INDIAN CLAIMS COMMISSION
PROCEEDINGS

(2009) 24 ICCP

Reports

Carry the Kettle First Nation
1905 Surrender Inquiry

Neskonlith, Adams Lake and Little Shuswap Indian Bands
Neskonlith Douglas Reserve Inquiry

Nadleh Whut’en First Nation
Lejac School Inquiry

Sturgeon Lake First Nation
1913 Surrender Inquiry

Red Earth and Shoal Lake Cree Nations
Quality of Reserve Lands Inquiry

Muskowekwan First Nation
1910 and 1920 Surrender Inquiry

Michipicoten First Nation
Pilot Project (Mediation)

Response

Response of the Minister of Indian Affairs and Northern Development to the
Paul First Nation - Kapasiwin Townsite Inquiry Report
The Indian Claims Commission Proceedings is a continuing series of official reports, background documents, articles, and comment published by the Indian Claims Commission (Canada).

For information about subscriptions and extra copies or to request the French edition, Actes de la Commission des revendications des Indiens, please contact Indian Claims Commission
427 Laurier Avenue West, Suite 400
Ottawa, Ontario K1P 1A2
613-943-2737
Fax 613-943-0157

Web site: www.indianclaims.ca
CONTENTS

Letter from the Chief Commissioner v

Abbreviations vii

Key Words Index x

REPORTS

Carry the Kettle First Nation
1905 Surrender Inquiry 3

Neskonlith, Adams Lake and Little Shuswap Indian Bands
Neskonlith Douglas Reserve Inquiry 99

Nadleh Whut’en First Nation
Lejac School Inquiry 211

Sturgeon Lake First Nation
1913 Surrender Inquiry 307

Red Earth and Shoal Lake Cree Nations
Quality of Reserve Lands Inquiry 411

Muskowekwan First Nation
1910 and 1920 Surrender Inquiry 595
CONTENTS

Michipicoten First Nation
Pilot Project (Mediation)
711

RESPONSE

Response of the Minister of Indian Affairs and Northern Development to the Paul First Nation - Kapasiwin Townsite Inquiry Report
773

THE COMMISSIONERS

775
FROM THE CHIEF COMMISSIONER

This is the 24th and last volume of the Indian Claims Commission Proceedings to be published. The ICC closes its doors on March 31, 2009, and in keeping with the OIC 2007-1789, these are the last inquiry and mediation reports. I am pleased to present this volume on behalf of the Commissioners of the Indian Claims Commission. It includes five inquiry reports, one mediation report, and one letter of response to the Commission’s recommendations in completed inquiries.

The first report on the Carry the Kettle First Nation 1905 Surrender Inquiry, dated December 2008, relates the history, analysis, and findings of the inquiry. The Commission recommended that the claim not be accepted for negotiation under the Specific Claims Policy.

The second report on the Neskonlith, Adams Lake and Little Shuswap Indian Bands Neskonlith Douglas Reserve Inquiry is dated June 2008. The panel recommended that the claim not be accepted for negotiation under Canada’s Specific Claims Policy.

The third report is on the Nadleh Whut’en First Nation Lejac School Inquiry, dated December 2008. The panel recommended that under Canada’s Specific Claims Policy, Canada negotiate with the Nadleh Whut’en First Nation for compensation regarding loss of the full use and enjoyment of the eastern portion of Indian Reserve lands that were set aside for school purposes.

In the fourth report on the Sturgeon Lake First Nation 1913 Surrender Inquiry, dated December 2008, the panel recommended that a portion of Indian Reserve 101 not be accepted for negotiation under Canada’s Specific Claim Policy.

The fifth report is on the Red Earth and Shoal Lake Cree Nations Quality of Reserve Lands Inquiry, dated December 2008. The panel recommended the claim regarding the provision of “farming lands” in Treaty 5 not be accepted for negotiation under Canada’s Specific Claims Policy. However, the Commission also recommended that Canada meet with the Red Earth and Shoal Lake Cree Nations and initiate discussions on how the conditions on their reserves may be changed.

The sixth inquiry report is on the Muskowekwan First Nation 1910 and 1920 Surrender Inquiry, dated November 2008. It relates the history, analysis,
and findings of the inquiry. The Commission recommended the surrenders be accepted for negotiation.

One mediation report is also included in this volume of the Proceedings. It relates to the negotiation, with the assistance of the Commission, of the Michipicoten First Nation Pilot Project (October 2008).

Finally, included in this volume is one letter of response from the Minister of Indian Affairs and Northern Development pertaining to the Paul First Nation - Kapasiwin Townsite Inquiry Report. The Minister accepted the Commission's recommendation.

Renée Dupuis, C.M., Ad.E.
Chief Commissioner
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>ANQ</td>
<td>Archives nationales du Québec</td>
</tr>
<tr>
<td>BCCA</td>
<td>British Columbia Court of Appeal</td>
</tr>
<tr>
<td>BCR</td>
<td>Band Council Resolution</td>
</tr>
<tr>
<td>CA</td>
<td>Court of Appeal</td>
</tr>
<tr>
<td>CAM</td>
<td>Conseil Attimatek-Montagnais</td>
</tr>
<tr>
<td>CLSR</td>
<td>Canada Lands Surveys Records</td>
</tr>
<tr>
<td>CNLR</td>
<td>Canadian Native Law Reporter</td>
</tr>
<tr>
<td>DIAND</td>
<td>Department of Indian Affairs and Northern Development</td>
</tr>
<tr>
<td>DLR</td>
<td>Dominion Law Reports</td>
</tr>
<tr>
<td>DOJ</td>
<td>Department of Justice</td>
</tr>
<tr>
<td>DSGIA</td>
<td>Deputy Superintendent General of Indian Affairs</td>
</tr>
<tr>
<td>ICC</td>
<td>Indian Claims Commission</td>
</tr>
<tr>
<td>ICCP</td>
<td>Indian Claims Commission Proceedings</td>
</tr>
<tr>
<td>IR</td>
<td>Indian Reserve</td>
</tr>
<tr>
<td>LAC</td>
<td>Library and Archives Canada</td>
</tr>
<tr>
<td>NA</td>
<td>National Archives of Canada</td>
</tr>
<tr>
<td>Ont. CA</td>
<td>Ontario Court of Appeal</td>
</tr>
<tr>
<td>OR</td>
<td>Ontario Reports</td>
</tr>
<tr>
<td>PC</td>
<td>Privy Council</td>
</tr>
<tr>
<td>QB</td>
<td>Court of Queen’s Bench</td>
</tr>
<tr>
<td>QVIDA</td>
<td>Qu’Appelle Valley Indian Development Authority</td>
</tr>
<tr>
<td>RSC</td>
<td>Revised Statutes of Canada</td>
</tr>
<tr>
<td>SAGMAI</td>
<td>Secrétariat des activités gouvernementales en milieu amérindien et inuit</td>
</tr>
<tr>
<td>Abbreviation</td>
<td>Description</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Sask QB</td>
<td>Saskatchewan Court of Queen’s Bench</td>
</tr>
<tr>
<td>SC</td>
<td>Statutes of Canada</td>
</tr>
<tr>
<td>SCB</td>
<td>Specific Claims Branch</td>
</tr>
<tr>
<td>SCC</td>
<td>Supreme Court of Canada</td>
</tr>
<tr>
<td>SCR</td>
<td>Canada Supreme Court Reports</td>
</tr>
<tr>
<td>SGIA</td>
<td>Superintendent General of Indian Affairs</td>
</tr>
<tr>
<td>SProvC</td>
<td>Statutes of the Province of Canada</td>
</tr>
<tr>
<td>WWR</td>
<td>Western Weekly Reports</td>
</tr>
</tbody>
</table>
KEY WORDS INDEX*

-A-

ABANDONMENT See RESERVE

ABORIGINAL TITLE See also MANDATE OF INDIAN CLAIMS COMMISSION; SPECIFIC CLAIMS POLICY

ADDITIONS TO RESERVE POLICY

Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261

EXTINGUISHMENT


Lax Kw’alaams Indian Band: Tsimpsean Indian Reserve 2 Inquiry (Ottawa, June 1994), reported (1995) 3 ICCP 99

Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117

ABSENTEE See TREATY LAND ENTITLEMENT

ADDITIONS TO RESERVE POLICY See ABORIGINAL TITLE

ADJOURNMENT See PRACTICE AND PROCEDURE

ADMINISTRATIVE REFERRAL


ADMISSIBILITY See EVIDENCE

---

1 ICCP : Indian Claims Commission Proceedings.

* Note: Minor errors in previous editions of the Key Word Index have been corrected in this index.
AGRICULTURAL BENEFITS See TREATY RIGHT

ALBERTA

Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21

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


Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209

Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries (Ottawa, August 1995), reported (1996) 1 ICCP 3

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

Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3


Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85

ALLOCATION See INDIAN ACT

ALLOCIMENT See RESERVE

AMALGAMATION See BAND; TREATY LAND ENTITLEMENT

ANNUITY See TREATY RIGHT; See also SPECIFIC CLAIMS POLICY
KEY WORDS INDEX

- B -

BAND

AMALGAMATION
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3

BAND LIST

DIVISION
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3

MEMBERSHIP See also INDIAN ACT
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 355
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

MIGRATION
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 355

STATUS
Young Chipewyan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

TRUST FUND
Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277
Micbitipocolen First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711
Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 41
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3

xi
INDIAN CLAIMS COMMISSION PROCEEDINGS

Touchwood Agency: Mismanagement (1920–24) Claim Mediation
(Ottawa, August 2005), reported (2008) 21 ICCP 59

BAND COUNCIL
BAND COUNCIL RESOLUTION
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa,
March 1996), reported (1996) 5 ICCP 235
Nadleb Whut'en First Nation: Lejac School Inquiry (Ottawa, December
2008), reported (2009) 24 ICCP 211
Qu’Appelle Valley Indian Development Authority (Muscoupetung, Pasqua,
Standing Buffalo, Sakimay, Cowessess, and Ochapowace First
9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding
Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakola Nation: Flooding Mediation (Ottawa,
March 2004), reported (2007) 18 ICCP 3

POWERS
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa,
March 1996), reported (1996) 5 ICCP 235

BAND COUNCIL RESOLUTION See BAND COUNCIL

BAND LIST See BAND

BAND MEMBERSHIP See BAND; INDIAN ACT

BEYOND LAWFUL OBLIGATION See SPECIFIC CLAIMS POLICY

BILL C-31 See INDIAN ACT

BREACH OF TREATY See FIDUCIARY DUTY

BRIDGE See RIGHT OF WAY

BRITISH COLUMBIA
Blueberry River First Nation and Doig River First Nation: Highway Right
of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported
(2008) 21 ICCP 201
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa,
December 2001), reported (2002) 15 ICCP 3
KEY WORDS INDEX

Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Lax Kw’alaams Indian Band: Tsimplsean Indian Reserve 2 Inquiry (Ottawa, June 1994), reported (1995) 3 ICCP 99
Mamalelegala Qwe’qwa’ Sol’ Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Nadleh Whut’en First Nation: Lejac School Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 211
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
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa, August 1997), reported (1998) 8 ICCP 281
Taku River Tlingit First Nation: Wenab Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

DITCHBURN-CLARK REVIEW
Eskelemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Mamalelegala Qwe’qwa’ Sol’ 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

INDIAN LANDS
See BRITISH COLUMBIA – INDIAN SETTLEMENT

INDIAN RESERVE COMMISSION
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
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
INDIAN RESERVE COMMISSIONER
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

INDIAN SETTLEMENT
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Mamaleleqala Que’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Taku River Tlingit First Nation: Wenah Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

JOINT INDIAN RESERVE COMMISSION
Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

MCKENNA-MCBRIDE COMMISSION
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Mamaleleqala Que’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Nakazdli First Nation: Abt-Len-jees Indian Reserve 5 Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 81
’Namgis First Nation: McKenna-McBride Applications Inquiry (Ottawa, February 1997), reported (1998) 7 ICCP 109
KEY WORDS INDEX

Taku River Tlingit First Nation: Wenab Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

PRE-EMPTION

Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Homalco Indian Band: Aule Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Mamaleleqala Qwe’ Qwa’ Sol’ Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

RESERVE CREATION See also RESERVE

Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Mamaleleqala Qwe’ Qwa’ Sol’ Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Namgis First Nation: Aht-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), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225
SETTLEMENT LANDS See BRITISH COLUMBIA — INDIAN SETTLEMENT TERMS OF UNION, 1871

Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Mamaleleqala Que'Qua'So'T'Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199

TRUTCH REVIEW

'Namgis First Nation: Cormorant Island Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 3

VILLAGE SITES

Esketemc First Nation: Wright's Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

BRITISH NORTH AMERICA ACT, 1867 See CONSTITUTION — CONSTITUTION ACT, 1867

BURDEN OF PROOF See EVIDENCE — ONUS OF PROOF

BURIAL SITE See CULTURE AND RELIGION

BY-LAW See BAND COUNCIL — POWERS

- C -

CANADA ACT, 1982 See CONSTITUTION — CONSTITUTION ACT, 1982

COLDWATER TREATY (1836) See TREATIES

COLLINS TREATY (1785) See TREATIES

COMMUNITY EVIDENCE See EVIDENCE — ORAL HISTORY
KEY WORDS INDEX

COMPENSATION See also PRE-CONFEDERATION CLAIM; RESERVE; TREATY

INTERPRETATION

A unusually See DAMAGES

CRITERIA

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern
Railway Right of Way Inquiry (Ottawa, February 2008), reported
(2009) 23 ICCP 143

Paul First Nation: Kapsiwin Townsite Inquiry (Ottawa, February 2007),
reported (2009) 22 ICCP 85

Peepeeksis First Nation: File Hills Colony Inquiry (Ottawa, March 2004),
reported (2007) 18 ICCP 19

DAMAGES

Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa,
March 2003), reported (2004) 17 ICCP 21

Athabasca Denesuliné (Fond du Lac, Black Lake, and Hatchet Lake First
Nations): Treaty Harvesting Rights Special Report (Ottawa, December
1993), reported (1995) 4 ICCP 177

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern
Railway Right of Way Inquiry (Ottawa, February 2008), reported
(2009) 23 ICCP 143

Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February
2007), reported (2009) 22 ICCP 41

Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry (Ottawa,
February 1995), reported (1996) 4 ICCP 3

Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa,
August 1997), reported (1998) 8 ICCP 281

INJURIOUS AFFECTION

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern
Railway Right of Way Inquiry (Ottawa, February 2008), reported
(2009) 23 ICCP 143

LOSS OF USE

Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000),
reported (2000) 12 ICCP 269

Nadleh Whut’en First Nation: Lejac School Inquiry (Ottawa, December
2008), reported (2009) 24 ICCP 211

COMPENSATION CRITERIA See COMPENSATION – CRITERIA; MANDATE OF
INDIAN CLAIMS COMMISSION; SPECIFIC CLAIMS POLICY

COMPREHENSIVE CLAIM See SPECIFIC CLAIMS POLICY
CONSTITUTION
CONSTITUTION ACT, 1867
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
CONSTITUTION ACT, 1930 See also NATURAL RESOURCES TRANSFER AGREEMENT, 1930
CONSTITUTION ACT, 1982
Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 117
TERMS OF UNION, 1871 See BRITISH COLUMBIA
CONSTRUCTIVE REJECTION See MANDATE OF INDIAN CLAIMS COMMISSION
CONSULTATION See FIDUCIARY DUTY
CONTRACT
MISTAKE
Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307
CRITERIA FOR COMPENSATION See COMPENSATION
CULTURE AND RELIGION
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225
BURIAL SITE
Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
Taku River Tlingit First Nation: Wenah Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225
HISTORICAL SITE
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
KEY WORDS INDEX

PITHOUSES
  Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
  Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

POTLATCH
  ’Namgis First Nation: McKenna-McBride Applications Inquiry (Ottawa, February 1997), reported (1998) 7 ICCP 109

SEASONAL ROUND
  Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
  Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

SPIRITUAL SITE
  Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
  Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209

WINTER VILLAGES
  Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

- D -

DAM See FLOODING; RIGHT OF WAY

DAMAGES See COMPENSATION

DATE OF FIRST SURVEY See TREATY LAND ENTITLEMENT

DE FACTO RESERVE See RESERVE

DECLARATION OF RIGHTS See MANDATE OF INDIAN CLAIMS COMMISSION

DEEMED REJECTION See MANDATE OF INDIAN CLAIMS COMMISSION – CONSTRUCTIVE REJECTION

DEFENCES

DETRIMENTAL RELIANCE
  Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
ESTOPPEL
  Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117
RES JUDICATA
  Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

DELAY See MANDATE OF INDIAN CLAIMS COMMISSION

DETRIMENTAL RELIANCE See DEFENCES

DISPOSITION See RESERVE

DITCHBURN-CLARK REVIEW See BRITISH COLUMBIA

DIVISION See BAND

- E -

ECONOMIC BENEFITS See TREATY RIGHT

ELDER WITNESS See EVIDENCE – ORAL HISTORY

ENVIRONMENT See also FIDUCIARY DUTY; FLOODING; INDIAN ACT
  Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 117

EQUITABLE FRAUD See FRAUD

ESTOPPEL See DEFENCES

EVIDENCE See also PRACTICE AND PROCEDURE
  ADMISSIBILITY
    Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
    James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
    Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
KEY WORDS INDEX

Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3

EXPERT
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3

ONUS OF PROOF
Alexis First Nation TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21
Kabkwistabaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3
Kabkwistabaw First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
Moosomin First Nation: 1909 Reserve Land Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 101
Moosomin First Nation 1909 Reserve Land Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 243
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3

ORAL HISTORY
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307

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

SIGNATURE BY MARK See also SURRENDER
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3

EXPERT See EVIDENCE

EXPROPRIATION See INDIAN ACT; RIGHT OF WAY
EXTINGUISHMENT See ABORIGINAL TITLE; TREATY INTERPRETATION

- F -

FIDUCIARY DUTY
BREACH OF TREATY

Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries (Ottawa, August 1995), reported (1994) 1 ICCP 3


COMPENSATION

Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535

CONSULTATION

Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535

Mamaleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199

Namgis First Nation: McKenna-McBride Applications Inquiry (Ottawa, February 1997), reported (1998) 7 ICCP 109

