13–15 (ICC Exhibit 3a, pp. 13–15).

### **Auction Sale, 1910**

Beginning in 1908, inquiries were made regarding the purchase of lots in the Wabamun townsite. The department's standard response was that the "subdivision at Lake Wabamun ... is not at present in the market."<sup>144</sup> In the fall of 1909, after much correspondence with the railway companies, the department finally decided to move towards selling the Wabamun town plot. Surveyor J.K. McLean reported to DSGIA Frank Pedley on September 26, 1909, that "the Minister has instructed me to re-open the lines and replant any missing posts on the town plot of Wabamun as he intends selling it this fall or winter."<sup>145</sup> On February 22, 1910, Surveyor McLean again reported to Pedley:

Last fall the Minister instructed me to go over the town plot of Wabamun and renew the lines and re-plant any missing posts with a view of putting this town plot on the market. Since then the Minister enquired what shape it was in and I informed him that we were endeavouring to have the Can. Northern Railway Co. locate a station.<sup>146</sup>

Surveyor McLean recommended that the lots requested by the CNR be reserved, that the railway company be required to place a deposit, and that the sale of the town plot "be held over in the meantime until say next fall when the question of the station may be finally decided."<sup>147</sup> However, on March 9, 1910, Frank Pedley instructed W.A. Orr, the Clerk in charge of the Lands Branch of the Department of Indian Affairs, to

arrange to sell by public auction as early in May as possible the lots indicated on the plan of the townsite of Waubanum, herewith; conditions are that each purchaser must put up a \$300.00 building within one year from the date of sale, 25% of the purchase money to be paid in cash, the balance in three annual instalments, with the usual rate of interest.<sup>148</sup>

A sale notice was prepared on April 2, 1910, which stated:

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144 See, for example, J.D. McLean, Secretary, Department of Indian Affairs, to P.O. Dwyer, April 27, 1908, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 348).

145 J.K. McLean to Frank Pedley, DSGIA, September 26, 1909, LAC, RG 10, vol. 4019, file 279393-5 (ICC Exhibit 1a, p. 371).

146 J.K. McLean to the Deputy Minister, February 22, 1910, LAC, RG 10, vol. 7667, file 22110-7 C.N., pt 1 (ICC Exhibit 1a, p. 395).

147 J.K. McLean to the Deputy Minister, February 22, 1910, LAC, RG 10, vol. 7667, file 22110-7 C.N., pt 1 (ICC Exhibit 1a, p. 395).

148 Frank Pedley, DSGIA, to Mr. Orr, March 29, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 396).

There will be offered by public auction at an upset price at the City of Edmonton, in the Province of Alberta, on Wednesday, the 11th day of May, at one o'clock P.M., the following lots in the townplot of Wabamun ... Block 1, lots 2-6, incl.; block 2, lots 1-6, incl.; block 3, lots 1-6, incl.; block 4, lots 1-6, incl.; block 5, lots 1-8, incl.; block A lots 1-8, incl.; block 10, lots 1-16, incl.; block 11, lots 1-16, incl.; block 12, lots 1-16, incl.; block 13, lots 1-16, incl.; block 14, lots 1, 2, & 31; block 19, lots 1-16, incl.; block 20, lots 1-16, incl.; block 21, lots 1-16, incl.; block 22, lots 1, 2, 3, 4, 5, 15 and 16.

The townplot in question is situate on White Whale or Wabamun Lake, about thirty miles west of Edmonton, and the lots are specially adapted for the building of summer residences.

The terms of sale will be one-quarter cash and the balance in three equal, annual instalments with interest at the rate of five per cent on the unpaid balance of purchase money. A building to cost at least \$300 to be erected on each parcel sold, within one year from the date of sale.<sup>149</sup>

The only lots offered for sale were those south of the GTPR right of way and west of Burntstick Avenue. The lands north of the GTPR right of way and east of Burntstick Avenue were not offered for sale in 1910 (including Block 23, reserved for the CNR).

On April 4, 1910, the department instructed the King's Printer to run the sale advertisements in the following eight newspapers, "one insertion each week for four weeks": the *Edmonton Bulletin*, *German Herold* (Edmonton), *Le Courrier de l'Ouest* (Edmonton), *Post* (Wetaskiwin), *Times* (Wetaskiwin), *Reporter* (Fort Saskatchewan), *Plain Dealer* (Strathcona), and *Manitoba Free Press* (Winnipeg).<sup>150</sup> The available advertising invoices show that the notices ran three times in all the papers except the *Edmonton Bulletin* and the *Manitoba Free Press*, which billed for four insertions of the notice.<sup>151</sup>

In addition, extra efforts were made to publicize the auction on the day before and on the day of the sale. Inspector Markle submitted vouchers to the department for posting 200 notices on May 10, and the distribution of

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149 Draft sale advertisement, April 2, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 398).

150 J.D. McLean, Secretary, Department of Indian Affairs, to the King's Printer, April 4, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 401).

151 Manitoba Free Press Co. to the Department of Indian Affairs, April 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 410); The Plaindealer Co. to the Department of Indian Affairs, April 16, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 412); Alberta Herold Publishing Co. Ltd. to the Department of Indian Affairs, April 28, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 423); Le Courrier de l'Ouest Publishing Co. Ltd. to the Department of Indian Affairs, April 28, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 424); The Weekly Chronicle to the Department of Indian Affairs, April 29, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 425); Bulletin Co. Limited to the King's Printer (Department of Indian Affairs), May 3, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 427); The Post to the Department of Indian Affairs, May 12, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 442).

1,000 handbills on the day of sale. Large advertisements were also placed in the *Edmonton Journal* and *Edmonton Bulletin* on the morning of the sale.<sup>152</sup> In his report to the department, Inspector Markle explained that

although it was regularly advertised I soon learned that many did not know of the sale. This forced me to the conclusion that it would be prudent to advertise it in larger print and with more space to attract attention and to get hand bills and distribute them on the morning of the sale.<sup>153</sup>

The Record of Sale shows that, of the 161 parcels put up for sale, only 42 were sold, realizing a total of \$4,954.<sup>154</sup> Of the 42 sale transactions, 32 were made at the upset prices, with the remaining 10 sales made slightly above the upset prices.<sup>155</sup> Almost all the sales were for the beachfront property south of the railway.

Most of the purchasers were Edmonton residents who each bought between one and four lots. Included among the purchasers were William J. Webster, the Agent for the Edmonton Immigration Agency (and son-in-law of Frank Oliver, the Superintendent General of Indian Affairs), two employees of the Dominion Lands Office, the clerk of the sale, the wife of the auctioneer, and Charles McLeod of the Seton Smith Company (the employer of Robert Smith, the auctioneer of the sale).<sup>156</sup> Inspector Markle commented that the auctioneer, Robert Smith, “assumed the payment of the 25% for several individuals.”<sup>157</sup>

### **Interim Period between Auctions, May 1910–June 1912**

After the auction in May 1910, inquiries regarding the unsold Wabamun townsite lots continued to trickle in. The majority were informed that the lands were “not at present in the market.” On August 27, 1910, Edmonton Immigration Agent W.J. Webster reported that “a number of parties have called here asking what lots were still vacant, and the prices.” He offered to take applications “from parties who wished to purchase at the upset

152 Voucher, May 10, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 428); Voucher, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, pp. 437–39); advertisement, *Edmonton Journal*, May 11, 1910 (ICC Exhibit 1a, pp. 440–41); J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, pp. 446–48).

153 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, part 1 (ICC Exhibit 1a, p. 444).

154 Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

155 Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

156 Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

157 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 444).



price” and commented: “I am satisfied that I could dispose of quite a number and you could allow me whatever commission you thought my services were worth.”<sup>158</sup> Webster was informed, however, that the lots were “not at present in the market for sale.”<sup>159</sup> He inquired again in May 1911, this time directly to Frank Oliver, asking if he could “arrange to have some person instructed to dispose of the lots.” He explained that “a great many persons have been coming to me asking if lots can be purchased there” and that “it is the wish of a great many to buy and erect buildings this season, if they can purchase lots at once.”<sup>160</sup> A memorandum to the Deputy Minister, dated May 31, 1911, recommended that, “provided it is the intention of the Department to dispose of same[,] they probably could be placed in the hands of our Agent at Edmonton for disposition at the upset price,” subject to the original building conditions.<sup>161</sup> Webster was informed on June 19, 1911, that the matter would be brought to the Minister’s attention “on his return to the city.”<sup>162</sup>

#### **Sale of Block 13 to the Alberta Sunday School Association**

In 1911, Block 13 of the town plot (south of the railway) was sold to the Alberta Sunday School Association. The department sold the block for \$293, or \$100 per acre (less than half the upset price of \$625). In a letter to Inspector Markle dated April 17, 1911, the General Secretary of the Association offered \$100 per acre for property in the town plot and noted:

I have just had a conversation with Hon. Frank Oliver, Minister of the Interior, in which he expressed himself, on behalf of the Government, as being anxious to give our Association the most liberal terms possible on this property, and would agree to anything that would be satisfactory to the Indians themselves.<sup>163</sup>

A Band Council Resolution dated the next day, April 18, 1911, resolved to sell the land to the association for \$100 per acre,

on the condition that The Hon. Superintendent General of Indian Affairs purchases one hundred sacks of flour out of the proceeds of sale of the said land and causes

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158 W.J. Webster, Immigration Agent, Edmonton Agency, Department of the Interior, to the Superintendent, Indian Lands Department, August 27, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 454).

159 J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Webster, Immigration Agent, September 7, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 455).

160 W.J. Webster, Edmonton Agency, Immigration Branch, Department of the Interior, to Frank Oliver, Minister of the Interior, May 25, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 475).

161 Unidentified author, to the Deputy Minister, May 31, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 476).

162 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.J. Webster, June 19, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 479).

163 H.E. Kenny, General Secretary, Alberta Sunday School Association, to J.A. Markle, Inspector of Indian Agencies, April 17, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 461).

the said lot of flour to be equally distributed to the members of our said band in weekly distributions of ten sacks and that the remaining portion of the money from the sale of the land hereby authorized be funded for our benefit and the benefit of our people.<sup>164</sup>

Fourteen band members signed the resolution with their X marks, including Ex-Chief Paul.<sup>165</sup> It is not certain if there was a recognized chief at this time or if he signed the document. On April 21, 1911, Inspector Markle reported that he had discussed the proposed sale with the Band on a recent visit, during which they resolved to sell the lands to the association. He explained:

The Indians claimed that they had not heretofore received any portion of the proceeds of sale of land out of this townplot and that they [had] desired a portion. The claim seemed to me to be a reasonable one and as it would assist them while at work I agreed to it, subject to your approval.<sup>166</sup>

You are aware that the Railway Company declined to stop on the Indians Townplot, claiming the grade was too heavy. While I'm not an expert on such matters I question whether this was the true reason[,] for the grade does not appear to me to be of much account.

I favour this deal chiefly for the reason that if carried out the railway company will now have considerable business offered if it agrees to erect a platform at this point and stop when people desire to get off or on it's [sic] cars. The remaining portion of the plot will then be more saleable.

I may say that I was told that the Association already have the promise of help from the local officers of the railway company to get a platform erected at Wabamun and stops made at that point when business demands it.<sup>167</sup>

On May 16, 1911, W.A. Orr recommended to the Deputy Minister that, although the upset price for the lots was \$625, the deal should be approved "[i]n view ... of the resolution of the Indians, and the recommendation of Mr. Inspector Markle."<sup>168</sup> A marginal note on Frank Pedley's report to Frank Oliver states that, if 100 sacks of flour could be delivered to the Indians "at the price stated[,] sell."<sup>169</sup>

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164 Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 462).

165 Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 462). David Peter, Baptiste Peter, and John Rain all signed this BCR with their X marks. The same three individuals had signed the surrender of IR 133B in 1906 with their signatures.

166 J.A. Markle, Inspector, to the Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 463).

167 J.A. Markle, Inspector, to the Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 463-64).

168 W.A. Orr, In Charge, Lands and Timber Branch, Department of Indian Affairs, to the Deputy Minister, May 16, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 473).

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### **Auction Sale, 1912**

In the summer of 1911, Surveyor J.K. McLean visited the Wabamun reserve to conduct surveys in connection with the surrender of lands on IR133A (the Duffield townsite and surrounding farm lands). As noted above, that surrender is not at issue in this inquiry. While there, he reported to DSGIA Frank Pedley: “I met the Minister here today and he inquired if anything was being done towards cutting out the streets on the Wabamun Town Plot. ... He said he wished them completed and for me to state that he mentioned the matter to me.”<sup>170</sup> McLean also discussed the future sales of lots in the Wabamun town plot:

I also mentioned the selling of the Lots and recommended that they be put in the hands of the Indian Agent for sale to applicants and to this he was favourably inclined.

I may say people usually want summer resort Lots at irregular times, and there have been a number of inquiries about these. People would purchase if they could secure one when inclined. I do not think that at auction they would realize [any] above the upset price. The Town Plot is becoming a favourite picnic ground for Edmonton people, the second since my arrival is being held today.<sup>171</sup>

Some time later, it was decided to place the unsold lands surrendered in 1906 up for auction once again. An undated memo from Surveyor McLean notes the scheduled auction for the sale of the Duffield townsite and farm lands and suggests: “Would it not be well to have Town Plot of Wabamun sold at same time[?] Duffield and Wabamun Town Plots are on same Reserve.”<sup>172</sup>

On April 6, 1912, Surveyor McLean made a report to the Deputy Minister regarding the Wabamun townsite:

The Town Plot was laid out in 1906, chiefly with the expectation that it would become a summer resort as well as of commercial value.

At that time the Canadian Northern Railway was surveyed across the property and had some grading done within the Reserve as well as between Stony Plain town and the Reserve.

It was expected that a station would be placed on the Townplot by the C.N.R. As this Railway was unable to get the proper approval for its plans the G.T. Pacific

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169 Marginal note written by SGIA F[rank] O[liver] on memorandum from Frank Pedley, DSGIA, to Mr Oliver, May 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 474).

170 J.K. McLean to Frank Pedley, DSGIA, August 12, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 493).

171 J.K. McLean to Frank Pedley, DSGIA, August 12, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 493).

172 J.K. McLean to unidentified recipient, undated, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 517).

almost pre-empted the C.N.R. route and is now built across the Town Plot, while the C.N.R. is about 12 miles further north.

The Grand Trunk Pacific Railway located their station about a mile west across a bay of Wabamun Lake and a small village is now there.

The Indian Department town plot is now only of use for summer camping purposes.

...

Inquiries are made occasionally for the lots on the Lake Shore.

In accordance with the instructions of the Hon. Frank Oliver[, ] former Minister[, ] some of the streets were cut out last season with a view of improving the appearance of the lots. The streets so cleared extend back to Burntstick Avenue.

On some of the lots sold very nice cottages have been built. I think all the lots fronting on the water will now sell readily, and as the use of the beach has been reserved in common, some of the lots further back should sell.

This Town Plot has also become quite a favorite place for picnics and excursion parties from Edmonton.

Last season the G.T.P. stopped its trains for these parties and a platform for arriving and departing parties was spoken of.<sup>173</sup>

In regard to the remaining unsold lots, McLean recommended that

all that part of the Town Plot west of Burntstick Avenue be offered for sale at the same time as the sale of Duffield Town Plot and the surrendered sections of this Reserve. ...

...

I would also only register that part of the plan extending to Burntstick Avenue as I am doubtful if the remainder of the subdivision will sell as lots and it would save withdrawing the plan if we ever wanted to sell remainder as farm land.

The valuation made in expectation of the C.N.R. crossing the property is sufficiently high and need not be changed.<sup>174</sup>

On April 12, 1912, a sale notice for the upcoming auction was prepared, and W.A. Orr recommended that the advertisements be run in 10 newspapers, including two Edmonton papers.<sup>175</sup> The advertisement stated that “357 lots in the townplot of Wabamun, on White Whale Lake” would be up for sale, although this time there was no mention of the \$300 building condition.<sup>176</sup> It

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173 J.K. McLean to the Deputy Minister, April 6, 1912, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 521–22).

174 J.K. McLean to the Deputy Minister, April 6, 1912, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

175 W.O. Orr, In Charge, Lands and Timber Branch, to the Deputy Minister, April 12, 1912, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 525).

176 Sale advertisement, April 12, 1912, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 523).

appears that these 357 lots correspond to all the unsold lots west of Burntstick Avenue, both north and south of the GTPR right of way.

The Record of Sale shows that 49 parcels were sold at the June 12, 1912, auction, for a total of \$5,352. Thirty-one of the sales were for beach lots – the remaining beach lots south of the railway and most of the beach lots to the north. All but four of these lots sold above their upset price, some for as much as four times that price. In addition, 18 inland lots were sold, mostly at or slightly above their upset prices. As in the first sale, most of the purchasers were from Edmonton – although in this case there were only 12 buyers in all, some of whom obtained as many as 13 lots each.<sup>177</sup> Purchasers included the auctioneer, Frank Waddington, and P.O. Dwyer, who also purchased lands at the Alexander sale in 1906.<sup>178</sup> Many of the 1912 sales, especially those for the beach lots north of the railway, were later cancelled.

#### **Incorporation of the Village of Wabamun Beach (Kapasiiwin), 1913**

On October 25, 1913, the Alberta legislature passed an act to incorporate the Village of Wabamun Beach on part of the Wabamun town plot. The village included the land south of the Grand Trunk Pacific right of way and west of Burntstick Avenue, “together with the road allowances or streets between and adjoining said lands, and together with the beach of Wabamun Lake adjoining the said lands so far as the same has been patented by the Crown.”<sup>179</sup> The village was later renamed the Village of Kapasiiwin Beach. (Contrary to the wording of the legislation, the road allowances and beach were not actually included in the village, but were transferred to the province in 1932. This issue is discussed in more detail below.)

In 1915, the Secretary-Treasurer of the village inquired whether the department would enforce the building condition before issuing patents to lot owners.<sup>180</sup> W.A. Orr replied on October 26, 1915, that “some little time ago it was considered advisable to waive the condition in regard to the erection of buildings on lots sold in this townplot, and the Department will issue patents for lots to parties entitled thereto upon payment in full therefor.”<sup>181</sup>

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177 Record of Sale for “Wabamun Lots,” June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40).

178 Record of Sale for “Wabamun Lots,” June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40); Peggy Martin-McGuire, “First Nation Land Surrenders on the Prairies: 1896–1911,” prepared for the Indian Claims Commission, September 1998, pp. 360, 478 (ICC Exhibit 8e, pp. 360, 478).

179 *An Act to Incorporate the Village of Wabamun Beach*, SA 1913, c. 40 (ICC Exhibit 6c, p. 2).

180 W.W. Gould, Secretary-Treasurer, to the Secretary, Department of Indian Affairs, October 21, 1915, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 554).

181 W.A. Orr, In Charge, Lands and Timber Branch, Department of Indian Affairs, to W.W. Gould, October 26, 1915, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 555).

**Subsequent Sales, 1912–32**

Following the second auction sale, sporadic inquiries were made about the purchase of the unsold lots surrendered in 1906. The documentary record is incomplete with regard to the sales after 1912, but it appears that, as late as 1919, some prospective purchasers were informed that the lots were “not in the market.” An exception was made for the Village of Kapasiwin, which began purchasing lots after its incorporation as a village in 1913. Beginning in approximately 1920, the department began selling lots at the upset price to prospective purchasers when applications were made to either the Indian Agent or directly to the department.

In 1922, the Rotary Club of Edmonton applied to purchase or lease a block of beach lots in the Wabamun townsite, north of the railway (Block H).<sup>182</sup> Indian Agent George Race valued the block at \$500 per acre and suggested that the club be allowed a 10-year lease at between \$125 and \$150 per year.<sup>183</sup> Lots 7 and 8 of this block were originally valued by Surveyor J.K. McLean in 1907 at \$60 and \$70 each.<sup>184</sup> It is not known what the original valuation was for the remaining six lots in Block H. Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, submitted the proposal to the Minister and recommended that a 10-year lease be granted, at an annual rental of \$150.<sup>185</sup> For reasons unknown, the Minister’s private secretary replied that “it is desirable that informal permission to use this Indian ground be issued from year to year without rental, and in the event of a sale of this land being under consideration, the Rotary Club should be given first opportunity of purchasing.”<sup>186</sup> It does not appear that this arrangement was ever implemented. Indian Commissioner W.M. Graham informed the department on August 4, 1922, that, “after thorough consideration of the matter,” the Rotary Club had decided to look for a campsite elsewhere.<sup>187</sup>

182 J.W. Mould, Chairman, Boys’ Work Committee, Rotary Club of Edmonton, to Chas. Stewart, Minister of the Interior, May 9, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 588–89).

183 [George H.] Race to the Secretary, Department of Indian Affairs, June 11, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 594).

184 Record of Sale for “Wabamun Lots,” June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40).

185 D.C. Scott to Mr. Featherston, June 12, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 595).

186 J.E. Featherston, Private Secretary, Minister’s Office, Department of Indian Affairs, to D.C. Scott, June 28, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 597).

187 W.M. Graham, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 4, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 600). The documentary record indicates that a boys’ camp was eventually established on the adjacent Block G, but it is not known whether there is any connection to the application by the Rotary Club of Edmonton. (See Exhibit 1a, p. 689.)

### **Transfer of Streets and Lanes to the Province of Alberta, 1932**

On December 9, 1931, the Village Council of Kapasiwin wrote to the Secretary, stating that it wished to make “certain regulations with regard to the use of streets” and requesting the transfer of the streets and lanes within the village to the Province of Alberta by Order in Council.<sup>188</sup> It later clarified that “[t]he municipality of the village of Kapasiwin does not extend to the North and East of the railway, consequently we are interested only in the streets and lanes lying to the South and West of the railway.”<sup>189</sup> As requested, the streets and lanes south of the railway and west of Burntstick Avenue were transferred to the province by Order in Council PC 278 on February 5, 1932.<sup>190</sup> The transferred streets and lanes included the beach and Wapumeg Avenue (the road allowance between the beachfront lots and the beach).

Following this Order in Council, the Village Council applied for the closure of Wapumeg Avenue, along the beach. The Alberta Board of Public Utility Commissioners issued an Order dated February 28, 1935, closing Wapumeg Avenue and granting an easement to each beach lot owner of all the land between the lot and the water’s edge.<sup>191</sup> The closure of Wapumeg Avenue is not surprising, considering that, as early as 1922, some of the cottagers were reported to have cottages encroaching on the road allowance.<sup>192</sup> It was later reported by the Sunday School Association that a fence had been erected by the beach lot owners at the rear of all the beach lots in 1932, a fence that ran the full length of Gibbons Avenue, from the railway to the southern boundary of Block 1.<sup>193</sup> The effect of this fence and the later easement was, effectively, to grant a private beach to the owners along the waterfront.<sup>194</sup> This action also closed off access to the beach for all inland lot owners, except for a small public area at the north end of the village. In 1953, this arrangement was formalized by a resurvey, which extended all the beach lots to the water’s edge and added the road allowances west of Gibbons Avenue to the adjoining lots.

188 Abbot and McLaughlin, Barristers and Solicitors, to the Secretary, Department of Indian Affairs, December 9, 1931, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, pp. 620–21).

189 Abbot and McLaughlin, Barristers and Solicitors, to T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, January 9, 1932, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 624).

190 Order in Council PC 278, February 5, 1932, DIAND, Indian Lands Registry, Instrument no. 11627 (ICC Exhibit 1a, p. 626).

191 Order 7486, Board of Public Utility Commissioners for the Province of Alberta, February 28, 1935, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 645–46).

192 Annie A. Davies to the Honourable Charles Stewart, October 13, 1922, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, pp. 601–4).

193 W. Dredge, Secretary, Edmonton United Church Sunday School Association, to the SGIA, July 12, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 649).

194 *Kapasiwin: A History of Alberta’s First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 3–4, 101, 103, 119 (ICC Exhibit 8a, pp. 3–4, 101, 103, 119). A public beach was apparently reserved at the north end of the Village of Kapasiwin, but it is unknown how many years that area remained open to the public. The public beach was surveyed into lots and sold by the village in 1953. (See Exhibit 8a, pp. 3–4, 83.)

The public beach north of Block A was also subdivided into new lots and sold.<sup>195</sup>

In 1937, the Edmonton United Church Sunday School Association (the owners of the camp on Block 13) complained to the department regarding the privatization of the beach, to which they no longer had access. In their letter, the association asked for any advice that would enable its members “to regain the privileges that have been taken from them as their camp site is of no use under existing conditions.”<sup>196</sup> The department replied that it could not offer any assistance, and the association apparently sold the camp site to the village that same year.<sup>197</sup>

### **Lands Returned to Reserve Status, 1936**

In 1936, all the unsold lands east of Burntstick Avenue in the surrendered IR 133B, totalling 420 acres, were returned to reserve status. Order in Council PC 1248 reads in part:

And Whereas the Superintendent General of Indian Affairs reports that it has been found that this area of 635 acres will not be required for the Townplot of Wabamun, and that the Indian Reserve as it now stands is not large enough for the Indians; and

That as additional agricultural lands are required, it is considered advisable that a portion of the surrendered area remaining unsold be again added to the reserve;

The following is a description of the portion so desired,

All that parcel of land containing four hundred and twenty acres, more or less ... lying east of the east limit of Burntstick Avenue ... except the right of way of the Grand Trunk Pacific Railway.<sup>198</sup>

### **Interest Distribution Payments, 1942, 1945, and 1949**

According to a 1981 historical report on the Paul First Nation, three interest payments were made to band members in the 1940s.<sup>199</sup> These payments were apparently made to fulfill the terms of surrender which required that interest on the IR133B sale revenue be “paid to us and our descendants annually or

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195 Natural Resources Canada, Plan F4249 CLSR AB, “Re-Plot, Plan of Re-subdivision of Part of the Townsite of Wabamun (Kapasawin Beach),” surveyed by John H. Holloway, ALS, 1953 (ICC Exhibit 7L).

196 W. Dredge, Secretary, Edmonton United Church Sunday School Association, to the SGIA, July 12, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 649–50).

197 J.C. Caldwell, Chief, Reserves Division, to W. Dredge, July 23, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 652); *Kapasawin: A History of Alberta's First Incorporated Summer Village*, ([Kapasawin, Alta], 1987), 100 (ICC Exhibit 8a, p. 100).

198 Order in Council PC 1248, May 29, 1936, DIAND, Indian Lands Registry, Instrument no. L11630 (ICC Exhibit 1a, p. 647).

199 See Donna Gordon, “Paul’s Band: A History of Its Land,” prepared for TARR/IAA, May 1981 (ICC Exhibit 2a).



semi-annually as to the Department of Indian Affairs may seem best in our interests.”<sup>200</sup>

The first payment of \$5,450 was made on August 27, 1942, and represented a \$25 payment to each of 218 people. The second payment of \$1,095 (\$5 to each of 219 people) was made on May 2, 1945. The third and final payment of \$610 (\$5 to each of 122 people) was made on July 15, 1949. It is not known why the number of people paid at the third payment was so much lower than at the previous payments. The total interest payments made to the Paul band members on account of IR133B sales amounted to \$7,155.<sup>201</sup>

### **Further Sales and Requests for the Return of Surrendered Lands**

Up until 1944, lots continued to be sold on an ad hoc basis, at the upset price placed by Surveyor J.K. McLean in 1907. During this period, Kapasiwin residents purchased the remaining lots in the west halves of Blocks 10–12 to ensure privacy for their adjacent beach lots.<sup>202</sup> The department also allowed the village to exchange patented lots in Blocks 12, 20, and 21 (still unsold, surrendered land as of 1981) for other lots within the townsite.<sup>203</sup>

Following an inquiry in September 1944 regarding the purchase of unsold lots north of the railway, the department instructed the Indian Agent to conduct a revaluation of the requested lots before a sale would be made.<sup>204</sup> Local Indian agents were again instructed to carry out revaluations of the unsold lots in 1945 and 1946.<sup>205</sup> There is no record of whether these revaluations were completed, although it appears that the department continued to sell lots at the original upset prices.

200 Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 230).

201 Donna Gordon, “Paul’s Band: A History of Its Land,” prepared for TARR/IAA, May 1981, p. 12 (ICC Exhibit 2a, p. 12). No further documentation is on record pertaining to these interest payments.

202 Registrar of Indian Lands Patents, Department of Indian Affairs, to the Registrar of Titles, Edmonton, June 7, 1934, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 638); see also H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 715); *Kapasiwin: A History of Alberta’s First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 3–4 (ICC Exhibit 8a, pp. 3–4).

203 McCuaig and Parsons, Barristers and Solicitors, to the Superintendent of Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, July 8, 1944, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 654); see also Duplicate Certificate of Title, June 18, 1940, DIAND, Indian Lands Registry, Instrument no. 11628 (ICC Exhibit 1f, p. 18). The lands returned to the department were valued at \$180 in total; the lands acquired by the village through the exchange were valued at \$150 in total, based on original 1907 valuations.

204 D.J. Allan, Superintendent, Reserves and Trusts, to W.H. Giddy, October 14, 1944, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 657).

205 D.J. Allan, Superintendent, Reserves and Trusts, to J.T. Faunt, Acting Indian Agent, January 26, 1945, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 662); and D.J. Allan, Superintendent, Reserves and Trusts, to J.T. Faunt, Indian Agent, May 22, 1946, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 667).

In July 1947, Indian Agent E.A. Robertson asked the department to inform him whether Blocks 23–27 were still part of the town plot, as they were “fenced in and included in the Band pasture.”<sup>206</sup> D.J. Allen, the Superintendent of Reserves and Trusts, replied: “I can find nothing on record to show these blocks as different from the others, despite the fact they are fenced. They are still part of the Townplot regardless of their use as band pasture.”<sup>207</sup> However, it was recommended to the Deputy Minister in November 1947 that “Blocks 23 to 27, inclusive, which have for years been enclosed in the Band pasture,” be reconstituted as part of IR133B.<sup>208</sup> On December 8, 1947, the Agent was informed that the Minister had approved this recommendation; however, no action was taken in the matter for some time.<sup>209</sup>

In 1951, all of Block E (along the beach, north of the railway) was sold to the Department of National Defence for the sum of \$400, reserving all mines and minerals.<sup>210</sup> These lands were valued by Surveyor J.K. McLean in 1907 at \$660, and originally sold in 1912 for \$1,480, although those sales were later cancelled.<sup>211</sup> Also in 1951, Indian Agent E.A. Robertson apparently submitted another revaluation of the unsold lots within the town plot, although this revaluation has not been located.<sup>212</sup>

In July 1952, H.N. Woodsworth, the Edmonton Agency Superintendent, reported that

on June 27, 1952, during a treaty payment on the Wabamun Indian Reserve, the Chief and Council of the Paul’s Band requested that no further land sales be made from lands surrendered for sale and not yet sold. Both [Regional Supervisor of Indian Agencies] Mr. Gooderham and the Council were concerned as to whether mineral rights have been reserved where land sales have been made up to date. Neither Mr. G.H. Gooderham or myself were aware of the facts. ...

It would be appreciated if you would review and advise us of all the land yet not sold in the surrendered portions of the Wabamun Indian Reserve.<sup>213</sup>

206 E.A. Robertson, Indian Agent, Edmonton Agency, to Indian Affairs Branch, Department of Mines and Resources, July 29, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 668).

207 D.J. Allan, Superintendent, Reserves and Trusts, to E.A. Robertson, Indian Agent, September 23, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 671).

208 Director, to the Deputy Minister, November 22, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 674).

209 D.J. Allan, Superintendent, Reserves and Trusts, to E.A. Robertson, Indian Agent, December 8, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 675).

210 Order in Council PC 144, January 12, 1951, DIAND, Indian Lands Registry, Instrument no. 11595 (ICC Exhibit 1a, p. 686).

211 Record of Sale for “Wabamun Lots,” June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 538).

212 Acting Superintendent, Reserves and Trusts Division, to H.N. Woodsworth, Indian Superintendent, July 28, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 689).

Woodsworth also noted that “[i]t is considered, as an alternative to sell, that the band will be willing to lease these [lands] rather than sell them.”<sup>214</sup> A marginal note on this letter indicates that mines and minerals were reserved only on sales made since January 1947.<sup>215</sup> That same month, the department instructed Woodsworth to review Robertson’s 1951 valuations of all the unsold lots in the town plot, in view of the large number of applications being received to purchase lots.<sup>216</sup>

On October 1, 1952, the Paul First Nation signed two Band Council Resolutions. The first granted an easement to Calgary Power along the eastern boundary of Pattison Avenue, which extended 25 feet into Blocks 23–27 (the unsold surrendered land used as band pasture).<sup>217</sup> The second resolution requested the cancellation of the sales of Blocks 23–27 and the portion of Block 22 lying north of the railway.<sup>218</sup>

On October 8, 1952, Woodsworth responded to the department’s request for valuations of the unsold Wabamun townsite lots and made a number of recommendations for dealing with the unsold lands. He informed the department that “the Indians of the Paul’s Band are strongly opposed to the selling of any more of their land” and that the future value of the unsold lots “can reasonably be expected to be very high especially with the advent of Calgary Power into the area.”<sup>219</sup> Woodsworth recommended that Blocks 22–27 be returned to the First Nation, “as this area is part of the Indians pasture” and was required for their growing cattle herds. This is the same land that the Minister had agreed should be returned to reserve status in 1947. Woodsworth further recommended that Blocks B, 6–8, and most of Blocks 14–17 “be not sold or leased unless by permission of the Indian Council. It may be the sale of this Block of land should not be entertained.”<sup>220</sup> Finally, he recommended that the remaining lots in Blocks H, J, and 18 (at the north end

213 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687).

214 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687).

215 Marginal notation written on letter from H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687). The available sales documentation suggests that mines and minerals were not reserved on some sales made as late as 1953. (See Exhibit 1f.)

216 Acting Superintendent, Reserves and Trusts Division, to H.N. Woodsworth, Indian Superintendent, July 28, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 689–90).

217 Band Council Resolution, October 1, 1952, DIAND, Indian Lands Registry, Instrument no. 11631 (ICC Exhibit 1a, p. 692).

218 Band Council Resolution, October 1, 1952, DIAND, Indian Lands Registry, Instrument no. 11631 (ICC Exhibit 1a, p. 693).

219 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 694).

220 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 694–95).

of the Wabamun town plot) be sold, since a summer resort had been established in that area. He noted that “the Indians would of course benefit more from a lease of the land” rather than a sale, although this would impose hardships on “organization[s] of campers” located there.<sup>221</sup>

### **Return of Blocks 22–27 to Reserve Status, 1953**

In consideration of the “considerable agitation” of Paul First Nation to have its band pasture (Blocks 23–27 and part of Block 22) returned to the reserve, G.H. Gooderham, the Regional Supervisor of Indian Agencies, recommended the return of Blocks 23–27 to reserve on February 11, 1953.<sup>222</sup> The department informed him:

On advice received from the Departmental Legal Adviser, it is considered necessary for the incorporation into a Reserve of lands that have been surrendered, that the consent of the membership of the Band concerned be first obtained. In other words, it must be done in the same manner as it was released. Should the Band Council wish to proceed with their plan, arrangements should be made for the convening of a meeting of the membership at some convenient date, and have the membership vote on a Resolution requesting that these five blocks be again taken into the Reserve.<sup>223</sup>

On May 6, 1953, Superintendent Woodsworth reported that

at an interest payment held on the Wabamun Indian Reserve May 4, 1953, and at the request of the Paul’s Band Council, a vote was taken, which is herewith attached, from the band membership voters who voted on a resolution of the Band Council dated October 1, 1952, requesting that Blocks 23 to 27 Lots 9, 10 and 11 and in Block 22 in the Townplot of Wabamun be returned to Wabamun Indian Reserve and the jurisdiction of the Band Council.<sup>224</sup>

Woodsworth attached a voters list, which records a vote of 68 in favour out of 69 members present.<sup>225</sup> A note beside the name of Peggy Paul, marked present at the meeting, states: “[D]id not vote[,] refused.”<sup>226</sup>

221 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 695).

222 G.H. Gooderham, Regional Supervisor of Indian Agencies, to the Superintendent, Reserves and Trusts, Indian Affairs Branch, February 11, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 696). Although this letter refers only to Blocks 23–27, the lots in Block 22 lying north of the railway were later returned to reserve status as well.

223 L.L. Brown, Superintendent, Reserves and Trusts, to G.H. Gooderham, Regional Supervisor of Indian Agencies, February 24, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 697).

224 H.N. Woodsworth, Superintendent, Edmonton Agency, to G.H. Gooderham, Regional Supervisor of Indian Agencies, May 6, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 702).

225 Complete List of Voters, May 4, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 703–7). There were 106 eligible voters listed on the voters’ list; the remaining 37 voters were marked absent.

By Order in Council PC 1953-1178, dated August 5, 1953, the department returned 23.6 acres of the Wabamun town plot to the reserve. The transferred land contained Blocks 23–27 and the part of Block 22 north of the railway, “together with the intervening streets and lanes,” “subject to an easement for an electric power transmission line granted Calgary Power Limited.”<sup>227</sup>

### **Further Sales and Band Requests for the Return of Lands, 1953–58**

On December 17, 1953, L.L. Brown, the Superintendent of Reserves and Trusts, informed Edmonton Agency Superintendent Woodsworth that arrangements had been made for a reappraisal of the remaining unsold lots in the Wabamun town plot. He explained that since Blocks 22–27 had been returned to the reserve, “we now assume that the Band as a whole, would not oppose further sales of other lots at this time.”<sup>228</sup>

Woodsworth replied on February 11, 1954, that “[t]he Indians of the Paul’s Band desire the return of as much unsold land in the Townplot of Wabamun and other land surrendered by them to their ownership.”<sup>229</sup> Therefore, “in the best interests of the Department,” he recommended that the east halves of Blocks 10–12, and all of Blocks 19–21 (south of the railway), as well as Blocks B, 6–8 and 14–17 (north of the railway), be returned to the Band’s ownership. He also again recommended the sale of unsold lots in Blocks H J, 9 and 18 (the resort area north of the railway).<sup>230</sup> Woodsworth concluded by noting that “I do not consider it in the interests of the Indians of the Paul’s Band that at any time they lose control of any further lands by sale with the exceptions mentioned.”<sup>231</sup> These recommendations echo similar suggestions previously made by Woodsworth on October 8, 1952.

L.L. Brown responded on March 4, 1954, requesting that the First Nation submit a Band Council Resolution requesting the withdrawal of unsold lots in Blocks 10–12 and 19–21 from sale. He stated that “we believe as you do that their return to the Reserve would be just as beneficial to the Paul’s Band as would any monies that may be received from the sale of these lots.”<sup>232</sup> At the

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226 Complete List of Voters, May 4, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 706).

227 Order in Council PC 1953-1178, August 5, 1953, DIAND, Indian Lands Registry, Instrument no. 11632 (ICC Exhibit 1a, p. 710).

228 L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, December 17, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 714).

229 H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 715).

230 H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 715–16).

231 H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 716).

same time, he noted that there might be legal complications associated with the return of those lands to band ownership, owing to the incorporation of the lots within the Village of Kapasiwin and the previous transfer of the streets and lanes to the Province of Alberta.<sup>233</sup> Brown's response did not address the matter of other lands referred to in Woodsworth's recommendation. As requested, the First Nation signed a Band Council Resolution on April 5, 1954, requesting that Blocks 10–12 and Blocks 19–21 be “returned to the ownership of the Paul's Band and that any road allowances involved in the area also be returned to the ownership of the Paul's Band.”<sup>234</sup>

In a letter dated May 7, 1954, Superintendent Woodsworth forwarded the Band Council Resolution to the department and relayed the request of “the Chief and Council of Paul's Band” that Blocks B, 6–8 and 14–17 also be “withdrawn and returned to the Paul's Band ownership.”<sup>235</sup> Sales of lots in the townsite north of the railway continued until at least 1958, including lots from Blocks 8 and 17, which the First Nation had requested be returned to reserve status.

### Unsold Lands

On December 10, 1958, the First Nation signed a Band Council Resolution requesting that all unsold lots within the Wabamun town plot be withheld from sale for the following five years.<sup>236</sup> It is not known if there were any further sales during or after this five-year period. In 1961 and 1962, the First Nation granted easements to Calgary Power for a right of way over some of the unsold lots north of the railway, on the condition that the land under the easement could be used for “pasture or agriculture.”<sup>237</sup> As of 1981, there were 143 unsold lots within the Wabamun town plot, divided into two clusters:

- The east halves of Blocks 10–12, and all of Blocks 19–21, all south of the railway;

232 L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, March 4, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 717).

233 L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, March 4, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 717).

234 Band Council Resolution, April 5, 1954, DIAND, Indian Lands Registry, Instrument no. 11632 (ICC Exhibit 1a, p. 718).

235 H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, May 7, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 719).

236 Marginal note written on Loose Leaf Land Sales Ledger, Wabamun Band, Sale 149 (ICC Exhibit 1e, p. 3). A copy of the original Band Council Resolution has not been located.

237 Band Council Resolution, October 5, 1961, DIAND, Indian Lands Registry, Instrument no. L10984 (ICC Exhibit 1a, p. 747); Band Council Resolution, May 30, 1962, DIAND, Indian Lands Registry, Instrument no. L10985 (ICC Exhibit 1a, p. 748).

- Blocks B, 6, 7, part of 14, 15, 16, and six lots in Block 17, all north of the railway.<sup>238</sup>

A 1995 Memorandum of Intent between Canada and the First Nation outlines a plan to return these lands to the First Nation, although no final agreement has yet been reached.<sup>239</sup>

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238 Donna Gordon, "Paul's Band: A History of Its Land," prepared for TARR/IAA, May 1981, pp. 12–13 (ICC Exhibit 2a, pp. 12–13).

239 Working copy, "Memorandum of Intent regarding proposed arrangements to resolve the jurisdictional and administrative problems arising out of the 1906 and 1911 surrenders of Paul Indian Reserve Land," November 23, 1995 (ICC Exhibit 3a, pp. 42–50).

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# **INDIAN CLAIMS COMMISSION**

## **BLOOD TRIBE/KAINAIWA BIG CLAIM INQUIRY**

### **PANEL**

Commissioner Daniel J. Bellegarde (Chair)  
Commissioner Alan C. Holman

### **COUNSEL**

For the Blood Tribe/Kainaiwa  
Ken McLeod / Eugene Creighton / Joanne Crook / Melanie Wells

For the Government of Canada  
Douglas Faulkner

To the Indian Claims Commission  
John B. Edmond / Diana Kwan

**MARCH 2007**



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## **SUMMARY**

### **BLOOD TRIBE/KAINAIWA BIG CLAIM INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Blood Tribe/Kainaiwa: Big Claim Inquiry* (Ottawa, March 2007), reported (2009) 22 ICCP 209.

*This summary is intended for research purposes only. For a complete account of the inquiry, the reader should refer to the published report.*

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman

**Treaties** – Treaty 7 (1877); **Reserve** – Surrender – Reserve Creation; **Indian Act** – Surrender; **Treaty Land Entitlement** – Date of First Survey; **Fiduciary Duty** – Treaty Land Entitlement; **Alberta**

#### **THE SPECIFIC CLAIM**

The Blood Tribe has long pursued its claim to the Big Claim lands. This claim involves the area between the Kootenay (Waterton) and Belly Rivers, the location of the southern boundary of the reserve, and an outstanding treaty land entitlement. The Blood Tribe submitted its claim in July 1996 under the current Specific Claims Policy of the Department of Indian Affairs and Northern Development (DIAND). Supplemental submissions were made in December 1997. Canada, advising of its preliminary review in November 1999, stated that there was no outstanding lawful obligation with respect to the claim. The Blood Tribe made further submissions in March 2000, and, in November 2001, Canada advised that no outstanding obligation existed with respect to the treaty land entitlement aspect of the claim. All parts of the claim were rejected by Canada in November 2003.

The Blood Tribe formally requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim in January 2003.

#### **BACKGROUND**

The Blood Tribe is a member of the Blackfoot Confederacy, which also includes the Siksika, and the Piikani (Peigan) in Alberta, and the Blackfeet Nation of Montana. The traditional territory of the Blackfoot Confederacy is the area between the North

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Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west, and the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers extending to the mountains at the international boundary.

Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east-west line located 14 miles north of the international boundary. By the time Treaty 7 was concluded on September 22, 1877, the Blood Tribe's way of life in its home base was in transition. The buffalo were becoming extinct; meanwhile, colonization and settlement brought whiskey traders and new diseases to the area. Treaty 7, concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe, was intended to open lands to settlers while ensuring reserve lands for Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, an Order in Council was issued, authorizing a surrender of the Blood Tribe's portion of the joint reserve at Bow River, with a view to setting aside a reserve near Fort Kipp. Following a surrender in September 1880, lands were selected for the Blood Tribe reserve.

The Blood Tribe reserve was surveyed twice. In 1882, a 650-square-mile reserve, large enough for 3,250 people and located between the Belly and St Mary Rivers with the southern boundary located nine miles north of the international border, was surveyed by John Nelson, Dominion Land Surveyor. The second survey, in 1883, moved the southern boundary of the reserve farther north, resulting in a 547.5-square-mile reserve surveyed for approximately 2,737 people.

In 1887, a group of Mormons arrived from Utah and settled near Lee's Creek at what eventually became the town of Cardston. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883. Much confusion surrounded the reserve's southern boundary, with the result that Indian Agent William Pocklington requested a map showing its exact location. Once a map was received, Pocklington met with Red Crow and showed him where the southern boundary was located. He reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled

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to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the Department of Indian Affairs, and in 1888, the Mormons obtained Crown grants to the lands they had camped upon.

In 1889, an Order in Council confirmed the Blood Tribe reserve as surveyed in 1882 and amended in 1883.

### **ISSUES**

As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit? In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit? Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve? Was the reserve established by the Nelson survey work in 1882? If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883? Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve? If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?

### **FINDINGS**

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7, the Crown was nevertheless obligated to set aside a reserve for the Blood Tribe. Historical events show that the Crown and the Blood Tribe agreed that the reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a cognizable interest in its lands in the home base.

With respect to the surrender of the Blood Tribe's interest in the Bow River reserve, the panel finds that a surrender was required. The panel further finds that the statutory requirements of a meeting and a vote on the surrender did not take place, and, as a result, the *Indian Act* was breached. However, the effect of a breach of these statutory requirements is technical in nature and does not render the surrender invalid. In examining whether a breach of fiduciary duty occurred with respect to the surrender, the panel concludes that the Blood Tribe did not abnegate its decision-making power and that the surrender was not an exploitative bargain. No breach of fiduciary duty occurred with respect to the surrender.

As for when the Blood Tribe's reserve was established, the panel concludes that John Nelson's 1882 survey established the reserve. Although the panel is mindful that the 1883 survey is acknowledged as confirming the reserve, the panel states that the circumstances surrounding the 1883 survey warrant careful examination. Because the reserve was established in 1882, a surrender was necessary in 1883 to move the southern boundary. Also, the panel concludes that the Crown failed to fulfill its fiduciary obligations with respect to the movement of the southern boundary.

With respect to the treaty land entitlement (TLE) portion of this inquiry, the panel notes that the parties had agreed to limit their arguments to the date of first survey (DOFS) only and not address the remaining TLE issues. As the panel has concluded that the Blood Tribe's reserve was established in 1882, the panel also concludes that the DOFS is 1882.

#### **RECOMMENDATIONS**

Recommendation 1: That the claim for the Big Claim lands constituting the reserve not be accepted. The panel finds that the Blood Tribe reserve would at least be located within the Blood Tribe's home base, subject to the treaty land entitlement formula and the other terms of Treaty 7. Recommendation 2: That the claim that the 1882 Nelson survey established the Blood Tribe reserve be accepted. The panel finds that the 1882 Nelson survey established the reserve and that a surrender was required to move the southern boundary. Recommendation 3: That the date of first survey for the Blood Tribe be accepted as 1882.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*R. v. Marshall*, [1999] 3 SCR 456; *Cardinal v. R.*, [1982] 1 SCR 508; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Semiabmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (Fed. CA); *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245; *Ross River Dena Band v. Canada*, [2002] 2 SCR 816; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.



### **ICC Reports Referred To**

*Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Peepseekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004); *Kabkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3; *Mamaleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Nak'azdli First Nation: Abt-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Taku River Tlingit First Nation: Wenab Specific Claim Inquiry* (Ottawa, March 2006); *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

### **Treaties and Statutes Referred To**

*Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966); Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); *Indian Act*, SC 1876.

### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 ICCP 171–85.

INDIAN CLAIMS COMMISSION PROCEEDINGS

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**COUNSEL, PARTIES, INTERVENORS**

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## PART I

### INTRODUCTION

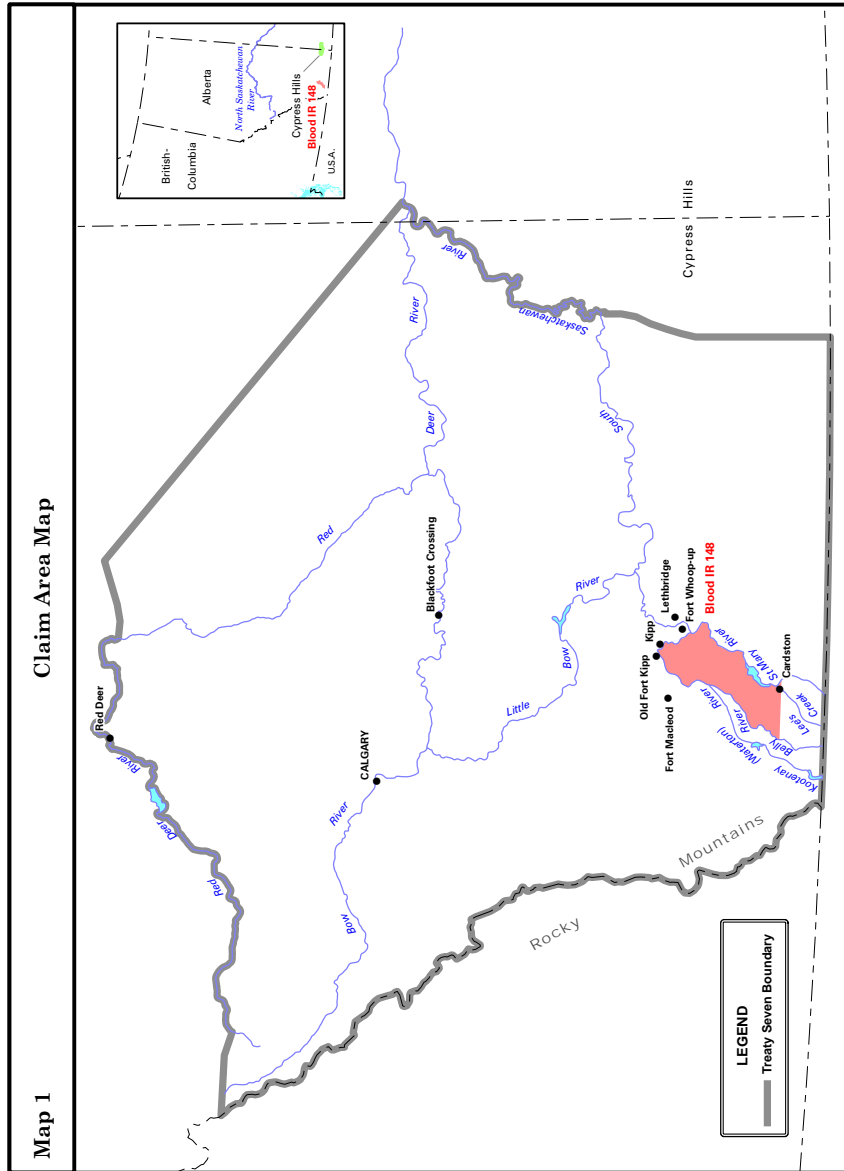
The Blood Tribe is a member of the Blackfoot Confederacy, which also includes the Siksika, and the Piikani (Peigan) in Alberta, and the Blackfeet<sup>1</sup> Nation of Montana. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west, while the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers extending to the mountains at the international boundary.

Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east–west line located 14 miles north of the international boundary. The area between the Kootenay (Waterton) and Belly Rivers is the subject of part of this inquiry, while the location of the southern boundary of the reserve forms another part of this inquiry. In addition, the Blood Tribe states that there is an outstanding treaty land entitlement.

By the time Treaty 7 was concluded on September 22, 1877, the Blood Tribe's way of life in its home base was in transition. The buffalo were becoming extinct; meanwhile, colonization and settlement brought whiskey traders and new diseases to the area. Treaty 7, concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe, was intended to open lands to settlers while ensuring reserve lands for Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

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1 The Blackfeet Nation refers to the member nation located in Browning, Montana. During the time of treaty and afterwards, the term "Blackfeet Nation" was used to describe the Blackfoot Nation, known today as the Siksika.



The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, an Order in Council had been issued, authorizing a surrender to be taken of the Blood Tribe's portion of the joint reserve at Bow River, with a view to setting aside a reserve near Fort Kipp. Following a surrender in September 1880, lands were selected for the Blood Tribe reserve.

The Blood Tribe reserve was surveyed twice. In 1882, a 650-square-mile reserve, large enough for 3,250 people and located between the Belly and St Mary Rivers with the southern boundary located nine miles north of the international border, was surveyed by John Nelson, Dominion Land Surveyor. The second survey, in 1883, moved the southern boundary of the reserve farther north, resulting in a 547.5-square-mile reserve surveyed for approximately 2,737 people.

In 1887, a group of Mormons arrived from Utah and settled near Lee's Creek at what eventually became the town of Cardston. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883. Much confusion surrounded the reserve's southern boundary, with the result that Indian Agent William Pocklington requested a map showing its exact location. Once a map was received, Pocklington met with Chief Red Crow and showed him where the southern boundary was located. He reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south, and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the Department of Indian Affairs, and, in 1888, the Mormons obtained Crown grants to the lands they had camped upon. In 1889, Order in Council PC 1151 was passed, confirming the Blood Indian Reserve (IR) 148 as surveyed in 1882 and amended in 1883.

The Blood Tribe has long pursued a claim related to the Big Claim lands and the setting aside of a reserve. The treaty land entitlement aspect of this claim was originally submitted in the 1970s, and, in 1980, a joint task force was formed to review the claim. In August 1981, the joint task force recommended that Canada pursue further research to review the population of the Blood Tribe at the relevant time. Canada opted to not follow the recommendation. The Blood Tribe submitted a revised claim under the current Specific Claims Policy of the Department of Indian Affairs and Northern Development (DIAND) in July 1996. Supplemental submissions

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were made in December 1997. Canada, advising of its preliminary review in November 1999, stated that there was no outstanding lawful obligation with respect to the claim. The Blood Tribe made further submissions in March 2000, and, in November 2001, Canada advised that no outstanding obligation existed with respect to the treaty land entitlement aspect of the claim. All parts of the claim were rejected by Canada in November 2003.

Prior to receiving a letter rejecting all aspects of its claim, the Blood Tribe formally requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim in January 2003. A full historical background to the First Nation's claim is found at Appendix A to this report. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B to this report. During the course of the inquiry, one interim ruling was issued, regarding the admission of 17 statutory declarations.<sup>2</sup>

#### MANDATE OF THE COMMISSION

The mandate of the Indian Claims 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 the claim was already rejected by the Minister."<sup>3</sup> This Policy, outlined in DIAND's 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.<sup>4</sup> The term "lawful obligation" is defined in *Outstanding Business* as follows:

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 an obligation arising out of the *Indian Act* or other statutes per-

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<sup>2</sup> Diana Kwan, Associate Legal Counsel, Indian Claims Commission, to Ken MacLeod, Walsh Wilkins Creighton, and Douglas Faulkner, DIAND, Legal Services, April 1, 2005 (ICC file 2108-25-03). This ruling on the Admission of 17 Statutory Declarations is reproduced as Appendix C to this report.

<sup>3</sup> 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.

<sup>4</sup> Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

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BLOOD TRIBE/KAINAIWA – BIG CLAIM INQUIRY

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- taining 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.<sup>5</sup>

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<sup>5</sup> *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

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## PART II

### FACTS

The Blood Tribe, a member of the Blackfoot Confederacy, is based in southern Alberta on the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east–west line located 14 miles north of the international boundary. The Blood Tribe has a long history in this area. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west. However, the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers from their confluence to the mountains at the international boundary.

The area between the Kootenay (Waterton) and Belly Rivers is characterized by the Belly Buttes, a series of undulating hills which is the heart of the Blood Tribe home base. The Blood Tribe's oral history includes the story of Blood Clot, the creation story of the Belly Buttes. Blood Clot was swallowed by an animal, but was able to escape by jumping up and down and slicing the belly of the animal with a knife that was tied in his hair. The intestines of the animal became the Belly Buttes. Within these lands, the Blood Tribe was created, and it is within these lands that the Blood Tribe developed both a practical and a spiritual existence. To the Blood Tribe, the home base is sacred.

Within the home base, the Blood Tribe is governed by the clan system that exists to this day. Traditionally, the Blood Tribe was known as “the Tribe of Many Chiefs.” Sixteen clans and four sacred societies exist today, and include the Lone Fighters, Many Children, Blackened Lodge Door Flaps, Fish Eaters, All Short People, All Tall People, Little Robes, and Crooked Wheels. Each clan had its own particular areas within the home base. Every year, in the summer, all of the clans would gather for the Sundance and, in the winter, all of the clans would share wintering grounds.



The Blood Tribe's traditional customs have always included consensus in decision making and *innaihtsiini*, a peacemaking approach to treaty. Essentially, a course of action is not chosen until consensus is reached. According to Blood Tribe custom, when consensus is reached, how the decision is made is not questioned and everyone is responsible for the decision. *Innaihtsiini* involves two disparate parties coming together and reaching an agreement to maintain peace.

In 1877, Treaty 7 was concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe. By this time, the Blood Tribe's way of life had changed dramatically. The buffalo had almost disappeared, and the lands were rapidly being settled. In addition, exposure to diseases like smallpox had greatly reduced the population of the Blood Tribe. Treaty 7 was intended to open lands to settlers while ensuring reserve lands for Indians. More specifically, Canada would provide treaty benefits in exchange for Crown title to the territories occupied by the Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of the Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, Order in Council 565 was issued, authorizing Indian Commissioner Edgar Dewdney and North-West Mounted Police Commissioner Lieutenant-Colonel James Macleod to take a surrender of the Blood Tribe's portion of the joint reserve with a view to setting aside a reserve located near Fort Kipp. In September 1880, a surrender of the Bow River reserve was taken from the Blood Tribe; however, there is no evidence that it was taken in accordance with the 1876 *Indian Act* provisions. A month later, Red Crow, Indian Agent N.T. MacLeod, and others selected the area for the Blood Tribe reserve. Indian Agent MacLeod reported to Indian Commissioner Dewdney that he did not agree with Red Crow's selection for a reserve, and he selected other lands, which now form the current reserve.

By December 1881, the surveys of Indian reserves across the country became a priority in the face of rapid settlement. With respect to the Blood Tribe's reserve, instructions were given to John Nelson, Dominion Land Surveyor, in June 1882. During the summer, Nelson surveyed a 650-square-mile reserve, later to become Blood Indian Reserve (IR) 148, between the Belly and St Mary Rivers ending nine miles north of the international border. Based on the Treaty 7 land entitlement formula, this reserve was sized for a population of approximately 3,250 people. In

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December 1882, Nelson reported to the Department of Indian Affairs that he had completed the survey.

In 1883, a series of surrenders were taken from the Blood Tribe, the Blackfoot and the Sarcee to effect the changes to Treaty 7. In April, an Order in Council was issued, authorizing Dewdney and Macleod to obtain a surrender from the Blackfoot as it was believed that a surrender of the joint reserve was necessary from the Blood Tribe, as well as the Blackfoot and the Sarcee. These surrenders, obtained in June and July 1883, are known as the "Amendment to Treaty 7." However, with respect to the Blood Tribe, the 1883 surrender documents were not accompanied by an affidavit, and another surrender was taken in February 1884 to address this deficiency. In January 1885, Order in Council PC 400 was issued, approving the Amendment to Treaty 7. However, in April 1886, an error in the Amendment relating to the Blood Tribe reserve was discovered. Instead of excepting the northwest quarter section, the northeast quarter section was excepted so that Fort Whoop-Up was included in the reserve. This error was corrected in September 1886 with a sworn document.

A second survey of the Blood Tribe reserve was completed by Nelson in the summer of 1883. This time, a 547.5-square-mile reserve for approximately 2,737 people was surveyed. Generally, the reserve remained as surveyed in 1882 except for the southern boundary, which was moved farther north.

In 1887, a group of Mormons arrived from Utah and settled at Lee's Creek at what eventually became the town of Cardston. The Blood Tribe's oral history relates how, at the time of their arrival, the Mormons had asked Red Crow for permission to set up camp. The Blood Tribe's oral history also describes a 99-year lease signed by Red Crow, allowing the Mormons to stay on the land. This lease has never been located. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883.

The presence of the Mormon colony was noted by Indian Agent Pocklington, who wrote to Indian Commissioner Dewdney, asking to be provided with the exact location of the southern boundary of the Blood Tribe's reserve. Once a map was received, Pocklington met with Red Crow and showed him where the southern boundary was located. Pocklington reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south, and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to.

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Following this meeting, the confusion over the location of the southern boundary was considered resolved by the department, and, in 1888, the Mormons obtained Crown grants to the lands they had camped on.

In 1889, Order in Council PC 1151 was passed, confirming the Blood Indian Reserve (IR) 148 as surveyed in 1882 and amended in 1883.

## PART III

### ISSUES

#### **The Big Claim Lands Should Constitute the Reserve**

- 1 As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit?
- 2 In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit?
- 3 Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

#### **In the Alternative, the 1882 Nelson Survey Work Established the Reserve**

- 4 Was the reserve established by the Nelson survey work in 1882?
- 5 If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?

#### **In the Further Alternative the Blood Tribe Claim a Treaty Land Entitlement**

- 6 Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve?
- 7 If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?

## PART IV

### ANALYSIS

#### **BIG CLAIM LANDS AND THE BLOOD TRIBE RESERVE**

This inquiry focuses on the Big Claim lands, which are identified as the lands between the St Mary and Kootenay (Waterton) Rivers from their confluence in southern Alberta extending to the mountains at the international boundary. The Blood Tribe claims a lawful entitlement to these lands, such that the whole of the Big Claim lands should have been its reserve. Canada argues that the interest in all of the Blood Tribe's lands, including the Big Claim lands, was surrendered.

In establishing its entitlement to the Big Claim lands, the Blood Tribe argues that the lands were held by it as a result of Treaty 7. If not held by it as a result of Treaty 7, then the Blood Tribe argues that its reserve was established by an 1882 survey completed by John Nelson, which did not include the entirety of the Big Claim lands. In the further alternative, the Blood Tribe argues that there is an outstanding treaty land entitlement as Canada failed to provide sufficient reserve lands to the Blood Tribe.

More specifically, the Blood Tribe's argument that the Big Claim lands were held by it as a result of Treaty 7 and Canada's disagreement with this position are set out in these issues:

- 1 As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit?
- 2 In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit?
- 3 Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

The first two issues deal with events that occurred between the making of Treaty 7 and 1880, and ultimately, ask the panel to make findings with respect to the lands held by the Blood Tribe in this time period. As a result, the panel will analyze these two issues together.

**Issues 1 and 2: Lands Held by the Blood Tribe, 1877–80**

***Factual Background***

In the early 1870s, the Dominion of Canada was undergoing much social and political change. Responsibility for governance and law had been transferred from the Hudson's Bay Company to the dominion, the country was being surveyed and opened for settlement, and treaties were being negotiated with Indians in the west. In establishing the treaties, the Crown intended to open lands to settlers while ensuring reserve lands for Indians. More specifically, Canada would provide treaty benefits in exchange for Crown title to the territories occupied by the Indians.

The Blood Tribe's approach to treaty making is based on *innaihtsiini*. This traditional process does not focus on surrender through treaty, but on peacemaking. At the community session, Pete Standing Alone stated:

*Innaihtsiini* to me, it doesn't mean a surrender. It means coming together because peacemaking and Treaty-making all stemmed out of that word, for us. *Innaihtsiini* means to come to a truce.<sup>6</sup>

The Elders explained that entering into a treaty did not mean that one party submitted to the other party; rather, the parties attempted to understand and accommodate one another. During treaty making, the pipe was used to symbolize peace and to bind the parties.<sup>7</sup> The Blood Tribe states that this process informed the Blood Tribe's participation at the making of Treaty 7.

At the time of the treaty, the Blood Tribe was experiencing change. Members of the Blood Tribe describe the era leading to Treaty 7 as a period of transition and vulnerability. The buffalo, long the mainstay of their lives, was becoming extinct. Colonization and settlement brought whiskey traders and new diseases to the area. The Blood Tribe suffered from a smallpox epidemic, greatly reducing its numbers. Although the Blood Tribe had little contact with Europeans and its members' knowledge of English was limited, the Tribe had some prior experience with treaties, including the Jay Treaty of 1794 and the

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<sup>6</sup> ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 292, Pete Standing Alone).

<sup>7</sup> ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 104, Andy Black Water); August 30–31, 2004 (ICC Exhibit 5a, p. 333 Louise Crop Eared Wolf).

Blackfoot Treaty of 1855.<sup>8</sup> As well, the Blood Tribe had established peace treaties with the Sioux, the Mandan of North Dakota, and Cree throughout the past.<sup>9</sup>

On September 22, 1877, Treaty 7 was concluded between Canada, three tribes from the Blackfoot Confederacy – the Blood Tribe, the Blackfoot, and the Peigans – as well the Sarcees and the Stoneys (a branch of the Assiniboine). The written terms of Treaty 7 include:

- provisions for the payment of annuities;
- reserves to be provided on the basis of five persons per square mile (128 acres per person);
- provisions for the purchase of ammunition;
- a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee;
- 10 axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones for each chief and councillor;
- once the bands were settled upon reserves, two cows would be furnished by the government for every family of five, three cows for families with five to nine persons; and four for families of 10 and over, as well one bull for each chief and councillor. If a family wished to farm besides raising cattle, it would reduce its cattle allotment by one cow and receive instead two hoes, one spade, one scythe, and two hay forks. Three such families could collectively receive also a plough and harrow, with enough potatoes, barley, oats, and wheat to plant the broken land.<sup>10</sup>

Treaty 7 was finalized over a five-day period, beginning on September 16, 1877, when Treaty Commissioners David Laird and Lieutenant-Colonel James Macleod arrived at Blackfoot Crossing.<sup>11</sup> The Blood Tribe Chiefs present for

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8 The Blackfoot Treaty is sometimes also referred to as the Lame Bull Treaty of 1855, the Stevens Treaty of 1855, the Yellowstone Treaty of 1855, or Otahkoi itahtaa or the Yellow River Treaty. "Lame Bull" was a U.S. Peigan leader who was a signatory of the proceedings (ICC Exhibit 2o, pp. 23–26).

9 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 7 (ICC Exhibit 9e, pp. 7-9).

10 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 1–10 (ICC Exhibit 1b, pp. 1–10).

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their arrival were Medicine Calf and Rainy Chief.<sup>12</sup> However, “[t]here were four leading chiefs of the Blood tribe: Red Crow of the Fish Eaters, Father of Many Children of the Buffalo Followers, Medicine Calf of the Many Tumors, and Many Spotted Horses of the Lone Fighters.”<sup>13</sup> Rainy Chief was recognized as leader of the northern Blood Tribe, while Red Crow was recognized as the leader of the southern Blood Tribe.<sup>14</sup>

Blood Tribe oral history refers to Red Crow as the main leader of the Blood Tribe. Elder Andrew Black Water states: “[W]e understand there’s different leaders, different Clans, eh. But amongst them, they would rely on one individual, you know. So it turn out to be that Red Crow was sort of the one that was acknowledged to lead the people.”<sup>15</sup> Elder Louise Crop Eared Wolf, a descendant of Red Crow, attested to his leadership abilities:

I have heard that when he was young he was brave. He went on a lot of raids. This is what got him recognition – going on raids. This shows what a courageous person he was. He also took care of the people. For these reasons people had high regard for him and because of this he became a camp leader. I also heard that he was very intelligent – it was this intelligence that gave him success on his raids. Also, if he got material goods on his raids he would not only benefit himself but when he returned home he would share with the people. It was these characteristics that caused people to have high regard for him – his generosity, courage and kindness. It was really because Red Crow went on numerous raids that he was so esteemed and became a leader. Red Crow has set an example for many succeeding Chiefs.<sup>16</sup>

Blood Tribe oral history indicates that Red Crow was not interested in attending the treaty negotiations at Blackfoot Crossing.<sup>17</sup> As told by Elder Rosie Red Crow:

At the time of the Treaty, he wanted the Treaty to take place at Fort Macleod. They did not listen to him. Instead, they went to Blackfoot Crossing. As a result, Red Crow went to Sweet Grass Hills instead of the Blackfoot Crossing. Then they sent a

11 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 107 (ICC Exhibit 9a, p. 107).

12 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 107 (ICC Exhibit 9a, p. 107).

13 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 114 (ICC Exhibit 9a, p. 114).

14 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen’s University Press, 1996), 43 (ICC Exhibit 9e, p. 43).

15 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 93, Andrew Black Water).

16 Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, Louise Crop Eared Wolf, pp. 198–99).

17 Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, Louise Crop Eared Wolf, p. 194).



messenger to ask Red Crow to attend. ... He [Red Crow] went south. At the time there was no United States. He went south.<sup>18</sup>

Elder Mary Louise Oka offers a similar explanation of Red Crow's desire to treat on Blood Tribe territory and how he came to join the treaty parties at Blackfoot Crossing. She states:

I heard that at the time of the Treaty, that Red Crow did not attend the Treaty, they did not sign the Treaty. He wanted the Treaty at – he wanted the Treaty to be held at Fort Macleod, not at Blackfoot Crossing. Instead, the Treaty was taken to take place at Blackfoot Crossing. Red Crow was very disappointed. He packed up and moved to the Porcupine Hills.

When he did not show up at Blackfoot Crossing, the people were there waiting for him. They sent a messenger to ask him to attend the Blackfoot Crossing, and then he moved to the Blackfoot Crossing.<sup>19</sup>

Elder Rosie Red Crow states that Red Crow ultimately decided to travel to Blackfoot Crossing because “Crowfoot was a cousin to Red Crow. Crowfoot's mother was from the Bloods. When Crowfoot asked Red Crow to attend Blackfoot Crossing because of the protocol and out of respect, Red Crow was unable to refuse.”<sup>20</sup> Elder Stephen Fox explains the relationship between Red Crow and Crowfoot and why Crowfoot waited for him:

At the time of the Treaty, Crowfoot waited for Red Crow. However, because Crowfoot was already there, the non-Natives, the government people thought that Crowfoot was superior to Red Crow, that Crowfoot was a much bigger leader than Red Crow. However, it was out of respect that they waited for each other.

... Crowfoot was not going to make any moves with regard to the Treaty, and he wouldn't – due to the protocols, he waited. He insisted on waiting until Red Crow arrived.<sup>21</sup>

On the evening of September 20, Red Crow and Father of Many Children arrived at Blackfoot Crossing. During the final day of negotiations, Commissioner Laird had asked the leaders of all the tribes to indicate where they wished their reserve to be located. Only the Blackfoot, Stoneys, and Peigan chose their land immediately. A joint reserve was set aside for the

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18 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 148–49, Rosie Red Crow).

19 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 182–83, Mary Louise Oka).

20 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 149, Rosie Red Crow).