Qu’Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Couessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159

Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77

Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

ENVIRONMENT

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

FIDUCIARY EXPECTATION


INDIAN LAND

Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535
KEY WORDS INDEX

INDIAN SETTLEMENT
   Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
   Homalco Indian Band: Atpe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
   Mamalelegala Que Que’So’ Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
   ’Namgis First Nation: McKenna-McBride Applications Inquiry (Ottawa, February 1997), reported (1998) 7 ICCP 109
   Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

MINERALS
   Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85

POST-CONFEDERATION
   Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

POST-SURRENDER
   Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Rama First Nations): Coldwater-Narrows Reservation Surrender Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 187
   Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
   Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209
   James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
   Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa, August 1997), reported (1998) 8 ICCP 281

PRE-CONFEDERATION CLAIM
Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry (Ottawa, June 2003), reported (2004) 17 ICCP 227
Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

PRE-RESERVE CREATION
Esketemc First Nation: Wright’s Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

PRE-SURRENDER
Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
Carry the Kettle First Nation: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 3
Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209
Duncan’s First Nation: 1928 Surrender Inquiry (Ottawa, September 1999), reported (2000) 12 ICCP 53
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
Kabkwastawauk First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3
Kabkwastawauk First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
KEY WORDS INDEX

Mistawasis First Nation: 1911, 1917, and 1919 Surrenders Inquiry
   (Ottawa, March 2002), reported (2002) 15 ICCP 333
Moosomin First Nation: 1909 Reserve Land Surrender Inquiry (Ottawa,
   March 1997), reported (1998) 8 ICCP 101
Moosomin First Nation: 1909 Reserve Land Surrender Mediation (Ottawa,
   March 2004), reported (2007) 18 ICCP 243
Muscowequan First Nation: 1910 and 1920 Surrenders Inquiry (Ottawa,
   November 2008), reported (2009) 24 ICCP 595
Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007),
   reported (2009) 22 ICCP 85
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa,
   September 2007), reported (2009) 23 ICCP 3
Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry (Ottawa,
   February 1995), reported (1996) 4 ICCP 3
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa,
   August 1997), reported (1998) 8 ICCP 281

PROTECTION OF LAND
Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to
   Indian Reserve 201 Inquiry (Ottawa, March 1998), reported
   (1998) 10 ICCP 117
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa,
   December 2001), reported (2002) 15 ICCP 3

PROTECTION OF RESERVE LAND
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa,
   March 2005), reported (2008) 20 ICCP 183
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry
   (Ottawa, March 2005), reported (2008) 20 ICCP 335
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004),
   reported (2007) 18 ICCP 19

RESERVE CREATION
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa,
   December 2001), reported (2002) 15 ICCP 3
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern
   Railway Right of Way Inquiry (Ottawa, February 2008), reported
   (2009) 23 ICCP 143
Mamaleqalga Qwe’Qwa’Sol’Enox Band: McKenna-McBride Applications
   Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
Nadleh Whut’en First Nation: Lejac School Inquiry (Ottawa, December
   2008), reported (2009) 24 ICCP 211
’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), reported (2008) 21 ICCP 97

RIGHT OF WAY

Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21

Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 201

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143

Qu’Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Couwessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159

Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77

Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3


SURRENDER


Couwessess First Nation: 1907 Surrender Phase II Inquiry (Ottawa, July 2006), reported (2008) 21 ICCP 349

THIRD PARTY


Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21

Albabbasca 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
KEY WORDS INDEX

TREATY LAND ENTITLEMENT

Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269

FIDUCIARY EXPECTATION See FIDUCIARY DUTY

FIDUCIARY OBLIGATION See FIDUCIARY DUTY

FIDUCIARY RELATIONSHIP See FIDUCIARY DUTY

FIFTEEN–YEAR RULE See SPECIFIC CLAIMS POLICY

FISHING See TREATY RIGHT

FLOODING

DAM

Eel River Bar First Nation: Eel River Dam Inquiry (Ottawa, December 1997), reported (1998) 9 ICCP 3
Qu’Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

FRAUD See also SPECIFIC CLAIMS POLICY – BEYOND LAWFUL OBLIGATION

Chippewas of the Thames First Nation: Clench Defalcation Inquiry (Ottawa, March 2002), reported (2002) 15 ICCP 307
Chippewas of the Thames First Nation: Clench Defalcation Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 27
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3

**EQUITABLE FRAUD**


- **G** -

GATHERING See TREATY RIGHT – HARVESTING

GRAVE SITE See CULTURE AND RELIGION – BURIAL SITE

- **H** -

HARVESTING See TREATY RIGHT

HIGHWAY See RIGHT OF WAY – ROAD

HISTORICAL SITE See CULTURE AND RELIGION

HUNTING See TREATY RIGHT

HYDRO LINE See RIGHT OF WAY

- **I** -

INDIAN ACT See also STATUTE – LAWFUL OBLIGATION

ALLOCATION

Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

BAND MEMBERSHIP

James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
**KEY WORDS INDEX**

*Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004), reported (2007) 18 ICCP 19

**BILL C-31**


**ENVIRONMENT**

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

**EXPROPRIATION** See also RIGHT OF WAY

*Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005), reported (2007) 18 ICCP 277

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

*Keeseekowenin First Nation: 1906 Land Claim Mediation* (Ottawa, August 2005), reported (2008) 21 ICCP 43

*Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry* (Ottawa, 2009), reported (2009) 23 ICCP 143

*Michipicoten First Nation: Pilot Project Mediation* (Ottawa, 2008), reported (2009) 24 ICCP 711


**INDIAN STATUS**


**JURISDICTION**

*Carry the Kettle First Nation: 1905 Surrender Inquiry* (Ottawa, December 2008), reported (2009) 24 ICCP 3

**PERMIT** See also RIGHT OF WAY

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

*Qu’Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Couessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation* (Ottawa, December 2005), reported (2008) 21 ICCP 77

*Standing Buffalo Dakota Nation: Flooding Mediation* (Ottawa, March 2004), reported (2007) 18 ICCP 3

*Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3
REGISTRATION OF INDIAN RESERVE

Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209

SUBDIVISION

Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

SURRENDER See also RESERVE – SURRENDER

Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277

Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209

Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263

Carry the Kettle First Nation: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 3

Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209

Cowessess First Nation: 1907 Surrender Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 223

Cowessess First Nation: 1907 Surrender Phase II Inquiry (Ottawa, July 2006), reported (2008) 21 ICCP 349

Duncan's First Nation: 1928 Surrender Inquiry (Ottawa, September 1999), reported (2000) 12 ICCP 53

Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219

Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291

James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335

Kabewistabau First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3

Kabewistabau First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3

The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3

Lax Kw’alaams Indian Band: Tsimpsean Indian Reserve 2 Inquiry (Ottawa, June 1994), reported (1995) 3 ICCP 99

Metepenagiag Mi’kmaq Nation: Hosford Lot and Indian Reserve 7 Negotiations Mediation (Ottawa, May 2008), reported (2009) 23 ICCP 431

Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711
**KEY WORDS INDEX**

*Mistawasis First Nation: 1911, 1917, and 1919 Surrenders Inquiry*  
(Ottawa, March 2002), reported (2002) 15 ICCP 333  

*Moosomin First Nation: 1909 Reserve Land Surrender Inquiry*  
(Ottawa, March 1997), reported (1998) 8 ICCP 101  

*Moosomin First Nation: 1909 Reserve Land Surrender Mediation*  
(Ottawa, March 2004), reported (2007) 18 ICCP 243  

*Muskowekwan First Nation: 1910 and 1920 Surrenders Inquiry*  
(Ottawa, November 2008), reported (2009) 24 ICCP 595  

*Paul First Nation: Kapasiwin Townsite Inquiry*  
(Ottawa, February 2007), reported (2009) 22 ICCP 85  

*Roseau River Anishinabe First Nation: 1903 Surrender Inquiry*  
(Ottawa, September 2007), reported (2009) 23 ICCP 3  

*Sturgeon Lake First Nation: 1913 Surrender Inquiry*  
(Ottawa, December 2008), reported (2009) 24 ICCP 307  

*Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry*  
(Ottawa, February 1995), reported (1996) 4 ICCP 3  

*Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry*  
(Ottawa, August 1997), reported (1998) 8 ICCP 281  

*Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry*  
(Ottawa, December 1994), reported (1995) 3 ICCP 175  

**TAXATION**  
*Alexis First Nation: TransAlta Utilities Rights of Way Inquiry*  
(Ottawa, March 2003), reported (2004) 17 ICCP 21  

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

**TRESPASS**  
*Mamalelegala Que’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry*  
(Ottawa, March 1997), reported (1998) 7 ICCP 199  

**INDIAN CLAIMS COMMISSION** See MANDATE OF INDIAN CLAIMS COMMISSION; See also SPECIFIC CLAIMS POLICY  

**INDIAN LANDS** See BRITISH COLUMBIA – INDIAN SETTLEMENT  

**INDIAN RESERVE COMMISSION** See BRITISH COLUMBIA  

**INDIAN SETTLEMENT** See BRITISH COLUMBIA; FIDUCIARY DUTY; SPECIFIC CLAIMS POLICY  

**INDIAN STATUS** See INDIAN ACT
INDIAN TITLE See ABORIGINAL TITLE
INTERVENOR See PRACTICE AND PROCEDURE
ISSUES See MANDATE OF INDIAN CLAIMS COMMISSION

- L -

LATE ADHERENT See TREATY LAND ENTITLEMENT

LAWFUL OBLIGATION See INDIAN ACT; SPECIFIC CLAIMS POLICY; STATUTE

LAND OCCUPIED PRIOR TO TREATY See TREATY LAND ENTITLEMENT

LEASE See RESERVE

LETTERS PATENT See PRE-CONFEDERATION CLAIM; RESERVE

LOSS OF USE See COMPENSATION

- M -

MANDATE OF INDIAN CLAIMS COMMISSION See also SPECIFIC CLAIMS POLICY

ABORIGINAL TITLE

Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000),
reported (2000) 13 ICCP 117

Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa,
February 2007), reported (2008) 21 ICCP 535

COMPENSATION CRITERIA

Lax Kw’alaams Indian Band: Tsimpsean Indian Reserve 2 Inquiry
(Ottawa, June 1994), reported (1995) 3 ICCP 99

Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000),
reported (2000) 12 ICCP 269

Thunderchild First Nation: 1908 Surrender Mediation (Ottawa,
March 2004), reported (2007) 18 ICCP 261

CONSTRUCTIVE REJECTION

Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa,
March 2003), reported (2004) 17 ICCP 21
Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 201
Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 91
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Couwessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu'Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

DECLARATION OF RIGHTS

DEEMED REJECTION See MANDATE OF INDIAN CLAIMS COMMISSION – CONSTRUCTIVE REJECTION

DELAY
Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21
Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 201
Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 91
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

ISSUES
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 5
MEDIATION

Chipewas of the Thames First Nation: Muncey Land Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 285
Chipewas of the Thames First Nation: Clench Defalcation Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 27
Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291
Fort Pelly Agency: Pelly Haylands Claim Mediation (Ottawa, March 2008), reported (2009) 23 ICCP 279
Kakwewistabaw First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
Keeseekowenin First Nation: 1906 Land Claim Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 43
Keeseekowenin Mi'kmaw Nation: Hosford Lot and Indian Reserve 7 Negotiations Mediation (Ottawa, May 2008), reported (2009) 23 ICCP 431
Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711
Moosomin First Nation: 1909 Reserve Land Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 243
Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411
Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 91
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3
Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261
KEY WORDS INDEX

REJECTED CLAIM
Micmacs of Gesgapegiag First Nation: Horse Island Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 253

SUPPLEMENTARY MANDATE
Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

MANITOBA
Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
Keeseekowenin First Nation: 1906 Land Claim Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 43
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269
Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 41
Peguis First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 183
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
Sandy Bay Ofishway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

MARRIAGE See TREATY LAND ENTITLEMENT

MCKENNA-MCBRIDE COMMISSION See BRITISH COLUMBIA

MEDIATION See MANDATE OF INDIAN CLAIMS COMMISSION

XXXV
MEDICAL AID See TREATY RIGHT

MEMBERSHIP See BAND; INDIAN ACT – BAND MEMBERSHIP

MIGRATION See BAND

MINERALS See FIDUCIARY DUTY – MINERALS; TREATY RIGHT

- N -

NATURAL RESOURCES TRANSFER AGREEMENT, 1930

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

Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries (Ottawa, August 1995), reported (1994) 1 ICCP 3


NEW BRUNSWICK

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

Metepenagiag Mi’kmaq Nation: Hosford Lot and Indian Reserve 7 Negotiations Mediation (Ottawa, May 2008), reported (2009) 23 ICCP 431

NUNAVUT

NUNAVUT LAND CLAIMS AGREEMENT


KEY WORDS INDEX

- O -

ONTARIO


Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209

Chippewas of the Thames First Nation: Clench Defalcation Inquiry (Ottawa, March 2002), reported (2002) 15 ICCP 307

Chippewas of the Thames First Nation: Clench Defalcation Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 27


Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711

Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry (Ottawa, June 2003), reported (2004) 17 ICCP 227

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

Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117

ONUS OF PROOF See EVIDENCE

ORAL HISTORY See EVIDENCE

ORAL TERMS See TREATY INTERPRETATION – OUTSIDE PROMISES

ORDER IN COUNCIL See SPECIFIC CLAIMS POLICY

OUTSIDE PROMISES See TREATY INTERPRETATION

OUTSTANDING BUSINESS See SPECIFIC CLAIMS POLICY
- P -

PARK
INDIAN LAND
Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535

PAROL EVIDENCE RULE See EVIDENCE

PERMIT See INDIAN ACT; RIGHT OF WAY

PETITION OF RIGHT See PRE-CONFEDERATION CLAIM

POLICY See ABORIGINAL TITLE – ADDITIONS TO RESERVE POLICY
SPECIFIC CLAIMS POLICY; TREATY LAND ENTITLEMENT

POPULATION FORMULA See TREATY LAND ENTITLEMENT

POST-SURRENDER See FIDUCIARY DUTY

POTLATCH See CULTURE AND RELIGION

POWERS See BAND COUNCIL

PRACTICE AND PROCEDURE See also EVIDENCE
ELDER WITNESS See EVIDENCE – ORAL HISTORY
INTERVENOR
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3

WITNESS See also EVIDENCE – ORAL HISTORY
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
KEY WORDS INDEX

PRE-CONFEDERATION CLAIM See also FIDUCIARY DUTY; SPECIFIC CLAIMS POLICY; TREATY INTERPRETATION

COMPENSATION
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

LETTERS PATENT
Micmacs of Gesgapegiag First Nation: Horse Island Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 253

PETITION OF RIGHT
Micmacs of Gesgapegiag First Nation: Horse Island Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 253

PURCHASE
Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry (Ottawa, June 2003), reported (2004) 17 ICCP 227
Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117

RESERVATION

RESERVE CREATION
Moose Deer Point First Nation: Potawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

SURRENDER
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry (Ottawa, June 2003), reported (2004) 17 ICCP 227
Walpole Island First Nation: Boblo Island Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 117

PRE-CONFEDERATION TREATY See PRE-CONFEDERATION CLAIM; See also TREATIES

PRE-EMPTION See BRITISH COLUMBIA

PRE-SURRENDER See FIDUCIARY DUTY

PROCEEDS OF SALE See RESERVE

PROTECTION OF LAND See FIDUCIARY DUTY

PROTECTION OF RESERVE LAND See FIDUCIARY DUTY

PURCHASE See PRE-CONFEDERATION CLAIM

- Q -

QUALITY OF LAND See TREATY LAND ENTITLEMENT

QUEBEC

Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277

Micmacs of Gesgapegiag First Nation: Horse Island Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 253

- R -

RAILWAY See RIGHT OF WAY

REGISTRATION OF INDIAN RESERVE See INDIAN ACT

REJECTED CLAIM See MANDATE OF INDIAN CLAIMS COMMISSION

RELIGION See CULTURE AND RELIGION

RELIGIOUS SITE See CULTURE AND RELIGION – SPIRITUAL SITE
KEY WORDS INDEX

RES JUDICATA See DEFENCES

RESERVATION See PRE-CONFEDERATION CLAIM

RESERVE See RIGHT OF WAY; TREATY LAND ENTITLEMENT

ABANDONMENT

James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

ALIENATION

Fort Pelly Agency: Pelly Haylands Claim Mediation (Ottawa, March 2008), reported (2009) 23 ICCP 279

ALLOTMENT

Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
'Namgis First Nation: Cormorant Island Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 3

COMPENSATION

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Nadleh Whut'en First Nation: Lejac School Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 211

DE FACTO RESERVE

Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3

DISPOSITION

Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005)
Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa, August 1997), reported (1998) 8 ICCP 281

LEASE
Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 3

LETTERS PATENT

PERMIT See RIGHT OF WAY

PROCEEDS OF SALE
Carry the Kettle First Nation: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 3
Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 2007), reported (1998) 8 ICCP 209
Chippewas of the Thames First Nation: Clench Defalcation Inquiry (Ottawa, March 2002), reported (2002) 15 ICCP 307
Chippewas of the Thames First Nation: Clench Defalcation Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 27
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
KEY WORDS INDEX

Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 41
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa, August 1997), reported (1998) 8 ICCP 281

RESERVE CLAUSE See TREATY INTERPRETATION
RESERVE CREATION SEE ALSO BRITISH COLUMBIA; FIDUCIARY DUTY; PRE-CONFEDERATION CLAIM
Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Esketemc First Nation: Wright's Meadow Pre-emption Inquiry (Ottawa, June 2008), reported (2009) 23 ICCP 481
Fort Pelly Agency: Pelly Haylands Claim Mediation (Ottawa, March 2008), reported (2009) 23 ICCP 279
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Mamalequeoha Que'Quwa'So'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: McKenna-McBride Applications Inquiry (Ottawa, February 1997), reported (1998) 7 ICCP 109
Taku River Tlingit First Nation: Wenab Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97
Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 225

REVERSIONARY INTEREST See RIGHT OF WAY
RIPARIAN RIGHTS
Alhabsah Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 117
Qu’Appelle Valley Indian Development Authority (Muskowketung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

ROAD See RIGHT OF WAY
SALE See RESERVE – DISPOSITION
STREETS AND LANES
Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 41

SURRENDER
Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209
Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry (Ottawa, July 2003), reported (2004) 17 ICCP 263
CarrystheKettle First Nation: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 3
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Rama First Nations): Coldwater-Narrows Reservation Surrender Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 187
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 209
Chippewas of the Thames First Nation: Clench Defalcation Inquiry (Ottawa, March 2002), reported (2002) 15 ICCP 307
Chippewas of the Thames First Nation: Clench Defalcation Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 27
Cowessess First Nation: 1907 Surrender Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 223
Cowessess First Nation: 1907 Surrender Phase II Inquiry (Ottawa, July 2006), reported (2008) 21 ICCP 349
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
Duncan’s First Nation: 1928 Surrender Inquiry (Ottawa, September 1999), reported (2000) 12 ICCP 53
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
Kabkwistabaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3
Kabkwistabaw First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
Lax Kw’alaams Indian Band: Tsimpsean Indian Reserve 2 Inquiry (Ottawa, June 1994), reported (1995) 3 ICCP 99
Moosomin First Nation: 1909 Reserve Land Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 101
Moosomin First Nation: 1909 Reserve Land Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 243
Mushkegowuk First Nation: 1910 and 1920 Surrenders Inquiry (Ottawa, November 2008), reported (2009) 24 ICCP 595
Nak’azdli First Nation: Ah’t-Len-Jees Indian Reserve 5 Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 81
Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85
Peguis First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 183
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3
Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307
Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry (Ottawa, August 1997), reported (1998) 8 ICCP 281
Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261

SURRENDER FOR EXCHANGE
Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307
Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261

THIRD PARTY

TRESPASS
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335

REVERSIONARY INTEREST See RIGHT OF WAY

RIGHT OF PASSAGE See TREATY INTERPRETATION

RIGHT OF WAY See ALSO FIDUCIARY DUTY
ABANDONMENT

BRIDGE
Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277

DAM
Eel River Bar First Nation: Eel River Dam Inquiry (Ottawa, December 1997), reported (1998) 9 ICCP 3
Qu’Appelle Valley Indian Development Authority (Muskoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3
KEY WORDS INDEX

EXPROPRIATION
Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21
Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277
Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 201
Eel River Bar First Nation: Eel River Dam Inquiry (Ottawa, December 1997), reported (1998) 9 ICCP 3
Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143
Qu’Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Couwessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

HIGHWAY See RIGHT OF WAY – ROAD

HYDRO LINE
Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21
Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711

PERMIT
Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21
Eel River Bar First Nation: Eel River Dam Inquiry (Ottawa, December 1997), reported (1998) 9 ICCP 3
Qu’Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Couwessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3
RAILWAY

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143

Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711

Muskowekwan First Nation: 1910 and 1920 Surrenders Inquiry (Ottawa, November 2008), reported (2009) 24 ICCP 595


REVERSIONARY INTEREST

Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 143


ROAD

Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277

Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 201


SURRENDER

Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries (Ottawa, March 2005), reported (2007) 18 ICCP 277

TRESPASS

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

Qu’Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159

Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77

Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

RIPARIAN RIGHTS See RESERVE

ROAD See RIGHT OF WAY

ROBINSON-HURON TREATY (1850) See TREATIES
ROBINSON-SUPERIOR TREATY (1850) See TREATIES

ROYAL PREROGATIVE

_Carry the Kettle First Nation: Cypress Hills Inquiry_ (Ottawa, July 2000), reported (2000) 13 ICCP 209
_Cumberland House Cree Nation: Indian Reserve 100A Inquiry_ (Ottawa, March 2005), reported (2008) 20 ICCP 183
_James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry_ (Ottawa, March 2005), reported (2008) 20 ICCP 355
_James Smith Cree Nation: Indian Reserve 100A Inquiry_ (Ottawa, March 2005), reported (2008) 20 ICCP 3

ROYAL PROCLAMATION OF 1763

_Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry_ (Ottawa, March 1997), reported (1998) 8 ICCP 209
_Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry_ (Ottawa, June 2003), reported (2004) 17 ICCP 227
_Walpole Island First Nation: Boblo Island Inquiry_ (Ottawa, March 2000), reported (2000) 13 ICCP 117

-SA-

SALE See RESERVE-DISPOSITION

SASKATCHEWAN

_Carry the Kettle First Nation: 1905 Surrender Inquiry_ (Ottawa, December 2008), reported (2009) 24 ICCP 3
_Carry the Kettle First Nation: Cypress Hills Inquiry_ (Ottawa, July 2000), reported (2000) 13 ICCP 209
_Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries_ (Ottawa, August 1993), reported (1994) 1 ICCP 3
Cowessess First Nation: 1907 Surrender Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 223
Cowessess First Nation: 1907 Surrender Phase II Inquiry (Ottawa, July 2006), reported (2008) 21 ICCP 349
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291
Fort Pelly Agency: Pelly Haylands Claim Mediation (Ottawa, March 2008), reported (2009) 23 ICCP 279
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3
Kabkewistahaw First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry (Ottawa, November 1996), reported (1998) 6 ICCP 21
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235
Moosomin First Nation: 1909 Reserve Land Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 101
Moosomin First Nation: 1909 Reserve Land Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 243
Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411
Muskowekwan First Nation: 1910 and 1920 Surrenders Inquiry (Ottawa, November 2008), reported (2009) 24 ICCP 595
Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 91
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159
Qu'Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77
Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 411
Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3
Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307
Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 3
Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261
Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

NORTH-WEST REBELLION
Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 301

TREATY LAND ENTITLEMENT FRAMEWORK AGREEMENT
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
SCOPE See SPECIFIC CLAIM POLICY; TREATY INTERPRETATION

SETTLEMENT AGREEMENT See TREATY LAND ENTITLEMENT

SETTLEMENT LANDS See BRITISH COLUMBIA – INDIAN SETTLEMENT

SIGNATURE BY MARK See EVIDENCE

SPECIFIC CLAIMS POLICY See also MANDATE OF INDIAN CLAIMS COMMISSION

ABORIGINAL TITLE

Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3

BAND


Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

BEYOND LAWFUL OBLIGATION

James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335

Mamalelegala Que’Quwa’Sot’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199

Peepeskasis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

COMPENSATION CRITERIA

Lax Kw’alaams Indian Band: Tsimpsean Indian Reserve 2 Inquiry (Ottawa, June 1994), reported (1995) 3 ICCP 99

Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269

COMPREHENSIVE CLAIM


Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535

FIDUCIARY DUTY

Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
KEY WORDS INDEX

Mamaleleqala Que’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
‘Namgis First Nation: Cormorant Island Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 3
Taku River Tlingit First Nation: Wenab Specific Claim Inquiry (Ottawa, March 2006), reported (2008) 21 ICCP 97

FIFTEEN-YEAR RULE
Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 3

FRAUD
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89
James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 335

INDIAN LAND
Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535

INDIAN SETTLEMENT
Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry (Ottawa, December 1995), reported (1996) 4 ICCP 89

LAWFUL OBLIGATION
Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry (Ottawa, December 2001), reported (2002) 15 ICCP 3
Mamaleleqala Que’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
‘Namgis First Nation: Cormorant Island Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 3

ORDER IN COUNCIL
‘Namgis First Nation: Cormorant Island Inquiry (Ottawa, March 1996), reported (1998) 7 ICCP 3

OUTSTANDING BUSINESS
PRE-CONFEDERATION CLAIM

Micmacs of Gesgapegiag First Nation: Horse Island Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 253

SCOPE

Mamaleqala Qwe’Qwa’Sol’Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199
’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

STANDING See SPECIFIC CLAIMS POLICY – BAND

SPIRITUAL SITE See CULTURE AND RELIGION

STANDING See SPECIFIC CLAIMS POLICY – BAND

STATUS See BAND; INDIAN ACT – INDIAN STATUS

STATUTE

LAWFUL OBLIGATION

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

SUBDIVISION See INDIAN ACT

SUPPLEMENTARY MANDATE See MANDATE OF INDIAN CLAIMS COMMISSION

SURRENDER See FIDUCIARY DUTY; INDIAN ACT; PRE-CONFEDERATION CLAIM; RESERVE; RIGHT OF WAY

SURRENDER FOR EXCHANGE See RESERVE

- T -

TAXATION See INDIAN ACT

TERMS OF UNION, 1871 See BRITISH COLUMBIA

THIRD PARTY See FIDUCIARY DUTY; INDIAN ACT; RESERVE

liv
KEY WORDS INDEX

TIMBER See TREATY RIGHT – HARVESTING

TLE See TREATY LAND ENTITLEMENT

TRAPPING See TREATY RIGHT – HARVESTING

TREATIES

COLDWATER TREATY (1836)

COLLINS TREATY (1785)
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

ROBINSON-HURON TREATY (1850)
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

ROBINSON-SUPERIOR TREATY (1850)
Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

TREATY OF 1779
Eel River Bar First Nation: Eel River Dam Inquiry (Ottawa, December 1997), reported (1998) 9 ICCP 3

TREATY OF 1836
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

TREATY 1 (1871)
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269
Peguis First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 183
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389
TREATY 1 (1876)
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

TREATY 2 (1871)
Keeseekoose First Nation: 1906 Land Claim Mediation (Ottawa, August 2005), reported (2008) 21 ICCP 43

TREATY 3 (1792)
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

TREATY 4 (1874)
Carry the Kettle First Nation: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 3
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
Cowessess First Nation: 1907 Surrender Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 223
Cowessess First Nation: 1907 Surrender Phase II Inquiry (Ottawa, July 2006), reported (2008) 21 ICCP 349
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
Fishing Lake First Nation: 1907 Surrender Mediation (Ottawa, March 2002), reported (2002) 15 ICCP 291
Fort Pelly Agency: Pelly Haylands Claim Mediation (Ottawa, March 2008), reported (2009) 23 ICCP 279
Kabkwewistahaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3
Kabkwewistahaw First Nation: 1907 Reserve Land Surrender Mediation (Ottawa, January 2003), reported (2004) 17 ICCP 3
Kabkwewistahaw First Nation: Treaty Land Entitlement Inquiry (Ottawa, November 1996), reported (1998) 6 ICCP 21
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
The Key First Nation: 1909 Surrender Inquiry (Ottawa, March 2000), reported (2000) 13 ICCP 3
Muskowekwan First Nation: 1910 and 1920 Surrenders Inquiry (Ottawa, November 2008), reported (2009) 24 ICCP 595
KEY WORDS INDEX

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

Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19

Qu’Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry (Ottawa, February 1998), reported (1998) 9 ICCP 159

Qu’Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation (Ottawa, December 2005), reported (2008) 21 ICCP 77


Standing Buffalo Dakota Nation: Flooding Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 3

TREATY 5 (1875)

Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 411

TREATY 5 (1876)

Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183

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

Opaskwayak Cree Nation: Streets and Lanes Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 41

TREATY 6 (1876)

Alexis First Nation: TransAlta Utilities Rights of Way Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 21

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

Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005)


James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 355

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


Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235


Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 301


Moosomin First Nation: 1909 Reserve Land Surrender Inquiry (Ottawa, March 1997), reported (1998) 8 ICCP 101

Moosomin First Nation: 1909 Reserve Land Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 243

Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411

Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007), reported (2009) 22 ICCP 85

Sturgeon Lake First Nation: 1913 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 307

Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 3


Thunderchild First Nation: 1908 Surrender Mediation (Ottawa, March 2004), reported (2007) 18 ICCP 261

Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

TREATY 7 (1877)


Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209

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

TREATY 8 (1899)

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

**TREATY 10 (1906)**


**TREATY 25 (1822)**

*Chippewas of the Thames First Nation: Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307

*Chippewas of the Thames First Nation: Clench Defalcation Mediation* (Ottawa, August 2005), reported (2008) 21 ICCP 27

**TREATY 29 (1827)**

*Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209
WILLIAMS TREATY (1923)
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

TREATY See TREATIES; TREATY AMENDMENT; TREATY INTERPRETATION; TREATY LAND ENTITLEMENT; TREATY RIGHT

TREATY AMENDMENT

TREATY INTERPRETATION See also TREATIES; TREATY RIGHT
COMPENSATION
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

EXTINGUISHMENT

FARMING LANDS
Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 411

ORAL TERMS See TREATY INTERPRETATION – OUTSIDE PROMISES
OUTSIDE PROMISES
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135
Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007), reported (2009) 23 ICCP 3
Roseau River Anishinabe First Nation: Medical Aid Inquiry (Ottawa, February 2001), reported (2001) 14 ICCP 3
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389
KEY WORDS INDEX

PRE-CONFEDERATION CLAIM
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
Moose Deer Point First Nation: Potawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135

RESERVE CLAUSE
Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), reported (2000) 13 ICCP 209
Cumberland House Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 183
Fishing Lake First Nation: 1907 Surrender Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 219
James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235
Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004), reported (2007) 18 ICCP 19
Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 411

RIGHT OF PASSAGE
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31

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

TREATY LAND ENTITLEMENT
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269
Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411

TREATY LAND ENTITLEMENT (TLE) See also FIDUCIARY DUTY; TREATY INTERPRETATION

ABSENTEE
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3

AMALGAMATION

DATE OF FIRST SURVEY
Blood Tribe/Kainaiwa: Big Claim Inquiry (Ottawa, March 2007), reported (2009) 22 ICCP 209
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
Kakewistabaw First Nation: Treaty Land Entitlement Inquiry (Ottawa, November 1996), reported (1998) 6 ICCP 21
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235
KEY WORDS INDEX

Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 301
Peguis First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 2001), reported (2001) 14 ICCP 183

LAND OCCUPIED PRIOR TO TREATY
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

LANDLESS TRANSFER
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

LATE ADHERENT
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

LOSS OF USE
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269

MARRIAGE
Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

PAYLIST
POLICY


Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3


Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73

Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235

Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 301

Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411


Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389


POPULATION FORMULA

Fort McKay First Nation: Treaty Land Entitlement Inquiry (Ottawa, December 1995), reported (1996) 5 ICCP 3


Kabwecistabau First Nation: Treaty Land Entitlement Inquiry (Ottawa, November 1996), reported (1998) 6 ICCP 21

Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73

Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235


Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411

Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 389

KEY WORDS INDEX

QUALITY OF LAND
Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry (Ottawa, June 2007), reported (2009) 22 ICCP 589

SASKATCHEWAN TLE FRAMEWORK AGREEMENT
Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry (Ottawa, November 1996), reported (1998) 6 ICCP 21
Kawacatoose First Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 73
Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry (Ottawa, March 1996), reported (1996) 5 ICCP 235
Muskoday First Nation: Treaty Land Entitlement Mediation (Ottawa, April 2008), reported (2009) 23 ICCP 411
Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry (Ottawa, December 1994), reported (1995) 3 ICCP 175

SETTLEMENT AGREEMENT
Long Plain First Nation: Loss of Use Inquiry (Ottawa, February 2000), reported (2000) 12 ICCP 269
Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry (Ottawa, February 2008), reported (2009) 23 ICCP 301

SEVERALTY

SUFFICIENCY OF TREATY LANDS

TREATY LAND ENTITLEMENT FRAMEWORK AGREEMENT See SASKATCHEWAN

TREATY PROMISE See TREATY INTERPRETATION; TREATY RIGHT
TREATY RIGHT See also CONSTITUTION

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

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

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

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
KEY WORDS INDEX

James Smith Cree Nation: Indian Reserve 100A Inquiry (Ottawa, March 2005), reported (2008) 20 ICCP 3
RESERVE See also RESERVE; TREATY LAND ENTITLEMENT
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135
Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 91
TIMBER See TREATY RIGHT – HARVESTING
TRAPPING See also TREATY RIGHT – HARVESTING
Albabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 117
TRESPASS See INDIAN ACT; RESERVE; RIGHT OF WAY
TRUST FUND See BAND
TRUTCH REVIEW See BRITISH COLUMBIA

- W -

WILLIAMS TREATY (1923) See TREATIES
Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry (Ottawa, March 1998), reported (1998) 10 ICCP 31
Moose Deer Point First Nation: Pottawatomi Rights Inquiry (Ottawa, March 1999), reported (1999) 11 ICCP 135
WITNESS See EVIDENCE – ORAL HISTORY; PRACTICE AND PROCEDURE

- X -

X MARK See EVIDENCE – SIGNATURE BY MARK

- Y -

YUKON
Kluane National Park and Kluane Game Sanctuary Inquiry (Ottawa, February 2007), reported (2008) 21 ICCP 535
REPORTS

Carry the Kettle First Nation
1905 Surrender Inquiry
3

Neskonlith, Adams Lake and Little Shuswap Indian Bands
Neskonlith Douglas Reserve Inquiry
99

Nadleh Whut’en First Nation
Lejac School Inquiry
211

Sturgeon Lake First Nation
1913 Surrender Inquiry
307

Red Earth and Shoal Lake Cree Nations
Quality of Reserve Lands Inquiry
411

Muskowekwan First Nation
1910 and 1920 Surrender Inquiry
595
Michipicoten First Nation
Pilot Project (Mediation)
711
INDIAN CLAIMS COMMISSION

CARRY THE KETTLE FIRST NATION
1905 SURRENDER INQUIRY

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

Counsel
For the Carry the Kettle First Nation
W. Allan Brabant
Daniel J. Maddigan

For the Government of Canada
Douglas Faulkner

To the Indian Claims Commission
Julie McGregor

December 2008
CONTENTS

SUMMARY 7
KEY HISTORICAL NAMES CITED 11

PART I INTRODUCTION 13
Background to the Inquiry 13
Mandate of the Commission 15

PART II THE FACTS 19

PART III ISSUES 21

PART IV ANALYSIS 22
Issue 1 Jurisdiction of the Governor in Council under the Indian Act 22
  Background 22
  First Nation’s Position 26
  Canada’s Position 27
  Findings 28
Issue 2 Compliance with the Indian Act 33
  Background 34
  First Nation’s Position 37
  Canada’s Position 37
  Findings 38
    Did a surrender meeting actually take place? 38
    Was a meeting called in accordance with the rules of the Band? 39
    Was there a majority of eligible voting members in attendance at the sur-
    render meeting? 40
    Did a majority of eligible voters in attendance vote in favour of the sur-
    render? 41
Issue 3 Fiduciary Duty 42
  Background 43
    Compensation for Improvements 45
    Requests for the Distribution of Trust Fund Money 46
  First Nation’s Position 46
CONTENTS

Canada’s Position 46
The Test for Pre-Surrender Fiduciary Duty 47
Findings 48
  Was the Band’s Understanding Adequate? 48
  Did the Crown’s Conduct Taint the Dealings? 49
  Did the Surrender Constitute an Exploitative Bargain? 50
  Had the Band Ceded its Decision-Making Powers? 51
Issue 4 Outstanding Lawful Obligation 51

PART V CONCLUSIONS AND RECOMMENDATION 52

APPENDICES
A Historical Background 55
B Chronology 97
SUMMARY

CARRY THE KETTLE FIRST NATION
1905 SURRENDER INQUIRY
Saskatchewan

The report may be cited as Indian Claims Commission, Carry the Kettle First Nation Inquiry: 1905 Surrender Inquiry (Ottawa, December 2008), reported (2009) 24 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 S.G. Purdy (Chair), Commissioner J. Dickson-Gilmore, Commissioner A.C. Holman

Treaties - Treaty 4 (1874); Reserve - Surrender - Proceeds of Sale; Indian Act - Jurisdiction - Surrender; Fiduciary Duty - Pre-Surrender; Saskatchewan

THE SPECIFIC CLAIM
On December 16, 1988, the Carry the Kettle First Nation submitted a claim under the federal Specific Claims Policy challenging the validity of the 1905 surrender of approximately 5,760 acres of lands from the Assiniboine Indian Reserve No.76. On May 24, 1994, the Department of Indian Affairs rejected the claim; the First Nation then applied to the Indian Claims Commission to inquire into its rejected claim. The ICC agreed to conduct an inquiry on December 1, 1994. Following a protracted period during which the inquiry was placed in abeyance at the request of the First Nation, awaiting the completion of another inquiry involving the Carry the Kettle First Nation, the inquiry was resumed on November 17, 2004.