21 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 433, Stephen Fox).

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Blackfoot, Blood Tribe, and Sarcee Bands at Blackfoot Crossing.<sup>22</sup> The reserve is described in Treaty 7 as

a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of concluding of this Treaty, when it shall cease to be a portion of the said Indian Reserves, as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river.<sup>23</sup>

In exchange, the Blood Tribe, Blackfoot, Peigan, Sarcee, and Stoney tribes were expected to

cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada. ...<sup>24</sup>

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22 This reserve is occasionally referred to in this report as the Bow River reserve.

23 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

24 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3–4 (ICC Exhibit 1b, pp. 3–4).

During this period, the Blood Tribe required English interpreters. As the Blackfoot language was extraordinarily complex, a number of interpreters were present at treaty, including Jerry Potts, who acted as an interpreter for the Crown. Blood Tribe oral history indicates that Potts was not the best interpreter. Elder Pete Standing Alone states:

Jerry Potts was not fluent in either language. He never went to school, he didn't live extensively with the Bloods to learn the language real well. You know, he's back and forth. And he was in Fort Benton when Macleod was coming west. No, the interpretation was, I would say ...very poor.<sup>25</sup>

Elder Louise Crop Eared Wolf states:

There's a lot of stories, lot of people that I heard, and I'm still hearing it, that Jerry Potts was a drunk. He was drunk most of the time, and they had to get other interpreters to replace him.

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... he interpreted some, but not that accurate. Not a bit accurate, as we can see on the signatures when he said that he couldn't even say Is sah pum khi ka. It came up with the word Chapo Mexico.<sup>26</sup>

The Blood Tribe has its own interpretation of what was negotiated in Treaty 7. Elder Rosie Day Rider states:

At the time, they promised us that they would educate us, that they would take care of our health, and that they would train us and provide the funds to farm, and that they would do this as long as the sun shines, the rivers flow, and as long as the grass grows. And as long as the mountains are there.<sup>27</sup>

Once the treaty was signed, registration and annuity payments took place. Ten head Chiefs, 40 minor Chiefs or councillors, and 4,342 others were paid, totalling \$52,954.<sup>28</sup>

Following the conclusion of Treaty 7, as the Blood Tribe oral history consistently relates, Red Crow broke camp at Blackfoot Crossing and returned home to the Big Claim lands.<sup>29</sup> In the summer of 1878, Red Crow and his

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25 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 310, Pete Standing Alone).

26 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 357–58, Louise Crop Eared Wolf).

27 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 208, Rosie Day Rider).

28 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: Department of Indian Affairs and Northern Development (DIAND), 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, app. D, p. 328).

29 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 210, 219, Rosie Day Rider); August 30–31, 2004 (ICC Exhibit 5a, p. 434, Stephen Fox).

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followers met with the commissioners at Fort Kipp for annuity payments, and he advised the Treaty Commissioners that he did not want to settle at Bow River. Instead, he would take his reserve on the Belly River, within their traditional territory.<sup>30</sup> The Blood Tribe's dissatisfaction with the Bow River reserve was reported by Indian Commissioner Dewdney:

[T]he Blood Indians are very desirous of having a Reserve apart from the other Indians of the Blackfeet nation and made a formal application to me at an interview I had with them about two months ago. "Mekasto", the Head Chief spoke first, then "Running Rabbit" and all the Minor Chiefs one after the other followed in the same direction. They said they were all of one mind. They wanted their Reservation in the neighbourhood of Fort Kipp, where they say their Indians are mostly resided and where the bones of their Ancestors lie. Upon my informing them it was out of my power to alter the Treaty as agreed upon by them, they then requested that I would make known their wishes to the Government while at Ottawa.<sup>31</sup>

As a result, Order in Council 565 was issued on March 26, 1880:

...The Minister recommends that authority be given ... to E. Dewdney, Esquire, Indian Commissioner for the North West Territories and Manitoba, and Lieut. Colonel McLeod, Commissioner for the North West Mounted Police, to attend a Council of the Blackfeet Nation ... to be summoned by Mr. Dewdney for the purpose; and to submit a proposition to them to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire; And should the Indians assent to the proposal, the gentlemen above referred to should take a surrender from them executed in accordance with the provision of the Indian Act 1876 covering the land in question.<sup>32</sup>

### ***The Parties' Positions***

Issues 1 and 2 both focus on the outcome of Treaty 7. The Blood Tribe argues it was never its understanding that it was to give up the Big Claim lands at the time of Treaty 7. In other words, the Blood Tribe argues that the written terms of Treaty 7 as they relate to land do not reflect the agreement reached at the time of treaty. Canada argues that the effect of Treaty 7 was that the Blood

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30 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 122 (ICC Exhibit 9a, p. 122).

31 Edgar Dewdney, Indian Commissioner, Manitoba and NWT, Department of Indian Affairs (DIA), to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGLA), December 15, 1879, Library and Archives Canada (LAC), RG 10, vol. 6620, file 104A-1-1 1, p. 16 (ICC Exhibit 1a, pp. 96–99).

32 Order in Council PC 565, March 26, 1880, LAC, RG 2(1), vol. 389, March 26, 1880 (ICC Exhibit 1a, pp. 160–61).

Tribe surrendered its interest in the Big Claim lands. Each of these positions will be explored in detail.

*Blood Tribe's Position*

The Blood Tribe argues that the honour of the Crown was breached when Treaty 7 was concluded, and that the Crown's fiduciary obligations to the Blood Tribe with respect to reserve lands were also breached. The Blood Tribe does not challenge the validity of Treaty 7 and agrees that, at the very least, there was a treaty obligation to create a reserve for the Blood Tribe.<sup>33</sup> However, the Blood Tribe understood that it continued to have exclusive use and occupation of the Big Claim lands. To this end, the Blood Tribe argues that Treaty 7 was negotiated and concluded in a manner inconsistent with the honour of the Crown.<sup>34</sup> The basis of this argument is the oral history of the Blood Tribe Elders and, more specifically, the actions of the Blood Tribe during and following the negotiations of Treaty 7.

The key oral history evidence, some of which was set out above, can be summarized as follows:

- The Blood Tribe's approach to treaty making, *innaihtsiini*. This process informed the Blood Tribe's participation at the Treaty 7 negotiations. The Blood Tribe agreed to keep the peace in exchange for the Crown, promising to take care of the Blood people forever.
- The role and leadership of Red Crow. In particular, the Elders described his initial absence and arrival at Blackfoot Crossing, at the request of Crowfoot.
- The events at Blackfoot Crossing. The Elders described the drills that the North-West Mounted Police were conducting, and how the Blood Tribe members had been below a hill with cannons pointed in their direction.<sup>35</sup>
- The lack of proper interpretation at Blackfoot Crossing, and the role of Jerry Potts. According to the Elders, Jerry Potts was drunk and not particularly fluent in either English or Blackfoot, a complex language. As a result of his inaccurate and imprecise interpretation,<sup>36</sup> the written

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33 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 56.

34 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 60.

35 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 35.

36 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 36.

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terms of Treaty 7 do not reflect the Blood Tribe's understanding of the treaty.

- The actions of Red Crow after Treaty 7. Following the conclusion of Treaty 7, the Elders unequivocally stated that Red Crow broke camp and announced that he was "going home"<sup>37</sup> to the Belly Buttes.

The Blood Tribe argues that the oral history of the Elders places the claim in an appropriate historical and cultural context. The oral history establishes that the Blood Tribe had a very different understanding of Treaty 7. As a result, the oral history is useful, reliable, and should be given full weight.

Ultimately, the Blood Tribe members state that their understanding of Treaty 7 with respect to land and reserves is not reflected in the written terms of Treaty 7. This discrepancy results from the failure of the Crown to act honourably in its dealings with the Blood Tribe at Blackfoot Crossing. The Blood Tribe sets out treaty interpretation principles with respect to the intention of the parties<sup>38</sup> and outlines the concept of the honour of the Crown.<sup>39</sup> Based on these principles, the Blood argues that the Crown failed to act honourably during the discussions at Blackfoot Crossing and breached its duties in the following ways:

- The Treaty Commissioners, acting for the Crown, failed to acknowledge Red Crow as the leader of the Blood Tribe and did not wait for Red Crow before commencing treaty discussions at Blackfoot Crossing.<sup>40</sup>
- The terms of the treaty had largely been concluded prior to Red Crow's arrival at Blackfoot Crossing, resulting in no consultation with Red Crow on the issues of land and reserves.<sup>41</sup>
- The treaty was concluded without proper interpretation for the Blood Tribe.<sup>42</sup>

In addition, the Blood Tribe argues that the Crown had a fiduciary duty, following the conclusion of Treaty 7, to set aside the Big Claim lands as the Blood Tribe's reserve. Since Treaty 7 set aside a joint reserve for the Blood

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37 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 38.

38 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, pp. 50–52.

39 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 53.

40 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, pp. 58–59.

41 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 59.

42 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 60.

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Tribe at the Bow River, the Tribe argues that the Crown's fiduciary duty was breached because the decision to create a joint reserve was unilateral and made without consulting the Blood Tribe.<sup>43</sup> Setting aside a reserve at Bow River for the Blood Tribe was not in the best interests of the Tribe as the reserve was outside of its home base.

In summary, the Blood Tribe argues that it was never its intention to occupy the Bow River reserve, and immediately after the making of Treaty 7, the Blood Tribe returned home to the Big Claim lands. After Treaty 7, the Blood Tribe argues that its members continued to have the use and benefit of the Big Claim lands. In the alternative, the Blood Tribe argues that, if Treaty 7 established a reserve at Bow River, then the Blood Tribe exchanged this interest for the Big Claim lands. The surrender of the Bow River reserve interest was dependent on receipt of the Big Claim lands and the receipt of the Big Claim lands was a key term of the surrender. The Blood Tribe argues that the failure to receive the Big Claim lands as its reserve means that the surrender was invalid.

#### *Canada's Position*

Canada argues that, as a result of Treaty 7, the Blood Tribe surrendered all of its interests in the Big Claim lands in exchange for joint reserve lands at the Bow River. The surrender in Treaty 7 is effective even though the Blood Tribe never settled at Bow River. Although Canada acknowledges that the Blood Tribe returned to the Big Claim lands following treaty, Canada states that the Blood Tribe's occupation of the Big Claim lands was "at the pleasure of the Crown."<sup>44</sup>

Canada disagrees with the Blood Tribe over the following:

- The significance of events prior to and at Blackfoot Crossing. In particular, Canada states that the location of Blackfoot Crossing for the treaty discussions was at Crowfoot's request. Several chiefs, including Red Crow, chose not to attend the discussions at Blackfoot Crossing.<sup>45</sup>
- The role of Jerry Potts. Canada states that the Treaty Commissioners had intended Jerry Potts to act as interpreter, but, because he was incapable, James Bird, John Monroe, Isidore St Duval, and Jean L'Heureux acted as interpreters instead.<sup>46</sup>

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43 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 75.

44 Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 2.

45 ICC Transcript, October 4, 2005 (ICC Exhibit 5a, Douglas Faulkner, p. 70).

46 Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 9.

- The relationship between Crowfoot and Red Crow. Canada asserts that, once Red Crow and the other Blood Tribe and Peigan Chiefs arrived, they met with Crowfoot and the other Chiefs. As a result of this meeting, Canada states that Crowfoot was chosen to lead the final negotiations.<sup>47</sup>

Canada states that a key principle in treaty interpretation discussed in the Supreme Court of Canada's decision in *R. v. Marshall* is to seek out the common intention which best reconciles the interests of both parties at the time a treaty was signed. Accordingly, Canada argues that there is no evidence that the Crown ever intended the Big Claim lands to form the Blood Tribe's reserve.<sup>48</sup> Canada then focuses its argument on the effect of the 1880 Order in Council. In summary, Canada argues that the Blood Tribe did not hold the Big Claim lands for its use and benefit between Treaty 7 and 1880.

### ***Panel's Findings***

In the first two issues, the panel is asked to determine whether the Big Claim lands were held by the Blood Tribe for its use and benefit following the conclusion of Treaty 7. The following portion of Treaty 7 is relevant:

And where the said Commissioners have proceeded to negotiate a Treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Piegan, Sarcees, Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence southwesterly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;<sup>49</sup>

In addition, Treaty 7 states the following with respect to the joint reserve at Bow River:

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<sup>47</sup> Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 10.

<sup>48</sup> Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 38.

<sup>49</sup> *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3 (ICC Exhibit 1b, p. 3).



[T]he Reserves of the Blackfeet, Blood and Sarcee Bands of Indians, shall consist of a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan,<sup>50</sup>

The following principles of treaty interpretation, which have been set out in a number of previous cases, are summarized by the Supreme Court of Canada in *R. v. Marshall*, [1999] 3 SCR 456, and cited by both parties:

- 1 Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation ...
- 2 Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories ...
- 3 The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed ...
- 4 In searching for the common intention of the parties, the integrity and honour of the Crown is presumed ...
- 5 In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties ...
- 6 The words of the treaty must be given the sense which they would naturally have held for the parties at the time ...
- 7 A technical or contractual interpretation of treaty wording should be avoided ...
- 8 While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic ...
- 9 Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting

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50 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context ...<sup>51</sup>

The Supreme Court in *Marshall* also sets out a two-step approach to interpreting a treaty:

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra*, at para. 76, “the scope of treaty rights will be determined by their wording”. The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretation not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention. This determination requires choosing “from among the various possible interpretations of the common intention the one which best reconciles” the parties’ interests: *Sioui, supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon, supra*, at pp. 402–3; *Sundown, supra*, at paras. 30 and 33.<sup>52</sup>

The ICC has considered treaty interpretation principles in previous reports<sup>53</sup> dealing with Treaties 4 and 6. In *Carry the Kettle First Nation: Cypress Hills Inquiry*,<sup>54</sup> the ICC inquired into whether a reserve had been set aside at Cypress Hills as a result of Treaty 4, as a result of the *Indian Act*, or on a *de facto* basis. In examining whether a reserve was created by Treaty 4, the ICC concluded that Treaty 4 required the Crown to set aside a reserve:

51 *R. v. Marshall*, [1999] 3 SCR 456 at 511–13.

52 *R. v. Marshall*, [1999] 3 SCR 456 at 514–15.

53 ICC, *Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004).

54 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209.

[I]n our view the Crown's obligation under Treaty 4 was to establish a reserve for the First Nation after appropriate consultation with the band to ensure that the reserved lands were suitable for their intended purpose. Following the process of consultation, the lands selected would generally be surveyed and Canada and the band would confirm their acceptance of that survey, either formally or by way of conduct. Thus, the requisite elements in the setting aside of a reserve include:

- consultation and selection;
- survey; and
- acceptance.<sup>55</sup>

To determine what the Blood Tribe did following Treaty 7, it is appropriate for the panel to examine the events before, during, and after Treaty 7. Prior to Treaty 7, the Blood Tribe was in a period of transition and vulnerability. Its way of life was rapidly changing as growing numbers of settlers came to occupy the same area the Tribe used and occupied in southern Alberta. The oral history of the Blood Tribe leaves no doubt about the traditional significance of these lands. The Elders were unequivocal in their perception of Red Crow as the guardian and steward of the Blood Tribe and the Tribe's home base. The Elders also described the traditional understanding of treaty making and were adamant that this approach informed Red Crow's participation at Treaty 7.

During Treaty 7, a joint reserve at Bow River was set aside for the Blood Tribe, the Blackfoot, and the Sarcee. This clause of the treaty is unique as it sets out the location and size of the joint reserve. However, history shows that the location and the joint aspect of the reserve were not accepted by the Blood Tribe. Even though the wording in Treaty 7 is clear and unambiguous as to whom the joint reserve is for and where the joint reserve is located, the events that follow disclose a discrepancy between what was seemingly agreed to in Treaty 7 and what actually happened.

After Treaty 7 was concluded, as the oral history relates, Red Crow broke camp and returned to the Blood Tribe home base. When the Blood Tribe returned to the Big Claim lands, the Crown did not attempt to move the members to the joint reserve at Bow River. History shows that the joint reserve set out in Treaty 7 was never completely surveyed. Instead, by 1880, an order in council had been passed, effectively directing that the reserve for the Blood Tribe be relocated; eventually, the reserve was located in part of the territory occupied by the Blood Tribe prior to treaty.

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55 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 303.

Applying the *Marshall* principles, these events disclose an ambiguity not apparent on the face of the wording of Treaty 7 such that the Blood Tribe had a different understanding of *at least* the location of its reserve. If the parties had been in complete and total agreement at Treaty 7, the panel concludes, the Blood Tribe would have gone to the joint reserve at Bow River immediately after treaty or soon thereafter.

The question then becomes, what did the Blood Tribe hold following Treaty 7? The Blood Tribe argues that it held the Big Claim lands for its use and benefit, while Canada argues that the effect of treaty was to surrender these lands for the joint reserve at Bow River. Canada states that the Blood Tribe held the lands at Bow River for its use and benefit. The panel finds that the common intention of Treaty 7 was at least to set aside a reserve for the Blood Tribe. As a result, at the very least, the Blood Tribe held an interest in having a reserve set aside, and the Crown was obligated to ensure that this interest crystallized. Treaty 7 stipulated a joint reserve at Bow River, and, seemingly, the Blood Tribe held an interest in this joint reserve immediately following Treaty 7.

However, the events between 1877 and 1880 show that the Blood Tribe rejected the location of this reserve and the joint aspect of this reserve. Red Crow returned to the Blood Tribe home base, and expressed dissatisfaction with the joint reserve at Bow River to Treaty Commissioner Laird. The effect of this rejection was to make the location of the reserve an open question following Treaty 7. In the interim, the Blood Tribe remained on its home base, without any opposition from the Crown. *Marshall* requires the panel to resolve any ambiguity in favour of the band. The panel therefore finds that these events indicate a *de facto* acceptance by the Crown that the Blood Tribe's reserve would be located within its home base. At the least, the Blood Tribe's interest in having a reserve set aside would have to be crystallized within this area.

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7, the Crown was nevertheless obligated to set aside a reserve for the Blood Tribe. Historical events show that the Crown and the Blood Tribe agreed that the reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a specific or cognizable interest in its lands in the home base.

### Issue 3: Surrender of Interest in Bow River Reserve

#### 3 Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve?

Order in Council 565, also known as the 1880 Exchange Agreement, authorized Commissioner Dewdney and Lieutenant-Colonel James Macleod to relocate the Blood Tribe reserve and specified that a surrender of the portion of the reserve allotted to the Blood Tribe under Treaty 7 be taken in accordance with the 1876 *Indian Act* once a new reserve had been located.

A surrender of the Blood Tribe's interests in the Bow River reserve was purportedly obtained on September 25, 1880. The surrender document reads as follows:

Whereas a Treaty was made and concluded on the twenty second day of September in the year of Our Lord one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, of the other part.

And whereas it was agreed in said Treaty that the Reserve of the Blackfeet, Blood and Sarcee Bands of Indians should consist of a belt of land on the North side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers down stream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I "Mekasto" or "Red Crow", Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty do hereby give up all our rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River.<sup>56</sup>

There is no evidence, either documentary or oral, of a surrender meeting or a vote where a majority of the adult male members of the Blood Tribe assented to the surrender. In 1883, in a memorandum to Council, Sir John A. Macdonald noted Crowfoot's absence when the Blood Tribe surrendered its interest in the joint reserve in 1880. Macdonald believed that a surrender by the Blackfoot Tribe was required for the surrender of the Blood Tribe's interest to comply with *Indian Act* provisions,<sup>57</sup> and he directed Dewdney

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56 Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67). The Kootenay River is now officially called the Waterton River.

and Macleod to obtain a surrender from the Blackfeet.<sup>58</sup> Macdonald, however, did not direct that a surrender be taken from the Sarcee Tribe for its interest in the Bow River reserve.

An Order in Council dated April 25, 1883, officially authorized Dewdney and Macleod to obtain the surrender from the Blackfoot Tribe.<sup>59</sup> The surrender was obtained June 20, 1883. The surrender document states:

Know all men by these presents, that we, the Blackfoot Indians, being a majority of the male members of the Blackfoot Band of the full age of twenty-one years, assembled in council duly called for the purpose of considering the surrender of the reserve hereinafter mentioned, and in presence of the Honourable Edgar Dewdney, the Lieutenant-Governor of the North-West Territories, and Commissioner duly authorized to attend said council, do hereby assent to ratify and confirm a certain treaty made and concluded the twentieth day of June last past between Her Majesty the Queen, by Her Commissioners, the said the Honourable Edgar Dewdney and James Farquharson MacLeod, C.M.G., of the one part, and the Blackfoot Indians by their Head and Minor Chiefs, of the other part.

And in consideration of the terms of the said Treaty, we do hereby unanimously release and surrender to Her Majesty the Queen all the land reserved to the said Blackfoot Indians, under and by virtue of a certain treaty made and concluded on the twenty-seventh day of September, in the year of Our Lord one thousand eight hundred and seventy-seven.<sup>60</sup>

On June 27, 1883, Dewdney and Macleod obtained a similar consent from the Sarcee<sup>61</sup> and on July 2, 1883, another surrender was obtained from the Blood Tribe.<sup>62</sup> In a letter dated September 24, 1883, Dewdney explained why he obtained the surrender of the Sarcees and the Blood Tribe: "It was found however desirable during these negotiations, to obtain the surrender of the Sarcee's to their interest in the Blackfeet Reservation as well as to obtain a formal surrender from the Bloods who had formerly only given a conditional one."<sup>63</sup>

According to the July 2, 1883, Blood Tribe surrender, by relinquishing its interest in the Bow River reserve, the Blood Tribe would receive:

57 Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 681).

58 Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 682).

59 Order in Council, April 25, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 687-88).

60 Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 130 (ICC Exhibit 1b, p. 22).

61 Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136 (ICC Exhibit 1b, p. 30).

62 Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140-280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

63 Edgar Dewdney, Indian Commissioner, to the Superintendent General, September 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 841-42).

All that certain tract of land in the North-West Territories, Canada, butted and bounded as follows, that is to say: Commencing on the north bank of the St. Mary's River at a point in north latitude forty nine degrees twelve minutes and sixteen seconds (49° 12' 16"); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49° 12' 16"), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the north-east quarter of section number three, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries; to have and to hold the same unto the use of the said Blood Indians forever.<sup>64</sup>

All of these surrenders became the Amendment to Treaty 7.

However, an affidavit as required by the *Indian Act* was not included with the surrender from the Blood Tribe. On July 10, 1883, Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), advised Indian Commissioner Dewdney that an affidavit, an "absolute necessity," had not been received.<sup>65</sup> Dewdney was directed to obtain affidavits.<sup>66</sup> On January 29, 1884, Dewdney arrived on the Blood Tribe reserve to obtain a third surrender. Band members were notified on January 30 and 31 that a meeting would be held on February 1, 1884, "to make a final settlement."<sup>67</sup> The meeting included "a majority of the male members of the Blood Band of the full age of 21 (twenty-one) years, assembled in council, duly called for the purpose of considering the surrender of the reserve."<sup>68</sup> Shortly thereafter, both the Sarcee<sup>69</sup> and the Blackfoot<sup>70</sup> signed their surrenders as well. All documents were witnessed by James F. Macleod as a stipendiary magistrate and Edgar Dewdney in his position of Indian Commissioner and Lieutenant Governor. Dewdney then returned the documents to Ottawa.<sup>71</sup> The surrenders were submitted to Council on

64 Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

65 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, July 10, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 768–70).

66 John A. Macdonald, Privy Council, to Edgar Dewdney, December 18, 1883, (ICC Exhibit 1a, pp. 976–77).

67 Unidentified author, note to file, undated, H. Dempsey, "An Unwilling Diary" (1959), 7:3 *Alberta Historical Review* 9 (ICC Exhibit 1a, p. 1060).

68 Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 132–33 (ICC Exhibit 1b, pp. 26–27).

69 Surrender No. 204, February 4, 1884, Sarcee Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 30–31).

70 Surrender No. 202, February 7, 1884, Blackfoot Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 128–29 (ICC Exhibit 1b, pp. 22–23).

February 26, 1884,<sup>72</sup> and the Amendment to Treaty 7 was approved by Order in Council PC 400 on January 24, 1885.<sup>73</sup>

Yet another issue with the surrender was discovered in April 1886. Fort Whoop-Up had been erroneously included within the boundaries of the Blood Tribe reserve. The amended treaty stated that the northeast quarter of section 3 was “excepted” from the reserve when in actuality it was the northwest quarter section.<sup>74</sup> On September 9, 1886, the necessary changes were made through a sworn statement and the treaty was amended once more.<sup>75</sup> The Blood Tribe reserve, with the eastern, western, and northern boundaries established in 1882 and the southern boundary surveyed in 1883, was approved by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary's River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee's Creek which enters near the south-east corner, empties into the St. Mary's. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary's *Coulée* on the eastern which opens into that of the St. Mary's.<sup>76</sup>

71 Edgar Dewdney, Indian Commissioner for Manitoba and the NWT, DIA, Regina, to Superintendent General of Indian Affairs, Ottawa, February 9, 1884, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 1122–23).

72 Copy of Submission to Council, LAC, RG 10, vol. 1085, pp. 403–9 (ICC Exhibit 1a, pp. 1146–52).

73 Order in Council PC 400, January 24, 1885, LAC, RG 2(1), vol. 460, January 24, 1885 (ICC Exhibit 1a, pp. 1281–94).

74 Edgar Dewdney, Indian Commissioner, to Superintendent General, April 3, 1886, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, pp. 1481–82).

75 Amendment to Treaty 7, Blood Tribe to the Queen, LAC, RG 10, vol. 3622, file 4948, and Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 194–95 (ICC Exhibit 1b, pp. 22–28).

76 Order in Council PC 1151, May 17, 1889, in Nelson's Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).



***Blood Tribe's Position***

The Blood Tribe argues that the surrender of its interest at the Bow River reserve was contingent upon the Crown acknowledging that the Big Claim lands constituted the Blood Tribe reserve. The surrender in 1880 was conditional. Absent this condition being met, the surrender of the Blood Tribe interest in the Bow River reserve was invalid.<sup>77</sup> In addition, the Blood Tribe argues that, if the Blood Tribe and the Crown agreed that the Blood Tribe would give up its interest in the Bow River reserve in exchange for the Big Claim lands, then the Crown failed to fulfill its part of the agreement since the Blood Tribe received less land in the exchange than was agreed upon.

In relation to the surrender itself, the Blood Tribe argues that the Crown failed to follow the requirements of the *Indian Act* to obtain a valid surrender of the Bow River reserve lands. There is no oral history regarding a surrender meeting or vote. The Blood Tribe argues that, because of the unusual nature of such a meeting, it would have been noted in the oral history.<sup>78</sup> In contrast, the Blood Tribe's oral history describes in detail a vote that took place later regarding a surrender of 90,000 acres on the north end of the reserve.<sup>79</sup>

Also, the surrender documents and the affidavit are suspect. The Blood Tribe points to the Blackfoot surrender. The detailed documents supporting that surrender included a plan of the lands the Blackfoot wanted for its reserve. However, there is no corresponding detail in the purported Blood Tribe surrender.<sup>80</sup>

The Blood Tribe argues that the Crown's fiduciary duty to prevent an exploitative bargain was breached and that the statutory requirements of the *Indian Act* were not met. With respect to the breach of fiduciary duty, the Blood Tribe argues that the surrender was exploitative because the reserve did not include all of the Big Claim lands. The Crown, as a result of the 1880 Order in Council, was obligated to ensure that the Blood Tribe received the Big Claim lands in exchange for its interest in the Bow River reserve. The Blood Tribe argues that the Crown was aware that the Blood Tribe would not surrender its interest in the Bow River reserve without receiving the entirety of the Big Claim lands, lands that were in accordance with its desire.<sup>81</sup> The Crown did not properly ensure that the Blood Tribe understood the terms of the surrender.

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77 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 3.

78 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 105.

79 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 105.

80 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 106.

81 Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 90.

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With respect to the statutory requirements, the Blood Tribe argues that there is insufficient evidence showing that a meeting or vote that took place as required by the *Indian Act* on February 1, 1884. The Blood Tribe argues that, although there is no voters list or detailed description of the events at the meeting, there is a detailed letter written by Colonel James Macleod to his wife describing his dealings with Dewdney.<sup>82</sup> Macleod was concerned about the request to obtain affidavits and wrote:

I think I told you about the difficulty there was about the Indian Treaties Mr. D. & I made last year. It never occurred to me that they should be made differently than the first treaties and surely the Indian Commissioners & his Agents should have known that some other ceremony should have been gone thro [sic] with.

...

... I had to swear that they were made with the consent of the male members of each Band of 21 years old & upwards. D. wrote to me to make the affidavits stating that he would make his before Col. Richardson. I replied I would do nothing of the kind as we had dealt only with the chiefs as the Treaties showed.<sup>83</sup>

Macleod eventually obtained the affidavits; nevertheless, the Blood Tribe argues that the meeting on July 2, 1883, did not meet *Indian Act* requirements. Specifically, it argues that the requirement that the surrender be assented to by a majority of the male members of the band over 21 years of age is a mandatory requirement. Given that only the Chiefs had met, this requirement was not fulfilled. As a result, given the lack of a voters list, the lack of oral history, and the clear failure to assemble a proper meeting, the Blood Tribe argues that there was no valid surrender of the Blood Tribe's interest in the Bow River reserve.

### ***Canada's Position***

Canada first states that a surrender of the Blood Tribe's interest in the Bow River reserve was unnecessary on the basis that there is a distinction between an interest in a reserve and an interest in having a reserve set aside. A surrender was not required because an actual reserve was not set aside at Bow River and what was being surrendered was an interest set out in treaty.<sup>84</sup> The Indian Act covers surrenders for land, not interests set out in treaty.

Canada acknowledges that a surrender was pursued; its position is that this surrender was valid even though there were delays in finalizing the technical aspects.<sup>85</sup>

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82 Jim Macleod to Mary Macleod, February 10, 1884 (ICC Exhibit 1a, p. 1124).

83 Jim Macleod to Mary Macleod, February 10, 1884 (ICC Exhibit 1a, pp. 1124–25).

84 Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 40.

***Panel's Findings***

This issue concerns the question of whether the surrender of the Blood Tribe's interest in the Bow River reserve was valid. The parties differ over whether a surrender was required, as well as whether the statutory requirements of the surrender were met.

***Was a Surrender Required?***

Before addressing the question of whether a surrender was required, the panel must determine if a reserve was created in Treaty 7. Among the numbered treaties, Treaty 7 is unique in that the Bow River reserve was specifically described and set aside as a joint reserve for the Blood Tribe, the Blackfoot, and the Sarcee. The portion of the joint reserve that each Tribe was entitled to, based on the formula of one square mile for each family of five, was not allocated within Treaty 7. Yet, Treaty 7 is unique; no other numbered treaty in Canada specifically describes the location and size of a reserve. Instead, every other treaty sets out an obligation to establish a reserve in consultation with the bands in the treaty. The location of the reserve is selected at some point after the conclusion of the treaty; the reserve is surveyed and then confirmed by order in council.

Following the conclusion of Treaty 7, the location of the Blood Tribe reserve was an open question. The Blood Tribe never settled at Bow River, and Red Crow had expressed dissatisfaction with the joint reserve and its location at Bow River. In 1879, the Crown and the Blood Tribe agreed that the Blood Tribe reserve would be "in the neighbourhood of Fort Kipp ... where the bones of their Ancestors lie."<sup>86</sup> Order in Council 565 confirms this agreement and provides for a reserve near Fort Kipp, the specific location to be determined in consultation with the Blood Tribe and, ostensibly, within the limits of the formula set out in Treaty 7.

Order in Council 565 specified that a surrender in accordance with the 1876 *Indian Act* be taken of the portion of the reserve allotted to the Blood Tribe once a new location for its reserve was selected. The Blood Tribe argues that this Order in Council is an agreement by which the Blood Tribe agreed to surrender its interest in the Bow River reserve for the Big Claim lands. For its part, Canada argues that the Order in Council stipulates a surrender of the Bow River reserve.

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<sup>85</sup> Written Submissions on Behalf of the Government of Canada, August 30, 2005, p. 3.

<sup>86</sup> Edgar Dewdney, Indian Commissioner, Manitoba and NWT, DIA, to L. Vankoughnet, DSGIA, December 15, 1879, LAC, RG 10, vol. 6620, file 104A-1-11, p. 16 (ICC Exhibit 1a, doc. 96-99).

The panel finds that Order in Council 565 has a dual nature. On the one hand, the Order in Council is an amendment to Treaty 7 with respect to the location of the reserve for the Blood Tribe. The Blood Tribe gave up its interest in the joint reserve at Bow River for a reserve within its home territory in southern Alberta. Therefore, the section of Treaty 7 relating to the joint reserve was replaced with an obligation to establish a reserve within the Blood Tribe's home base. In effect, one section of Treaty 7 was rewritten, and all of the other parts of Treaty 7 remained intact.

On the other hand, Order in Council 565 stipulates that a surrender of the Blood Tribe's portion of the Bow River reserve be taken in accordance with the surrender provisions of the 1876 *Indian Act*. This requirement indicates that officials of the day believed that a reserve was created by Treaty 7. In addition, officials of the day referred to the area as a "Reserve" in all of the documents. Yet, Canada has argued that because this reserve was never formally surveyed or confirmed by order in council, the reserve was never actually established and therefore never fell under the administration of the *Indian Act*. Because the Bow River reserve never fell under the administration of the *Indian Act*, Canada argues, a surrender was not necessary. In essence, Canada has applied the reserve-creation principles involving consultation, survey, and confirmation to this situation. The panel notes that these principles were developed in the context of numbered treaties that specified a reserve interest and did not specify an exact location or size of a reserve as in Treaty 7. Also, the panel is confronted in this issue with the question of how an historical situation should be examined: should modern principles be applied or should the principles of the time be applied? The panel must choose between applying modern principles to an historical event or applying historical principles to the historical event. The panel finds the intentions of the officials in the 1880s clear; they believed a reserve was created and believed a surrender was necessary to implement Order in Council 565. As a result, the panel finds that a surrender according to the *Indian Act* was required.

*Were the Surrender Requirements Met?*

As the panel has established that a surrender was required, the analysis moves to determining whether the statutory requirements were met. A surrender was taken from the Blood Tribe on September 25, 1880; however, there is no record of a meeting of the male members of the Blood Tribe or a vote by them at such a meeting taking place.<sup>87</sup> A second surrender from the Blood Tribe was taken on July 2, 1883,<sup>88</sup> in conjunction with surrenders from the

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Blackfoot and the Sarcee with respect to the joint reserve. This surrender is formally titled the “Amendment to Treaty 7.” A third surrender was taken on February 1, 1884,<sup>89</sup> to fulfill the requirement for an affidavit. The Blood Tribe argues that the surrender requirements were not met, specifically arguing that a surrender meeting, a mandatory requirement, never took place at any of the three surrenders. Canada argues that a surrender was not required, but, as a surrender was pursued, the statutory requirements were met and the surrender is valid.

According to the *Indian Act*, 1876:

26. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding except on the following conditions:-

1. 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 their rules, 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; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resided on or near and is interested in the reserve in question;

2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.<sup>90</sup>

The 1885 Order in Council confirming the surrender refers to section 37 of the 1880 *Indian Act*, which is identical to section 26. The Blood Tribe specifically argues that neither a meeting nor a vote was held.

The Supreme Court of Canada has considered the meaning of section 49 of the *Indian Act*, which is similar to section 26, in the case of *Cardinal v. R.*<sup>91</sup>

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87 Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67).

88 Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

89 Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 26–27).

90 *Indian Act*, SC 1876, c. 18, s. 26 (1, 2) (ICC Exhibit 6a, p. 9).

In that case, Estey J provided the following summary of the Act's 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.<sup>92</sup>

The main issue in *Cardinal* was the definition of the requisite "majority" pursuant to section 49(1) of the Act. Estey J held that a valid consent to a surrender did not require that an absolute majority of all eligible voting members vote in favour; rather, he held that the section required only that a majority of eligible voters be in attendance at the meeting, and that a majority of those in attendance give their assent to the surrender. The ICC has considered the statutory requirements regarding a surrender in many past reports. A specific analysis of the technical requirements was undertaken in *Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry*.<sup>93</sup>

Determining whether a meeting and subsequent vote took place involves a finding of fact. In this case, the panel notes that the oral history does not refer to a meeting or vote of this nature. The Blood Tribe oral history does contain a reference to another vote that took place after Red Crow's leadership; however, there is no history of a vote during Red Crow's leadership. Given that a meeting and vote would be unusual in Blood Tribe custom, the Elders believe that the event would have been passed down through oral history. In addition, Colonel James Macleod wrote a letter to his wife, Mary, in 1884, explicitly stating that no meeting had taken place to discuss the surrender.

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

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

93 ICC, *Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 61.

Based on this evidence, the panel concludes that a meeting and vote on the surrender did not take place, and, as a result, section 26 of the *Indian Act* was breached. The effect of a breach of these statutory requirements was examined by McLachlin J in *Apsassin*, where she noted:

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 then certifying the assent. I therefore agree with the conclusion of 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.<sup>94</sup>

The 1927 *Indian Act* was the subject of this analysis; however, the provisions are similar to the 1876 provisions. Essentially, a technical breach has occurred such that the surrender is not rendered invalid. For a surrender to be void *ab initio*, a breach of fiduciary duty must have occurred. The Supreme Court of Canada in *Guerin v. The Queen*<sup>95</sup> established the existence of a fiduciary relationship between the Crown and the Indians. The case dealt with a proposal to lease part of the Musqueam Indian Band Reserve to a golf club. The Band had surrendered its lands for lease on the basis of specific lease conditions. Ultimately, the final lease contained different terms from those which the Band had agreed to, and it resulted in a loss to the Band. Although the original claim was a breach of trust action, the Supreme Court of Canada held that the Crown's obligation was not a trust; rather, the Crown has a fiduciary duty to deal with the land for the benefit of the Indians.

The Crown's fiduciary duty, triggered upon the surrender of Indian land, interposes the Crown in any deal between Indians and a third party. The *Royal Proclamation of 1763* and the surrender provisions of the *Indian Act* highlight a general inalienability of Indian reserve land except for surrender to the Crown. No third party can purchase land from Indians directly. A sale of reserve lands can only be effected by the Indians first surrendering land to the Crown, with the Crown completing the transaction on their behalf. The purpose is to prevent exploitation.

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<sup>94</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 374–75 (sub nom. *Apsassin*).

<sup>95</sup> *Guerin v. The Queen*, [1984] 2 SCR 335.

The Court then discussed the specific breach of fiduciary duty that occurred:

The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the fields of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. 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.<sup>96</sup>

In summary, the Court in *Guerin* found that a special fiduciary relationship exists between the Crown and the Indians. When reserve land is surrendered, a fiduciary duty arises. This duty is defined by the terms of surrender.

The standard of conduct of the Crown as a fiduciary was further discussed by the Supreme Court of Canada in *Apsassin*. In analyzing the Band's contention that the Crown had a fiduciary duty to prevent it from surrendering its reserve as a surrender was not in its best long-term interests, McLachlin J examined the underlying policy of the *Indian Act* provisions:

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.<sup>97</sup>

Ultimately, the decision to surrender is made by the Band:

[I]f 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.<sup>98</sup>

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96 *Guerin v. The Queen*, [1984] 2 SCR 335 at 388.

97 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370–71 (sub nom. *Apsassin*).

98 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*).



In *Apsassin*, the Court confirmed the ruling in *Guerin* that the Crown's obligation is limited to preventing exploitative bargains. In other words, a fiduciary duty is triggered upon the approval of the surrender in the post-surrender period.

The definition and scope of the Crown's fiduciary duty was further refined in *Semiabmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (FCA). Following *Guerin* and *Apsassin*, the Federal Court of Appeal held that the Crown owed a fiduciary duty to the Band to prevent an exploitative bargain:

I should emphasize that the Crown's fiduciary obligation is to withhold its own consent to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction.<sup>99</sup>

Generally, the decision to surrender ultimately rests with the First Nation, and the Crown's role is to withhold its consent where this decision is foolish, improvident, or exploitative to the point where the First Nation is not truly making an autonomous decision.

In this inquiry, in order to find a breach of fiduciary duty, the panel must conclude that the Blood Tribe was not truly making an autonomous decision with the result that the surrender was exploitative. At the time of the surrender, the Blood Tribe was led by a number of leaders, the most significant being Red Crow. As consistently related by the Blood Tribe oral history, Red Crow was a strong leader who did his best to retain the Blood Tribe home base for the Tribe. Consequently, the panel finds, the Blood Tribe was autonomous and did not abnegate decision-making power to the Crown. With respect to whether the surrender was exploitative, the panel notes that the Blood Tribe's oral history confirms that the Blood had no interest in settling at Bow River and wanted to remain within its members' home base. As a result, the surrender could not have been exploitative. The fiduciary duty of the Crown in this case has been fulfilled.

In summary, the panel finds that the statutory requirements of a meeting and a vote on the surrender did not take place, resulting in a breach of the *Indian Act*. The effect of a breach of statutory requirements is technical and

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<sup>99</sup> *Semiabmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 at 538.

does not invalidate the surrender. In addition, no breach of fiduciary duty occurred with respect to the surrender as the common intent of the parties was to locate the Blood Tribe reserve in its home base.

#### **ESTABLISHMENT OF THE BLOOD TRIBE RESERVE**

Earlier in this report, the panel concluded that, following Treaty 7, the Blood Tribe's reserve had not yet been formally set aside but that it would be set aside in the Blood Tribe's home base, subject to the terms of the treaty. The panel must now consider the alternative arguments presented by the Blood Tribe, specifically, that the lands surveyed in 1882 formed its reserve. The Blood Tribe acknowledges that this survey did not include all of the Big Claim lands, which resulted in a much smaller reserve for the Blood Tribe. Canada argues that the 1882 survey was incomplete and not approved to become the reserve. Essentially, the panel must determine when the reserve for the Blood Tribe was established.

The parties' positions are set out in the following issues:

- 4 Was the reserve established by the Nelson survey work in 1882?
- 5 If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?

#### **Issue 4: Effect of Nelson's Survey**

##### ***Factual Background***

In this issue, the panel's attention is directed to specific events between 1880 and 1882. In late 1880, Red Crow, Indian Agent N.T. MacLeod, his son, N.T. MacLeod Jr, Father Lacombe, Jerry Potts, and Fred Pope selected the area for the Blood Tribe reserve.<sup>100</sup> N.T. MacLeod Jr described the trip:

I followed to where he [Red Crow] was sitting at the edge of the high bank opposite the Belly Buttes. As interpreted by Jerry [Potts], this is what he said:

"That is where I wish to live the rest of my life and to die there."<sup>101</sup>

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<sup>100</sup> The reserve of the Blood Tribe is sometimes referred to as Kainai or Kainaiwa.

<sup>101</sup> Newspaper clipping, N.T. MacLeod, c. 1880, in Glenbow Archives, J. Higinbotham Papers, M517, Scrapbook, vol. 1 (ICC Exhibit 1a, p. 107).

In his report to Indian Commissioner Dewdney, Indian Agent MacLeod wrote that he did not agree with Red Crow's choice:

I ... accompanied by "Red Crow" Head Chief of the Blood Indians to select a location for their Reservation. I went to the Forks of the Kootenai and Belly Rivers where I found a large bottom, the upper portion of which is occupied by Mr. Fred K. Wachter's Ranch; and below him a man of the name of Murray has a small ranch; the remaining portion of the bottom is chiefly gravel and sand, with very little soil and had been all overflowed during the higher waters in summer, there is no quantity of building timber available. This is the bottom which "Red Crow" once desired to settle upon but I considered it unfit.<sup>102</sup>

Indian Agent MacLeod went on to report his choice of the northern, eastern, and western boundaries of the reserve:

On the occasion of your visit to this treaty, in September, you made arrangements with the head chief, "Red Crow", to take a location on the Belly River, and to begin with his people to settle there until you could make arrangements to have the reservation finally decided upon. By your instructions I proceeded to this place and selected suitable land on the south side of the Belly River from the fork of the Kootenai eastward.<sup>103</sup>

Although the Blood Tribe reserve had been located, it remained unsurveyed until June 1882 when Lawrence Vankoughnet, DSGIA, reported that Indian Commissioner Edgar Dewdney had instructed John C. Nelson to survey the Blood Tribe reserve.<sup>104</sup> On October 5, 1882, E.T. Galt, Assistant Indian Commissioner, informed Commissioner Dewdney that the survey of the Blood Tribe reserve had been "completed" in the summer.<sup>105</sup>

On December 29, 1882, Nelson submitted his report of Indian reserves surveyed in Treaties 4 and 7 to the Superintendent General of Indian Affairs. Nelson described the limits of the Blood Tribe reserve as follows:

This large reserve occupies a tract of country lying between, and bounded by, the St. Mary's and Belly rivers, from their junction below Whoop-up to an east and west

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102 N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, p. 171).

103 N.T. MacLeod, Indian Agent, Treaty 7, Office of Indian Agent, Fort Macleod, to Edgar Dewdney, Indian Commissioner, Ottawa, December 29, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 97–100 (ICC Exhibit 1a, p. 181). There is no consistency to how the geography of the reserve is described. At times, it is described as being south of the Belly River and, at other times, as being east of the Belly River. Regardless, the reserve is bounded by the Belly River on the east side.

104 L Vankoughnet, DSGIA, to E.T. Galt, Assistant Indian Commissioner, June 27, 1882, LAC, RG 10, vol. 4452, pp. 153–54 (ICC Exhibit 1a, pp. 407–8).

105 E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534–35).

line which forms its south boundary, as shown by the accompanying sketch marked (e). This east and west line lies about nine miles north of the International Boundary.

Commencing near Whoop-up, a careful traverse was made of the St. Mary's River, up to the International Boundary.<sup>106</sup>

Nelson also stated in this report that the area of the Blood Tribe reserve measured 650 square miles and that the best quality land was found in the southern portion of the reserve and at Lee's Creek.<sup>107</sup> As noted, in correspondence dated October 5, 1882, E.T. Galt, Assistant Indian Commissioner, acknowledged that the survey of the Blood Tribe reserve had been completed in the summer.<sup>108</sup> Later, Nelson would confirm that the survey of the Blood Tribe reserve was completed by October 12, 1882.<sup>109</sup>

In January 1883, Nelson wrote to the DSGIA, providing additional information about the uncertain boundaries of the Blood Tribe reserve and advising of squatters near the reserve:

If this reserve is to extend all the way to the junction of these rivers it will include the old whiskey trading post called Whoop-Up and the bottom upon which it stands. This place is still occupied by a Mr. David Akers one of the pioneer Indian traders of the country.

I do not see any special advantage in taking Whoop-Up and the surrounding bottom into the reserve for the following reasons viz:

(1) Mr. Akers may ask a big figure for his improvements the intrinsic value of these to the department lies only in the logs of cotton-wood timber of which the buildings are composed.

(2) The bottom at Whoop-Up is very gravelly and Mr. Akers has his farm or field on the north side of Belly River on that account.

...

By keeping out of the reserve the section of land partly bounded by the pink margin on the sketch, the people at Whoop-Up will have no claims against the Department.<sup>110</sup>

<sup>106</sup> John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, p. 601).

<sup>107</sup> John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, pp. 595 and 601).

<sup>108</sup> E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534-35).

<sup>109</sup> John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, Ottawa, to Superintendent General of Indian Affairs, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 221 (ICC Exhibit 1a, p. 602).

<sup>110</sup> John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to DSGIA, Ottawa, January 15, 1883, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 634-35). David Akers was a squatter on a part of what was the Blood reserve on the west side near the St Mary River. The "Akers claim" is another specific claim filed by the Blood Tribe; it has been accepted for negotiation and has nothing to do with this claim.

Much of southern Alberta was subject to grazing leases granted by the Crown to ranchers. In the early 1880s, the dominion government made the settlement of the west a priority and began to develop policies to this end.

One of the purposes of the National Policy of Sir John A. Macdonald's Conservative government was to exercise Canadian governmental authority over the largely uninhabited territories of the Northwest. An important aspect of that policy involved the encouragement of large, well-capitalized companies or syndicates to acquire vast tracts of land considered too dry for ordinary agriculture, to carry on the business of ranching. To carry out the policy, the Dominion Government approved new grazing regulations in May 1881 which allowed non-residents to acquire up to 100,000 acres of land at a nominal rent for up to twenty-one years, and a number of large ranching companies were organised by eastern Canadian investors to take advantage of the new scheme.<sup>111</sup>

An Order in Council issued in April 1882 granted a total of 46 leases in the North-West Territories, a number of which were in the immediate vicinity of the Blood Tribe reserve and the Big Claim lands.<sup>112</sup> Three of the more significant leases are the leases granted to Cochrane, Parks, and the York Grazing Company.

The Cochrane Ranch lease was located between the Belly and Kootenay Rivers.<sup>113</sup> Cochrane acquired this land through two leases which were transferred from the Eastern Townships Ranch Company (lease no. 34)<sup>114</sup> and the Rocky Mountain Cattle Company (lease no. 25).<sup>115</sup> In September 1891, an Order in Council was passed, approving the relocation of the Cochrane Ranch from between the Kootenay and Belly Rivers, to land south of the Blood Tribe reserve within the Big Claim lands area.<sup>116</sup> It should be noted that, aside from the name, there is no obvious connection between the Cochrane Ranch Co. and the "squatter" named Cochrane who was paid to surrender his homestead at Standoff when the Blood Tribe reserve was established there.<sup>117</sup>

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111 Teresa Homik, "Kainaiwa Big Claim Confirmation Report," February 11, 1998 (ICC Exhibit 3a, p. 16). All of this information is based on Order in Council PC 803 (a), May 20, 1881, as amended by Order in Council PC 1710 (a), December 23, 1881. These Orders in Council are not part of the record for this inquiry.

112 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

113 "Leases Adjoining the Blood Reserve," author unknown, undated (ICC Exhibit 7n).

114 Order in Council PC 834, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 683).

115 Order in Council PC 835, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 684).

116 Order in Council PC 2149, September 12, 1891, LAC, RG 2 (ICC Exhibit 1a, pp. 2049–50, 2052).

117 L. Vankoughnet, DSGIA, to unidentified recipient, April 2, 1855, LAC, RG 10, vol. 3637, file 7134, pp. 550–54, Deputy Superintendent General's letterbook (ICC Exhibit 1a, pp. 1320–24).

On December 30, 1882, John H. Parks leased 66,000 acres (lease no. 30), comprising all of the land south of the reserve to the international boundary,<sup>118</sup> more particularly described as follows:

Township one, and part [east] of Lee's creek of Township two, in Range twenty-six. That part West of the St. Mary's River of the Northern one-third of Township one, also all West of said River of Township two, in Range twenty-five, and the portion West of said River of Township two Range twenty-four, and the East-half of Township one in Range twenty-seven, all West of the Fourth Principal Meridian ...<sup>119</sup>

In April 1883, this lease was transferred to the North West Land and Grazing Company, of which Parks was president.<sup>120</sup> By June 1883, the Department of the Interior realized that the Parks lease was included within the Blood Tribe reserve and commended that the lease be reduced to exclude the 15,000 acres overlapping with the reserve. The department's position was based on the 1882 southern reserve boundary, since the 1883 survey was not undertaken until July of that year.<sup>121</sup>

By July 1883, Nelson received instructions from Indian Commissioner Dewdney to re-survey the southern boundaries of the reserve "in conformity with the terms of the amended Treaty."<sup>122</sup> Nelson began the survey on July 12, 1883, and noted "that owing to the rapidly decreasing census of this tribe, the area of the Reserve surveyed by me last year required considerable reduction. This was effected by shifting the south boundary further northward as shewn [sic] by the maps."<sup>123</sup> Nelson's survey map shows an area of 547.5 square miles.

Parks requested in September 1883 that he be allowed to retain his lease and asked that the southern boundary of the Blood Tribe reserve be moved to accommodate his lease:

Having Received a Report from the Manager who went out for the purpose of commencing operations, he finds that the portion sought to be deducted is by far

118 "Leases Adjoining the Blood Reserve" (ICC Exhibit 7n).

119 Indenture, Deputy Minister of Interior and John H. Parks, December 30, 1883, file 241713] (ICC Exhibit 1a, pp. 611-14); Schedule, December 30, 1883, [LAC, RG 15, vol. 1233, file 241713] (ICC Exhibit 1a, p. 618).

120 John H. Parks, Saint John, NB, to Sir John A. Macdonald, Minister of the Interior, Ottawa, April 12, 1883, LAC, RG 10, vol. 1233, file 241713 (ICC Exhibit 1a, p. 636).

121 A. Russell, Department of the Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740-41).

122 John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 941-42).

123 John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 954-55).

the most valuable part of the range, having the most eligible site for the home farm and corral, and – what is an important matter when there is danger of raids by American Indians across the border – it is the portion furthest from the American boundary.

The Manager also writes that the Indian Commissioner informs him that the Reserve is not actually located yet, and Mr. Parks wishes me to ask if it will not be possible to retain the lease as it now is, and have the Southern boundary of the Reserve on the Northern line of the Second Township. He would respectfully submit that he made this selection, when nearly the whole of the grazing lands were open to him to choose from, and if, at that time, this piece, consisting of nearly half of one township and portions of two others, probably 20,000 acres in all, had not been included, he says that he would likely not have taken the tract at all, and he certainly would not have done so with the information since obtained from the Manager, but would have selected a ranche in some other locality, nearly the whole, as before stated, being at that time open.

Under the circumstances he feels that he is only asking what is reasonable and just in urging that the lease may be allowed to stand as now executed.<sup>124</sup>

On February 25, 1885, the department informed the North West Land and Grazing Company that the boundary confusion was considered settled, stating as follows:

I am directed to say, that a few days ago, a plan was received in this Department from the Department of Indian Affairs, showing the boundaries of the Blood Indian Reserve, by which I see that the reserve as it is now established, does not interfere with the grazing lands leased by this Department to Mr. John H. Parks.

I am to say that on receipt at this office of an assignment of the lands question in duplicate from Mr. Parks to the North West Land and Grazing Company, together with the registration fee of \$2.00 and ground rent of the lands described in the lease, amounting to \$1405.80 / 100, the Minister of the Interior will recommend to Council that the assignment be registered in this Department.<sup>125</sup>

The lease to Parks was subsequently cancelled by Order in Council PC 1837, dated July 18, 1890, owing to failure to “comply with the provisions” contained therein.<sup>126</sup>

On April 11, 1882, York Grazing Company was granted a lease consisting of 77,000 acres on land on the southwest side of the southern Big Claim lands to the Belly River (lease no. 13). The description is as follows:

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124 W. Pugsley, Jr, Secretary, Office of the North West Land and Grazing Company (Limited), Saint John, NB, to John A. Macdonald, Minister of the Interior, September 5, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 824–26).

125 P.B. Douglas, Assistant Secretary, Department of the Interior, Ottawa, to W. Pugsley, Secretary, North West Land and Grazing Co., Saint John, NB, February 25, 1885, LAC, RG 15, vol. 1223, file 241713 (ICC Exhibit 1a, pp. 1304–6).

126 Order in Council PC 1837, July 18, 1890, LAC, RG 2 (ICC Exhibit 1a, pp. 1987–88).

That part west of Lee's Creek of Township two in Range twenty-six, Township two in Range twenty-seven; that part east of Belly River of Township two in Range twenty-eight; the west half of Township one, Range twenty-seven, and Township one, Range twenty-eight, all west of the fourth meridian.<sup>127</sup>

The York lease was affected by the confusion concerning the Blood Tribe reserve's southern boundary. Order in Council PC 147 of February 6, 1886, was passed to address the situation:

The Minister further submits, that under date 8th January, 1886, an Order in Council was passed, cancelling the Order above recited, for the failure on the part of the Company to comply with the conditions imposed by the several Regulations and Orders in Council, governing the disposal of grazing lands.

The Company now state that this failure, on their part, to comply with the said Regulations arose from the fact, that subsequent to the passing of the Order in Council of the 11th April, 1882, before mentioned, an alteration was made in the Southern boundary of the Blood Indian Reserve, by which a portion of the tract accorded to the Company was included in the reserve, reducing the area of their ranche from Seventy-seven thousand acres, to Forty-nine thousand three hundred acres, and that owing to this reduction of area, they were prevented from making the financial arrangements necessary to enable them to comply with the Regulations in question.

The Minister represents that the statement made by the Company's Agent concerning the Southern boundary of the Blood Indian Reserve is correct, and that now the Southern boundary of the Blood Indian Reserve has been moved so far to the North as not to cover any part of the tract formerly promised to the Company, he, the Minister, recommends upon the request of the Company through their Agent, that the original area of Seventy-seven thousand acres be granted to them, and that he be authorized, under the Regulations and Orders in Council in that behalf now in force, to issue a lease for grazing purposes to the "York Grazing Company," for the tract of land hereinbefore described, upon payment being made of the rental for the same for the half-year commencing on the 1st March, 1886

...<sup>128</sup>

This lease was eventually cancelled, by Order in Council, on December 22, 1888, owing to the failure of York to comply with lease stipulations.<sup>129</sup>

Also related to the confusion over the southern boundary following the 1883 survey is the settlement of the Mormons at Lee's Creek in the spring of 1887.<sup>130</sup> On September 13, 1887, J.S. Dennis, Inspector of Surveys, wrote to

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127 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376-84).

128 Order in Council PC 147, February 6, 1886, LAC, RG 2 (ICC Exhibit 1a, pp. 1460-66).

129 Order in Council PC 2718, December 22, 1888, LAC, RG 2 (ICC Exhibit 1a, pp. 1800-1).

130 "Kainaiwa Big Claim Historical Report," prepared by Joan Holmes and Associates Inc., September 1994, p. 58 (ICC Exhibit 2a, p. 58); ICC Transcript, August 30-31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).



the Surveyor General stating that he had almost completed the subdivision of township 3, range 25, west of the 4th Meridian on behalf of the Mormons.<sup>131</sup> This area was located within the 1882 southern boundary of the Blood Tribe reserve but outside the 1883 southern boundary.

The establishment of the Mormon Colony at Lee's Creek prompted Red Crow to inquire into the southern boundary. The arrival of the Mormons is noted in the Blood Tribe's oral history. At the community session, Elder Mary Louise Oka related the following:

Many Wives, which are the Mormons, came from the south to this area. They were tired. They used the cows, and that's how they travelled. There were more children than there were men. There were more women than there were men. They asked to see the leader. They met with Red Crow. They asked if they could rest there until summer. They promised to move and they never did. They are still there.

Later on, people from the government came to meet with Red Crow, and they asked if the Mormons would be able to temporarily stay there, to lease the area for 99 years. Red Crow only knew that they asked to stay temporarily. He did not know what a 99-year lease was.

...

I never heard of Red Crow signing a piece of paper or signing a 99-year lease. All I heard was that later on there was a document with Red Crow's mark on it, the X that indicated his mark was very neat.

Today when we have Elders that sign a document or put their mark to a document and they are unable to write, they mark the paper so hard, they use the pen so hard trying to put their X on it, that they just about tear the paper, and their mark or their X is very crooked. It's not neat or even.<sup>132</sup>

Elder Pete Standing Alone recounts a similar history about the 99-year lease:

What I heard was that they journeyed from Salt Lake, Utah. And by the time they got to where they are today, they – it was getting late, towards winter, in the fall, and they were in bad shape. And I guess they wanted to talk to the leader which is Red Crow, and they did.

And what I heard, you know, after, that they were headed for the Peace River country. That's where they were going to. But they couldn't go any further that year because they were exhausted, the animals and themselves. So they asked Red Crow to spend the winter there, and Red Crow agreed. And the 99-year lease, that's where it came about. And Red Crow did not know it was a 99-year lease. He thought it was just for that one winter and they'll be on their way to Peace River country.

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131 J.S. Dennis, Inspector of Surveys, Calgary, to Surveyor General, Department of the Interior, September 13, 1887, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1644).

132 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 186–87, 189, Mary Louise Oka).

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And I also heard that this guy from Montana was the witness of that transaction. And at his death bed, he confessed that he did crooked work for the Mormons as interpreter or whatever. That's what I heard.<sup>133</sup>

The presence of the Mormon Colony was noted by the Blood Tribe and Indian Agent Pocklington. Pocklington wrote to Dewdney, asking to be provided with the exact location of the southern boundary of the Blood Tribe reserve. On September 26, 1887, Pocklington acknowledged that he had received a map with the information he requested from Dewdney.<sup>134</sup>

On December 2, 1887, J.C. Nelson, who surveyed the Blood Tribe reserve in 1882 and 1883, responded to Assistant Indian Commissioner Hayter Reed's request for information on Red Crow's claim by confirming the Blood Tribe reserve boundaries as amended by treaty in July 1883.<sup>135</sup> However, some confusion remained as Nelson went on to state:

I may add that a large number of colonists came into the country last spring, from Salt Lake Utah, U.S.A., & formed a settlement along the south boundary of the Blood Reserve near it's south-east corner, & this influx of American settlers may possibly have alarmed Red Crow & caused him to lay claim to the country lying west of the reserve.<sup>136</sup>

The Mormons had settled near the southern boundary of the reserve, yet Nelson is referring to Red Crow's complaints about the western boundary of the reserve. Nelson continued his report by stating:

The Department of the Interior has, last summer, subdivided the land adjacent to the south boundary of the reserve with a view apparently of permitting the colonists from Utah to take up homesteads.

It is almost unnecessary to add, in conclusion, that the boundaries of the Blood Reserve have been established in strict conformity with the description in the amended Treaty already referred to that I was present when that Treaty was made, & that the Indians were satisfied as they had every reason to be with the Reserve between the Belly & St. Mary's Rivers, given to them in exchange for their interest in the four mile belt along the Bow and South Saskatchewan Rivers assigned to them in the Treaty of 1887 [sic].<sup>137</sup>

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133 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 303–4, Pete Standing Alone).

134 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, September 26, 1887, LAC, RG 10, vol. 1555, p. 739 (ICC Exhibit 1a, p. 1649).

135 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

136 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

137 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1651–52).

On January 30, 1888, a meeting was held between the Chiefs of the Blood Tribe, the Peigans, Indian Agent Pocklington, Indian Department representative Springett, Superintendent P.R. Neale of the North-West Mounted Police detachment at Fort Macleod, and two interpreters. A transcript of this meeting describes the Blood Tribe's view of the signing of treaty at Blackfoot Crossing and the subsequent survey of the Blood Tribe reserve:

Red Crow (Chief of Bloods) asked that the Hon. J.F. Macleod be present. That gentleman being asked to attend replied that he was unable to do so as he was busy, White Calf (Blood) said he thought it was strange that Judge Macleod could always attend to the Whites and would not come to hear the Indians. Red Crow, after expressing his annoyances at Judge Macleod's refusal to come said:

[Red Crow:] Everyone knows what was said to us at the Blackfoot Crossing when the Treaty was made. We were satisfied. We did not at first want to make treaty. White men spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time that we wanted the country where the mountains and the timber were. The Government said they would be good to us. We took what the Government offered us. At one time we owned all the country and kept other Indians out. Since the treaty they are all together again. We are all friends and God has taken all the game away. Judge Macleod runs this part of the country. Why does he not come here and hear us talk? If a white man is shot by Indians by accident the Indian gets into trouble. When we were here to talk about my horses and the killing of six Bloods he said if the horses came back we would not do any wrong. We have not done wrong but now the whites are trying to do us wrong. Have the Indians done anything to the whites?

Mr. Pocklington: Not that I am aware of.

White Calf to Mr. Pocklington: You are treating our little children badly. The whites are cutting the reserve off, and we know nothing of it. We claim between the two rivers (Belly & St. Marys) up to the mountains. Now where we get the timber is on the white man's ground.

Mr. Pocklington: Who interpreted when you were told where the boundaries of your Reserve were to be placed?

Red Crow: Dave Mills.

Mr. Pocklington to Mills: Did you explain for Mr. Nelson where the line was to run?

Red Crow and Mills: (Mills asks Red Crow) Red Crow says: I never told him where to mark out the reserve.<sup>138</sup>

In his account of the meeting, Indian Agent Pocklington stated:

As regards the Reserve “Red Crow” said he claimed the whole of the country between the St. Mary’s & Belly rivers from Fort Kipp to the mountains. He spoke of the good behaviour of the Blood generally, that they had never shed any blood in their country and could not understand why the Police should shove the Indians. As regards his Reserve, he wished to know why, when the survey was being made he was not asked to go and see it as he would not have accepted any Reserve that did not run back to the mountains. He spoke a long time about the rations and said they were not getting as much as usual or so much as they required, the rations were too poor altogether and more of the kind. “North Axe” spoke of the same thing, though his talk was chiefly about the Indian being shot by [illegible] but of course he had to talk about rations very freely as also did the other Piegan Chiefs.

I informed the Indians that the “River bank Mormons” would surely be compensated that you had already started the matter and read your telegram to them on the subject, also that the shoving was a mistake. I endeavoured to explain to “Red Crow” that when the Treaty was made with the Indians they were to receive so many acres of land for every family of five and that when the survey was made the amount of land given them was in accordance with the Treaty however he did not seem satisfied and still said he claimed back to the mountains. I think it was a great pity that when the survey was made “Red Crow” had not been there.<sup>139</sup>

In August 1888, Indian Agent Pocklington and Surveyor Nelson accompanied Red Crow and others to the southeast corner of the reserve, where an iron post was placed in a mound and the line of the reserve explained. Pocklington later reported to the Indian Commissioner:

Red Crow said that when the amended treaty was made in 1883, he claimed all the land between the two rivers back to the mountains. I explained to him that there was far more land in the area he claimed than they were entitled to under treaty. I have explained to him that, as a matter of fact, the present Reserve contained far more land than they were entitled to. He and the two minor chiefs expressed themselves as well satisfied and pleased that we were going to take them over the boundary line.

We found the mounds and posts in a good state of preservation at mile intervals, and in every instance the mounds were renewed arriving at the S or corner another post was placed in the centre of the mound. “Red Crow” said he now knew where his Reserve ran and was satisfied.<sup>140</sup>

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138 PR. Neale, Superintendent (Commanding Macleod District), NWMP, Macleod, February 2, 1888, LAC, RG 18, vol. 19 (ICC Exhibit 1a, pp. 1658–59).

139 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, February 4, 1888, LAC, RG 10, vol. 1556, pp. 259–64 (ICC Exhibit 1a, pp. 1671–73).

140 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, August 30, 1888, LAC, RG 10, vol. 3791, file 45995 (ICC Exhibit 1a, pp. 1730–31).

In his account of the meeting with Red Crow, Surveyor Nelson stated that Red Crow had a “notion that he owned the territory lying between the Belly and St. Mary’s Rivers, from their confluence to the mountains.”<sup>141</sup> Following this meeting, the confusion over the southern boundary was considered resolved, resulting in an Order in Council dated December 17, 1888, allowing the Mormons to purchase the land upon which they had settled<sup>142</sup> and additional lands for homesteading purposes.<sup>143</sup>

The Blood Indian Reserve (IR) 148 was confirmed by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary’s River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee’s Creek which enters near the south-east corner, empties into the St. Mary’s. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary’s *Coulée* on the eastern which opens into that of the St. Mary’s.<sup>144</sup>

### ***Blood Tribe’s Position***

The Blood Tribe states that, if the panel does not find that the Big Claim lands formed the reserve, then the lands surveyed by Nelson in 1882 formed the

141 John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775).

142 Section 9, township 3, range 25, W4M. The Mormons also purchased land on the west side of the Belly River; see E.J. Wood, Latter Day Saints, Cardston, to J.D. McLean, Assistant Deputy and Secretary, DIA, Ottawa, February 15, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2260). They also purchased land in the southwest corner of the reserve; see Indian Agent, Blood Agency, Cardston, to Secretary, DIA, Ottawa, February 20, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2261).

143 Order in Council PC 2547, December 17, 1888, LAC, RG 2(1) (ICC Exhibit 1a, pp. 1796–98).

144 Order in Council PC 1151, May 17, 1889, in Nelson’s Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

reserve. Nelson completed the survey of the Blood Tribe reserve in the summer of 1882, and this survey was accepted by the Department of the Interior and the Department of Indian Affairs.<sup>145</sup>

The Blood Tribe cites the reserve-creation requirements outlined in the *Lac La Ronge Indian Band v. Canada* case:

...[F]or an Indian reserve to be created there must be a clear intention on the part of the Crown to set apart a defined tract of land as an Indian reserve. The Crown must carry out this intention by, for example a positive act of an official properly “deputed” or authorized to carry out the intention.<sup>146</sup>

In applying these principles to this issue, the Blood Tribe argues that the 1880 Order in Council reflects the intentions of the Crown to create a reserve. The Blood Tribe acknowledges that a form of consultation regarding the location of the reserve occurred when the Blood Tribe rejected the joint reserve at Bow River and, through Red Crow, chose to remain at its home base. In June 1882, Nelson received clear instructions from Dewdney to survey the Blood Tribe reserve. He completed the survey in 1882, which he reported to the Superintendent General of Indian Affairs in December 1882. The Blood Tribe argues that the 1882 survey was consistently acknowledged by the Crown, and this acknowledgment had the effect of ratifying the 1882 survey. In particular, the Blood Tribe points to the correspondence between the Crown and the North West Land and Grazing Co., regarding a grazing lease that had been entered into in April 1882, as well as an 1886 Order in Council, as manifestations by the Crown that the lands surveyed in 1882 constituted the reserve.

### ***Canada’s Position***

Canada argues that the 1882 Nelson survey was incomplete and not confirmed. Nelson was sent back in 1883 to address the incomplete 1882 survey and provide further survey plans. As a result, the 1882 survey was not sufficient evidence of an exercise of the Crown prerogative to create a reserve for the following reasons:

- Nelson’s survey lacked adequate traverses and failed to meet technical standards;

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<sup>145</sup> Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 114.

<sup>146</sup> Written Submissions on Behalf of the Blood Tribe, June 15, 2005, p. 115.

- the quantum of land surveyed was based on an inflated population number. A more accurate population figure was reached after the list of members was reduced and the reserve was reduced by 102.5 square miles;
- the survey failed to include the property of the Cochrane ranch lands that the Crown had been unable to purchase;
- the survey failed to show the Band's timber limit;
- the survey included lands that had already been the subject of grazing permits, resulting in a dual legal interest; and
- Nelson only surveyed the reserve and did not have the power to create the reserve.<sup>147</sup>

Canada cites the steps outlined in *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816, to create a reserve. In addition, Canada states that the intent to create a reserve for the Blood Tribe is set out in Treaty 7, and that the remaining steps in reserve creation are the setting apart of the lands and acceptance by the Crown. Both of these steps were met with the 1882 survey, and in doing so, Canada has met its fiduciary obligations.

### ***Panel's Findings***

In this issue, the panel is asked to determine when the Blood Tribe reserve was established. The parties differ in their approach to reserve creation. The Blood Tribe argues from a perspective based on intention and facts, while Canada argues from a perspective based on procedure. There is no doubt that there was a definite intention to create a reserve and that a reserve was created. The parties disagree over the date of creation; the Blood Tribe argues that the reserve was created in 1882, while Canada argues that the proper date is 1883.

In addressing this issue, the panel is guided by case law presented by both parties and past ICC inquiry reports. In *Lac La Ronge Indian Band v. Canada*, the court considered the steps of reserve creation with respect to the Treaty 6 area and stated:

There is no single method to create a Reserve. However, there are certain things which are essential. The Crown must make a deliberate decision to establish a

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147 Written Submissions on Behalf of the Government of Canada, August 30, 2005, pp. 48–49.