BACKGROUND
The Carry the Kettle First Nation is descended from the Assiniboine bands led by Chiefs The Man Who Took the Coat and Long Lodge, which amalgamated in 1885, and adhered to Treaty Four in September 1877. Five years later, in May of 1882, a reserve was surveyed for the Carry the Kettle Band at Indian Head which was finalized in June 1885. Indian Reserve 76 (IR 76) was confirmed by Order in Council P.C.
1511 on May 17, 1889, and the lands were removed from the operation of the Dominion Lands Act in June 14, 1893.

In December 1904, the Band approached Indian Agent Aspdin to enquire about surrendering the nine southernmost sections of IR 76. Aspdin communicated the Band’s request to the department, noting that, should the surrender proceed, the remaining lands were sufficient to meet the requirements of the Band. The Band’s request followed one made three years earlier by a settler for part of IR 76, which had been rebuffed by the resident Agent Aspdin, who reported the Band as adamantly opposed to any surrender.

Inspector of Indian Agencies W.M. Graham visited the reserve in March of 1905 to discuss the surrender request with the Band, whom he reported as most anxious for the surrender. At the ensuing meeting, the Band outlined six conditions of surrender to Graham, including: that the proceeds of the surrender and sale be applied against the Band’s debts to the department, and the remainder used to purchase lumber, to build a shed to house the thresher, purchase a new engine for the thresher and compensate band members who had invested labour in the lands surrendered. The Band requested that any monies remaining after these expenditures be managed by the department as it saw fit, and that money should be made available to ease destitution among elderly and vulnerable members on the reserve. Although Graham did not add this last item to the list of conditions for the surrender, he encouraged the department to consider the Band’s request.

The department agreed to proceed with the surrender, and on April 12, 1905, Deputy Superintendent General of Indian Affairs Frank Pedley forwarded the forms for surrender to Graham and authorized Aspdin to take the surrender in accordance with the provisions of the Indian Act. Aspdin's May 3, 1905 record of the surrender meeting reports that there was a 'decided majority in favour of the sale', and 'a number of absentees whom it is known are favorable'. A surrender for sale of 5,760 acres (sections 25, 26, 27, 28, 29 and 30, in township 15, range 11; sections 25, 26, 27 in township 15, range 12) was signed on April 26, 1905. The surrender document, which includes the six conditions set out by the Band, was signed or marked by Chief Carry the Kettle and Head Men Broken Arm, Chas. Rider and Eah Sickan (also known as The Saulteaux or David Saulteaux), and the affidavit to the surrender was signed by Indian Agent Aspdin and Chief Carry the Kettle on May 3, 1905, before a justice of the peace. On May 23, 1905, the Governor in Council approved the surrender. In September of 1905 a survey of the surrendered lands was undertaken, and on February 14, 1906, 34 of the 36 quarter sections surveyed were sold at an auction held in Sintaluta. Proceeds from the sales were distributed consistent with the six conditions of the surrender specified by the Band.
CARRY THE KETTLE FIRST NATION: 1905 SURRENDER INQUIRY

ISSUES
Given the terms and conditions of the 1905 surrender, did the Governor in Council exceed its jurisdiction under the Indian Act, when it (a) consented to the surrender; (b) sold the lands subject thereto; or (c) used the proceeds of the sale for certain of the purposes directed therein? Was the 1905 surrender taken in compliance with the requirements mandated by the Indian Act? Did Canada breach any fiduciary duty owed to the First Nation relative to the 1905 surrender? As a result of the answers to questions 1 to 3 above, does Canada have an outstanding lawful obligation to the First Nation?

FINDINGS
The Governor in Council did not exceed its jurisdiction under the Indian Act when it consented to the 1905 surrender of the southern portion of the reserve, and used the proceeds from the surrender for the purposes set out in the surrender document, in particular, repayment of a debt to the Crown and the purchase of farming machinery. Sections 70 and 139 of the Act do not contain exhaustive lists of items, thus permitting the government broad discretion to direct funds to purposes not specified in the sections, such as farming equipment. Furthermore, the Band’s debt for previous purchases of farm machinery was assumed by the Band as a whole, and the expenditure was of value to the whole Band, not only to the individuals farming at that time.

The Crown complied with the surrender requirements of the Indian Act when it took the 1905 surrender. The record indicates that a surrender meeting did, in fact, take place; it was called in accordance with the rules of the Band; there was a majority of eligible voters who attended the surrender meeting; and, a majority of those voted in favour of the surrender.

The Crown did not breach its fiduciary duty to the Band. The evidence shows that the Band understood the terms of the surrender and did not cede their decision-making powers to the Crown when they decided to proceed with a surrender. It was the Band who requested the surrender and the conditions attached to it. There exists no evidence to suggest that Indian Agent Aspdin exerted any pressure or undue influence on the Band. The 1905 surrender was not exploitive of the Band; the surrendered land comprised a small portion of the reserve, which at that time, was largely unused. It would have been reasonable from the Band’s perspective to sell off this portion and use part of the proceeds to refurbish the farm machinery, which in turn would lead to greater self-sufficiency.
RECOMMENDATION
That the claim of the Carry the Kettle First Nation regarding the 1905 surrender of a portion of Indian Reserve 76 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 that is fully referenced in the report.

Cases Referred To

ICC Reports Referred to
ICC, Paul First Nation: Kapasiwin Townsite Inquiry (Ottawa, February 2007).

Treaties and Statutes Referred To
Indian Act, RSC 1886, c.43; Interpretation Act, RSC 1985, c. I-2.

Other Sources Referred To
DIAND, Outstanding Business: A Native Claims Policy – Specific Claims (Ottawa: Minister of Supply and Services, 1982).

COUNSEL, PARTIES, INTERVENORS
W.A. Brabant, D.J. Maddigan for the Carry the Kettle First Nation; D. Faulkner for the Government of Canada; J. McGregor to the Indian Claims Commission.
KEY HISTORICAL NAMES CITED

Aspdin, Thomas, Farmer in Charge Assiniboine Reserve, 1898 - 1900; Indian Agent, Assiniboine Reserve, 1901 - 1905.

Bray, Samuel, Chief Surveyor, Department of Indian Affairs, 1899 - 1903.

Carry the Kettle, Chief and member of the Carry the Kettle First Nation, 1891.


Graham, W.M., Inspector of Indian Agencies, February 1904 - February 1918.

Grant, W.S., Indian Agent, Assiniboine Reserve, 1886 - 1897, 1906 - ca. 1911.

Jack, Joseph, member of Carry the Kettle First Nation.

Kennedy, Daniel, Chief and member of Carry the Kettle First Nation.

Laird, David, Indian Commissioner 1879 - 1888 and 1898 - 1914.

Lake, R.S., Member of Parliament for Qu'Appelle, SK, 1904 - 1911.

Long Lodge, Chief and member of the Assiniboine Band, 1870 - 1885.

Man Who Took The Coat, Chief of the Assiniboine Band.

McGibbon, Alex, Inspector of Indian Agencies and Reserves, in 1889 - 96.

McKenna, J.A., Assistant Indian Commissioner in 1901 - 1908.

Mackenzie, Rev. E., Hurricane Hills Mission.

McLean, J.D., Secretary for the Department of Indian Affairs, 1897 - 1910; Assistant Deputy and Secretary for the same department 1910 - 1916.

Oliver, Frank, Minister of the Interior and Superintendent General of Indian Affairs, April 1905 - October 1911.

Orr, W.A., In Charge, Lands and Timber Branch for the Department of Indian Affairs, 1894 - 1921.

Paget, E.H., Accountant for the Department of Indian Affairs, 1898 - 1913.

Pedley, Frank, Deputy Superintendent General of Indian Affairs, 1902 - 1913.

Rider, Charles, member of Carry the Kettle First Nation.

Rider, Tom, member of Carry the Kettle First Nation.

Ross, William, Senator, Victoria, Nova Scotia, 1905 - 1912.

Scott, D.C., Accountant for the Department of Indian Affairs, 1894 - 1913.

Smart, James A., Deputy Superintendent General of Indian Affairs, 1897 - 1902.

Smith, Peter, Auctioneer, Sintaluta, Saskatchewan.

The Man Who Took The Coat, Chief and member of the Assiniboine Band, 1885 - 1891.

The Saulteaux, member of Carry the Kettle First Nation.

Thomson, Levi, Member of Parliament, Qu'Appelle, SK, 1911 - 1921.

Tremandan, A.H., Settler, Montmartre, Saskatchewan.
PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

The modern Carry the Kettle First Nation traces its ancestry to the Assiniboine Chiefs The Man Who Took the Coat and Long Lodge, whose peoples originally resided within their traditional territories in the Cypress Hills of southern Saskatchewan, and who amalgamated as one band under their present name in 1885. In 1877, these bands signed Treaty 4, and surveys in May 1882 and June 1885 laid out and finalized their reserve at Indian Head. Indian Reserve 76 (IR 76) was confirmed by Order in Council P.C. 1511 on May 17, 1889, and the lands were removed from the operation of the Dominion Lands Act in June 14, 1893.

In December 1904, the Band approached Indian Agent Aspdin to enquire about surrendering the nine southernmost sections of IR 76. Aspdin communicated the Band’s request to the department, noting that, should the surrender proceed, the remaining lands were sufficient to meet the requirements of the Band. Inspector of Indian Agencies W.M. Graham visited the reserve in March of 1905 to discuss this request with the Band, whom he reported as most anxious for the surrender. At the ensuing meeting, the Band outlined six conditions of surrender to Graham, including: That the proceeds of the surrender and sale be applied against the Band’s debts to the department, and the remainder used to purchase lumber, etc., to build a shed to house the thresher, purchase a new engine for the thresher and compensate Band members who had invested labour in the lands surrendered. The Band requested that any monies remaining after these expenditures be managed by the department as it saw fit, and the Band requested that a portion of the remainder be made available to ease destitution among elderly and vulnerable members on the reserve. Graham encouraged the department to consider the Band’s request.
The department agreed to proceed with the surrender, and on April 12, 1905, Deputy Superintendent General of Indian Affairs, Frank Pedley, forwarded the forms for surrender to Graham and authorized Aspdin to take the surrender in accordance with the provisions of the Indian Act. Aspdin’s May 3, 1905 record of the surrender meeting reports that there was a ‘decided majority in favour of the sale’, and ‘a number of absentees whom it is known are favorable’. A surrender for sale of 5,760 acres (sections 25, 26, 27, 28, 29 and 30, in township 15, range 11; sections 25, 26, 27 in township 15, range 12) was signed on April 26, 1905. The surrender document, which contains the six conditions set out by the Band, was signed or marked by Chief Carry the Kettle and Head Men Broken Arm, Chas. Rider and Eah Sickan (also known as The Saulteaux or David Saulteaux), and the Affidavit of Surrender was signed by Indian Agent Aspdin and Chief Carry the Kettle on May 3, 1905, before a justice of the peace. On May 23, 1905, the Governor in Council approved the surrender. In September of 1905 a survey of the surrendered lands was undertaken, and on February 14, 1906, 34 of the 36 quarter sections surveyed were sold at an auction held in Sintaluta. Proceeds from the sales were distributed consistent with the six conditions of the surrender specified by the Band.

On December 16, 1988, the Carry the Kettle First Nation submitted a specific claim to the Department of Indian Affairs challenging the validity of the 1905 surrender of approximately 5,760 acres of IR 76 lands. The department rejected this claim in a letter from its Specific Claims Branch dated May 24, 1994. The First Nation subsequently approached the Indian Claims Commission to conduct an inquiry into its rejected claim, and on December 1, 1994, the Commission agreed to do so. To this end, a planning conference was held at Regina on April 12, 1995, and a community session was undertaken in the Carry the Kettle community on October 25, 1995. Shortly thereafter, at the Band’s request, the Carry the Kettle First Nation’s 1905 Surrender Inquiry was placed into abeyance while another claim involving this Band was completed (Cypress Hills). The 1905 Surrender Inquiry was reactivated on November 17, 2004. Given the passage of time during which the inquiry was in abeyance, the Commission held a second planning conference at Regina on December 5, 2005, and held a second community session at Carry the Kettle on November 29, 2006. As Elder Percy Ryder was not available for this session, his testimony was taken via video conference at Regina on May 24, 2007. Written legal submissions on behalf of the First Nation were received by the Commission on August 24, 2007; Canada’s submissions were received October 26, 2007, and the First Nation’s
reply to Canada's submissions was received on November 13, 2007. The Commission received oral submissions from the parties at Regina on November 20, 2007.

A summary of the written submissions, documentary evidence, transcripts, and a 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.” This 1973 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. 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.

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.\(^4\)

Map 2   Plan of Assiniboine [Carry the Kettle] IR 76, 1901
CARRY THE KETTLE FIRST NATION: 1905 SURRENDER INQUIRY

PART II

THE FACTS

The modern Carry the Kettle First Nation traces its ancestry to the Assiniboine Chiefs The Man Who Took the Coat and Long Lodge, whose peoples originally resided within their traditional territories in the Cypress Hills of southern Saskatchewan, and who amalgamated as one Band under their present name in 1885. In 1877, these bands signed Treaty 4, and surveys in May 1882 and June 1885 laid out and finalized their reserve at Indian Head. Indian Reserve 76 (IR 76) was confirmed by Order in Council P.C. 1511 on May 17, 1889, and the lands were removed from the operation of the Dominion Lands Act in June 14, 1893.

Between 1895 and 1905 the Carry the Kettle Band was reportedly well-established on IR 76. A number of the band members were successful farmers, raising a variety of crops, while others obtained good incomes selling wood and hay to settlers residing in the environs of the reserve. The Band was reportedly quite prosperous, and had no debts as of 1901. In 1903-04, with financial assistance from the department, the Band purchased farm implements and equipment, including an $820.00 thresher in 1903, for which they had reimbursed the department $520.00 by 1904, and $500.00 worth of fencing materials, purchased by the department and reimbursed by the band in 1904.

In December 1904, the Band approached Indian Agent Aspdin to enquire about surrendering the nine southernmost sections of IR 76. Aspdin communicated the Band’s request to the department, noting that, should the surrender proceed, the remaining lands were sufficient to meet the requirements of the Band. The Band’s request followed one made three years earlier by a settler for part of IR 76, which had been rebuffed by Aspdin, who reported the Band to be adamantly opposed to any surrender.

Inspector of Indian Agencies W.M. Graham visited the reserve in March of 1905 to discuss the surrender request with the Band, whom he reported as most anxious for the surrender. At the ensuing meeting, the Band outlined six...
conditions of surrender to Graham, including: That the proceeds of the surrender and sale be applied against the Band’s debts to the department, and the remainder used to purchase lumber, etc., to build a shed to house the thresher, purchase a new engine for the thresher and compensate Band members who had invested labour in the lands surrendered. Any monies remaining after these expenditures be managed by the department as it saw fit, and the Band requested that a portion of the remainder be made available to ease destitution among elderly and vulnerable members on the reserve. Although Graham did not add this last item to the list of conditions for the surrender, he encouraged the department to consider the Band’s request.

The department agreed to proceed with the surrender, and on April 12, 1905, Deputy Superintendent General of Indian Affairs Frank Pedley forwarded the forms for surrender to Graham and authorized Aspdin to take the surrender in accordance with the provisions of the Indian Act. Aspdin’s May 3, 1905 record of the surrender meeting reports that there was a ‘decided majority in favour of the sale,’ and ‘a number of absentees whom it is known are favorable.’ A surrender for sale of 5,760 acres (sections 25, 26, 27, 28, 29 and 30, in township 15, range 11; sections 25, 26, and 27 in township 15, range 12) was signed on April 26, 1905. The surrender document, which contains the six conditions set out by the Band, was signed or marked by Chief Carry the Kettle and Head Men Broken Arm, Chas. Rider and Eah Sickan (also known as The Saulteaux or David Saulteaux), and the Affidavit of Surrender was signed by Indian Agent Aspdin and Chief Carry the Kettle on May 3, 1905, before a justice of the peace. On May 23, 1905, the Governor in Council approved the surrender.

In September of 1905 a survey of the surrendered lands was undertaken, and on February 14, 1906, 34 of the 36 quarter sections surveyed were sold at an auction held in Sintaluta. Proceeds from the sales were distributed consistent with the six conditions of the surrender specified by the Band.

Just over a year after the surrender, the Band approached the department with the first of what would be six petitions between 1906 and 1917, requesting the distribution of interest accruing from the monies raised by the land sales. Per capita interest payments were made to the Band between 1913 and 1920, with a final payment made in 1923.
PART III

ISSUES

The Indian Claims Commission is inquiring into the following four issues as agreed to by the parties:

1. Given the terms and conditions of the 1905 surrender, did the Governor in Council exceed its jurisdiction under the Indian Act, when it:
   i. consented to the surrender
   ii. sold the lands subject thereto; or
   iii. used the proceeds of the sale for certain of the purposes directed therein?

2. Was the 1905 surrender taken in compliance with the requirements mandated by the Indian Act?

3. Did Canada breach any fiduciary duty owed to the First Nation relative to the 1905 surrender?

4. As a result of the answers to questions 1 to 3 above, does Canada have an outstanding lawful obligation to the First Nation?
PART IV

ANALYSIS

ISSUE 1  JURISDICTION OF THE GOVERNOR IN COUNCIL UNDER THE INDIAN ACT

1 Did the Governor in Council exceed its jurisdiction under the Indian Act, when it:
   i consented to the surrender
   ii sold the lands subject thereto; or
   iii used the proceeds of the sale for certain of the purposes directed therein?

The panel is being asked to make a finding of whether the Governor in Council exceeded its jurisdiction under the 1886 Indian Act when it consented to the 1905 surrender, sold the surrendered lands and used part of the proceeds of the sale to repay a debt owed to the Crown. The First Nation claims that the 1886 Indian Act granted the Governor in Council limited powers to expend monies derived from the sale of surrendered lands and that those powers were exceeded. Canada argues that the Governor in Council exercised its powers reasonably and acted within the limits of the 1886 Indian Act.

The panel finds that, based on the documentary evidence before it and having examined the relevant law, the Governor in Council did not exceed its jurisdiction under the Indian Act when it consented to the 1905 surrender of the southern portion of the reserve; sold the surrendered lands; and, used the proceeds from the surrender for the purposes outlined in the surrender document itself.

Background
The current Carry the Kettle First Nation members consider themselves direct descendants of Assiniboine Chiefs The Man Who Took the Coat and Chief Long Lodge, whose respective Bands were amalgamated in 1885 under Chief The
Man Who Took the Coat until his death in 1891, at which time he was succeeded by his brother, Carry the Kettle. The first survey of a reserve at Indian Head for the Assiniboine commenced in May 1882, at which time the Bands were on route to Indian Head from their traditional lands in the Cypress Hills area where they had previously resided. At the time, John C. Nelson, Dominion Land Surveyor in charge of Indian Surveyors, surveyed 220 square miles for the Bands of the Man Who Took the Coat, Long Lodge and Piapot.

In January of 1885, following the death of Long Lodge a month earlier, Indian Commissioner Dewdney contacted the department and expressed a desire to amalgamate the two Assiniboine Bands under Chief The Man Who Took the Coat. By March, Indian Agent McDonald had met with Chief The Man Who Took The Coat and the principal men of both Bands and confirmed that "Little Mountain, the Principal Head Man of Band No. 77, said that he and the followers of their late Chief had decided to recognize The Man Who Took the Coat as their Chief." The amalgamation of the two Bands was approved by the department on March 28, 1885.

A second survey of the reserve was completed on June 16, 1885. Indian Reserve (IR) 76 was laid out nine miles from east to west, eight miles from north to south, and was situated seven miles south of the village of Sintaluta and 84 kilometres east of Regina.

The Band was encouraged by the Indian Agent, and later the Farming Instructor, to take up mixed farming. In addition to cultivating wheat, oats, potatoes, turnips, onions and carrots, they raised cattle, sheep, pigs, and chickens. Reports reveal that band members were slow to engage in the raising of cattle due to the difficulty of obtaining water and the attraction of quick money from the sale of hay and wood.

Between 1896 and 1905, it was reported that band members had purchased a variety of implements and that the Band, aided by loans from the department, also purchased various implements for the use of members and to make improvements to the reserve. In 1900, Inspector McGibbon reported that the Band was free of debt.
In October 1902, the Band presented the department with a request to purchase a thresher. In response, the department instructed the Agent to purchase machinery as cheaply as possible, but with the understanding that the thresher would not be paid for until July 1, 1903, as there were no funds immediately available. The department further specified that, "The Indians will be required to refund to the department the cost of the threshing outfit in the manner suggested by you." The Indian Agent purchased an outfit from Massey Harris for $820.00.

By January 1903, money had been collected from band members for the thresher. It was reported in April 1904 that the Indian Agent had expressed concern that poor crops might prevent the Indians from keeping up with regular payments on the engine and had asked if stock could be sold to pay for the engine, although the record does not indicate whether this requested was granted. The same correspondence indicates that the department paid $220.00 in 1903-1904, and $300.00 in 1902-1903 toward the thresher.

In 1904, the department advanced the Band $500.00 for the fencing of a pasture, which permitted the cattle to roam and feed overnight. The Indian Agent proposed that this loan could be repaid at a rate of $100 a year; the department, however, disagreed with this payment schedule and requested that the loan be repaid in two years at three per cent interest. The Indian Agent reported in his Annual Report that the Band had been able to make a "substantial repayment of the money advanced" by August of the same year.

The Chief and Headmen of the Carry the Kettle Band approached Indian Agent Aspdin in December of 1904 to inquire about surrendering a portion of their land:

...[that] the Dept. sell for them the nine most southern sections and that in view of this that the Dept. do not press them for the money owing for the threshing outfit and also for the pasture made last summer but that these liabilities be paid out of

9 S. Stewart, Asst. Secretary, to T.W. Aspdin, Indian Agent, October 11, 1902, LAC, RG 10, vol. 4998, (ICC Exhibit 1a, pp. 456-57). Please note that the record of Agent Aspdin's proposed method of repayment has not been located.
12 J.D. McLean, Secretary, to T.W. Aspdin, Indian Agent, January 22, 1903, LAC, RG 10, vol. 5008 (ICC Exhibit 1a, p. 477).
13 J.D. McLean, Secretary, to W.M. Graham, April 11, 1904, LAC, RG 10, vol. 5057 (ICC Exhibit 1a, pp. 564-65).
14 J.D. McLean, Secretary, to D. Laird, Indian Commissioner, February 17, 1904, LAC, RG 10, vol. 5051 (ICC Exhibit 1a, pp. 560-61).
15 Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, August 15, 1904, Annual Report of the Department of Indian Affairs for the Year ended June 30, 1904, 125-27 (ICC Exhibit 1a, p. 595).
sale of these lands and that the Dept. advance them enough at interest to pay the
difference between the threshing engine now on hand and a new modern engine.\textsuperscript{16}

The record is clear that it was the Band that made the request for a surrender,
yet three years earlier, Agent Aspdin rebuffed an inquiry from a settler
interested in acquiring reserve lands with a statement that the Band would
"decidedly object" to a surrender of any portion of their reserve.\textsuperscript{17} Although
the record does not disclose the exact reasons why the Band requested the
surrender, the preceding quote would seem to indicate it was motivated in
part by a desire to pay off existing debts and to replace the increasingly
unsatisfactory second-hand thresher.

The Band’s request was communicated to W.M. Graham, Inspector of
Indian Agencies, who visited the reserve in March of 1905. According to
Graham, a majority of the Band seemed anxious to sell the land and was
prepared to surrender lands if the following six conditions were met:

- That the present indebtedness on the threshing outfit of about $1200.00 be
  paid off at the earliest possible date, out of the proceeds of the sale.
- That the Department be paid for the money advanced to purchase wire for the
  pasture fence, from the proceeds of the sale.
- That lumber etc. be purchased to build a suitable shed to house the threshing
  machine and engine, out of the proceeds of the sale of land.
- That the present engine, which was a second-hand one when purchased, be
  exchanged on a new engine and the difference be paid out of the proceeds of the
  sale of the land.
- That Daniel Kennedy and one or two other Indians be paid compensation for
  any ploughing that should happen to be on the strip of land that it is proposed to
  surrender, out of the proceeds of the sale.
- That the balance of the money be funded and managed by the Department as it
  sees fit.\textsuperscript{18}

As well, Graham supported an informal request from "[o]ne or two of the
old people" who "expressed a desire that a portion of the money be spent at
the beginning of each winter in the purchase of clothing and food for the very
old who have no one to work for or look after them".\textsuperscript{19} He did not

\textsuperscript{16} Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, December 16, 1904, LAC, RG 10, vol.
4001, file 208590-1 (ICC Exhibit 1a, pp. 627-28).

\textsuperscript{17} James A. Smart, Deputy Superintendent General, Indian Affairs Branch, Ottawa, January 30, 1901, LAC, RG 10,
vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 332).

\textsuperscript{18} W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC,

\textsuperscript{19} W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC,
incorporate this request into the terms of the surrender, but commented that
"it could be granted and no abuse made of it".20

On April 26, 1905, a surrender for sale was taken of nine sections of IR
76 - 5,760 acres composed of projected sections 25, 26, 27, 28, 29 and 30 in
-township 15, range 11 and projected sections 25, 26, and 27 in township 15,
-range 12, all west of the 2nd initial meridian, (including road allowances).21
Chief Carry the Kettle and Head Men Broken Arm, Chas. Rider and Eah Sickan,
also known as The Saulteaux or David Saulteaux, signed the Surrender
Document by making X's beside their names. It includes the six conditions set
out in Graham's letter of March 30, 1905.22

In correspondence dated June 28, 1905, the department explained that a
new engine could not be purchased until the surrendered sections of land
were sold and paid for. The Agent was instructed to obtain prices on
engines.23 No further information is known about this transaction.

First Nation's Position
The First Nation takes issue with the Governor in Council's jurisdiction to
consent to and implement the terms and conditions of the 1905 surrender,
asserting that the power delegated to the Governor in Council through the
1886 Indian Act was insufficient to permit the surrender according to those
terms.24 Insofar as the Band's title and interest in its reserve lands are
inalienable except where the sale has been first lawfully authorized in
accordance with the existing relevant legislation, the surrender and sale, in its
view, are not lawful.25

In particular, the First Nation argues that the Governor in Council's
jurisdiction under the 1886 Indian Act was not broad enough to implement all
of the terms and conditions of the 1905 surrender at the time.26 Sections 70
and 139 of the 1886 Act provide the Governor in Council with the power and
authority to: "invest and manage the sale proceeds of Indian lands";
"compensate band members for improvements made to Indian lands"; and
"construct permanent improvements upon a band's reserve".27 The Act did

20 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC,
23 J.D. McLean, Secretary, to T.W. Aspdin, Indian Agent, June 28, 1905, LAC, RG 10, vol. 5100 (ICC Exhibit 1a, pp.
666-67).
24 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 3.
25 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 4.
26 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 8.
27 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 8.
not, at the time of the surrender, and would not, until the 1924 amendments to the Indian Act, provide the necessary authority to the Crown to use proceeds from the sale of Indian lands to purchase farming implements or machinery. The Act also did not provide for the repayment of debts of the Band or its individual members from the proceeds of land surrenders and sales. Therefore, asserts the First Nation, the Governor in Council exceeded its jurisdiction under the Act by consenting to the surrender, selling the surrendered lands and using the proceeds of the sale for the purposes directed in the Surrender Document, including and especially those related to the purchase of machinery or the repayment of debts to the Crown.28

In support of this argument, the First Nation argues that the maxim "expressio unis est exclusio alterius" or the "implied exclusion rule"29 should be applied when interpreting the meaning of sections 70 and 139 of the Act. This rule holds that if the legislature had meant to include a particular thing within legislation, it would have referred to that thing expressly, thus any exclusions from legislation must be deemed intentional.

The Governor in Council’s authority under section 70 was limited to direct expenditures for the following expenses: surveys, compensation for improvements or any interest a band may have had in lands taken, construction or repair of roads, bridges, ditches and watercourses on such reserve or lands and contributions to schools attended. Section 139 granted the Governor in Council, on consent of the Band, the ability to authorize the expenditure of moneys for purchases of land as a reserve or additions to the reserve, cattle purchases, construction of permanent improvements on the reserve, or such works of permanent value to the band. Insofar as this list of items does not include the implements and farming equipment that were purchased by Indian Agent Aspdin, prior to the surrender, or expressly permit the use of funds secured by surrender and sale of reserve lands to repay a band’s debts to the Crown, such expenditures are clearly beyond those expressly permitted in sections 70 and 139 of the 1886 Indian Act.

Canada’s Position
It is Canada’s position that the Governor in Council did not exceed its jurisdiction under the 1886 Indian Act. Canada maintains that the Governor in Council validly exercised its discretion and that it was reasonable to conclude that the Carry the Kettle First Nation’s request that the proceeds be

28 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 9.
used to pay for important farming equipment and necessary fencing would be permitted as ‘incidental to the management of the reserve’ or of ‘permanent value to the band’. In Canada’s view, the expenditures assisted the Band to continue to develop towards self-sufficiency and autonomy.

Canada relies upon the “plain and ordinary meaning rule” to interpret sections 70 and 139 of the Indian Act, which suggests that the ordinary meaning of a legislative text is the meaning intended by the legislature. It is an accepted rule of construction that general words precede more specific words which are intended to provide specific examples from within the broad general category. Canada for its part argues that the wording of section 70 is clear and unambiguous and does not state that the Governor in Council cannot use the monies for equipment or fencing. Canada suggests that the wording of both sections 70 and 139 is broad enough to provide the Governor in Council with discretion to decide how monies derived from the sale of surrendered lands were to be spent. The fact that section 70 goes on to list possible areas of expenditures does not limit the broad and inclusive wording of the provision. Additionally, section 139 does not limit the Governor in Council’s authority but rather permits, with band consent, expenditures from the capital account of the band, for such works on the reserve that in the opinion of the Governor in Council, will be of permanent value to the band. Canada asserts that the surrender conditions were completely within the limits of the broad wording of these sections and that the Governor in Council, validly exercising the discretion granted, could comply with the Band’s surrender conditions.

Findings
To determine whether the Governor in Council exceeded its jurisdiction, it is necessary to review the sections of the Indian Act that were applicable to the 1905 surrender. Section 39 of the 1886 Indian Act gave the Governor in Council authority to accept or refuse a surrender for which a band had given its consent.
Section 41 provided the Governor in Council with the authority to manage, lease and sell Indian lands, subject to the conditions of surrender and the provisions of the Act. Section 41 of the 1886 *Indian Act* is reproduced below:

41. All Indian lands, which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act.\(^{36}\)

Section 70 authorized the Governor in Council to invest, manage and make specific expenditures of moneys arising from the disposal of Indian Lands, subject to the provisions of the Act. Specifically, section 70 of the 1886 *Indian Act*, as amended in 1898, states that:

70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians (with the exception of such sum, not exceeding ten per cent of the proceeds of any lands, timber, or property, as is agreed at the time of the surrender to be paid to the members of the band interested therein), shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given; and he may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act, and may authorize and direct the expenditure of such moneys for surveys, for compensation to Indians for improvements or any interest they have in lands taken from them, for the construction or repair of roads, bridges, ditches and watercourses on such reserves or lands, for the construction of school buildings, and by way of contribution to schools attended by such Indians.\(^{37}\)

Section 139, as amended in 1894, gave authority to the Governor in Council to expend capital moneys of the band, with the consent of the band, for specified purposes. Section 139 states:

139. 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

\(^{36}\) *Indian Act*, RSC 1886, c. 43.

\(^{37}\) *Indian Act*, RSC 1886, c. 43, s. 70, as amended by S.C. 1898, c. 34, s. 6.
the purchase of cattle for the 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.38

The above sections of the 1886 Indian Act provide a foundation for the
Governor in Council’s authority to act. As outlined above, the parties have
offered differing interpretations of these provisions.

The parties acknowledge that the Governor in Council had the authority to
accept surrenders and sell surrendered lands. The First Nation, however,
suggests that the Governor in Council was constrained by sections 70 and 139
of the Act and could not use the moneys for any purposes other than those
listed in these sections. This would exclude those purposes directed in the
Surrender Document. The First Nation also points to amendments that were
adopted by Parliament in 1924 as evidence that the legislature never intended
to include the expenditures listed in the 1905 surrender. They argue that the
broader powers contained in the 1924 Act, namely, the right to purchase
“implements or machinery for the band”39, are not found in the 1886 Act and
as they are not stated explicitly in the earlier legislation, it must be presumed
that Parliament intended their exclusion from that legislation. Section 45(3)
of the Interpretation Act however, states that “the repeal or amendment of an
enactment in whole or in part shall not be deemed to be or to involve any
declaration as to the previous law.”40 Thus we are directed not to presume
anything about the 1886 Act from the amendments which characterize the
1924 Act.

The wording of section 70 does not explicitly include the purchase of
farming implements or equipment. Nor does it explicitly permit the repayment
of debts to the Crown. The Carry the Kettle First Nation, like many other First
Nations, was urged by the government to take up mixed farming pursuits and
it is likely that farming implements and equipment were necessary
expenditures to achieve the goal of self-sufficiency.

The wording of section 70 is intentionally broad. The question then
becomes at what point may the breadth of actions taken under the auspices of
this section be deemed to have over-reached the intention of Parliament? In
resolving this question, the panel has viewed section 70 as composed of two
parts. The first portion of the section empowers the Governor in Council with

38 Indian Act, RSC 1886, c. 43, s. 139, as amended by S.C. 1894, c. 32, s. 11.
39 Indian Act, RSC 1906, c. 81, s. 90, as amended by S.C. 1924, c. 47, s. 5.
40 Interpretation Act, R.S.C. 1985, c. I-2, s. 45(3).
the discretion to decide how moneys arising from the sale of surrendered lands are to be used, whilst the second part of the section permits the Governor in Council to provide for the "general management of such moneys" and "from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Act". It is the view of the panel that the term "general management" gives the Governor in Council broad discretion to direct funds to a number of expenditures which presumably could include farming equipment and implements. In this light, funds directed to farming equipment are no different from moneys expended for costs associated with, and incidental, to lands and property. While section 70 goes on to list circumstances where expenditures may be made for such things as "construction or repairs of roads, bridges, ditches and watercourses on such reserves or lands, for the construction and repair of school buildings and charitable institutions, and by way of contribution to schools attended by such Indians"42, the panel does not interpret this as an exhaustive list of items, but rather as specific examples of the broad category of expenses which may be provided for within this section.