Reserve; there must be consultation with the Indians; there must be a clear demarcation of the lands; and there must be some manifestation by the Crown that the lands will constitute an Indian Reserve.

The position of the plaintiffs is that if there is consultation and demarcation, whether by survey or reference to the township plan, then a Reserve comes into existence. In my opinion, that approach is too broad and simplistic. There were times when this happened and a Reserve did result. There were instances when the surveyor was instructed to create the Reserve. No further approval was needed. There were other instances when the instructions were not all inclusive and the Crown did not expressly give its approval, but by its silence and subsequent attitude the Crown manifested its acquiescence in the land being constituted a Reserve. Then there were other instances when the instructions clearly limited the authority. In such a case a survey in itself was not sufficient.

It is my conclusion that the land was not “set apart” until the Crown treated it as such. That could happen in more than one way, including an absence of protest.

As best I can make out, on the prairies all of the Reserves are the subject of an Order-in-Council. However, I do not consider such Orders to be an essential part of the process of establishing a Reserve ... The Orders-in-Council were no more than an administrative act which confirmed or clarified what already was a reality.”<sup>148</sup>

More recently, the question of reserve creation in the *Indian Act* was dealt with by the Supreme Court of Canada in *Ross River Dena Council Band v. Canada*.<sup>149</sup> The Supreme Court stated the following with respect to reserve creation:

Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1998] 2 S.C.R. 654, at pp. 674–75; Woodward, *supra*, at pp. 233–37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.<sup>150</sup>

<sup>148</sup> *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 337–38.

<sup>149</sup> *Ross River Dena Band v. Canada*, [2002] 2 SCR 816.

<sup>150</sup> *Ross River Dena Band v. Canada*, [2002] 2 SCR 816 at 850–51.



The Court also stated that fiduciary duties apply in the reserve-creation process:

It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights.<sup>151</sup>

The nature of the Crown's fiduciary duties in reserve creation was further discussed in *Wewaykum Indian Band v. Canada*.<sup>152</sup> Although this case deals specifically with reserve creation in British Columbia, the case is also the Supreme Court of Canada's most recent statement regarding the Crown / Aboriginal fiduciary relationship and when this relationship gives rise to a fiduciary duty.

In *Wewaykum*, two different bands claimed the other band's reserve or compensation from the Crown over the allocation of the reserves. The Supreme Court of Canada dismissed the appeals of both bands. In doing so, the Court said the following regarding fiduciary law:

1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.<sup>153</sup>

Essentially, the Supreme Court confirmed that the Crown / Aboriginal relationship is a fiduciary relationship, and that “not all obligations existing between the parties to a fiduciary relationship are fiduciary in nature.”<sup>154</sup> The Court also acknowledged that “[t]he fiduciary duty imposed on the Crown

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151 *Ross River Dena Band v. Canada*, [2002] 2 SCR 816 at 851.

152 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

153 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

154 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 288.

does not exist at large but in relation to specific Indian interests.”<sup>155</sup> In *Wewaykum*, this specific Indian interest was identified as land.

An Indian band’s interest in specific lands that are subject to the reserve-creation process and where the Crown acts as the exclusive intermediary with the province can trigger a fiduciary duty. The Court said the following with respect to the content of a pre-reserve–creation fiduciary duty:

Here ... the nature and importance of the appellant bands’ interest in these lands prior to 1938, and the Crown’s intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.<sup>156</sup>

The Court advised that consideration must be given to the context of the time at reserve creation and the likelihood of the Crown facing conflicting demands. The Crown is not an ordinary fiduciary and must balance the public interest with the Aboriginal interest:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.).<sup>157</sup>

The question of reserve creation has been dealt with in numerous ICC reports, both in a treaty<sup>158</sup> and a non-treaty<sup>159</sup> context. More specifically, in the *Carry the Kettle First Nation: Cypress Hills Inquiry*, cited earlier in this report, the Commission inquired into whether a reserve had been set aside at

155 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286.

156 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 294.

157 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 293.

158 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 3; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

159 ICC, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3; *Mamalelegala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Nak'azdli First Nation: Abi-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (Ottawa, March 2006); *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

Cypress Hills for the Carry the Kettle First Nation. The Commission held that the three requisite elements in setting aside a reserve included consultation and selection, survey, and acceptance. The key issue in the Cypress Hills inquiry was the element of acceptance in reserve creation.<sup>160</sup> In finding that the Cypress Hills reserve was not accepted by Canada, the Commission stated the following:

The Commission does not accept the contention that the setting aside of reserve land, in the context of the numbered prairie treaties, was simply a matter of royal prerogative. The treaties contemplated the involvement of both parties in the reserve creation process and, in our view, a true meeting of the minds was fundamental to the selection, surveying, and setting aside of reserves. In the result, there must exist some evidence of the intent of both Canada and the First Nation that the lands identified should be set aside as Indian reserves. In the circumstances of this case, we are unable to conclude that the Government of Canada was party to such a consensus.<sup>161</sup>

Acceptance of the reserve by both parties is critical to the establishment of the reserve. As well, while an order in council is evidence of acceptance, the ICC has stated, in the past, that the order in council is not strictly necessary in creating a reserve:

Although the Commission does not make any findings on whether a federal order in council is necessary before an Indian reserve can be created, the fact that the survey plan submitted by Nelson was accepted by Canada by means of an Order in Council provides evidence that the Crown agreed to the reserve surveyed by Nelson in 1881.<sup>162</sup>

In addition, the Commission has noted that reserves which had been surveyed could be rejected by either the First Nation or Canada prior to being formally set aside.<sup>163</sup>

With respect to this inquiry, there is no doubt that a reserve was intended to be created. The parties at least agree that, following 1880, a reserve was intended to be established within the home base of the Blood Tribe in southern Alberta. What the parties do not agree on is the date the reserve was

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160 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 309.

161 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 318.

162 *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 87.

163 ICC, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209 at 314.

actually established and, ultimately, the date of first survey for treaty land entitlement purposes. The panel is faced with the following questions:

- When was the reserve established?
- Were the fiduciary duties of the Crown met when the reserve was established?

To address these questions, the panel is guided by the principle of a fact-based analysis established in *Lac La Ronge* and *Ross River*. The panel is also guided by the elements of consultation and selection, survey, and acceptance as set out in previous ICC reports.

With respect to consultation and selection, the panel notes the Blood Tribe has acknowledged that a form of consultation had occurred when Red Crow chose to remain in the Blood Tribe's home base. The panel also notes N.T. MacLeod Jr's description of Red Crow's choice of land, Indian Agent MacLeod's disagreement with this choice, and his subsequent selection of land for the reserve. The Blood Tribe's extensive oral history and traditional knowledge of Red Crow leave little doubt that Red Crow had selected land between the Kootenay (Waterton) and St Mary Rivers. This area would have included the Belly Buttes and the area where the Blood Tribe originally held the Sundance ceremony. While the panel is intrigued by this set of facts, the focus and the arguments presented in this particular issue are on the two surveys of the reserve, the impact of these surveys on the southern boundary of the reserve, and the acceptance of the reserve by the parties.

Two surveys of the reserve were completed, and the second survey altered the southern boundary of the reserve. Order in Council PC 1151, issued on May 17, 1889,<sup>164</sup> concluded the formal process of establishing the reserve and approved the 1882 survey of the reserve, as amended in 1883. However, given the unique occurrence of two surveys and the parties' arguments, the panel is compelled to examine closely the facts behind these two surveys and what led to the change in the southern boundary. The panel states that the 1882 survey established the Blood Tribe's reserve. Although mindful of the significance of the 1889 Order in Council and its role in the reserve-creation process, the panel believes that an exception is warranted in this case based on the facts and evidence. The panel states the following evidence shows that

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<sup>164</sup> Order in Council PC 1151, May 17, 1889, in Nelson's Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

the Crown believed the Blood Tribe's reserve to have been established in 1882:

- In a letter to the Indian Commissioner dated October 5, 1882, E.T. Galt, the Assistant Indian Commissioner, acknowledged that the survey of the Blood Tribe reserve had been completed in the summer.<sup>165</sup>
- Indian Agent C.E. Denny wrote in his annual report to the Superintendent General of Indian Affairs, dated November 10, 1882, that the Blood had “been anxious to have their reserves laid out. This has now been done as far as the Bloods, Peigans, Sarcees and Stoneys are concerned.”<sup>166</sup>
- In his annual report to the Superintendent General of Indian Affairs dated December 15, 1882, Edgar Dewdney, the Indian Commissioner, wrote that he had visited the Blood Tribe reserve and he reported on the extent of settlement on the reserve.<sup>167</sup>
- In his report to the Superintendent General of Indian Affairs dated December 29, 1882, Surveyor John C. Nelson wrote that he had completed the survey of the reserve for the Blood Tribe. The reserve was 650 square miles, enough land for 3,250 people.<sup>168</sup>
- Between April 9, 1883, and June 14, 1883, correspondence between Indian Agent Denny and Indian Commissioner Dewdney discussed the issue of D.J. Cochrane, who occupied a farm included within the Blood Tribe reserve.<sup>169</sup>

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165 E.T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, p. 534).

166 C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 168–77 (ICC Exhibit 1a, p. 558).

167 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, Ottawa, December 15, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 193–203 (ICC Exhibit 1a, p. 586).

168 John C. Nelson, Dominion Land Surveyor, to the Superintendent General of Indian Affairs, December 29, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 221 (ICC Exhibit 1a, p. 602).

169 C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, April 9, 1883, LAC, RG 10, vol. 1550, p. 121 (ICC Exhibit 1a, p. 676); C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, April 24, 1883, LAC, RG 10, vol. 1550, p. 171 (ICC Exhibit 1a, p. 685); L. Vankoughnet, DSGIA, to John A. Macdonald, Superintendent General of Indian Affairs, Ottawa, June 7, 1883, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 723–25); Edgar Dewdney, Indian Commissioner, June 14, 1883, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 726).

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There is no question that Nelson conducted a survey in 1882 or that the Blood Tribe had settled in the area where its reserve was surveyed. The question that the parties disagree upon is whether the 1882 survey firmly established the reserve. All of the above correspondence confirms that the Blood Tribe reserve was surveyed and acknowledged by the Crown as being complete by the end of 1882. At this stage, all of the criteria outlined in *Lac La Ronge* have been met: there was a deliberate decision to establish a reserve, consultation with respect to the general location of the reserve had occurred, Nelson's 1882 survey clearly demarcated the lands, and, most importantly, the completion of the reserve was acknowledged by the Crown.

However, an order in council confirming the reserve was not issued immediately, and a second survey took place in 1883. Therefore, the panel is compelled to examine all of the facts in this situation. The existence of the 1883 survey is not in dispute between the parties; rather, the significance of this survey is in dispute. The panel states that the circumstances surrounding the 1883 survey are suspicious and warrant careful consideration with respect to the issue of reserve creation. Notably, the panel focuses on the following facts:

- Concurrent with the 1882 survey, the Department of Indian Affairs actively pursued a policy to curtail what was perceived to be fraudulent claims for rations. This policy was driven by economic concerns.<sup>170</sup>
- In June 1883, the Department of the Interior realized that the Parks lease overlapped with the southern boundary of the Blood Tribe reserve, as surveyed in 1882.<sup>171</sup> The department had recommended that the lease be reduced to accommodate the reserve.
- A second surrender, the Amendment to Treaty 7, was taken on July 2, 1883. The surrender describes the Blood Tribe reserve and specifically locates the southern boundary at 49 degrees, 12 minutes and 16 seconds. The location of this southern boundary is the re-surveyed southern boundary, or the boundary that was moved north 10 miles.
- Surveyor Nelson, however, received instructions on June 28, 1883, and completed his re-survey after the July 2, 1883, surrender. The survey was completed by August 1883; however, Nelson's field notes and

170 E.T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 537–38).

171 A. Russell, Department of the Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

plans, as of August 1884, had not been forwarded to the department for examination.<sup>172</sup> In his December 1883 report, Nelson wrote that he had received instructions with respect to changing the boundaries of the Blood Tribe reserve on June 28, 1883, and shifted the southern boundary northward to reflect “the rapidly decreasing census of this tribe.”<sup>173</sup>

- With respect to the population, there was acknowledgment of movement across the border.<sup>174</sup> However, the population numbers between September 1882 and June 1883 are consistent. The 1882 payroll completed in September 1882 shows that 3,542 people were paid.<sup>175</sup> Between September 1882 and June 1883, the numbers found in historical documents that refer to a population number for the Blood Tribe range between 3,400 and 3,600.<sup>176</sup>
- In the interim between 1883 and 1889, when the Order in Council was issued, there was much confusion over where exactly the southern boundary of the Blood Tribe reserve was and whether the Parks lease overlapped with this part of the reserve.

The panel’s attention is specifically drawn to the fact that the July 2, 1883, Amendment to Treaty 7 or surrender contains an exact bearing description for the southern boundary of the Blood Tribe reserve. The bearing description locates the southern boundary north of the original boundary surveyed in 1882. In effect, the size of the reserve was reduced with the movement of the southern boundary. Nelson received instructions on June 28, 1883, to adjust the boundary based on the change in the population. His second survey of the southern boundary was not completed until August 12, 1883, after the surrender.

However, all of the historical documentation that refers to a population for the Blood Tribe consistently cites it in the range of 3,400 to 3,600. There is no

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172 R. Sinclair, Acting Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister, Department of the Interior, August 8, 1884 (ICC Exhibit 1a, pp. 1230–31).

173 Letter from Indian Reserve Surveys to the Commissioner of Indian Affairs, December 1, 1883 (ICC Exhibit 1a, p. 954).

174 John C. Young, United States Indian Agent, to the Commissioner of Indian Affairs, August 11, 1882 (ICC Exhibit 1a, p. 490).

175 Treaty annuity paylists, Blood Tribe, 1877–1910 (ICC Exhibit 1g).

176 E.T. Galt, Assistant Indian Commissioner, to the Indian Commissioner, October 5, 1882 (ICC Exhibit 1a, p. 535); Newspaper clipping, October 6, 1882 (ICC Exhibit 1a, p. 544); C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, November 10, 1882 (ICC Exhibit 1a, p. 561); T.P. Wadsworth, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, December 9, 1882 (ICC Exhibit 1a, p. 567); John A. Macdonald, Superintendent General of Indian Affairs, to Sir John Douglas Sutherland Campbell, Marquis of Lorne, December 31, 1882 (ICC Exhibit 1a, p. 626); Report of D. Bruce Payne, Church Missionary Society for Africa and the East, 1883–84 (ICC Exhibit 1a, p. 631).

documentation discussing the adjustment of the population in the period between the 1882 survey and June 1883, when Nelson received new instructions. There is a letter suggesting that there are irregularities with the 1882 payroll, but these irregularities are related to sizes of families changing from the previous payroll without explanation.<sup>177</sup> Also, Indian Agent Denny wrote on July 10, 1883, that a reduction in the number of Indians who had received rations on the Blood Tribe reserve was made after a correct census was done.<sup>178</sup> However, no updated census or population number is provided until September 1883, after the reserve was reduced. There are no other records providing a background for Nelson's instructions to re-survey the Blood Tribe reserve's southern boundary in June 1883.

Based on the same evidence, Canada has argued that the reduced lists were necessary to ensure an accurate population count and an adequate reserve. Canada has also argued that Nelson had been instructed to correct survey errors from the previous year. However, the panel's examination of the evidence, particularly during the period between the two surveys, does not indicate that Nelson had made errors. Nor does the historical documentation provide any explanation for reducing the population so drastically. There are far too many gaps in the evidence to reach a reasonable conclusion as to why the July 2, 1883, surrender contains the bearing description for the relocated southern boundary and how the decision to move the southern boundary was reached.

The panel finds the lack of an explanation and the lack of a population number at the time Nelson received his instructions to re-survey the southern boundary disturbing. Once the southern boundary was moved, the reserve contained 547.5 square miles, enough land for a population of 2,727 people based on the Treaty 7 land entitlement formula. The population would have to have been reduced by almost one thousand people in a short period of time in order to effect this change in the reserve's size by June 28, 1883, when Nelson received his new instructions, or by July 2, 1883, when the surrender containing the bearing description of the southern boundary was signed. With such a great reduction, the panel reasons that an explanation must have been given or documented. Yet, no records exist. As a result, the panel cannot solely rely on the argument of a population decrease to explain the movement of the southern boundary.

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177 L. Vankoughnet, DSGIA, to E.T. Galt, Assistant Indian Commissioner, February 21, 1882 (ICC Exhibit 1a, p. 643).

178 C.E. Denny, Indian Agent, to Superintendent General of Indian Affairs, July 10, 1883 (ICC Exhibit 1a, p. 763).

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Instead, the panel's attention is drawn to the fact that Parks was granted a lease that was shown to overlap with the Blood Tribe reserve on the 1882 surveyed southern boundary. In June 1883, the Department of the Interior had recommended a reduction in the acreage of the lease and had advised Parks. The panel reasons that, if the acreage of the lease had been reduced, then there would have been no need to move the southern boundary of the Blood Tribe reserve. Instead, the surrender document signed by the Blood Tribe contained a description of the southern boundary that had already been moved north. The panel reasons that the movement of the southern boundary was more likely the result of accommodating the Parks lease rather than a decrease in the Blood Tribe's population.

Canada has argued that the Crown was balancing competing interests between settling the west and addressing the needs of the Blood Tribe for a reserve. Canada has stated that the Crown had duties to different groups of people in the west and these groups include settlers as well as First Nations. Although the panel is mindful of the Crown's duty to balance competing interests, the panel states that these competing interests are not necessarily equal interests. As a result, the Crown will inevitably be required to prioritize competing interests. In this situation, the Crown certainly had a duty to Parks and other settlers, but the Crown had a concurrent and more pressing duty to fulfill a treaty obligation to the Blood Tribe. When the Crown is faced with a duty to fulfill a treaty obligation to establish a reserve and a duty to fulfill a lease, the panel believes that a proper balancing of the interests would place the Blood Tribe's interest in having a reserve established ahead of ensuring the location of the Parks lease. Essentially, the southern boundary should not have been arbitrarily moved and the Parks lease should have been reduced to accommodate the reserve.

On the balance of this evidence, the panel cannot find that the Crown met its basic fiduciary obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the Aboriginal beneficiaries. The Crown failed to provide full disclosure with respect to the movement of the southern boundary and, in moving the southern boundary, the Crown failed to properly balance the competing interests of a lease obligation and a treaty obligation. As a result, the panel concludes that the Crown breached its basic fiduciary duties with respect to the creation of the Blood Tribe reserve.

To further illustrate the panel's reasoning, attention is drawn to the confusion caused by the re-survey of the southern boundary. By the end of

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1882, correspondence between department officials indicates that they believed the survey of the Blood Tribe reserve was complete. There are no documented instructions regarding the 1883 re-survey. A serious gap in the historical documentation exists. The confusion that this gap created is reflected historically by the arrival of the Mormons in 1887. This event prompted Red Crow to inquire about the location of the southern boundary, which, in turn, prompted Indian Agent Pocklington to request a map setting out the exact location of the southern boundary. Red Crow's understanding of the location of the southern boundary appears to be consistent with the 1882 survey. In 1887, the Blood Tribe believed that the southern boundary was farther south than as surveyed in 1883. The oral history of the Blood consistently relates the Mormon arrival in the winter and how Red Crow was asked permission for them to camp at Lee's Creek. As well, the oral history consistently refers to a 99-year lease that was signed by Red Crow allowing the Mormons to stay; however, this lease has never been found. The panel reasons that, if the reserve had been established clearly, and there was no issue regarding acceptance of the boundary, then the confusion regarding the location of the southern boundary would not have occurred.

All of these facts point to the Crown failing to fulfill its fiduciary obligations with respect to the movement of the southern boundary. The second survey was not completed in a transparent fashion such that the Blood Tribe had received full disclosure. In fact, the Department of Indian Affairs was not completely aware that the second survey had occurred. These actions do not show that the Crown acted with ordinary prudence with a view to the best interests of the Blood Tribe. Because the panel cannot find that the Crown met its fiduciary obligations with respect to the creation of the Blood Tribe reserve in 1883, the panel concludes that the Blood Tribe reserve was established in 1882.

**Issue 5: Was a Surrender Required after the 1883 Survey?**

- 5 If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883?**

As the panel has concluded that the reserve was established by the 1882 Nelson survey, the panel also concludes that a surrender was required to move the boundary as a result of the 1883 Nelson survey.

A surrender was not taken in this case, and an outstanding lawful obligation exists with respect to this surrender. The panel does not feel it is necessary to examine this issue in depth.

**TREATY LAND ENTITLEMENT CLAIM**

**Issue 6: Treaty 7 Formula and the Blood Tribe Reserve**

**6 Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve?**

In this issue, the Blood Tribe argues that, primarily, the TLE formula does not apply as the reserve consists of the Big Claim lands. However, the Blood Tribe argues that the TLE formula in Treaty 7 applies to the creation of the reserve on the basis that the Crown is obligated to provide a reserve sufficient for the Blood Tribe's population. Treaty 7 contains a formula for minimum sizes of reserves based on population, and this formula is a minimum amount of land to be allotted. The Blood Tribe further argues that the failure to provide the minimum amount is a breach of fiduciary duty.

Canada argues that the formula in Treaty 7 applies.

The panel notes that the parties generally agree that the formula with respect to land entitlement applies to the creation of the Blood Tribe reserve. Given the panel's conclusions in the previous issues, it is not necessary to go any further in this issue.

**Issue 7: Date for Calculation of Treaty Land Entitlement**

**7 If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?**

On this issue, the parties had agreed to limit their arguments to the date of first survey (DOFS) only, and not address any other treaty land entitlement issues. As the panel has concluded that the Blood Tribe reserve was established in 1882, the panel also concludes that the date of first survey for the Blood Tribe is also 1882.

## PART V

### CONCLUSIONS AND RECOMMENDATIONS

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7 in 1877, a joint reserve along the Bow River was set aside for the Blood Tribe, the Blackfeet, and the Peigan. Subsequent to 1877, historical events show that the Crown and the Blood Tribe agreed that the Blood would give up its interest in the joint reserve at Bow River in exchange for a reserve in its homelands on the Belly Buttes. The reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a cognizable interest in its lands in the home base.

With respect to the surrender of the Blood Tribe's interest in the Bow River reserve, the panel finds that a surrender was required. The panel further finds that the statutory requirements of a meeting and a vote on the surrender did not take place, and, as a result, the *Indian Act* was breached. However, the effect of a breach of these statutory requirements is technical in nature, and a technical breach does not render the surrender invalid. In examining whether a breach of fiduciary duty occurred with respect to the surrender, the panel concludes that the Blood Tribe did not abnegate its decision-making power and that the surrender was not an exploitative bargain because the common intent of the parties was to locate the Blood Tribe reserve in its home base. No breach of fiduciary duty occurred with respect to the surrender.

As for when the Blood Tribe's reserve was established, the panel concludes that the 1882 survey conducted by John Nelson established the reserve. Although mindful that the 1883 survey is acknowledged as confirming the reserve in an 1889 Order in Council, the panel states that the circumstances surrounding the 1883 survey warranted careful examination. Because the reserve was established in 1882, a surrender was necessary in 1883 to move the southern boundary. Also, the panel concludes that the Crown failed to

fulfill its fiduciary obligations with respect to the movement of the southern boundary.

With respect to the treaty land entitlement portion of this inquiry, the panel notes that the parties had agreed to limit their arguments to the date of first survey only and not address the remaining TLE issues. As the panel has concluded that the Blood Tribe's reserve was established in 1882, the panel also concludes that the date of first survey is 1882.

We therefore recommend to the parties:

**RECOMMENDATION 1**

**That the claim for the Big Claim lands constituting the reserve not be accepted.** The panel finds that the Blood Tribe reserve would at least be located within the Blood Tribe's home base, subject to the treaty land entitlement formula and the other terms of Treaty 7.

**RECOMMENDATION 2**

**That the claim that the 1882 Nelson survey established the Blood Tribe reserve be accepted.** The panel finds that the 1882 Nelson survey established the reserve and that a surrender was required to move the southern boundary.

**RECOMMENDATION 3**

**That the date of first survey for the Blood Tribe be accepted as 1882.**

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FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commissioner (Chair)



Alan C. Holman  
Commissioner

Dated this day of 30th day of March, 2007.



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# **APPENDIX A**

## **HISTORICAL BACKGROUND**

### **BLOOD TRIBE/KAINAIWA BIG CLAIM INQUIRY**

**INDIAN CLAIMS COMMISSION**

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### INTRODUCTION TO THE BLOOD TRIBE

The Blood Tribe<sup>1</sup> is a member of the Blackfoot Confederacy,<sup>2</sup> which consists of the Peigan, the Blackfoot, the Blood, and the South Peigan (U.S.)<sup>3</sup> Tribes. The area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west forms the Confederacy's traditional territory,<sup>4</sup> and according to Blood Tribe oral history, this territory was managed by all members of the Blackfoot Confederacy. As described by Elder Pete Standing Alone, the Tribes are closely bound together:

They have to be to protect their vast territory. Like the Blackfeets in Montana, they live in the south. They kind of take care of that, those borders, and us who kind of take care of the east. Siksika kind of takes care of the north, Peigans takes care of the mountains. So they are very close. And each one of those Nations have their own Head Chief.<sup>5</sup>

The home base of the Blood Tribe, in the eastern corridor of this territory, is the area between the Kootenay (Waterton) and St Mary Rivers to the mountains at the international boundary. Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. Its northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and the reserve extends southward to an east–west line located 14 miles north of the international boundary.

The area between the Kootenay (Waterton) and Belly Rivers is characterized by the Belly Buttes, a series of undulating hills, which symbolize the Blood home base. At the community session, Elder Rosie Day Rider told the story of Blood Clot, the creation story of the Belly Buttes. Blood Clot is swallowed by an animal, but he has a knife tied in his hair and is able to escape by jumping up and down and slicing the belly of the animal. The intestines of the animal became the Belly Buttes.<sup>6</sup> The Elders explained that it is within the Big Claim lands that the Blood Tribe was created.<sup>7</sup> Elder Rosie Day Rider states:

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1 For the purposes of this historical report, the term "Blood Tribe" will be used.  
2 Also referred to as the Blackfoot Nation.  
3 Also referred to as the South Peigans.  
4 Canadian Blackfoot Indians to the Honourable John Munro, Minister of Indian Affairs, "Position Paper re: the Blackfoot Nation of Indians and the Stevens or Blackfoot Treaty of 1855," August 4, 1990, p. 1 (ICC Exhibit 8b, p. 1).  
5 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 289–90, Pete Standing Alone).  
6 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 191–99, Rosie Day Rider).  
7 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 119, 120, 133, Andrew Black Water; p. 154, Rosie Red Crow; p. 200, Rosie Day Rider; p. 256, Adam Delaney); August 30–31, 2004 (ICC Exhibit 5a, p. 348, Louise Crop Eared Wolf; pp. 458, 472, 473, Frank Weasel Head).

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when Red Crow says or our people say, We're going home, it's related to the story. Even when ... I was growing up, rather, whenever my family travelled to Browning or visit other relatives in our territory, we always longed for the Belly Buttes. When we see them, we feel very good that we are at home again.<sup>8</sup>

Within the home base, the Blood Tribe is governed by the clan system that exists to this day. Today's 16 to 20 clans include the Lone Fighters, Many Children, Blackened Lodge Door Flaps, Fish Eaters, All Short People, All Tall People, Little Robes, and Crooked Wheels.<sup>9</sup> Each clan settled in its own particular areas within the home base. Every summer, all of the clans gather for the Sundance and, in the winter, the clans all share wintering grounds.<sup>10</sup>

At the community session, Elder Louise Crop Eared Wolf stated: “[W]e lived by the clan system.”<sup>11</sup> The effect of the clan system on the social and political organization of the tribe is considerable. Each clan had its own leader, whom the clan members would follow. One of these clan leaders would be “chosen” as the leader of the tribe. For most of the period covered by this report, the tribal leader was Red Crow, leader of the Blood Tribe's Fish Eaters Clan.<sup>12</sup> The Blood Tribe in fact acquired its name because it provided so many leaders; loosely translated, it is “Tribe of Many Leaders, [or] Kaiani.”<sup>13</sup> It can be assumed that, when reference is made by Canada to the Chief and minor Chiefs of the Blood Tribe (in the text of Treaty 7, for example), Canada is referring to traditional clan leaders, since the concept of Head Chief was introduced into Blood Tribe culture at the time of treaty.<sup>14</sup>

It is Blood Tribe custom to follow its leaders and live as a clan. For example, at treaty annuity time, Blood Tribe members would collect their treaty money according to their clan.<sup>15</sup> During the Sundance ceremony, the Blood Tribe members would camp according to their clan at designated places at the Sundance grounds.<sup>16</sup> It is also Blood Tribe custom to settle matters by consensus: “[W]hen there is a matter of importance, their leaders come together and they talk about it. They don't settle it right then and there, but they talk about it and they always come to a consensus, and they go by a consensus. They don't argue and they don't go up against another Clan.”<sup>17</sup>

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8 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 203, Rosie Day Rider).

9 Blood Tribe / Kainaiwa Clan System Diagram (ICC Exhibit 5e).

10 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 278, Adam Delaney; pp. 284, 287, Pete Standing Alone).

11 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 330, Louise Crop Eared Wolf).

12 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 93–94, Andrew Black Water). Red Crow was also known as Mekasto. The Fish Eaters clan is also known as *Ma My Yiktsi*.

13 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 331, Louise Crop Eared Wolf).

14 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 354, Louise Crop Eared Wolf).

15 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 347, Louise Crop Eared Wolf).

16 See ICC Exhibit 5e, “Blood Tribe / Kainaiwa Clan System Diagram,” held at the Gladstone Hall, Blood Tribe Indian Reserve, Alberta, and submitted as an Exhibit on August 30, 2004.

**TREATY MAKING AND THE BLOOD TRIBE**

The Blood Tribe's approach to treaty making is based on *innaihtsiini*, a traditional process that does not focus on surrender in treaty, but on peacemaking. At the community session, Pete Standing Alone stated:

*Innaihtsiini* to me, it doesn't mean a surrender. It means coming together because peacemaking and Treaty-making all stemmed out of that word, for us. *Innaihtsiini* means to come to a truce.<sup>18</sup>

Blood Tribe oral history describes the "peace treaties" as a traditional mechanism of conflict resolution. Elder Louise Crop Eared Wolf expands on this point:

We made Treaty with several of the different Tribes. And when it comes to making Treaty, we made Treaty with the Crows and all those southern Tribes of Indian people. We didn't take away their lands when we made Treaty. It was just we want to make peace with them. And the meaning of Treaty, *innaihtsiini*, is something that's practiced. It was practiced in those days.

Two Nations, when they want to make Treaty, they come together with goods. They send a messenger, and then they – if they agree, if the other one agrees, then they come forward together, two powerful Nations. And they smoke the pipe which ... symbolizes peace. And once a Treaty is made, it's never to be broken by either party. It lasts forever.

And each party, they would exchange gifts, and they would never take away the land from the other Tribe. It's just a gesture of peace, peacemaking, that they would never – their friendship would last forever.<sup>19</sup>

Her reference to the pipe is important to note. Blood Tribe oral history makes clear that the use of the pipe is not to be taken lightly. Elder Andrew Black Water states that "And the usage of the sacred pipe. It's not really the X, but we rely on that. The sacred pipe is binding. That binds everything, makes it final, finalizes any agreement."<sup>20</sup> Furthermore, Elder Black Water connects the significance of the pipe to the Blood Tribe's understanding of the treaty-making process:

The whole notion of Treaty-making is a mechanism to settle, whether it's a dispute or an agreement. But based on the usage of our pipe, which was used at Treaty 7. A pipe is offered. One party would offer a pipe to the other party, whether that's the party that you've made some transgression, you violated that person's life or

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17 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 341, Louise Crop Eared Wolf).

18 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 292, Pete Standing Alone).

19 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 333, Louise Crop Eared Wolf).

20 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 98, Andrew Black Water).

whatever. Being that, that you don't want to continue to live in being insecure, then you decide to, for the sake of your family, decide to make Treaty. So you take your pipe and then you approach a person. Of course, it's associated with providing gifts. And once the pipe is accepted by that party and it's lit and you smoke, that is what is binding that Treaty. Now, that is, the understanding today, it's the same understanding that we have today, and we still utilize our own Treaty at various times where we have to make Treaty.<sup>21</sup>

In a series of interviews conducted by the Tribal Council of Treaty 7, Elders of the Blood Tribe recounted various interpretations of what “treaty” meant to them. Fred Gladstone said that a treaty meant having peace between peoples or tribes; it was a “negotiation between two peoples.” Rosie Red Crow indicated that the treaty meant that “we all agreed to be on friendly terms.” Wallace Mountain Horse described the treaty process as it had affected the Bloods when they made treaty with both the Cree and the Crow peoples at various times in his memory. He reiterated that the treaty meant an agreement “not to fight anymore.”<sup>22</sup>

The Blood states that this process informed the Tribe's participation in earlier treaties with other bands, as well as the U.S. government. In 1810, the Blood Tribe and the Sioux met in the Cypress Hills to establish a peace between the two nations that set a boundary point of hunting territories, with the Sioux claiming the lands east of Cypress Hills and the Blood claiming those to the west.<sup>23</sup> In the early 1830s, the Blood made peace with the Mandan of North Dakota,<sup>24</sup> and during the winter of 1870–71 a peace alliance was agreed to by the Cree and Blackfoot nations after a “devastating battle that resulted in tremendous loss to the Cree.”<sup>25</sup>

The Jay Treaty of 1794 was entered into by Canadian and American governments and had an impact on both Canadian and American First Nations peoples. The separation of North America into Canada and the United States of America had affected the traditional territory of the Blackfoot Confederacy because “the Canada–U.S.A. boundary arbitrarily divided the Blackfoot

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21 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 103, Andrew Black Water).

22 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 113–14 (ICC Exhibit 9e, pp. 113–114).

23 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), (ICC Exhibit 9e, p. 7).

24 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 7 (ICC Exhibit 9e, p. 7).

25 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 8–9 (ICC Exhibit 9e, pp. 8–9).

Nation.”<sup>26</sup> Elder Andrew Black Water states that the international border conflicted with the Blood Tribe’s traditional way of knowing its land, which relied heavily on the use of natural boundaries such as the rivers and mountains.<sup>27</sup> The Jay Treaty was significant because it permitted unrestricted cross-border travel for the First Nations residing in both countries. More specifically, the Jay Treaty allowed First Nations peoples, such as the Blood Tribe, the freedom to move across borders to visit their brethren and to follow the buffalo without restriction. Elder Frank Weasel Head explained that the Blood Tribe has always had close relations with the South Peigans in the United States, which often necessitated cross-border travel:

My dad had relations in Browning, Montana; in Siksika; in the North Peigan. ... my maternal grandmother on my mother’s side was from the Southern Peigans. I have cousins there. At one time my mother owned a little piece of land from her mother, her grandfather’s estate, that her and her sister shared.<sup>28</sup>

Another “peace treaty” the Blood Tribe participated in was the Blackfoot Treaty of 1855,<sup>29</sup> which was concluded between representatives of the Blackfoot Confederacy and the U.S. government and allowed authorities to build railways and maintain other transportation systems in the west. The historical documentation indicates that Blood Tribe members were present at the negotiations:

According to the preamble to the Treaty, the United States authorities were entering into relations with the Blackfoot Nation residing East of the Rockies, and the Blackfoot Nation was described as consisting of the Peigan, Blood, Blackfoot and Gros Ventres tribes, but no hint is given anywhere that the leaders of these tribes all reside on the United States side of the international boundary. In fact, I am informed that among the signatories on behalf of the Bloods – Onis-tay-say-que-im, The Father of all Children, the Bull’s Back Fat, Heavy Shield, Nah-tose-onistah, and The Calf Shirt – are some who are regarded by the Canadian Bloods as being among their ancestors and having lived on the Canadian side of the border.<sup>30</sup>

Red Crow’s uncle, Piinakkoyim, or Seen From Afar, was present at the negotiations of the Blackfoot Treaty, as was his mentor, Rainy Chief.<sup>31</sup>

26 “Border Issues: Blood Tribe Position Paper” (Stand-off, Alberta, August 4, 1978), p. 1 (ICC Exhibit 8a, p. 1).  
 27 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 91–92, Andrew Black Water).  
 28 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 449, Frank Weasel Head).  
 29 The Blackfoot Treaty is sometimes also referred to as the Lame Bull Treaty of 1855, the Stevens Treaty of 1855, the Yellowstone Treaty of 1855, or Otahkoi itahtaa or the Yellow River Treaty. “Lame Bull” was a U.S. Peigan leader who was a signatory of the proceedings (ICC Exhibit 2o, pp. 23–26).  
 30 An Opinion by L.C. Green, University of Alberta, “The Treaty of 1855 and The Blood Indians” (undated), pp. 2–3 (ICC Exhibit 8c, pp. 2–3).

### PRELUDE TO THE SIGNING OF TREATY 7

By the early 1870s, rapid social and political change was transpiring in the Canadian northwest. Responsibility for government and the administration of laws was transferred from the Hudson's Bay Company to the Canadian government, lands were being surveyed and opened for settlement, and treaties were being negotiated with Canadian Indians on the prairies. Generally speaking, this was not a peaceful time for the Blood Tribe:

The Buffalo were hunted to almost extinction by the outsiders, there was no other, just small game to sustain our existence. And, of course, whiskey traders came in and did further damage to our people, and we did not understand the perils of the use of alcohol. And there's something new that just kind of went rampant. And, of course, we went through great suffering with the smallpox.<sup>32</sup>

The whiskey trade proved problematic to the Blood Tribe as the traders encroached upon the Blood's hunting territories and made alcohol readily available.<sup>33</sup> "Whiskey forts" were established to traffic liquor, and repeating rifles depleted vulnerable buffalo herds.<sup>34</sup>

In 1875, a meeting was held in which all tribes of the Blackfoot Nation were present. The purpose of this meeting was to discuss the increased and notable presence of non-Confederacy persons within the territory.<sup>35</sup>

In 1876, the Chiefs of the Blackfoot Nation, including Red Crow, sent a petition to Lieutenant Governor Alexander Morris. In their petition, the Chiefs referred to the meeting they convened to discuss the encroachment on their lands:

That in the winter of 1871, a message of Lieut. Govt. Archibald was forwarded into the Saskatchewan by W.J. Christie a member of your honourable [illegible] Council and the contain of said message was duly communicated to all your petitioners.

That your petitioners [illegible] that a promise was made to them in that document that the Government of the White men will not take the Indians lands

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31 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 17 (ICC Exhibit 9e, p. 17).

32 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 97, Andrew Black Water).

33 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: Department of Indian Affairs and Northern Development (DIAND), 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, pp. 305–6).

34 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), app. D to Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, p. 305).

35 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 19 (ICC Exhibit 9e, p. 19).

without a council of Her Majesty's Indian Commissioners and the respective Indian Chiefs ...<sup>36</sup>

The petition went on to state:

That the white men have already taken the best of locations and built houses in any place they please into your petitioners hunting grounds.

...

That Americans ... and others are founding a large settlement in Belly River, the best hunting quarters of your petitioners. ...That your petitioners do pray for an Indian Commissioner to visit us this summer ... so we could meet him and hold a Council for putting a rule to the invasion of our country til our treaty be made with the government.<sup>37</sup>

In his research report on Treaty 7, Hugh Dempsey states that the government's motive in seeking a treaty with the Blackfoot Confederacy was simple:

As part of the terms of bringing British Columbia into Confederation in 1871, the Canadian government had promised to build a trans-continental railway within ten years. Such a line would have to traverse the newly-acquired western territories, through land still nominally in control of Indian tribes. Huge land concessions would need to be offered to the company building the railway and later, the existence of the line would encourage large scale immigration to the western provinces.<sup>38</sup>

The Blood viewed the opportunity to sign a treaty with the Canadian government in the same respect as the Blackfoot peace treaty that it had signed some 20 years previously with the American government; in that case, it was a treaty of peace to allow the construction of a railway through its traditional territory. In effect, the Blood's approach to "treaty" differed greatly from the Canadian government's interpretation of land cessation.

#### **THE SIGNING OF TREATY 7, SEPTEMBER 22, 1877**

In early September 1877, Lieutenant Governor David Laird, acting as Treaty Commissioner, visited the Blood Tribe at Fort Macleod with a view to getting

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36 Unidentified author to Alexander Morris, Lieutenant Governor of Manitoba and NWT, Winnipeg, June 12, 1876, in Provincial Archives of Manitoba, Alexander Morris Papers, doc. 1265 (ICC Exhibit 1a, pp. 27–29).

37 Unidentified author to Alexander Morris, Lieutenant Governor of Manitoba and NWT, Winnipeg, June 12, 1876, in Provincial Archives of Manitoba, Alexander Morris Papers, doc. 1265 (ICC Exhibit 1a, pp. 27–29).

38 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 1 (ICC Exhibit 2c, app. D, p. 300).



the Blood to enter into treaty at Blackfoot Crossing. Hugh Dempsey indicates that some members of the Peigan and Blood Tribe were contemplating not attending the treaty negotiations because they planned to go buffalo hunting.<sup>39</sup> Blood Tribe oral history indicates that Red Crow was not interested in attending the treaty negotiations at Blackfoot Crossing.<sup>40</sup> Elder Rosie Red Crow states:

At the time of the Treaty, he wanted the Treaty to take place at Fort Macleod. They did not listen to him. Instead, they went to Blackfoot Crossing. As a result, Red Crow went to Sweet Grass Hills instead of the Blackfoot Crossing. Then they sent a messenger to ask Red Crow to attend. ... He [Red Crow] went south. At the time there was no United States. He went south.<sup>41</sup>

Elder Mary Louise Oka similarly explains Red Crow's desire to treat on Blood Territory and how he came to join the treaty parties at Blackfoot Crossing:

I heard that at the time of the Treaty, that Red Crow did not attend the Treaty, they did not sign the Treaty. He wanted the Treaty at – he wanted the Treaty to be held at Fort Macleod, not at Blackfoot Crossing. Instead, the Treaty was taken to take place at Blackfoot Crossing. Red Crow was very disappointed. He packed up and moved to the Porcupine Hills.

When he did not show up at Blackfoot Crossing, the people were there waiting for him. They sent a messenger to ask him to attend the Blackfoot Crossing, and then he moved to the Blackfoot Crossing.<sup>42</sup>

Elder Rosie Red Crow states that Red Crow ultimately decided to travel to Blackfoot Crossing because “Crowfoot was a cousin to Red Crow. Crowfoot's mother was from the Bloods. When Crowfoot asked Red Crow to attend Blackfoot Crossing because of the protocol and out of respect, Red Crow was unable to refuse.”<sup>43</sup> Elder Stephen Fox explains the relationship between Red Crow and Crowfoot and why Crowfoot waited for him:

At the time of the Treaty, Crowfoot waited for Red Crow. However, because Crowfoot was already there, the non-Natives, the government people thought that Crowfoot

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39 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 16 (ICC Exhibit 2c, app. D, p. 315).

40 Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, p. 194, Louise Crop Eared Wolf).

41 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 148–49, Rosie Red Crow).

42 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 182–83, Mary Louise Oka).

43 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 149, Rosie Red Crow).

was superior to Red Crow, that Crowfoot was a much bigger leader than Red Crow. However, it was out of respect that they waited for each other.

... Crowfoot was not going to make any moves with regard to the Treaty, and he wouldn't – due to the protocols, he waited. He insisted on waiting until Red Crow arrived.<sup>44</sup>

On September 16, 1877, Laird and his fellow Commissioner, Colonel James Macleod of the North-West Mounted Police (NWMP), arrived at Blackfoot Crossing to begin treaty negotiations with some of the Chiefs of the five tribes: three from the Blackfoot Confederacy (the Blood Tribe, the Blackfoot, the Peigans), the Sarcees, and the Stoneys (a branch of the Assiniboine).<sup>45</sup> The only Blood Chiefs present for the Commissioners' arrival were Medicine Calf and Rainy Chief.<sup>46</sup> As Hugh Dempsey has written, “[t]here were four leading chiefs of the Blood tribe: Red Crow of the Fish Eaters, Father of Many Children of the Buffalo Followers, Medicine Calf of the Many Tumors, and Many Spotted Horses of the Lone Fighters.”<sup>47</sup> Rainy Chief was recognized as leader of the northern Blood Tribe, while Red Crow was recognized as the leader of the southern Blood Tribe.<sup>48</sup>

Blood Tribe oral history refers to Red Crow as the main leader of the Blood Tribe. Elder Andrew Black Water states: “[W]e understand there's different leaders, different Clans, eh. But amongst them, they would rely on one individual, you know. So it turn out to be that Red Crow was sort of the one that was acknowledged to lead the people.”<sup>49</sup> Elder Andrew Black Water also comments on the leadership of Red Crow: “[H]e didn't really have to go out and ask the people to follow him. When he broke camp, just people just naturally just follow him. And you would follow a person that is going to provide you with the best, you know, protection and survival.”<sup>50</sup>

Elder Louise Crop Eared Wolf described Red Crow's leadership qualities:

I have heard that when he was young he was brave. He went on a lot of raids. This is what got him recognition – going on raids. This shows what a courageous person he was. He also took care of the people. For these reasons people had high regard for him and because of this he became a camp leader. I also heard that he was very intelligent – it was this intelligence that gave him success on his raids.

44 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 433, Stephen Fox).

45 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 107).

46 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 107).

47 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), (ICC Exhibit 9a, p. 114).

48 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 43 (ICC Exhibit 9e, p. 43).

49 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 93, Andrew Black Water).

50 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 93–94, Andrew Black Water).

Also, if he got material goods on his raids he would not only benefit himself but when he returned home he would share with the people. It was these characteristics that caused people to have high regard for him – his generosity, courage and kindness. It was really because Red Crow went on numerous raids that he was so esteemed and became a leader. Red Crow has set an example for many succeeding Chiefs.<sup>51</sup>

Also present at treaty was Jerry Potts, an interpreter for the Crown. Blood Tribe oral history indicates that Potts was not the best interpreter. Elder Pete Standing Alone states:

Jerry Potts was not fluent in either language. He never went to school, he didn't live extensively with the Bloods to learn the language real well. You know, he's back and forth. And he was in Fort Benton when Macleod was coming west. No, the interpretation was, I would say is very poor.<sup>52</sup>

Elder Louise Crop Eared Wolf states:

There's lot of stories, lot of people that I heard, and I'm still hearing it, that Jerry Potts was a drunk. He was drunk most of the time, and they had to get other interpreters to replace him.

...

... he interpreted some, but not that accurate. Not a bit accurate, as we can see on the signatures when he said that he couldn't even say Is sah pum khi ka. It came up with the word Chapo Mexico.<sup>53</sup>

A specific language issue at Treaty 7 was the misinterpretation of the Blood Tribe's custom to say "Ahh" when someone is speaking. Elder Rosie Red Crow states:

At the time of the Treaty, the interpreter told the Commissioners that the people were in agreement because the people sitting there were saying "ahh". However, the people that were sitting in there were only acknowledging the speaker as the speaker. They were not agreeing to whatever was being discussed. They were only acknowledging him as a speaker by saying "ahh".

When the interpreter was asked by the Commissioners, What are they saying, he because he did not understand, he was not a full member of the Blood Tribe, he did not understand, he told them that the people were in agreement.

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51 Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, "Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim," July 1996 (ICC Exhibit 2c, app. B, pp. 198–99, Louise Crop Eared Wolf).

52 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 310, Pete Standing Alone).

53 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 357–58, Louise Crop Eared Wolf).

To this day, we still use that practice. When somebody is speaking, the listener is sitting there and the listener will say “ahh”, but it is not to indicate that the listener is in agreement.<sup>54</sup>

On the evening of September 20, 1877, Red Crow and Father of Many Children arrived at Blackfoot Crossing and immediately began discussions with the other leaders. By the next day, consensus was reached among the parties and, on September 22, Treaty 7 was presented for the signature of the chiefs. “First to sign was Crowfoot, followed by the leading chiefs, minor chiefs and councillors of five tribes.”<sup>55</sup> The written terms of Treaty 7 closely followed the terms of treaties previously negotiated with First Nations peoples by the government, including:

- provisions for the payment of annuities;
- reserves to be provided on the basis of five persons per square mile (128 acres per person);
- provisions for the purchase of ammunition;
- each Chief and councillor would receive 10 axes, five handsaws, five augers, one grindstone, and the necessary files and whetstones;
- once the bands were settled upon reserves, two cows would be furnished by the government for every family of five, three cows for families with five to nine persons; and four for families of 10 and over; as well as one bull for each chief and councillor. If a family wished to farm besides raising cattle, it would reduce its cattle allotment by one cow and receive instead two hoes, one spade, one scythe, and two hay forks. Three such families could collectively receive also a plough and harrow, with enough potatoes, barley, oats, and wheat to plant the broken land.<sup>56</sup>

To illustrate the Blood understanding of what happened at Blackfoot Crossing, Louise Crop Eared Wolf related this story:

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<sup>54</sup> ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 167–68, Rosie Red Crow).

<sup>55</sup> Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987) (ICC Exhibit 2c, App. D, p. 29).

<sup>56</sup> *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 1–10 (ICC Exhibit 1b, pp. 1–10).

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At the signing of the treaty at Blackfoot Crossing, Red Crow pulled out the grass and gave it to the White officials and informed them that they will share the grass of the earth with them. Then he took some dirt from the earth and informed them that they could not share this part of the earth and what was underneath it, because it was put there by the Creator for the Indians' benefit and use.<sup>57</sup>

In addition, Elder Rosie Day Rider states:

At the time, they promised us that they would educate us, that they would take care of our health, and that they would train us and provide the funds to farm, and that they would do this as long as the sun shines, the rivers flow, and as long as the grass grows. And as long as the mountains are there.<sup>58</sup>

Under the written terms of Treaty 7, a joint communal reserve was set aside for the Blackfeet, Blood, and Sarcee Bands at Blackfoot Crossing.<sup>59</sup> The reserve is described as

a belt of land on the north side of the Bow and South Saskatchewan Rivers, of an average width of four miles along said rivers, down stream, commencing at a point on the Bow River twenty miles north-westerly of the Blackfoot Crossing thereof, and extending to the Red Deer River at its junction with the South Saskatchewan; also for the term of ten years, and no longer, from the date of concluding of this Treaty, when it shall cease to be a portion of the said Indian Reserves, as fully to all intents and purposes as if it had not at any time been included therein, and without any compensation to individual Indians for improvements, of a similar belt of land on the south side of the Bow and Saskatchewan Rivers of an average width of one mile along said rivers, down stream; commencing at the aforesaid point on the Bow River, and extending to a point one mile west of the coal seam on said river, about five miles below the said Blackfoot Crossing; beginning again one mile east of the said coal seam and extending to the mouth of Maple Creek at its junction with the South Saskatchewan; and beginning again at the junction of the Bow River with the latter river, and extending on both sides of the South Saskatchewan in an average width on each side thereof of one mile, along said river against the stream, to the junction of the Little Bow River with the latter river.<sup>60</sup>

In exchange, the Blood, Blackfoot, Peigan, Sarcee, and Stoney Tribes were expected to

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57 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 113–14 (ICC Exhibit 9e, pp. 113–14).

58 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 208, Rosie Day Rider).

59 This reserve is known as the Bow River reserve.

60 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966), 4 (ICC Exhibit 1b, p. 4).

cede, release, surrender, and yield up to the Government of Canada for Her Majesty the Queen and her successors for ever, all their rights, titles, and privileges whatsoever to the lands included within the following limits, that is to say:

Commencing at a point on the International Boundary due south of the western extremity of the Cypress Hills, thence west along the said boundary to the central range of the Rocky Mountains, or to the boundary of the Province of British Columbia, thence north-westerly along the said boundary to a point due west of the source of the main branch of the Red Deer River, thence south-westerly and southerly following on the boundaries of the Tracts ceded by the Treaties numbered six and four to the place of commencement;

And also all their rights, titles and privileges whatsoever, to all other lands wherever situated in the North-West Territories, or in any other portion of the Dominion of Canada. ...<sup>61</sup>

During the final day of negotiations, Commissioner Laird had asked the leaders of all the tribes to indicate where they wished their reserve to be located. Only the Blackfoot, Stoney, and Peigan chose their land immediately. When Commissioner Macleod asked Red Crow where he wanted his reserve, the Blood chief was not interested. Both the Blood Tribe and the Sarcee went along with Crowfoot's idea that having the three tribes reside on one communal reserve would allow them to be in a strong position to confront the government in the future.<sup>62</sup> Hugh Dempsey states:

Red Crow revealed that he had no clear grasp of the land aspects of the treaty. The idea of the Bloods living on a small parcel of prairie land – on the basis of five people per square mile – was utterly foreign to him. Since time immemorial, the Bloods had wandered from place to place, always pursuing the buffalo, going wherever the rumbling herds has roamed. In the heat of summer the Indians drifted onto the bare plains near Sweetgrass Hills ... in winter the blizzards drove them into the valleys of the Belly, Oldman, and Highwood rivers ...

Always to the west of them was Chief Mountain, that distinctive peak which protruded from the Backbone of the World, while out on the plains the Belly Buttes were a familiar landmark that showed the Bloods they were at home.<sup>63</sup>

After the treaty was signed, the registration and payment of annuities to the signatories and their followers occurred over the next several days. In all, the

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61 *Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort Macleod* (1877; reprint, Ottawa: Queen's Printer, 1966), 3–4 (ICC Exhibit 1b, pp. 3–4).

62 Treaty 7 Elders and Tribal Council, with Walter Hildebrandt, Sarah Carter, and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal and Kingston: McGill-Queen's University Press, 1996), 246 (ICC Exhibit 9e, p. 246).

63 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 116 (ICC Exhibit 9a, p. 116).

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government paid 10 head chiefs, 40 minor Chiefs or councillors, and 4,342 others, expending a total of \$52,954.<sup>64</sup>

In a letter written on April 13, 1879, two years after Treaty 7 was signed, Constantine Scollen, a missionary serving on the Blackfoot Reserve, wrote to Major A.G. Irvine of the NWMP relaying a conversation he had had with Crowfoot about the signing of Treaty 7. In this letter, Scollen stated:

Did these Indians, or do they now, understand the real nature of the treaty made between the Government and themselves in 1877? My answer to this question is unhesitatingly negative, and I stand prepared to substantiate this proposition.

It may be asked if the Indians did not understand what the treaty meant, why did they sign it? Because previous to the treaty they had always been kindly dealt with by the Authorities, and did not wish to offend them, and although they had many doubts in their mind as to the meaning of the treaty, yet with this precedent before them: and besides this, many outside influences were brought to bear upon them. They hoped that it simply meant to furnish them with plenty of food and clothing, and particularly the former every time they stood in need of them; but I repeat, they were not actuated by any intuitive comprehension of what they were called upon to do.<sup>65</sup>

The letter went on to state:

What was the cause of the Indians not understanding the treaty? The immediate cause was the absence of competent Interpreters, although they could have been procured ... The remote causes were many. ... It is true, Crowfoot, who, beyond a doubt is considered the leading Chief of the Plains, did seem to have a faint notion of the meaning of the treaty, as his last speech would go to show. ...

All the other Chiefs followed Crowfoot, and the substance of their speeches was that they agreed with him in all he had said.

Then followed the signing of the treaty and if you remember, Crowfoot would not touch the pen. This recalls to my mind a conversation between him and me last fall. After the payments, I and my companion travelled with the Blackfoot Camp until late in October. Crowfoot one day asked me what was the meaning of making the Indians touch the pen at the treaty. I explained to him that when making a bargain, the contracting parties draw it up in writing and sign their names so as to make it binding, and as the treaty was a bargain between the Government and the Indians, and the latter could not write they were made to touch the pen which was equivalent to signing their names. "Ah!" said he "they are out there for I did not touch it."<sup>66</sup>

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64 Hugh A. Dempsey, *Treaty Research Report: Treaty Seven* (Ottawa: DIAND, 1987), 29 (ICC Exhibit 2c, app. D, p. 328).

65 Copy of letter, Constantine Scollen, OMI, to Major A.G. Irvine, Assistant Commissioner, North-West Mounted Police, April 13, 1879 (ICC Exhibit 1h, pp. 2–3).

66 Copy of letter, Constantine Scollen, OMI, to Major A.G. Irvine, Assistant Commissioner, North-West Mounted Police, April 13, 1879 (ICC Exhibit 1h, pp. 3–4).

The oral history of the Blood Tribe contains a clear and consistent interpretation of Treaty 7 based on past treaty experiences and cultural contexts. Elder Louise Crop Eared Wolf is adamant that at Treaty 7 negotiations:

There was no signing. I never want to say that we signed Treaty. Because all I heard while I was growing up from lots of old people, and I still hear it very recently with some of our old people that have gone before us, that we make Treaty. When they mention the 1877, they always say [Speaking Blackfoot]. I never once heard anybody saying, When we signed Treaty with Queen Victoria. They always say, When we make Treaty with Queen Victoria.<sup>67</sup>

Elder Mary Louise Oka elaborates on what happened at Blackfoot Crossing:

According to Mu ka kin, Bob Tail Chief, who was very young at the time of the Treaty, maybe 12 years old, said that he was very inquisitive and he was present at the Treaty at Blackfoot Crossing. He was so inquisitive that he went around to find out and to see for himself what was taking place.

He never saw any of the Blackfoot people there with a pen. He never saw Red Crow touch a pen. He never saw Red Crow touch a piece of paper. The only people that had paper were the white people that were present. Jerry Potts, who was the interpreter, was neither fluent in Blackfoot nor in English. Jerry Potts, as he was interpreting, never fully translated what Red Crow was saying.

...  
... The government people promised Red Crow that they would take care of the people, they would place them in the palms of their hands and take care of all of their needs. They would provide health care, education, and they would provide rations, Treaty payments that were to be \$12. The \$12 decreased to \$5. Today the Treaty payment is still \$5. They would provide and continue with their hunting. Ammunition would be provided for. Red Crow was told that this is what was promised, and he said they could use the land but they were not to touch the subsurface.<sup>68</sup>

Blood Tribe oral history does not depict Red Crow as a passive observer at Blackfoot Crossing. Elder Louise Crop Eared Wolf recounts the popular story of the actions taken by Red Crow in getting his wishes across to the Treaty Commissioners:

[W]hat I heard was that he said at the time of the Treaty and other times, he made it clear. He said that, he picking up dirt on one hand and plucked some grass and

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67 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 329, Louise Crop Eared Wolf).

68 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 183, Mary Louise Oka).



he let the grass go back. He said that this will share with the settlers, the newcomers. But the dirt, he said this, we will never sell our land.

And a lot of times when old people at our home were telling stories, I often hear this phrase. They would say, Mah tsi sta tapiska topa, and I kept those words in my mind and in my heart. ... They said, they always say, the old people, We never sold – we didn't sell anything under the ground, under the earth.<sup>69</sup>

Blood Tribe oral history is clear that the Blood Tribe understood what was happening at Treaty 7, but what the people understood was in reference to their concept of what a treaty is and what it is meant to accomplish. Elder Andrew Black Water explains the Blood Tribe's understanding of Treaty 7 and what the Tribe had agreed to:

The spirit and intent of Treaty 7 is a Peace Treaty. We would lay down our arms, you know, then we would share, occupy this land, allow people to talk. But the Treaty provisions was clearly understood by our people that whatever you require today will be provided and into the future as long as the sun shines, you know.<sup>70</sup>

Many Elders have stories relating to how the younger generation present at Treaty 7 did not support the idea of entering into treaty with the Crown. Elder Adam Delaney states:

The younger generation when they knew, there are two leaders, Red Crow and Crowfoot, are going to have Treaty with the government. The younger generation most of them (indiscernible). Just, you know, they were excited. They didn't want to make Treaty. In es tsi sini, they will still fight for what they own. But respect. One man would get up and turn around and talk to the younger people. Oh, it's about time you quit fighting, you know. So that's how it is.<sup>71</sup>

Elder Pete Standing Alone elaborates:

[T]he young men, they were not ready to make Treaty. They were ready to fight. But with Red Crow and the other leaders, kept them from doing that. I guess one of the reasons is that they do have lot of respect for their leaders. And I heard that they were not going to wave their arms just because the government wanted them to.<sup>72</sup>

Treaty 7 was confirmed by Order in Council on February 6, 1878.<sup>73</sup>

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69 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 349, Louise Crop Eared Wolf).

70 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 104, Andrew Black Water).

71 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 235, Adam Delaney).

72 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 293, Pete Standing Alone).

73 Order in Council PC 400, February 6, 1878, Library and Archives Canada (LAC), RG 2, Series 1, vol. 154, February 6, 1878 (ICC Exhibit 2o, pp. 49–51).

**LOCATION OF RED CROW AND HIS FOLLOWERS, 1877–80**

According to Blood Tribe oral history, immediately following the conclusion of Treaty 7, Red Crow broke camp at Blackfoot Crossing and went home. Elder Rosie Day Rider asserts that “[h]e went back home to where he was raised, where he lived, and this is the land that he loved. ... he moved where he was born, and that is the Belly Buttes.”<sup>74</sup> Elder Stephen Fox explains that, after treaty, the Confederacy nations stated that

they were going back to their territory. The Peigans also indicated that they were going back to the Porcupine Hills after Red Crow said, if they were born at the Belly Buttes, then they can tell me where to live, but I am going home to the Belly Buttes.”<sup>75</sup>

The oral history relating to this event is consistent – Red Crow went home to the Belly Buttes area.

Hugh Dempsey reports that, with the proceedings at Blackfoot Crossing concluded, Red Crow took his band northwest to Cypress Hills, seeking the last herds of buffalo on Canadian soil.<sup>76</sup> The following summer, Red Crow and his followers met with the Commissioners at Fort Kipp for the 1878 treaty payments. Red Crow told the Commissioners that he did not want to settle at Bow River; instead, he would take his reserve on the Belly River in an area which he and his followers considered to be within their traditional territory.<sup>77</sup> After the annuity payments, some Blood Tribe members followed the buffalo to Bear Paw Mountain in Montana, while others, including Red Crow, returned to Cypress Hills.<sup>78</sup> Red Crow and his followers did not spend the winter of 1878 at Cypress Hills and, instead, went to their winter camp at the mouth of the Red Deer River, where there was enough buffalo for sustenance.<sup>79</sup> The following spring, Red Crow and his followers travelled to Fort Walsh, on the east side of Cypress Hills, where the summer was spent. Upon learning of large herds of buffalo across the international border, Red Crow followed other bands into Montana, settling near the Little Rocky Mountains for the winter of 1879.<sup>80</sup>

74 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 210, 219, Rosie Day Rider).

75 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 434, Stephen Fox).

76 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 120 (ICC Exhibit 9a, p. 120).

77 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 122 (ICC Exhibit 9a, p. 122).

78 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 123 (ICC Exhibit 9a, p. 123).

79 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 124 (ICC Exhibit 9a, p. 124).

80 Hugh A. Dempsey, *Red Crow: Warrior Chief* (Saskatoon: Fifth House, 1995), 124 (ICC Exhibit 9a, p. 124).

### **SURVEY OF THE BOW RIVER RESERVE, SEPTEMBER 1878**

In September 1878, Dominion Land Surveyor William Ogilvie commenced the survey of the Bow River reserve for the benefit of the Blackfoot, Blood, and Sarcee First Nations. Ogilvie reported that he had conferred with Crowfoot, Chief of the Blackfoot, and set out the limits of the reserve to which Crowfoot agreed.<sup>81</sup> The reserve consisted of 117,986.4 square miles or 75,511.32 acres, approximately enough land for 590 people.<sup>82</sup> By the end of October, Ogilvie had completed his survey of the reserve. A plan was submitted, but it covered only the northern portion of the reserve on the Bow River.<sup>83</sup> However, there is no evidence that Ogilvie's survey was confirmed or that any other survey work was completed with respect to the joint reserve.<sup>84</sup>

### **1880 EXCHANGE AGREEMENT**

Red Crow was not interested in settling on the Bow River reserve at Blackfoot Crossing. Oral history indicates that the Blood Tribe never had any intention of settling at the Bow River reserve. Elder Adam Delaney explains why:

If the Bow River – one of the things important for us in those days, you know, for firewood, you know. And on the other side, the land is not as good as in this area, one part.

Okay, the main part of it in this area is, like I said earlier, mention our culture, especially our religion. Like I said earlier, everything's here. Everything's here, in the east of the Rockies. This one is the most important thing in our culture, in our religion. We get that in that area, okay. The pipes we made, we get them here, too. The stuff we paint ourselves with, we get it here, too. And the ones that you talk about, the pines, the sweet grass pine, they all in this area. And our tobacco, too, for instance. ... We get them in the mountains. And there's a lot of herbs, too, not only that that we use for medicine, they're in that area, too, you know. ... So, in other words, we don't have to go two, 2, 3, 400 miles to get what we want, you know. It's all in this area.<sup>85</sup>

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- 81 W.M. Ogilvie, Dominion Land Surveyor, to the Minister of the Interior, May 31, 1879, Canada Lands Surveys Records (CLSR), Fieldbook 803, pp. 97–98 (ICC Exhibit 7d, p. 51).
- 82 "Treaty No. 7 Blackfoot Reserve Chief Crowfoot Band shewing that portion of Reserve above Blackfoot Crossing, Bow River N.W.T.," William Ogilvie, Surveyor, signed May 30, 1879, DIAND Indian Land Registry, Plan 1137 (ICC Exhibit 2o, map NM-22). This calculation is based on 128 acres per person as stipulated by Treaty 7.
- 83 "Treaty No. 7 Blackfoot Reserve Chief Crowfoot Band shewing that portion of Reserve above Blackfoot Crossing, Bow River N.W.T.," William Ogilvie, Surveyor, signed May 30, 1879, DIAND Indian Land Registry, Plan 1137 (ICC Exhibit 2o, map NM-22).
- 84 Joan Holmes, "Kainaiwa / Blood Tribe Big Claim Report on Additional Research," prepared for Kainaiwa / Blood Tribe, November 2004 (ICC Exhibit 2o, p. 4).
- 85 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 256, Adam Delaney).
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Furthermore, there is no recognition within Blood Tribe oral history that, following Treaty 7, the Blood had land at Bow River. When asked if any members of the Blood Tribe stayed and settled at Blackfoot Crossing after Treaty 7, Elder Andrew Black Water answered: “Not to my knowledge. Basically wanted to go home, so they all went home. Of course there might be a few people that stayed around to visit their relatives in Siksika. ... No, no. Not to settle.”<sup>86</sup>

Referring to the Big Claim lands in general, Elder Louise Crop Eared Wolf spoke of Red Crow’s preference for the Big Claim lands over that of the land offered at Bow River. She also offered insight into where Red Crow would have selected his reserve:

What I heard, that they were, the Bloods were given a tract of land someplace around where the badlands or in the Drumheller. Yeah, a strip of land that extended to the east, Saskatchewan border, that Red Crow never want to leave his territory which is between the Chief Mountain, the mountains and the Belly Buttes. That’s where his main territory. He wanted to stay here with his people because his ancestors were buried among these lands, and it was his special – our special territory.<sup>87</sup>

In 1879, members of the Blood Tribe expressed dissatisfaction with the Bow River reserve to Indian Commissioner Edgar Dewdney. Dewdney reported that the Blood Tribe was

desirous of having a Reserve apart from the other Indians of the Blackfoot nation and made a formal application to me at an interview I had with them about two months ago. “Mekasto”, the Head Chief spoke first, then “Running Rabbit” and all the Minor Chiefs one after the other followed in the same direction. They said they were all of one mind. They wanted their Reservation in the neighborhood of Fort Kipp, where they say their Indians are mostly resided and where the bones of their Ancestors lie. Upon my informing them it was out of my power to alter the Treaty as agreed upon by them, they then requested that I would make known their wishes to the Government while at Ottawa.<sup>88</sup>

The government agreed and Order in Council 565 was issued on March 26, 1880, authorizing

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86 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 143–44, Andrew Black Water).

87 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 348, Louise Crop Eared Wolf).

88 Edgar Dewdney, Indian Commissioner, Manitoba and NWT, Department of Indian Affairs (DIA), to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), December 15, 1879, LAC, RG 10, vol. 6620, file 104A-1-11, p. 16 (ICC Exhibit 1a, doc. 96–99).

E. Dewdney, Esquire, Indian Commissioner for the North West Territories and Manitoba, and Lieut. Colonel Macleod, Commissioner for the North West Mounted Police, to attend a Council of the Blackfeet Nation ... to be summoned by Mr. Dewdney for the purpose; and to submit a proposition to them to surrender such portion of the Reserve allotted to them under Treaty stipulations as would be the proper share of the Blood Band, were that Band to settle upon the said Reserve, with a view to a Reserve near Fort Kipp being assigned to the Blood Indians, in accordance with their desire; And should the Indians assent to the proposal, the gentlemen above referred to should take a surrender from them executed in accordance with the provision of the Indian Act 1876 covering the land in question.<sup>89</sup>

A surrender of the Blood Tribe's interest in the Bow River reserve was purportedly obtained on September 25, 1880. The surrender document states:

Whereas a Treaty was made and concluded on the twenty second day of September in the year of Our Lord one thousand eight hundred and seventy seven between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honorable David Laird, Lieutenant-Governor and Indian Superintendent of the North West Territories, and James Farquharson MacLeod, C.M.G., Commissioner of the North West Mounted Police, of the one part, and the Blackfeet, Blood, Piegan, Sarcee, Stony and other Indians, of the other part.

And whereas it was agreed in said Treaty that the Reserve of the Blackfeet, Blood and Sarcee Bands of Indians should consist of a belt of land on the North side of the Bow and Saskatchewan Rivers of an average width of four miles along said Rivers down stream, commencing at a point on the Bow River, twenty miles North-Westerly of the Blackfoot Crossing thereof and extending to the Red Deer River at its junction with the South Saskatchewan, I "Mekasto" or "Red Crow", Head Chief of the Blood Indians, on behalf and with the consent of the Blood Indians included in said Treaty do hereby give up all our rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant us a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River.<sup>90</sup>

There is no evidence that a surrender meeting was held or an assenting vote of a majority of the adult male members of the Blood Tribe obtained, as was required by the 1876 *Indian Act* which was in force at the time of the surrender. According to the *Indian Act, 1876*:

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89 Order in Council PC 565, March 26, 1880, LAC, RG 2(1), vol. 389, March 26, 1880 (ICC Exhibit 1a, pp. 160–61).

90 Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67). The Kootenay River is now officially called the Waterton River.

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26. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding except on the following conditions:—

1. 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 their rules, 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; Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resided on or near and is interested in the reserve in question;
2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county, or district court, or stipendiary magistrate, by the Superintendent-General or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.<sup>91</sup>

Blood Tribe oral history does not reference a meeting or vote of this kind. The Elders are certain that such an event would have been so contrary to their traditions and so unusual that it would have been the subject of stories. Elder Frank Weasel Head says that he would have heard his grandfather tell such a story: “[H]e was around, and he was at Treaty 7. He would have talked about a vote being taken in Red Crow’s time. So as far as I know, those people never talk of a vote during Red Crow’s time.”<sup>92</sup> Elder Louise Crop Eared Wolf states: “[O]ur people didn’t know anything about voting, and they were not allowed to vote. Just at one time they – some of our people were coerced to vote, to sell the land that’s the north part of our Reserve.”<sup>93</sup> Elder Andrew Black Water further added:

I have not really heard about ... an event that took place like that, but my question has always been on that. If there was a meeting that took place like what you referred to, then my question is, how did they arrive to a consensus on that, and that is what I have not heard anybody talk about ...