Similarly, the panel finds that the wording of section 139 is also intentionally broad and does not, as the First Nation suggests, constitute an exhaustive list of expenditures that could be made on the Band’s behalf. During the oral hearing of this inquiry, counsel for the First Nation noted that if, at the time, a request was made to buy horses, the Governor in Council could not approve such an expenditure because section 139 only contemplated expenditures for "cattle". Counsel for Canada, however, pointed out that in reserve surrender cases similar to this one, the record indicates that proceeds from the sale of surrendered lands were used for fencing, planers, shingles, mills, wagons, double harnesses, mowers, rakes and breaking ploughs in other words, for a wide range of expenditures relevant to the successful pursuit of farming and of permanent value to the band.44

We cannot accept counsel for the First Nation’s arguments, as these would lead to an absurdity in these circumstances. According to *Sullivan and Driedger on the Construction of Statutes*, “[A] proposed interpretation is likely to be labelled absurd if it would result in persons or things receiving different treatment for inadequate reasons or for no reason at all. This is one

41 Indian Act, RSC 1886, c. 43, s. 70.
42 Indian Act, RSC 1886, c. 43, s. 70, as amended by S.C. 1904, c. 20, s. 1.
of the most frequently recognized forms of absurdity.” To interpret section 139 as allowing for expenditures such as cattle to the exclusion of horses would be at minimum an overly constraining interpretation, and more than likely would lead to precisely the sort of absurdity specified in Sullivan and Driedger. As well, the narrowing of section 139 to the degree suggested by the First Nation’s counsel would quite probably render the sections incapable of meeting the Band’s farming necessities in 1905.

More importantly, and as previously stated, section 139, like section 70, is a broadly worded provision. In particular, the section makes reference to authorizing and directing expenditures of capital moneys for what, in the opinion of the Governor in Council, "will be of permanent value to the band". The First Nation suggests that farming equipment and implements purchased for the Band had value to a limited number of people and did not benefit the Band as a whole. This argument, however, is not wholly supported by the documentary record. According to the correspondence of the Indian Agent of the time, farming on the reserve was steadily increasing and culminated in 1900 with an annual report confirming that the Band was free of debt. Correspondence from Inspector McGibbon also stated that "the whole reserve was in a prosperous condition." The First Nation argues, however, that reports of the Band being free of debt may not have reflected the reality of the conditions on the reserve at this time. According to the First Nation, by 1903 the bulk of the Band’s farming was done by only six band member, including Dan Kennedy, Charles Ryder, Oaksheppy, Medicine Rope, Frank Risingsun and Wesecan. The First Nation asserts that the production records of the time, when compared to the Auditor General reports, indicate that these six men planted two-thirds of the wheat crop and 96 percent of the oat crop on the reserve. Therefore, although there were a reported 20 families involved in some aspects of farming, with the exception of the six members mentioned, most of the families would have only occasionally engaged in farming activities.

During the oral hearing, counsel for the First Nation queried where the responsibility for debts incurred for farming equipment ought to lie, with the Band as a whole, or with those few individuals who may have directly profited

---

46 Alex McGibbon to Superintendent General of Indian Affairs, August 7, 1900. Canada, Annual Report of the Department of Indian Affairs for the Year ended June 30, 1900, 210-14, and 221 (ICC Exhibit 1a, p. 280).
47 Alex McGibbon to Superintendent General of Indian Affairs, August 18, 1899. Canada, Annual Report of the Department of Indian Affairs for the Year ended June 30, 1899, 194-96, and 205 (ICC Exhibit 1a, pp. 258-61).
from the purchase of the equipment. There is nothing in the historical record to assist the panel in answering this question; nevertheless, we point to the fact that the debt for the farming equipment was assumed by the Band as a whole. Moreover, regardless of the number of band members who participated in farming or benefited from the proceeds, it is likely that the equipment purchased was of value to the Band. The threshing machine, like the replacement engine, was essentially an upgrade to more efficient equipment that would make it easier to farm successfully, which in turn would bring benefits to the Band. It was reasonable for the Indian Agent and the Farming Instructor to assume that the Band would require this equipment to continue to expand the Band’s farming pursuits. These expenditures could thus rightly be characterized as being of “permanent value” to the Band.

The panel therefore concludes that the Governor in Council did not exceed its jurisdiction when it consented to the surrender, sold the lands subject thereto and used the proceeds of the sale for the purposes directed.

**ISSUE 2  COMPLIANCE WITH THE INDIAN ACT**

2. Was the 1905 surrender taken in compliance with the requirements mandated by the *Indian Act*?

The panel has been asked to determine whether the 1905 surrender was taken in accordance with the provisions of the 1886 *Indian Act*. The First Nation argues that a surrender meeting was not called in accordance with the rules of the Band and that a majority of eligible voting members of the Band was not in attendance at the surrender meeting. Canada claims that there is both oral and documentary evidence that notice of the meeting was given consistent with the Band’s usual practice. They argue further that the documentary evidence confirms that an interpreter was present at the meeting to ensure that the membership understood what was being proposed; and that a majority of eligible voters probably attended; and a majority clearly voted in favour of the surrender.

The panel finds that, based on the documentary and oral evidence before it and having examined the relevant law, notice of the surrender meeting was given in accordance with the rules of the Band, a surrender meeting was held, a majority of male band members were in attendance, and a majority of those voted in favour of the surrender.
Background
In December 1904, the Chief and Headmen of the Carry the Kettle Band approached Indian Agent Aspdin to inquire about surrendering a portion of their land. The Band’s request for a surrender was communicated to W.M. Graham, Inspector of Indian Agencies, who visited the reserve in March of 1905. According to Graham, the Band seemed anxious to sell the land. The documentary record does not provide insight into what, in addition to the repayment of the debt and a desire to replace the thresher, may have motivated the Band to request the surrender.

On April 12, 1905, following the Band’s request for a surrender, the Deputy Superintendent General of Indian Affairs, Frank Pedley, forwarded surrender forms to W.M. Graham and authorized Indian Agent Aspdin to take the surrender in accordance with the provisions of the Indian Act. As outlined in Issue 1, a surrender was taken and the Affidavit of Surrender was signed by Aspdin and Chief Carry the Kettle, on May 3, 1905, before Justice of the Peace A. Ferguson.

The record does not indicate whether Aspdin recorded attendance at the surrender meeting; however, his report to Graham, written the day of the execution of the surrender Affidavit informed that, "[a]t the meeting there was a most decided majority in favour of the sale and there are a number of absentees whom it is known are favourable." He also wrote that a new matter was raised with regards to the compensation of Carry the Kettle band members who were not involved in agriculture and claimed not to receive any benefits from the pasture or threshing machine. Aspdin explained, "[a]s they earn a living and support their families without any help from the department they cannot be considered as destitutes. They ask for a pro rata payment of either money or useful articles to offset the money paid to the others (meaning the pasture and threshing outfit)." Aspdin recommended that the idea be given full consideration.

While Inspector Graham agreed that funds should be provided to the very old, he disagreed with Aspdin on the matter of compensation for those who did not farm. Graham forwarded the surrender and Aspdin’s letter to the Secretary, DIA, on May 6, 1905. He explained:

---

48 Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector of Indian Agencies, April 12, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 645).
49 Affidavit of Surrender, May 3, 1905, DIAND, file 675/30-12-76, vol. 1 (ICC Exhibit 1a, p. 651).
I cannot see that Indians who are not farming or raising cattle should receive special compensation. These people have the option of using the pasture and threshing machine any time they have occasion to do so.

The very old can be provided for with a portion of the funds, at the discretion of the Department as per section 6 on the surrender.\footnote{W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, May 6, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 653).}

There is no further information in the record regarding compensation for non-farming band members.

Another letter sent by Aspdin to the Secretary of the Department of Indian Affairs provides more detail on the taking of the 1905 surrender. The letter, dated May 15, 1905, requested payments of $1.00 each to Carry the Kettle band members Daniel Kennedy and Archie Thomson. Aspdin reported that Archie Thomson had travelled around the reserve summoning band members to the surrender meeting, and that Daniel Kennedy had acted as an interpreter at the same meeting.\footnote{Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 653).} Aspdin justified the need for an interpreter, stating, "I thought it best to use a good interpreter although I do not do so on ordinary occasions. There was a good deal of explanations to make to to [sic] be sure that every Indian thoroughly understood the matter."\footnote{Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 653).}

The oral testimony of the Carry the Kettle Elders, while at times consistent with the documentary record, offers conflicting views on some important questions such as whether the Band was debt-free, whether a surrender meeting happened at all, and whether the purpose of the surrender was for sale or lease of the land. Elder Kay Thomson told of the many stories of Agent Aspdin's and Inspector Graham's promises. She explained,

For example, there was a promise to pay off the debt incurred through the purchase of agricultural equipment... As well promises of more money to be made available to purchase more equipment, the tribe was promised that they would get money to buy equipment which was ploughs, disks, another threshing machine, cattle, horses, buggies, housing material, and they received a promise of other money for the band, and that was yet another inducement.\footnote{ICC Transcript, October 25, 1995 (ICC Exhibit 5a, p. 35, Kay Thomson).}

The oral history of Carry the Kettle Elders indicates there was no formal meeting held to discuss the surrender. Elder Percy Ryder explained,
a lot of them didn’t know that they were going to surrender. Like - - and they called for a meeting for - - to discuss this land, but nobody - - nobody went. Nobody didn’t show up, so there was no meeting and no vote. It was - - Mr. Aspdin went around from house to house taking names. I don’t know how many names he got, but that was what my grandfather talked about, that he came from house to house talking about it.

Ms. McGregor: Why didn’t the people go to the surrender meeting; do you know?

Percy Ryder: Well a lot of them didn’t care. They didn’t really - - they couldn’t understand too much anyway. You know, they - - a lot of them spoke the Assiniboine language, and that’s all they spoke.

... Yeah, they - - called for a meeting, but nobody showed up - - nobody came to the meeting, and they didn’t have a meeting, and ... there was no vote. They didn’t vote on anything. There was - - either to lease it or anything. There was no vote.56

Elder Ryder continued,

the council ... had a meeting. There was five or six of them, but that was mostly the council with - - they’re the only ones that had the meeting with - - but there was nothing - - it turned into - - around to nothing.

...

Where they met, it was at the Indian agent’s office.57

Elder Andrew Ryder recalled hearing that Dan Kennedy acted as the interpreter for the Indian Agent and “told the people that this is going to be leased, this land is going to be leased by - - well, I could say it in Indian, in my language, but you wouldn’t understand.”58 Mr. Ryder explained further that,

When the people at that time, I’ve heard this, when there’s something that they don’t want and they don’t like, they don’t go. If you called a meeting of them people that long ago, the tribe, and they all talked Nakoda, if you don’t - - if you don’t - - if they don’t like what they understood, they will not go.59

Elder Maurice Grey related that,

I used to sit in on - - when I was a youngster, in some of the meetings they had, and I heard them talk about the surrender, what we’re talking today. And at that time they were talking that it - - the land was to be leased. They were getting pressure
from the Indian Agent to lease it. It was - - it had lots to do with rations at that time. They were threatening to cut them off rations.\(^{60}\)

Mr. Grey also recalled,

I never heard them talk about a meeting. But I did hear from my other grandfather about a meeting, David Saulteaux. They tried to have a meeting and there wasn’t enough Band members at the Indian office to have a meeting. There was people there and the Indian Agent called them in and they thought they were going to get rations, but it wasn’t, it was supposed to be to a meeting, but there wasn’t enough there.\(^{61}\)

The surrender of Carry the Kettle IR 76 land was submitted to the Governor General in Council on May 11, 1905.\(^{62}\) The surrender of nine sections of land, comprising an area of 5,760 acres, was approved by Order in Council P.C. 940, dated May 23, 1905.\(^{63}\)

First Nation’s Position

Section 39(a) of the 1886 Indian Act\(^ {64}\) mandates the procedures and conditions required to effect a valid surrender. The First Nation asserts that the 1905 surrender failed to comply with section 39(a) of the Act.\(^ {65}\) Elders’ oral testimony indicates that the surrender meeting did not happen at all. Alternatively, if it was held, it was not called in accordance with the rules of the Band, including proper notice. At the meeting, the Indian Agent failed to prepare a detailed record of names of the band members in attendance, and while there is contrary evidence as to whether a vote was held, if there was one, the Agent failed to record the voting results. Consequently, argues the First Nation, the vote would have been non-binding due to the absence of a quorum.\(^ {66}\)

Canada’s Position

Whether the requirements of section 39 of the Indian Act were met depends upon the facts of this inquiry.\(^ {67}\) The evidence regarding the number of eligible voters who attended the surrender meeting is conflicting. The Elders’ evidence

\(^{60}\) ICC Transcript, November 29, 2006 (ICC Exhibit 5c, pp. 103-04, Maurice Grey).
\(^{61}\) ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 107, Maurice Grey).
\(^{62}\) Frank Oliver, Superintendent General of Indian Affairs, to the Governor General in Council, May 11, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 654).
\(^{64}\) Indian Act, RSC 1886, c. 43, s. 39(a).
\(^{65}\) Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, pp. 13-14.
\(^{66}\) Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 17.
ranges from no one attended because there was no such meeting, to only a few people attended. Although the Act at the time did not require the Crown to keep records of the proceedings of the surrender meeting, a voters list or a statement of the vote results, the documentary record is clear that a majority of male members attended the meeting and voted for the surrender.

Findings
Sections 39(a) and (b) of the 1886 Indian Act, as amended, set out the 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.

Did a surrender meeting actually take place?
Both parties acknowledge that the oral evidence regarding the surrender meeting is conflicting. Some of Elders suggest that a meeting was called but

---

70 Indian Act, RSC 1886, c. 43, as amended by S.C. 1898, c. 34, s. 2-3.
was poorly attended, while others suggest that no meeting was ever called. In light of this conflicting evidence greater deference must be shown to the documentary record, which contains relevant information on the surrender process. For example, a letter dated March 30, 1905, written by Inspector Graham to the Secretary of the Department of Indian Affairs tells us that he met with the Assiniboine Band on March 30, 1905 for the purpose of discussing the surrender of nine southern sections of the reserve. This document indicates that Graham engaged in surrender discussions with band members several weeks before the surrender vote.

In addition, a review of the correspondence from Indian Agent Aspdin indicates that a meeting was called for the specific purpose of discussing the surrender. In a letter dated May 15, 1905, Aspdin states that the amount of one dollar was paid to Archie Thompson to go around the reserve and summon the Indians to a meeting at the Agency to discuss and give their final decision in the matter of the sale of the nine sections of the land. This same letter states that a dollar was also paid to Daniel Kennedy for the interpretation services he provided during the surrender meeting. Finally, on May 3, 1905, Aspdin reported to Inspector Graham that, "[a]t the meeting there was a most decided majority in favour of the sale and there are a number of absentees whom it is known are favourable." There is no evidence to suggest that these accounts by Aspdin are false or misleading. We are satisfied, based on the documentary record, that a surrender meeting did take place.

*Was a meeting called in accordance with the rules of the Band?*

The First Nation asserts that, although there is some evidence to suggest that an effort was made to call a meeting to consider the surrender, proper notice of the meeting was not provided to all eligible voters. According to the oral evidence from the Community Session, it was the Band's practice to have a rider on horseback go to each household and give notice of a meeting. Elder Andrew Ryder stated, "...when they have a meeting...at that time there would be what they called a rider, horseback, who ran from house to house for communication, telling the people what is going to ...what is going to go on." While there is limited evidence on this point, Elder Ryder's account of

---

71 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 638-40).
72 Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 655).
74 ICC Transcript, November 29, 3006 (ICC Exhibit 5c, p. 55, Andrew Ryder).
how members were notified of meetings is supported by the 1905 letter from Indian Agent Aspdin. In the letter he reports to have paid Archie Thompson one dollar to go around the reserve and summon the Indians to a meeting at the Agency to discuss and give their final decision in the matter of the sale of the nine sections of the land. The First Nation argues that although the Agent may have paid Archie Thompson to summon the people to the meeting, not all households received notice of the meeting. In particular, the First Nation contends that individuals living in the north end of the reserve, who were not engaged in farming, were not properly notified of the meeting; however, there is no evidence to indicate that Mr. Thompson, who was retained by Aspdin to spread the word of the meeting, was selective in notifying the eligible voters. Further, Aspdin engaged the services of an interpreter to ensure that the surrender would be fully understood by the band members.

In the absence of compelling evidence to the contrary, we find that a surrender meeting was called in accordance with the rules of the Band.

**Was there a majority of eligible voting members in attendance at the surrender meeting?**

In *Cardinal et al v. R.*77, the Supreme Court reviewed section 49 of the 1906 *Indian Act*,78 which is virtually identical to amended section 39 of the 1886 Act. The Supreme Court noted that the surrender provision required what has come to be called a "double majority": a majority of the male members of the band, age 21 or older, must attend the meeting and a majority of those in attendance must vote in favour of the surrender.

Given the population of the Carry the Kettle Band at the time of the surrender, the required number of members needed to form a majority of eligible voters would have been approximately 19 to 20 eligible male members. Again, the oral testimony of the Elders regarding attendance at the surrender meeting is conflicting and varies from a few individuals having attended the meeting to no one having attended at all. Further, the documentary evidence does not confirm exact attendance numbers. Agent

---

75 Thos. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 655).
76 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 16.
78 *Indian Act*, RSC 1906, c. 81.
Aspdin, acting in accordance with the 1886 Indian Act, which did not require Indian agents to keep written records of surrender meetings, did not record the names of those in attendance.

In the Paul First Nation: Kapasiwin Townsite Inquiry, the panel noted that it is not unusual for documentation of the early historic surrenders to be inadequate to determine whether a majority of the voting band members attended a surrender meeting and voted in favour of the surrender. The panel must, therefore, examine all evidence, including circumstantial evidence, to determine whether a valid surrender vote was conducted.

The record indicates that a meeting held in December 1904, which was requested by band members to discuss a possible surrender, was attended by the Chief, the Headmen and 25 other men. While we do not have a record detailing attendance at the surrender meeting itself, Aspdin’s report to his superiors following the surrender, document clearly that "[a]t the meeting there was a most decided majority in favour of the sale and there are a number of absentees whom it is known are favourable." This document suggests that Aspdin was aware that a majority of eligible voters was required to be in attendance and that this was, in fact, the case. Furthermore, the Affidavit of Surrender, sworn by Chief Carry the Kettle before a justice of the peace, attests to fact that he and a majority of eligible male members present at the meeting assented to the surrender. Thus the preponderance of the evidence, although limited, supports a finding that a majority of eligible voters was in attendance at the surrender meeting.

Did a majority of eligible voters in attendance vote in favour of the surrender?

The Cardinal decision is clear that a majority of the eligible male members of the band must attend the meeting and a majority of those at the meeting must vote in favour of the surrender. As noted in the previous section, Agent Aspdin did not record the names of those who voted against or in favour of the surrender. The absence of records detailing the names of the eligible voters in attendance at the meeting, and the number who voted in favour of the surrender, is an unfortunate fact but consistent with the law and practice of most early surrenders. Since these records were not required, their absence...
was the rule, not the exception during this period. Absent any evidence of unscrupulous or negligent behaviour on Aspdin’s part in conducting the surrender meeting, the panel does not interpret the lack of these records as suspicious or conducive to a finding that the vote was invalid.

A review of the correspondence which precedes the surrender indicates that several members of the Band were in favour of a surrender. Graham’s correspondence suggests that previous meetings held to discuss the surrender were well attended by band members.83 Also, Aspdin wrote in December 1904 that the "Chief and headmen in company with about 25 other Indians are those who asked me to open up the matter again."84 While this document is not conclusive of how members may have voted in favour of the surrender during the meeting, it does show that as many as 25 band members were actively lobbying the Indian agent for a surrender. The panel finds, however, that the most compelling evidence that a majority voted in favour of the surrender remains the Affidavit of Surrender.

The First Nation argues that Chief Carry the Kettle, who signed the Affidavit of Surrender, had a limited understanding of the English language and there is no evidence that the Affidavit was interpreted for his benefit. Unfortunately, both the documentary record and the oral testimony of the Elders fail to shed light on this assertion. Still, the record does states that Indian Agent Aspdin paid Dan Kennedy to provide interpretation during the surrender meeting to ensure that the members fully understood the matter.85 Absent any evidence to the contrary, we are left to assume that Chief Carry the Kettle understood the contents of the surrender Affidavit and that a majority of male members present at the meeting voted in favour of surrender.

**ISSUE 3   FIDUCIARY DUTY**

3 Did Canada breach any fiduciary duty owed to the First Nation in relation to the 1905 surrender?

The panel has been asked to determine whether the Crown breached its fiduciary duty to the Carry the Kettle Band when it assented to the 1905 surrender of IR 76 lands. The First Nation argues that Canada breached its fiduciary duty to the Band by exceeding the scope of its discretion under the
by inducing the Band to surrender, and by allowing its self-interest and economic interests to conflict with its duty to the Band. Canada, it is alleged, failed to meet its duty to the Band to act with loyalty, good faith, full disclosure and ordinary prudence with a view to the Band’s best interests, in the conduct of the surrender and in the disposition of its proceeds.\(^8\) Canada, the First Nation argues, also failed to fully disclose the terms and consequences of the surrender.\(^7\) Canada maintains it fulfilled its fiduciary obligations to the First Nation in relation to all aspects of the 1905 surrender.

The panel, having reviewed the documentary record, oral evidence, and the relevant law, finds that Canada did not breach any fiduciary duty owed to the First Nation in relation to the 1905 surrender.

**Background**

The surrender of Carry the Kettle IR 76 land was submitted to the Governor General in Council on May 11, 1905.\(^8\) The surrender of the nine sections of land was approved by Order in Council P.C. 940, dated May 23, 1905.\(^9\) J.K. McLean, Dominion Land Surveyor, carried out the subdivision of the surrendered portion of IR 76 in September 1905. He valued the lands at four to five dollars per acre for third class land, five to six dollars for second class land, and seven to eight dollars for first class land.\(^9\) Those lands under cultivation in Section 28, Township 15, Range 11 W2M (28-15-11) received the highest upset prices, from seven to eight dollars per acre.\(^9\) The surveyor’s upset prices were reviewed and approved by both Samuel Bray and W.A. Orr, and the latter recommended the land be sold at auction at Indian Head on November 2, 1905.\(^9\) The Notice of Public Auction was prepared in December 1905, and the sale was scheduled to be held on February 14, 1906.\(^9\) Terms of the sale required cash in full or one-fifth cash to be paid at the time of sale.

---

86 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 45.
87 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 53.
88 Frank Oliver, Superintendent General of Indian Affairs, to the Governor General in Council, May 11, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 654).
92 S. Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, September 18, 1905 (ICC Exhibit 1a, p. 705), and W.A. Orr, In Charge Land and Timber Branch, to Deputy Minister, September 25, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 706-07).
93 J.D. McLean, Secretary, Department of Indian Affairs, to The King=s Printer, December 28, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 748-49).
and the balance in four equal, annual installments with five per cent interest.\textsuperscript{94}

The auction took place on February 14th, 1906, at Sintaluta. In accordance with instructions issued by the Deputy Superintendent General of Indian Affairs, Inspector Graham took charge of the sale and Peter Smith, of Wolseley, Saskatchewan, acted as auctioneer.\textsuperscript{95}

On February 20, 1906, Graham forwarded to Ottawa the pass book, (in which the particulars of each sale were recorded), and two bank drafts totalling $7,069.09, (being one-fifth of the purchase price), along with his report on the sale.\textsuperscript{96} Six men purchased a total of 34 quarter-sections of the surrendered IR 76 lands at the 1906 auction. According to the terms of sale, consideration for all purchases was to have been paid in full by February 14, 1910. By that time, however, only six sales had been completed.

Immediately following the 1906 auction, $6,680.34 was deposited to the Capital Account of Carry the Kettle Band’s trust fund and $388.75 to its Interest Account, the sum of those amounts equalling the auction proceeds forwarded by Inspector Graham.\textsuperscript{97} In total, $47,965.16 was collected by the department from the sale of the surrendered IR 76 lands; however, only $42,428.13 was credited to the First Nation’s Trust Account. The $5,537.03 difference represents the January 1920 payment made by Samuel Clarke, which does not appear to have been credited to the First Nation’s Trust Account.\textsuperscript{98}

The proceeds from the sale of the surrendered IR 76 lands were to be spent according to the terms of the 1905 surrender. A debt of approximately $1,200.00 arising from the purchase of a thresher was to be paid off as early as possible, as well as the remaining debt incurred by the Band for fencing wire. The Surrender Document also stipulated that the money received was to be used to purchase materials to build a shed and to purchase a new engine. A review of Carry the Kettle Band Trust Account #145 ledger for 1905-1906 reveals that, on March 2, 1906, $1,632.03 was debited from the Capital Account for the purchase of a new engine and shed material.\textsuperscript{99} The Auditor

\textsuperscript{94} J.D. McLean, Secretary, Department of Indian Affairs, December 28, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 748–49).
\textsuperscript{95} Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector of Indian Agencies, February 2, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 758).
\textsuperscript{96} W.A. Orr, In Charge Lands and Timber Branch, to Deputy Minister, March 10, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 775).
\textsuperscript{97} Carry the Kettle First Nation Trust Fund #145 (ICC Exhibit 9c, p. 2).
\textsuperscript{98} Public History Inc., Carry the Kettle First Nation Land Sale Claim, Historical Report, @ April 30, 2006, (ICC Exhibit 9a, p. 55).
\textsuperscript{99} DIAND, Carry the Kettle First Nation Trust Fund, #145 (ICC Exhibit 9c, p. 2).
General’s report for the same year shows that $1,500.00 was spent on a Sawyer-Massie engine, $76.73 for material to construct a lean-to shed and $64.00 was debited for freight on a thresher.¹⁰⁰ No further details of the First Nation’s debts are known and there is no indication whether the fencing debt was paid off.

**Compensation for Improvements**

The final condition of the surrender required the compensation of three band members for their improvements. At the time of the 1905 surrender, Daniel Kennedy, Joseph Jack, and The Saulteaux, were farming on section 28-15-11-W2M. A few weeks after the surrender, Indian Agent Aspdin wrote to the Secretary of the Department of Indian Affairs regarding their compensation. In particular, Daniel Kennedy requested an advance so that he might purchase feed grain to help see him through the task of breaking land elsewhere on the reserve.¹⁰¹ Kennedy farmed between 40 and 50 acres of land in section 28 for which he was promised compensation. On May 25, 1905 the department approved an advance of $25.00 from the amount payable to Kennedy for his improvements.¹⁰² The value of the improvements in section 28-15-11-W2M was established by Surveyor J.K. McLean at the time of the subdivision and valuation of surrendered lands in September 1905. McLean documented the improvements made by Daniel Kennedy, Joseph Jack and The Saulteaux in his report to the Deputy Superintendent General of Indian Affairs, Frank Pedley. Surveyor McLean wrote that the land was “in a good state of cultivation, in fact in equally as good condition as that of any white settler.”¹⁰³ McLean explained that Daniel Kennedy had 46 and one-fifth acres under cultivation, Joseph Jack cultivated 16 and one-quarter acres, and The Saulteaux 14 and a half acres. He recommended they be compensated at the rate of $5.00 per acre for their improvements.¹⁰⁴ With his report, McLean forwarded three statements signed by Kennedy, Jack, and The Saulteaux agreeing to $5.00 per acre compensation, and asking for payment by December 15, 1905.¹⁰⁵


¹⁰¹ Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 19, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 657).


department forwarded compensation cheques to W.M. Graham on March 3, 1906, for distribution. Joseph Jack received a cheque for $82.10, The Saulteaux a cheque for $73.25, and Daniel Kennedy a cheque for $208.40, which was the amount due plus five percent interest. The total compensation received by Daniel Kennedy for his improvements was $233.40. Graham acknowledged the distribution of the cheques and forwarded receipts to the department on March 23, 1906.

Requests for the Distribution of Trust Fund Money
Between 1907 and 1917, Carry the Kettle band members sent five petitions to the Department of Indian Affairs requesting annual, per capita payments from the Band’s Trust Account. Their requests were based on their understanding of the 1905 surrender conditions and the economic conditions on the reserve.

First Nation’s Position
As noted above, it is the First Nation’s position that the Crown breached its fiduciary duty by exceeding the scope of its discretion; by consenting to and implementing the terms and conditions of the surrender which provided for proceeds from the sale of the surrendered lands to be used to purchase machinery and repay the Band’s debts to the Crown. As well, the First Nation asserts that the Indian Agent made representations to band members to induce them to surrender their reserve lands and Canada later ignored these representations. Finally, it is argued that Canada failed to meet its obligations of loyalty, good faith, full disclosure and acting with ordinary prudence with a view to the band’s best interests with regard to the surrender.

Canada’s Position
It is Canada’s position that the Crown fulfilled its pre-surrender fiduciary duty to the First Nation in relation to the 1905 surrender and fully complied with its obligations. In the pre-surrender context, argues Canada, the Crown’s fiduciary duty to a Band is limited to preventing an exploitative bargain.

108 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 23, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 776).
109 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 53.
examination of the circumstances leading up to, at the time of, and subsequent to the 1905 surrender supports the conclusion that Canada did not breach its fiduciary duty. Specifically, Canada maintains that the Crown fully complied with all the requirements of the Indian Act as well as the Band’s usual practices to ensure a surrender meeting was properly called and the surrender vote properly conducted. Canada also maintains that there was no self-interest on the part of any member of the Crown in any of the proceedings prior to, during, and after the sale, that could give rise to a finding of undue influence or exploitation.

The Test for Pre-Surrender Fiduciary Duty
In the pre-surrender context, the nature and scope of Canada’s fiduciary obligation to First Nations is set out in Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) [hereinafter Apsassin]. The test enumerated in Wewaykum and establishing a threshold of fiduciary duty of loyalty, good faith, full disclosure and prudence applies to a pre-reserve creation context, and as such, cannot apply to a situation of surrender of reserve lands. In Apsassin, Justice Gonthier, writing for the majority, held that a First Nation’s consent to surrender should not be given effect if the band’s understanding of the surrender terms is found to be inadequate, or if the Crown’s conduct tainted the dealings in a manner which made it unsafe to rely on the band’s understanding and intention. Justice McLachlin, took a somewhat different approach to the question of fiduciary duty: focusing upon a situation where a vulnerable party may be said to have ceded their decision-making power to the fiduciary, she observed 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 ...” McLachlin further stated that:

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.\(^{119}\)

In a situation in which the First Nation is the decision-maker, such as when consenting to a surrender, Justice McLachlin confirmed the Crown's "duty to prevent an exploitative bargain" by refusing to approve the surrender if it was exploitative of the band:

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. ... It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band’s decision was foolish or improvident - a decision that constituted exploitation - the Crown could refuse to consent. In short, the Crown’s obligation was limited to preventing exploitative bargains.\(^{120}\)

McLachlin J. also noted that the *Indian Act* recognises First Nations as autonomous actors capable of making decisions concerning their interest in reserve property and ensures that the true intent of the First Nation is respected.\(^{121}\) However, a First Nation’s decision to surrender a portion of its reserve can be called into question if the First Nation’s understanding of the terms was inadequate or the Crown engaged in "tainted dealings" to the extent that it was unsafe to rely on the First Nation’s understanding and intention.

**Findings**

**Was the Band's Understanding Adequate?**

Several of the Elders who provided oral testimony during the community session stated that the band members at the time understood that the land would be leased and not sold. Elder Maurice Grey related that:


\(^{120}\) Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344 at paras. 35-36 (sub nom. Apsassin).

\(^{121}\) Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development) [1995] 4 S.C.R. 344 at para. 91 (sub nom. Apsassin).
I used to sit in on - - when I was a youngster, in some of the meetings they had, and I heard them talk about the surrender, what we're talking today. And at that time they were talking that it - - the land was to be leased. They were getting pressure from the Indian Agent to lease it.\(^\text{122}\)

Elder Grey also stated that many of the band members were surprised when they heard that the lands had been sold.\(^\text{123}\) However, the historical documents following the surrender do not contain any complaints from the Band or statements that the Band misunderstood the purpose of the surrender. There is no evidence that the Band at any time questioned the validity of the surrender. In fact in 1916, the Chief and Councillors of the Carry the Kettle Band petitioned to the Department of Indian Affairs to request annual per capita payments from the Band's Trust Account. The Chief and Councillors wrote, "We are quite familiar with the agreement made at the time we surrendered that portion of our land which was sold, but we now feel that the said agreement was not made for the best immediate interest of the Band..."\(^\text{124}\) Based on this evidence, we must conclude that the Band adequately understood the terms of the surrender.  

**Did the Crown's Conduct Taint the Dealings?**

The First Nation argues that Indian Agent Aspdin exerted pressure and undue influence on the Band to agree to the surrender. They assert that Aspdin was either inexperienced or negligent in his duties, as both Indian Agent and Farming Instructor, and points to records which, it argues, illustrate Aspdin's incompetence. In particular, the First Nation refers to a 1904 letter from Graham in which he allegedly reproached Aspdin for poor crops and suggested that a "practical farming instructor" be brought in to manage the Band's farming endeavours. This plan, the First Nation asserts, was frustrated by Aspdin's inability to purchase a suitable thresher. Aspdin, it is argued, was concerned for his own well-being and exerted pressure on the Band to agree to surrender conditions which favoured both the Crown and himself.  

With respect, we cannot accept this argument. There is no evidence on record to suggest that Aspdin was under any serious threat of sanctions such as being removed as Indian Agent, and there is no evidence that he exerted any pressure or undue influence on the Band to agree to the surrender. The record shows that it was the Chief and Headman who approached Aspdin.

---

122 ICC Transcript, November 29, 2006 (ICC Exhibit Sc, pp. 103-04, Maurice Grey).
124 Chief and Councillors of the Carry the Kettle Band to Secretary, Department of Indian Affairs, February, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 1338-39).
about the surrender and even proposed the terms of the surrender themselves. This suggests that the decision to surrender the southern portion of the reserve was made by the Band alone. We find that the Crown did not engage in pressure tactics or tainted dealings that would call into question the validity of the surrender.

**Did the Surrender Constitute an Exploitative Bargain?**

We turn to the question of whether the 1905 surrender constituted an exploitative bargain. In *Apsassin*, the Court held that if a Band’s decision to surrender were deemed foolish, improvident or exploitative, the Crown could refuse its consent. In assessing whether a surrender is exploitative, a number of factors may be considered. These factors may include: the quantity and quality of the remaining land in light of the Band's interests and perceived needs; the Band's existing and contemplated ways of life; its use of the land prior to the surrender; the terms of the surrender; and the potential benefits associated with the surrender. The First Nation argues that rather than selling the nine sections of the reserve, which were used to grow hay, provide summer pasture and grow crops, the Band had other options open to it. 125 They also argue that the Band’s overall interests in preserving the land as part of its reserve were substantial in 1901, and even greater by 1904-1905. 126 The surrender, the First Nation asserts, largely served the interests of the government, Agent Aspdin, and a small group of farmers, and the Crown placed itself in a conflict of interest when it approved the terms of surrender, which for the most part involved repayment of a debt owed to Canada. We agree with Canada’s position that the 1905 surrender did not constitute an exploitative bargain. The portion of the reserve proposed by the Band to be surrendered was relatively small, consisting of 5,760 acres from a reserve totalling over 46,000 acres. 127 Furthermore, the surrendered lands were for the most part unused. 128 It therefore would have been reasonable for the Indian Agent to conclude that the surrender would not impair the Band’s ability to be self-sufficient. The Band’s use of the southern portion of the reserve was limited. Elder testimony gathered during the community session indicates that the majority of Band members lived and farmed at the north end of the reserve and that only a few individuals kept farms at the south end. At the time, it would have been reasonable for the Band to sell this portion of the

---

125 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 49.
126 Written Submission on Behalf of the Carry the Kettle First Nation, August 24, 2007, p. 51.
reserve and use the proceeds to refurbish the farming equipment, which in turn would help it become more self-sufficient. We therefore conclude that the 1905 surrender was not foolish, improvident or exploitative and as a result there was no duty upon the Crown to refuse its consent.