... there has to be some form of a process that they would arrive to consensus. It’s always been very, very important part of our ways in terms of decision-making, is always trying to come to consensus. This way, everybody has ownership of the decision, ensuring there is ownership of the decision and along with the responsibility of the decision. It’s a strong belief that we have.<sup>94</sup>

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91 *Indian Act*, SC 1876, c. 18, s. 26 (1, 2) (ICC Exhibit 6a, p. 9).

92 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 461, Frank Weasel Head). Also see ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 294, Pete Standing Alone; p. 168, Rosie Red Crow).

93 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 354, Louise Crop Eared Wolf).

94 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 117, Andrew Black Water).

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### SELECTION OF THE BLOOD RESERVE LANDS

Later in 1880, with the requisite surrender ostensibly secured, Red Crow, Indian Agent N.T. MacLeod, N.T. MacLeod Jr, Father Lacombe, Jerry Potts, and Fred Pope went to the area where Red Crow wished the reserve to be situated.<sup>95</sup> The experience was recounted by N.T. MacLeod Jr:

I followed to where he [Red Crow] was sitting at the edge of the high bank opposite the Belly Buttes. As interpreted by Jerry [Potts], this is what he said:  
“That is where I wish to live the rest of my life and to die there.”<sup>96</sup>

It is not clear which high bank Red Crow was sitting on; it could have been on the Belly or the Kootenay River.

In October 1880, Indian Agent MacLeod reported to Indian Commissioner Dewdney that he did not agree with Red Crow’s choice of location.

I ... accompanied by “Red Crow” Head Chief of the Blood Indians to select a location for their Reservation. I went to the Forks of the Kootenai and Belly Rivers where I found a large bottom, the upper portion of which is occupied by Mr. Fred Wachter’s Ranch; and below him a man of the name of Murray has a small ranch; the remaining portion of the bottom is chiefly gravel and sand, with very little soil and had been all overflowed during the higher waters in summer, there is no quantity of building timber available. This is the bottom which “Red Crow” once desired to settle upon but I considered it unfit.<sup>97</sup>

Indian Agent MacLeod further reported that 300 members of the Blood Tribe were already living in the area and making improvements on the land,<sup>98</sup> but the letter does not specify the exact location of those improvements.

Indian Agent MacLeod chose the current northern, eastern, and western boundaries of the reserve. He reported his choice in 1880 to Indian Commissioner Dewdney:

On the occasion of your visit to this treaty, in September, you made arrangements with the head chief, “Red Crow”, to take a location on the Belly River, and to begin with his people to settle there until you could make arrangements to have the reservation finally decided upon. By your instructions I proceeded to this place

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95 The reserve of the Blood Tribe is sometimes referred to as Kainai or Kainaiwa.

96 Newspaper clipping, N.T. MacLeod, c. 1880, in Glenbow Archives, J. Higinbotham Papers, M517, Scrapbook, vol. 1 (ICC Exhibit 1a, p. 107).

97 N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, p. 171).

98 N.T. MacLeod, Indian Agent, to Edgar Dewdney, Indian Commissioner, DIA, Regina, October 15, 1880, LAC, RG 10, vol. 1427, pp. 34–37 (ICC Exhibit 1a, pp. 172–73).

and selected suitable land on the south side of the Belly River from the fork of the Kootenai eastward.<sup>99</sup>

Later in 1880, MacLeod noted in a letter that the Blood Tribe had settled “on their reservation at the junction of the Belly and Kootenay Rivers.”<sup>100</sup> In his annual report for the year 1880, Indian Commissioner Dewdney stated that, at the time of the agreement, he

informed the Blood Chief that if he would give a release of all his interest in the reserve situated at the Blackfoot Crossing, provided the government would give him a reserve at the point he indicated, I would send an instructor with him and his band to the spot selected by himself, where he could build houses and prepare some ground for the next season, and that I would recommend on my arrival below that a reserve be given to him at the point.<sup>101</sup>

In May 1881, the reserve was described as being “situated on the east side of the Belly River near its confluence with the Kootanie. [sic]”<sup>102</sup> In September 1881, the Blackfoot Confederacy met with the Governor General, the Marquess of Lorne, on his visit to the area.<sup>103</sup> The exact details of this meeting are not known; however, it has been reported that the Confederacy, specifically the Blood Tribe, took this opportunity to present a list of grievances to the Governor General regarding reserve land selection. In a letter published in the *Fort Macleod Gazette*, an anonymous author going by the alias “Gambler No. 1” reported that

[I]ast year, '81, they, the Bloods, went en mass to state their grievances to the Governor General, Lord Lorne. What His Excellency told them, I am not in a position to say, only from report. The Bloods wanted Stand Off bottom, where they could raise something, and came back with the impression that the Governor General had given it to them, and commenced building in the bottom accordingly. Then Mr. Dewdney, through his agents, told the Indians their reservation was 17

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- 99 N.T. MacLeod, Indian Agent, Treaty 7, Office of Indian Agent, Fort Macleod, to Edgar Dewdney, Indian Commissioner, Ottawa, December 29, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 97–100 (ICC Exhibit 1a, p. 181). There is no consistency to how the geography of the reserve is described. At times it is described as being south of the Belly River and, at other times, as being east of the Belly River. Regardless, the reserve is bounded by the Belly River on the east side.
- 100 N.T. MacLeod, Indian Agent, Fort Macleod, to unidentified recipient, November 2, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 85–87 (ICC Exhibit 1a, pp. 177–79).
- 101 Edgar Dewdney, Indian Commissioner, DIA, Regina, to the Superintendent General of Indian Affairs (SGIA), December 31, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 80–81 (ICC Exhibit 1a, pp. 189–90).
- 102 Unidentified author to unidentified recipient, May 30, 1881, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, xxiv–xxv (ICC Exhibit 1a, p. 225).
- 103 “The Governor General of Canada’s Tour,” *The Times* (London), September 26, 1881; Glenbow Archives, M314 (ICC Exhibit 1a, p. 253).



miles down and 17 miles up on the south side of Belly river, which seemed to be satisfactory, as they all made for the other side of the river and disposed of their buildings on the Stand Off bottom.<sup>104</sup>

In 1882, Indian Commissioner Dewdney reported that “the Blood Indians always objected to taking their reserve with the Blackfeet.”<sup>105</sup>

### **Determining the Population of the Blood Tribe**

Since the Blood Tribe had not yet settled on its reserve, the Department of the Interior, and subsequently the Department of Indian Affairs, had some difficulty in calculating its population. These difficulties would continue until 1884.<sup>106</sup> The Department of Indian Affairs was faced with the obligation to pay annuity and distribute food rations to an unpredictably fluctuating Blood Tribe population while maintaining its policy of economic efficiency. As a result, efforts were made to verify the names of Blood Tribe members on the ration list and payroll.

Indian Commissioner Dewdney, when he was appointed to that post in May 1879, was instructed by the Department of the Interior to employ

the strictest possible economy consistent with the efficient administration of the affairs placed under your charge. You will be good enough to exercise special supervision over the details of expenditure called for in connection with the proposed farming agencies.<sup>107</sup>

In 1879, in one of his first acts as Indian Commissioner, Dewdney intervened in the distribution of rations to the Blackfoot and Sarcee, which he concluded to be excessive.<sup>108</sup> In his report dated January 2, 1880, Dewdney recounted his statements to the Blackfoot and Sarcee First Nations:

I informed them that I could not feed them here any longer, but that if they went to the Blackfeet Crossing and picked out a piece of land and assisted my men to get out fencing &c. I would feed those who worked and the sick.  
They refused ...<sup>109</sup>

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104 Newspaper clipping, Gambler No. 1, *Fort Macleod Gazette*, July 8, 1882 (ICC Exhibit 1a, p. 412).

105 Edgar Dewdney, Indian Commissioner, Ottawa, to Minister, Department of Interior, Ottawa, February 28, 1882, LAC, RG 10, vol. 3580, file 750 (ICC Exhibit 1a, p. 361).

106 William Pocklington, Indian Agent, Treaty 7, Fort Macleod to Edgar Dewdney, Indian Commissioner, Manitoba and the North-West Territories, September 20, 1884, LAC, RG 10, vol. 1552, pp. 55–59; LAC, RG 10, vol. 3698, file 16106 (ICC Exhibit 1a, p. 1237).

107 J.S. Dennis, Deputy Minister, Department of the Interior, Ottawa, to Edgar Dewdney, Indian Commissioner, Ottawa, May 30, 1879, LAC, RG 10, vol. 3635, file 6567 (ICC Exhibit 1a, p. 74).

108 Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 117).

109 Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGLA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 117).

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Faced with the cost of feeding such a large population on a daily basis, the department attempted to be conscious of any perceived fraudulent claims being made by the First Nations against its system of ration distribution and the payment of annuities. Dewdney issued instructions to Colonel Macleod of the North-West Mounted Police on how he should issue rations to the Blood Tribe. In his report of January 2, 1880, Dewdney stated that

Col. MacLeod [*sic*] was very anxious to get distinct instructions about feeding the Indians. He stated that he expected some 2,000 Bloods at Fort MacLeod shortly ...

...

I was prepared, under the circumstances, to take my share of the responsibility of feeding the Indians, but I did not feel inclined to authorize any fixed rations, and I told him that the officers of the post must be guided by circumstances as they arose, and must use every precaution to economize and see that they were not imposed on by the Indians.

It appeared to me that the police officers of the different posts had been in the habit of issue supplies, more or less, to the Indians for some time, and they thought all they had to do was go to the forts and beg, and get what they wanted.

It thus made it very difficult to deny them food, but I do believe that there were occasions when the Government was imposed upon.<sup>110</sup>

In 1880, the population of the Blood Tribe was recorded as 1,039 on the payroll. The comments indicate that most of the Tribe was south of the international boundary during the July 26–30, 1880, payments at Fort Macleod.<sup>111</sup> Missionary Samuel Trivett recorded the Blood Tribe's population at 3,400 in total, but only approximately 800 were living on the Canadian side of the international boundary.<sup>112</sup>

Dewdney also proposed a new system of distributing food rations. He wanted to connect the payment of the annuity to the receipt of rations with a ticket system. Those who received an annuity payment would receive a ticket entitling them to rations. For those without a ticket, a ration would not be issued. Since the government was obligated only to feed First Nations who received annuity payments, this ticket system was intended to control the ration system.<sup>113</sup> The documentary record does not indicate if, or when, Dewdney's proposal was officially adopted; however, there is documentary

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110 Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 119).

111 Paylist for 1880, July 26–30, 1880, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1881, LAC, RG 10, vol. 9414 (ICC Exhibit 1g).

112 Letter from Samuel Trivett, Missionary, to unidentified recipient, LAC, MG 17, B2, C.1 / 0, No. 10 (ICC Exhibit 1a, p. 184).

113 Edgar Dewdney, Indian Commissioner, NWT, Ottawa, to SGIA, Ottawa, January 2, 1880, Canada, *Report of the Deputy Superintendent-General of Indian Affairs 1879*, pp. 76–103 (ICC Exhibit 1a, p. 138).

evidence which suggests that Treaty 7 members were given one ticket to prove their entitlement to annuity payments and a separate ticket to prove their entitlement to rations.<sup>114</sup>

In 1881, the number of Blood Tribe members receiving rations was 3,146.<sup>115</sup> In addition,

the Instructor [was] working under very great difficulties, in consequence of the large number of Indians who have lately arrived from across the line. His numbers have increased in the course of a few weeks from 800 to 3,300.<sup>116</sup>

In October 1881, Indian Agent N.T. MacLeod recorded a population at the “Blood Reserve [of] about 3,640 Indians.”<sup>117</sup> The 1881 payroll indicates that 3,561 people were paid annuity during the August 10 and October 6, 1881, payments.<sup>118</sup>

By January 1882, it was clear to Department of Indian Affairs officials that the “ticket system” was not providing efficient ration distribution or annuity payments in the Treaty 7 territory. Indian Agent C.E. Denny reported on the difficulties:

I understand that a great deal of trouble is caused at the Crossing by the differences existing between the ration ticket the Indians hold and their Treaty ticket – It seems that a great many of them were paid for more people than they really have in their families, and as their ration ticket shew [sic] only the number they really have they think they are cheated. If you would allow me, I could get all their Treaty tickets back and issue them with new ones shewing [sic] the real number they have in their families – This will take a little time, and when I can get time, I will do it myself.<sup>119</sup>

The department continued to issue food rations and pay annuity to the Blood Tribe despite difficulties in determining its actual population. The

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114 C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, DIA, Ottawa, January 22, 1882, LAC, RG 10, vol. 3574, file 167 (ICC Exhibit 1a, p. 350); C.E. Denny, Indian Agent, DIA, Fort Macleod, NWT, to SGIA, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 168–77 (ICC Exhibit 1a, p. 561).

115 Indian Agent N.T. MacLeod to unidentified recipient, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, xxiv–xxv (ICC Exhibit 1a, p. 225); T.P. Wadsworth, Inspector of Indian Agencies and Farms, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, 116–22 (ICC Exhibit 1a, p. 283).

116 Indian Agent N.T. MacLeod to unidentified recipient, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881*, xxv–xxvi (ICC Exhibit 1a, p. 229).

117 N.T. MacLeod, Indian Agent, “Statement of Number of Indian Reserves in Treaty 7,” LAC, RG 10, vol. 1549, p. 16 (ICC Exhibit 1a, p. 271).

118 Paylist for 1881, July 26–30, 1881, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1881, LAC, RG 10, vol. 9415 (ICC Exhibit 1g, p. 125).

119 C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, DIA, Ottawa, January 22, 1882, LAC, RG 10, vol. 3574, file 167 (ICC Exhibit 1a, p. 350).

department also continued to reduce the amount of food rationed to the Tribe. Inspector of Indian Agencies and Farms T.P. Wadsworth reported:

I returned here after making my Inspection of the Blood Reservation the day before yesterday. Whilst there it brought to my recollections, that it was at my visit there a year ago I fixed the flour ration at what it is  $\frac{1}{2}$  lb per soul. The Indians are as contented today as they were then when getting 1 lb, altho the Agent then thought it would not work at such a reduction. It is from making such savings as this to the Department I have my title to increase of pay. I know it is only my duty to cause retrenchment in expenditure, but I [say] the difference between one man and another is to make retrenchment without injury to the service, and I think too it is an honour to be the first to conceive just where and when to do it: I trust Sir you will not overlook my claims to either promotion or increase of salary.<sup>120</sup>

In August 1882, Wadsworth reorganized the administration of the Treaty 7 agency, making Indian Agent Denny solely responsible for the “Bloods, Piegans, and Pincher Creek Supply Farm.”<sup>121</sup> Wadsworth instructed Denny as follows:

You will also be able to give much personal attention to the office of the Agency which from my own observation I found sadly in need of it. I must particularly urge upon you the necessity of being present as often as possible at the killing, receiving and issuing of the beef to the Indians upon the Blood and Piegan Reservation as I have already instructed Mr. Pocklington to be at the Blackfeet, Sarcee and Stony. I am sure the Department will expect this duty of you as it takes in the largest expenditure in this Treaty.

...

The system of issuing rations has been very loosely conducted almost everywhere in this Treaty, in a measure this might have been owing to poor scales, now that we have good scales I trust that you will see that the Indians receive their full ration of  $\frac{1}{2}$  lb flour and 1 lb meat per soul. The issuer of rations must be notified that every pound of provisions issued by him must be entered immediately in his books and the true reason (if it is an extra issue) given why it is issued the system has prevailed to save both beef and flour in rationing and then issue this surplus without “rhyme or reason” and make no note of it as the quantity has already been covered by the entry for the days rations.<sup>122</sup>

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120 T.P. Wadsworth, [Inspector of Indian Agencies and Farms], Pincher Creek Supply Farm, DIA, Pincher Creek, to L. Vankoughnet, DSGIA, Ottawa, June 13, 1882, DIAND, Enclosure file B8260-157, vol. 2d (ICC Exhibit 1a, pp. 396–97).

121 T.P. Wadsworth, Inspector of Indian Agencies and Superintendent of Farms, Fort Macleod, NWT, to C.E. Denny, Indian Agent, Fort Macleod, NWT, August 5, 1882, LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 484–85).

122 T.P. Wadsworth, Inspector of Indian Agencies and Superintendent of Farms, Fort Macleod, NWT, to C.E. Denny, Indian Agent, Fort Macleod, NWT, August 5, 1882, LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 484–86).

Inspector Wadsworth reported his displeasure with the distribution of rations in Treaty 7 in another report in August 1882:

You will no doubt learn from my letters that I am a good deal upset by Mr. Denny's conduct ...

... [Although] there were 200 Indians visiting at Fort MacLeod the ration list was very little reduced as they had left their ration tickets behind, and as I suppose Mr. Denny fed these Indians here the Gov't was rationing them twice over.<sup>123</sup>

In September 1882, Assistant Indian Commissioner E.T. Galt instructed Indian Agent Denny as follows:

Issuing of Rations to Indians on Reserves.

The daily ration issued to Destitute Indians while living in their reservations must not exceed one pound of beef and one half pound of flour, and where Indians have harvested vegetables, the ration of flour should be reduced as much as possible. Extra rations should be issued only for work in connection with the operating of the respective farm Agencies, or in matters connected with the management of the Indian Agency, and then [may] Beef and Flour only be issued. Where the Head Chief has been receiving extra rations, the same practices may be continued. Where it is known that Indians are away from other Reserves, the ration issued to the parties representing them must be correspondingly reduced. Indians should be required to present their ration tickets before food is issued to them.<sup>124</sup>

Following the September 25, 1882, treaty annuity payments on the Blood reserve, Indian Agent Denny reported: "We made a reduction on last year's payments, finding several cases of duplicate tickets. ... I had new ration tickets issued to correspond with the pay tickets."<sup>125</sup>

The department continued to work on reducing rations and curtailing what it perceived to be fraudulent claims. On October 5, 1882, Assistant Indian Commissioner Galt reported as follows:

Food Issues.

There are 7,850 Indians on the Ration list in this Treaty, to whom is issued a daily ration of 1 pound of Beef and 1/2 pound of Flour, at a cost to the Government of about \$981 per day. It is anticipated, however, that the crops raised by the Indians this year will permit a reduction of 1/4 pound in the Flour ration, which will effect

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123 T.P. Wadsworth to unidentified recipient, [c. August 31, 1882], LAC, RG 10, vol. 3609, file 3380 (ICC Exhibit 1a, pp. 506–7).

124 E.T. Galt, Assistant Indian Commissioner, DIA, Fort [MacLeod], Alta., to C.E. Denny, Indian Agent, Treaty 7, DIA, Fort [MacLeod], Alta., September 30, 1882 (ICC Exhibit 1a, pp. 517–22).

125 C.E. Denny, Indian Agent, DIA, Fort MacLeod, NWT, to SGIA, Ottawa, November 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 176 (ICC Exhibit 1a, p. 561).

a saving to the Gov. in money value of about \$157 per day, or a diminution in the total ration of 17%.

... I have impressed upon the Indian Agent [Denny], and the Sub Indian Agent [Pocklington] the necessity of seeing for themselves that the issuing of rations at the various Reservations is made with the greatest possible economy, and start a [illegible] check is established to prevent Indians from drawing rations for members of their families who may at the time be absent from their Reserves and also, that as few extra rations as possible be issued.<sup>126</sup>

In his annual report to the Governor General, John A. Macdonald, Superintendent General of Indian Affairs (SGIA), reported:

The Bloods, Blackfeet and Sarcees are said to be decreasing in number; while the population of the Piegans and Stonies remains about the same.

The annuity payments under this treaty were considerably curtailed in the aggregate amount disbursed when compared with the payments of previous years. Owing to the Indians being all on their reserves for a length of time previous to pay day, an opportunity, which they never previously had, was afforded the officers of the Department to detect a number of frauds which had been systematically practised in previous years by the Indian annuitants on the paying officers. Similar frauds in connection with issues of rations having been detected, a corresponding reduction under that head has also been made.<sup>127</sup>

According to the 1882 Blood Tribe payroll, 3,542 members were paid annuity during the September 25–28 payments.<sup>128</sup> One month later, Assistant Indian Commissioner Galt reported that “[t]he number of Indians living on this Reserve is very large, there being no less than 3,600 souls in all.”<sup>129</sup>

#### SURVEY OF THE BLOOD RESERVE, 1882–83

The government was aware that reserves in the prairies had not yet been surveyed. Sir John A. Macdonald, then Superintendent General of Indian Affairs, realized that surveys had to be a priority if the department was to prevent “future complications,” given the “rapid settlement” in the area.<sup>130</sup>

126 E.T. Galt, Assistant Indian Commissioner, to Indian Commissioner, Winnipeg, Man., October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 537–38).

127 John A. Macdonald, SGIA, Ottawa, to Sir John Douglas Sutherland Campbell, Marquis of Lorne, Governor General of Canada, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, ix–xix, xliii (ICC Exhibit 1a, p. 628).

128 Paylist for 1882, September 25–28, 1882, Indian Affairs, Treaty annuity paylists, Treaties 4, 6, and 7, 1882, LAC, RG 10, vol. 9415A (ICC Exhibit 1g, 154).

129 E.T. Galt, Assistant Indian Commissioner, to Indian Commissioner, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, p. 535).

130 John A. Macdonald, SGIA, Ottawa, to John Douglas Sutherland Campbell, Marquis de Lorne, Governor General of Canada, Ottawa, December 31, 1881, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881* (ICC Exhibit 1a, pp. 297–302).

In June 1882, Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), reported that Indian Commissioner Edgar Dewdney had instructed John C. Nelson to lay out the limits of the Blood reserve.<sup>131</sup> On October 5, 1882, E.T. Galt, Assistant Indian Commissioner, informed Indian Commissioner Dewdney that the survey of the Blood reserve was “completed” in the summer and stated:

These Indians have been living on their Reserve pretty steadily since last Fall, and have built for themselves 200 houses. Their main camp is located on the Belly River, about 2 miles below where the Kootenie River joins it, and smaller camps are scattered along the banks of the Belly River, for about 5 miles above, and 6 miles below the main camp. The land chosen last spring for farming operations was well selected, small patches of land being broken for them along the river bottom. ...

The number of Indians living on this Reserve is very large, there being no less than 3,600 souls in all.<sup>132</sup>

On December 29, 1882, John C. Nelson submitted his report of the surveyed boundaries of Indian reserves in Treaties 4 and 7 to the Superintendent General of Indian Affairs. Nelson described the limits of the Blood reserve as follows:

This large reserve occupies a tract of country lying between, and bounded by, the St. Mary's and Belly rivers, from their junction below Whoop-up to an east and west line which forms its south boundary, as shown by the accompanying sketch marked (e). This east and west line lies about nine miles north of the International Boundary.

Commencing near Whoop-up, a careful traverse was made of the St. Mary's River, up to the International Boundary.<sup>133</sup>

Nelson also stated in this report that the area of the Blood reserve measured some 650 square miles (416,000 acres, or enough land for approximately 3,250 people according to the terms of Treaty 7) and that by mid September he had begun to survey the Peigan reserve, leaving “a part of the Blood Reserve to be finished later in the season.”<sup>134</sup> Nelson went on to mention that

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131 L. Vankoughnet, Deputy Superintendent General, to E.T. Galt, Assistant Indian Commissioner, June 27, 1882, LAC, RG 10, vol. 4452, pp. 153–54 (ICC Exhibit 1a, pp. 407–8).

132 E.T. Galt, Assistant Indian Commissioner, to E. Dewdney, Indian Commissioner, October 5, 1882, LAC, RG 10, vol. 3637, file 7134 (ICC Exhibit 1a, pp. 534–35).

133 John C. Nelson, Dominion Land Surveyor, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, p. 601).

134 John C. Nelson, Dominion Land Surveyor, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882* (ICC Exhibit 1a, pp. 595 and 601).

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the best quality land was found in the southern portion of the reserve and at Lee's Creek. Nelson also noted that "a man named Cochrane has improvements on the reserve near Stand-off."<sup>135</sup> Nelson returned to the Blood reserve on October 6, 1882, and "finished" the survey by October 12, 1882.<sup>136</sup>

In January 1883, Nelson wrote to the DSGIA, providing additional information about the uncertain boundaries of the Blood reserve, and stated that other squatters were living in the area of the reserve:

If this reserve is to extend all the way to the junction of these rivers it will include the old whiskey trading post called Whoop-Up and the bottom upon which it stands. This place is still occupied by a Mr. David Akers one of the pioneer Indian traders of the country.

I do not see any special advantage in taking Whoop-Up and the surrounding bottom into the reserve for the following reasons viz:

(1) Mr. Akers may ask a big figure for his improvements the intrinsic value of these to the department lies only in the logs of cotton-wood timber of which the buildings are composed.

(2) The bottom at Whoop-Up is very gravelly and Mr. Akers has his farm or field on the north side of Belly River on that account.

By keeping out of the reserve the section of land partly bounded by the pink margin on the sketch, the people at Whoop-Up will have no claims against the Department.<sup>137</sup>

In the summer of 1883, Nelson received instructions from Indian Commissioner Dewdney to re-survey the southern boundaries of the reserve "in conformity with the terms of the amended Treaty."<sup>138</sup> Nelson began the survey on July 12, 1883, and noted "that owing to the rapidly decreasing census of this tribe, the area of the Reserve surveyed by me last year required considerable reduction. This was effected by shifting the south boundary further northward as shewn [sic] by the maps."<sup>139</sup> Nelson's survey map

135 John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 220 (ICC Exhibit 1a, p. 601). Cochrane had a lease in this area and is discussed further below.

136 John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to SGIA, December 29, 1882, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1882*, 221 (ICC Exhibit 1a, p. 602).

137 John C. Nelson, Dominion Land Surveyor, Indian Reserve Surveys, DIA, Ottawa, to DSGIA, Ottawa, January 15, 1883, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 634-35). David Akers was a squatter on a part of what was the Blood reserve on the west side near the St Mary River. The "Akers claim" is another specific claim filed by the Blood Tribe; it has been accepted for negotiation and has nothing to do with this claim.

138 John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 941-42).

139 John C. Nelson, In Charge Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 1, 1883, LAC, RG 10, vol. 3668, file 10525 (ICC Exhibit 1a, pp. 954-55).



shows an area of 547.5 square miles (350,400 acres, or enough land for approximately 2,737 people according to the terms of Treaty 7).

Also in July 1883, prior to the 1883 annuity payments, Indian Agent Denny reported that he had succeeded in further reducing the number of Blood Tribe members receiving rations.<sup>140</sup> In his report regarding the Blood Tribe's 1883 annuity payments, Indian Agent Denny confirmed his reduction of the number of Blood Tribe members receiving both annuity and rations, eliminating 936 names from the payroll:

I have the honor to forward the Blood Pay-Sheets for this year, and to report that against \$18,110 paid last year, we have paid out this year \$13,190 being a reduction of \$4,930 or 936 people less. The money has been given to the Bloods at former payments as they asked for it, and as I have known for some time back that there was not the number represented, I determined to get them down to their number this year, but the work was not a pleasant one.

...

I have not yet got the Bloods down to their proper number, but am getting near it. It is not so much the money the Dept. saves by this reduction as the amount saved in rations which by this payment, will be very large indeed, as we shall now ration them by the new numbers.

I issued new pay tickets all around.

Your instructions to me were to make the last years pay-books a basis to pay on, this I could not do, the Indians being so much overpaid but I should recommend that the pay-books of this year, be taken in future as a basis to go by.

...

The reduction has been great and the saving in rations will be very large.<sup>141</sup>

Elder Andrew Black Water explains that a reduced population may have occurred at this time because “they had another distribution and there was lesser people that came for the distribution. But most of our people would be way down south in the Sweet Grass Hills and east of that.”<sup>142</sup>

In a memorandum dated September 29, 1883, Chief Surveyor W.A. Austin noted in his examination of Nelson's return of Indian reserve surveys that

[i]t is useless to examine this Reserve without further data. ...

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140 C.E. Denny, Indian Agent, Treaty 7, DIA, Fort Macleod, NWT, to SGIA, Ottawa, July 10, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1883*, 78–84 (ICC Exhibit 1a, p. 763).

141 C.E. Denny, Indian Agent, DIA, Fort Macleod, NWT, to Edgar Dewdney, Indian Commissioner, September 28, 1883, LAC, RG 10, vol. 3637, file 7130; vol. 1550, pp. 669–74 (ICC Exhibit 1a, pp. 844–54).

142 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 123–24, Andrew Black Water).

The Blood Indian reserve plan is made out at 6 miles to an inch and no traverses could be laid down to be correctly checked on such a scale considering the short distances of some of the lines.<sup>143</sup>

On a related note, there are references in the members' oral history to survey markers being seen around the current Blood Tribe Reserve. It should be noted that the exact location of these markers is unknown and some do not refer to the Big Claim lands at all. Elder Margaret Hind Man states:

I personally saw some survey markers in and around where [I] lived, and [I] also talked with Alfred Blood that worked at the Mike McIntyre ranch near the Milk River area where he used to ride. And that there were survey markers there, too, and on the sign it was very clear Blood Indian Reserve was on them. And when we started bringing up these land claim issues, they started disappearing.

...

He said the markers were about six inches diameter and looked like brass, yellow / gold top that encircled the marker. But they were also worn by the cattle scratching against those markers. ... There were several of them that were along the Milk River close to the U.S. border.<sup>144</sup>

Elder Pat Eagle Plume states that he also personally saw survey markers on leased land in "an area southeast of Cardston" for the Blood Tribe Reserve or, rather, what he referred to as survey pails.<sup>145</sup>

I was working at a ranch for a rancher by the name of Mellenberg. And there were five families from Cardston that were prominent at that time, and they used to round the people up for different duties.

And while I was working for Mr. Mellenberg, we were having a branding. And while we were getting the cattle together, my boss came to me and said, you come with me. And we went to a place northwest from where we were. And there was a hill that we went up to, and there was the pail ...

...

There were government documents that were in there and that when the lease expires, they would be retrieved. And we would go according to what's contained in the lease, and that was to give the land back.<sup>146</sup>

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143 Memorandum of W.A. Austin, Chief Surveyor, c. September 29, 1883, LAC, RG 10, vol. 3621, file 4753 (ICC Exhibit 1a, p. 861). See also "Plan on a scale of forty chains to one inch, showing the Survey of the Southern Boundary of the Blood Indian Reservation lying between the Belly & St. Mary's Rivers with a Key Plan on a scale of six miles to an inch," John C. Nelson, DLS, August 1883, [Natural Resources Canada, 323 CLSR AB] (ICC Exhibit 7a, M-06).

144 ICC Transcript, August 30–31, 2004 (Exhibit 5a, pp. 384, 389, 399, Margaret Hind Man). Elder Margaret Hind Man could have lived in the area of "Thirty Trees" or Lee's Creek; see ICC Transcript, August 30–31, 2004 (Exhibit 5a, p. 379, Margaret Hind Man).

145 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 387, Pat Eagle Plume, and p. 388, Diana Kwan).

146 ICC Transcript, August 30–31, 2004 (Exhibit 5a, pp. 387, 389, Pat Eagle Plume).

Elder Pat Eagle Plume further states:

When the whole discussion really picked up about the Big Claim, Mr. Edward Little Bear came to pick me up and asked me to take him to the place where I saw this marker. We went to that very place, the same place where the gate was. We went through, and there were roads right by the oil patch. And we got there, and it wasn't there anymore.

...

And, furthermore, his boss took him to some other markers from there. And around one of the markers, there were a lot of tepee rings, including one that was a prominent leader, a person that was in charge and leader of where they would camp, when they would break camp, and where they would go. And the tepee rings and where the rocks are laid out indicate such a person.<sup>147</sup>

Elder Stephen Fox also has stories about survey markers.

I was told at the south side there were markers. On the south side of the Reserve, south end of the Reserve, towards the United States, what we call the United States, the south, there were markers.

There was a marker, it was a cylindrical pipe. It had the identifications BIR identifying the Blood Indian Reserve. The people that were marking them went east. I don't know how many miles, but maybe it was six miles. This is where they had –that they had another marker. They put another marker there.

Then they went south. I don't know the directions. They said it was used to mark the west side of Raymond. The McIntyre ranch, the people that were working at the McIntyre ranch saw the pipe, they saw the marker. They said they then went that way.

...

... I don't know how far they went. They went on the west side and put another marker there. The hired hands used that. They would follow the trail. Across the side by Lee's Creek, there was another marker. Our leader at that time, Eh man na – his relations were Tall Man. Mike Blood told me. He was on horseback. He was riding beside his grandfather. His grandfather was riding in a wagon. They were shortening our original territory. Our land went right up to Montana. He asked them, why are you decreasing our Reserve? He said he was not going to accompany them anymore.<sup>148</sup>

Elder Stephen Fox also states:

Some years ago, we went by BB Flats, which was by the Timber Limits. Before the highway was widened, I drove there with Mike Eagle Speaker. We were on Lifetime Council at the time, we were members of the Lifetime Council. We were told to go check the widening of the highway.

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<sup>147</sup> ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 390, 399, Pat Eagle Plume).

<sup>148</sup> ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 427–28, Stephen Fox).

Mike Eagle Speaker said he was going to go down and check the side of the road. When we were there, we saw another marker. The marker clearly indicated it was the Blood Indian Reserve.

...  
I was told that the survey went along right up to the Kootenay River. There was another marker or another pipe that was located there. They then went along the Kootenay River. The river was the natural boundary. They did not need to place a marker there. They said that the natural boundary was the indication of our territory.<sup>149</sup>

### **Significance of the Big Claim Lands**

The Blood Tribe does not accept the boundaries of its reserve as surveyed by John C. Nelson in 1882 and 1883. Instead, the Blood Tribe's oral history consistently describes the spiritual / cultural and practical significance of the Big Claim lands, and consistently maintains that the land which Red Crow retained for the Tribe is the Big Claim lands area. Elder Mary Louise Oka describes it:

I heard that from the confluence of the river to the Kootenay to Chief Mountain, Red Crow always used the Belly River, Red Crow always camped by the water. He always also camped at the Belly Buttes. His parents were buried at the Belly Buttes along with his relatives.

When he said he was moving home, he was moving home to this area and to the Belly Buttes. He did not say that he was surrendering any land.<sup>150</sup>

Elder Frank Weasel Head offered further insight into what Red Crow meant when he announced that he was "going home" after treaty and where Red Crow understood his home to be at the time:

When Red Crow moved home, he said I'm going home to the Belly Buttes and Chief Mountain, to the mouths of these rivers. To him, he still wasn't conscious of the border, because the mouth of the St. Mary's River goes into Montana. Chief Mountain is located between the two rivers. Why would he say I'm going home to Chief Mountain and the Belly Buttes? So he wasn't fully – yes, he might have been – but it didn't matter to him. A lot of us today take it as an artificial boundary. Doesn't matter to us. It's there, that it is there.

So this is again referred the home base, the area. ... This was the best land. This was the best land.<sup>151</sup>

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149 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 428–29, Stephen Fox).

150 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 184, Mary Louise Oka).

151 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 459–60, Frank Weasel Head).

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The home base of the Blood Tribe is bounded on the west by the Kootenay (Waterton) River and extends to the mountains at the border. While a portion of the Blood Tribe's present-day reserve includes the Blood home base, the Big Claim area covers portions that are considered to be sacred grounds to the Blood Tribe. Sacred grounds are explained as

the very essence of our people, ... that's where our perception comes from. In terms of our relationship with what's out there. Every part of creation. And we go back once a year to relive, to reexperience, to revive, and to sustain that essence.<sup>152</sup>

Blood Tribe oral history and custom indicates that land which has been deemed sacred remains sacred in perpetuity.<sup>153</sup>

The Elders explained the spiritual and practical significance of the area between the Kootenay (Waterton) River and the Belly River, as well the area south of the current reserve's boundary.

#### **Confluence of the Belly and Kootenay (Waterton) Rivers<sup>154</sup>**

Indian Agent N.T. MacLeod described the Blood reserve as being located "at the junction of the Belly and Kootenay Rivers."<sup>155</sup> According to Blood Tribe oral history, the tribe had lived on the land between the Kootenay (Waterton) and Belly Rivers and the area is significant to the Blood Tribe.

Elder Rosie Red Crow testified that the Blood Tribe once held its sacred Sundance ceremonies on the land between the Waterton and Belly Rivers.<sup>156</sup> Hugh Dempsey reports that "there is ample evidence that the holy Sun Dance ceremonies were held between the Waterton and Belly rivers in the 1880s."<sup>157</sup> Elder Pat Eagle Plume also supports this knowledge, stating: "It was an important area, and the place of many spirits, a place that was considered sacred. And we still use it today as they used it back then."<sup>158</sup>

Elder Adam Delaney spoke of other reasons for the spiritual significance attributed to this area:

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152 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 15, Andrew Black Water).

153 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 18, Andrew Black Water).

154 Sometimes referred to as "Willows into the Creek" or "Willows into the River."

155 N.T. MacLeod, Indian Agent, Fort Macleod, to unidentified recipient, November 2, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 85–87 (ICC Exhibit 1a, pp. 177–79). In some of the historical documents, the point at which the Belly and Kootenay Rivers meet is referred to as the confluence, the junction, or the fork. In this history, confluence will be used.

156 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 152–53, Rosie Red Crow).

157 Hugh A. Dempsey, "Report on Research for The Big Claim Blood Tribe / Kainaiwa" (July 8, 1997), 24 (ICC Exhibit 2f, p. 24).

158 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 394–95, Pat Eagle Plume).

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[T]he most important thing in our culture as an Indian and the religion especially. Where the two rivers meet, right at the end, way up there where the Belly River and the Kootenay or Waterton River, I'm going to show you guys. The most important thing in our religion, this is where the root, the strongest in our religion, that's where we got it, and I got one.<sup>159</sup>

Elder Frank Weasel Head was born and raised on this parcel of land near the confluence of the Kootenay and Belly Rivers and is familiar with the history of his people's relationship to this land. He stated:

I did see some ... frameworks or foundations and tepee rings with the land that is now owned – I shouldn't say owned. I should really say to us, the Hutterites are borrowing or trespassing in that area. I seen that, and he told us of what we now have, the gathering of the Tribe, our sacred grounds on top.

And from what – I heard ... a lot of the camps were held there, ceremonies were held there, until we were forced or chased across the river to the top there.<sup>160</sup>

Elder Rosie Day Rider also spoke of the Tribe's use of this land:

[W]e still use it today, and even in the past we always felt a part of the place where the river flows from the mountains. And back then, our people went up there to use it for various reasons, including getting tepee poles as well as for some of the berries or plants we using for flooring. We use them for medicinal purposes. It was those things that we used back then are still true today, it helps for our healthy bodies – to have healthy bodies.<sup>161</sup>

Elder Andrew Black Water further emphasized:

[I]t's so important for us to try and regain that land so we can continue to utilize, you know, the resources as well as having access to those sacred grounds that we hold very dearly and for our survival. And then, of course, going up the other way sii tookata – land between the two rivers, our people did a lot of hay cutting and sold the hay to this rancher, and we utilize that area quite a bit grazing our horses.<sup>162</sup>

Elder Louise Crop Eared Wolf indicated that the river bottoms in this area were traditionally used “for wintering in the wintertime. The water's nearby and the firewood is nearby. The game is plentiful, and the herbs are there in

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159 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 248, Adam Delaney).

160 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 464–65, Frank Weasel Head).

161 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 210, Rosie Day Rider).

162 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 88, Andrew Black Water).

the fall, that when they get ripe, that's when we pick them. That everything is there for the living.”<sup>163</sup>

Elder Margaret Hind Man summarized both the practical and the spiritual significance of this area to the Blood Tribe. She recalled the reasons why the Blood Tribe chose to winter there, stating “it was close to getting wood for kindling, and the water source was there, and we didn't have to go too far. We carried the kindling on our backs, and the water wasn't far.”<sup>164</sup> Elder Margaret Hind Man further states that the Blood Tribe used this land “[f]or some of our most sacred ceremonies, some of the plants that were used were all along that area, from the confluence all the way up to Waterton Lakes.”<sup>165</sup>

It is not clear how the Blood Tribe lost the use of this area. Elder Rosie Red Crow tells the story of how “[t]hey told us to leave that area, there was going to be a flood. They also told us not to have the Sundance anymore. They scared us of everything.”<sup>166</sup> Elder Margaret Hind Man offered another explanation:

There was a white man that we referred to as the person with a tall house. And he had longhorns, and he sent his herd on where we used to camp. And he told us that these longhorns were very dangerous, that you better move back across the river. And that was another way of them taking land from us, of what we used to use it for.<sup>167</sup>

### **Land South of Present-Day Reserve and Chief Mountain**

Prior to the 1882 and 1883 surveys of the Blood Tribe Reserve, the Tribe enjoyed a long history of living on and using the land that extended south of the present-day reserve to Chief Mountain. Elder Louise Crop Eared Wolf indicates that the Blood Tribe had used the land near

Lee Creek, what they call Lee Creek now. It's south of the place where they – our people call the Place of Thirty Trees, and that was around that place where Red Crow was residing at that time.

And he – the reason why he called the place the Place of Thirty Trees was that our people were cutting down the trees and getting them to dry up and using them as firewood, and one day Red Crow was walking in the woods, and he noticed that there were only thirty big trees left. So he took some rag, and he tied on the trees in strips. He tie them, he counted, there were thirty. And he went to his people and he

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163 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 372, Louise Crop Eared Wolf).

164 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 378, Margaret Hind Man).

165 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 379, Margaret Hind Man).

166 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 153, Rosie Red Crow).

167 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 382, Margaret Hind Man).

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told them, there's only thirty big trees there. I don't want you to cut anymore. We leave those trees there.

So they call it the place of Thirty Trees, Ne ip uks ku. And so Lee Creek is not that far from it. That's the place around where the Heavy Runner's family are today. That's around there.<sup>168</sup>

The Blood Tribe used the southern portion of the Big Claim lands for subsistence and ceremonial needs. Elder Rosie Red Crow elaborated on this point, saying that “[t]he timber that we used was from that area and we would float them down the river.”<sup>169</sup> Elder Andrew Black Water stated “that was the only place that we can still secure lodge poles, but now we're able to access those from other areas, you know, along the Foothills. But our people relied on that area.”<sup>170</sup>

This area was also used for berry harvesting. Elder Andrew Black Water further stated, “depending on the time of the year as to when berries ripe, eh, they would ripe a little earlier going east from the mountains, and then they would ripe quite late in the mountains, so our people still kind of in the fall time go up to that, we call BB Flat, to harvest.”<sup>171</sup> Elder Adam Delaney explained the ceremonial significance of berries to Blood Tribe culture by explaining their use. “That's what we use, our religion, you know. That's all it would take. And the hymns, you know, the Holy Communion. Only we use berries, you know. You know, that's when we have our Sundance, we have to have fresh berries, you know. They grew by that time.”<sup>172</sup>

Elder Frank Weasel Head summarized the multipurpose uses of this land:

That area was important for its resources to sustain our people. There was a lot of deer, antelope, small game. And today, as we sit in here, we get hot, we get very uncomfortable if we're overly dressed in thick clothing. The buffalo, the elk, their hides were quite thick. The deer and the antelope, their hides were thinner. Those were used for our summer clothing.

And, again, plants grow. And, again, as I said before, I'm not going to go into the medicinal and spiritual part, but trying to also go into the practical part of it. Certain plants grow there that were good for nutritional value, to supplement our diets. Again, I go back to my grandmother. She used to dig up plants from the Mother Earth and wash them. And as children, not for medicinal purposes, to make – but to feed us for nutritional value, to sustain our diets. So all our resources were, part of our resources were also there. So it's important.<sup>173</sup>

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168 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).

169 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 157, Rosie Red Crow).

170 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 120, Andrew Black Water).

171 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 120, Andrew Black Water).

172 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 276, Adam Delaney).

173 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 470–71, Frank Weasel Head).



Blood Tribe oral history asserts that the southern portion of the Big Claim lands are significant in terms of maintaining the integrity of the Blackfoot Confederacy and the relations and connections among the Confederacy's constituting nations. Elder Pat Eagle Plume states:

That was our connection to our relations, the South Peigan. Our land goes all the way down to Yellowstone, and we have interests in all of our traditional land. Very important to us.

Some of the South Peigan came up north to where the Porcupine Hills are now, and now they're the North Peigan. And where we made Treaty at Blackfoot Crossing is where the Siksika are now today. We are all related.

We speak the same language. We all have relations, the same ceremonies. So our connection to our relatives are those lands in question.<sup>174</sup>

Traditionally, the nations of the Blackfoot Confederacy travelled freely within its territory, which was divided by the international boundary. The southern portion of the Big Claim lands allowed the Blood Tribe access to its southern relations, the Blackfeet or South Peigans, and vice versa. Because of the establishment of the current reserve's southern boundary, the Confederacy's mobility and the north / south connection were disrupted. Elder Andrew Black Water elaborated on this point:

[W]e have our southern brothers and sisters, the Blackfeet. Now, we're very close to them and we have relatives across there too, and I always had – the understanding was that we need to continue to link up the two land bases so we can continue to have movement north and south, you know. And today it really is unfortunate that we're not able to communicate or at least remain connected with our relatives down there. My grandfather's sister, that's where she married and located, and today I don't even know my relatives down there. So it becomes quite serious for some of us in terms of marriages, if we don't know who our relatives [are] now. Chances might be that we might marry our own relatives, and basically that's a no-no in Indian culture, especially with ours. So we do – we did a lot of trading, exchanging items with our southern brothers.<sup>175</sup>

Chief Mountain is located within Glacier National Park in northwestern Montana, due south of Waterton Lakes National Park, in southwestern Alberta. Blood Tribe oral history consistently emphasizes the importance of Chief Mountain. Elder Andrew Black Water states:

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174 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 396, Pat Eagle Plume).

175 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 90–91, Andrew Black Water).

There's a long history behind Chief Mountain, and some of the gifts in terms of sacred items and songs were secured there by way of vision quests of our people. Blackfoot name is [Spkg Blackfoot]. That's Chief Mountain in our language. Today there's still quite a few of our people that travel up there to do their vision quests.<sup>176</sup>

Elder Andrew Black Water also made it clear that Red Crow claimed the land between the two rivers to the source in the mountains, and that Waterton Lake is the source of the Kootenay and St Mary Rivers in the mountains.<sup>177</sup> Elder Louise Crop Eared Wolf speaks of the spiritual significance of this area:

[T]he mountains are sacred. Whenever we go to Waterton Lake or we go past the mountains, and we think about the mountains as a lot of power coming, and we feel the presence. We always feel some tranquility when we go into the mountains, and we feel a presence, and we know they are sacred.<sup>178</sup>

An explanation of the sacredness of this area was offered by Elder Pete Standing Alone.

One of the Beaver Bundles was acquired at Waterton Lakes. This Blood Indian, his name is Pah khi khi ka, Muddy Feet, I guess. His wife was taken in by the, I guess you would call them underground people, or Su et apiksi.

... And she was given the pipe, this Beaver Bundle pipe. And then they went back south to – back into this world, and they had a ceremony where the under people talked about. All the songs, anything that needs to be known about the Beaver Bundle, how to use it.

And up to now, they're still in existence and people are still using them as instructed, and that is one of the important things that I heard about the lands between these two rivers.<sup>179</sup>

#### AMENDMENT TO TREATY 7

Three errors were made by the Crown in the surrender of the Blood Tribe's interest in the Bow River reserve. The first mistake occurred in 1880, when Red Crow purportedly agreed on behalf of the Blood Tribe to exchange its "rights, titles and privileges whatsoever to the lands included in said Treaty, provided the Government will grant [them] a Reserve on the Belly River in the neighbourhood of the Mouth of the Kootenai River," apparently with no vote of

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176 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 39, Andrew Black Water).

177 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 91–92, Andrew Black Water).

178 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 371, Louise Crop Eared Wolf).

179 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 419, Pete Standing Alone).

the adult male members taken at a meeting of the Tribe, as required by the *Indian Act*.<sup>180</sup>

A second error in the surrender of the Blood Tribe's interest in the Bow River reserve, the failure to obtain a surrender of the joint interest from the Blackfoot Tribe, was noticed by Sir John A. Macdonald in 1883. In the spring of 1883, construction of the Canadian Pacific Railway had reached Alberta, and land was required for railway purposes in an area previously assigned to the Blood Tribe within the Bow River reserve. In a Memorandum to Council, Macdonald wrote that, at the time of the Blood Tribe's interest in 1880, Crowfoot, the Chief of the Blackfoot, was absent from the reserve, hunting buffalo in the United States, and did not return until the spring of 1881. Macdonald considered it "imperative" that the surrender by the Blackfoot Tribe was required in order for the surrender of the Blood Tribe's interest to comply with *Indian Act* provisions.<sup>181</sup> Macdonald recommended "His Honour Lieut-Governor Dewdney, Commissioner of Indian Affairs, conjointly with Col. James Macleod, Stipendiary Magistrate, be empowered to hold a council of the Blackfoot Indians and obtain the Surrender required."<sup>182</sup> It is unclear why Macdonald did not extend the same principle to the Sarcee Tribe's interest in the Bow River reserve.

An Order in Council dated April 25, 1883, officially authorized Dewdney and Macleod to obtain the surrender from the Blackfoot Tribe.<sup>183</sup> In his report, Dewdney stated that he met with the "Blackfoot Indians in Council"<sup>184</sup> and obtained the surrender on June 20, 1883. The surrender document states:

Know all men by these presents, that we, the Blackfoot Indians, being a majority of the male members of the Blackfoot Band of the full age of twenty-one years, assembled in council duly called for the purpose of considering the surrender of the reserve hereinafter mentioned, and in presence of the Honourable Edgar Dewdney, the Lieutenant-Governor of the North-West Territories, and Commissioner duly authorized to attend said council, do hereby assent to ratify and confirm a certain treaty made and concluded the twentieth day of June last past between Her Majesty the Queen, by Her Commissioners, the said the Honourable Edgar Dewdney and James Farquharson MacLeod, C.M.G., of the one part, and the Blackfoot Indians by their Head and Minor Chiefs, of the other part.

180 Surrender, Blood Band to the Crown, dated September 25, 1880, in LAC, RG 10, vol. 1427, pp. 16–17 (ICC Exhibit 1a, pp. 166–67).

181 Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 681).

182 Memorandum to Council, April 12, 1883, LAC, RG 10, vol. 1083 (ICC Exhibit 1a, p. 682).

183 Order in Council, April 25, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 687–88).

184 Edgar Dewdney, Blackfoot Crossing, to SGIA, Ottawa, June 20, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, p. 736).

And in consideration of the terms of the said Treaty, we do hereby unanimously release and surrender to Her Majesty the Queen all the land reserved to the said Blackfoot Indians, under and by virtue of a certain treaty made and concluded on the twenty-seventh day of September, in the year of Our Lord one thousand eight hundred and seventy-seven.<sup>185</sup>

On June 27, 1883, Dewdney and Macleod obtained a similar consent from the Sarcee,<sup>186</sup> and on July 2, 1883, another surrender was taken from the Blood Tribe.<sup>187</sup> In a letter dated September 24, 1883, Dewdney explained why he obtained the surrender of the Sarcees and the Blood Tribe: "It was found however desirable during these negotiations, to obtain the surrender of the Sarcees to their interest in the Blackfeet Reservation as well as to obtain a formal surrender from the Bloods who had formerly only given a conditional one."<sup>188</sup>

According to the July 2, 1883, Blood Tribe surrender, by relinquishing its interest in the Bow River reserve, the Blood Tribe would receive:

All that certain tract of land in the North-West Territories, Canada, butted and bounded as follows, that is to say: Commencing on the north bank of the St. Mary's River at a point in north latitude forty nine degrees twelve minutes and sixteen seconds (49° 12' 16"); thence extending down the said bank of the said river to its junction with the Belly River; thence extending up the south bank of the latter river to a point thereon in north latitude forty-nine degrees, twelve minutes and sixteen seconds (49° 12' 16"), and thence easterly along a straight line to the place of beginning; excepting and reserving from out the same any portion of the north-east quarter of section number three, in township number eight, in range twenty-two, west of the Fourth Principal Meridian, that may lie within the above mentioned boundaries; to have and to hold the same unto the use of the said Blood Indians forever.<sup>189</sup>

However, no affidavits were sent with the surrender documents. On July 10, 1883, DSGIA L. Vankoughnet wrote to Indian Commissioner Dewdney, stating: "Blackfoot surrender received but no Affidavit by yourself and Chief before a Judge or Stipendiary Magistrate attached. This absolutely necessary

185 Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 130 (ICC Exhibit 1b, p. 22).

186 Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136 (ICC Exhibit 1b, p. 30).

187 Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

188 Edgar Dewdney, Indian Commissioner, to the Superintendent General, September 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 841–42).

189 Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 134 (ICC Exhibit 1b, p. 28).

under Act. Please have one made also to the Surrender by the Bloods and Sarcees when taken.”<sup>190</sup> Although the July 2, 1883, document is described as “Articles of a Treaty,” it essentially comprised a surrender of the Blood Tribe’s interest in the Bow River reserve in exchange for new reserve lands. As there was no provision to “amend the treaty” in the *Indian Act*, it can be assumed that Vankoughnet wanted the surrender provisions of the 1880 *Indian Act* followed.<sup>191</sup> By the time Vankoughnet’s note was written, all three surrenders had been taken by Dewdney and Macleod; each of them having been signed by Dewdney, Macleod, and the head Chief and minor Chiefs of the respective tribes.

In a letter to Dewdney dated July 7, 1883, Vankoughnet wrote:

I regret to have to inform you that the articles of Treaty enclosed by you cannot be submitted to His Excellency in Council for acceptance until the fact that the Release or Surrender of the portion of the old Reserves ceded by said articles of Treaty are assented to by a majority of the male members of the Band at a Council or meeting summoned for the purpose shall have been certified on oath before a Judge or Stipendiary Magistrate by yourself and fellow Commissioners and by the Head Chief or one of the Principal men of the Blackfoot Indians.

I have further to call your attention to the fact that the Release or Surrender made by the Blood Indians on the 25th of September, 1880 has never been forwarded to this Department. A copy of the same was sent in your letter of the 30th of November 1880; but it is necessary that the original should be submitted to His Excellency in Council for acceptance and that it should subsequently be registered in the Registrar General’s Office; and unless the same has been certified on oath in the manner before described by yourself and Col. McLeod, who was appointed by Order in Council of the 26th of March, 1880 Joint Commissioner with you to hold council of the Blackfoot Indians at that time, and by one of the Chiefs or Principal men of the Blood Band, the same will not be legal, nor can it be submitted to His Excellency for acceptance.

A certified copy of the Articles of Treaty last made with the Blackfoot Indians and referred to in the first part of this letter is enclosed herein, with a view to the Certificate of them being made and attached thereto. It is considerably safer to retain the original in the Department and the certified copy will answer sufficiently all purposes for the Certificate under oath required by the Act.

...

P.S. There would appear to be no objection, if it is found more convenient to do so, to the Certificate under oath being made separately before Judge or Stipendiary Magistrate by each of the Special Commissioners and by the Chief or one of the Principal men, as it would not appear necessary that the Certificate

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190 L. Vankoughnet, Deputy Superintendent General, to Edgar Dewdney, Indian Commissioner, July 10, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 768–70).

191 *Indian Act*, SC 1880, c. 26, s. 37 (1, 2). The difference between the 1876 and 1880 *Indian Acts* with reference to surrenders is the section number. The clauses are identical.

should be made jointly by the above parties at the same time and before the same Judge or Stipendiary Magistrate.<sup>192</sup>

In reply to Vankoughnet's request, Macleod wrote to Dewdney, stating:

I regret very much to state that I was quite unaware of the provisions of section 37 of the Indian Act. My attention was never directed to it and I have had very little to do with Indian affairs for the last four years. It never occurred to me but that the Indians could release their reserves in the same manner as they released their rights to the larger territories by the first treaties.

It is of course impossible for me, and I could not ask any Chief or principal man, to certify as required by the Act, for the simple reason that the releases were not assented to by a majority of the male members of the Bands of the full age of 21 years, at a meeting or council thereof, summoned for that purpose according to their rules.

The Council held was composed of the Chiefs and minor Chiefs. The Indians in question have no rules for summoning such a Council as the Act speaks of. I may be wrong, but I feel quite certain that neither "Crowfoot" nor "Meekasto", nor indeed "Bulls Head" would sit in such a council where any "Buck" of twenty one had the same voice as either of them. You will remember at the Blackfoot Crossing how touchy Crowfoot was [illegible] the minor Chiefs taking part in the discussion.<sup>193</sup>

Edgar Dewdney forwarded Macleod's letter to Vankoughnet on October 24, 1883. Dewdney recounted his version of the negotiations:

I think his remarks are worthy of consideration & I agree with his views in regard to the advisability of conferring upon the Chiefs more power in important deliberations of this nature than upon ordinary Indians of the Band.

He is mistaken however when he states that the releases were not assented to by a majority of the male members of the Bands of the full age of 21.

The Chief was notified for what purpose the Council met & the meeting was held I believe in accordance with the rules governing the Band & in compliance with S. S. I sec 37, & all the male members of the band attended who took an interest in the negotiations, in fact on an occasion of that kind it would be impossible to keep them away.

Although the Chiefs were the ones who took the most active part in the negotiations, before the signing took place numbers of the minor Chiefs & some of the ordinary Indians expressed satisfaction at the decision & were unanimous in their consent, there was not a dissentient voice in the whole of the negotiations, consequently there was no occasion for a vote.

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192 L. Vankoughnet, Deputy Superintendent General, DIA, Ottawa, to Edgar Dewdney, Indian Commissioner, DIA, Regina, July 7, 1883, LAC, RG 10, vol. 4469, pp. 667-73 (ICC Exhibit 1a, pp. 754-58).

193 James Macleod, Fort Macleod, to Edgar Dewdney, Indian Commissioner, DIA, Regina, July 31, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 802-3).

If it is found absolutely necessary that the affidavits should be taken, I see no other course but to ask Col. Richardson to accompany me to Treaty 7 and take them. Col. Macleod being one of the Commissioners I presume would not be eligible.

I would suggest however in view of future negotiations [sic] whether it would not be well to amend claim 37 & its sub-sections 1 & 2 so as to give the Chief & Minor Chiefs more power and allow them to express the voice of the Band.

It is most difficult at times to persuade the Indians to make their marks & far more difficult to persuade them to kiss the bible. Crowfoot has never yet made his mark but deposes another to do it for him.<sup>194</sup>

In reply to Dewdney's suggestion that the Chiefs be given greater power to unilaterally surrender reserve land, Deputy Superintendent General Vankoughnet advised Superintendent General Macdonald, that,

however inconvenient the omission to comply with these requirements in the case of the surrender of a portion of the Blackfoot Indian Reserve obtained by the Indian Commissioner and by Stipendiary Magistrate McLeod, he does not, consider that it would be well to give by legislation the powers suggested by the Indian Commissioner of the North West Territories to Chiefs and Headmen of surrendering on behalf of their Bands the lands held in common by the Tribe or Band. Every member of the Band has as much interest in the Reserve so held as the Chief or Chiefs have; and it appears to the undersigned that, if the suggestion to give power to the Chiefs to surrender their lands were acted upon, it might open the door to serious abuses, as all that would be required in order to obtain a surrender of a Reserve or part of a Reserve would be to induce the Chiefs to grant the same, and this would soon result it is feared in the subversion of Indian rights in their lands to their prejudice.

It is in the opinion of the undersigned safer to let the law remain as it is, It has worked well hitherto, and it should not be changed unless after long deliberation it is concluded that it will be in the interests of the Indians to make a change.<sup>195</sup>

On December 18, 1883, Superintendent General Macdonald wrote to Dewdney attaching the "treaties" and requesting that he and Macleod get them verified under the Act. Macdonald stated:

Vankoughnet has sent you back your Blackfeet Treaties in order to get them verified under the Act.

The provision is not a new one as MacLeod supposes.

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194 Edgar Dewdney, Indian Commissioner, DIA, Regina, to SGIA, Ottawa, October 24, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 879–81).

195 L. Vankoughnet, DSGIA, Ottawa, to John A. Macdonald, SGIA, Ottawa, November 20, 1883, LAC, RG 10, vol. 6620, file 104A-1-1, pt. 1 (ICC Exhibit 1a, pp. 928–31).

It is to be found in the Act of 1876. The original treaties of surrender with the Indians are with the Nations & can therefore be dealt with by the Chiefs.

But where a specific Indian Reserve has been established each member of the band has a legal interest in the Reserve, a title in fact of which he cannot be deposed [sic] without his assent.

You had better take MacLeod with you. He can administer the affidavits as Stipendiary Magistrate, though he was a Commr. The assent of the majority present is only required and if they were aware of the terms of the Treaty & did not dissent, it may be held & properly held to be a unanimous decision.<sup>196</sup>

In his annual report of the Department of Indian Affairs to the Governor General in Council, Superintendent General Macdonald referred to the 1883 surrenders and stated: “[S]o soon as some slight informalities in connection with the execution of the surrender have been rectified – which is necessary in order to render the same strictly legal – the documents will be submitted to Your Excellency for confirmation.”<sup>197</sup>

On January 29, 1884, Dewdney arrived on the Blood reserve to obtain a third surrender from Red Crow and his followers. Band members were notified on January 30 and 31 that a meeting would be held on February 1, 1884, “to make a final settlement.”<sup>198</sup> The meeting included “a majority of the male members of the Blood Band of the full age of 21 (twenty-one) years, assembled in council, duly called for the purpose of considering the surrender of the reserve.”<sup>199</sup> Shortly thereafter, both the Sarcee<sup>200</sup> and the Blackfoot<sup>201</sup> signed their surrenders as well. All documents were witnessed by James F. Macleod as a Stipendiary Magistrate and Edgar Dewdney in his position of Indian Commissioner and Lieutenant Governor.

In compliance with the instructions given to him by Macdonald, Dewdney forwarded

the original Articles of Surrender and Treaty made the 20th June 1883 between Her Majesty the Queen, represented by myself and James Farquharson Macleod, C.M.G.

<sup>196</sup> John A. Macdonald, Privy Council, to Edgar Dewdney, December 18, 1883, (ICC Exhibit 1a, pp. 976–77).

<sup>197</sup> John A. Macdonald, Superintendent General, to Marquess of Lansdowne, Governor General in Council, January 1, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December 1883*, liv (ICC Exhibit 1a, p. 1035).

<sup>198</sup> Unidentified author, note to file, undated, H. Dempsey, “An Unwilling Diary” (1959) 7:3 *Alberta Historical Review* 9 (ICC Exhibit 1a, p. 1060).

<sup>199</sup> Surrender No. 203, February 1, 1884, Blood Tribe to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 132–33 (ICC Exhibit 1b, pp. 26–27).

<sup>200</sup> Surrender No. 204, February 4, 1884, Sarcee Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 136–37 (ICC Exhibit 1b, pp. 30–31).

<sup>201</sup> Surrender No. 202, February 7, 1884, Blackfoot Band to the Queen, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 128–29 (ICC Exhibit 1b, pp. 22–23).



as Commissioners of the one part and the Blackfoot Indians by their Head and Minor Chiefs of the other part, also similar Articles of Surrender and treaty between Her Majesty and the Sarcee Indians dated 27th June 1883 as well as the original of those signed by the Blood Indians on 2nd July 1883 and represented in the same manner.

Annexed to each of the foregoing will be found articles duly signed by the Chief representing a majority of the male members of the tribe, over the age of twenty one years confirmatory of the original surrender duly executed in accordance with sub-section one of section 37 of the Indian Act –

Attached to each of the latter are certificates on oath to comply with the requirements of the second sub-sec. of the Act.<sup>202</sup>

The surrenders were submitted to Council on February 26, 1884.<sup>203</sup> The Amendment to Treaty 7 was approved by Order in Council PC 400 on January 24, 1885.<sup>204</sup>

The third error in securing the surrender of the Blood Tribe's interests in the Bow River reserve was noticed in April 1886. Fort Whoop-Up had been erroneously included within the boundaries of the Blood reserve. The amended treaty stated that the northeast quarter of section 3 was "excepted" from the reserve when in actuality it was the northwest quarter section.<sup>205</sup> Assistant Indian Commissioner Hayter Reed wrote to James Macleod, explained the situation, and provided instructions to correct the error. Reed stated that,

in the making of the Treaty with the Blood Indians made on the 3rd of July 1883 & signed by you as one of Her Majesty's Commissioners, a Clerical error appears to have occurred, by which the N.E. of Section three in Township 8 Range 22, West of the 4 principal meridian is reserved from the land set aside for the use of these Indians instead of the N.W. of that section which it was desired to exclude from the Blood Res. on account of the claim which David Evans Akers would have to it. Whoop-up being located thereon.

It is therefore desired to have this mistake rectified and this would have to be done in the presence & with the consent of the Indians by one of the Commissioners who made the treaty with them & the fact that it was so done would have to be sworn to by him & one of the Chiefs before a Stipendiary Magistrate.<sup>206</sup>

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202 Edgar Dewdney, Indian Commissioner, Manitoba and NWT, DIA, Regina, to SGIA, Ottawa, February 9, 1884, LAC, RG 10, vol. 6620, file 104A-1-1, pt.1 (ICC Exhibit 1a, pp. 1122–23).

203 Copy of Submission to Council, LAC, RG 10, vol. 1085, pp. 403–9 (ICC Exhibit 1a, pp. 1146–52).

204 Order in Council PC 400, January 24, 1885, LAC, RG 2(1), vol. 460, January 24, 1885 (ICC Exhibit 1a, pp. 1281–94).

205 Edgar Dewdney, Indian Commissioner, to Superintendent General, April 3, 1886, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, pp. 1481–82).

206 Hayter Reed, Regina, to James Macleod, Fort Macleod, May 10, 1886, LAC, RG 10, vol. 3622, file 4948 (ICC Exhibit 1a, pp. 1490–91).

On September 9, 1886, the necessary changes were made through a sworn statement.<sup>207</sup> The Blood reserve, with the eastern, western, and northern boundaries established in 1882 and the southern boundary surveyed in 1883, was approved by Order in Council PC 1151, dated May 17, 1889. The Order in Council describes the reserve as follows:

It is bounded by a line beginning on the left bank of St. Mary's River, at a point in north latitude forty-nine degrees, twelve minutes and sixteen seconds, thence down the said bank of the said river to its junction with the Belly River, thence up the southern bank of the latter river to a point thereon in latitude forty-nine degrees, twelve minutes and sixteen seconds, thence east along a straight line to the point of beginning; containing an area of five hundred and forty-seven and one half square miles, more or less. Excepting and reserving from out the reserve any portion of the north-west quarter of section three, township eight, range twenty-two, west of the fourth initial meridian that may be within the above mentioned boundaries. The greater portion of the reserve is a high dry undulating plain. Its principal topographical feature is, Belly Butte (Mokowanis) a well known landmark with lofty escarpments of clay, facing Belly River. The principal Indian settlement is on the Belly River at Belly Butte, Turnip Hill (Massir-e-to-mo) is on the northern part of the reserve on the trail from Whoop-Up to Slide Out; Fishing Creek enters the reserve near the south-west corner and empties into the Belly River; and Lee's Creek which enters near the south-east corner, empties into the St. Mary's. There are two large valleys in the reserve, called respectively, Buffalo *coulée* on the western side, which opens into the valley of the Belly River and Prairie Blood or St. Mary's *Coulée* on the eastern which opens into that of the St. Mary's.<sup>208</sup>

It is important to note that the surrenders, or attempts to obtain them from the Blood Tribe, were sought during a time when the boundaries of the Blood reserve were still unknown by the Blood Tribe. It was not until 1888 that Red Crow was shown the boundaries of the reserve. In a letter to the Superintendent General dated November 12, 1888, Surveyor John C. Nelson recounted showing the boundaries to Red Crow:

I found these Indians had no idea of an artificial boundary, such as a line of mounds, their method of defining a tract of land being by means of natural boundaries, such as rivers, lakes and mountains, and they seemed to be unable to understand any other. Red Crow said he would visit the south boundary with us, and after seeing it would know what it was and where it was. Mr. Pocklington

207 Amendment to Treaty 7, Blood Tribe to the Queen, LAC, RG 10, vol. 3622, file 4948, and Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993), 194–95 (ICC Exhibit 1b, pp. 22–28).

208 Order in Council PC 1151, May 17, 1889, in Nelsons' Book, and LAC, RG 2(1), vol. 539, May 17, 1889 (ICC Exhibit 1e, p. 4).

explained that the area of land allotted them, is in excess of what their number called for, according to the stipulations of the original treaty at the Blackfoot Crossing; and some of the land claimed by Red Crow is in the United States.<sup>209</sup>

### SETTLEMENT OF THE BIG CLAIM LANDS

#### **Grazing Leases on the Big Claim Lands**

According to the documentary record, the first non-Blood Tribe occupants of the Big Claim lands acquired the land through grazing leases. In the early 1880s, the dominion government made the settlement of the west a priority and began to develop policies to this end.

One of the purposes of the National Policy of Sir John A. Macdonald's Conservative government was to exercise Canadian governmental authority over the largely uninhabited territories of the Northwest. An important aspect of that policy involved the encouragement of large, well-capitalized companies or syndicates to acquire vast tracts of land considered too dry for ordinary agriculture, to carry on the business of ranching. To carry out the policy, the Dominion Government approved new grazing regulations in May 1881 which allowed non-residents to acquire up to 100,000 acres of land at a nominal rent for up to twenty-one years, and a number of large ranching companies were organised by eastern Canadian investors to take advantage of the new scheme.<sup>210</sup>

Blood Tribe oral history includes few references to leases. Elder Pete Standing Alone stated:

I don't really hear anything off the Blood Reserve. I heard they were, the lands south of Cardston were leased out to ranchers.

...

They leased the whole Reserve, anything that is not fenced.<sup>211</sup>

An Order in Council issued in April 1882 granted a total of 46 leases in the North-West Territories, a number of which were in the immediate vicinity of the Blood reserve and the Big Claim lands.<sup>212</sup> The documentary record indicates there were four major leases of Big Claim land that are at issue here; details are provided in the following sections.

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209 John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775). This event will be covered more thoroughly in the next section of this history.

210 Teresa Homik, "Kainaiwa Big Claim Confirmation Report," February 11, 1998 (ICC Exhibit 3a, p. 16). All of this information is based on Order in Council PC 803(a), May 20, 1881, as amended by Order in Council PC 1710(a), December 23, 1881. These Orders in Council are not part of the record for this inquiry.

211 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 299, 240, Pete Standing Alone).

212 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

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**Leases between the Belly and Kootenay (Waterton) Rivers**

***Fred Wachter Lease***

Although little is known about this lease (no. 33), it appears that it was granted to G.F. Wachter in 1880.<sup>213</sup> In a letter dated October 15, 1880, Indian Agent MacLeod reported that the Wachter Ranch was located at the confluence of the Kootenay and Belly Rivers.<sup>214</sup> Order in Council 722, issued on April 11, 1882, described the location more accurately as “[t]hat portion north-west of Belly River of Township number six, Range twenty-five, west of the fourth meridian,” totalling 7,000 acres.<sup>215</sup>

***Cochrane Ranch Lease***

The Cochrane Ranch lease was located between the Belly and Kootenay Rivers, adjacent to the Wachter Ranch.<sup>216</sup> Cochrane acquired this land through two leases, which were transferred to him by the Eastern Townships Ranch Company (lease no. 34)<sup>217</sup> and the Rocky Mountain Cattle Company (lease no. 25).<sup>218</sup>

The Eastern Townships Ranch Company held a lease for

[t]hose portions between the Belly and Kootenai Rivers of Townships Five and six in Range Twenty-six and Township Five in Range Twenty-seven all West of the Fourth Meridian in the North-West Territories, containing Thirty-three thousand acres more or less.<sup>219</sup>

The Rocky Mountain Cattle Company leased 73,500 acres of:

The land between the Belly River and the Kootanie [sic] River, and its north fork and between the northern limit of Township number four, and the northern limit of Township number one, and extending westwardly to the western limit of Range twenty-nine.<sup>220</sup>

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213 Pamela Keating, Research Manager, Specific Claims Branch, Policy and Research Directorate, DIAND, Ottawa, to Lesia S. Ostertag, Barrister, Phillipow and Company, Saskatoon, Sask., October 27, 1997 (ICC Exhibit 1a, p. 2516). The 1880 Order in Council referred to in this document is not part of the record for this inquiry.

214 N.T. MacLeod, Indian Agent, Blood Reserve, to Edgar Dewdney, Indian Commissioner, DIA, Regina, NWT, October 15, 1880 (ICC Exhibit 1a, p. 171).

215 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 379).

216 “Leases Adjoining the Blood Reserve,” author unknown, undated (ICC Exhibit 7n).

217 Order in Council PC 834, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 683).

218 Order in Council PC 835, April 17, 1883, LAC, RG 2 (ICC Exhibit 1a, p. 684).

219 Indenture, Deputy Minister of Interior and Eastern Townships Ranch Co., March 20, 1883 (ICC Exhibit 1a, pp. 611–14).

220 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 378).

The Cochrane Ranch also leased 100,000 acres of land (lease no. 42) south of the first lease and west of the York lease (see below). The description is as follows:

The part north of Elbow River of Township twenty-four, and Township twenty-five in Range three; Townships twenty-five and twenty-six, in Range four, and the east halves of Townships twenty-five and twenty-six in Range 5, all west of the 5th meridian.<sup>221</sup>

In August 1891, it was proposed through a Submission to Council that the Cochrane Ranch lease be exchanged for an equal area of other lands, the lease of which would allow homesteading entry.<sup>222</sup> In September 1891, an Order in Council approved the relocation of the ranch from between the Kootenay and Belly Rivers, to land south of the Blood Tribe reserve within the Big Claim lands area.<sup>223</sup> It should be noted that, aside from the name, there is no obvious connection between the Cochrane Ranch Co. and the “squatter” named Cochrane who was paid to surrender his homestead at Standoff when the Blood Tribe Reserve was established thereon.<sup>224</sup>

### **Leases on Southern Big Claim Lands**

#### ***Parks / North West Land and Grazing Company Lease***

On December 30, 1882, John H. Parks leased 66,000 acres (lease no. 30) comprising all of the land south of the reserve to the international boundary,<sup>225</sup> more particularly described as follows:

Township one, and part [east] of Lee’s creek of Township two, in Range twenty-six. That part West of the St. Mary’s River of the Northern one-third of Township one, also all West of said River of Township two, in Range twenty-five, and the portion West of said River of Township two Range twenty-four, and the East-half of Township one in Range twenty-seven, all West of the Fourth Principal Meridian.<sup>226</sup>

In April 1883, Parks transferred the lease to the North West Land and Grazing Company, of which he was president.<sup>227</sup> In June 1883, the North West

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221 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, p. 380).

222 Edgar Dewdney, Minister, Department of Interior, Ottawa, to Governor General in Council, Privy Council Office, Ottawa, August 26, 1891 (ICC Exhibit 1a, pp. 2046–48).

223 Order in Council PC 2149, September 12, 1891, LAC, RG 2 (ICC Exhibit 1a, pp. 2049–50, 2052).

224 L. Vankoughnet, Deputy Superintendent General, DIA, Ottawa, to unidentified recipient, April 2, 1855, LAC, RG 10, vol. 3637, file 7134; Deputy Superintendent General’s letterbook, LAC, RG 10, vol. 1087, pp. 550–54 (ICC Exhibit 1a, pp. 1320–24).

225 “Leases Adjoining the Blood Reserve” (ICC Exhibit 7n).

226 Indenture, Deputy Minister of Interior and John H. Parks, December 30, 1883 (ICC Exhibit 1a, pp. 611–14); Schedule, December 30, 1883 (ICC Exhibit 1a, p. 618).

Land and Grazing Company was notified that its lease conflicted with the southern boundary of the Blood Tribe Reserve. The Department of the Interior's position was based on the 1882 southern reserve boundary, since the 1883 survey was not undertaken until July of that year.<sup>228</sup> It was proposed that the description of the lease be amended as follows:

Township one, and part East of Lee's Creek of the South half of Township 2 in Range 26. That part west of and adjacent to the St. Mary's river, of the Northern one-third of Township one, also all West of and adjacent to said river, of the South half of Township 2, in Range 25, The East half of Township one, and that part East of and adjacent to Lee's Creek of the South half of Township 2 in Range 27, containing an area of 62,000 acres more or less, all West of the 4th Meridian in the North West Territories.<sup>229</sup>

In September, 1883, Parks replied (through his secretary):

Having Received a Report from the Manager who went out for the purpose of commencing operations, he finds that the portion sought to be deducted is by far the most valuable part of the range, having the most eligible site for the home farm and corral, and – what is an important matter when there is danger of raids by American Indians across the border – it is the portion furthest from the American boundary.

The Manager also writes that the Indian Commissioner informs him that the Reserve is not actually located yet, and Mr. Parks wishes me to ask if it will not be possible to retain the lease as it now is, and have the Southern boundary of the Reserve on the Northern line of the Second Township. He would respectfully submit that he made this selection, when nearly the whole of the grazing lands were open to him to choose from, and if, at that time, this piece, consisting of nearly half of one township and portions of two others, probably 20,000 acres in all, had not been included, he says that he would likely not have taken the tract at all, and he certainly would not have done so with the information since obtained from the Manager, but would have selected a ranche in some other locality, nearly the whole, as before stated, being at that time open.

Under the circumstances he feels that he is only asking what is reasonable and just in urging that the lease may be allowed to stand as now executed.<sup>230</sup>

227 John H. Parks, Saint John, NB, to Sir John A. Macdonald, Minister of the Interior, Ottawa, April 12, 1883, LAC, RG 10, vol. 1233, file 241713 (ICC Exhibit 1a, p. 636).

228 A. Russell, Department of Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

229 A. Russell, Department of Interior, to W. Pugsley, Secretary, North West Land & Grazing Co. (Ltd), Saint John, NB, June 22, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit 1a, pp. 740–41).

230 W. Pugsley, Jr, Secretary, Office of the North West Land and Grazing Company (Ltd), Saint John, NB, to John A. Macdonald, Minister of the Interior, September 5, 1883, LAC, RG 15, vol. 1233, file 241713 (ICC Exhibit, 1a, pp. 824–26).

On February 25, 1885, the Department of the Interior informed the North West Land and Grazing Company that the boundary confusion was considered settled, stating as follows:

I am directed to say, that a few days ago, a plan was received in this Department from the Department of Indian Affairs, showing the boundaries of the Blood Indian Reserve, by which I see that the reserve as it is now established, does not interfere with the grazing lands leased by this Department to Mr. John H. Parks.

I am to say that on receipt at this office of an assignment of the lands question in duplicate from Mr. Parks to the North West Land and Grazing Company, together with the registration fee of \$2.00 and ground rent of the lands described in the lease, amounting to \$1405.80 / 100, the Minister of the Interior will recommend to Council that the assignment be registered in this Department.<sup>231</sup>

The lease to John H. Parks and the North West Land and Grazing Company was subsequently cancelled by Order in Council PC 1837, dated July 18, 1890, due to failure to “comply with the provisions” contained therein.<sup>232</sup>

#### ***York Grazing Company Lease***

On April 11, 1882, York Grazing Company was granted a lease consisting of 77,000 acres on land on the southwest side of the southern Big Claim lands to the Belly River (lease no. 13). The description is as follows:

That part west of Lee’s Creek of Township two in Range twenty-six, Township two in Range twenty-seven; that part east of Belly River of Township two in Range twenty-eight; the west half of Township one, Range twenty-seven, and Township one, Range twenty-eight, all west of the fourth meridian.<sup>233</sup>

The York lease was also affected by the confusion concerning the Blood reserve’s southern boundary. Order in Council PC 147 of February 6, 1886, was issued to rectify the situation. It reads:

The Minister further submits, that under date 8th January, 1886, an Order in Council was passed, cancelling the Order above recited, for the failure on the part of the Company to comply with the conditions imposed by the several Regulations and Orders in Council, governing the disposal of grazing lands.

The Company now state that this failure, on their part, to comply with the said Regulations arose from the fact, that subsequent to the passing of the Order in

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231 P.B. Douglas, Assistant Secretary, Department of the Interior, Ottawa, to W. Pugsley, Secretary, North-West Land and Grazing Co., Saint John, NB, February 25, 1885, LAC, RG 15, vol. 1223, file 241713 (ICC Exhibit 1a, pp. 1304–6).

232 Order in Council PC 1837, July 18, 1890, LAC, RG 2 (ICC Exhibit 1a, pp. 1987–88).

233 Order in Council PC 722, April 11, 1882, LAC, RG 2 (ICC Exhibit 1a, pp. 376–84).

Council of the 11th April, 1882, before mentioned, an alteration was made in the Southern boundary of the Blood Indian Reserve, by which a portion of the tract accorded to the Company was included in the reserve, reducing the area of their ranche from Seventy-seven thousand acres, to Forty-nine thousand three hundred acres, and that owing to this reduction of area, they were prevented from making the financial arrangements necessary to enable them to comply with the Regulations in question.

The Minister represents that the statement made by the Company's Agent concerning the Southern boundary of the Blood Indian Reserve is correct, and that now the Southern boundary of the Blood Indian Reserve has been moved so far to the North as not to cover any part of the tract formerly promised to the Company, he, the Minister, recommends upon the request of the Company through their Agent, that the original area of Seventy-seven thousand acres be granted to them, and that he be authorized, under the Regulations and Orders in Council in that behalf now in force, to issue a lease for grazing purposes to the "York Grazing Company," for the tract of land hereinbefore described, upon payment being made of the rental for the same for the half-year commencing on the 1st March, 1886 ...<sup>234</sup>

This lease was eventually cancelled, by Order in Council, on December 22, 1888, due to the failure of York to comply with lease stipulations.<sup>235</sup>

### **Mormon Colony and the Blood Reserve Boundary Dispute**

In the spring of 1887, a Mormon colony was established at Lee's Creek or the Place of Thirty Trees.<sup>236</sup> The colony was located within the 1882 southern boundary of the Blood reserve (nine miles from the U.S. border) but outside of the 1883 southern boundary (14 miles from the U.S. border). Lee's Creek is also situated north of the Parks lease. The colonists met on June 19, 1887, and decided to move the colony's townsite:

[I]t was thought best to locate the town on the bench on the south side of Lee's Creek, provided water could easily be obtained, if not, to build on the creek ... but owing to quicksands the wells, which the settlers attempted to dig, caved in; hence that location was given up as a townsite and in July (following) the present Cardston townsite was selected and surveyed."<sup>237</sup>

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234 Order in Council PC 147, February 6, 1886, LAC, RG 2 (ICC Exhibit 1a, pp. 1460–66).

235 Order in Council PC 2718, December 22, 1888, LAC, RG 2 (ICC Exhibit 1a, pp. 1800–1).

236 "Kainaiwa Big Claim Historical Report," prepared by Joan Holmes and Associates Inc. (September 1994), p. 58 (ICC Exhibit 2a, p. 58); ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 352, Louise Crop Eared Wolf).

237 Mormon Archives, Salt Lake City, Excerpts of the Manuscript History of the Alberta Stake and the Historical Minutes of the Cardston Ward, 1886–1894 (ICC Exhibit 1a, p. 1629).

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The historical documents indicate that the establishment of the Mormon Colony at Lee's Creek prompted Red Crow to complain about and inquire into the southern boundary. The presence of the Mormon Colony was noted by the Blood Tribe and Indian Agent Pocklington. Pocklington wrote to Dewdney asking to be provided with the exact location of the southern boundary of the Blood reserve, about which he was apparently uncertain despite his position of authority on the reserve at that time. On September 13, 1887, J.S. Dennis, Inspector of Surveys, wrote to the Surveyor General stating that he had almost completed the subdivision of township 3, range 25, west of the 4th meridian on behalf of the Mormons.<sup>238</sup> On September 26, 1887, Pocklington acknowledged that he had received a map with the information he requested from Dewdney.<sup>239</sup>

On December 2, 1887, John C. Nelson, the surveyor who had surveyed the Blood reserve in 1882 and 1883, wrote to Assistant Indian Commissioner Hayter Reed in reply to a letter of November 22, 1887, in which Reed had requested a report “on the claim of Chief Red Crow (Mekasto) to the country situated to the west of the present recognized boundary of his reserve and between it & the Rocky Mountains.”<sup>240</sup> Surveyor Nelson responded that the Blood Tribe “have no claim to the country above mentioned, vide amended Treaty of July 2nd, 1883.”<sup>241</sup> In a marginal notation on this letter an unidentified person wrote “should be south probably.”<sup>242</sup> Nelson went on to state:

I may add that a large number of colonists came into the country last spring, from Salt Lake Utah, U.S.A., & formed a settlement along the south boundary of the Blood Reserve near It's south east corner, & this influx of American may possibly have alarmed Red Crow & caused him to lay claim to the country lying west of the reserve.<sup>243</sup>

Another marginal notation appears on the document questioning, “South?”<sup>244</sup> This letter demonstrates the confusion that still prevailed in 1888.

238 J.S. Dennis, Inspector of Surveys, Calgary, to Surveyor General, Department of the Interior, September 13, 1887, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1644).

239 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, September 26, 1887, LAC, RG 10, vol. 1555, p. 739 (ICC Exhibit 1a, p. 1649).

240 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

241 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1650–52).

242 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

243 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1650).

The Mormons had settled adjacent to the south boundary of the reserve, yet Nelson refers to Red Crow's complaints about the western boundary of the reserve, which was still in question. Nelson continued his report by stating:

The Department of the Interior has, last summer, subdivided the land adjacent to the south boundary of the reserve with a view apparently of permitting the colonists from Utah to take up homesteads.

It is almost unnecessary to add, in conclusion, that the boundaries of the Blood Reserve have been established in strict conformity with the description in the amended Treaty already referred to that I was present when that Treaty was made, & that the Indians were satisfied as they had every reason to be with the Reserve between the Belly & St. Mary's Rivers, given to them in exchange for their interest in the four mile belt along the Bow and South Saskatchewan Rivers assigned to them in the Treaty of 1887 [sic].<sup>245</sup>

Indian Agent Pocklington, in communication with Dewdney, confirmed that the Department of Indian Affairs was aware that Red Crow continued to claim the western lands all the way to the mountains and suggested a method of resolving Red Crow's claims to the government's satisfaction. He stated:

Red Crow has always claimed the whole of the lands lying between the Belly & St. Mary's Rivers from their junction at old Fort Kipp clear back to the mountains.

I have on more than one occasion informed "Red Crow" that that was more land than his people were entitled to.

I would suggest that as it is more than probable a good many of the posts have been knocked down and mounds destroyed by cattle, that Mr. Nelson should come here during the year, and run the line again replacing posts & mounds, when I would take "Red Crow" with me and accompany the party over the limit.<sup>246</sup>

On January 30, 1888, a meeting was held between the Chiefs of the Blood Tribe, the Peigans, Indian Agent Pocklington, Indian Department representative Springett, Superintendent P.R. Neale of the North-West Mounted Police detachment at Fort Macleod, and two interpreters. A transcript of this meeting describes the Blood Tribe view of the signing of treaty at Blackfoot Crossing and the subsequent survey of the Blood reserve:

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244 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, p. 1651).

245 John C. Nelson, Indian Office, Regina, NWT, to Hayter Reed, Assistant Indian Commissioner, Manitoba and NWT, December 2, 1887, LAC, RG 10, vol. 3793, file 45995 (ICC Exhibit 1a, pp. 1651–52).

246 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, January 31, 1888, LAC, RG 10, vol. 1556 (ICC Exhibit 1a, pp. 1656–57).

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Red Crow (Chief of Bloods) asked that the Hon. J.F. Macleod be present. That gentleman being asked to attend replied that he was unable to do so as he was busy, White Calf (Blood) said he thought it was strange that Judge Macleod could always attend to the Whites and would not come to hear the Indians. Red Crow, after expressing his annoyances at Judge Macleod's refusal to come said:

[Red Crow:] Everyone knows what was said to us at the Blackfoot Crossing when the Treaty was made. We were satisfied. We did not at first want to make treaty. White men spoke and told us to say where we wanted Reserve. God made the mountains for us and put the timber there and we said at that time that we wanted the country where the mountains and the timber were. The Government said they would be good to us. We took what the Government offered us. At one time we owned all the country and kept other Indians out. Since the treaty they are all together again. We are all friends and God has taken all the game away. Judge Macleod runs this part of the country. Why does he not come here and hear us talk? If a white man is shot by Indians by accident the Indian gets into trouble. When we were here to talk about my horses and the killing of six Bloods he said if the horses came back we would not do any wrong. We have not done wrong but now the whites are trying to do us wrong. Have the Indians done anything to the whites?

Mr. Pocklington: Not that I am aware of.

White Calf to Mr. Pocklington: You are treating our little children badly. The whites are cutting the reserve off, and we know nothing of it. We claim between the two rivers (Belly & St. Marys) up to the mountains. Now where we get the timber is on the white man's ground.<sup>247</sup>

Mr. Pocklington: Who interpreted when you were told where the boundaries of your Reserve were to be placed?

Red Crow: Dave Mills.

Mr. Pocklington to Mills: Did you explain for Mr. Nelson where the line was to run?

Red Crow and Mills: (Mills asks Red Crow) Red Crow says: I never told him where to mark out the reserve.<sup>248</sup>

In his account of the meeting, Indian Agent Pocklington stated:

As regards the Reserve "Red Crow" said he claimed the whole of the country between the St. Mary's & Belly rivers from Fort Kipp to the mountains. He spoke of the good behaviour of the Blood generally, that they had never shed any blood in

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<sup>247</sup> It is uncertain who is identifying the names of these two rivers – either the Constable or White Calf.

<sup>248</sup> P.R. Neale, Superintendent (Commanding Macleod District), North-West Mounted Police, Fort Macleod, February 2, 1888, LAC, RG 18, vol. 19 (ICC Exhibit 1a, pp. 1658–59).

their country and could not understand why the Police should shove the Indians. As regards his Reserve, he wished to know why, when the survey was being made he was not asked to go and see it as he would not have accepted any Reserve that did not run back to the mountains. He spoke a long time about the rations and said they were not getting as much as usual or so much as they required, the rations were too poor altogether and more of the kind. "North Axe" spoke of the same thing, though his talk was chiefly about the Indian being shot by [illegible] but of course he had to talk about rations very freely as also did the other Piegan Chiefs.

I informed the Indians that the "River bank Mormons" would surely be compensated that you had already started the matter and read your telegram to them on the subject, also that the shoving was a mistake. I endeavoured to explain to "Red Crow" that when the Treaty was made with the Indians they were to receive so many acres of land for every family of five and that when the survey was made the amount of land given them was in accordance with the Treaty however he did not seem satisfied and still said he claimed back to the mountains. I think it was a great pity that when the survey was made "Red Crow" had not been there.<sup>249</sup>

In August 1888, Indian Agent Pocklington and Surveyor Nelson accompanied Red Crow and others to the southeast corner of the reserve, where an iron post was placed in a mound, and the line of the reserve explained. Pocklington later reported to the Indian Commissioner:

Red Crow said that when the amended treaty was made in 1883, he claimed all the land between the two rivers back to the mountains. I explained to him that there was far more land in the area he claimed than they were entitled to under treaty. I have explained to him that, as a matter of fact, the present Reserve contained far more land than they were entitled to be. He and the two minor chiefs expressed themselves as well satisfied and pleased that we were going to take them over the boundary line.

We found the mounds and posts in a good state of preservation at mile intervals, and in every instance the mounds were renewed arriving at the S or corner another post was placed in the centre of the mound. "Red Crow" said he now knew where his Reserve ran and was satisfied.<sup>250</sup>

In his account of the summer meeting with Red Crow, Surveyor Nelson stated that Red Crow had a "notion that he owned the territory lying between the Belly and St Mary Rivers, from their confluence to the mountains."<sup>251</sup> Nelson recounted:

249 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, Regina, February 4, 1888, LAC, RG 10, vol. 1556, pp. 259–64 (ICC Exhibit 1a, pp. 1671–73).

250 William Pocklington, Indian Agent, Blood Agency, to Indian Commissioner, August 30, 1888, LAC, RG 10, vol. 3791, file 45995 (ICC Exhibit 1a, pp. 1730–31).

251 John C. Nelson, In Charge, Indian Reserve Surveys, to Superintendent General, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, p. 1775).

[I]t was decided that we should go over the boundaries of the reserve with Red Crow and the more influential of the minor chiefs, and point out to them the limits of their land, as Red Crow had been promised at the treaty, that I would show him the boundaries of his reserve when laying it out, but owing to his absence in the United States to recover stolen horses, at the time of survey, this had not been done ...

... He [Red Crow] said that Jerry Potts, who acted as interpreter, did not translate correctly; but here I was able to correct him, for I was present at the treaty, and heard Potts tell him that the south boundary of the reserve would run from Lee's Creek to Fish Creek. Besides I knew Potts was thoroughly acquainted with the topography of the country and was competent to describe the boundaries in a manner the Indians could not well misunderstand. I also knew, and told Red Crow, that Potts had, subsequent to the survey shown the line to Chief "One Spot" ...

... On the 25th we completed the renewal of the mounds and placed an iron post at the south-west corner on Belly River. The Indians carefully located the position of every post. Red Crow was now asked if he was satisfied, and he answered in the affirmative.<sup>252</sup>

Nelson reported that the Blood Tribe expressed discontent with the unauthorized cutting of reserve timber by the Mormons at Lee's Creek, but considered the matter settled. Nelson reported:

When passing the Mormon colony White Calf had drawn my attention to some poplar saplings which had been cut and taken off the reserve, apparently by the settlers. I counted the stumps, and sent for Mr. Card, the head man of the community, who, upon being told what had been done, apologized to the Indians for one of his people having unwittingly committed a trespass, and promptly settled the claim. Whereupon the Indian chiefs expressed their good will towards their white neighbours at Lee's Creek. Some benefit may result from the settlement of these people in the neighbourhood of the reserve. They have been very successful this season in their farming operations, and informed me that their number would be greatly increased by further immigration.<sup>253</sup>

Within the same report, Nelson further commented that "I found these Indians had no idea of an artificial boundary, such as a line of mounds, their method of defining a tract of land being by means of natural boundaries, such as rivers, lakes and mountains, and they seem to be unable to understand any other."<sup>254</sup>

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252 John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772-78).

253 John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772-78).

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With the controversy over the southern boundary considered remedied, the government issued an Order in Council dated December 17, 1888, allowing the Mormons to purchase the land upon which they had settled<sup>255</sup> and additional lands for homesteading purposes.<sup>256</sup> Blood Tribe oral history is inconclusive regarding the arrival and settlement of the Mormons in present-day Cardston. There is awareness among the Elders of the rumoured existence of a 99-year lease, which covered the Mormon's land at Cardston, but no concrete evidence has been found.

At the community session, Elder Frank Weasel Head stated that “... it was always a common knowledge that there was a 99-year lease.”<sup>257</sup> In contrast, Elder Pete Standing Alone stated: “Yeah, I’ve heard of the 99-year lease. I heard that they had this interpreter from Montana that wrote up the agreement. And later years, that guy said that the Mormons, Red Crow did not know it was a 99-year lease. And nobody has seen that document.”<sup>258</sup> Elder Mary Louise Oka told the following story of the arrival and settlement of the Mormons in the area, a story that is not refuted by any other story. She stated:

Many Wives, which are the Mormons, came from the south to this area. They were tired. They used the cows, and that’s how they travelled. There were more children than there were men. There were more women than there were men. They asked to see the leader. They met with Red Crow. They asked if they could rest there until summer. They promised to move and they never did. They are still there.

Later on, people from the government came to meet with Red Crow, and they asked if the Mormons would be able to temporarily stay there, to lease the area for 99 years. Red Crow only knew that they asked to stay temporarily. He did not know what a 99-year lease was.

...

I never heard of Red Crow signing a piece of paper or signing a 99-year lease. All I heard was that later on there was a document with Red Crow’s mark on it, the X that indicated his mark was very neat.

Today when we have Elders that sign a document or put their mark to a document and they are unable to write, they mark the paper so hard, they use the pen so hard trying to put their X on it, that they just about tear the paper, and their mark or their X is very crooked. It’s not neat or even.<sup>259</sup>

254 John C. Nelson, In Charge, Indian Reserve Surveys, DIA, Regina, to SGIA, November 12, 1888, LAC, RG 15, vol. 544, file 15737 (ICC Exhibit 1a, pp. 1772–78).

255 Section 9, township 3, range 25, W4M. The Mormons also purchased land on the west side of the Belly River: see E.J. Wood, Latter Day Saints, Cardston, to J.D. McLean, Assistant Deputy and Secretary, DIA, Ottawa, February 15, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2260). They also purchased land in the southwest corner of the reserve: see Indian Agent, Blood Agency, Cardston, to Secretary, DIA, Ottawa, February 20, 1926, LAC, RG 10, vol. 7765, file 27103-1 (ICC Exhibit 1a, p. 2261).

256 Order in Council PC 2547, December 17, 1888, LAC, RG 2(1) (ICC Exhibit 1a, pp. 1796–98).

257 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 478, Frank Weasel Head).

258 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 422, Pete Standing Alone).

259 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 186–87, 189, Mary Louise Oka).

Elder Pete Standing Alone also tells a similar story of the 99-year lease.

What I heard was that they journeyed from Salt Lake, Utah. And by the time they got to where they are today, they – it was getting late, towards winter, in the fall, and they were in bad shape. And I guess they wanted to talk to the leader which is Red Crow, and they did.

And what I heard, you know, after, that they were headed for the Peace River country. That's where they were going to. But they couldn't go any further that year because they were exhausted, the animals and themselves. So they asked Red Crow to spend the winter there, and Red Crow agreed. And the 99-year lease, that's where it came about. And Red Crow did not know it was a 99-year lease. He thought it was just for that one winter and they'll be on their way to Peace River country.

And I also heard that this guy from Montana was the witness of that transaction. And at his death bed, he confessed that he did crooked work for the Mormons as interpreter or whatever. That's what I heard.<sup>260</sup>

Mormon history tells a different story about the establishment of Cardston.

In the summer of 1886, when anti-Mormon persecutions were at their height in the United States, John Taylor, president of the Church of Jesus Christ of Latter-day Saints and former resident of Upper Canada, advised Charles O. Card, president of Cache Valley Stake in northern Utah and southern Idaho, to venture north of the 49th parallel and locate a suitable place for Latter-day Saint families to settle. Leaving with three companions in September 1886, Card explored the country south of Calgary to the international boundary, paying special attention to the region north of Lee Creek, a tributary of the St. Mary River, 14 miles north of the United States boundary. Satisfied that they had found a suitable location for settlement, they dedicated the land and returned to Utah where they reported to President Taylor. He instructed them to select forty families and lead them there the next Spring.<sup>261</sup>

Apparently Cardston was not the site at which Card preferred to settle, however: “Between the Kootenai (Waterton) and Belly rivers near present-day Stand Off they found the country for which they were searching. ... This area was also in the heart of Indian country, and thus an advantageous place for a mission”<sup>262</sup>

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260 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, pp. 303–4, Pete Standing Alone).

261 Leonard J. Arrington, “Historical Roots of the Mormon Settlement in Southern Alberta,” in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 3 (ICC Exhibit 9s, p. 6).

262 Brighton Y. Card, “Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories,” in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 86 (ICC Exhibit 9s, p. 53). This area is the “confluence” or the land between the Kootenai and Belly Rivers and is also included in the Big Claim lands.

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According to Mormon history, the Mormon colonists

arrived at Stand Off on April 16, during a severe storm. Upon finding that the land that they favored for settlement was under lease or owned by ranchers and unavailable, Card wrote from Fort Macleod to Taylor, suggesting that the church supply funds to purchase land near the Blood Indian Reserve ...<sup>263</sup>

Shortly thereafter, Card learned of an expired lease adjacent to the Blood reserve upon which he decided the colony should settle.<sup>264</sup> The first Mormon colonists arrived in present-day Cardston on May 1, 1887.<sup>265</sup>

The Mormon colonists who settled in Cardston diversified their method of settlement. Canada apparently did not seem as open as they had thought.

The assumption that Mormons in Alberta followed the pattern established in Utah, where unclaimed lands could be freely distributed among settlers, is flawed, however. When the first Mormons in Cardston settled on a half section registered in the name of Charles Ora Card, it was made clear that title to the surrounding land could not be purchased by the group cooperatively, and that the Saints, like other immigrants, would be required to abide by homesteading regulations or purchase land at going rates. ...

What actually occurred in Mormon settlement was a combination of homesteading and hamlet dwelling, of land obtained by pre-emption and homestead claim.<sup>266</sup>

Responding to reports that the Mormons were practising polygamy, Canada initially expressed apprehension about their intentions.<sup>267</sup> Impressed with the Mormons' progress, eventually Canada cooperated in the emigration and settlement of the colonists, going as far as appointing Charles Ora Card Sub-Agent of Dominion Lands for the Lethbridge District in 1898.<sup>268</sup> Card's

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- 263 Brighton Y. Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).
- 264 Brighton Y. Card, "Charles Ora Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).
- 265 Brighton Y. Card, "Charles Ora. Card and the Founding of the Mormon Settlements in Southwestern Alberta, North-West Territories," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 88 (ICC Exhibit 9s, p. 55).
- 266 Maureen Ursenbach Beecher, "Mormon Women in Southern Alberta: The Pioneer Years," in Brighton Y. Card et al., eds., *The Mormon Presence in Canada* (Edmonton: University of Alberta Press, 1990), 216 (ICC Exhibit 9s, p. 80).
- 267 A.M. Burgess, Deputy Minister, Department of the Interior, Ottawa, to Charles O. Card, Lee's Creek, January 24, 1888, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1938).
- 268 Wm. Pearce, Superintendent, Office of the Superintendent of Mines, Calgary, to Secretary, Department of the Interior, Ottawa, October 17, 1888, LAC, RG 15, vol. 544, file 157337 (ICC Exhibit 1a, p. 1753).
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responsibilities were explained to him in a letter from the Assistant Secretary of the Department of the Interior.

It will be your duty to accept any application for a homestead entry which may be made to you accompanied by a fee of \$10.00, excepting in the case of cancelled lands as hereinafter provided, and to give an Interim Receipt therefor on one of the forms which will be supplied to you for that purpose, taking care to insert after the description of the land the following words: "Provided such land is open for entry". ...

...

You are also authorized to accept applications of any kind relating to Dominion Lands, such, for instance, as applications to cancel existing entries, etc.,

You are also empowered to take applications for patents for Dominion Lands and the necessary affidavits in connection therewith.<sup>269</sup>

There is no 99-year lease in the documentary record nor any record of the Mormons approaching the Blood Tribe about acquiring land from it other than to build a mission on the reserve in 1923.<sup>270</sup> It is also clear that the Mormon colonists spread out into settlements, with Cardston becoming the core settlement. An explanation of this settlement is twofold. First, the settlement of many Mormons who chose to immigrate to Cardston was facilitated by Card's concurrent positions as Sub-Agent of Dominion Lands and Stake president of the settlement. Second, the Mormons had influential friends, which gave them access to lucrative leases. An article entitled "The Mormons Come to Canada" comments on the relationship between the Mormons, the Northwest Coal and Navigation Company, and the Galt family:

A partnership which was portentous for the future of Mormon Colonization in Alberta developed between the church and the Northwest Coal and Navigation Company, the most important corporate enterprise in the Territories. The company's land agent, Charles A. Magrath, who was a friend of the colonists and had formerly been a Dominion land surveyor, negotiated the sale of approximately 20,000 acres to the Mormons. Included in the acreage was some fine grazing land, and the General authorities notified Card that they were sending five hundred head of cattle from the Church herd to be pastured there.

In October, 1889, the First Presidency ... spent several weeks in Alberta. They inspected the land which had recently been purchased from the Northwest Coal and Navigation Company, and they were taken to view additional properties that might be acquired. In Lethbridge they conferred with Elliot T. Galt, son of Sir

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269 Assistant Secretary, Department of the Interior, Ottawa, to C.O. Card, Cardston, January 12, 1898, LAC, RG 15, vol. 743, file 455748 (ICC Exhibit 1a, pp. 2161–63).

270 J.T. Faut, Indian Agent, Blood Agency, Fort Macleod, to D.C. Scott, DSGIA, Ottawa, February 28, 1923, LAC, RG 10, vol. 8287, file 773 / 7-3-2 L.D.S. (ICC Exhibit 1a, p. 2248).

Alexander T. Galt and manager of the Northwest Coal and Navigation Company. Here undoubtedly were forged the bonds of understanding that eventually led to the construction of the great St. Mary's River irrigation canal and to the founding of Mormon towns as Stirling, Magrath, and Raymond.<sup>271</sup>

Historically, there has been tension in the relationship between the Mormons and the Blood Tribe. Many Blood Tribe Elders have commented on the 1980 blockade in Cardston. Elder Rosie Red Crow stated the blockade took place

when we were really pursuing the Big Claim, especially the area where the Mormons have now settled in Cardston. My sister, Mary Louise Oka, and I were present. We were in a tepee, and we were also in there with Many Grey Horses. We were praying.

...

I was late arriving at the scene the next morning. Dan Chief Moon, an extremely old man at the time, was being dragged by the hair by the time I had arrived. John Chief Moon was being dragged as well. Esther Tail Feathers was being pulled in either direction, and she was sent to jail. Binky Blood was also sent to jail as well. There was no recourse for us. We could not appeal to anyone.

...

They were ready to shoot our people. They were on top of the service station that was in close proximity. They were very ready to shoot.<sup>272</sup>

### **Waterton Lakes National Park<sup>273</sup>**

On May 30, 1895, Waterton Lakes National Park was created in the southwestern portion of the Big Claim lands, contiguous to the border of British Columbia and the international boundary.<sup>274</sup> The establishment of this park became controversial for the Blood Tribe members when they realized they no longer had access to this sacred area and to Chief Mountain, which was located across the international boundary.

Waterton Lakes National Park was made part of the Waterton Glacier International Peace Park on May 26, 1932.<sup>275</sup> In the 1930s, park officials

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271 Lawrence B. Lee, "The Mormons Come to Canada, 1887-1902" (1968) 59:1 *Pacific Northwest Quarterly* 18-19 (ICC Exhibit 9q, pp. 9-10).

272 ICC Transcript, June 22-25, 2004 (ICC Exhibit 5a, pp. 168-69, Rosie Red Crow).

273 For a more complete history of the establishment of Waterton Lakes National Park, see excerpts from C.A. MacInnes, *In the Shadow of the Rockies* (London: Rivingtons, 1930), 136-37, 150-55 (ICC Exhibit 9n); excerpts from Jack Holterman, *Place Names of Glacier / Waterton National Parks* (Helena, Montana: Falcon Press Publishing Co., 1985) (ICC Exhibit 9g); and Ian Getty, "The History of Waterton Lakes National Park," a research paper prepared for the National and Historic Parks Branch, revised February 1972 (ICC Exhibit 2c, app. K, pp. 687-765).

274 Order in Council PC 1621, May 30, 1895, LAC, RG 84, vol. 2165, file W-2, pt. 1 (ICC Exhibit 1a, pp. 2154-55); F.W. Godsal to Wm. Pearce, Superintendent of Mines, Calgary, Alta., September 12, 1893, LAC, RG 84, vol. 2165, file W-2, pt. 1 (ICC Exhibit 1a, p. 2099).

expressed concerns about the proximity of Blood Indian Reserve 148A, timber limit, within the park and road access to the park through that reserve.<sup>276</sup>

### **Hutterites**

Another religious group, the Hutterites, also settled on the Big Claim lands between the Kootenay and Belly Rivers, although the only reference to that community in the documentary record of this claim is found in Blood Tribe oral history. As stated above, this land has considerable ceremonial significance to the Blood Tribe. Elder Louise Crop Eared Wolf states:

The original Kainai was on the west side of the Belly River. We used these areas in the early 1900's. Then the white man slowly took this land away from us. The Hutterites only arrived here at the time of the first World War. They said they did not wish to be in the War and that is why they fled here. Their religion forbade them to be in the War. The Federal Government gave our lands to the Hutterites. Our people were very unhappy about this but we were scared with the law and with violence. Many of our people were arrested. Our people were afraid of the Hutterites.<sup>277</sup>

Elder Louise Crop Eared Wolf states, furthermore:

I don't know why they stay there but – because they said that there was a white man that lived there before. One of our people, our woman was married to that white man. And after he died, then they saw the Hutterites coming in to settle.

And that place where they settled down today is a very sacred place to our people. All that field that they're using up today, that they are commercializing and they getting all the benefits from that land was ours. It was a sacred land for us. Our people held it very sacred because they had their – Medicine Lodge women held their Sacred Lodge there, and they held an encampment there, what I was talking about, and all the Clans were there. It's a big area. You see it when you pass. It's a real big area, and they took that away from us. The Waterton River.<sup>278</sup>

Elder Pete Standing Alone offers a similar time frame for the arrival of the Mormons.

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275 *An Act respecting the Waterton Glacier International Peace Park*, SC 1932, c. 55 (ICC Exhibit 6c, p. 1).

276 J.A. Wood, Assistant Controller, National Parks Service, Ottawa, to Mr Smart, May 4, 1949 (ICC Exhibit 1a, pp. 2311–13).

277 Blood Tribe Elder Statutory Declarations dated and signed May–June 1996, forming app. B in Pillipow & Company, “Blood Tribe / Kainaiwa Land Claim Submission – The Big Claim,” July 1996 (ICC Exhibit 2c, app. B, p. 197, Louise Crop Eared Wolf).

278 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, pp. 350–51, Louise Crop Eared Wolf).

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[T]here used to be the main trail going through the Hutterites, and there used to be a big barn, you know those old big barns, built in 1924. And I would think they were there in the late '20s. I think they were the first Hutterites to arrive in the southern Alberta, and for Alberta for that matter.<sup>279</sup>

Elder Margaret Hind Man recalled that there was also a police outpost located in this area, near the Hutterites:

[T]here were people that live by the police outpost, in that area where the Hutterites live, in that vicinity today, where the outpost was.

... some of our people [were] living there when one of the North West Mounted Police came in a wagon and told them that they're going to build a jail for criminals and that it would be dangerous if they stayed around there in case these criminals get out. That they might start shooting. And they said that to scare them off, and they pulled up their stakes and moved back across the Belly River.<sup>280</sup>

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279 ICC Transcript, June 22–25, 2004 (ICC Exhibit 5a, p. 299, Pete Standing Alone).

280 ICC Transcript, August 30–31, 2004 (ICC Exhibit 5a, p. 383, Margaret Hind Man).

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## APPENDIX B

### CHRONOLOGY

#### Blood Tribe / Kainaiwa: Big Claim Inquiry

- 1 Planning conference Lethbridge, August 12, 2003
  - 2 Community session June 22–25, 2004  

The Commission heard from Andrew Black Water, Rosie Red Crow, Pete Standing Alone, Frank Weasel Head, Mary Louise Oka, Rosie Day Rider, Adam Delaney, Councillor Randy Bottle.

August 30–31, 2004

The Commission heard from Louise Crop Eared Wolf, Margaret Hind Man, Pat Eagle Plume, Rosie Day Rider, Pete Standing Alone, Stephen Fox, Frank Weasel Head, Rosie Red Crow, Councillor Randy Bottle.
  - 3 Interim rulings  

Ruling into the Admission of 17 Statutory Declarations, April 2005 (Appendix C)
  - 4 Written legal submissions  

Submissions with respect to Admission of 17 Statutory Declarations

    - Submission on Behalf of the Blood Tribe / Kainaiwa, March 15, 2005
    - Submission on Behalf of the Government of Canada, March 18, 2005

Submissions to oral session

    - Submission on Behalf of the Blood Tribe / Kainaiwa, June 15, 2005
    - Submission on Behalf of the Government of Canada, August 30, 2005
  - 5 Oral legal submissions Lethbridge, October 4–6, 2005
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6 Content of formal record

The formal record of the Blood Tribe / Kainaiwa: Big Claim Inquiry consists of the following materials:

- Exhibits 1–10 tendered during the inquiry, including transcripts of community session (2 volumes) (Exhibit 5a)
- transcript of oral session (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

## **APPENDIX C**

### **INTERIM RULING: ADMISSION OF 17 STATUTORY DECLARATIONS**

#### **INDIAN CLAIMS COMMISSION**

#### **BLOOD TRIBE / KAINAIWA BIG CLAIM INQUIRY**

#### **INTERIM RULING**

#### **ADMISSION OF 17 STATUTORY DECLARATIONS**

#### **PANEL**

Commissioner Daniel J. Bellegarde (Chair)  
Commissioner Alan C. Holman

#### **COUNSEL**

For the Blood Tribe / Kainaiwa  
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For the Government of Canada  
Douglas Faulkner

To the Indian Claims Commission  
Diana Kwan

**APRIL 2005**

**BACKGROUND**

The Blood Tribe / Kainaiwa (hereinafter “Blood Tribe”) has requested that 17 statutory declarations from Blood Tribe elders be admitted into the formal record of inquiry. Canada has objected to the inclusion of these declarations into the record. This ruling addresses whether or not the Statutory Declarations should be admitted into the record.

In April 1975, the Blood Tribe submitted a Treaty Land Entitlement (hereinafter “TLE”) claim to the Office of Native Claims. This claim was rejected on June 20, 1978. In 1980, a Joint Task Force was formed with a mandate to review and present recommendations to the Minister of Indian Affairs on a number of outstanding Blood Tribe claims, including a TLE. The Joint Task Force concluded its work in August 1981; however, its recommendations were not adopted by the Minister.

In 1996, the Blood Tribe submitted their claim to the Specific Claims Branch for review. A Supplementary Legal Submission was made in February 1998. The Specific Claims Branch rejected the claim in November 1999. This rejection prompted further supplemental legal submissions, resulting in another rejection in November 2001 and November 2003.

In January 2003, the Blood Tribe requested the Indian Claims Commission (“ICC”) to conduct an inquiry into its claim. The Commissioners accepted this request, and notice was given to the parties in February 2003. A planning conference was held in August 2003. Two separate community sessions were held in June 2004 and August 2004.

At the community sessions, held in June and August 2004, 11 elders testified. Prior to the June 2004 community session, the Blood Tribe’s legal counsel had indicated that statutory declarations may be forthcoming for admission into the record. These statutory declarations were received in September 2004, with an additional declaration added in February 2005. Canada expressed objections to the inclusion of this evidence.

Canada provided its objections on February 22, 2005, stating that the statutory declarations were not oral history evidence, and that there was no knowledge of the process behind them.

Written submissions from the Blood Tribe were received on March 15, 2005, and Canada’s reply was received on March 18, 2005.

**ISSUE**

Should the statutory declarations be admitted into the formal record?



**POSITIONS OF THE PARTIES**

**Summary of Blood Tribe's Submissions**

The Blood Tribe argue that the 17 statutory declarations should be admitted to the record. The submissions on this issue can be summarized as follows:

- 1 The statutory declarations contain evidence directly related to the issues of the inquiry and are therefore relevant.
- 2 The following questions should guide whether or not the evidence should be admitted:
  1. Is the evidence relevant?
  2. Will the Panel be assisted in its assessment of the issues by examining the proffered evidence?
  3. Does the proposed evidence have a circumstantial guarantee of trustworthiness?
  4. Does the type of evidence proposed for admission fall within the Commission's mandate and expertise?<sup>281</sup>
- 3 The evidence falls within the ICC guidelines; ie, the ICC has the discretion to accept a wide range of relevant material.
- 4 The evidence is important.
- 5 The admissibility of the statutory declarations is consistent with the treatment of other evidence.
- 6 Any of Canada's concerns can be addressed. The Blood Tribe continues to extend an invitation to have Canada or the ICC interview or any other necessary steps to assess or test the evidence in the statutory declarations.
- 7 Admissibility of the evidence is distinct from the weight assigned to the evidence.

**Summary of Canada's Submissions**

Canada opposes the inclusion of the 17 statutory declarations for the following reasons:

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<sup>281</sup> Written Submission on Behalf of the Blood Tribe / Kainaiwa, March 15, 2005, p. 4.

- 1 The statutory declarations are not oral history evidence; instead, these declarations are written documents.
- 2 If the declarations are oral history evidence, then the ICC guidelines for taking oral history evidence were not followed, and neither the ICC nor Canada has had the opportunity to hear or test the evidence contained in the statutory declarations.
- 3 Evidence that is unreliable and entered in the record could potentially be relied upon by the ICC in its report and could call into question the reliability of the report. According to Canada:

The existence of evidence in the record that has not been properly presented raises the prospect that any Report based upon that record will also be subject to concerns regarding the reliability of the Report. This would tend to severely undermine the validity of the work product of the ISCC.<sup>282</sup>
- 4 In addition, admitting evidence which fails to adhere to the ICC guidelines would “further undermine the credibility of the process whereby evidence is permitted into the claim record.”<sup>283</sup>
- 5 If these statutory declarations are considered to be oral history evidence, then Canada argues the statutory declarations do not meet any standards for evaluating oral evidence.
- 6 Canada had no role in planning the community session. If it had, Canada would have argued that the FN “should be permitted to put forward as many witnesses as it determined were necessary to address every matter raised in the Statement of Issues.”<sup>284</sup>
- 7 If the statutory declarations are admitted into the record as “relevant and not a simple duplication of material already on the record”<sup>285</sup>, Canada believes that the evidence should be taken as per paragraph 44 of the ICC guidelines or the community session should be re-opened.

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282 Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 4.

283 Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 5

284 Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 8

285 Written Submission on Behalf of the Government of Canada, March 18, 2005, para. 8

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### ANALYSIS

The issue before the Panel is whether or not the statutory declarations should be admitted as evidence into the formal record of inquiry.

The ICC is not bound by traditional rules of evidence. Paragraph 48 of the June 1, 2004 guidelines states:

The Commission may receive evidence that might be inadmissible in a court of law. The strict rules of evidence do not necessarily apply to determine the admissibility of evidence. The Panel will determine whether to admit the evidence on the basis of its relevance.<sup>286</sup>

This proposition is supported by the courts in many cases; it is a well-established common law principle that administrative agencies are not courts and are not bound by the rules of evidence. In *Bortolotti v. Ontario (Ministry of Housing)*, the court stated:

The Commission of Inquiry is charged with the duty to consider, recommend and report. It has a very different function to perform from that of a court of law, or an administrative tribunal, or an arbitrator, all of which deal with rights between parties ... It is quite clear that commission appointed under the Public Inquiries Act, 1971, is not bound by the rules of evidence as applied traditionally in the Court, with the exception of the exclusionary rule as to privilege (s. 11) ... The approach of the Commission should not be technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject matter of the inquiry.<sup>287</sup>

While the ICC is not bound by the rules of evidence, the Panel is aware of the purpose for the rules of evidence. According to Macaulay and Sprague in *Hearings Before Administrative Tribunals*, the rules of evidence exist to:

- 1 Establish a sound factual basis for decisions;
- 2 Ensure a proper balance between the harm in accepting evidence and the value in doing so; and
- 3 Maintain a fair and effective process<sup>288</sup>

More specifically, Macaulay and Sprague suggest that the following questions be addressed when dealing with a question of whether or not to admit certain evidence:

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286 Indian Claims Commission "Inquiry Process, Guidelines for Parties", June 1, 2004, para. 48.

287 *Bortolotti v. Ontario (Ministry of Housing)*, (1977) 15 OR (2nd) 617 (Ont. CA) at 623-24.

288 Macaulay and Sprague in *Hearings before Administrative Tribunals* (1995: Carswell) at 17-26.

- 1 Is this evidence capable, if believed, of creating a factual basis for the decision in question, and if so, how far can it logically be taken to do so?
- 2 If it is capable of supporting the necessary factual base, is there some other reason why it should be rejected? Will its receipt lead to some greater social harm than the good likely to be accomplished by accepting it?
  - (a) How necessary is the information in accomplishing your mandate?
  - (b) How necessary is the evidence for one of the parties to make his case?
  - (c) Is the disputed evidence really of the nature claimed by the party disputing its admission?
  - (d) How much harm will result from its disclosure to the person opposing its use? Will there also be some harm to some public interest from its admission? If so, how does this harm compare to the value hoped to be achieved through your proceedings?
  - (e) Is there any way to minimize this harm?
- 3 Assuming that the evidence meets the first two concerns, is there anything about the way the evidence is coming which threatens the fairness or the smooth operation of your hearing? And if so, is this threat of sufficient importance, in light of your mandate, to warrant its exclusion?<sup>289</sup>

The submissions reflect the distinct needs of each party. The Blood Tribe is attempting to provide as much evidence in support of its claim as possible, while working within the practical requirements of the ICC's community session. Their submissions also distinguish the issue of admissibility of the evidence from the weight given to the evidence. On the other hand, Canada's needs relate to the the integrity of the evidence gathering process and subsequently, the results of that process. Canada has submitted that the process of gathering the statutory declarations is outside of the ICC process and if these declarations are admitted, then the entire ICC inquiry and the resulting report's credibility is potentially undermined.

Both parties also differ in how the evidence should be characterized. The Blood Tribe argue that the evidence is oral history evidence, while Canada

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<sup>289</sup> Macaulay and Sprague in *Hearings before Administrative Tribunals* (1995: Carswell) at 17-2.6 and 17-2.11.

argues that the evidence is in the nature of documents. Canada has not made any arguments regarding the relevance of the evidence.

**RULING**

With consideration to the above matters, the Panel has determined that the 17 statutory declarations should be admitted to the record for the following reasons:

- As a commission of public inquiry, part of the role of the ICC involves eliciting all relevant information or fact finding. Fulfilling this role means not being tied to strict rules of evidence or procedure.
- The Panel notes that there is a distinction between oral testimony and oral history. Essentially, this is a distinction between the form of the evidence and the nature of the evidence. The nature of the evidence given at an ICC community session is oral history evidence, and this evidence is received through oral testimony. This process is covered by ICC guidelines.
- The 17 elders who each provided a statutory declaration did not provide oral testimony at the community session, but have sworn that the information provided has been passed to them through oral tradition. As such, the declarations are sworn statements of a person's knowledge on certain issues.
- The 17 statutory declarations contain information related to the issues of the inquiry and, as a result, the statutory declarations are relevant. However, the Panel notes that there is a distinction in receiving this evidence in a statutory declaration as opposed to receiving the evidence through oral testimony in a community session.
- The Panel further notes that the question of admissibility of evidence is distinct from the weight given to the evidence.

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FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commissioner (Chair)



Alan C. Holman  
Commissioner

Dated this 1st day of April, 2005

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# **INDIAN CLAIMS COMMISSION**

## **SAULTEAU FIRST NATION TREATY LAND ENTITLEMENT AND LANDS IN SEVERALTY INQUIRY**

### **PANEL**

Chief Commissioner Renée Dupuis, C.M. (Chair)  
Commissioner Daniel J. Bellegarde  
Commissioner Jane Dickson-Gilmore

### **COUNSEL**

For the Sauleau First Nation  
Christopher G. Devlin

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
John B. Edmond / Julie McGregor

**APRIL 2007**





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## **SUMMARY**

### **SAULTEAU FIRST NATION TREATY LAND ENTITLEMENT AND LANDS IN SEVERALTY INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Saulteau First Nation: Treaty Land Entitlement and Lands in Severalty Inquiry* (Ottawa, April 2007), reported (2009) 22 ICCP 367.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Chief Commissioner R. Dupuis, C.M. (Chair), Commissioner D.J. Bellegarde, Commissioner J. Dickson-Gilmore

**Treaties** – Treaty 8 (1899); **Fiduciary Duty** – Treaty Land Entitlement; **Treaty Land Entitlement (TLE)** – Severalty; **British Columbia**

#### **THE SPECIFIC CLAIM**

In August 1997, the Treaty 8 Tribal Association submitted two specific claims to the Government of Canada on behalf of the Saulteau First Nation. The First Nation claimed that Canada breached its legal and fiduciary duties by failing to perform its obligations under the land entitlement provisions of Treaty 8 and claimed a shortfall of 4,898 acres. The First Nation also maintained that a claim to land known as Deadman Creek should be recognized as entitlement under the severalty provisions of Treaty 8.

In 2003, the Indian Claims Commission (ICC) accepted these claims as having been constructively rejected by the Minister of Indian Affairs and Northern Development. In February 2006, in anticipation of the claims' acceptance for negotiation by the Minister, the Saulteau First Nation requested the inquiry into their claims be concluded. As a result of the First Nation's request, the Commission panel declared the inquiry closed on June 1, 2006.

#### **BACKGROUND**

On June 21, 1899, the dominion government signed Treaty 8 with the Cree, Chipewyan, and Beaver Indians at Lesser Slave Lake. The land provisions of the treaty

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stated that signatory bands would receive reserves with areas equal to 640 acres for each family of five (i.e., 128 acres per capita), and families or individuals who wished to live apart from the reserves would receive 160 acres of lands in severalty.

Based on the land provisions of Treaty 8, the First Nation claimed a treaty land entitlement shortfall of 4,898 acres for a number of band members who were late adherents, absentees, or landless transfers at the date of first survey. In 1974, Saulteau band member Jim Gauthier applied for a disposition of 91.06 hectares of Crown land based on his great-grandfather Charles Gauthier's claim for lands in severalty.

#### **OUTCOME**

The First Nation requested the inquiry into their claims be concluded before the parties had agreed to a joint statement of issues.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

#### **Treaties and Statutes Referred To**

*Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.* (1899; reprint, Ottawa: Queen's Printer, 1966).

#### **Other Sources Referred To**

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

#### **COUNSEL, PARTIES, INTERVENERS**

C.G. Devlin for the Saulteau First Nation; P. Robinson for the Government of Canada; J.B. Edmond, J. McGregor to the Indian Claims Commission.

# PART I

## INTRODUCTION

### BACKGROUND TO THE INQUIRY

In August 1997, the Treaty 8 Tribal Association submitted two specific claims to the Government of Canada on behalf of the Sauleau First Nation. The First Nation claimed that Canada had breached its legal and fiduciary duties by failing to perform its obligations under the land entitlement provisions of Treaty 8, and it claimed a shortfall of 4,898 acres for a number of band members who were late adherents, absentees, or landless transfers at the date of first survey. The First Nation also maintained that a claim to land known as Deadman Creek should be recognized as entitlement under the severalty provisions of Treaty 8.

On August 21, 2003, the Treaty 8 Tribal Association on behalf of the Sauleau First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the First Nation's claims, which had been submitted in August 1997 and to which Canada had not responded. The Treaty 8 Tribal Association requested that the ICC consider the claims constructively rejected on the basis of excessive delay and unmet assurance by the Minister of Indian Affairs and Northern Development that the claims were a priority and a response would be given "within a relatively short time."<sup>1</sup> The ICC accepted the claims for inquiry on November 28, 2003.

### MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council<sup>2</sup> 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 the

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<sup>1</sup> Robert Nault, Minister of Indian Affairs and Northern Development, to Chief Stewart Cameron, Sauleau First Nation, c/o Treaty 8 Tribal Association, February 10, 2000 (ICC file 2109-36-01, vol. 1).

<sup>2</sup> 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.

claim was already rejected by the Minister.” This Policy, outlined in the 1982 booklet put out by the Department of Indian Affairs and Northern Development (DIAND) and 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.<sup>3</sup> The term lawful obligation is defined in *Outstanding Business* as follows:

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 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.<sup>4</sup>

The Commission was asked to inquire into whether the First Nation’s claims were valid for the purposes of negotiation under the Specific Claims Policy. The ICC accepted the claims for inquiry in November 2003 as having been constructively rejected by the department, under its mandate to “inquire into and report on ... whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.”<sup>5</sup>

In January 2006, the Saulteau First Nation, in anticipation of acceptance of its claims for negotiation by the Minister, requested the inquiry into their claims be concluded.

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3 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 Indian Claims Commission *Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

4 *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 171 at 179–80.

5 Order in Council PC 1992-1730, Part “ a)” of the mandate.

## PART II

### HISTORICAL BACKGROUND

#### INTRODUCTION

Indian Reserve (IR) 169, also known as the East Moberly Lake Reserve, is located in township 79, range 24, west of the 6th Meridian, approximately 25 kilometres from the town of Chetwynd, BC, and 1,212 kilometres northeast of Vancouver. It is within the area covered by Treaty 8.

#### TREATY 8

On June 21, 1899, the dominion government signed Treaty 8 with the Cree, Chipewyan, and Beaver Indians at Lesser Slave Lake. The land provisions of the treaty stated that signatory bands would receive reserves with areas equal to 640 acres for each family of five (i.e., 128 acres per capita), and that families or individuals who wished to live apart from the reserves would receive “land in severalty to the extent of 160 acres to each Indian.”<sup>6</sup>

#### 1914 ADHESION TO TREATY 8

In November 1913, Assistant Indian Agent Harold Laird of the Lesser Slave Lake Agency advised the Department of Indian Affairs that there was a group of Saulteau, “23 in all,” settled at the eastern end of Moberly Lake who had never adhered to treaty. He remarked on their “comfortable houses and ... fair gardens,” and noted that they were anxious to retain the land on which they resided. Laird also mentioned that several Beaver Indians from Fort St John and Hudson’s Hope were in residence at Moberly Lake and suggested setting aside reserves for all three groups, since it was anticipated that settlers would be entering the district soon.<sup>7</sup> The Assistant Deputy and Secretary of the

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<sup>6</sup> *Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.* (1899; reprint, Ottawa: Queen’s Printer, 1966). Subsequent adhesions were signed at Peace River Landing, Vermilion, Fond du Lac, Dunvegan, Fort Chipewyan, Smith’s Landing, Fort McMurray, and Wapiscow Lake between July 1 and August 14, 1899, see *Treaty No. 8*, 15–18.

<sup>7</sup> Extract of letter from Harold Laird to the Secretary, Department of Indian Affairs, November 3, 1913, Library and Archives Canada (LAC), RG 10, vol. 7777, file 27131-1 (ICC file 2109-36-01).

department, J.D. McLean, informed Indian Agent W.B.L. Donald on December 18 that a surveyor would be sent to lay out the reserves on “as early a date as may be convenient.”<sup>8</sup>

Respecting the bands’ formal adhesion to treaty, the department’s accountant, F. Paget, advised Deputy Superintendent General D.C. Scott that he did not see the necessity of negotiating a new treaty. As the First Nation already resided within the treaty area, they would simply be paid their annuities at the next treaty payments. He emphasized that reserving land for them was “urgent,” citing the influx of settlers that Paget said would undoubtedly arrive when the next season opened.<sup>9</sup>

#### SURVEY OF INDIAN RESERVE 169

In a March 25, 1914, memorandum to the Deputy Superintendent General, Chief Surveyor Bray discussed the upcoming surveys within the Peace River Block. He stated:

[U]nder the treaty these Indians are entitled to choose their reserves in severalty if they so desire; the Agent, however, recommends that three reserves be laid out and Inspector Conroy recommends strongly that lands in severalty be not laid out if it can possibly be avoided.<sup>10</sup>

Two months later, a band member named Charles Gauthier claimed squatter’s rights over the northeast quarter of section 22, township 79, range 24, W6M. In his statutory declaration, he stated that he had built a cabin on the land in 1904 and had resided there during the summer months. Gauthier indicated that he was married with five children, that he had broken one and a half acres of land so far, and that he was raising horses.<sup>11</sup>

In May 1914, Dominion Land Surveyor Donald F. Robertson was instructed to undertake the survey of three reserves in the Peace River District, one located near Fort St John, another near Halfway River, and the third at Moberly Lake. Secretary McLean instructed Robertson to set aside an area “in the proportion of 640 acres to a family of five.”<sup>12</sup> He continued: “They are

8 J.D. McLean, Assistant Deputy and Secretary, to W.B.L. Donald, Indian Agent, December 18, 1913, LAC, RG 10, vol. 7779, file 27143-4, part 1 (ICC file 2109-36-01).

9 F. Paget, Accountant, to Mr Scott, February 21, 1914, LAC, RG 10, vol. 7777, file 27141-1 (ICC file 2109-36-01).

10 S. Bray, Chief Surveyor, to the Deputy Superintendent General, March 25, 1914, LAC, RG 10, vol. 7777, file 27131-1 (ICC file 2109-36-01).

11 Statutory Declaration of Chas. Gauthier, May 23, 1914, British Columbia Archives and Records Service (BCARS), Government Record 436, Box 333 and 345, file 3194474 (ICC file 2109-36-01).

12 J.D. McLean, Assistant Deputy and Secretary, to Donald F. Robertson, DLS, May 27 1914, LAC, RG 10, vol. 4065, file 412786-3 (ICC file 2109-36-01).



also entitled to take their lands in severalty but this is undesirable if it can possibly be avoided.”<sup>13</sup>

That June, 34 Saulteaux were paid annuities at Moberly Lake, including Charles Gauthier and his family, who were paid under ticket no. 7. The Gauthier family was shown on the Saulteau Band treaty annuity payroll as comprising one man, one woman, three boys, two girls, and one “other” female relative.<sup>14</sup>

DLS Robertson arrived at Moberly Lake on July 9, 1914. He met with “Indians at East end of Moberly Lake” on the 15th and began traversing the southern boundary of the reserve. Between July 21 and 28, Robertson surveyed the west, north, and east boundaries, stopping for another meeting with the Band on the 28th. He finished cutting the lines on August 5 and departed for Halfway River on August 6, 1914.<sup>15</sup>

Upon returning to Ottawa, Robertson reported on the 1914 survey season. Of the reserves set out around Moberly Lake, he said:

In accordance with your instructions, ...  
At the east end of Moberly Lake an area of 7656<sup>16</sup> acres was chosen and surveyed for the Saulteaux Indians and a number of the Beaver Indians of St. John band who wished to have their land there.<sup>17</sup>

Robertson wrote that the reserve was suitable for grazing, gardens, and “mixed farming,” with a supply of whitefish and trout in the lake, plentiful game, as well as ample timber and hay. The survey plan was approved on July 25, 1916.<sup>18</sup>

13 J.D. McLean, Assistant Deputy and Secretary, to Donald F. Robertson, DLS, May 27 1914, LAC, RG 10, vol. 4065, file 412786-3 (ICC file 2109-36-01).

14 Saulteau Band treaty annuity payroll, June 11, 1914. There are 25 additions on the 1915 payroll with the notations: “From ... St. John” or “On Treaty 1st time”; see Saulteau Band treaty annuity payroll, June 15, 1915 (ICC file 2109-36-01).

15 Robertson’s field diary, season 1914, LAC, RG 10, vol. 4065, file 412786-3, pp. 9–12 (ICC file 2109-36-01).

16 There appears to be a discrepancy in the reserve acreage originally reported by DLS Donaldson and the amount ultimately set aside in 1918. When Donaldson made his report on the survey of Indian Reserve (IR) 169, the reserve was said to be 7,656 acres (see Donald F. Robertson to Assistant Deputy and Secretary, Department of Indian Affairs, March 18, 1915, LAC, RG 10, vol. 4065, file 412-786-3, and Donald F. Robertson to the Assistant Deputy and Secretary, Department of Indian Affairs, March 30, 1915, Federal Records Centre, file 975/30-5-168A). The Department of the Interior also stated that the reserve was comprised of “7656 acres or approximately 11.96 square miles” (see N.O. Coté, Controller, Land Patents Branch, Department of the Interior, December 11, 1916, LAC, RG 15, vol. 1117, file 3188380). However, when the reserve was confirmed by Order in Council, the reserve acreage was changed to 7,646 acres (see Order in Council PC 2302, September 19, 1918, *Canada Gazette*, November 19, 1918, vol. 15, no. 16). No explanation for this change can be found in the documents provided.

17 Donald F. Robertson to Assistant Deputy and Secretary, Department of Indian Affairs, March 18, 1915, LAC, RG 10, vol. 4065, file 412-786-3 (ICC file 2109-36-01). Robertson mentions in a separate March 18 letter that 25 Beaver Indians from St John Band were given land at the Saulteau reserve; see Donald F. Robertson to Assistant Deputy and Secretary, Department of Indian Affairs, March 18, 1915, LAC, RG 10, vol. 7779, file 27143-4, part.1 (ICC file 2109-36-01).

In March 1915, Robertson reported that a number of squatters were claiming lands within the surveyed reserve, band member Charles Gauthier among them. Robertson noted that Gauthier had taken treaty, and recommended that the northeast quarter of section 22, claimed by Gauthier, be included in the reserve.<sup>19</sup>

In 1916, the Department of Indian Affairs applied to the Department of the Interior to set aside the East Moberly Lake reserve. Charles Gauthier's claim upon the northeast corner of section 22 was mentioned, but the position of the Department of Indian Affairs, as stated in a memo by N.O. Coté of the Land Patents Branch of the Department of the Interior, was that, as Gauthier had accepted treaty after making the declaration, he did "not appear to have any claim to this land."<sup>20</sup>

Indian Reserve 169 was set aside by Order in Council PC 2302 on September 19, 1918. The reserve consisted of sections 13, 14, 15, 22, 23, 24, and 26, township 79, range 24, W6M, comprising an area of 7,646 acres.<sup>21</sup>

#### JIM GAUTHIER'S CLAIM TO LANDS IN SEVERALTY

In 1974, Saulteau band member Jim Gauthier, the great-grandson of Charles Gauthier, applied for a disposition of 91.06 hectares of Crown land on Deadman Creek, located between IR 169 and the town of Chetwynd. His application was denied by the Department of Lands, Forests and Water Resources the following year.<sup>22</sup> After a second application was rejected in 1978,<sup>23</sup> the Saulteau First Nation requested the assistance of the Union of BC Chiefs on Jim Gauthier's behalf.<sup>24</sup>

In February 1983, the BC Ministry of Lands, Parks and Housing ordered Gauthier to vacate the property by June 1, 1983.<sup>25</sup> Asserting his right to

18 See Order in Council PC 2302, September 19, 1918, *Canada Gazette*, November 19, 1918, vol. 15, no. 16 (ICC file 2109-36-01).

19 Donald F. Robertson to the Assistant Deputy and Secretary, Department of Indian Affairs, March 30, 1915, Federal Records Centre, file 975/30-5-168A (ICC file 2109-36-01).

20 N.O. Coté, Controller, Land Patents Branch, Department of the Interior, [recipient not identified], December 11, 1916, LAC, RG 15, vol. 1117, file 3188380 (ICC file 2109-36-01).

21 Order in Council PC 2302, September 19, 1918, *Canada Gazette*, November 19, 1918, vol. 15, no. 16 (ICC file 2109-36-01).

22 R.H. Goodchild, Director of Lands, to Jim J. Gauthier, March 7, 1975, no file reference available (ICC file 2109-36-01). The application was disallowed on the basis that the "subject area lies within a reserve against agricultural settlement."

23 Department of Lands, Forests, and Water Resources, British Columbia, Lands Branch, Land Classification Report, June 22, 1978, no file reference available (ICC file 2109-36-01); H.K. Boas, Regional Land Manager, Ministry of the Environment, to Jim J. Gauthier, June 26, 1978, no file reference available (ICC file 2109-36-01). The province required that the lands applied for be at least 50 per cent arable; Gauthier was informed that the area around Deadman Creek had "insufficient arable lands to establish the basis of a viable unit."

24 Councillor Amy Gauthier to Union of BC Indian Chiefs, c.1979, no file reference available; Affidavit by Jim John Gauthier, July 14, 1983, no file reference available (ICC file 2109-36-01).

160 acres of severalty lands under Treaty 8 and citing overcrowding on the reserve, Gauthier persisted in his attempts to acquire title to the lands. In the summer of 1983, DIAND apparently agreed to purchase the land for him.<sup>26</sup> In November 1985, with the matter still not concluded, the Lands and Trusts Branch of DIAND advised the First Nation that it could not add land to reserves for a single family. It was resolved that the department would contact the province to see if it was still willing to sell the lands.<sup>27</sup> On February 4, 1986, Lands and Trusts informed Jim Gauthier that there were no funds to purchase the land, and suggested approaching the Office of Native Claims.<sup>28</sup>

Two years later, the matter remained unresolved. The BC Ministry of Crown Lands informed Gauthier that there were some other parcels that could be purchased if he wished, and that his personal property must be moved off the land at Deadman Creek by September 15, 1988.<sup>29</sup> In October 1988, a one-year extension of that deadline appears to have been granted,<sup>30</sup> but in December 1989, Gauthier's possessions on the property were seized.<sup>31</sup> Soon thereafter, he approached the Treaty 8 Tribal Association for assistance.<sup>32</sup>

Through its solicitor, the Treaty 8 Tribal Association informed the province that it would be seeking damages.<sup>33</sup> In 1994, the Treaty 8 Tribal Association asserted that they claimed the lands as part of their rights to severalty lands under Treaty 8 and demanded that an order be issued to cease cutting hay on the parcel, which Gauthier had seeded.<sup>34</sup> The province agreed not to issue any hay permits for the time being.<sup>35</sup>

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- 25 D.T. Ross, Regional Director, Peace Region, Ministry of Lands, Parks and Housing, to Jim Gauthier, February 23, 1983, no file reference available (ICC file 2109-36-01).
- 26 Jim Gauthier to unidentified recipient, April 24, 1983, no file reference available (ICC file 2109-36-01); Affidavit by Jim John Gauthier, July 14, 1983, no file reference available (ICC file 2109-36-01); Louise Mandell, Lawyer, Union of BC Indian Chiefs, to Chief and Council, Saulteau Indian Band, August 2, 1983, no file reference available (ICC file 2109-36-01); Louise Mandell, Lawyer, Union of BC Indian Chiefs, to John Evans, Director, Reserves and Trusts, Department of Indian Affairs, January 13, 1984, no file reference available (ICC file 2109-36-01).
- 27 Juliet E. Balfour, Advisor, Reserves and Trusts, British Columbia Region, Indian and Northern Affairs Canada, to Brad Northstein, Saulteau Band Office, November 12, 1985, no file reference available (ICC file 2109-36-01).
- 28 Juliet Balfour, Advisor, Lands, Revenue and Trusts, BC Region, to Louise Mandell, Mandell Ostrove Pinder, Barristers and Solicitors, February 4, 1986, no file reference available (ICC file 2109-36-01).
- 29 Max Nock, Manager, Land Administration, Ministry of Crown Lands, to Mr and Mrs Gauthier, July 13, 1988, no file reference available (ICC file 2109-36-01).
- 30 Unidentified note to file, October 1988, no file reference available (ICC file 2109-36-01).
- 31 Egon Weger, Regional Director, Ministry of Crown Lands, to J. Gauthier, December 20, 1989, no file reference available (ICC file 2109-36-01).
- 32 Jim Gauthier to Treaty 8 Tribal Association, January 22, 1990 [stamp date], no file reference available (ICC file 2109-36-01).
- 33 Lawrence Roland Fast, Barrister and Solicitor, to Egon Weger, Regional Director, Ministry of Crown Lands, March 13, 1990, no file reference available (ICC file 2109-36-01).
- 34 Chiefs, Treaty 8 Tribal Association, to Ken Collingwood, Regional Manager, Prince George Regional Office, British Columbia Ministry of Forests, April 6, 1994, no file reference available (ICC file 2109-36-01).
- 35 W.R. Brash, District Manager, Ministry of Forests, to Treaty 8 Tribal Association, May 24, 1994, no file reference available (ICC file 2109-36-01).
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Documentation dated October 1994 indicates the province agreed to establish the parcel as a Section 12 Land Act Reserve until September 30, 1996.<sup>36</sup>

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<sup>36</sup> Egon Weger, Chair, Omineca/Peace IAMC, Ministry of Environment, Lands and Parks, to Jim Webb, Treaty 8 Tribal Association, October 20, 1994, no file reference available (ICC file 2109-36-01).

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## **PART III**

### **ISSUES**

The Treaty 8 Tribal Association on behalf of the Saulteau First Nation requested an inquiry into the First Nation's claims for treaty land entitlement and lands in severalty. During the time between the request for inquiry and withdrawal from the process, the inquiry did not progress to the point of an agreed statement of issues.

## PART IV

### PROCEDURAL HISTORY

On August 12, 1997, the Treaty 8 Tribal Association submitted two specific claims to the Minister of Indian Affairs and Northern Development on behalf of the Saulteau First Nation, concerning land entitlement and lands in severalty in accordance with the terms of Treaty 8. The First Nation claimed that the Crown had breached its legal and fiduciary obligations to the First Nation by failing to provide sufficient lands consistent with the terms of Treaty 8, and by refusing to set aside lands under the severalty provisions of Treaty 8.

The claims were submitted to the Minister in August 1997, the First Nation requested an update on the file in April 1999. The Specific Claims Branch responded to the First Nation, stating it “may expect to receive some communication from Specific Claims with respect to the status of the TLE Claim shortly.”<sup>37</sup> The Specific Claims Branch further informed the First Nation that its lands in severalty claim was assigned to a policy analyst for review.<sup>38</sup> On February 10, 2000, Robert Nault, then Minister of Indian Affairs and Northern Development, acknowledged the First Nation’s frustration with the lengthy time frames for dealing with specific claims and advised that “BC Treaty 8 First Nations’ claims are presently near the top of the list of priorities of the lawyer assigned to handle these claims.”<sup>39</sup> He further stated that a response would be forthcoming “within a relatively short time.”<sup>40</sup> On March 20, 2002, the parties met to discuss Canada’s TLE and lands in severalty policies. In June 2003, three years after Minister Nault’s letter, the First Nation was informed by the Specific Claims Branch<sup>41</sup> that it was continuing to

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37 John Hall, Research Manager, Specific Claims West, (DIAND), to Peter Havlik, Director, Treaty 8 Tribal Association, April 21, 1999 (ICC file 2109-36-01, vol. 1).

38 John Hall, Research Manager, Specific Claims West, (DIAND), to Peter Havlik, Director, Treaty 8 Tribal Association, April 21, 1999 (ICC file 2109-36-01, vol. 1).

39 Robert Nault, Minister of Indian Affairs and Northern Development, to Chief Stewart Cameron, Saulteau First Nation, c/o Treaty 8 Tribal Association, February 10, 2000 (ICC file 2109-36-01, vol. 1).

40 Robert Nault, Minister of Indian Affairs and Northern Development, to Chief Stewart Cameron, Saulteau First Nation, c/o Treaty 8 Tribal Association, February 10, 2000 (ICC file 2109-36-01, vol. 1).

41 John Hall, Research Manager, Specific Claims West, (DIAND), to the Treaty 8 Tribal Association, June 18, 2003 (ICC file 2109-36-01, vol. 1).

develop its position regarding the two claims. By August 2003, the First Nation had not received confirmation from Canada of either the acceptance or rejection of its claims. On August 21, 2003, the First Nation requested that the Indian Claims Commission conduct an inquiry into its claims.<sup>42</sup> On November 28, 2003, the Commission deemed the claims to have been constructively rejected and accepted the claims for inquiry.<sup>43</sup> The Commission requested that the parties provide their relevant documentation. On behalf of the First Nation, the Treaty 8 Tribal Association submitted part of its document collection and advised that more material would be forthcoming. Canada provided no documentation, and notified the Commission that the First Nation's participation in the inquiry would not be funded, since Canada did not consider the claims to be rejected. In November 2004, Canada and the First Nation agreed to engage the mediation and facilitation services offered by the ICC. In April 2005, the First Nation advised the ICC that it wished to proceed with the inquiry process.

On February 9, 2006, in anticipation of the acceptance for negotiation of the TLE claim by the Minister of Indian Affairs and Northern Development, the First Nation requested the inquiry into both claims be concluded.<sup>44</sup> Accordingly, the Commission issued a Declaration on June 1, 2006, concluding the inquiry.<sup>45</sup>

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42 Deborah Smithson, Director, Treaty and Aboriginal Rights Research, Treaty 8 Tribal Association, to Kathleen Lickers, Commission Counsel, ICC, August 21, 2003 (ICC file 2109-36-01, vol. 1).

43 Renée Dupuis, Chief Commissioner, ICC, to Deborah Smithson, Director, Treaty and Aboriginal Rights Research, Treaty 8 Tribal Association, November 28, 2003; Renée Dupuis, Chief Commissioner, ICC, to Robert D. Nault, Minister of Indian Affairs and Northern Development, and Martin Cauchon, Minister of Justice and Attorney General of Canada, November 28, 2003 (ICC file 2109-36-01, vol. 1).

44 Christopher G. Devlin, Counsel, Saulteau First Nation, to Julie McGregor, Associate Counsel, ICC, February 19, 2006 (ICC file 2109-36-01, vol. 1).

45 ICC, Declaration, dated June 1, 2006. This order is reproduced as Appendix A to this report.

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## PART V

### CONCLUSION

For the reasons given in our Declaration of June 1, 2006, the inquiry was concluded.

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FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis, C.M. (Chair)    Daniel J. Bellegarde    Jane Dickson-Gilmore  
Chief Commissioner            Commissioner            Commissioner

Dated this 12<sup>th</sup> day of April, 2007.



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# APPENDIX A

## DECLARATION

**Treaty 8 Tribal Association  
Saulteau First Nation  
Treaty Land Entitlement and Lands in Severalty Inquiry**

**Association tribale du Traité 8  
Première Nation des Saulteux  
Revendication relative à des droits fonciers issus de traité et  
à l'attribution de terres individuelles**

### DECLARATION

On August 12, 1997, the Treaty 8 Tribal Association, on behalf of the Saulteau First Nation, submitted a specific claim to the Minister of Indian Affairs and Northern Development (“the Minister”) respecting treaty land entitlement and lands in severalty pursuant to the terms of Treaty 8.

By a Band Council Resolution from the Saulteau First Nation, dated August 6, 2003, the Treaty 8 Tribal Association requested that the Indian Claims Commission conduct an inquiry into its claim.

On November 28, 2003, this Commission deemed the claim to have been rejected and accepted the claim for inquiry.

By Band Council Resolution dated February 13, 2006 (attached as Appendix A), the Saulteau First Nation requested that this inquiry be closed.

SINCE the Saulteau First Nation has requested this inquiry be closed,

### DÉCLARATION

Le 12 août 1997, l'Association tribale du Traité 8, au nom de la Première Nation des Saulteux, a présenté une revendication particulière au ministre des Affaires indiennes et du Nord canadien (« le ministre ») concernant des droits fonciers issus de traités et l'attribution de terres individuelles conformément aux dispositions du Traité 8.

Par voie d'une résolution du conseil de bande de la Première Nation des Saulteux datée du 6 août 2003, l'Association tribale du Traité 8 a demandé à la Commission des revendications des Indiens de mener une enquête au sujet de sa revendication.

Le 28 novembre 2003, la Commission a jugé que la revendication avait été rejetée et l'a acceptée aux fins d'enquête.

Par voie d'une résolution du conseil de bande datée du 13 février 2006 (voir Appendice A), la Première Nation des Saulteux a demandé qu'on mette un terme à ladite enquête.

ÉTANT DONNÉ que la Première Nation des Saulteux a demandé qu'on mette un terme à ladite enquête,

INDIAN CLAIMS COMMISSION PROCEEDINGS

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THIS COMMISSION THEREFORE  
DECLARES AS FOLLOWS:

The inquiry into this specific claim is hereby  
concluded.

At Ottawa, Ontario, this 1st day of June, 2006.



Renée Dupuis  
Chief Commissioner (Chair)



Daniel J. Bellegarde  
Commissioner



Jane Dickson-Gilmore  
Commissioner

LA COMMISSION DÉCLARE CE QUI  
SUIT :

L'enquête sur la revendication particulière  
précitée est par la présente close.

Fait à Ottawa (Ontario), le 1<sup>er</sup> jour de juin  
2006.



Renée Dupuis  
Présidente (présidente du comité)



Daniel J. Bellegarde  
Commissaire



Jane Dickson-Gilmore  
Commissaire

SAULTEAU FIRST NATION – TLE AND LANDS IN SEVERALTY INQUIRY

APPENDIX A TO THE DECLARATION



Indian and Northern Affairs Canada

Document No.:	2006 - 009
File Reference No.:	02-13-06 - TLC

**BAND COUNCIL RESOLUTION**

NOTE: The words "from our Band Funds", "capital" or "revenue, whichever is the case, must appear in all resolutions requesting expenditures from Band Funds.

The Council of the	<b>SAULTEAU FIRST NATIONS</b>	Province	B.C.
Date of duly convened meeting:	<b>FEBRUARY 13, 2006</b>	Capital amount:	\$
		Capital account:	\$

DO HEREBY RESOLVE:

- WHEREAS:** Sauteau First Nations has submitted to Canada two specific claims, Treaty No. 8 Land Entitlement Claim of the Sauteau First Nations, Vol. 1, Statement of Facts and Legal Argument, submitted in March 1997 (the "TLE Claim") and Specific Claim of Jimmy Gauthier to Lands in Severalty Pursuant to Treaty No. 8, filed by Treaty 8 Tribal Association, dated uncertain but before 2002 ("Severalty Claim"); and
- WHEREAS:** Sauteau First Nations has subsequently requested an Inquiry by the Indian Claims Commission ("ICC") respecting the "deemed" rejection of the TLE Claim and the Severalty Claim due to the inordinate delay by the Minister in accepting or rejecting either claim; and
- WHEREAS:** Sauteau First Nations and Canada have come to an understanding respecting how the TLE claim may obtain the Minister's acceptance for negotiation, which would involve the Sauteau First Nations withdrawing its specific claim with respect to the outstanding lawful obligation that Canada has to provide lands in severalty with respect to the land sought by Charles Gauthier's statutory declaration in 1914, but continuing to pursue its specific claim with respect to Canada's outstanding TLE obligation;
- THEREFORE:** Chief and Council of Sauteau First Nations hereby resolves as follows;
1. With respect to the Severalty Claim made on behalf of Jimmy Gauthier, Sauteau First Nations withdraws the claim in its entirety from the Specific Claims process;
  2. With respect to the TLE Claim, Sauteau First Nations withdraws those portions of the general TLE claim that assert an outstanding lawful obligation of Canada to provide land in severalty to those families who made statutory declarations for land in 1914;
  3. With respect to the ICC inquiry, Sauteau First Nations requests that the inquiry into their TLE Claim and Severalty Claim be concluded.

THREE (3)  
Quorum Required

*Denise Covertville*  
(Chief, Sauteau First Nations)

*[Signature]*  
(Chief, Sauteau First Nations)

*[Signature]*  
(Minister of Indian Affairs)

FOR DEPARTMENTAL USE ONLY		FOR DEPARTMENTAL USE ONLY	
Expenditure:	Authentic (Indian Act Section)	Source of Funds: Capital Revenue	Expenditure: Authentic (Indian Act Section)
Recommending Officer:	Signature	Date	Signature
Approving Officer:	Signature	Date	Signature



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# **INDIAN CLAIMS COMMISSION**

## **SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY**

### **PANEL**

Commissioner Renée Dupuis, C.M., Ad.E. (Chair)  
Commissioner Daniel J. Bellegarde  
Commissioner Alan C. Holman

### **COUNSEL**

For the Sandy Bay Ojibway First Nation  
J.R. Norman Boudreau

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
John B. Edmond / Diana Kwan

**JUNE 2007**



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## **SUMMARY**

### **SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry* (Ottawa, June 2007), reported (2009) 22 ICCP 389.

*This summary is intended for research purposes only.  
For a complete account of the inquiry, the reader should refer to  
the published report.*

**Panel:** Chief Commissioner R. Dupuis, C.M., Ad.E. (Chair), Commissioner D.J. Bellegarde, Commissioner A.C. Holman

**Treaties** – Treaty 1 (1871, 1876); **Treaty Interpretation** – Outside Promises; **Treaty Land Entitlement** – Land Occupied Prior to Treaty, Landless Transfer, Late Adherent, Marriage, Policy, Population Formula, Quality of Land, **Band** – Membership; **Manitoba**

#### **THE SPECIFIC CLAIM**

In 1982, the Sandy Bay Ojibway First Nation submitted a treaty land entitlement (TLE) claim that was rejected by the Department of Indian Affairs and Northern Development (DIAND) in 1985. In 1991, following further research analyzing paylists, Canada again advised the First Nation that there was no outstanding treaty land entitlement. In 1998, the Sandy Bay First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE; this request was accepted. At issue in this inquiry is whether the First Nation has an outstanding treaty land entitlement.

#### **BACKGROUND**

The Sandy Bay Ojibway First Nation makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay Ojibway First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. Shortly after Treaty 1 was signed, the Portage Band was divided into three distinct bands: the Portage Band, the Long Plain First Nation, and the Sandy Bay Ojibway First Nation. A revision to Treaty 1 was then signed in 1876, on which the

Sandy Bay Ojibway First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay Ojibway First Nation wanted to settle on the western shore of Lake Manitoba. Included in this area were five farms previously occupied by Sandy Bay members; two of these farms were within the reserve. Township 18, range 9, originally surveyed by Dominion Land Surveyor C.P. Brown in 1873 and located on the western shore of Lake Manitoba, was set aside as a reserve for the Sandy Bay Ojibway First Nation. After a period of flooding and a time during which many members withdrew from the treaty and later were readmitted, the reserve was confirmed as Sandy Bay Indian Reserve (IR) 5 by Order in Council 2876 on November 21, 1913.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marsh, or 3,840 acres (more or less), for the Sandy Bay Indian Reserve.

In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

#### **ISSUES**

What is the amount of land in I.R. No. 5 which can be credited toward TLE? What is the amount of land originally set apart for Sandy Bay Ojibway First Nation in Treaty 1 and in 1876? What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)? Can the lands provided in 1930 and 1970 be credited toward TLE? What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty? What is the population number for Sandy Bay Ojibway First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

#### **FINDINGS**

This inquiry focuses on whether the Sandy Bay Ojibway First Nation has an outstanding treaty land entitlement claim. Part of answering this question involves determining how much land was originally set aside for the First Nation. In examining the 1913 Order in Council setting aside the reserve, the panel concludes that 12,102 acres of dry land were set aside and that no marshland was included as part of the reserve. The panel further concludes that the 1930 Order in Council was issued to clarify and confirm that the six square miles of marsh were intended to be part of the reserve. However, while the marshland was intended to be part of the reserve, the panel finds that the marshlands cannot be attributed to TLE since a fundamental goal

of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have fulfilled this goal; therefore, even though marsh may be considered land, it cannot be credited toward TLE.

With respect to the issue of land improved and occupied prior to treaty, the panel concludes that the two farms which fell within reserve boundaries at the date of first survey were occupied by members of the Sandy Bay Ojibway First Nation. As a result, the Band is entitled to count these two members as part of the date of first survey population; however, the lands of these two farms should not be credited toward TLE. In other words, lands occupied and improved prior to treaty should not diminish the Band's land entitlement.

As for the issue dealing with the population number for the Sandy Bay Ojibway First Nation, which is required to calculate its TLE, the panel first had to determine where 17 people – claimed by both the Sandy Bay Ojibway First Nation and the Long Plain First Nation – should be counted. Based on the evidence presented, the panel concludes that these 17 people must be deducted from Sandy Bay's TLE population count and should be counted with the Long Plain First Nation. In addition, with respect to Sandy Bay's TLE population count, the panel notes that additional research is required to determine whether any of the 38 non-treaty women may be added to the Sandy Bay population count. Based on the evidence presented, the panel has determined that the population count is 207. There are an additional seven people whom the panel cannot conclude, based on the evidence, whether to add to the population count.

#### **RECOMMENDATION**

We therefore recommend that this claim not be accepted for negotiation.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*R. v. Marshall*, [1999] 3 SCR 456. *Merritt v. Toronto (City)* (1913) 48 SCR 1.

#### **ICC Reports Referred To**

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

**Treaties and Statutes Referred To**

Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957); Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii–xxix.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 ICCP 171–85.

**COUNSEL, PARTIES, INTERVENORS**

J.R.N. Boudreau for the Sandy Bay Ojibway First Nation; P. Robinson for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.

# PART I

## INTRODUCTION

### BACKGROUND TO THE INQUIRY

The Sandy Bay Ojibway First Nation<sup>1</sup> makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. At that time, the Portage Band was to receive a reserve. Shortly after Treaty 1, the Portage Band was divided into three distinct bands. Each group supported either Chief Yellow Quill, Short Bear, or Na-naw-wach-ew-wa-capow. In 1876, the Portage Band was recognized as three separate bands, and Treaty 1 was revised. Short Bear's group became the Long Plain First Nation and Na-naw-wach-ew-wa-capow became the Chief of the Sandy Bay First Nation. A revision to Treaty 1 was then signed in 1876, on which the Sandy Bay First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that Sandy Bay wanted to settle on the western shore of Lake Manitoba. According to Brown's field notes, the township had originally been taken for a reserve by the Sioux. Following Reid's report, however, the land was set aside as a reserve for the Sandy Bay First Nation. Included in this area were five farms previously occupied by Sandy Bay members; two farms fell within the boundaries of the reserve. Township 18, range 9, originally surveyed by Dominion Land Surveyor C.P. Brown in 1873 and located on the western shore of Lake Manitoba, was set aside as a reserve for the Sandy Bay First Nation. After a period of flooding and a time during which many members withdrew from treaty and later were readmitted, the reserve was confirmed as

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<sup>1</sup> For ease of reference, the Sandy Bay Ojibway First Nation is referred to as the Sandy Bay First Nation or Sandy Bay throughout the report.

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Sandy Bay Indian Reserve (IR) 5 by Order in Council 2876 on November 21, 1913.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marshland, or 3,840 acres (more or less), for the Sandy Bay Indian Reserve.

In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

In 1982, the Sandy Bay First Nation submitted a treaty land entitlement (TLE) claim to what was then known as the Office of Native Claims. The claim was originally rejected in 1985. In 1991, following further research analyzing paylists, Canada again advised the First Nation that there was no outstanding treaty land entitlement. A full historical background to the First Nation's claim is found at Appendix A to this report. In 1998, the Sandy Bay First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE. The ICC accepted this request for inquiry. However, after Sandy Bay presented its issues for inquiry, Canada objected to the scope of the inquiry, arguing that the issues had not been previously considered by Canada. After receiving written submissions from the parties on the ICC's mandate, the panel ruled on June 28, 1999, that it would proceed with an inquiry into the issues presented by Sandy Bay, and that Canada would be given a reasonable amount of time to consider any new matters. This ruling is reproduced as Appendix B to this report.

Following the ICC's ruling on its mandate, further research was undertaken to clarify issues surrounding the TLE claim. A series of events outside of the inquiry process occurred, affecting both the First Nation and Canada's participation in the inquiry. Progress of the inquiry was delayed; however, in 2003, present legal counsel for the First Nation was appointed and the parties proceeded with the inquiry.

At a planning conference in September 2004, the parties agreed to proceed directly to the written and oral submissions of the inquiry, without holding a community session. However, the parties were unable to reach agreement on the Statement of Issues. Canada proposed a two-phased inquiry process, with which the First Nation did not agree. In addition, the Long Plain First Nation sought standing to intervene in the Sandy Bay inquiry with respect to 17 people claimed as members by both First Nations. After receiving written submissions from the parties, the panel ruled on November 22, 2004, that the inquiry would be conducted in a single phase, granted the Long Plain First

Nation standing to seek intervention, and finalized the issues. This ruling is reproduced as Appendix C to this report.

In granting standing to the Long Plain First Nation, the panel specified that a Band Council Resolution (BCR) had to be provided, in addition to written submissions. An oral hearing into this matter was scheduled for June 15, 2005. Shortly afterwards, on June 29, 2005, the panel issued a written ruling, granting standing to the Long Plain First Nation to provide written and oral submissions on the 17 people claimed by both Sandy Bay and Long Plain. This ruling is reproduced as Appendix D to this report.

A chronology of this inquiry is set forth in Appendix E of this report.

#### MANDATE OF THE COMMISSION

The mandate of the Indian Claims 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 the claim was already rejected by the Minister.”<sup>2</sup> This Policy, outlined in DIAND’s 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.<sup>3</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

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 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.

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2 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.

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

## PART II

### THE FACTS

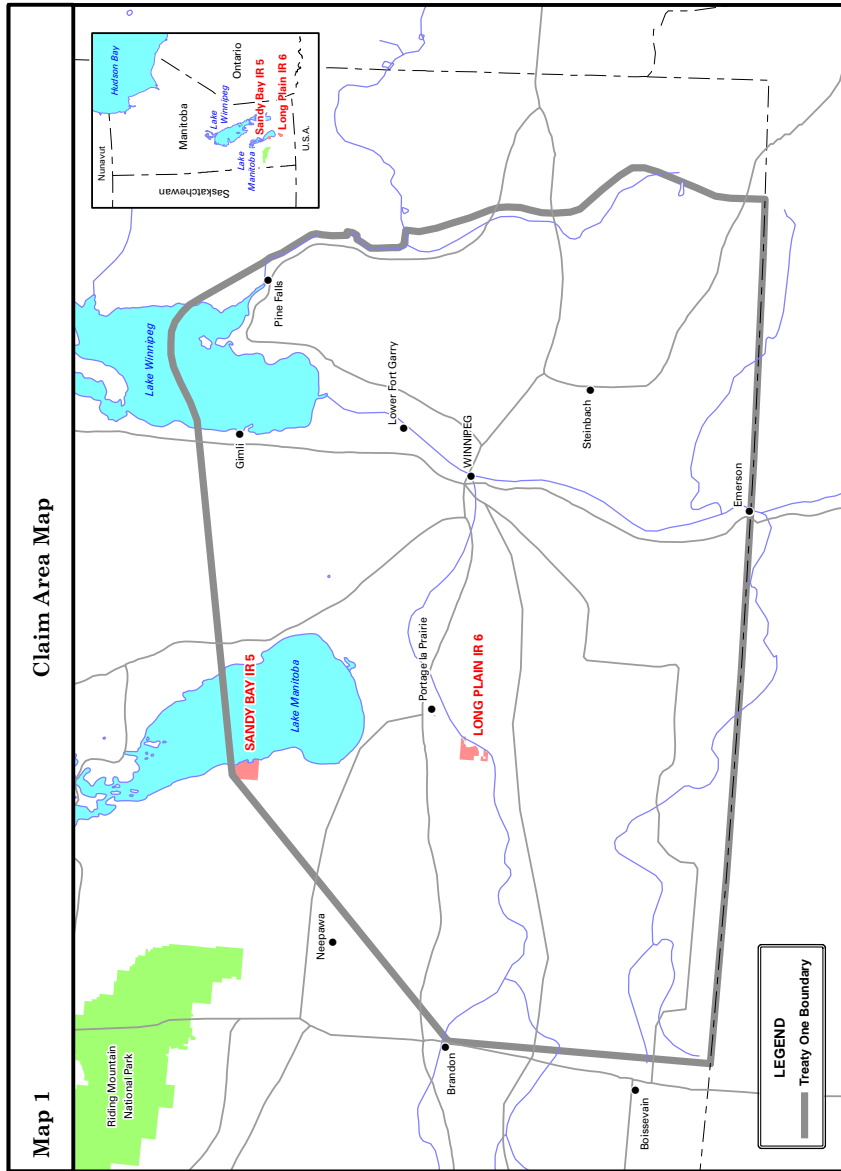
The Sandy Bay First Nation makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. Shortly after Treaty 1, Chief Na-naw-wach-ew-wapow wrote to Indian Commissioner Wemyss Simpson, stating that the White Mud River Band was not represented at treaty, and that it wanted to be separate from the Portage Band.

By 1875, the Portage Band had been divided into three distinct bands: the Portage Band, the Long Plain First Nation, and the Sandy Bay First Nation. A revision to Treaty 1 was then signed on June 20, 1876, on which the Sandy Bay First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay First Nation wanted to settle on the western shore of Lake Manitoba. Included in this area were five farms previously occupied by Sandy Bay members. The western shore of Lake Manitoba had been surveyed by Dominion Land Surveyor C.P. Brown in 1873 as township 18, range 9, containing 12,085.81 acres of land, 492.55 acres of roads, and 10,949.19 acres of water and marsh on the western shore of Lake Manitoba. Brown's survey was approved on January 1, 1874. According to Brown's field notes, the township had originally been taken for a reserve by the Sioux. Following Reid's report, however, the land was set aside as a reserve for the Sandy Bay First Nation. In November 1876, Reid returned to the area but did not actually re-survey the township. Instead, he consulted with the First Nation with respect to the boundaries and based the reserve on the survey completed by Brown in 1873. He noted in his report that the area was approximately 900 acres greater than the First Nation's entitlement; but since a large percentage



SANDY BAY OJIBWAY FIRST NATION – TREATY LAND ENTITLEMENT INQUIRY



of the shore was muskeg and marsh, the entire township should be included in the reserve.

The land surveyed by Brown and reviewed by Reid for a reserve was eventually confirmed as Sandy Bay IR 5 by Order in Council 2876 on November 21, 1913. Between 1876 and 1913, questions had been raised by the Department of the Interior as to whether the Hudson's Bay Company still held any rights to the lands. Lieutenant Governor Alexander Morris protested the delay in confirming the reserve, stating to both the Minister of the Interior and the Secretary of State that the Band was already living on the land and making improvements.

By 1879, the reserve was still not confirmed. By now, flooding had become an issue, and it would remain a problem until 1883. In 1880, the Department of the Interior examined the possibility of obtaining dry land near the reserve for agricultural purposes. This possibility was investigated in conjunction with the Band's request to extend the southern boundary of the reserve by two miles. Later, the Band advised that it wished for the western rather than the southern boundary to be extended as a means of acquiring more dry land. In 1881, Indian Agent Francis Ogletree agreed that the land on the south was flooded as well, and that it would be necessary to seek land on the west. In June 1881, Indian Superintendent James F. Graham instructed a dominion land surveyor to extend the reserve boundary south. However, when the surveyor arrived at the reserve, he was told by the Band that it wanted its reserve extended west, not south. The surveyor was unable to locate any dry land west of the reserve. By 1883, flooding on the Sandy Bay Reserve had subsided. Conditions remained favourable through 1884, allowing the Band to cultivate land.

As a result of the flooding, many members of the Band left the reserve, with very few occupying it by 1886. Indian Agent H. Martineau reported that many had left to join other bands. Some members took scrip and signed an agreement to leave the reserve, but because there were so few members left on the reserve, the members who took scrip continued to live on the reserve. However, some of the members who took scrip did not realize that they were withdrawing from treaty, and made accusations of being misinformed and misled. In 1887, Indian Agent Martineau reported that most of the Sandy Bay First Nation had taken scrip, and that the remaining members did not reside on the reserve. A similar report was filed in 1888. The Indian Agent's report in 1890 stated that all but one of the families on the reserve had withdrawn from the treaty. Later in 1890, the Minister of the Interior received a petition from the Sandy Bay scrip recipients requesting readmission to treaty. Deputy

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Superintendent General of Indian Affairs L. Vankoughnet recommended that the scrip recipients be allowed to rejoin the Band as long as the value of the scrip was repaid. In 1892, almost all of the Sandy Bay scrip recipients were readmitted to treaty.

On November 21, 1913, Order in Council 2876 was passed, confirming Sandy Bay IR 5, comprising all of fractional township 18, range 9, containing 19 square miles. This Order in Council excluded all road allowances on the reserve.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. More specifically, because the description in the 1913 Order in Council was unclear, the issue was whether the marshlands along Lake Manitoba were part of the Sandy Bay Reserve. In 1923, one government official stated that the marsh was excluded from the reserve, while in 1926 another official stated that the marsh was included in the reserve. In 1927, another official stated that the marsh was not included. By 1930, the Department of Indian Affairs had determined that the marsh had not been included in the reserve; yet it was the Band's understanding that the boundary of the reserve was the lake, not the marsh. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marshland, or 3,840 acres (more or less), as an addition to the Sandy Bay Indian Reserve.

Concurrent with the confusion over the eastern boundary of the reserve was a quality-of-lands issue. In 1928, the Inspector of Indian Agencies, M. Christianson, reported that the conditions on the reserve were poor. Given that the population of the Band was growing, it would be difficult for band members to make a living off of the land. The Department of Indian Affairs acknowledged that the Band was no longer hunting and trapping, and that the land was of poor quality and unsuited to agriculture. As a result, the department proposed to relocate the Band. The issue was not raised again until 1932, when the department considered obtaining other lands and relocating the Band in order to address the quality-of-lands issue. However, the Chief Surveyor was not optimistic that suitable lands could be obtained for another reserve in the district. The department also considered amalgamating Sandy Bay with another band. At the same time, the First Nation requested that additional lands be secured for their use. However, there is no documentary evidence in this inquiry that this request was ever granted by the department.

In 1958, the Department of Indian Affairs wrote to the Government of Manitoba, proposing that the road allowances on the reserve be transferred to

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the reserve. The provincial government agreed on the condition that Canada exchange an area of land on the reserve for drainage purposes.

In 1959, a Band Council Resolution was passed, agreeing to the exchange. In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

## **PART III**

### ISSUES

Final Statement of Issues Based on Panel Ruling November 22, 2004.

- 1 What is the amount of land in I.R. No. 5 which can be credited toward TLE?
  - a) What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?
  - b) What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?
  - c) Can the lands provided in 1930 and 1970 be credited toward TLE?
- 2 What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?
- 3 That is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

## PART IV

### ANALYSIS

#### ISSUE 1 LAND THAT CAN BE CREDITED TOWARD TLE

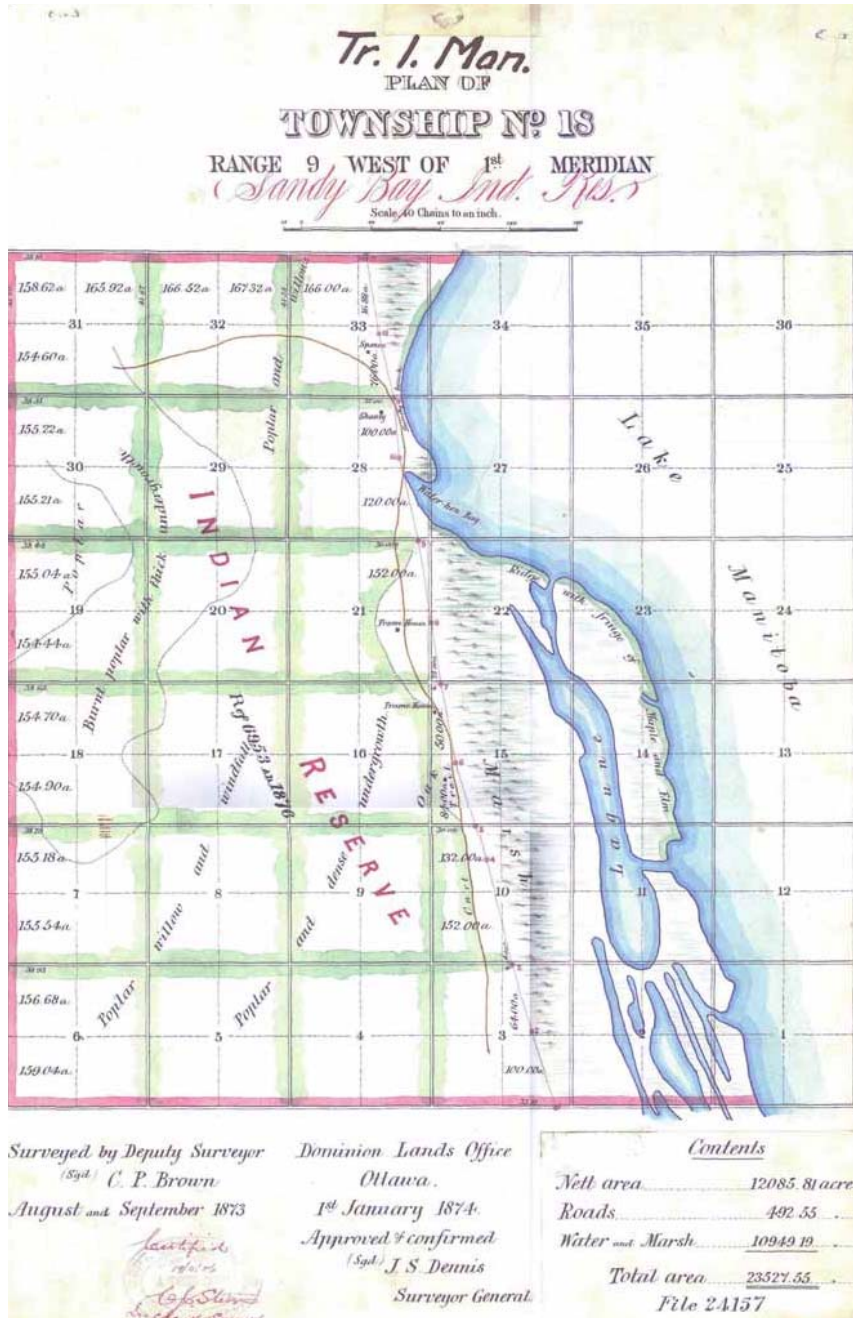
- 1 What is the amount of land in I.R. No. 5 which can be credited toward TLE?**
- a) What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?**
  - b) What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?**
  - c) Can the lands provided in 1930 and 1970 be credited toward TLE?**

In this issue, the panel is being asked to make a factual finding as to the amount of land in Indian Reserve No. 5 that can be credited toward treaty land entitlement (TLE) for the Sandy Bay First Nation. The panel notes that the parties are in agreement regarding the lands in the 1970 Order in Council and that this issue is no longer an issue for the inquiry.

The parties have made submissions on what was surveyed in 1876 and on lands provided to Sandy Bay in 1930. In response to this issue, the panel has concluded that the amount of land originally set aside for the First Nation and confirmed in the 1913 Order in Council (OIC) is 12,102 acres. In the 1930 Order in Council, the panel has concluded that the marshland was confirmed as part of the original reserve. With respect to whether this marshland can be credited toward TLE, in this case the panel finds that marsh cannot be credited toward TLE.

The panel's reasons follow.

SANDY BAY OJIBWAY FIRST NATION – TREATY LAND ENTITLEMENT INQUIRY



**Factual Background**

On August 3, 1871, Treaty 1 was formally concluded at Lower Fort Garry.<sup>4</sup> One of the original signatories was the Portage Band. However, by 1876, Treaty No. 1 was revised. The Portage Band was divided into three distinct bands: the Portage Band, Sandy Bay First Nation, and Long Plain First Nation, each with its own reserve. The three reserves were to contain each First Nation's proportional share of the original Portage reserve, which had not yet been surveyed and was intended for all three bands, relative to their population.<sup>5</sup>

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay First Nation wished to have its reserve located on the western shore of Lake Manitoba in township 18, and he identified five prior holdings belonging to members of the Sandy Bay First Nation.<sup>6</sup> Based on Reid's report, Alexander Morris, the Lieutenant Governor of Manitoba, recommended to the Minister of the Interior that township 18, range 9, be set aside as a reserve for Sandy Bay.<sup>7</sup>

Township 18, containing 12,085.81 acres of land, 492.55 acres of roads, and 10,949.19 acres of water and marsh, was originally surveyed by Dominion Land Surveyor C.P. Brown in 1873. His survey was approved on January 1, 1874.<sup>8</sup> The area was visited by Dominion Land Surveyor J. Lestock Reid in November 1876. Reid did not actually re-survey township 18; instead, he consulted with the First Nation with respect to the boundaries and based the reserve on the survey completed by Brown in 1873.<sup>9</sup> He noted in his report that the area is approximately 900 acres greater than the First Nation's entitlement but that a large percentage of the shore is muskeg and marsh, and he recommended that the entire township be included in the reserve.

On November 21, 1913, Order in Council 2876 was issued, confirming Sandy Bay IR No. 5:

Whereas Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to

4 *The Manitoban*, PAM, August 12, 1871 (ICC Exhibit 1, p. 11).  
 5 Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxvii–xxix (ICC Exhibit 1, p. 131).  
 6 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxxi (ICC Exhibit 1, pp. 138–39).  
 7 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 140).  
 8 See Plan 782, "Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.)," surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August–September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).  
 9 *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 13).



existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians.

Therefore His Royal Highness the Governor General in Council is pleased to Order that the lands comprised within the following reserves shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act, subject to existing rights as defined or created thereunder, namely. ...

7. Sandy Bay Indian Reserve, No. 5, comprising all of fractional township eighteen, range nine, west of the principal meridian, as shown on the official plan of the township, approved and confirmed on the first day of January, one thousand eight hundred and seventy-four, excepting thereout and therefrom the road allowance as shown on the said official plan; the said reserve containing by admeasurement nineteen square miles, more or less ...<sup>10</sup>

All road allowances were excluded from the reserve.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. N.B. Sheppard of the Land Patents Branch of the Department of the Interior wrote to T. Shanks, Assistant Surveyor General, inquiring as to whether sections 11 and 29 as well as the lands lying east of the traverse line on the survey – all in fractional township 18, range 9, west of the principal meridian – were intended to be included in IR 5.<sup>11</sup> Sheppard indicated that if the land to the east of the traverse line<sup>12</sup> was to be included in IR 5, then there was an error in the 19-square-mile area described. Assistant Surveyor General Shanks replied that the marshlands were excluded from the reserve, stating that “[t]he description of Sandy Bay Indian Reserve is evidently intended to include only the land west of the traverse line shown on the original township plan.”<sup>13</sup>

The concern regarding the eastern boundary of the reserve continued. On October 9, 1926, J.M. Roberts, Secretary of the School Lands Branch of the Department of the Interior, wrote to J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, inquiring as to whether the area shown as “marsh” on the Township Plan, including section 11 and other lands lying east of the traverse line, were part of the Sandy Bay Indian Reserve.<sup>14</sup> McLean responded that “Frac. Sec. 11-18-9-W.P.M., has been

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10 Governor General in Council, Privy Council Office, Order in Council 2876, November 21, 1913, LAC, 2, 1, vol. 1276 (ICC Exhibit 1, p. 262).

11 N.B. Sheppard, Land Patents Branch, Department of the Interior, Ottawa, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

12 It should be noted that Surveyor Brown's survey and field notes identify a segmented traverse line along the western edge of what he identified as marsh.

13 Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior Ottawa, July 18, 1923, Natural Resources Canada, Legal Survey's Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

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considered to be part of the Sandy Bay Indian reserve No. 5 and confirmed as such by Order in Council P.C. 2876, dated 21<sup>st</sup> NOV. 1913, when the confirmation of Sandy Bay stated that the reserve comprised all of Frac. Tp. 18-9-W.P.M. as shown on the official plan of the Township approved and confirmed 1st Jan. 1874.”<sup>15</sup>

However, in 1927, Surveyor General E.H. Peters indicated that the marshland was not included in the calculation of land within the township.

The plan of township 18-9-W.Pr. dated January 1st, 1874 [Brown's Township survey] bears a tabulation showing the land in sections as 12085.81 acres and the water areas as 10949.19 acres. No section lines are shown on the marsh. The land area mentioned is almost exactly nineteen square miles as given in the description of the Indian Reserve. The height of the water in Lake Manitoba is subject to variation so that the marsh shown on the township plan would probably be completely under water at certain periods, and at the time the plan was issued, evidently the view was held that the marsh might be regarded as part of the lake. The opinion expressed in my memorandum of July 18th 1923 was based on these considerations.

If at any time it is found that the marsh has become sufficiently dry to be classified as land, it should be surveyed and added to the Indian Reserve.<sup>16</sup>

In 1930, the boundary was questioned again. On March 10, 1930, Indian Agent J. Waite sought advice from Indian Commissioner W.M. Graham.

Will you please advise me, of [sic] the water constitutes the boundary of a reserve, where the reserve is situated on a lake, or is a reserve similar to other lands, in that the shore of the lake is reserved as a public road. On the Sandy Bay Reserve there are three fishing camps on the lake shore, the fishing is usually good at this point, and there is a danger of other fishermen erecting camps in the vicinity. This will not only crowd out the Indian fisherman, but it will become a point of contention in time, and I would like a ruling in the matter. The reserve map shows nothing that would be of any help in this matter.<sup>17</sup>

Acting Assistant and Deputy Secretary A.F. MacKenzie (successor to J.D. McLean) wrote to Indian Commissioner Graham on March 21, 1930, stating that the marshlands on the shore of the lake were not included in the reserve.

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14 J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 9, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 264).

15 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, October 14, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 265).

16 E.H. Peters, Surveyor General, to the Controller, School Lands Division, Dominion Lands Branch, Department of the Interior, February 9, 1927, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 266).

17 J. Waite, Indian Agent, to W.M. Graham, Indian Commissioner, March 10, 1930, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 271).

I have to advise you that generally speaking Indian reserves fronting on lakes and rivers include all the lands within the land boundaries extending down to the waters on which the reserve fronts and parties camping on the shore of such waters without departmental authority, would be committing an act of trespass and could be prosecuted under the Act.

However, in the particular case mentioned, namely, Sandy Bay Indian reserve, the Department appears to be in a somewhat different position, inasmuch as the confirmatory Order in Council confirmed the reserve in accordance with the Township plan and stated the area to be approximately 19 sq. miles. The Township plan referred to shows an area of approximately 19 sq. miles without including the area covered by water and marsh and as this marsh is shown on the Township plan as extending along almost the entire water front, it is doubtful if the Department could support the contention except along the shore of Sec. 28 and a portion of the S.E. [1/4] Sec. 33.<sup>18</sup>

To clarify the situation, Order in Council 1004, dated May 13, 1930, set apart six square miles of marshland, or a total of 3,840 acres (more or less), as an addition to the Sandy Bay Indian Reserve.

All that portion of Township 18, Range 9, West of the Principal [sic] Meridian, lying between Lake Manitoba and Sandy Bay Indian Reserve No. 5, described as a marsh on the plan of the said township, approved and confirmed at Ottawa, by J.S. Dennis, Surveyor General on the 1st day of January, 1874, of record in the Department of the Interior, containing by admeasurement Six square miles, more or less.<sup>19</sup>

### **Summary of First Nation's Position**

The First Nation argues that 11, 211 acres of land is the amount of land that can be credited for treaty land entitlement purposes.

To reach this figure, the First Nation argues that all of township 18, composed of either 12,085.81 or, based on the 1874 Brown survey, 12,102 acres of land, was set aside. The First Nation further argues that in 1876, Reid used the original Brown survey acreage of 12,085.81 and subtracted the agreed-upon "belt" acreage of 5,291 acres to arrive at 6,794.81 acres. Reid was told that Sandy Bay had 183 members so, according to the treaty formula, he divided 183 by five (36.6); rounded up to 37 families; and multiplied this number by 160 acres for a total of 5,920 acres that still had to be set aside.<sup>20</sup> Reid noted that the reserve was 874.81 acres over TLE entitlement; but

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18 A.F. MacKenzie, Secretary of Department of Indian Affairs, to W.M. Graham, Indian Commissioner, March 21, 1930, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 273).

19 Order in Council PC 1004, May 13, 1930, LAC, RG 2, Series 1, vol. 1840 (ICC Exhibit 1, p. 274).

20 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, at p. 32.

because of the presence of about 900 acres of marsh and swamp, he concluded that the overage was acceptable.

The First Nation, in its land calculation, includes the amount comprising the belt. The 11,211 acreage results from adding the 5,291 acreage belt share to the 5,920 acreage treaty formula amount.

With respect to the 1930 Order in Council, the First Nation argues that the OIC *confirmed* that the six square miles of marshland were part of the reserve, as opposed to *added* land to the reserve. The First Nation argues that the boundary of the reserve extended to the water and included the marsh; this was consistent with Surveyor Reid's notes. Although questions in the 1920s had arisen as to whether the boundary of the reserve extended to the edge of the water or stopped at the shore, the confusion was resolved when the 1930 OIC confirmed that the six square miles were *already included* within township 18 and did not count as TLE lands.<sup>21</sup>

The First Nation further argues that the land that was to be provided in fulfillment of treaty obligations had to be "land" and not marsh. If providing marsh fulfills treaty obligations, then a breach of the honour of the Crown has occurred. In addition, a breach of fiduciary duty has occurred because the First Nation was never consulted as to its desire for marsh area. If the 1930 Order in Council provided land that was an "addition" in fulfillment of treaty obligations, then Canada must explain why there was absolutely no consultation with the Band. The First Nation was never told that marsh would count as TLE.

In any event, the First Nation submits that marsh is not "land." Land promised under treaty was, according to the statements of Lieutenant Governor of Manitoba and the North-West Territories Adam G. Archibald during Treaty 1 negotiations, "[t]o form a farm for each family"; as well, Archibald stated that "there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land."<sup>22</sup>

### **Summary of Canada's Position**

Canada states that the reserve was confirmed by the 1913 Order in Council, which sets aside 12,160 acres or "19 sq. miles, more or less" for the First Nation. However, Canada submits that the 12,160 acres is Reid's allocation, which is not completely accurate. Instead, 12,102 acres, as identified in the

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21 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, at p. 52.

22 Reply Submission on Behalf of the Sandy Bay Ojibway First Nation, May 30, 2006, at p. 31.

survey, is more accurate.<sup>23</sup> Canada further states that at this time, the marsh did not likely form part of the original reserve. Instead, in 1930 the marshland added to the reserve was “the continuation of the setting apart of reserve lands pursuant to Treaty 1.”<sup>24</sup> As well, the marsh was necessary to provide the First Nation with exclusive access to the lake and fishing.

Although the 1930 Order in Council specifies “six sq. miles, more or less,” which is approximately 3,840 acres, Canada accepts that the land east of the traverse line on the survey is 2,914 acres. A 1991 memorandum by Regional Surveyor for Energy, Mines and Resources G. Kitchen sets out the township as 15,000 acres. The original Brown survey identified 12,085.81 acres of land. Therefore, when 12,085.81 is subtracted from the 15,000 acres, the result is 2,914 acres. Canada states that the critical issue in this inquiry is whether the 2,914 acres can be counted toward fulfilling treaty land entitlement. Canada argues that this amount can be counted toward fulfilling treaty land entitlement.

The practice of counting the marsh toward TLE is based on treaty interpretation. Canada states that the duty to consult the First Nation, with respect to selection and location of reserve lands, was met. There is no specific discussion in Treaty 1 regarding land quality. Each party understood that the reserve included land diverse in nature and quality, and for multiple uses. There was no expectation that only arable land would suffice.<sup>25</sup> The First Nation was satisfied with the reserve’s location, and it had specifically requested land on the water’s edge to allow the continuation of a traditional lifestyle that included a mixture of hunting and fishing.

Canada further argues that marsh is “land” based on court cases such as *Merritt v. Toronto (City)*<sup>26</sup>. Since marshlands are “land,” this addition can then be counted as part of TLE; therefore, 2,914 acres are added to TLE.

### **The Panel’s Reasons** ***1913 Order in Council***

This inquiry focuses on whether the Sandy Bay First Nation has an outstanding treaty land entitlement (TLE) claim. Part of answering this question involves determining how much land was originally set aside for the First Nation. This issue seeks to answer this question.

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23 Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 28.

24 Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 137.

25 Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 103.

26 *Merritt v. Toronto (City)* (1913) 48 SCR 1.

Determining the amount of land set aside for the reserve requires the panel to make a factual finding that will assist in establishing whether there is an outstanding TLE. The logical starting point for the panel is the 1913 Order in Council (2876), which states that the reserve comprises all of township 18 as shown on the official plan. Township 18 was originally surveyed by C.P. Brown in late 1873, and his survey was approved in 1874. Following the Revision to Treaty 1, Surveyor Reid was advised that the First Nation wanted to have its reserve located on the west shore of Lake Manitoba.<sup>27</sup> Reid visited the area again and reported the following:

On my arrival amongst the White Mud Band of Indians I found their Chief was away but I pointed out to Baptiste Spence one of the Councillors the boundaries of the Reserve being the whole of the fractional Township 18 Range 9 West on the West shore of Lake Manitoba containing twelve thousand one hundred and two acres (12102) acres being nearly nine hundred acres over and above what they are actually entitled to but owing to a large percentage of the front of the Reserve along the Lake Shore being muskeg and marsh I would suggest that the whole Township be included in the Reserve.<sup>28</sup>

Reid did not re-survey the area; instead he relied on Brown's township survey, completed as part of general surveys in Manitoba and approved in 1874. Reid reported that his calculations were based on the following:

I found this Band<sup>29</sup> (White Mud River) to number one hundred and eighty three (183) persons being almost (37) thirty seven families of five each and they being entitled to the same grants as Yellow Quills Band would have a total area of eleven thousand two hundred and eleven (11211 acres) but as in the case of Yellow Quills Reserve there is a large portion of the front on the Lake drowned land I would therefore propose that the whole of the fractional Township 18 Range 9 West containing twelve thousand one hundred and two acres be set apart for this Band the White Mud River Indians. ...

Reid noted the extent of the marsh and muskeg and compensated for this poorer quality of land by allocating an additional 900 acres to the First Nation.

Unfortunately, it is not entirely clear how much dry land is contained in township 18. On the one hand, the Order in Council states that the entire

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27 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxxi (ICC Exhibit 1, pp. 138–39).

28 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 152–53).

29 J. Lestock Reid, Dominion Land Surveyor, c. 1876, attached to W.A. Austin, Department of Indian Affairs, to Deputy Minister, March 1, 1888, LAC, RG 10, v. 3624, f. 5217-1 (ICC Exhibit 1, pp. 244–45).

fractional township is set aside; and on the other hand, 19 square miles (12,160 acres) is specified. The question for the panel is whether the 19 square miles is solely dry land or includes the marsh. An examination of township 18, as shown in Brown's survey, shows that the amount of dry land is approximately 12,087.81 acres, which is close to Brown's original survey figure and Reid's description. The discrepancy between the 12,102 acres and the 12,087.81 acres may be attributable to more land being dry when Reid visited the site. In any event, from this figure the panel concludes that no marshland was included as part of the reserve in the 1913 OIC.

### ***1930 Order in Council***

With respect to Order in Council 1004, passed on May 13, 1930, the issue between the parties is whether the six square miles were added to the reserve or whether the amount of marshland was confirmed as part of the reserve. Canada argues that the marshland was added, while the First Nation argues that the marshland was confirmed as part of the reserve. The parties also differ over whether the marshland can be credited to fulfilling the First Nation's TLE.

Based on the facts, the evidence, and the panel's examination of Brown's survey, the panel concludes that six square miles of marshland were confirmed as part of the reserve by the 1930 OIC. It appears that in 1876, the intention was to set aside the entire fractional township as the reserve. However, a description error was made in the 1913 OIC, in which all of the fractional township was set aside but 19 square miles were specified. The result was that only the dry land formed the reserve. After an examination of the historical documentation, the panel notes that the policy of the Department of Indian Affairs was to include the marshlands in the reserve. The panel reasons that in this case, the marshlands were not included owing to a description error, and that the 1930 OIC was issued to clarify the situation and *confirm* the six square miles of marshland as part of the reserve.

### ***Can Marshland be Counted Toward TLE?***

The question then turns to whether the marshland can be attributed to TLE. The panel notes that Canada has argued that the marshland is land based on jurisprudence; however, this analysis does not necessarily apply when considering whether marshland is land for TLE purposes. In this case, the panel finds that marshland cannot be attributed to TLE.

The First Nation has stated that its interests at the time of reserve creation were to preserve a traditional way of life, which included hunting and fishing.

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As the Band was granted exclusive use of the marsh, the marsh would allow access to the lake for fishing. Access to fishing would have allowed the Band to maintain its economic well-being. In essence, the lands and the marsh that form the reserve were usable to the Band. Since the First Nation elected not to proceed with a community session, there is no oral history on the practices of the Band at the time of treaty or shortly afterwards. The panel therefore does not have any oral history on how advanced the Band's farming practices were, or on how heavily the Band was involved in fishing at that time. The lack of oral history evidence on this issue is a distinct disadvantage. However, in reaching its conclusions on marshlands, the panel is guided by the background to Treaty 1.

The government's goals at the time Treaty 1 was negotiated were to secure title to the land and to open the country for settlement. At the same time, the government wanted to encourage Indians to settle on reserves and adopt a sedentary lifestyle. Reserves were intended to provide a means of economic self-sufficiency through agricultural production. With this policy in mind, and given the challenges that Indians were facing at this time, the panel concludes that any lands set aside for reserve purposes should have been usable to the Band for agricultural purposes. Support for this conclusion can be found in the record for inquiry.

In his opening address at the start of Treaty 1 negotiations, Lieutenant Governor Archibald said:

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this.<sup>30</sup>

His comments reflect the Crown's focus on agriculture. Archibald went on to describe reserves.

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30 Lieutenant Governor, Manitoba, to Secretary of State, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces* for the year ending June 30, 1871, pp. 16–17 (ICC Exhibit 16, p. 35).

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These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers.

...

When you have made your Treaty you will still be free to hunt over much of the land included in the Treaty. ... Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.<sup>31</sup>

The First Nations had a different understanding of the reserve system and had originally requested more land. *The Manitoban* newspaper reported on all eight days of the negotiations; included in the reports was a detailed account of the various First Nations' demands regarding the location and size of their reserves. On July 29, 1871, *The Manitoban* reported that Ay-ee-ta-pe-pe-tung stated:

I will tell you what I mean to reserve. When first you (His Excellency) began to travel (from Fort William), you saw something afar off, and this is the land you saw. At that time you thought I will have that some day or other; but behold you see before now the lawful owner of it. I understand you are going to buy this land from me. ...With regard to land within the Settlement, I have nothing to say, as I am on the outside. But you will see from this document that I have made a claim, (written document handed in); and I want to know what is to be allowed me. (This claim is about 160 miles long by 60 broad, and extends from the mouth of Tobacco Creek, to Medicine Lodge at Pembina, from there north-west to White Clair; thence down to Stony Creek, a branch of the White Mud River, at the upper crossing, and from thence North, to the Salt Springs, on Lake Winnepegosis). No chief appears to represent the Indians at White Mud River, ... teh [sic] chief gave me authority to mention to the Commissioner, for the White Mud River Indians, that they wished their reserve attached to ours. This is the reason our claim extends so far north as Salt Springs.<sup>32</sup>

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31 Lieutenant Governor, Manitoba, to Secretary of State, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, pp. 16–17 (ICC Exhibit 16, p. 36).

32 Transcription of article entitled "Fourth Day's Proceedings" from *The Manitoban*, August 12, 1871 (ICC Exhibit 1, p. 10).

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However, Archibald explained the purpose of the reserve and the allotment of 160 acres for each family of five. In addition, the Treaty 1 negotiations had been deadlocked for a few days until Henry Prince, Chief of the St. Peter's Band, asked how the Indians were expected to cultivate the land. Archibald's response was that much assistance would be provided; a school and instructor would be provided to each reserve, and the Indians would be provided with ploughs and harrows. The addition of these agricultural provisions altered the whole tenor of the negotiations. Shortly afterwards, Treaty 1 was signed on August 3, 1871. However, the agricultural provisions that had broken the deadlock in the negotiations were omitted in the text of Treaty 1. These omitted agricultural provisions were the "outside promises" that were the subject of the Revision to Treaty 1 in 1876.<sup>33</sup>

Further context is provided by D. Aidan McQuillan in his article, *Creation of Indian Reserves on Canadian Prairies: 1870–1885*,<sup>34</sup> which discusses government policy regarding Indians in western Manitoba. The article provides the socio-economic context of the 1870s and examines the general conditions that First Nations in Canada faced. This was a period of transition, during which traditional ways of life were being challenged by rapid settlement, disease, and the disappearance of the buffalo. At the same time, the government hoped to convert the Indians to a sedentary lifestyle with settlement on a reserve, encouraging agriculture as a means of self-sufficiency. In addition to providing implements and tools for farming, the government hired a number of agricultural instructors to establish "model" farms that served as teaching farms adjacent to reserves.

All these references show that while the First Nations primarily pursued traditional ways of life that included hunting, trapping, and fishing, the goal was to convert this lifestyle to one focused on agriculture. The panel infers that to fulfill this policy goal in Treaty 1, the Crown would have to provide not only agricultural tools and implements, but also appropriate land. As a result, for land to be credited to TLE, the land should be usable and fulfill the goals of treaty. In this particular inquiry, an essential goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have been used to fulfill this goal; therefore, marshland, even though it may be considered land, cannot be credited to TLE.

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33 D.J. Hall, "A Serene Atmosphere? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 327 (ICC Exhibit 25, p. 7).

34 D. Aidan McQuillan, "Creation of Indian Reserves on Canadian Prairies: 1870–1885" (Oct. 1980) 70:4 *Geographical Review*, 370–96 (ICC Exhibit 23, appendix D, p. 1626).

**ISSUE 2 LAND THAT SHOULD NOT BE CREDITED TOWARD TLE**

**2 What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?**

This issue addresses the question of whether the lands farmed and occupied by two Sandy Bay members, George Spence and Robert Sutherland, prior to treaty, can be counted toward TLE.

**Factual Background**

During his initial visit to survey a reserve for Sandy Bay in July 1876, Dominion Land Surveyor Reid reported that he had located five prior holdings belonging to:

- 1 George Spence, S.E. 1/4 section, of section 33, Township 18, range 9, west. A house about 30 feet by 20 feet, stable, nine head of cattle, four horses, and has lived here about two years.
- 2 Robert Sutherland, N.E. 1/4 section of section 33, Township 18, range 9, west. A small house; has lived here about two years.
- 3 Matawawawin, N.W. 1/4 section of section 26, Township 17, range 9, west. A small house, stable, and has about an acre in garden; has lived here eight years.
- 4 Joseph DeJaislais, N.W. 1/4 section of section 23, Township 17, range 9, west. Owing to not being able to find the posts, the position of these buildings are not accurate; two small houses, stable, two cows, three calves and three horses; has lived here about fifteen years.
- 5 Battiste Spence, N.W. 1/4 section of section 2, Township 17, range 9, west. Has four horses, built his house last fall.<sup>35</sup>

Many First Nations people included in Treaties 1 and 2 had occupied and improved lands, within or outside their eventual reserves, prior to entering into treaty. George Spence and Robert Sutherland occupied lands that were included within the reserve boundaries; whereas as the pre-treaty land holdings occupied by Matawawawin, Joseph DeJaislais and Battiste Spence

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<sup>35</sup> J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

were outside of the reserve boundaries. The issue of prior holdings arose during pre-treaty meetings between the government and First Nations.<sup>36</sup> Reports from the negotiations indicate that the First Nations were concerned that they would lose their prior holdings if they took treaty.<sup>37</sup> At the negotiation of Treaty 1, “an agreement was concluded that properties occupied and cultivated before the Treaty were to be held exclusive of and in addition to the per capita Treaty entitlement.”<sup>38</sup> There are a number of historical documents which support the position that such prior land holdings were to be held in addition to reserve land granted under Treaty.<sup>39</sup>

The revised Treaty 1, agreed to on June 10, 1876, states:

And it is further agreed that the Indians residing heretofore and now in the neighbourhood of the White Mud River shall be recognized as a distinct Band, and Na-wa-che-way-a-pow shall be accepted as their Chief, that as some of them have settled there and desire to remain, those of them who have substantial improvements shall be protected in their holdings, except in cases where the land so occupied has already been sold or granted by the Department of the Interior to other parties, but the said Indians will not be allowed to occupy or take up any other lands than those already bona fide occupied by each of them.<sup>40</sup>

### Summary of First Nation’s Position

The First Nation argues that the 320 acres occupied and improved by George Spence and Robert Sutherland prior to treaty and contained within the reserve’s boundaries should not be credited to TLE. Based on the legislation, on Treaty 1, and on the Revision to Treaty 1, these lands were protected. The First Nation points out that lands held by non-Indians were protected and states that Indians who held similar lands should be treated the same way. In addition, the First Nation argues that the title passed to George Spence and Robert Sutherland was prior to treaty; therefore, treaty could not affect these grants.

Because George Spence and Robert Sutherland each occupied and improved 160 acres, these 320 acres should be deducted from the amount of

36 Wemyss Simpson, Indian Commissioner, to Secretary of State, November 3, 1871, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke, & Co., 1880), 38 (ICC Exhibit 12, p. 68).

37 Author unknown, to W. Simpson, July 26, 1873, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 21).

38 Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, 2 (ICC Exhibit 12, p. 3).

39 Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, 2 (ICC Exhibit 12, pp. 3–5).

40 Copy of Revision to Treaty 1, June 20, 1876 (ICC Exhibit 1, p. 131).

land received for TLE. Canada breached an obligation to exclude lands occupied and improved prior to treaty when calculating TLE.

### **Summary of Canada's Position**

Canada clarified at the oral session (June 29, 2006) that if individual Indians were in occupation of improved lands prior to Treaty 1, then the specific amount of that land should not be counted toward TLE. However, these individuals can be counted toward the date of first survey (DOFS) population as long as they met the criteria.

Canada argues that George Spence and Robert Sutherland were not in possession of holdings at the time of treaty in 1871. In 1876, Surveyor Reid reported that they had only been there “about 2 years.”<sup>41</sup> Canada also states that the Treaty 1 promise was modified by the 1876 amendment; however, the 1876 amendment does not apply to Spence and Sutherland because they did not live in the White Mud River area.

Instead, Spence and Sutherland held their land under a “location title,” which has a specific meaning under section 10 of the 1876 *Indian Act*. That is,

Any Indian or non-Treaty Indians in ... the Province of Manitoba ... who has, or shall have, previously to the selection of a reserve, possession of and made permanent improvements on a plot of land which has been or shall be included in or surrounded by a reserve, shall have the same privileges, neither more or less, in respect of such plot, as an Indian enjoys who holds under a location title.<sup>42</sup>

Essentially, Canada states that no acreage should be deducted from the total acreage credited to TLE.

### **The Panel's Reasons**

The panel finds that the lands previously occupied should not be counted toward TLE.

These lands were occupied and improved by at least 1874, as reported by Reid.<sup>43</sup> George Spence and Robert Sutherland's lands were located within the reserve boundaries. There are two governing treaty documents in this issue: Treaty 1, and the Revision to Treaty 1.

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41 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

42 *Indian Act*, 1876 S.C. 1876, C. 18 (39 Vict), as cited in Written Submissions on Behalf of the Government of Canada, May 16, 2006, at para. 174.

43 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

The panel believes that the treaty documents govern in this issue, and as such the panel is guided by the Supreme Court of Canada's principles on treaty interpretation as set out in *R. v. Marshall*<sup>44</sup>:

- 1 Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.
- 2 Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories.
- 3 The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.
- 4 In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.
- 5 In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.
- 6 The words of the treaty must be given the sense which they would naturally have held for the parties at the time.
- 7 A technical or contractual interpretation of treaty wording should be avoided.
- 8 While construing the language generously, courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic.
- 9 Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.<sup>45</sup>

In addition, the Supreme Court in *Marshall* sets out a two-step approach to interpreting a treaty:

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<sup>44</sup> *R. v. Marshall*, [1999] 3 SCR 456.

<sup>45</sup> *R. v. Marshall*, [1999] 3 SCR 456 at 512-13.

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra*, at para. 76, “the scope of treaty rights will be determined by their wording”. The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty’s historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretation not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties’ common intention. This determination requires choosing “from among the various possible interpretations of the common intention the one which best reconciles” the parties’ interests: *Sioui, supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon, supra*, at pp. 402–3; *Sundown, supra*, at paras. 30 and 33.<sup>46</sup>

Based on these principles, the panel must undertake a two-step analysis, taking into consideration first the relevant words of the treaty and then the historical and cultural context at the time the treaty was negotiated.

In step one, the panel must examine the words of Treaty 1 and the Revision to Treaty 1. Treaty 1 states:

... if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to Indians.

In addition, the Revision to Treaty 1 specifies that “... those of them who have substantial improvements shall be protected in their holdings. ...”<sup>47</sup>

Both the First Nation and Canada agree that pre-treaty land holdings should not be counted toward TLE and that the individuals occupying the land prior to treaty should be counted toward the DOFS population. In this issue, the First Nation and Canada disagree over when these lands were occupied,

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<sup>46</sup> *R. v. Marshall*, [1999] 3 SCR 456 at 514–15.

<sup>47</sup> Copy of Revision to Treaty 1, June 20, 1876 (ICC Exhibit 1, p. 131).

with Canada arguing that the lands were occupied after Treaty 1. Therefore, the panel must proceed to step two in interpreting the treaty provisions, and consider the historical and cultural context at the time Treaty 1 and the Revision to Treaty 1 were concluded. This approach specifically addresses the location of Spence and Sutherland.

In this inquiry, the evidence shows that Spence and Sutherland's farms fell within the boundaries of the reserve. Furthermore, according to treaty land entitlement principles, the amount of land set aside for a reserve is based on the band's total population at the date of first survey. That is, whatever lands are at the time occupied by band members are not relevant to TLE calculations. The panel believes that it would be unfair, as Canada argues, to strictly interpret location and limit the application of these treaty provisions to the area of White Mud River when in fact the Band itself was always a separate band and had occupied the west shore of Lake Manitoba. The treaty provisions are general statements regarding the Band and its collective entitlement, irrespective of the location of the actual White Mud River. Spence and Sutherland occupied the lands that fell within reserve boundaries and were members of the First Nation. Therefore, the Band is entitled to count these two members as part of its DOFS population. However, the lands that Spence and Sutherland occupied should not be credited to TLE. In other words, lands occupied prior to treaty should not diminish the Band's treaty land entitlement.

### **ISSUE 3 POPULATION NUMBER FOR LAND CALCULATION**

#### **3 What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?**

A key component in a TLE claim is population; that is, the question of TLE is based both on the amount of land originally received by the First Nation, and on the First Nation's population. In order for a TLE claim to be found, the amount of land the First Nation receives must be shown to be less than what the First Nation is entitled to based on its population.

Part of the history of this inquiry involved a TLE working group organized and facilitated by the Indian Claims Commission to assist the parties in attempting to sort out the population of Sandy Bay at the date of first survey (DOFS). The working group exchanged preliminary positions on the TLE



population for Sandy Bay, but could not reach agreement on 38 identified people. At least 17 of these 38 people were paid with Long Plain First Nation at its DOFS. These 17 people are currently being claimed by Sandy Bay for its population count.

Because of the overlap between the two bands, the Long Plain First Nation sought standing to intervene on the issue of where, in Sandy Bay's inquiry, the 17 people should be counted. After written submissions and an oral hearing, the Long Plain First Nation was granted intervener status on June 29, 2005. This ruling can be found in Appendix D. The 17 people are significant to Long Plain because of current negotiations over loss-of-use compensation. Determining the population number is based on Canada's TLE policy, which does not permit people to be counted with two bands (i.e., double count). If these 17 people are counted with Long Plain, they are landed transfers and not eligible to be counted with Sandy Bay, and vice versa. This specific issue centres on where these 17 people should be counted.

#### **Summary of Sandy Bay's Position**

Sandy Bay states that 183 people were counted by Surveyor Reid at DOFS. The 17 people in the Levasseur family and the Weegeegon (also referred to as Weewagon, Weezeegon, and Weezegan) family are also being claimed, for a subtotal of 200 people. It is argued that the affidavits of the Levasseur family provide strong evidence that the family members were properly affiliated with Sandy Bay and in fact clearly state they were with the White Mud River / Sandy Bay group and had been living there for several years prior to treaty. In addition, Michel Levasseur was later the Chief of Sandy Bay.

These families were placed on the wrong payroll, and this error is the result of a lack of proper discipline applied by Canada to the paylists.

As well, Sandy Bay claims an additional 35 people on its list, for a total of 235.

#### **Summary of Long Plain's Position**

The Long Plain First Nation argues that the 17 people from the Levasseur family and the Weegeegon family were on the DOFS payroll for Short Bear, who was chief of Long Plain First Nation at this time. Long Plain states that there was an opportunity for the families to associate themselves with White Mud / Sandy Bay prior to 1877; however, the White Mud Band was paid separately from the Portage Band in 1873, 1874, and 1875. In addition, these families did not choose to be paid with White Mud.

The Long Plain First Nation further argues that the Levasseur children were born at different locations around southern Manitoba. The affidavits of the Levasseurs provided by Sandy Bay speak to residency, not membership.

Lastly, Long Plain First Nation argues that the inclusion of the three families on the 1876 list is significant owing to the context of treaty payment. Because of the division of the Portage list into three bands, it was clear that each member was selecting affiliation.

### **Summary of Canada's Position**

With respect to the 17 people, Canada states that they are properly counted on Long Plain's DOFS payroll. The 14 members of the Levasseur family were paid on the Long Plain list and counted for Long Plain First Nation's TLE. In addition, Canada states that there is no other evidence showing that the three members of the Weegeegon family were not landed transfers to Sandy Bay in 1877. Therefore, this family is properly counted on Long Plain's DOFS payroll.

Following the working group, Canada agreed to add an additional 13 people originally in dispute, bringing Canada's total proposed population count to 207. These 13 additional people include 11 questionables from the DOFS population list<sup>48</sup> and two people in the "other" category.<sup>49</sup> These two people are the wife of Joseph Boileau (ticket #4) and a child of Baptiste Metwawenin Sr (ticket #23).

### **The Panel's Reasons**

#### ***The 17 People***

This issue questions where the 17 people should be counted. The reason why the membership of these 17 people is an issue is partly due to history. There were three distinct groups within the Portage Band that originally signed Treaty 1 in 1871. Each group supported either Chief Yellow Quill, Short Bear, or Na-naw-wach-ew-wa-capow. In 1876, the Portage Band was recognized as three separate bands, and Treaty 1 was revised. Short Bear's group became the Long Plain First Nation, and Na-naw-wach-ew-wa-capow became the Chief of the Sandy Bay First Nation.

The specific question before the panel is whether residency can form the basis for membership.

The evidence on the 17 people can be summarized as follows:

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48 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 17).

49 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

- Long Plain has shown that the 17 people were on Short Bear’s payroll in 1876; and
- Sandy Bay has provided affidavits attesting to the residency of these people and how they had settled at Sandy Bay and eventually became members of Sandy Bay.

The ICC has previously examined the issue of membership in the *Fort McKay First Nation Treaty Land Entitlement Inquiry*. In examining whether the Fort McKay First Nation had a TLE, the panel established many TLE principles that formed the basis for Canada’s current TLE guidelines. More specifically, the panel examined the relevance of paylists and their relationship to membership and stated the following:

Although the “residency approach” is very interesting, we are unwilling to depart from the established practice of relying on the payroll as a starting point in treaty land entitlement analysis. We recognize that a payroll has its own shortcomings, that it is not a band list, and that there was no payroll for the Fort McKay group in 1915. Furthermore, although the payroll is a relevant historical reference in the identification of band membership, it is not determinative. Membership is a factual question, established on the basis of all relevant evidence, including the oral testimony of elders.<sup>50</sup>

In addition, the ICC, in referring to a situation in which individuals who were paid annuities with one band and subsequently receive annuities with another, stated:

... when an individual has transferred between bands and it is unclear where that person should be counted, the practice has been to assess the strength of the individual’s connection to each band, usually in terms of continuity of association.<sup>51</sup>

In this inquiry, the panel sees no reason to depart from the practice of using the payroll as a starting point from which to identify band membership. In other words, without compelling evidence the panel will not determine membership solely on evidence related to residency. As a result, the panel finds that there is insufficient evidence to show that the 17 people were not properly on Short Bear’s payroll in 1876. At the meeting held in 1876, these 17 people chose to be counted with Short Bear, and there is no evidence that shows these people were put on Long Plain’s list against their wishes.

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50 Indian Claims Commission, *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (1996) 5 ICCP 3 at p. 59.  
51 Indian Claims Commission, *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (1996) 5 ICCP 3 at p. 56.

These 17 people must be deducted from Sandy Bay's population count, and they should be counted with Long Plain First Nation.

***The Population Number***

The panel's attention must now turn to calculating the population number of Sandy Bay, based on the evidence presented in the record and the submissions of the parties. During the course of the TLE working group, Canada and Sandy Bay reached an agreement to count 194 people (172 DOFS, and 22 absentees and arrears), and 37 people were agreed to be in dispute.<sup>52</sup>

In written submissions, Canada agreed to add an additional 13 people originally in dispute, bringing Canada's total proposed population count to 207.<sup>53</sup> These 13 people include 11 questionables from the DOFS population list,<sup>54</sup> and two people in the "other" category.<sup>55</sup> These two people are the wife of Joseph Boileau (ticket #4) and a child of Baptiste Metwawenin Sr (ticket #23). In addition, Canada has acknowledged that some of the 38 non-treaty women claimed by Sandy Bay in its written submissions may be counted for TLE. However, additional genealogical research and information are required.<sup>56</sup>

In its written submissions, Sandy Bay has proposed a population count of 235, while Canada has proposed a population count of 207.

Sandy Bay's proposed population number of 235 breaks down into the following:

DOFS population	183
Levasseur / Weegeegon families	17
Subtotal	200
<u>Arrears &amp; absentees</u>	<u>35</u>
Total TLE population	235

Sandy Bay rests its arguments on the arrears and absentees. In its written submissions, Sandy Bay argues that the following 23 people should be counted.<sup>57</sup>

52 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26).

53 Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 54.

54 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 17).

55 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

56 Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 71.

57 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

#10	Paul Desjarlais	7 people
#24	Baptiste Metwawenin Jr	3 people
#11	Joseph Desjarlais	3 people
#23	Baptiste Metwawenin Sr	10 people

During the course of the TLE working group, Sandy Bay and Canada agreed that 13 people on tickets #10, 24, and 11 would be counted.<sup>58</sup> Sandy Bay's written submissions do not acknowledge the prior agreement that was reached during the course of the working group, nor do the submissions challenge the conclusions that were reached by the working group. Canada has not reduced its proposed population count by these people, nor is Canada disputing the inclusion of these 13 people in the population count.

With respect to the 10 people on Baptiste Metwawenin Sr's ticket, nine were originally agreed to be counted, with one child in dispute during the course of the working group.<sup>59</sup> This one child was added to the count by Canada in its written submissions,<sup>60</sup> and the other nine are not in dispute.

In addition, Sandy Bay argues that the following six people should be counted:<sup>61</sup>

#56	Kahweetahpeness or Oosketoak	4 people
#139	Francis Desmarais	1 person
#40	Saswis	1 person

During the course of the working group, Sandy Bay agreed to exclude these people from the population count.<sup>62</sup> There is no reason given in the submissions for why Sandy Bay has changed its position from the time of the working group, nor is any additional evidence provided to show why these people should now be counted. The one person claimed by Sandy Bay on ticket #4, Joseph Boileau, was added to the count by Canada in its written submissions.<sup>63</sup>

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58 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 4).

59 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 4 and p. 20).

60 Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 53.

61 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

62 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 13).

Of the 35 people claimed as arrears and absentees in Sandy Bay's written submissions, the following five people remain.<sup>64</sup>

#17	Keewaytanook	1 person
#49	Wezaesaquet	4 people

Keewaytanook, #17, remains in dispute between the parties; this is consistent with the chart of questionables agreed to by the parties during the course of the working group.<sup>65</sup> Wezaesaquet, #49, does not appear in the working group. However, in written submissions<sup>66</sup> Canada argues that this person was also known as "Louison Lacoite." The working group parties agreed to exclude Louison Lacoite from the population count.<sup>67</sup>

Of the 35 people claimed as arrears and absentees by Sandy Bay in its written submissions, only one person, #17 Keewaytanook, is actually in dispute between the parties. In its written submissions, Sandy Bay also claimed an additional two people from ticket #20, Christine Matwawind.<sup>68</sup> This person was not found during the course of the working group; an analysis of the paylists on the record was required to determine where this person could be counted. A paylist analysis for this ticket was completed, and the analysis indicates that the two people on this ticket were likely included in the DOFS count.

The following seven people actually remain in dispute between Canada and Sandy Bay:

#17	Keewaytanook	1 person
#29½	Netawoosake	3 people
#12	Kahkeekayake	1 person
#53	Weescoup's son	1 person
#342	Gilbert Roulette	1 person

63 Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 54.

64 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 89.

65 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 20).

66 Written Submissions on Behalf of the Government of Canada, May 16, 2006, p. 64.

67 Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, p. 9).

68 Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 92.

In addition, Sandy Bay has claimed that some or all of the non-treaty women could be included in the population count; statements made by Jim Gallo form the basis of this argument.<sup>69</sup> During the course of the working group, Sandy Bay had agreed to exclude the 38 non-treaty women from the population count.<sup>70</sup> Sandy Bay did not provide an explanation in its written submissions for why it was changing its position from the working group, nor did it provide any additional evidence or research to show that some or all of these women could be counted.

In summary, the 35 people in Sandy Bay's written submissions include 22 people who were already included in the population count during the course of the working group, 10 people who were agreed to be excluded from the count during the working group, and two people who were added to the count in Canada's written submissions. After all of the accounting, one person of the 35 listed remains as actually in dispute between the parties; however, when the results of the working group are also taken into account, there are seven people in total actually in dispute between the parties.

Given the information on the record and noting that additional research is required to determine whether any of the 38 non-treaty women may be added, the panel has determined that the population count is 207. We cannot conclude from the evidence before us that the seven people who are in dispute should be included in Sandy Bay's population count. Since the panel has concluded that marshlands cannot be credited to TLE, the TLE calculation is:

Original reserve acreage	12,102
Belt deduction	5,291
Total land received	6,811
Population count for this amount $[(6,811 / 160) \times 5]$	= 213

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<sup>69</sup> Written Submissions on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006, p. 78.

<sup>70</sup> Sandy Bay First Nation Inquiry, Treaty Land Entitlement Analysis, October 28, 2004 (ICC Exhibit 26, pp. 7–8).

## PART V

### CONCLUSIONS AND RECOMMENDATION

This inquiry focuses on whether the Sandy Bay First Nation has an outstanding treaty land entitlement claim. Part of answering this question involves determining how much land was set aside for the First Nation in 1876.

In examining the 1913 Order in Council confirming the reserve, the panel concludes that 12,102 acres of dry land were set aside and that no marshland was included as part of the reserve. The panel further concludes that the 1930 Order in Council, which set aside six square miles of marshland for the Sandy Bay First Nation, was issued to clarify and confirm that this area was intended to be part of the reserve. Although the marshland was intended to be part of the reserve, the panel finds that the marshlands cannot be attributed to TLE since a fundamental goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have fulfilled this goal; therefore, even though marsh may be considered land, it cannot be credited toward TLE.

With respect to the issue of land improved and occupied prior to treaty, the panel concludes that the two farms which fell within reserve boundaries at the date of first survey were occupied by members of the Sandy Bay First Nation. As a result, the Band is entitled to count these two members as part of the date of first survey population; however, the lands of these two farms should not be credited toward TLE. In other words, lands occupied and improved prior to treaty should not diminish the Band's land entitlement.

As for the issue dealing with the population number for the Sandy Bay First Nation, which is used for calculating its TLE, the panel first had to determine where 17 people, claimed by both the Sandy Bay First Nation and the Long Plain First Nation, should be counted. Based on the evidence presented, the panel concludes that these 17 people must be deducted from Sandy Bay's TLE population count and should be counted with the Long Plain First Nation. In addition, with respect to Sandy Bay's TLE population count, the panel finds that additional research is required to determine whether any of the 38 non-




treaty women may be added to Sandy Bay's population count. Based on the evidence presented, the panel has determined that the population count is 207. As well, there are seven people whom the panel cannot conclude, based on the evidence, whether to add to Sandy Bay's population count.

**We therefore recommend that this claim not be accepted for negotiation.**

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FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis, C.M., Ad.E.  
Chief Commissioner (Chair)

Daniel J. Bellegarde  
Commissioner

Alan C. Holman  
Commissioner

Dated this 28<sup>th</sup> day of June, 2007



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# **APPENDIX A**

## **HISTORICAL BACKGROUND**

### **SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY**

**INDIAN CLAIMS COMMISSION**

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## INTRODUCTION

The reserve of the Sandy Bay First Nation (IR 5) is located on the southwest shore of Lake Manitoba. At the time of survey in 1876, many members of the First Nation were of Ojibway and French ancestry, having descended from French-Ojibway fur trade associations.<sup>1</sup>

The First Nation settled in the White Mud River region, close to the present-day reserve, and established a farming community there prior to treaty.<sup>2</sup> It was referred to as the “White Mud River Band of Indians” until 1876, when it changed its name to Sandy Bay.<sup>3</sup> “The Sandy Bay community was also comprised of a number of Ojibway families who, in former times, recognized the leadership of the Chiefs of the Portage Band.”<sup>4</sup> The Department of Indian Affairs<sup>5</sup> historically associated the Sandy Bay First Nation as being part of the Portage Band, as occurred at the negotiations of Treaty 1.

## NEGOTIATION OF TREATY 1, 1871<sup>6</sup>

When Canada acquired Rupert’s Land and the North-Western Territory in 1870, the dominion government assumed the obligation to reconcile the interests of the First Nations and Métis peoples who inhabited the region with the needs of the growing population of settlers.<sup>7</sup>

First Nations in Manitoba anticipated changes to their ways of life as a result of the 1870 transfer. They were familiar with American-style treaty-making as well as the Selkirk Treaty and were anxious to negotiate treaties as a means “to secure their lands and way of life as far as possible, payment for lands taken by the whites, and government aid in making the transition to a new way of life.”<sup>8</sup>

Meetings between Canada and First Nations to negotiate Treaty 1 were scheduled to begin on July 25, 1871, at Lower Fort Garry, Manitoba. Owing to

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1 Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 4).

2 Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 4).

3 Hereafter referred to as Sandy Bay First Nation or the First Nation but also referred to as White Mud River Band.

4 Roger Townshend, TARR Centre Manitoba, *Treaty Land Entitlement for the Sandy Bay Indian Band*, November 1982, 1 (ICC Exhibit 4, p. 5).

5 Hereafter referred to as “the department.”

6 Treaty 1 is also referred to as the Stone Fort Treaty.

7 D.J. Hall, “A Serene Atmosphere? Treaty 1 Revisited” (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 323 (ICC Exhibit 25, p. 3).

8 D.J. Hall, “A Serene Atmosphere? Treaty 1 Revisited” (1984) 4:2 *The Canadian Journal of Native Studies*, 321 at 323–25 (ICC Exhibit 25, pp. 3–5).

the late arrival of a number of First Nations, however, negotiations did not commence until the afternoon of July 27.<sup>9</sup>

Although the Sandy Bay First Nation was invited to participate in the treaty negotiations, it was not actively involved in the discussions, nor did any of its members sign the treaty. During the negotiations, the speaker for the Portage Band, Ay-ee-ta-pe-pe-tung, told the Treaty Commissioners that he had the authority of the “Chief” to negotiate on behalf of the White Mud River Indians.<sup>10</sup> It is unknown, however, whether the “Chief” referred to by Ay-ee-ta-pe-pe-tung was Yellow Quill, Chief of the Portage Band; or Na-naw-wach-ew-wa-capow, Chief of the Sandy Bay First Nation.

Confusion regarding the identity of chiefs at treaty negotiations had been encountered previously. In his report on the negotiations of Treaty 1, the Lieutenant Governor of Manitoba and the North-West Territories, Adams G. Archibald, referred to the signing of the Selkirk Treaty in 1817, at which

certain Indians signed as chiefs and representatives of their people. Some of these Indians now deny that these men ever were chiefs or had authority to sign the Treaty.

With a view therefore to avoid a recurrence of any such question, we asked the Indians, as a first step, to agree among themselves in selecting their Chiefs, and then to present them to us and have their names and authority recorded.<sup>11</sup>

Despite Archibald’s efforts, Ay-ee-ta-pe-pe-tung’s claim was refuted the following year in a letter written by Na-naw-wach-ew-wa-capow to the Indian Commissioner, in which the author indicated that no such authorization was given and that, in fact, he was Chief of the Sandy Bay First Nation during Treaty 1 negotiations.<sup>12</sup>

After much ceremony and preparation, formal negotiations began on July 27 and ran for eight days, concluding on August 3, 1871.<sup>13</sup> In his opening address to the assembled First Nations, Lieutenant Governor Archibald described, in general terms, what Canada would offer in exchange for the extinguishment of their aboriginal title to the lands in question.

9 Adams G. Archibald to Secretary of State for the Provinces, July 29, 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 14 (ICC Exhibit 1, p. 1).

10 Transcription of article entitled “Fourth Day’s Proceedings” from *The Manitoban*, August 12, 1871 (ICC Exhibit 1, p. 10).

11 Adams G. Archibald to Secretary of State for the Provinces, July 29, 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 14 (ICC Exhibit 1, p. 1).

12 Na-naw-wach-ew-wa-capow, Chief of the White Mud River Indians, to Wemyss Simpson, Indian Commissioner, July 23, 1872, Library and Archives Canada (hereafter LAC), RG 10, vol. 3555, file 11 (ICC Exhibit 1, p. 19).

13 *The Manitoban*, Archives of Manitoba, PAM, August 12, 1871 (ICC Exhibit 1, p. 11).



First. Your Great Mother, the Queen, wishes to do justice to all her children alike. She will deal fairly with those of the setting sun, just as she would with those of the rising sun. She wishes order and peace to reign through all her country, and while her arm is strong to punish the wicked man, her hand is also open to reward the good man every where in her Dominions.

Your Great Mother wishes the good of all races under her sway. She wishes her red children to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites, to till land and raise food, and store it up against a time of want. She thinks this would be the best thing for her red children to do, that it would make them safer from famine and distress, and make their homes more comfortable.

But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this.<sup>14</sup>

Lieutenant Governor Archibald went on to describe the concept of reserves to those present.

Your Great Mother therefore, will lay aside for you 'Lots' of land to be used by you and your children forever. She will not allow the white man to intrude upon these Lots. She will make rules to keep them for you, so that, as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or if he chooses, build his house and till his land.

These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family, where farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by tilling, you must not expect to have included in your reserve more of hay grounds than will be reasonably sufficient for your purposes in case you adopt the habits of farmers. The old settlers and the settlers that are coming in, must be dealt with on the principles of fairness and justice as well as yourselves. Your Great Mother knows no difference between any of her people. Another thing I want you to think over is this: in laying aside these reserves, and in everything else that the Queen shall do for you, you must understand that she can do for you no more than she has done for her red children in the East. If she were to do more for you, that would be unjust for them. She will not do less for you because you are all her children alike, and she must treat you all alike.

When you have made your Treaty you will still be free to hunt over much of the land included in the Treaty. ... Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But

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<sup>14</sup> Memorandum of an Address to the Indians by the Lieutenant Governor, Manitoba, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 16 (ICC Exhibit 16, p. 35).

when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.<sup>15</sup>

Lieutenant Governor Archibald later commented that the First Nations did not understand his comments regarding reserve creation and size. He reported:

A general acquiescence in the views laid down by Mr. Simpson and myself was expressed, but it was quite clear by the proceedings of to-day, that our views were imperfectly apprehended. When we met this morning, the Indians were invited to state their wishes as to the Reserves, they were to say how much they thought would be sufficient, and whether they wished them all in one or in several places.

In defining the limits of their reserves, so far as we could see, they wished to have about two-thirds of the Province. We heard them out, and then told them it was quite clear that they had entirely misunderstood the meaning and intention of Reserves. We explained the object of these ... and then told them it was of no use for them to entertain any such ideas, which were entirely out of the question. We told them that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many in number as their whole people there assembled, would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.

We told them that what we proposed to allow them, was an extent of one hundred and sixty acres for each family of five, or in that proportion; that they might have their land where they chose, not interfering with existing occupants; that we should allow an annuity of twelve dollars for every family of five, or in that proportion per head. We requested them to think over these propositions till Monday morning.<sup>16</sup>

Indian Commissioner Wemyss Simpson, in his report dated July 20, 1871, also noted this misunderstanding. He stated:

When the subject of Reserves came up, it was found that the Indians had misunderstood the object of these Reservations, for their demands in this respect were utterly out of the question. After a prolonged discussion with them, I consulted with the Lieutenant Governor, and determined to let them at once

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15 Memorandum of an Address to the Indians by the Lieutenant Governor, Manitoba, July [27], 1871, Canada, *Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 16–17 (ICC Exhibit 16, pp. 35–36).

16 Adams G. Archibald to Secretary of State, July 29, 1871, Canada, *Annual Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 15 (ICC Exhibit 1, p. 2).

understand the terms that I was prepared to offer, and I pointed out that the terms offered were those which would receive Her Majesty's consent. On further explanation of the subject, the Indians appeared to be satisfied, and willing to acquiesce in our arrangements as hereinafter mentioned, and having given them diagrams showing the size of the Lots they would individually become possessed of, and having informed them of the amount of their annuity, it was finally settled that they should meet on Monday, the 31st, and acquaint me with their decision.<sup>17</sup>

*The Manitoban* newspaper reported on all eight days of the negotiations. Included in the reports was a detailed account of the various First Nations' demands regarding the location and size of their reserves, made on July 29, 1871, including the apparent demand of the Sandy Bay First Nation. *The Manitoban* reported that Ay-ee-ta-pe-pe-tung stated:

I will tell you what I mean to reserve. When first you (His Excellency) began to travel (from Fort William), you saw something afar off, and this is the land you saw. At that time you thought I will have that some day or other; but behold you see before now the lawful owner of it. I understand you are going to buy this land from me. ...With regard to land within the Settlement, I have nothing to say, as I am on the outside. But you will see from this document that I have made a claim, (written document handed in); and I want to know what is to be allowed me. (This claim is about 160 miles long by 60 broad, and extends from the mouth of Tobacco Creek, to Medicine Lodge at Pembina, from there north-west to White Clair; thence down to Stony Creek, a branch of the White Mud River, at the upper crossing, and from thence North, to the Salt Springs, on Lake Winnepegosis). No chief appears to represent the Indians at White Mud River, ... teh [sic] chief gave me authority to mention to the Commissioner, for the White Mud River Indians, that they wished their reserve attached to ours. This is the reason our claim extends so far north as Salt Springs.<sup>18</sup>

Despite the First Nations' high initial expectations regarding the size of reserves, an understanding was eventually reached and Treaty 1 was concluded on August 3, 1871. In the treaty, a reserve was to be set aside for the use and benefit of the Portage Band according to a formula of 160 acres for each family of five (32 acres per person): the same formula presented to the First Nations at negotiations. Treaty 1 also promised an additional allotment of 25 square miles for the Portage Band, stating:

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17 Wemyss M. Simpson, Indian Commissioner, to Secretary of State, July 30, 1871, Canada, *Annual Report on the Indian Branch of the Department of the Secretary of State for the Provinces for the Year Ending June 30, 1871*, 18 (ICC Exhibit 1, p. 5).

18 Transcript of *The Manitoban*, PAM, August 12, 1871 (ICC Exhibit 1, p. 10).

... and for the use of the Indians of whom Oo-za-we-kwun [Yellow Quill] is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, reserving also a further tract enclosing said reserve, to comprise an equivalent to twenty-five square miles of equal breadth, to be laid out round the reserve, it being understood, however, that if, at the date of the execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves 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.<sup>19</sup>

#### REQUESTS FOR SURVEY

Treaty 1 also stipulated that the government was to conduct a census of the First Nations, as soon as possible, in order to calculate the land entitlement of each First Nation.<sup>20</sup> In a letter dated July 6, 1872, Lieutenant Governor Archibald noted that nothing had been done in that regard during the year which had passed since the conclusion of Treaty 1 and instructed that a census be taken without delay. He stated:

When the Treaty of 3rd August last was made, the Indians were promised, that a Census of their different Tribes should be taken with as little delay as possible, and that immediately afterwards the Reserves should be laid off allotting to each Soul Thirty-Two Acres. A year or nearly a year, has elapsed and not as [sic] step has been taken towards ascertaining the number of Indians, or laying off the Reserve.

...

I feel a delicacy in interfering with matters outside my Jurisdiction, but I cannot allow a feeling of that kind to prevent me doing what I can to put out sparks, which if neglected might produce a serious conflagration. It is quite time these questions should be settled. Instructions should be given to have the Indian Census taken and the Reserves laid off, with the least possible delay, so as to avoid the very serious complications which may arise if the work is not done.<sup>21</sup>

There is no documentary evidence in this inquiry that a census was ever undertaken in fulfillment of Lieutenant Governor Archibald's recommendation.

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19 Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1, p. 7).

20 Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1, p. 7).

21 Adams G. Archibald, Government House, to Secretary of State for the Provinces, July 6, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 15, 17).

On July 23, 1872, the Chief of the Sandy Bay First Nation, Na-naw-wach-ew-wa-capow, wrote to the Indian Commissioner requesting a reserve be surveyed for the use of his band, saying:

We, the inhabitance [sic] of the mouth of the River ask of you half mile up the river, from the mouth to the basse [sic] line, and from there to the big grass, for a free grant for us and our children, also north of the basse [sic] line to the mouth.

The reason we ask it of you is because we like the place having been born, and brought up in it so we would be much [one line of document illegible] ... you know that the whitemud [sic] Chief said nothing last summer about the lands, so that is the reason he speaks now, and wishes to get satisfaction from you as soon as possible.<sup>22</sup>

As mentioned previously, Na-naw-wach-ew-wa-capow also denied that Yellow Quill was given authority to represent Sandy Bay at Treaty 1 negotiations in 1871. He stated, “I should like now if you come and make at treaty with us.”<sup>23</sup> Subsequent correspondence indicates that Yellow Quill had been appointed Chief of the Portage Band by the Hudson’s Bay Company, rather than through traditional protocol. The Sandy Bay First Nation, therefore, did not acknowledge his authority as Chief.<sup>24</sup> Na-naw-wach-ew-wa-capow stated:

You have no dout [sic] seen me last summer if you remember you asked me who was my master, or Chief, I said no one. You asked me where I wished be, I said at White Mud is the place I wish to live, you also asked me my name, I told you Na-naw-wach-ew-wa-capow, Chief of the White Mud River.<sup>25</sup>

On August 8, 1872, Na-naw-wach-ew-wa-capow made a second request for a reserve to be surveyed for the Sandy Bay First Nation, asking for the establishment of a reserve “on the shore of Lake Manitoba so as to be separate from the Portage Indians.”<sup>26</sup>

By September 1872, Treaty 1 First Nations were beginning to speak of certain “outside promises” made at the negotiations which were not reflected in the text of the treaty (but were attached as a memorandum to Treaty 1) and

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22 Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 18–19).

23 Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, p. 19).

24 Alexander Morris, Lieutenant Governor, to Minister of the Interior, August 10, 1875, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 99).

25 Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Mr. Simpson, July 23, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, p. 19).

26 Na-naw-wach-ew-wa-capow, Chief of White Mud River Indians, to Indian Commissioner, August 8, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, p. 21).

were not being honoured by Canada. In a letter to the Secretary of State for the Provinces, the local Member of Parliament, John Schultz, reported:

You are of course aware that the Treaty relations entered into or said to have been entered into with the Indians between Lake Shebandowin and the Lake of the Woods have been of so unsatisfactory a nature that the bands on the line of route have this year totally refused to accept the Government payment. You have doubtless also been informed that one of the Bands in the Province, that at Portage La Prairie have likewise refused to take the Treaty money for this year.

...  
They say first, that at the Treaty of August 1871 certain promises were made to them by the Commissioner which have not since been fulfilled.

That these promises included Work oxen, Ploughs, Harrows, and other Agricultural implements, indispensable to a people who by the sale of their lands would be compelled to give up the Hunt and depend upon Agricultural pursuits.

That owing to the high price of merchandise here, the Three Dollars per head which they get is quite insufficient to supply even fishing twine for their nets and is not even equivalent to the loss of time entailed on those living at a distance in coming to the payments.

That the Treaty now in print is not as they understood it at the time when it was signed in August 1871.

That it was stated to them that no Indians in the other provinces ever received more than Three dollars per head for their lands and that they have now reason to believe that the Government has before paid as high as Four dollars per head.

That the Chief, Councillors and Head men alike only get three dollars per head here whereas in other parts of Canada the Chief, Councillors, &c receive a considerable amount more than the ordinary members of the tribe.

...  
You have then a wide spread dissatisfaction among the Indians of the province[. T]his feeling is more likely to increase than decrease and is certain to influence the Plain Crees and other tribes west of us and may possibly lead to serious complications if the matter is not at once dealt with by the Government.<sup>27</sup>

By 1873, no reserves had been surveyed for Treaty 1 First Nations. In a letter dated January 19, 1873, it was reported that Lieutenant Governor Alexander Morris (Archibald's successor) had recommended that reserves in Treaty 1 "should be surveyed with as little delay as possible."<sup>28</sup>

Correspondence indicates that preliminary steps were taken in August 1873 to survey the reserve for the Portage Band.<sup>29</sup> The Sandy Bay First Nation, however, considered itself separate from the Portage Band and had no interest

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27 John Schultz to Secretary of State for the Provinces, September 23, 1872, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 22-25).

28 Department of Secretary for the Provinces, Indian Office, to I.C. Aikin, Secretary of State of Canada, LAC, RG 10, vol. 3555, file 7, January 19, 1873 (ICC Exhibit 1, p. 27).

in this reserve. On October 22, 1873, Indian Agent Molyneux St. John reported that the Indians of the Portage Band

are divided amongst themselves on the subject of a Chief. A large party of them have settled near White Mud River, and allege that they were not represented at the time of the Treaty; that they have their own Chief, their own habitations and lands on the borders of the lake, and they persistently refuse to have anything in common with Orzahwaguan's Band. Their names are on the same paysheets, but that, they say, is our doing, not their own. ...

In the case of the White Mud River Indians, I have told them that men occupying houses would not be ejected, and that the Government would be informed of their position with a view to protecting them in the occupancy of such lands as they really possess.<sup>30</sup>

The matter of the “outside promises” remained a significant issue between First Nations and Canada from 1873 until the spring of 1875, when the Governor General in Council formally recognized the “outside promises” made at Treaty 1 by means of an Order in Council dated April 30, 1875.<sup>31</sup>

By the summer of 1875, reserve lands had still not been set aside for the use of the Sandy Bay First Nation, and the government continued to associate it with the Portage Band. On August 10, 1875, Lieutenant Governor Morris advised the Minister of the Interior that the Sandy Bay First Nation (or White Mud Indians), “who live there constantly, should be recognized as a distinct Band and should elect a Chief.”<sup>32</sup> In a letter written three days later, Indian Commissioner J.A.N. Provencher reported to the Minister of the Interior following his visit to the Sandy Bay First Nation:

When I had occasion of visiting the fraction of Yellow Quill's Band at White Mud River near Lake Manitoba, they insisted once more for having a Reserve granted to them in that locality.

I had already the honor to submit to your consideration the fact that these Indians are very quiet industrious altogether moved by the desire of improving

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29 See Joseph Howe, Indian Branch, to Molyneux St. John, April 3, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 30–31); W. Spragge, Deputy Superintendent of Indian Affairs, Indian Branch, Department of the Interior, to [J.A.N. Provencher, Indian Commissioner, July 18, 1873, LAC, RG 10, vol. 3603, file 2120 (ICC Exhibit 1, pp. 32–35); Lindsay Russell, Assistant Surveyor General, Dominion Lands Office, to J.A.N. Provencher, Indian Commissioner, August 13, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 36–37); J.S. Dennis, Dominion Lands Office, Department of the Interior, to J.A.N. Provencher, Indian Commissioner, November 3, 1873, LAC, RG 10, vol. 3555, file 11 (ICC Exhibit 1, pp. 42–44).

30 Molyneux St. John, Indian Agent, to J.A.[N.] Provencher, Indian Commissioner, October 22, 1873, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1874*, part 2, 59 (ICC Exhibit 1, p. 38).

31 Order in Council, April 30, 1875, LAC, RG 10, vol. 3571, file 124, part 2 (ICC Exhibit 1, pp. 95–97).

32 Alexander Morris, Lieutenant Governor, to Minister of the Interior, August 10, 1875, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 110).

their position and providing for the future of their children, they have already a dozen of houses built some since few years and would rely altogether to Farming if they had the means of doing it and if they were sure they would never be troubled in the possession of their property.

I have already given them the assurance, that they would be allowed to remain on their Lots as long as they will cultivate them, but I have reason to believe that a far greater encouragement would be given to them if that land was granted as a Reserve.

...

By the spirit of the opposition and the difference in the general way of living it is not likely that this fraction of the Indians will ever consent to join the main body of Yellow Quill; they would prefer to leave the Province altogether, and resume their hunting expeditions farther in the North West.<sup>33</sup>

The Sandy Bay First Nation remained adamant in its request to be a band independent of the Portage Band. In October 1875, Indian Commissioner Provencher reported to the Superintendent General of Indian Affairs that the Sandy Bay First Nation

have refused to submit to their Chief, and ... have persisted in requesting the Government to acknowledge them as a separate Band from that with which they have been associated in the Treaty.

For several years past, these Indians, to the number of 180, have devoted themselves to farming, ...

The locality where they wish to remain, and where they have settled, and on which they have already built about twelve houses, is situate to the south-west of Lake Manitoba. The locality suits them, because it gives them the arable ground they need and a good hunting and fishing country.

....

Some few other families already own eight houses to the south-east of the Portage ... They also ask to be separated from the party having Ozooquan the present Chief.<sup>34</sup>

Despite these recommendations, Minister of the Interior David Laird was not convinced that the Sandy Bay First Nation should constitute a separate band. In a letter to Lieutenant Governor Morris dated April 21, 1876, Minister Laird wrote:

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33 J.A.N. Provencher, Indian Commissioner, to Minister of the Interior, August 13, 1875, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 112-14).

34 J.A.N. Provencher, Indian Commissioner, to Superintendent General of Indian Affairs, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1876*, 41 (ICC Exhibit 1, p. 125).



I should not feel disposed, with the information at present before me to recommend that they should be recognized as a distinct band with a Reserve and Chief of their own. The number of these Indians seems hardly to warrant their claiming a separate Reserve and Chief and there is certainly no land in the neighborhood where they are now living which would be available as a reserve for them. It seems very desirable that the White Mud River Indians should attach themselves either to Yellow Quill or Short Bear and share in the Reserve assigned to such portion of the Band. Any of these Indians, however, who are now settled in the neighborhood of White Mud River and desire to remain there will not be disturbed in their holdings unless indeed the land so held has already been granted to other parties by the Land Branch of this Department in ignorance of the fact of its being occupied by Indians. In no case, however, are Indians to consider themselves at liberty to settle on any fresh lands in that neighborhood.<sup>35</sup>

Nevertheless, Laird left “the matter of the White Mud River Indians” to Lieutenant Governor Morris’ “discretion, having no doubt that ... [he] will make with them the most advantageous arrangements which the case admits.”<sup>36</sup>

In June 1876, Lieutenant Governor Morris visited the Portage Band with a mandate to discuss the implementation of the “outside promises” and the leadership divisions among the First Nations, and to settle reserve issues inhibiting the settlement of the First Nations on reserves. Morris wrote that on the first day of discussion, the Sandy Bay First Nation had informed him

that they were Christians and had always lived at the White Mud River; that they did not wish to join either Yellow Quill’s or Short Bear’s reserve, but desired a reserve at the Big Point. I told them they could not have it there, as there were settlers, and the Government wished them to join one of the other bands, and explained to them that their holdings would be respected, except where inadvertently sold. ... Yellow Quill said his councillors were willing that the other Indians should have a separate reserve provided they retained the belt of twenty-five miles, in addition to their proportion of the reserve. I informed them this could not be done; the reserve belongs to all.<sup>37</sup>

Morris wrote that on the second day

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35 David Laird, Minister of the Interior, to Lieutenant Governor of Manitoba & the N.W.T., April 21, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 128–29).

36 David Laird, Minister of the Interior, to Lieutenant Governor of Manitoba & the N.W.T., April 21, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 129).

37 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 139–40 (ICC Exhibit 1, pp. 134–35).

Yellow Quill told me that his band were now willing to separate from the others, and wished to select a reserve higher up the river. I informed them that I would accede to their request, but that they must do it at once, and on the approval thereof by the Privy Council it would be laid off. Short Bear's band still desired a reserve at the Long Plain, to which I assented. The White Mud River Indians asked for a separate reserve where they could farm, and I informed them that under the discretionary powers I possessed I would have a reserve selected for them, giving them their proportion of the original reserve. ... I then signed the agreement, and called upon Yellow Quill to do so. He came forward cheerfully and said he would sign it, because he now understood what he never did before, viz., what was agreed to at the Stone Fort. ... I then called on the White Mud River Indians to select a Chief and one Councilor, being under the impression at the time that they were the least numerous band, which, however, has turned out not to be the case, which they did at once.<sup>38</sup>

On June 20, 1876, an agreement was reached between Canada and the First Nations of Treaty 1 (and Treaty 2) supplementing Treaty No 1 (and Treaty 2). This agreement dealt with the implementation of the “outside promises” and the division of the Portage Band into three separate bands: Short Bear (later Long Plain), Yellow Quill, and Sandy Bay (still referred to as White Mud River), with separate reserves for each.<sup>39</sup> Regarding Sandy Bay, the agreement read:

And it is further agreed that the Indians residing heretofore, and now in the neighbourhood of the White Mud River, shall be recognized as a distinct Band, and Na-wa-che-way-ka-pow shall be accepted as their Chief, that as some of them have settled there and desire to remain, those of them who have substantial improvements shall be protected in their holdings, except in cases where the land so occupied has already been sold or granted by the Department of the Interior to other parties, but the said Indians will not be allowed to occupy or take up any other lands, than those already *bona fide* occupied by each of them.<sup>40</sup>

#### PRIOR HOLDINGS OF SANDY BAY MEMBERS

Following the signing of the agreement dated June 20, 1876, Lieutenant Governor Morris instructed Dominion Land Surveyor J. Lestock Reid to visit the Sandy Bay First Nation to record all individuals with prior holdings and related improvements to the land.<sup>41</sup> On July 12, 1876, Reid reported that, in

38 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 140–41 (ICC Exhibit 1, pp. 135–36).

39 Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii–xxix (ICC Exhibit 1, pp. 131–32).

40 Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii (ICC Exhibit 1, p. 131).

the company of the Chief and councillors of the Sandy Bay First Nation, he had located five prior holdings, belonging to:

1. George Spence S.E. 1/4 section, of section 33, Township 18, range 9, west. A house about 30 feet by 20 feet, stable, nine head of cattle, four horses, and has lived here about two years.
2. Robert Sutherland, N.E. 1/4 section of section 33, Township 18, range 9, west. A small house; has lived here about two years.
3. Matawawawin, N.W. 1/4 section of section 26, Township 17, range 9, west. A small house, stable, and has fenced about an acre in garden; has lived here eight years.
4. Joseph DeJaislais, N.W. 1/4 section of section 23, Township 17, range 9, west. Owing to not being able to find the posts, the position of these buildings are not accurate; two small houses, stable, two cows, three calves and three horses; has lived here about fifteen years.
5. Battiste Spence, N.W. 1/4 section of section 2, Township 17, range 9, west. Has four horses, built his house last fall.<sup>42</sup>

Later, in 1877, Indian Agent Francis Ogletree reported that the First Nation had made further improvements after Surveyor Reid's visit. He stated:

[t]hat the Reserve was pointed out to them by the Surveyor some months previous to being surveyed and after they had some nine houses built the Surveyor came to survey the Reserve, and told them he had made a mistake that where he pointed out to them areas on the Danish Reserve consequently he had to move further north which leaves those nine houses outside altogether which they complain of and which they ask to be included in the Reserve.<sup>43</sup>

It was not uncommon for First Nations people in Treaties 1 and 2 to have occupied and improved lands prior to entering into treaty, either within or beyond the boundaries of their eventual reserves. The government became aware of these prior holdings during pre-treaty meetings with First Nations.<sup>44</sup> Reports of the negotiations suggest that the First Nations were concerned that they would lose their prior holdings if they took treaty.<sup>45</sup> A memorandum

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41 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 8, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 141 (ICC Exhibit 1, p. 136).

42 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx (ICC Exhibit 1, p. 138).

43 Francis Ogletree, Indian Agent, to J.A.N. Provencher, Superintendent of Indian Affairs, August 20, 1877, LAC, RG 10, vol. 3556, file 24 (ICC Exhibit 1, p. 158).

44 Wemyss Simpson, Indian Commissioner, to Secretary of State, November 3, 1871, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and The North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 38 (ICC Exhibit 12, p. 69).

45 Author unknown, to W. Simpson, July 26, 1873, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 21).

written by one of Canada's representatives at Treaty 1 recorded the concerns of the First Nations:

I remember the Indians asking the question whether the amount of land set apart for each family; that is 160 acres for every family of five; was meant to include the land already occupied by them.

The answer was that the allotment now provided for was irrespective of and in addition to their holdings ...<sup>46</sup>

Historical documents indicate that, at the negotiation of Treaty 1, "an agreement was concluded that properties occupied and cultivated before the Treaty were to be held exclusive of and in addition to the per capita Treaty entitlement."<sup>47</sup> Commissioner Wemyss Simpson reported on the case of Henry Prince's Band of Treaty 1. This Band was known to have prior holdings at the time of treaty and "it was agreed that such plots should be considered as their own property."<sup>48</sup> Numerous historical documents support the position that such prior land holdings were to be held in addition to reserve land granted under treaty.<sup>49</sup> The right of First Nations' members to dispose of those holdings, however, was the subject of some controversy.

#### **SURVEY OF SANDY BAY INDIAN RESERVE 5**

On July 12, 1876, Dominion Land Surveyor J. Lestock Reid reported that

It seems to be the unanimous wish of this Band, to have their Reserve located on the west shore of Lake Manitoba, in Township 18, range 9, west, if such should meet the approval of the Government. The whole of this tract of country (township 18, range 9, west) consists apparently of large meadows lying low and wet, abundantly supplied with hay, with an occasional small ridge intervening, rising some two or three feet above the meadow lands, and though the country with the exception of those ridges is unfit for actual tillage, still it is one of the best, if not the best stock farming district in the Province.

The Indians say they will have plenty of fish from the lake, a good game country, abundance of hay for their stock, and sufficient land to cultivate. I find from the Land Office Register, that there is one entry, east 1/2 section 21, township 18, range 9, west, being a homestead and preemption.<sup>50</sup>

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<sup>46</sup> Unknown author to unknown recipient, c. 1875, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, pp. 45-46).

<sup>47</sup> Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, p. 2 (ICC Exhibit 12, p. 3).

<sup>48</sup> Wemyss Simpson to E.A. Meredith, Deputy of the Minister of the Interior, February 15, 1875, LAC, RG 10, vol. 3614, file 4311 (ICC Exhibit 30, p. 23).

<sup>49</sup> See Jim Gallo, TARR Centre Manitoba, *Properties Occupied and Cultivated Prior to Treaty*, September 28, 1978, pp. 2-4 (ICC Exhibit 12, pp. 3-5).

On July 14, 1876, Alexander Morris recommended to the Minister of the Interior that the reserve and the prior holdings as described above be set aside for the use and benefit of the Sandy Bay First Nation.<sup>51</sup> Morris forwarded a copy of Surveyor Reid's report, which included

'A' of his examination of the improvements of the Indians belonging to the White Mud River Band, and  
'B' intimating the place where these Indians desire to have a Reserve allotted to them.

Morris wrote:

I see no reason why their desire should not be complied with, and if, on receipt, of this, you concur with me, I would be obliged by your telegraphing me, your approval thereof, in order, that Mr. Reid may lay off the Reserve.

I ask this, in view, of my contemplated speedy and protracted absence in the service of the Privy Council.<sup>52</sup>

In the fall of 1876, Reid visited the area and recommended that all of fractional township 18, range 9, west of the principal meridian, totalling 12,102 acres, be set aside as a reserve for the Sandy Bay First Nation.<sup>53</sup> Reid's report to Lieutenant Governor Morris, dated November 30, 1876, states:

On my arrival amongst the White Mud Band of Indians I found their Chief was away but I pointed out to Baptiste Spence, one of the Councillors, the boundaries of the Reserve being the whole of the fractional Township 18 Range 9 West on the West shore of Lake Manitoba containing twelve thousand one hundred and two acres (12,102) acres being nearly nine hundred acres over and above what they are actually entitled to but owing to a large per centage of the front of the Reserve along the Lake Shore being muskeg and marsh I would suggest that the whole Township be included in the Reserve.<sup>54</sup>

Reid also mentioned that the First Nation had put up further improvements on the land.

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50 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor, July 12, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxx–xxxii (ICC Exhibit 1, pp. 138–39).

51 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 140).

52 Alexander Morris, Lieutenant Governor, to Minister of the Interior, July 14, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 140–41).

53 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, p. 152–54).

54 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 152–53).

I might here mention that since my visit to this locality in the Spring under instructions from you I found that some ten or twelve houses had been put up within the Reserve and I have much pleasure in reporting an apparent desire on the part of these Indians towards cultivating the lands and general improvements.<sup>55</sup>

In later correspondence addressed to the Surveyor General, Reid detailed the reserve land calculation he used in surveying the Sandy Bay Reserve.

I found this Band (White Mud River) to number one hundred and eighty three (183) persons being almost (37) thirty seven families of five each and they being entitled to the same grants as Yellow Quills Band would have a total area of eleven thousand two hundred and eleven (11211 acres) acres but as in the case of Yellow Quills Reserve there is a large portion of the front on the Lake drowned land I would therefore propose that the whole of the fractional Township 18 Range 9 West containing twelve thousand one hundred and two acres be set apart for this Band the White Mud River Indians.<sup>56</sup>

It should be noted that the 1876 treaty annuity payroll for the White Mud River Band, dated June 21, 1876, shows a total of 188 people belonging to 39 families as having received payment of treaty annuities with the Band at that time.<sup>57</sup>

Contrary to the common Indian reserve survey practices of the time, Dominion Land Surveyor Reid did not actually survey the Sandy Bay Reserve.<sup>58</sup> Fractional township 18, range 9, west of the principal meridian was surveyed and subdivided in August and September 1873 by Dominion Land Surveyor C.P. Brown (and confirmed in 1874) and originally set aside for the Sioux.<sup>59</sup> “Brown’s survey of these lands ... was not conducted with a view to the land being set aside as an Indian Reserve. Rather, it was carried out as part of the Dominion Land surveys in Manitoba.”<sup>60</sup> Dominion Land

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55 J. Lestock Reid, Dominion Land Surveyor, to Alexander Morris, Lieutenant Governor of Manitoba, November 30, 1876, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 153–54).

56 Extract of report, J. Lestock Reid, Dominion Land Surveyor, c. 1876, attached to W.A. Austin, Department of Indian Affairs, to Deputy Minister, March 1, 1888, LAC, RG 10, vol. 3624, file 5217-1 (ICC Exhibit 1, pp. 244–45).

57 Treaty Annuity Paylist, White Mud River Band, June 21, 1876, LAC, RG 10, vol. 9531, pp. 158–59 (ICC Exhibit 18b, pp. 89–90).

58 See Secretary of State for Canada, “Manual shewing [sic] the System of Survey adopted for the Public Lands of Canada in Manitoba and the North-West Territories, with Instructions to Surveyors, Illustrated by Diagrams,” First Edition, 30111 CLSR, 1871 (ICC Exhibit 14); Jim Gallo, Manager, Treaty Land Entitlement and Claims, INAC Manitoba, to Chris Angeconeb, Associate Legal Counsel, ICC, memorandum concerning Instructions to Surveyors, October 31, 2000 (ICC Exhibit 19).

59 See Plan 782, “Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.),” surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August–September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).

60 *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, pp. 10–11).

Surveyor Reid merely visited the area and showed Councillor Baptiste Spence the boundaries of the reserve, using Dominion Land Surveyor Brown's 1873 survey and plan of fractional township 18, range 9, west of the principal meridian.<sup>61</sup>

Township 18 is referred to as a fractional township because "the eastern edge of the land in the township ... fronts on Lake Manitoba. There is a considerable extent of marsh along the shore, rendering it difficult to survey that portion of the township, let alone accurately define the water's edge."<sup>62</sup>

The process of confirming the Sandy Bay Reserve by Order in Council was laden with complications. Once lands were set apart as reserves for the Sandy Bay, Long Plain, and Short Bear First Nations, questions were raised by Ottawa as to whether the Hudson's Bay Company had any rights to the lands.<sup>63</sup> The historical documentation of this inquiry suggests that the Minister of the Interior was hesitant to officially confirm these reserves until it was determined to whom the lands in question were vested.

The documentary record also indicates that Lieutenant Governor Morris strongly disagreed with the Minister's decision to delay the confirmation of Sandy Bay, Long Plain, and Short Bear Reserves, as well as with the suggestion that the land might not be available for the First Nations. In a letter to the Minister of the Interior dated February 19, 1877, Morris stated:

I presume you are unaware [sic] that on the Short Bear and White Mud Reserves, the Indians have erected Houses and commenced farms. I have therefore to point out to you that their eviction will be a necessary consequence of your present decision.

This matter is so important and your action will have so disturbing an effect on the Indian mind; regarding it, as they will do, as a breach of Treaty obligations, that I have deemed it my duty, to call the attention of the Privy Council thereto.<sup>64</sup>

On the same day, Lieutenant Governor Morris drafted a letter to the Secretary of State, informing the Privy Council of the situation. Morris stated:

I am compelled by the gravity of the circumstances, as I view them, to call the attention of the Privy Council, to a serious difference of opinion which has arisen

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61 *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 13).

62 *Sandy Bay Treaty Land Entitlement Claim Additional Research Final Report*, Public History Inc., May 23, 2004 (ICC Exhibit 16, p. 11). It should be noted that Surveyor Brown's survey and field notes identify a segmented traverse line along the western edge of what he identified as marsh.

63 Alexander Morris, Lieutenant Governor, to Minister of the Interior, January 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 347–60).

64 Alexander Morris, Lieutenant Governor, to Minister of the Interior, February 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 367–68).

between the Minister of the Interior and myself, with regard to certain Indian Reserves, in the Province of Manitoba, and which I regard as no mere Departmental matter, but as seriously affecting the relations of the Government towards a large and influential Band of Saulteaux Indians, who maintain the closest and most intimate relations with the Indians of the Western Plains.

When the Treaty at the Stone Fort was made .... a Reserve was stipulated to be given to the Saulteaux Indians of the Portage, 'about twenty miles above the Portage.' Disputes arose as to the extent of Reserve. One was surveyed by the Government but the Indians refused to accept it. I was requested by the Honourable Mr. Laird, Minister of the Interior to endeavour to procure the settlement with this Band, of the 'outside promises' and the adjustment of the Reserve question.

I succeeded after much difficulty and two visits to them, in coming to an agreement with them, which was duly forwarded to the Minister of the Interior.

The band was really composed of three separate Bands.

By the instructions of the Minister, a Surveyor was placed at my disposal to accompany me, to survey the Reserves to be selected. These have been selected and surveyed, the locality of two of them having been sanctioned by the Minister in advance, subject of course to the approval of Council.

The Indians are living on them and two of the Bands have built houses and made a good commencement of a settlement.

The present Minister of the Interior declines 'to enter into any inquiry as to the origin of the negotiations with these Indians' and refuses to confirm the Reserves, on the ground that being in surveyed territory, there are School and Hudson's Bay Company's lands included in them, and that Indian Reserves should be in unsurveyed territory.

...

The question is very simple – By the Stone Fort Treaty, these Indians extinguished their title to the lands covered thereby, and were promised in return a Reserve about twenty miles from the Portage, which is now a very large Canadian settlement. Till now, no understanding could be arrived at with them, as to the extent and localities of the land to be set apart for them. ...

...

... As the good faith of the Crown is involved, I have been compelled to address you and can only express my earnest trust, that the Privy Council will consider my representations, which a full knowledge of the whole circumstances, and a positive conviction that the action of the Minister of the Interior will have consequences among the Indian tribes of the gravest character has compelled me to make.<sup>65</sup>  
[Emphasis in the original]

The Minister of the Interior responded to the Lieutenant Governor on July 6, 1877, stating:

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65 Alexander Morris, Lieutenant Governor, to Secretary of State, February 19, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 369–75).



2. I do not deem it necessary to enter into any inquiry as to the origin of the negociations [sic] with these Indians, as in my opinion the Government have not the power to confirm these reserves as selected. ...

...

6. Under the provisions of this section [*Dominion Lands Act*, sections 6–21 inclusive], the lands which you have undertaken to convert into an Indian Reserve are not such lands as the law contemplates being retained for that purpose, but surveyed lands set out for settlement, in which the rights of the Hudson's Bay Company have become vested, and in which, by the operation of the Act of Parliament in that behalf, they have already acquired the title in fee simple. It is too obvious, therefore, to require discussion that neither this Department nor Parliament itself, would have any right to confiscate these lands, which have become private property, and convert them into an Indian Reserve, without the consent of the Hudson's Bay Company ...

...

10. It is not necessary that I should consider whether these points escaped the observation of my predecessor and yourself, but it is clear to my mind that it is not well to undertake in any case to convert lands set out for settlement into Indian Reserves. In every instance, such reserves should be selected from the unsurveyed lands of the Dominion, which are so very extensive as to furnish the Indians sufficient room for choice.

11. I regret that I am not able to confirm the reservations which you have been at so much trouble to make [illegible words].<sup>66</sup>

Despite the disagreement among officials at higher levels, work at the local level continued. On August 20, 1877, Indian Agent Ogletree reported that the members of the Sandy Bay First Nation “were unanimous in stating that it was their intention to remain on their reserve and to go on with their improvements.”<sup>67</sup>

By 1879, the Sandy Bay Reserve was still not confirmed. In January of that year, E. McColl, the Inspector of Indian Agencies (hereafter referred to as “Inspector”), reported that the Sandy Bay First Nation had requested “their Reserve extend south about two miles in order to include houses built by them previous to its survey.”<sup>68</sup>

In April 1879, Indian Agent Ogletree investigated the request. He reported that if the reserve was to extend two miles to the south to include a house belonging to a man named Williams, “the same amount of land would be taken from some other part of the Reserve” and “it would have to be taken

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<sup>66</sup> Department of the Interior, to Lieutenant Governor of Manitoba, July 6, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, pp. 384–90).

<sup>67</sup> Francis Ogletree, Indian Agent, to J.A.N. Provencher, Superintendent of Indian Affairs, Manitoba, August 20, 1877, LAC, RG 10, vol. 3642, file 5217-1 (ICC Exhibit 1, p. 158).

<sup>68</sup> Extract of inspection report, E. McColl, Inspector of Indian Agencies, to unknown recipient, 1879, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 160).

from off the West-side” since the First Nation also had houses on the northern boundary of the reserve.<sup>69</sup>

While waiting for the Department of the Interior to decide whether to confirm its reserve and/or to extend it two miles to the south, the Sandy Bay First Nation had the more immediate issue of flooding to deal with.

In September 1879, Indian Agent Ogletree reported:

last year their crops were very much injured by the wet season ... Their reserve is much better suited for stock raising and fishing purposes, they are well satisfied with their reserve, and were the seasons as dry now as formerly they would be able to farm more extensively, and many of them would in a few years be self-supporting.<sup>70</sup>

In 1881, Indian Agent Ogletree reported that the water level of Lake Manitoba had risen “within the past three or four years some four or five feet thereby inundating the whole country for miles around with the exceptions of here and there, a small patch of ground scarcely large enough to build a house on.”<sup>71</sup>

Correspondence concerning whether the Sandy Bay Reserve should be extended two miles to the south continued in 1880, between the Surveyor General and Inspector McColl. A memorandum dated February 3, 1880, summarized an exchange of comments between the Surveyor General and Inspector McColl regarding the proposal “[t]hat the Sandy Bar [sic] Reserve be extended about 2 miles further south. Township 18 in range 9 W.”<sup>72</sup> According to the memorandum, the Surveyor General remarked “[t]heir Reserve contains 891 acres more than they are entitled to. If it be extended 2 miles further south an equal quantity should be taken from the north end. This extension would include a log house and improvements by one Williams.”<sup>73</sup> Inspector McColl, in turn, was said to have replied “Agent Ogletree [sic] says could not cut off the north end as the Indians have their houses there. Cut off the west end. No entry made for any lands in proposed

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69 Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, April 21, 1879, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 162).

70 Francis Ogletree, Indian Agent, to Superintendent General of Indian Affairs, September 15, 1879, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879*, 69 (ICC Exhibit 1, p. 164).

71 Francis Ogletree, Indian Agent, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 10, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, pt. 1, 62 (ICC Exhibit 1, p. 195).

72 Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 169).

73 Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 169).

extension in Mr. Mills books.”<sup>74</sup> Reportedly, the Surveyor General then remarked:

Reserve at present given them has twice the frontage on lake than it has in depth. To further increase the frontage and lessen depth correspondingly would be to grant a most undue extent of front on lake in proportion to area. Indian Agent does not give information re Williams from knowledge on ground but merely proves no entry in Land Office. Williams may be white squatter, he was there previous to Surveys.

Can suggest no objection to their obtaining permits to cut wood for their own use but they have already received full quantity of land therefore if the land as well as wood were given them a similar quantity should be taken from present reserve.<sup>75</sup>

#### QUALITY-OF-LAND ISSUES, 1877–1883

In September 1880, 14 members of the Sandy Bay First Nation wrote to the Lieutenant Governor of Manitoba, Joseph Cauchon, requesting assistance with the flooding that had been plaguing their Reserve. They stated:

During the last two or three years we have reaped little or no benefit from our crops.

Our Reserve is generally overflowed. It is impossible for us to continue in this place.

We will not be able to sow next Spring.”<sup>76</sup>

Cauchon forwarded their request to the Minister of the Interior on October 18, 1880.<sup>77</sup> On October 29, 1880, Deputy Superintendent General of Indian Affairs L. Vankoughnet responded to Lieutenant Governor Cauchon, stating that “enquiry will be made into this matter and if the complaints of the Indians are found to be well founded such remedial measures as may be possible will be adopted.”<sup>78</sup>

In response to the First Nation’s request, Vankoughnet instructed the Acting Indian Superintendent at Winnipeg to consult with Indian Commissioner Edgar Dewdney “on the advisability of endeavouring to obtain some dry land in the vicinity of their Reserve for the purposes of

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74 Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 170).

75 Extract from memo, Surveyor General to unknown recipient, February 3, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 170).

76 Jean Baptiste Spence & other Indians of Sandy Bay Reserve, to Lieutenant Governor of Manitoba, September 24, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 171).

77 Joseph Cauchon to Minister of the Interior, October 18, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 174).

78 LVK [L. Vankoughnet] to Joseph Cauchon, Lieutenant Governor of Manitoba, October 29, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 175).

agriculture.”<sup>79</sup> On November 5, 1880, Vankoughnet asked the Surveyor General, Lindsay Russell, for his suggestion on how it might be possible to accommodate the First Nation’s request to have its reserve extended two miles southward in order to obtain more arable land.<sup>80</sup>

In response, Surveyor General Russell suggested:

That all those Indians of the band, unable to find land within the reserve suitable for cultivation, and at the same time prepared to immediately begin cultivation, be permitted to enter and take possession of by residence and cultivation, one quarter section each adjoining or as near to the Southern boundary of the present reserve as they may be able to find it. That for each quarter section so taken to the Southward by the band, a quarter section be taken off the rear of the reserve as it was originally granted, or if the Indians prefer off the north end of the Reserve, the equivalents of the new selections made to be thus deducted in a continuous block from some one side or other of the Reserve, as the Indians may indicate and may be approved and arranged with them.<sup>81</sup>

On November 23, 1880, the department advised Acting Indian Superintendent James F. Graham that it had accepted Surveyor General Russell’s proposal and instructed him that Indian Agent Ogletree should visit the reserve before the following spring, locate the First Nation members who wished to obtain farmland in the manner suggested by Russell, and report his findings to the department.<sup>82</sup>

Two days later, Inspector McColl wrote in his annual report that, owing to the extensive flooding, the First Nation now wished the western boundary of its reserve extended to acquire more arable land, instead of the southern boundary.<sup>83</sup> McColl recommended that this request “should be granted, in order that the requisite agricultural facilities be afforded them. This extension, while apparently increasing the acreage, really gives them no greater quantity of land than they are entitled to under treaty stipulations.”<sup>84</sup>

79 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to James F. Graham, Acting Indian Superintendent, October 12, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 173).

80 L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, to Lindsay Russell, Surveyor General, November 5, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 177–78).

81 Lindsay Russell, Surveyor General, Dominion Lands Office, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, November 9, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 180–81).

82 Author unknown, to James F. Graham, Acting Indian Superintendent, November 23, 1880, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 182).

83 E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, November 25, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 57 (ICC Exhibit 1, p. 186).

84 E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, November 25, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 57 (ICC Exhibit 1, p. 186).

In February 1881, Indian Agent Ogletree was instructed to carry out the proposal outlined in Surveyor General Russell's letter dated November 9, 1880, in accordance with the instructions given to Acting Indian Superintendent Graham in the letter dated November 23, 1880.<sup>85</sup> In a letter to Indian Superintendent Graham dated February 28, 1881, Ogletree stated:

in reference to the Surveyor's Generals [sic] letter recommending the location of Land on the South side of the Reserve, that all the Land for miles on the South is as wet as the Reserve itself, and to get dry land it will be necessary to go West, there may be Land enough in the west side of the Reserve fit for cultivation without going outside, but I am of the opinion that I will require the assistance of a Surveyor, if I find it necessary to locate them on other land, as the lines which have been run several years ago are all grown over with bush, and nearly all the Posts have been destroyed by fire. I might say that unless I have the option of locating Land on the West side, and the assistance of a Surveyor if necessary, it will be useless for me to go out.<sup>86</sup>

The matter was set aside until June 1881, when Indian Superintendent Graham instructed Dominion Land Surveyor W.A. Austin to visit the Sandy Bay Reserve to implement Surveyor General Russell's plan. Austin was instructed to extend the reserve boundary to the south and

[t]hat for each quarter Section so taken to the Southward by the Band, a quarter section be taken off the rear of the Reserve as it was originally granted, or if the Indians prefer, off the north end of the Reserve, the equivalent of the new selections made to be thus deducted in a continuous block from some one side or other of the Reserve, as the Indians may indicate and may be approved and arranged with them.<sup>87</sup>

Surveyor Austin visited the Sandy Bay Reserve in the early summer of 1881 to carry out those instructions, but later reported:

While at Totogan I met the chief, a councillor and a number of the Indians of the reserve, who informed me that they did not want their reserve extended to the north or south but an enlargement of it to the westward, extending to a small prairie ridge about 3 chains in width, where they might have a small portion of

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85 James F. Graham, Indian Superintendent, to Edgar Dewdney, Indian Commissioner, February 15, 1881, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 188–89).

86 Francis Ogletree, Indian Agent, to James F. Graham, Indian Superintendent, February 28, 1881, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, pp. 190–91).

87 James F. Graham, Indian Superintendent, Indian Office, to W.A. Austin, Dominion Land Surveyor, June 13, 1881, LAC, RG 10, vol. 3745, file 29546 (ICC Exhibit 22, pp. 1–2).

land on which to place their houses and cultivate, as their reserve was nearly all under water.

When I visited Mr. Ogletree at Portage La Prairie he informed me of the matter and said that I had better see the reserve for myself.

I therefore went along the north end of the reserve westward to the north-west corner and thence westward one and a-half miles or thereabouts to the aforementioned ridge, which is about 3 chains wide and 8 to 15 feet in height. Thence down the ridge southerly, inclining to the eastward for about two miles. I then went easterly to the front of the reserve nearly the whole way walking in the water with the exception of small isolated patches of ground, none of which I should say were over one foot above the water.<sup>88</sup>

The documentary record does not indicate whether Surveyor Austin adjusted the reserve boundaries at that time. It appears, however, that the flooding situation began to improve within a few months of Austin's report. In his annual report for the year 1882, Indian Agent Ogletree stated that the water level in Lake Manitoba was lower than it had been for several years.<sup>89</sup> In November of that year, Inspector McColl also noted the lower water level and expressed optimism that the reserve would once again be productive.<sup>90</sup> By 1883, Indian Agent Ogletree reported that flooding on the Sandy Bay Reserve had subsided substantially. He stated:

[The Sandy Bay Band] Put in 42 bushels of potatoes, 3 lbs. of turnip seed, 1 lb. of onion seed, and 1 lb. of carrot seed supplied by the Government, besides nearly an acre of potatoes, corn and other seeds belonging to Baptiste Spence, sen., which looked remarkably well on the 24th of July when I was paying them.

This reserve is in much better condition this year for farming. The Indians are in better spirits, and think that if the seasons come in as dry as usual they will be able to carry on farming profitably.

The water is some three or four feet lower than for several years past: where I travelled in a canoe in 1880 and 1881, we drove a double team this year. They will be in a better position to secure hay for their stock of which they have quite a number and they were in exceedingly good condition when I saw them.<sup>91</sup>

88 W.A. Austin, Dominion Land Surveyor, Gloucester, to Superintendent General of Indian Affairs December 22, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881*, 135–36 (ICC Exhibit 1, pp. 393–94).

89 Francis Ogletree, Indian Agent, Portage la Prairie Agency, to Superintendent General of Indian Affairs, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 34 (ICC Exhibit 1, p. 198).

90 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to recipient unknown, November 28, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 152 (ICC Exhibit 1, p. 201).

91 Francis Ogletree, Indian Agent, Portage la Prairie Agency, Manitoba, to Superintendent General of Indian Affairs, September 1, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 54 (ICC Exhibit 1, p. 205).

The documentary record indicates conditions on the Sandy Bay Reserve remained good through 1884, enabling the First Nation to cultivate crops and develop grazing and meadowlands.<sup>92</sup>

#### WITHDRAWAL FROM TREATY 1

Despite Inspector McColl's report of improved conditions which, he anticipated, would lead to increased agricultural productivity on the Sandy Bay Reserve, the historical documentation for this inquiry indicates that a large number of Sandy Bay members either left the reserve or never maintained permanent residences there.

Inspector McColl reported in 1884 that the extensive flooding had forced many members of the Sandy Bay First Nation to find alternative methods of subsistence.

Owing to the flooded state of the reserve during a number of years past, nearly all the Indians abandoned it, and wandered about on lakes and rivers; through forests and over prairies, in order to obtain food for themselves and families.<sup>93</sup>

Inspector McColl further reported, however, that "since the waters receded, they returned and resumed the cultivation of their former gardens with renewed energy."<sup>94</sup> The treaty annuity paylists indicate that 280 people belonging to 57 families received payment with the Sandy Bay First Nation (also referred to on the payroll as "Nahwahchewaykahpow's Band") at Sandy Bay on July 23, 1884.<sup>95</sup>

In late 1884 or early 1885, administrative responsibility under the Department of Indian Affairs for the Sandy Bay First Nation was transferred from the Portage la Prairie Agency to the Manito-wah-pah Agency. In contrast with Inspector McColl's earlier report, the new Indian Agent, H. Martineau, suggested that the First Nation's apparent absence from the reserve was not abandonment due to flooding, but rather attributable to persistent "nomadic habits."<sup>96</sup> In his annual report dated June 30, 1885, Martineau commented:

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- 92 E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).
- 93 E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).
- 94 E. McColl, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, October 30, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 123 (ICC Exhibit 1, p. 221).
- 95 Treaty annuity payroll, Nahwahchewaykahpow's / Sandy Bay Band, July 23, 1884, LAC, RG 10, vol. 9359 (ICC Exhibit 18b, pp. 111–14).
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Most of them come from the Prairie tribes and, as a consequence, were always absent from the reserve visiting their relatives and friends, or hunting, only returning about the months of June or July of each year, when they came to receive their annuity money, and then they went away again for another year; so in reality the band only numbered some five or six families who remained to improve the reserve.<sup>97</sup>

Martineau continued, however, by stating that

[t]his spring they returned earlier than usual, took up land on the reserve, hauled logs to build their houses, broke up new land and planted potatoes in it, fenced it with good new rails, and some of them sowed wheat, barley peas, corn, beans, pumpkins, onions, carrots and turnips.<sup>98</sup>

The historical correspondence for the year 1886 suggests another explanation of why so few members of the Sandy Bay First Nation were occupying their reserve. On October 11, 1886, Indian Agent Martineau reported that

“[t]he Indians of this band have left the reserve to join some other bands; as a consequence the school is closed, and the Government cattle and general property are under the care of the late teacher, awaiting your decision regarding the disposal of them.”<sup>99</sup>

The treaty annuity paylists for the Sandy Bay First Nation indicate that 16 people belonging to six families received payment at Sandy Bay on July 9, 1886.<sup>100</sup> The 1886 payroll also includes notations beside the names of 52 families indicating they had withdrawn from treaty, applied for discharge, or otherwise left the Band.<sup>101</sup>

A report filed by Commissioner R. Goulet in 1889 recounted the visit of the Half Breed Commission to the Sandy Bay reserve in February 1887.

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96 H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

97 H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

98 H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, June 30, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 49 (ICC Exhibit 1, p. 223).

99 H. Martineau, Indian Agent, Manito-wah-pah Agency, to Superintendent General of Indian Affairs, October 11, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 58 (ICC Exhibit 1, p. 230).

100 Treaty annuity payroll, Sandy Bay Band, July 9, 1886, LAC, RG 10, vol. 9361 (ICC Exhibit 18b, pp. 119–22).

101 Treaty annuity payroll, Sandy Bay Band, July 9, 1886, LAC, RG 10, vol. 9361 (ICC Exhibit 18b, pp. 119–22).



These half breeds were treaty half-breeds who got their discharge in 1886 or 1887 & got their scrips in winter, February 1887, from the half breed Commission at Sandy Bay & Totogan. The most of them were actually living in good houses in Sandy Bay Indian Reserve & some of them had a small field or a garden near their houses at the time of the Commission visit there in Feb. 1887. At that time they wanted their scrips without signing the agreement that they had to leave the Reserve, houses and improvements, but being told that they had to do it they at last after some time, did sign said agreement but as there was only few Indians left in that Reserve they, the half-breeds continued to live on said Reserve in their houses and continued to cultivate their small fields or gardens, but I beleive [sic] their intention [was] all the time to petition the Government to get said Reserve opened for them to get homesteads on it in form of River lots....

I wrote them ... telling them that I thought it was hard to open up an Indian Reserve for settlement not to give them any hopes for nothing; but I am telling you if that could be done it would help them and be done with another settlement.<sup>102</sup>

It was also reported by the Commissioner of Dominion Lands in 1890 that Commissioner Goulet had stated that members of the Sandy Bay First Nation took scrip<sup>103</sup> because they were under the “impression that all children born up till 1885 would be entitled to scrip. It was explained that this was not the case.”<sup>104</sup>

Some members of the Sandy Bay First Nation made accusations of manipulation, misinformation, and other irregularities with respect to their acceptance of scrip. On December 7, 1886, E. McColl, the Superintendent and Inspector of Indian Agencies, reported on his investigation into these accusations.

On arriving at Sandy Bay Reserve on the 20th, I called a meeting of the half-breeds who had withdrawn from treaty ... I investigated complaints made against the agent [Martineau] that he unduly influenced them through misrepresentations to withdraw from treaty, but his accusers failed to sustain their charges against him. He produced letters from those parties themselves wherein they repeatedly implored him to release them from the obligations of treaty as they were desirous of obtaining scrip. George Spence and Little Fish were the only half-breeds present who claimed that they understood from what Mr. Martineau had stated to them that they could retain their possessions within the reserve after their withdrawal from treaty. The ex-chief and all the other half breeds present contradicted this, and said that the agent at a meeting held for the purpose told them all that they would have to leave the reserve as soon as they withdrew from treaty. It is therefore evident that

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102 R. Goulet, Half Breed Commissioner, to A. M. Burgess, Deputy Minister of the Interior, August 15, 1889, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 6–9).

103 Certificates issued by the Department of the Interior in exchange for extinguishment of land claims.

104 Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

they were aware of all the consequences which would follow upon their leaving treaty, and these trumped up grievances are manufactured by designing interested parties, or are inventions of the half-breeds themselves after they squandered the proceeds of their scrip or of their claims thereto. ... On my arrival at Totogan the following day Baptiste Metwaywenind called to see me, and represented that he never made an application to the agent to withdraw from treaty, although he understood that such had been made in his behalf by a scrip dealer. I find that his mark is attached to his application on file in this office, and that it is witnessed by one Garrioch whom I interviewed on the matter. It would appear from all the enquiries yet made by me that this party never understood when he made his mark that he was making an application to withdraw from treaty. However, I will make further enquiries into the matter and report at a subsequent date the result of my investigations.<sup>105</sup>

McColl also noted that “the 16 Indians who now constitute the band were away at Riding Mountains, where they generally wander about hunting and trapping for their living.”<sup>106</sup>

On January 1, 1887, John A. Macdonald, Superintendent General of Indian Affairs, informed the Marquess of Lansdowne, Governor General of Canada, that

[t]he greater number of the members of the band owning the reserve at Sandy Bay, on Lake Manitoba, were half-breeds and they have withdrawn from the band and accepted land scrip. There are therefore but a few families left in the community.<sup>107</sup>

Macdonald, however, seemed unconcerned about the decrease in Sandy Bay’s population, saying: “[T]his ... is all the better for them as their individual interest in the reserve and in the personal property of the band is, as a consequence of the diminution of the population, largely increased.”<sup>108</sup>

Indian Agent Martineau, in his report of August 22, 1887, stated not only that most of the First Nation had taken scrip and withdrawn from treaty, but also that the remaining members “do not ... reside on the reserve, but roam

105 E. McColl, Superintendent & Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 7, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 165 (ICC Exhibit 1, p. 233).

106 E. McColl, Superintendent & Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 7, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 165 (ICC Exhibit 1, p. 233).

107 John A. Macdonald, Superintendent General of Indian Affairs, to Marquess of Lansdowne, Governor General of Canada, January 1, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, xliii (ICC Exhibit 1, p. 236).

108 John A. Macdonald, Superintendent General of Indian Affairs, to Marquess of Lansdowne, Governor General of Canada, January 1, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, xliii (ICC Exhibit 1, p. 236).

from one place to another.”<sup>109</sup> In 1888, Martineau filed a similar report.<sup>110</sup> Another report, from 1890, stated that “all the families on the reserve except one” had withdrawn from treaty.<sup>111</sup>

#### READMITTANCE TO TREATY

On December 19, 1890, the Commissioner of Dominion Lands forwarded a petition from the Sandy Bay scrip recipients to the Minister of the Interior, Edgar Dewdney, in which they requested readmittance to treaty. In his covering letter, the Commissioner indicated that Half Breed Commissioner Goulet had explained to those receiving scrip that, by so doing, they forfeited rights to their reserve, which they now regretted, although they continued to occupy their lands on the reserve.<sup>112</sup> The Commissioner of Dominion Lands reported that the scrip-takers now regretted their decision to withdraw from treaty and that Commissioner Goulet suggested that they be readmitted to treaty or that the one family still under treaty be relocated to another reserve, opening the Sandy Bay Reserve for settlement by the scrip recipients.<sup>113</sup>

On January 8, 1891, Deputy Superintendent General Vankoughnet suggested that “... the best plan would be to allow the Halfbreeds to rejoin the Band and to remain in possession of their lands on the ... stipulation that they refund the value of the scrip to the Government.”<sup>114</sup>

On October 29, 1892, Superintending Inspector McColl reported that “[n]early all the Sandy Bay Indians withdrew from treaty in 1887, but were subsequently readmitted at their urgent importunities on condition of their refunding the value of scrip given them; but during the interval the cultivation of their gardens was neglected, and therefore they retrograded instead of advancing, and are only beginning to regain their former prosperity.”<sup>115</sup>

109 H. Martineau, Indian Agent, Manito-Wa-Pah Agency, to Superintendent General of Indian Affairs, Ottawa, August 22, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887*, 61 (ICC Exhibit 1, p. 238).

110 H. Martineau, Indian Agent, Manito-wa-paw Agency, to Superintendent General of Indian Affairs, Ottawa, August 20, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888*, 50 (ICC Exhibit 1, p. 247).

111 Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

112 Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, p. 15).

113 Commissioner of Dominion Lands, to Edgar Dewdney, Minister of the Interior, December 19, 1890, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 15–16).

114 L. Vankoughnet, Deputy Superintendent General, to Edgar Dewdney, Superintendent General of Indian Affairs, January 8, 1891, LAC, RG 10, vol. 3828, file 60717 (ICC Exhibit 18d, pp. 20–21).

115 E. McColl, Superintending Inspector, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 29, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 55 (ICC Exhibit 1, p. 253).

On January 11, 1893, L. Vankoughnet, the Deputy Superintendent General of Indian Affairs, reported to Superintendent General T. Mayne Daly that an apparent increase of 178 people in the Indian population of the general region was attributable to the return of the Sandy Bay First Nation to treaty relations with Canada.<sup>116</sup>

#### **CONFIRMATION OF SANDY BAY INDIAN RESERVE 5**

The lands of Sandy Bay IR 5, containing 19 square miles, comprising all of fractional township 18, range 9, west of the principal meridian, excepting the road allowances shown on the official township plan, were withdrawn from the operation of the *Dominion Lands Act* by Order in Council 2876 dated November 21, 1913, which stated as follows:

WHEREAS Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians.

THEREFORE His Royal Highness the Governor General in Council is pleased to order that the lands comprised within the following reserves shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act, subject to existing rights as defined or created thereunder, namely:

...  
7. Sandy Bay Indian Reserve, No. 5, comprising all of fractional township eighteen, range nine, west of the principal [sic] meridian, as shown on the official plan of the township, approved and confirmed on the first day of January, one thousand eight hundred and seventy-four, excepting thereout and therefrom the road allowances as shown on the said official plan; the said reserve containing by admeasurement nineteen square miles, more or less.<sup>117</sup>

#### **Questioning of Reserve Boundaries**

In 1923, questions arose regarding the precise boundaries of the Sandy Bay Reserve in relation to the marsh that bordered Lake Manitoba. The 1913 Order in Council described IR 5 as containing 19 square miles of land (or 12,160 acres) "more or less." Questions also arose regarding school lands in the marsh.

On June 25, 1923, N.B. Sheppard of the Land Patents Branch of the Department of the Interior wrote to Thomas Shanks, Assistant Surveyor

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116 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Ottawa, to T. Mayne Daly, Superintendent General of Indian Affairs, January 11, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, xvi–xvii (ICC Exhibit 1, pp. 256–57).

117 Order in Council PC 2876, November 21, 1913, LAC, RG 2, Series 1, vol. 1276 (ICC Exhibit 1, pp. 260, 262).

General, advising him that (according to the School Lands Division of the Department of the Interior) the School Lands Endowment was entitled to select lands in lieu of sections 11 and 29 in fractional township 18, range 9, west of the principal meridian, which were apparently included in IR 5, as described in Order in Council 2876.<sup>118</sup> Section 29 was located west of the marsh, but section 11 was within the marshy area. Sheppard asked if section 11 had been “sufficiently surveyed to constitute it School Lands”<sup>119</sup> and pointed out that, if the land to the east of the traverse line was intended to be included in IR 5, there was evidently an error in the 19 square mile area quoted.

Writing on behalf of the Surveyor General, Shanks replied to Sheppard on July 18, 1923, stating: “Section 11, township 18-9-W.Pr. has not been surveyed so as to constitute it School Lands.”<sup>120</sup> Shanks also indicated that the marshlands were excluded from the reserve, saying “[t]he description of Sandy Bay Indian Reserve is evidently intended to include only the land west of the traverse line shown on the original township plan.”<sup>121</sup>

The discrepancy regarding the precise eastern boundary of the reserve and the marshlands continued into 1926. On October 9, 1926, J.M. Roberts, Secretary of the School Lands Branch of the Department of the Interior, wrote to J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, to inquire whether the area lying east of the traverse line (including section 11), shown on the township plan, formed a portion of the Sandy Bay Indian Reserve.<sup>122</sup> McLean responded that “Frac. Sec. 11-18-9-W.P.M., has been considered to be part of the Sandy Bay Indian Reserve No. 5 and confirmed as such by Order in Council, P.C. 2876, dated 21st NOV.1913, when the confirmation of Sandy Bay stated that the reserve comprised all of Frac. Tp. 18-9-W.P.M., as shown on the official plan of the Township approved and confirmed 1st Jan. 1874.”<sup>123</sup>

118 N.B. Sheppard, Land Patents Branch, Department of the Interior, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

119 N.B. Sheppard, Land Patents Branch, Department of the Interior, to T. Shanks, Assistant Surveyor General, June 25, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 93).

120 Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior, July 18, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

121 Thomas Shanks for Surveyor General, to N.B. Sheppard, Land Patents Branch, Department of the Interior, July 18, 1923, Natural Resources Canada, Legal Surveys Division, file SM8207-06397-A, vol. 1 (ICC Exhibit 16, p. 95).

122 J.M. Roberts, Secretary, School Lands Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, October 9, 1926, DIAND file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 264).

In a February 1927 response directed to the Controller of the School Lands Division, however, Surveyor General F.H. Peters indicated that the marshland was not included in the calculation of land within the township.

The plan of township 18-9-W.Pr. dated January 1st, 1874 [Brown's survey] bears a tabulation showing the land in sections as 12085.81 acres and the water areas as 10949.19 acres. No section lines are shown on the marsh. The land area mentioned is almost exactly nineteen square miles as given in the description of the Indian Reserve. The height of the water in Lake Manitoba is subject to variation so that the marsh shown on the township plan would probably be completely under water at certain periods, and at the time the plan was issued, evidently the view was held that the marsh might be regarded as part of the lake. The opinion expressed in my memorandum of July 18th 1923 was based on these considerations. [Note: this memorandum has not been found.]

If at any time it is found that the marsh has become sufficiently dry to be classified as land, it should be surveyed and added to the Indian Reserve.<sup>124</sup>

In 1930, the eastern boundary came into question again, this time in relation to fishing. On March 10, 1930, Indian Agent J. Waite asked for advice from the department concerning the boundaries of the Sandy Bay Reserve.

Will you please advise me, of [sic] the water constitutes the boundary of a reserve, where the reserve is situated on a lake, or is a reserve similar to other lands, in that the shore of the lake is reserved as a public road. On the Sandy Bay Reserve there are three fishing camps on the lake shore, the fishing is usually good at this point, and there is a danger of other fishermen erecting camps in the vicinity. This will not only crowd out the Indian fisherman, but it will become a point of contention in time, and I would like a ruling in the matter. The reserve map shows nothing that would be of any help in this matter.<sup>125</sup>

In response, Acting Assistant Deputy and Secretary of the Department of Indian Affairs A.F. MacKenzie (successor to J.D. McLean) wrote to Indian Commissioner W.M. Graham on March 21, 1930, stating that the marshlands on the shore of the lake were not included in the reserve.

I have to advise you that generally speaking Indian reserves fronting on lakes and rivers include all the lands within the land boundaries extending down to the

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123 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, October 14, 1926, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 265).

124 F.H. Peters, Surveyor General, to the Controller, School Lands Division, Dominion Lands Branch, Department of the Interior, February 9, 1927, Natural Resources Canada, Surveyor General's Office, file 8207-06397, Sandy Bay Indian Reserve (ICC Exhibit 1, p. 266).

125 J. Waite, Indian Agent, to W.M. Graham, Indian Commissioner, March 10, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 271).

waters on which the reserve fronts and parties camping on the shore of such waters without departmental authority, would be committing an act of trespass and could be prosecuted under the Act.

However, in the particular case mentioned, namely, Sandy Bay Indian reserve, the Department appears to be in a somewhat different position, inasmuch as the confirmatory Order in Council confirmed the reserve in accordance with the Township plan and stated the area to be approximately 19 sq. miles. The Township plan referred to shows an area of approximately 19 sq. miles without including the area covered by water and marsh and as this marsh is shown on the Township plan as extending along almost the entire water front, it is doubtful if the Department could support its contention except along the shore of Sec. 28 and a portion of the S.E. [1/4] Sec. 33.

I am enclosing a blueprint of the reserve, on whi[ch] it is requested that the Indian Agent indicate the appro[xi]mate position of the camps of which he complains. I may [illegible word] that with a view to protecting the reserve front, the De[part]ment is in correspondence with the Department of the In[terior] in order to ascertain if they would consider the issue [illegible words] an amending Order in Council which would give us contr[ol] over all the land and marsh in this Township.<sup>126</sup>[Note: original document torn.]

The band members, however, told the Indian Agent that the boundary of the reserve at the time of survey was considered to be the shoreline of Lake Manitoba.

The Indians are again enquiring as to whether the Indian reserve lands continue to the edge of the water or not. I may say the Indians now inform the Agent that at the time of the survey, the line running east and west on the north side of the reserve was 2½ miles long, and the line on the south of the reserve was 4 miles long. The Agent states that if this is correct, all the marshlands would be included in the reserve.<sup>127</sup>

#### **“ADDITION” OF MARSHLANDS TO IR 5**

As a result of the above-mentioned correspondence, the Department of Indian Affairs requested an amending Order in Council “which would definitely establish the claim of the department to all the lands, marsh or otherwise, situate in this Township extending to the shore of Lake Manitoba.”<sup>128</sup> By Order in Council 1004, dated May 13, 1930, an area of six square miles (or 3,840 acres), more or less, was withdrawn from the operation of the

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126 A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to W.M. Graham, Indian Commissioner, March 21, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 273).

127 W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, January 9, 1931, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 275).

128 A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to Commissioner of Dominion Lands, March 21, 1930, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 272).

*Dominion Lands Act* and set apart as an addition to the Sandy Bay Indian Reserve. The Order in Council described the lands as follows:

All that portion of Township 18, Range 9, West of the Principal [sic] Meridian, lying between Lake Manitoba and Sandy Bay Indian Reserve No. 5, described as a marsh on the plan of the said township, approved and confirmed at Ottawa, by J.S. Dennis, Surveyor General on the 1st day of January, 1874, of record in the Department of the Interior, containing by admeasurement Six square miles, more or less.<sup>129</sup>

#### RETURN TO QUALITY-OF-LAND ISSUES

In 1928, M. Christianson, Inspector of Indian Agencies, filed a report regarding the Sandy Bay Reserve in which he stated:

The conditions on this reserve ... have caused me a lot of worry, as I cannot just see what is going to become of these Indians. The number in the band now is approximately 450 and it is impossible for them to make a living on the reserve, and as a consequence they are away from there most of the time. ... On the other hand we cannot herd them on the reserve, because if we did they would starve to death. There is no way for them to make a living there, and it is, therefore, necessary for them to get out to earn a living for themselves and their families. The future for these Indians looks to me anything but bright. ... If we could move some of this band to another location it would probably help to solve the question.<sup>130</sup>

Inspector Christianson's letter apparently prompted officials at the Department of Indian Affairs to consider relocating the Sandy Bay First Nation. On July 30, 1928, Commissioner Graham forwarded Christianson's letter to the department and, in his covering letter, stated:

The situation at Sandy Bay, is to say the least, most disconcerting and the question is whether these Indians will ever be able to make a living at that point or not. We have a Farming Instructor there, but apparently no matter how good he may be, it is doubtful if conditions will ever improve. It seems to me that steps should be taken to close this reserve up by transferring the Indians to other points.<sup>131</sup>

The department did not respond to the proposal to relocate the First Nation until September 15, 1932, when a memorandum originating in the Minister's office stated:

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129 Order in Council PC 1004, May 13, 1930, LAC, RG 2, Series 1, vol. 1840 (ICC Exhibit 1, p. 274).

130 M. Christianson, Inspector of Indian Agencies, to Graham, July 17, 1928, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, pp. 267-68).

131 W.M. Graham, Indian Commissioner, to Scott, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 270).



The Minister has been informed that conditions at the Sandy Bay Reserve, Manitoba, leave much to be desired: The land is said to be of poor quality and, apparently, unsuited to agriculture; while hunting and trapping in the district have practically disappeared. The conditions leave the Indians with practically no means of livelihood except that of casual labour.

The Minister desires to be informed as to whether it is possible to have these Indians moved to another Reserve, or if the Department has any recommendations to make which might meet the situation.<sup>132</sup>

A reply written on behalf of the Chief Surveyor and dated September 17, 1932, stated:

It is improbable that any suitable lands for another reserve could be obtained in that district for this band, except by purchase.

...

The present reserve contains 15,971 acres, of which 3,840 are classed as marsh lands in front of the reserve.<sup>133</sup>

A second option, considered only briefly by the department, was to amalgamate the Sandy Bay First Nation with some other First Nation(s). Acting Deputy Superintendent General A.S. Williams reported on September 19, 1932, that

[i]n order to amalgamate this band with some other band it would require the consent of each band which might be difficult to obtain. It does not appear at the moment just where any such amalgamation could be effected.<sup>134</sup>

On October 15, 1932, Inspector A.G. Hamilton reported on the condition of the reserve, suggesting several ways to improve matters. He recommended “[t]hat more hay lands be permitted,” “[t]hat commercial licences be supplied by the Dept.” for fishing purposes, and that “wild rice be purchased and planted along the lake shore within the boundary of the reserve.”<sup>135</sup> In a briefing memo written to the Superintendent General of Indian Affairs, Thomas G. Murphy, dated October 21, 1932, the Acting Deputy Superintendent General of Indian Affairs, A.S. Williams, stated that the

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132 E. Clapp for Private Secretary, Minister's Office, to Williams, September 15, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 277).

133 W. R. White for Chief Surveyor, Department of Indian Affairs, to Williams, September 17, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 278).

134 A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to Buskard, September 19, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 279).

135 A.G. Hamilton, Inspector, Manitoba Inspectorate, Department of Indian Affairs, to Williams, October 15, 1932, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 284).

Inspector's recommendations "do not seem to provide a foundation on which to build permanent progress and development; and there are other objections."<sup>136</sup>

There is no documentary evidence in this inquiry that the department ever took action to relocate or amalgamate the Sandy Bay First Nation.

With conditions at the Sandy Bay Reserve still poor, the First Nation requested that additional lands be secured for its use.<sup>137</sup> There is no documentary evidence in this inquiry that the department ever followed through on this request or that the First Nation raised it again.

**"ADDITION" OF ROAD ALLOWANCES TO IR 5**

Order in Council 2876 of November 21, 1913, which confirmed the Sandy Bay Indian Reserve, excluded all road allowances shown on the original township plan.<sup>138</sup> The original survey plan indicates that there were 492.55 acres of road allowances within township 18, range 9, west of the principal meridian.<sup>139</sup> In 1958, the Department of Indian Affairs communicated with the Government of Manitoba seeking to dedicate the road allowances to the First Nation, stating that it "would facilitate our administration of the Sandy Bay Reserve if ownership of the rights-of-way were re-vested in the Sandy Bay Band of Indians."<sup>140</sup> The provincial government agreed to the request on the condition that Canada exchange an area of land upon the reserve for drainage purposes.<sup>141</sup> Subsequent correspondence indicates that the area of land to be exchanged was located on the southern boundary of the reserve, adjacent to the road allowance along the southern boundaries of sections 3, 4, 5, and 6.<sup>142</sup> On October 19, 1959, the Sandy Bay First Nation issued a Band Council Resolution (BCR) seeking the return of the road allowances to the Band.<sup>143</sup> By Band Council Resolution dated November 13, 1959, the First Nation agreed

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- 136 A.S. Williams, Acting Deputy Superintendent General of Indian Affairs, to the Hon. Thomas G. Murphy, October 21, 1932, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 288).
- 137 J. Waite, Indian Agent, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 7, 1946, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 290).
- 138 Order in Council PC 2876, November 21, 1913, LAC, RG 2, Series 1, vol. 1276 (ICC Exhibit 1, pp. 260-63).
- 139 Plan 782, "Plan of Township No. 18, Range 9, West of 1st Meridian (Sandy Bay Ind. Res.)," surveyed by C.P. Brown, Deputy Surveyor of Dominion Lands, August-September 1873, confirmed January 1, 1874, and certified as true copy April 19, 1906 (ICC Exhibit 2).
- 140 R.D. Ragan, Regional Supervisor of Indian Agencies, to E.S. Wright, Department of Public Works, Highways Branch, September 18, 1958, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 296).
- 141 E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to R.D. Ragan, Supervisor of Indian Affairs, April 28, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 20, p. 7).
- 142 A.G. Leslie, Regional Supervisor of Indian Agencies, to E.S. Wright, Right-of-Way Agent, Department of Public Works, June 16, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 8).
- 143 Sandy Bay First Nation Band Council Resolution, October 19, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 298).

to the transfer to the province of the reserve land required for a drainage ditch.<sup>144</sup> It should be noted, however, that although the province had sought a strip of land along the entire southern boundary of the reserve, the BCR of November 13, 1959, refers only to land within section 6.<sup>145</sup>

On December 30, 1959, W.C. Bethune, Chief of Reserves and Trusts, Department of Indian Affairs and Northern Development, wrote to the Manitoba Department of Public Works stating that the question of the transfer of road allowances and the surrender of land for the drainage ditch were two issues that should be dealt with separately.<sup>146</sup> A report prepared for this inquiry by Public History Inc. concluded that “[t]he history of the correspondence clearly illustrates that [the transfer of the road allowances] was an exchange of land, despite the suggestion by a senior DIA official in December 1959 that the drainage ditch be kept ‘separate and apart from the road question.’”<sup>147</sup>

The provincial government subsequently applied further conditions to the transfer, stipulating that the road allowances bordering on the outside boundaries of the reserve would remain in the province’s possession and that the Canadian National Railway would receive title to the area within the railway’s right of way.<sup>148</sup>

There was a significant delay between the passage of the November 13, 1959, Band Council Resolution and the ultimate conveyance of the road allowances to the First Nation, possibly because of the time it took to resolve the discrepancy between the BCR’s terms and the province’s expectations. Correspondence from the Department of Public Works in late 1964 indicates that this may have been the case.

We had of course assumed that the resolution referred to all of the area shown [on survey plan 1125] ... and were unaware that same covered section 6 only ...

It is the feeling of this Department that should the Band Council wish to have the road allowances revested to the Reserve, they should be prepared to pass a

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144 Sandy Bay First Nation Band Council Resolution, November 13, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 9).

145 Sandy Bay First Nation Band Council Resolution, November 13, 1959, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 9).

146 W.C. Bethune, Chief, Reserves and Trusts, to E.S. Wright, Department of Public Works, Highways Branch, December 30, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 300).

147 Public History Inc., “Sandy Bay Indian Reserve No. 5 – Road Allowances and Drainage Ditch,” preliminary report prepared for Sandy Bay Ojibway First Nation, October 25, 2000, 2 (ICC Exhibit 20, p. 2); W.C. Bethune, Chief of Reserves and Trusts, to Department of Public Works, December 30, 1959, DIAND, file 501/30-31-5, vol. 1 (ICC Exhibit 1, p. 300).

148 E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to W.C. Bethune, Chief, Reserves and Trusts, March 10, 1960, DIAND, file 510/30-31-5, vol. 1 (ICC Exhibit 1, p. 301).

resolution agreeing to convey to the Province, the area of drainage works shown on the plan of survey.<sup>149</sup>

Despite its earlier reluctance to “consider relinquishing land” for the drainage ditch in sections 3, 4, 5, or 6,<sup>150</sup> the Sandy Bay First Nation eventually passed a Band Council Resolution on October 30, 1969, agreeing to transfer to the province, for drainage purposes, a right of way comprising a total of 10.2 acres of land in two quarter sections of section 6.<sup>151</sup> In September 1970, the province transferred title to the road allowances to Canada, saying “[t]he issuance of this Title in the name of Canada concludes the exchange of properties.”<sup>152</sup>

On November 24, 1970, the former road allowances, containing approximately 495 acres, were formally set apart for the use and benefit of the First Nation by Order in Council 1970-2030 “as an addition to ... Sandy Bay Indian Reserve Number 5.”<sup>153</sup> The schedule attached to the Order in Council describes the land as follows:

In Manitoba; all those portions of Government Road Allowances in township 18, range 9, west of the principal [sic] meridian, which lie within the boundaries of Sandy Bay Indian Reserve number 5, which boundaries are shown on plan 5158 in the Canada Lands Surveys Records at Ottawa, a copy of which is filed in the Land Titles Office at Portage la Prairie as 1125; LESS those portions taken for the right-of-way of the Canadian Northern Railway shown coloured pink on a plan registered in said Office as 429, a copy of which is recorded in said Records as 5107; the remainder containing about 495 acres.<sup>154</sup>

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149 E.S. Wright, Right-of-Way Agent, Department of Public Works, Highways Branch, to H.R. Conn, Chief, Economic Development Division, Indian Affairs Branch, November 23, 1964, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, pp. 46–47).

150 P. Jackson, Superintendent, Dauphin Agency, to Regional Supervisor, February 20, 1964, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 29).

151 Sandy Bay First Nation Band Council Resolution, October 30, 1969, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 77).

152 H.A. Good, Director, Land Acquisition Branch, Department of Public Works, to Q.P. Jackson, Department of Indian Affairs and Northern Development, September 3, 1970, DIAND, file 501/31-4-31, vol. 1 (ICC Exhibit 20, p. 83).

153 Order in Council PC 1970-2030, November 24, 1970, DIAND, file 577/31-4-18-5 (ICC Exhibit 1, p. 314).

154 Order in Council PC 1970-2030, November 24, 1970, DIAND, file 577/31-4-18-5 (ICC Exhibit 1, p. 315).

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# **APPENDIX B\***

**INTERIM RULING, JUNE 28, 1999**

## **INDIAN CLAIMS COMMISSION**

**INTERIM RULING: SANDY BAY FIRST NATION INQUIRY  
TREATY LAND ENTITLEMENT CLAIM**

**RULING ON GOVERNMENT OF CANADA OBJECTIONS**

### **PANEL**

Commission Co-Chair Daniel J. Bellegarde  
Commissioner Roger J. Augustine  
Commissioner Elijah Harper

### **COUNSEL**

For the Sandy Bay First Nation  
Rhys Jones

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
David E. Osborn, QC / Chris Angeconeb

**JUNE 28, 1999**

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\* Reported (2003) 16 ICCP 39.

### BACKGROUND

Further to correspondence from Canada objecting to the Commission's continued jurisdiction in the above-noted matter by letters dated November 12, 1998, and April 12, 1999, we have had an opportunity to consider the presentations of both parties in this matter and decide as follows.

### FACTS

Sandy Bay First Nation originally made a submission to the Specific Claims Branch of Indian Affairs in November of 1982. The Band's main arguments at that time were as follows: 1) there was a land shortfall at the initial survey (date of first survey) established through historical and payroll analysis; 2) there was a shortfall of land based on a multiple survey-current population approach to calculating entitlement (the Band's main argument); and 3) there should have been an exclusion of lands occupied and improved by Indians (some 92.88 acres) prior to treaty from the total reserve allotment.

Under cover of letter, dated January 3, 1985, from R.M. Connelly, Director of the Specific Claims, to Andrew Beaulieu, Band Administrator, Canada rejected the claim. Canada wrote: "Based upon the per capita land allotment promised in Treaty No. 1 ... the total entitlement figure ... would be 11,812.36 acres. The band on the other hand has received a total of 15,928.26 acres allotted pursuant to treaty, and therefor there is no outstanding treaty land entitlement." It goes on to write, "[w]ith respect to the second argument ... no evidence was supplied that indicated that the federal government employed a general policy of using current population to calculate treaty land entitlement with subsequent surveys, or a specific policy to do so in determining the treaty land entitlement of the Sandy Bay Band. If such a policy did exist it would not alter the federal government's lawful obligation to provide land to the band pursuant to the terms of the treaty. The additions of land in 1930 and 1970 therefore have been considered as lands laid aside

in fulfillment of the treaty obligation.” As for the third argument, Canada stated, “... there is insufficient substantial evidence to support the Band’s contention that these lands should be exclusive of the lands allotted under treaty. Furthermore, the lands allotted ... are sufficient to fulfil the treaty land entitlement even if the 92.88 acres are proven to have been exclusive of and in addition to the other lands allotted in fulfillment of the treaty land obligation.”

A Band Council Resolution dated April 2, 1998, from Sandy Bay First Nation requests that the Indian Claims Commission conduct an inquiry into the rejected claim. The Commissioners accepted this claim for inquiry and notice was sent to the parties by letter dated May 27, 1998.

On October 3, 1998, at a planning conference, counsel for Canada made it clear that the Band’s submission, as presented, constituted a new claim. Counsel for the Band undertook to forward its submissions in writing and this was subsequently forwarded to Canada and the ICC under cover of letter dated October 27, 1998. Canada relayed its objection regarding the restatement in letters dated November 12, 1998, and April 12, 1999.

The Band’s restatement basically states that, although Canada may have provided a sufficient quantum of land at the date of first survey in 1876, Canada should not receive credit for all of this land due to its poor quality. As well, the Band claims that Canada should not receive credit for additional allotments of land in the 1930s and 1970s since the land was not explicitly provided in fulfillment of the Treaty 1 obligations.

## ISSUE

The Orders in Council establishing this Commission provide as follows:

and we do hereby advise that our Commissioners on the basis of Canada’s Specific Claims Policy ... 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<sup>1</sup>

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<sup>1</sup> 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 (Consolidated Terms of Reference).

The Policy, *Outstanding Business*, outlines what is required from a claimant:

1) Presentation of the Claim

Specific claims are presented by Indian bands to the Minister of Indian Affairs and Northern Development, acting on behalf of the Government of Canada. Because they often raise complex issues, claim presentations should include a clear, concise statement of what is being claimed, a comprehensive historical and factual background, and a statement of the grounds upon which the claim is based....

2) Review of Claims by the Office of Native Claims (ONC)

The Office of Native Claims undertakes a review of the claim at the direction of the Minister of Indian Affairs and Northern Development. In conducting its review, ONC analyses the historical facts presented in the claim and arranges for additional research if required. It also investigates the sequence of historical events surrounding the issues raised in the claim....

All pertinent facts and documents are then referred by ONC to the Department of Justice for advice on the federal government's lawful obligation....

...

5) Further Review of the Claim

A claim which has not been accepted for negotiation may be presented again at a later date for further review, should new evidence be located or additional legal arguments produced which may throw a different light on the claim.<sup>2</sup>

The issue is whether or not this is a "substantially new claim," and if so, whether or not this affects the ICC's jurisdiction to continue hearing this claim.

Canada's objection is based on the view that this restated claim "... represents an unequivocal departure from the claim as originally presented ..." and that it has not yet been rejected by Canada. Canada further asserts that the submission be redirected to the Policy and Research Directorate of DIAND for assessment under the Claims Policy.

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<sup>2</sup> Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 23–5; reprinted in (1994), 1 ICCP 171.



## RULING

We have read the materials submitted by the parties and appreciate the very able arguments of counsel.

The submission of the restatement initially arose because “the band was asked to restate its claim for the benefit of the Commission and the government of Canada. This was because the original claim submission appears to have been made without the benefit of legal advice.” The First Nation had previously submitted its claim through researchers from Treaty and Aboriginal Rights Research Centre (TARR). The First Nation has only now taken advantage of its ability to retain and instruct legal counsel in pursuit of its claim and, in doing so, has found (and conceded) that much of its submission has had to be changed. It can’t be disputed that the competent presentation of a specific land claim will normally require the expertise of a lawyer, particularly if issues are complex or involve questions of law. The First Nation cannot be faulted for seeking out the best possible representation in pursuit of its specific claim. We also note that, at the very minimum, the Band has been consistent in its claim that the Band’s lawful entitlement to reserve lands under Treaty 1 was never fulfilled.

Canada refers to the Claims Policy and notes that the “issues raised in the claim” are central to any claim assessment and that the Commission’s own Order in Council states that it is only to consider “those matters at issue when the dispute was initially submitted...” Canada also argues that if the commission accepts “the theory of the claims process and the ICC mandate that flows from the ... Band Submission [restatement] ... [that the result is] inconsistent with both the spirit, and the four cornered literal reading, of the Claims Policy...” However, Mr Robinson also concedes, “... it is difficult to set out precise criteria that would demarcate the exact point at which a previously submitted claim and rejected claim is so materially changed that it can properly be characterized as a ‘new’ claim that should be resubmitted to Canada for review.” In any case, we have, in past rulings, tended to view our mandate in a very broad manner. In the *Lax Kw’alaams* report we stated: “On an ordinary reading of our Orders in Council, we have concluded that the Commission’s mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada’s Specific Claims Policy. In our view, this Commission was created to assist parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission’s mandate is not strictly limited to

the four corners of the Specific Claims Policy.”<sup>3</sup> That our mandate is remedial in nature is absolutely clear.

We note Canada’s submission that, if we accept Mr Jones’s account of the claims process, it would lead to results that were not contemplated by the policy and ICC mandate. As an illustration of the point, Canada writes:

1. A Band alleges a breach of fiduciary duty in relation to, say, a surrender of reserve land in 1940.
2. In a one page claim presentation, the band asserts that Canada owes the Band a lawful obligation on the basis that the Band did not receive the \$5000 as specified in the surrender documents.
3. In reviewing the claim, Canada investigates the sequence of historical events surrounding the issues raised in the claim and confirms that the band did receive the \$5000.
4. Consequently, Canada rejects the claim.
5. If Mr. Jones position accurately reflects Canada’s obligations and the ICC role, then the band would be allowed to request that the ICC commence an Inquiry to determine whether Canada owes an outstanding lawful obligation to the band in relation to the 1940 surrender.
6. On Mr. Jones account of the claims policy and the ICC mandate, the band could then raise a variety of issues related to the surrender such as lack of informed consent, fraud, exploitative transaction, undue influence etc. In other words, issues that were never raised by the band in its original submission.

Canada then goes on to outline the view that a First Nation might, as a strategy, line jump or completely circumvent the claims process in this manner. The view of the Commission is that each claim must be reviewed in its own unique circumstances. In this case, 17 years have passed since Sandy Bay first presented this claim to Canada and a proper review by legal counsel has necessitated a change in arguments. We can see no evidence to suggest that the Band is acting in bad faith, other than to have its claim finally dealt with.

Consequently, we are ruling against Canada’s objection. In the interest of fairness, Sandy Bay will not be required to re-submit its claim to the Specific Claims Branch of the Department of Indian Affairs. The Commission will continue to retain its jurisdiction in this matter and Canada will be given a reasonable amount of time to consider any new matters contained in the restatement of the Sandy Bay First Nation.

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<sup>3</sup> ICC, *Lax Kw’alaams Indian Band Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99 at 158.


FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde  
Commission Co-Chair



Roger J. Augustine  
Commissioner



Elijah Harper  
Commissioner

Dated this 28th day of June, 1999.



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# **APPENDIX C**

**INTERIM RULING, NOVEMBER 22, 2004**

**INDIAN CLAIMS COMMISSION**

**INTERIM RULING: SANDY BAY OJIBWAY FIRST NATION INQUIRY  
TREATY LAND ENTITLEMENT CLAIM**

## **PANEL**

Chief Commissioner Renée Dupuis (Chair)  
Commissioner Daniel J. Bellegarde  
Commissioner Alan C. Holman

## **COUNSEL**

For the Sandy Bay Ojibway First Nation  
J. R. Norman Boudreau

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
Diana Kwan

**NOVEMBER 22, 2004**

### BACKGROUND

Canada has proposed that the inquiry proceed with a phased approach and has recommended that a third party be granted status to intervene. This third party, the Long Plain First Nation, has requested standing to intervene in the Sandy Bay inquiry. In addition, the parties have been unable to agree on the Statement of Issues. This preliminary ruling addresses all of these issues.

The Sandy Bay First Nation (hereinafter “the First Nation”) originally submitted their claim to the Specific Claims Branch in November 1982. Essentially, the First Nation’s claim is a Treaty Land Entitlement claim (hereinafter “TLE claim”).

In a letter dated January 3, 1985, the Director of the Specific Claims advised the First Nation that Canada had rejected the claim.

On April 2, 1998, the First Nation forwarded a Band Council Resolution (hereinafter “BCR”) to the Indian Claims Commission (hereinafter “the ICC”), requesting that an inquiry be conducted into the rejected claim. The Commissioners accepted this claim for inquiry and notice was given to the parties in a letter dated May 27, 1998.

The parties met at a Planning Conference on October 3, 1998. Legal counsel for Canada stated that the First Nation’s submission to the ICC constituted a new claim, and challenged the ICC’s mandate to assume jurisdiction over the claim. Counsel for the First Nation forwarded its submissions in writing on October 27, 1998. Canada responded with submissions dated November 12, 1998 and April 12, 1999. The ICC issued a ruling based on the parties’ written submissions on June 28, 1999, and determined that:

In the interest of fairness, Sandy Bay will not be required to re-submit its claim to the Specific Claims Branch of the Department of Indian Affairs. The Commission will continue to retain its jurisdiction in this matter and Canada will be given a reasonable amount of time to consider any new matters contained in the restatement of the Sandy Bay First Nation.<sup>1</sup>

Following the ICC’s ruling on the mandate, further research was undertaken to clarify issues surrounding the TLE claim. As well, a series of events outside of the inquiry process occurred, resulting in delayed progress. Notably, the First Nation has had three changes in legal counsel, and faced a leadership dispute, which resulted in Canada withdrawing its participation in

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<sup>1</sup> Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, June 28, 1999) reported (2003) 16 ICCP 39, p. 45.

the inquiry until the dispute was resolved. In October 2003, present legal counsel for the First Nation was appointed, and the parties have attempted to proceed in the inquiry process.

At a Planning Conference held on September 10, 2004, the parties made some progress in understanding their respective positions, and agreed to proceed straight to the Oral Session with a site tour scheduled the day before the Oral Session. However, before setting timelines for the remainder of the inquiry process, Canada believes that a number of issues need to be addressed. To this end, Canada has made two requests requiring ruling from the Panel. Furthermore, Canada and the First Nation are unable to agree on the final order of the Statement of Issues, which also requires a ruling from the Panel.

On October 28, 2004, the ICC received correspondence from legal counsel for the Long Plain First Nation seeking standing to intervene in the Sandy Bay inquiry.

#### **ISSUES**

1. Should Canada's proposal for a two-phased inquiry process be accepted?
2. Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?
3. What should the final Statement of Issues be?

#### **SUMMARY**

In summary, the Panel has made the following rulings:

1. The Panel has ruled that this inquiry will be conducted in a single phase.
2. The Panel has determined that the Long Plain First Nation can apply to the ICC to seek standing in the following manner:
  - (a) The Long Plain First Nation must provide a BCR to the ICC supporting the motion to seek standing, and its written submissions, copied to all parties, on why the Long Plain First Nation should be granted standing to intervene by **Monday, December 20, 2004**;
  - (b) Canada and the Sandy Bay First Nation are entitled to respond with written submissions, sent to the ICC and copied to all parties, by **Monday, January 17, 2005**; and
  - (c) If the written submissions are sufficient, then the Panel will issue a ruling on whether or not the Long Plain First Nation will be granted standing. The Panel maintains the discretion of determining whether or not oral submissions will be necessary.

3. The Panel has determined that the Statement of Issues for the Sandy Bay inquiry to be:
  1. *What is the amount of land in I.R. No. 5 which can be credited toward TLE?*
    - a. *What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?*
    - b. *What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?*
    - c. *Can the lands provided in 1930 and 1970 be credited toward TLE?*
  2. *What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?*
  3. *What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?*

#### ANALYSIS & RULING

### ***1 Should Canada's proposal for a two-phased inquiry process be accepted?***

At a Planning Conference held on September 10, 2004, Canada proposed a two-phased inquiry process where the first phase of the inquiry would focus on determining the TLE population of the First Nation, and the second phase would focus on the amount of TLE land west of the traverse line on Survey Plan 782. This proposal was outlined in more detail in correspondence dated September 15, 2004. In summary, Canada has proposed to conduct the inquiry in the following manner:

- (1) Determine the TLE population of the First Nation;
- (2) Determine the amount of land west of the traverse line on Survey Plan 782, and if there is a TLE shortfall, then conduct a further inquiry into the following:
  - (a) whether a 492.55 acre road allowance counts toward TLE;  
and
  - (b) whether the 3840 acres of land east of the traverse line counts toward TLE.

Both the First Nation and Canada have participated in a TLE analysis summarized by the ICC's Research Unit. The parties agree that the minimum

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population is 194. The First Nation's maximum population is 231 with 37 identified questionable people. The First Nation and Canada do not agree on the amount of land west of the traverse line on Plan 782; however, Canada believes that determining the appropriate TLE population will resolve any land issues.

On September 16, 2004, the First Nation provided a letter rejecting Canada's proposal. Additional exchanges of correspondence occurred in which the parties reiterated their positions. On October 22, 2004, the First Nation stated their belief that "the most expeditious way to proceed is to deal with all matters as a whole rather than be denied the Commission's views of the full claim."

Canada's approach to TLE in this case is to focus on population and determine whether or not a TLE shortfall occurs based on the amount of land west of the traverse line on Survey Plan 782. Their position is that the population figure will be enough to determine whether or not there is a threshold shortfall based on the acreage they argue exists west of the traverse line on the Survey Plan.

The First Nation has rejected this approach, and does not believe that this phased approach would expedite the inquiry process. In addition, the First Nation prefers to have all of the issues examined in the inquiry at the same time.

The Panel has ruled that the amount of land and population is information needed in a TLE claim. As a result, the Panel has decided to conduct the Sandy Bay inquiry in a single phase.

## **2        *Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?***

Also at the Planning Conference on September 10, 2004, Canada advised of an issue with the Sandy Bay inquiry that may be relevant to the Long Plain First Nation. Further details were outlined in Canada's letter dated September 15, 2004. In 2000, the ICC released its report on the Long Plain TLE inquiry,<sup>2</sup> and recommended negotiations. Essentially, the ICC concluded that a TLE land shortfall and loss of use are tied to a band's TLE population. Canada and Long Plain entered into negotiations, and for the purposes of a settlement agreement, agreed on an acreage for the TLE shortfall. However, the parties

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<sup>2</sup> Indian Claims Commission, *Long Plain First Nation: Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269.

did not agree on using the agreed upon acreage for loss of use compensation; instead, this compensation would be tied to population.

The issue that arises is that at one point, Sandy Bay and Long Plain were part of the same band – the Portage Band, along with Swan Lake. Swan Lake has settled their TLE, Long Plain is in negotiations, and Sandy Bay is in the ICC process. However, Canada and Sandy Bay disagree over 37 identified people and their inclusion in the TLE population count. Canada states that some of these 37 people may be more appropriately counted with Long Plain, and has a policy not to count people as members of two bands (ie, double-count). As such, they wish to put the Long Plain First Nation on notice and recommend that they be allowed to intervene by way of making submissions in the Sandy Bay inquiry.

Specifically, Canada has submitted the following:

Canada submits that it would be unfair to decide an issue that is vital to Long Plain's interest without putting Long Plain First Nation on notice and allowing them an opportunity to make submissions on point. Accordingly, Canada recommends that all payroll information/reports, compiled by Canada, Sandy Bay and the ICC in the context of this inquiry, be provided to the Long Plain First Nation to allow them to make informed representations on the issue of the band affiliation of individuals, that may be claimed by both First Nations.

Long Plain should be afforded the opportunity to make these representations before the Commission so that the Commissioners will have all relevant information before them prior to making their recommendations.<sup>3</sup>

On September 24, 2004, the First Nation provided a written response to this request. The First Nation rejected any possibility of allowing Long Plain to intervene in the Sandy Bay inquiry. Essentially, the First Nation states that this claim is Sandy Bay's claim against Canada, and there is no reason for Long Plain to intervene. As well, the First Nation believes it should not be prejudiced by Canada's policy not to double-count.

A further exchange of correspondence occurred. On October 14, 2004, Canada provided another written response, reiterating Canada's position that it will not double-count members, and that this is the sole reason for recommending that Long Plain be granted permission to intervene. On October 22, 2004, the First Nation provided another response, confirming their position "that the Commission should reject Canada's proposal as being

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<sup>3</sup> Correspondence from Canada, September 15, 2004.

unnecessary and unwarranted ...” Additional exchanges occurred, confirming the parties’ positions.

On October 28, 2004, the ICC received correspondence from legal counsel for the Long Plain First Nation. The Long Plain First Nation is seeking standing to intervene in the Sandy Bay inquiry:

We understand that pay lists are an issue before the Commission and that in fact, there are 17 people whose names appear on pay lists for both the Sandy Bay Ojibway Nation and the Long Plain First Nation at different times. The issue that the Commission is being asked to resolve, as we understand it, is to which pay list the individuals should be assigned. As you can appreciate, this issue is a very important one for the Long Plain First Nation as it moves toward resolution of its Loss of Use claim. The quantum of compensation will likely be tied to the pay lists.

Accordingly, please be advised that it is our intention to seek standing before the Commission to make representations with respect to this issue.<sup>4</sup>

Specifically, the Long Plain First Nation is seeking status to participate in Sandy Bay’s inquiry and is inquiring into the ICC’s procedures for seeking standing.

Canada believes that the Long Plain First Nation should be accorded the opportunity to participate in the Sandy Bay inquiry. Participation has been defined as providing Long Plain with all of the payroll reports prepared for Sandy Bay and allowing Long Plain to make representations or submissions in the Sandy Bay inquiry.

Sandy Bay First Nation rejects any participation from the Long Plain First Nation. As Sandy Bay was not accorded the right to participate in settlement discussions regarding Long Plain’s TLE claim, Sandy Bay does not believe that Long Plain should be involved in their claim.

The Panel believes that any party can apply to the ICC for standing to intervene in an inquiry. To do so, if the party seeking status is a First Nation, then that First Nation must provide a BCR supporting the motion to seek standing to intervene. The party is invited to make submissions on the question of whether or not the ICC should grant status to intervene. The parties to the inquiry are entitled to respond with their submissions. The Panel will then issue a ruling based on written submissions. If the Panel feels that the written submissions are not sufficient, the Panel has the option of hearing oral arguments on the issue.

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<sup>4</sup> Correspondence from the Long Plain First Nation’s Legal Counsel, October 28, 2004.

In this case, the Long Plain First Nation is required to submit a BCR in support of the motion to seek intervention. This BCR can be submitted concurrently with Long Plain's written submissions. These written submissions, due by **Monday, December 20, 2004**, would address the reasons why the Long Plain First Nation should be granted standing to intervene in the Sandy Bay inquiry. The written submissions from Long Plain would also describe the extent of intervention sought. Both Canada and the Sandy Bay First Nation are entitled to respond to Long Plain's submissions, and their submissions expected by **Monday, January 17, 2005**. Following review of the written submissions, and if the Panel did not wish to hear oral submissions, the Panel would release a ruling on whether or not Long Plain would be granted standing to intervene in the Sandy Bay inquiry.

**3      *What should the final Statement of Issues be?***

Both Canada and the First Nation have presented similar issues. The parties disagree on the order and wording of the issues. Canada proposes that Issue #1 should be population, while the First Nation prefers that land issues precede the determination of TLE population.

Canada's reason for placing the population issue first is related to its proposal for a phased inquiry. Canada believes that answering the population question will definitively resolve the quantum of land issue.

As the Panel has ruled against a two phased inquiry, and prefers to maintain consistency in its approach to TLE analysis, the Panel has determined that the following Statement of Issues should govern this inquiry:

1.      What is the amount of land in I.R. No. 5 which can be credited toward TLE?
  - a.      What is the amount of land originally set apart for Sandy Bay First Nation in Treaty 1 and in 1876?
  - b.      What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)?
  - c.      Can the lands provided in 1930 and 1970 be credited toward TLE?
2.      What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty?

3. What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?
- 

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis (Chair)  
Chief Commissioner



Daniel J. Bellegarde  
Commissioner



Alan C. Holman  
Commissioner

Dated this 22nd day of November, 2004.



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# **APPENDIX D**

**INTERIM RULING, JUNE 29, 2005**

## **INDIAN CLAIMS COMMISSION**

**INTERIM RULING: SANDY BAY OJIBWAY FIRST NATION INQUIRY**

**TREATY LAND ENTITLEMENT CLAIM**

**RULING ON LONG PLAIN FIRST NATION'S REQUEST TO INTERVENE**

### **PANEL**

Chief Commissioner Renée Dupuis (Chair)  
Commissioner Daniel J. Bellegarde  
Commissioner Alan C. Holman

### **COUNSEL**

For the Sandy Bay Ojibway First Nation  
J.R. Norman Boudreau

For the Long Plain First Nation  
Jeffrey F. Harris

For the Government of Canada  
Perry Robinson

To the Indian Claims Commission  
Diana Kwan

**JUNE 2005**

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### BACKGROUND

This ruling addresses the Long Plain First Nation's (hereinafter "Long Plain") request to intervene in the Sandy Bay Ojibway First Nation's (hereinafter "Sandy Bay") inquiry into its rejected treaty land entitlement (hereinafter "TLE") claim.

At a Planning Conference in September 2004, Canada advised of an issue with the Sandy Bay inquiry that may be relevant to Long Plain. Canada also proceeded to advise Long Plain of this issue.

On October 28, 2004, the Indian Claims Commission (hereinafter "ICC") received correspondence from Long Plain seeking standing to intervene in Sandy Bay's inquiry on the issue of population. In 2000, the ICC released its report on the Long Plain loss of use inquiry,<sup>1</sup> and recommended negotiations. Canada and Long Plain entered into negotiations, and for the purposes of a settlement agreement, agreed on an acreage for the TLE shortfall. However, the parties did not agree on using the agreed upon acreage for loss of use compensation; instead, this compensation would be tied to population. Sandy Bay and Long Plain were once part of the Portage Band, along with another First Nation. While the TLE has been settled, Long Plain is currently in negotiations over loss of use compensation.

Canada and Sandy Bay disagree over 38 identified people and their inclusion in the TLE population count. Canada states that 17 of these 38 people may be more appropriately counted with Long Plain, and has a policy not to count people as members of two bands (ie, double-count).

On November 22, 2004, the ICC released an interim ruling,<sup>2</sup> stating the following with respect to Long Plain's request to intervene:

The Panel has determined that the Long Plain First Nation can apply to the ICC to seek standing in the following manner:

- a. The Long Plain First Nation must provide a BCR to the ICC supporting the motion to seek standing, and its written submissions, copied to all parties, on why the Long Plain First Nation should be granted standing to intervene by Monday, December 20, 2004;
- b. Canada and the Sandy Bay First Nation are entitled to respond with written submissions, sent to the ICC and copied to all parties, by Monday, January 17, 2005; and

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1 Indian Claims Commission, *Long Plain First Nation Inquiry – Loss of Use Claim* (Ottawa, February 2000) reported (2000) 12 ICCP 269.

2 Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, November 22, 2004).



- c. If the written submissions are sufficient, then the Panel will issue a ruling on whether or not the Long Plain First Nation will be granted standing. The Panel maintains the discretion of determining whether or not oral submissions will be necessary.

The ICC received a BCR from Long Plain on December 12, 2004. On December 20, 2004, the ICC received submissions from legal counsel for the Long Plain First Nation. On January 17, 2005, the ICC received submissions from legal counsel for Sandy Bay First Nation and Canada.

In February 2005, the Panel directed that an oral hearing be scheduled in Winnipeg.

On June 15, 2005, oral submissions were heard from the parties in Winnipeg.

#### ISSUES

1. Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?
2. If the Long Plain First Nation is allowed standing to intervene in the Sandy Bay inquiry, then what should be the nature and extent of this intervention?

#### SUMMARY

In summary, the Panel has made the following rulings:

1. The Long Plain First Nation will be permitted standing to intervene in Sandy Bay's inquiry;
2. Long Plain First Nation is granted standing in the following manner:
  - a. Canada is to provide a letter to Sandy Bay and Long Plain, copied to the ICC, confirming the identity of the 17 people in dispute by ***Monday, July 4, 2005***;
  - b. The Long Plain First Nation is to provide written submissions to the parties on why the 17 people in dispute belong on Long Plain's payroll by ***Monday, August 15, 2005***;
  - c. Sandy Bay and Canada will respond to Long Plain's submissions in their written submissions as part of Issue no. 3 in the Statement of Issues in the inquiry. To this end, timelines for the remaining inquiry process have been set as follows:

Sandy Bay's Written Submissions: Monday, September 26, 2005  
Canada's Written Submissions: Monday, November 7, 2005  
Sandy Bay's Reply: Monday, November 21, 2005  
Oral Submissions (Winnipeg): Thursday, January 12, 2006

- d. The Panel has reserved the right to request Long Plain to present oral submissions in Winnipeg on January 12, 2006. The ICC will advise Long Plain of this request at least a month prior to the Oral Submissions date.

**SUMMARY OF LONG PLAIN'S POSITION**

In their Motion Brief dated December 17, 2004, and in oral submissions on June 15, 2005, legal counsel for Long Plain set out the legal tests for intervener status. While deferring to the ICC's broad discretion in setting its own procedures, legal counsel argues that rule 109 of the Federal Court Rules provides guidance on the intervener issue:

- 109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
- (2) Notice of motion under subsection (1) shall
- (a) set out the name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
  - (b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.
- (3) In granting a motion under subsection (1), the Court shall give directions regarding
- (a) the service of documents; and
  - (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

In support of its argument for intervention, legal counsel for Long Plain has provided the following case law to the ICC:

*Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168

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*M. v. H.* (1994) 20 O.R. (3d) 70  
*Eli Lilly Canada Inc. v. Canada (Minister of Health)* [2001] F.C.J. No. 210  
*Abbott v. Canada (T.D.)* [2000] 3 F.C. 482  
*Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.* [2000] F.C.J. No. 220  
*Chrétien v. Canada (Attorney General)* [2005] F.C.J. No. 684

Notably, in *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168, the Federal Court set out the three criteria for intervener status in dealing with an application from the Canadian Drug Manufacturers' Association to intervene in a federal court case dealing with patent registration<sup>3</sup>:

1. The applicant intervention must have an interest in the outcome;
2. The rights or the applicant will be seriously affected by the outcome to the litigation; and
3. The applicant, as intervener, will bring a different perspective to the proceedings.

In determining whether these criteria were met, the Court considered the following factors<sup>4</sup>:

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?
6. Can the Court hear and decide the cause on its merits without the proposed intervener?

Long Plain FN argues that intervener status on the issue of population should be granted for the following reasons:

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<sup>3</sup> *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168 at para. 4.

<sup>4</sup> *Pfizer Canada Inc. v. Canada (Attorney General)* 2001 FCT 1168 at para. 6.

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- Long Plain has an interest in the outcome

While Long Plain's TLE claim has been settled, the First Nation is in current negotiations over loss of use compensation. The 1994 TLE Settlement Agreement was based on a population figure of 223; however, Canada has indicated that the population figure will be re-addressed for the purposes of loss of use compensation. Sandy Bay's TLE claim, which depends on population, has yet to be validated. If the 17 members at issue are counted with Sandy Bay to validate their TLE, then, according to Canada's TLE policy, these members cannot be counted with Long Plain in their loss of use population calculation. Determining population is based on Canada's TLE policy, which does not permit people to be counted on two bands (ie, double count).

- Long Plain will be adversely affected by a judgment in the proceeding and the right of the FN will be seriously affected by the outcome of the litigation

If any of the people whose membership is disputed are included on Sandy Bay's payroll, then they will not be included on Long Plain's pay list, and Long Plain's possible compensation for loss of use will be reduced.

- Long Plain will bring a different perspective to the proceedings and is likely to make a useful contribution without causing prejudice to the parties

Long Plain states that it is in the best position to advocate as to who its members were and the ICC will have a more complete picture of population. In addition, Long Plain does not expect either Sandy Bay or Canada to advocate on its behalf. As a result, Long Plain can present evidence to provide a more complete view of the facts and issues.

To this end, Long Plain seeks full participation on issues regarding determination of pay list & band membership, including access to all pay list information / reports, the right to call and cross-examine witnesses, and make full submissions.

#### **SUMMARY OF CANADA'S POSITION**

Canada provided its written submissions on intervention on January 17, 2005, and oral submissions on June 15, 2005.

Canada confirmed that preliminary positions on TLE population have been exchanged between Canada and Sandy Bay, and that 38 identified people are

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in dispute. At least 17 of these 38 people were paid with Long Plain at their DOFS, and these 17 are currently being claimed by Sandy Bay for their population count. If these 17 people are counted with Long Plain, they are landed transfers and not eligible to be counted with Sandy Bay and vice versa.

As a result, Canada believes that it would be unfair to decide an issue that may affect Long Plain without allowing them to make submissions on this issue. Canada supports Long Plain's application for standing, and has recommended Long Plain's intervention on issue no. 3 of the inquiry – "What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?" Specifically, Canada has recommended that all payroll information / reports compiled by Canada, Sandy Bay and the ICC in this inquiry be provided to Long Plain to allow them to make informed representations on the issue of band affiliation for individuals claimed by both Sandy Bay and Long Plain.

#### **SUMMARY OF SANDY BAY'S POSITION**

Sandy Bay provided its written submissions on January 17, 2005, and oral submissions on June 15, 2005.

Sandy Bay argues that Long Plain should not be granted intervener status for the following reasons:

- Sandy Bay states that the focus should be on who should be on Sandy Bay's payroll, and not on where these individuals should be listed
- Sandy Bay's TLE can be resolved without prejudice to Long Plain
- Long Plain has no interest in the outcome of Sandy Bay's inquiry and there will be no impact on Long Plain's claim
- Sandy Bay is not and has not been involved in Long Plain's claim at any point in time
- Long Plain can only make a negligible contribution and allowing them to intervene would create greater complexity and cause more delays

In the alternative, Sandy Bay states that if Long Plain is granted intervener status, then Sandy Bay recommends the following degree of intervention:

- That Long Plain not be granted the right to call and cross examine witnesses;

- That the ICC give directions regarding the procedure to be followed, including service of documents and costs, to be based on the Rules of the Federal Court;
- That the ICC limit the intervention to the provision of documents not currently before the ICC and to making arguments; and
- That all documents and other evidence related to determining which individuals Long Plain could or could not claim, including documents used in Long Plain's initial claim validated in 1982 and used in subsequent processes, be provided to the ICC.

#### ANALYSIS & RULING

**1. *Should the ICC allow the Long Plain First Nation to seek standing to intervene in the Sandy Bay inquiry?***

The Panel notes that the parties are not in dispute over the applicable law to seeking intervenor status.

The criterion for intervenor status in an administrative tribunal setting is similar; however, the discretion of an administrative tribunal to grant intervenor status appears to be broader due to the nature of administrative tribunals. The following points regarding intervenor status are noted by Macaulay & Sprague in *Hearings Before Administrative Tribunals*:

- intervenors are not parties to the proceeding, but have an interest or perspective which may be of interest to the proceeding;
- the ability of an agency to grant intervenor status is implicit in the agency's power to conduct a hearing;
- intervenors are added at the discretion of the agency;
- an intervenor's participation is defined by the agency;
- the degree of intervention is related to the extent to which the intervenor can assist the agency in fulfilling its mandate; and
- the purpose of an intervenor is to bring a view or expertise which will be useful in determining the relevant issue before the agency.<sup>5</sup>

A similar issue was heard by the ICC in the James Smith Cree Nation Inquiry. In that inquiry, the James Smith FN. had a partially accepted claim and

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<sup>5</sup> Macaulay and Sprague in *Hearings Before Administrative Tribunals* (1995: Carswell) at p. 12-61-12-62.

requested an inquiry into the rejected part of their claim. Other bands who had an interest in the James Smith claim were put on notice by Canada, and the ICC invited these bands to participate in the inquiry. No agreement could be reached on the scope of participation from the other bands. As a result, the Panel conducted an oral hearing into the matter and issued an interim ruling in November 2002.<sup>6</sup>

Notably, the Panel stated:

1. Does the Commission have the mandate to allow an Indian Band to participate in the Inquiry of another Band when the Band seeking participation does not have a rejected specific claim relating to the subject matter of the Inquiry?

Yes. The Commission panels have heard and considered the objections and arguments of the James Smith Cree Nation, Canada and the other Host Bands to this issue and have concluded that yes, ***the Indian Claims Commission pursuant to its Order in Council and the Inquiries Act, has the power to exercise its discretion to hear any evidence and argument it deems requisite to the full investigation of the matters into which it is mandated to examine. In this regard, the Commission panel in this case is not limited to hearing the evidence and/or argument of only Bands that have submitted a claim or only those Bands who have a rejected claim.***

2. If yes, does the Commission have the mandate to allow participation in the Inquiry to an Indian Band claiming an interest in a rejected specific claim of another Band, which claim is subject of an Inquiry by the Commission, without the consent of Canada and the Band whose claim has been rejected?

Yes. In the exercise of its discretion pursuant to its Order in Council and the *Inquiries Act*, the Commission panel may seek out and hear whatever witnesses it deems would be beneficial to its understanding of the issues. As previously stated, the Commission's authority is not limited to hearing from only those Bands with a rejected claim. In exercising this discretion, the Commission panel does not require the consent of either party to the inquiry.

***Pursuant to its Order in Council, the Commission panel may adopt whatever method it deems expedient for the conduct of the inquiry.*** The flexibility of adopting its own procedures for inquiry means that the Commission has the power not only to adopt its own procedures, but it also has the power to control its own process. In so saying, it has the power

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<sup>6</sup> Indian Claims Commission, *James Smith Cree Nation Inquiry and Chakastaypasin IR 98 Surrender Claim* (Ottawa, November 1, 2002) reported (2003)16 ICCP 139.

to determine who it will hear in the absence of the parties' consent.<sup>7</sup>

Based on case law, the ICC's mandate, and past ICC precedent, the Panel believes that it has the authority to determine whether to grant intervener status to Long Plain.

Sandy Bay's claim is essentially a TLE claim, which is dependent on population. Issue No. 3 in the Statement of Issues of the inquiry reads:

3. What is the population number for Sandy Bay First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?<sup>8</sup>

The impetus behind Long Plain's application for intervention is a situation where at least 17 people could be counted with either Sandy Bay or Long Plain. Canada's position is that a person cannot be counted for two different bands. In other words, Canada has a policy not to double count.

There is no doubt that placing these 17 people on one or the other's payroll will affect each band. If all 17 people are listed with Sandy Bay, their land entitlement is potentially validated or increased, but Long Plain's loss of use compensation is decreased. If all 17 people are listed with Long Plain, their compensation for loss of use is potentially increased, but Sandy Bay may no longer have a land entitlement or their entitlement is potentially decreased.

In determining whether Long Plain should be allowed to intervene, the focus must be on whether Long Plain can provide a perspective that can assist the Panel in making its recommendations in the Sandy Bay inquiry. More specifically, can Long Plain provide further information on the 17 people who could be part of Sandy Bay or Long Plain?

The Panel believes Long Plain can provide information on the 17 people who are at issue that will assist the Panel in making its recommendations on Issue No. 3 in the Sandy Bay inquiry, and as such, Long Plain is granted standing to intervene in this inquiry, on the question of the 17 people who are at issue.

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<sup>7</sup> Indian Claims Commission, *James Smith Cree Nation Inquiry and Chakastaypasin IR 98 Surrender Claim* (Ottawa, November 1, 2002) reported (2003) 16 ICCP 139 at pp. 143–44.

<sup>8</sup> Statement of Issues as set out in Indian Claims Commission, *Sandy Bay First Nation Treaty Land Entitlement Inquiry Interim Ruling* (Ottawa, November 22, 2004).



**2. *If the Long Plain First Nation is allowed standing to intervene in the Sandy Bay inquiry, then what should be the nature and extent of this intervention?***

While Long Plain has been granted status to intervene, further consideration must be given to the nature of the intervention granted.

Long Plain has requested full participation on the issues in the inquiry related to paylists and band membership, including the right to call witnesses and make full submissions. In addition, Long Plain has requested access to all pay list information and reports produced by the ICC and Sandy Bay.

Canada recommends Long Plain's participation on Issue No. 3 in the Statement of Issues, and that Long Plain be given access to all payroll information and reports compiled by Canada, Sandy Bay and the ICC to make submissions.

Sandy Bay requests that Long Plain be required to provide the ICC any documentation relating to paylists.

The issue with respect to intervention relates to 17 disputed people and their affiliations. Essentially, Long Plain is arguing that these 17 members should be counted with Long Plain and not Sandy Bay. During Oral Submissions, legal counsel for Long Plain advised that their base population at DOFS was 223, which Canada agreed to in the 1994 TLE Settlement Agreement. As such, Long Plain is in a position to provide information on these 17 disputed members to the ICC.

The Panel directs the following nature and extent of intervention:

- a. Canada is to provide a letter to the parties confirming the identity of the 17 people in dispute by ***Monday, July 4, 2005***;
- b. The Long Plain First Nation is to provide written submissions to Sandy Bay and Canada, copied to the ICC, on why the 17 people in dispute belong on Long Plain's payroll by ***Monday, August 15, 2005***;
- c. Sandy Bay and Canada will respond to Long Plain's submissions in their written submissions as part of Issue no. 3 in the Statement of Issues in the inquiry. To this end, timelines for the remaining inquiry process have been set as follows:

Sandy Bay's Written Submissions: Monday, September 26, 2005

Canada's Written Submissions: Monday, November 7, 2005

Sandy Bay's Reply: Monday, November 21, 2005

Oral Submissions (Winnipeg): Thursday, January 12, 2006

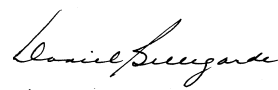

INDIAN CLAIMS COMMISSION PROCEEDINGS

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- d. The Panel has reserved the right to request Long Plain to present oral submissions in Winnipeg on January 12, 2006. The ICC will advise Long Plain of this request at least a month prior to the Oral Submissions date.

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FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis  
Chief Commissioner

Daniel J. Bellegarde  
Commissioner



Alan C. Holman  
Commissioner

Dated this 29<sup>th</sup> day of June, 2005.

## APPENDIX E

### CHRONOLOGY

#### Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry

1. Planning conference
  - Winnipeg, October 13, 1998
  - Winnipeg, October 28, 1999
  - Winnipeg, June 27, 2000
  - Winnipeg, August 13, 2002
  - Winnipeg, November 29, 2002
  - Winnipeg, February 11, 2004
  - Winnipeg, June 10, 2004
  - Vancouver, September 10, 2004
  
2. Community session

First Nation elected not to proceed with a Community Session.
  
3. Site Visit June 13, 2005
  
4. Interim Rulings
  - Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, June 28, 1999
  - Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, Nov 22, 2004
  - Sandy Bay Ojibway First Nation: Treaty Land Entitlement – Interim Ruling, June 29, 2005
  
5. Written legal submissions
  - Mandate Challenge
    - Submission on Behalf of the Sandy Bay Ojibway First Nation, February 2, 1999
    - Reply Submission on Behalf of the Government of Canada, April 12, 1999

Long Plain First Nations request to Intervene

- Submission on Behalf of the Long Plain First Nation, December 17, 2004
- Submission on Behalf of the Sandy Bay Ojibway First Nation, January 17, 2005
- Submission on Behalf the Government of Canada, January 17, 2005

Written Submissions

- Long Plain First Nation's written submission re: Paylist Analysis, August 15, 2005
- Submission on Behalf of the Sandy Bay Ojibway First Nation, January 31, 2006
- Reply Submission on Behalf of the Long Plain First Nation, February 28, 2006
- Submission on Behalf of the Government of Canada, May 16, 2006
- Reply Submission on Behalf of the Sandy Bay Ojibway First Nation, May 30, 2006

6. Oral legal submissions

Winnipeg, June 15, 2005  
Winnipeg, June 29–30, 2006

7. Content of formal record

The formal record of the Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry consists of the following materials:

- Exhibits 1–30 tendered during the inquiry
- transcript of oral session (3 volumes)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

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# **RESPONSE**

Response of the Minister of Indian Affairs and Northern Development to the  
Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry Report  
510

RESPONSE

Ministre des Affaires indiennes et  
du Nord canadien et interlocuteur fédéral  
auprès des Métis et des Indiens non inscrits



Ottawa, Canada K1A 0H4

Minister of Indian Affairs and  
Northern Development and Federal Interlocutor  
for Métis and Non-Status Indians

WITHOUT PREJUDICE

ENGLISH TRANSLATION

Ms. Renée Dupuis  
Chief Commissioner  
Indian Specific Claims Commission  
PO Box 1750, Station B  
OTTAWA ON K1P 1A2

Dear Ms. Dupuis:

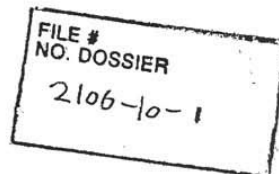
This concerns the report of the Indian Specific Claims Commission entitled *Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry*, published on September 27, 2007. As you know, in the report, the Commission recommends against accepting this claim for negotiation purposes.

I would like to inform you that the Government of Canada has decided to reject the claim made by the Sandy Bay Ojibway First Nation. I wish to thank the Commission for its work on this issue.

Sincerely,

Chuck Strahl

c.c.: Mr. Johnny Spence  
Mr. Alan Holman  
Mr. Daniel Bellegarde



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## The Commissioners



**Chief Commissioner Renée Dupuis** has had a private law practice in Quebec City since 1973 where she specializes in the areas of Aboriginal peoples, human rights, and administrative law. Since 1972, she has served as legal advisor to a number of First Nations and Aboriginal groups in her home province, including the Indians of Quebec Association, the Assembly of First Nations for Quebec and Labrador, and the Attikamek and the Innu-Montagnais First Nations, representing them in their land claims negotiations with the federal, Quebec, and Newfoundland governments and in constitutional negotiations. From 1989 to 1995, Madame Dupuis served two terms as commissioner of the Canadian Human Rights Commission, and she is chair of the Barreau du Québec's committee on law relating to Aboriginal peoples. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on administrative law, human rights, and Aboriginal rights. She is the recipient of the 2001 Award of the Fondation du Barreau du Québec for her book *Le statut juridique des peuples autochtones en droit canadien* (Carswell), the 2001 Governor General's Literary Award for Non-fiction for her book *Quel Canada pour les Autochtones?* (published in English by James Lorimer & Company Publishers under the title *Justice for Canada's Aboriginal Peoples*), and the YWCA's Women of Excellence Award 2002 for her contribution to the advancement of women's issues. In June 2004, the Barreau du Québec bestowed on her the Christine Tourigny Merit Award for her contribution to the promotion of legal knowledge, particularly in the field of Aboriginal rights. She was appointed a Member of the Order of Canada in 2005. She was one of the first recipients of the *Advocatus emeritus* award, created by the Quebec Bar in 2007. Madame Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001, and Chief Commissioner on June 10, 2003.

## THE COMMISSIONERS

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**Daniel J. Bellegarde** is a member of the Little Black Bear First Nation in southern Saskatchewan. Educated at the Qu'Appelle Indian Residential School and the University of Regina's Faculty of Administration, he has also received specialty training at various universities and professional development institutions. Mr Bellegarde has held several senior positions with First Nations organizations, including socio-economic planner for the Meadow Lake Tribal Council and president of the Saskatchewan Indian Institute of Technologies. He was first Vice-Chief of the Federation of Saskatchewan Indian Nations, holding the treaty land entitlement and specific claims portfolio, as well as the gaming, justice, international affairs and self-government portfolios. He is currently the president and senior governance coordinator of the Treaty 4 Governance Institute, an organization mandated to work with Treaty 4 First Nations to develop and implement appropriate governance processes and structures. He has served on various boards and committees at the community, provincial, and national levels, including the Canadian Executive Service Organization. Mr Bellegarde was appointed Commissioner of the Indian Claims Commission on July 27, 1992, and continues to serve in this capacity. He also served as Co-Chair of the Commission from 1994 to 2000.

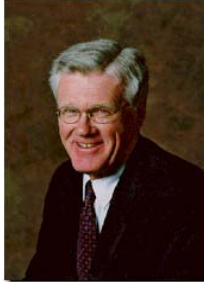


**Jane Dickson-Gilmore** is an associate professor in the Law Department at Carleton University, where she teaches such subjects as Aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she serves as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on Aboriginal culture, history, and politics. In the past, she provided expert advice to the Smithsonian Institution – National Museum of the American Indian on Kahnawake Mohawks. Ms Dickson-Gilmore has also been called upon to present before the Standing Committee of Justice and Human Rights and has been an expert witness in proceedings before the Federal Court and the Canadian Human Rights Commission. A published author and winner of numerous academic awards, she graduated from the London School of Economics with a PhD in law and holds a BA and MA in criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed Commissioner of the Indian Claims Commission on October 31, 2002.



## THE COMMISSIONERS

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**Alan C. Holman** is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the *Charlottetown Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, Nova Scotia, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.



**Sheila G. Purdy** was born and raised in Ottawa. Between 1996 and 1999, she worked as an advisor to the government of the Northwest Territories on the creation of the Nunavut territory. Between 1993 and 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on matters related to the Criminal Code and Aboriginal affairs. In the early 1990s, Ms Purdy was also special advisor on Aboriginal affairs to the Leader of the Opposition. Previously, she provided legal services on environmental matters and worked as a legal aid lawyer representing victims of elder abuse. After graduating with a law degree from the University of Ottawa in 1980, Ms Purdy worked as a litigation lawyer in private practice until 1985. Her undergraduate degree is from Carleton University, Ottawa. Ms Purdy is on the executive of the Canadian Biodiversity Institute, the Advisory Council of Canadian Arctic Resources Committee, and the Women's Legal Education and Action Fund (LEAF). She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.