Had the Band Ceded its Decision-Making Powers?
The final part of the Apsassin pre-surrender fiduciary duty analysis requires us to determine whether the Crown took extra caution if the Band had ceded or abnegated its powers to decide whether to surrender the land. In the present case, however, there was no such cession or abnegation by the Band of its powers to decide whether or on what terms the lands would be surrendered. It is clear that the Band not only requested the surrender but also proposed the conditions for the surrender. It does not appear that undue influence was applied to the Band, such that the Crown effectively became the decision-maker. We therefore conclude that the Band did not cede or abnegate its decision-making powers to the Crown.

Throughout the surrender process the Crown acted as a prudent and reasonable fiduciary. As a result, we find no breach of the Crown's pre-surrender fiduciary obligation to the First Nation.

ISSUE 4 OUTSTANDING LAWFUL OBLIGATION

4 As a result of the answers to questions 1 to 3 above, does Canada have an outstanding lawful obligation to the First Nation?

Having found that Canada did not exceed its jurisdiction or breach any statutory or fiduciary obligations to the Carry the Kettle First Nation with respect to the 1905 surrender, we find that Canada does not owe an outstanding lawful obligation to the First Nation.
PART V

CONCLUSIONS AND RECOMMENDATION

The Commission has been asked to inquire into and report upon whether the Government of Canada owes an outstanding lawful obligation to the Carry the Kettle First Nation. The panel in this inquiry finds that, based on the documentary evidence before it and having examined the relevant law, the Government of Canada does not owe an outstanding lawful obligation to the Carry the Kettle First Nation.

On the first issue, the panel was asked to make a finding of whether the Governor in Council exceeded its jurisdiction under the 1886 Indian Act when it consented to the 1905 surrender, sold the surrendered lands and used the proceeds of the sale to repay a debt owed to the Crown and other farming purchases. The First Nation claims that the 1886 Indian Act granted the Governor in Council limited powers to expend monies derived from the sale of surrendered lands and that those powers were exceeded. Canada argues that the Governor in Council exercised its powers reasonably and acted within the limits of the 1886 Indian Act. Having reviewed the relevant sections of the 1886 Indian Act pertaining to surrenders and the appropriate uses of proceeds therefrom, as well as the relevant law, the panel concludes that Governor in Council did not exceed its jurisdiction when it consented to the surrender, sold the lands subject thereto and used the proceeds of the sale for the purposes directed therein.

The panel was also asked to determine whether the 1905 surrender was taken in accordance with the provisions of the 1886 Indian Act, most notably those sections pertaining to the holding of a meeting for purposes of surrender as well as attendance and voting at that meeting. The panel finds that, based on the documentary and oral evidence before it and having examined the relevant law, notice of the surrender meeting was given in accordance with the rules of the Band, a surrender meeting was held, a majority of male band members were in attendance, and a majority of those voted in favour of the surrender.
The third issue required the panel to determine whether Canada breached any fiduciary duty owed to the First Nation when it assented to the 1905 surrender. Having reviewed the documentary record, oral evidence, and the relevant law, the panel finds that Canada acted as a prudent and reasonable fiduciary throughout the surrender process. As a result, there has been no breach of the Crown's pre-surrender fiduciary obligation to the First Nation.

As a result of the answers to the three issues outlined above, the panel finds that Canada did not exceed its jurisdiction or breach any statutory or fiduciary obligations to the Carry the Kettle First Nation with respect to the 1905 surrender, and thus Canada does not owe an outstanding lawful obligation to the First Nation.

We therefore recommend to the parties:

That the claim of the Carry the Kettle First Nation regarding the 1905 surrender of a portion of Indian Reserve 76 not be accepted for negotiation under Canada’s Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Sheila G. Purdy
Commissioner (Chair)

Jane Dickson-Gilmore
Commissioner

Alan C. Holman
Commissioner

Dated this 1st day of December, 2008.
APPENDIX A

HISTORICAL BACKGROUND

CARRY THE KETTLE FIRST NATION
1905 SURRENDER INQUIRY
CONTENTS

Introduction 59
  Origins of Carry the Kettle First Nation 59
  Adhesion to Treaty 4, 1877 59
  The Assiniboine and the Cypress Hills, 1874–83 62
  First Survey of the Indian Head Reserve, 1882 64
  Band Amalgamation and the Second Reserve Survey, 1885 65
  Euro-Canadian Settlement of the Indian Head District 67
  Agricultural Development of IR 76, 1895–1905 67

Requests for IR 76 Land 72
  1901 Request for Land 72
  1904 Request for Surrender 75
  1905 Surrender 78

Survey and Sale of Surrendered Land, 1905–1906 82
  Subdivision and Valuation of Land 82
  1906 Auction Sale 83
  Compensation for Improvements 85
  Requests for the Distribution of Trust Fund Money 87
    First Petition 87
    Second Petition 89
    Third Petition 92
    Fourth Petition 94
    Fifth Petition 95
INTRODUCTION

In 1905, Carry the Kettle First Nation surrendered approximately 5,760 acres of land along the southern portion of its 46,854-acre reserve, Assiniboine Indian Reserve (IR) 76. The reserve is located near Indian Head, 80 kilometres east of Regina, in southern Saskatchewan. The First Nation has since challenged the validity of the 1905 surrender through the federal Specific Claims process. The Government of Canada, however, affirms that the surrender was properly obtained and that, consequently, there is no outstanding lawful obligation to the First Nation.

Origins of Carry the Kettle First Nation

In the 1870s, Carry the Kettle First Nation was one of a number of Assiniboine Bands who inhabited the Cypress Hills in the southern Prairies. Prior to 1885, the collective group was referred to by Department of Indian Affairs (DIA) officials as the "Assiniboine Bands." Current Carry the Kettle First Nation members consider themselves direct descendants of two Assiniboine Chiefs, The Man Who Took the Coat and Long Lodge, whose respective Bands were amalgamated in 1885 under Chief The Man Who Took the Coat. After this amalgamation the Band was referred to by DIA officials as the "Assiniboine Band." Carry the Kettle Band was led by Chief The Man Who Took the Coat until his death in 1891, at which time he was succeeded by his brother, Carry the Kettle. The name Carry the Kettle Band first appears in correspondence after the turn of the century, and was used by DIA officials interchangeably with Assiniboine Band. The capital and interest accounts for this Band, however, are identified as Assiniboine Band #145. Carry the Kettle Band members referred to themselves as the Assiniboine Band until at least 1916. For the purposes of this report, Carry the Kettle First Nation is identified as Carry the Kettle Band, except when appearing in a direct quotation.

Adhesion to Treaty 4, 1877

In addition to setting out the terms for the Confederation of the Provinces of Canada, Nova Scotia, and New Brunswick, the Constitution Act, 1867, by
section 146, provided for the subsequent admission to the Union of Rupert's Land and the North-Western Territory.

Addresses of the Canadian House of Commons and Senate, dated December 16 and 17, 1867, respectively, requested the Queen to unite "Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government." Furthermore, those addresses stated:

upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.

In response, the British government passed the *Rupert's Land Act, 1868*, which enabled the surrender by the Hudson's Bay Company (then the owner of Rupert's Land) "of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities whatsoever granted or purported to be granted ... to the said Governor and Company within Rupert's Land" to the Queen. To facilitate the construction of a transcontinental railway and the settlement of the Prairies (two pillars of the governing Conservative Party's National Policy) the dominion government sought to secure title to the North-West Territories by signing treaties with the Aboriginal inhabitants of the area. First Nations also sought to negotiate treaties in an attempt to preserve their way of life in the face of Euro-Canadian settlement on their traditional lands. In return for certain rights, privileges, and provisions promised in those treaties, including annuities and reserves, the signatory bands ceded their Aboriginal title to the subject lands.

In 1874, the dominion government, represented by Alexander Morris, Lieutenant Governor of the North-West Territories, signed Treaty 4 with the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice. The Assiniboine bands resident in this area, however, were not present at these negotiations. It was not until September 1877 that the Assiniboine Tribe, led

---

132 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, December 16 & 17, 1867, attached as Schedule (A) to *Rupert's Land and North-Western Territory Order*, June 25, 1870, reprinted in RSC 1985, App. II, No. 9.
133 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, December 17 & 16, 1867, attached as Schedule (A) to *Rupert's Land and North-Western Territory Order*, June 25, 1870, reprinted in RSC 1985, App. II, No. 9.
by Chief Long Lodge Tepee Hoska, Chief The Man Who Took the Coat, Chief Poor Man, and Chief Wich-a-wos-taka, met with J.M. Walsh, the North-West Mounted Police Commander of Fort Walsh in the Cypress Hills, and signed an adhesion to Treaty 4.\textsuperscript{136}

Treaty 4 provided reserves of "one square mile for each family of five, or in that proportion for larger or smaller families."\textsuperscript{137} It further stipulated:

> 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.\textsuperscript{138}

The treaty also provided for an annuity, maintenance of schools on reserves, triennial clothing for the chiefs and headmen, ammunition, and twine. Signatories were also promised that:

> the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{135} Chief The Man Who Took the Coat is also referred to as Jack, The One Who Took the Coat, The One That Fetched the Coat, and The One Who Stole the Coat. For the purposes of this paper, we will refer to the Chief as The Man Who Took the Coat unless his name appears in a direct quotation.
  \item \textsuperscript{136} Canada, Treaty No. 4 Between Her Majesty and the Cree and Saulteaux Tribes of Indians, 1874 (Ottawa: Queen's Printer and Controller of Stationery, 1966) (ICC Exhibit 1a, pp. 1-14).
  \item \textsuperscript{137} Canada, Treaty No. 4 Between Her Majesty and the Cree and Saulteaux Tribes of Indians, 1874 (Ottawa: Queen's Printer and Controller of Stationery, 1966) (ICC Exhibit 1a, pp. 1-14).
  \item \textsuperscript{138} Canada, Treaty No. 4 Between Her Majesty and the Cree and Saulteaux Tribes of Indians, 1874 (Ottawa: Queen's Printer and Controller of Stationery, 1966) (ICC Exhibit 1a, pp. 1-14).
  \item \textsuperscript{139} Canada, Treaty No. 4 Between Her Majesty and the Cree and Saulteaux Tribes of Indians, 1874 (Ottawa: Queen's Printer and Controller of Stationery, 1966) (ICC Exhibit 1a, pp. 1-14).
\end{itemize}
The Assiniboine and the Cypress Hills, 1874–83
Historically, the Assiniboine Tribe was comprised of approximately 33 bands.140 Those bands traditionally inhabited an area around the Mississippi headwaters and at "the peak of their power their territory ranged from the Saskatchewan and Assiniboine river valleys in Canada to the region north of the Milk and Missouri rivers in the U.S."141 At the time of its adhesion to Treaty 4, the Assiniboine Tribe was one of several groups occupying the Cypress Hills, an area of 2,500 square kilometres in what is now southeastern Alberta and southwestern Saskatchewan.142 During treaty negotiations, the Assiniboine made it known to Treaty Commissioner J.M. Walsh that the Cypress Hills was part of its territory:

The country claimed by the Assiniboines, admitted in treaty this year by me as the country of their forefathers, extends from the west end of Cypress Mountain to Wood Mountain on the east, north to the South Saskatchewan and south to Milk River.

Since my arrival in this country they have not gone further east than forty (40) miles east of the east end of Cypress Mountain, this is owing to the large number of Sioux in that locality whom the Assiniboines do not care about intermingling with. The other sections of the country mentioned have been occupied by them for the last two (2) years, one-half have wintered on the Canadian side of the line on Milk River, the other half at the west end of the mountain.143

The Assiniboine Bands did not select their reserves until 1879. In his annual report for that year, Indian Commissioner Edgar Dewdney informed the Superintendent General of Indian Affairs in his annual report that "[t]he Assiniboines have not, as yet, settled on their reservations. One band whose chief's name is 'The Man that Stole the Coat,' expressed a wish last spring to settle, and picked out land at the west of Cypress Mountain for his reservation."144 Dewdney visited the site in October 1879 and described the area as:

144 Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs (SGIA), January 2, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1879, 76–103 (ICC Exhibit 1a, p. 40).
situated on the north-west end of Cypress Mountains, and is well located for farming, provided early summer frosts are not prevalent.

As no crop of any kind has ever been put in this locality, it is difficult to say how it may turn out.

It has been a favorite wintering-place for Half-breeds for several years, and there are a number of abandoned houses, which will be made use of by the Indian instructor sent there, as well as by the Indians themselves.\footnote{Edgar Dewdney, Indian Commissioner, to SGIA, January 2, 1880, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880}, 95 (ICC Exhibit 1a, p. 58).}

In the spring of 1880, Allan P. Patrick surveyed an area north of the Cypress Hills, containing 340 square miles, for the Assiniboines.\footnote{Allan Patrick, Dominion Topographical Surveyor, to E. Dewdney, Commissioner, December 16, 1880, LAC, RG 10, vol. 5730, file 26219 (ICC Exhibit 1a, p. 48).}

The Assiniboine did not remain long at Cypress Hills. Between 1880 and 1882, the living conditions of Indians residing in the southern Prairies deteriorated quickly. In December 1882, the Superintendent at Fort Walsh reported that the buffalo had completely disappeared and the Indians in the area were starving and reliant on rations.\footnote{J.H. McIlree, Superintendent, Commanding Post, to Commissioner, Department of Indian Affairs, December 2, 1882, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, p. 83).}

Chief Dan Kennedy later recalled that "[t]he Buffalo were wiped out in 1879, and in consequence we had to eat our horses in the winter of 1880–81 at Cypress Hills."\footnote{Dan Kennedy, \textit{Recollections of an Assiniboine Chief}, (Toronto: McClelland and Stewart, 1972), 66 (ICC Exhibit 8h, p. 3).} As early as December 1880, DIA officials recommended the removal of bands from the Cypress Hills area, considering it prudent to move them north of the Canadian Pacific Railway line near Qu’Appelle.\footnote{E. Dewdney, Indian Commissioner, to SGIA, December 31, 1880, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880}, 94 (ICC Exhibit 1a, p. 78).}

The Assiniboine, however, were reluctant to leave. Colonel A.G. Irvine, Commissioner of the North-West Mounted Police (NWMP), met with the Assiniboine bands in the spring of 1882 and induced them to move to the Qu’Appelle area. Irvine reported: "'The-man-that-took-the-coat,' or ‘Jack,’ was the first Assinaboine Chief who consented to proceed to the reservation allotted him by the Government."\footnote{A.G. Irvine, Commissioner, NWMP, to Minister of the Interior, January 1, 1883, Canada, \textit{Annual Report of the Department of the Interior for the Year 1882}, 3 (ICC Exhibit 1a, p. 120).}

Chief Dan Kennedy explained the Assiniboine’s reasons for moving:

> The destruction of the buffalo was a mortal blow. We had no alternative but to comply with the provisions of our reserve, where we would receive rations of flour, bacon and tea.

Consequently, in the spring of 1882 we left Cypress Hills, our favourite hunting territory – the land of the evergreens, chinook winds and running brooks.
– and moved to our reserve, the Skull Mountainettes – the land of the dead – where two epidemics of smallpox wiped out two large tribes of Crees in the forties of the last century.\(^{151}\)

The lodges under Chiefs Long Lodge and The Man Who Took the Coat reached Qu’Appelle on June 1st.\(^{152}\)

**First Survey of the Indian Head Reserve, 1882**

The survey of a reserve at Indian Head for the Assiniboine began in May 1882, while the Bands were en route from the south.\(^{153}\) At that time, John C. Nelson surveyed 220 square miles for the Bands of The Man Who Took the Coat, Long Lodge, and Piapot, describing the land as "an attractive place for these unsettled Plain Indians. The soil is of the choicest quality; there is a good proportion of hay grounds, wood and plenty of water, and the Canadian Pacific Railway is only a few miles to the north."\(^{154}\)

When the lodges of The Man Who Took the Coat and Long Lodge arrived at Indian Head in June 1882, they settled on their selected reserves and briefly commenced farming. Two months later, Chief Long Lodge and his followers, dissatisfied with their situation, departed for Wood Mountain and eventually the United States. The Man Who Took the Coat and his followers left soon after. Agent McDonald reported:

The Assiniboines were induced to take a reserve at the Indian Head. They at first appeared fully contented but towards payment time became unsettled and restless, they stated they could not live on bacon, and had always been accustomed to live on fresh beef. In order that they should have no excuse in that respect, I ordered beef three times a week; this satisfied them for a time, but after the payments they returned everything they had received from the Government in the way of tools, &c. and said they must go south. The chief, The man-that-took-the-Coat, came to me with his men and said that he would not leave, as his brother chief, Long Lodge, had done without telling me why he did not like to stop north; he said he was pleased with the way he had been treated, but his people did not like the place, that their friends all lived south, and that their old people were buried there, they begged for a reserve in the south.\(^{155}\)

---


The Assiniboine did not return to Indian Head until the spring of 1883, having spent the fall and winter of 1882–83 in the vicinity of Fort Walsh. After relocating the bands to Qu'Appelle over the summer of 1882, the department removed its representative from Fort Walsh, leaving only a detachment of the North-West Mounted Police, which was poorly equipped to handle the demands of the large numbers of Indians who returned to the fort. After a difficult winter, the Assiniboine Bands returned to Indian Head and, by July 1883, farming operations were once again under way.

Band Amalgamation and the Second Reserve Survey, 1885

In January 1885, Indian Commissioner Dewdney reported that Chief Long Lodge had died on Christmas Eve, 1884. In the same letter, Dewdney expressed his desire to amalgamate the two Assiniboine Bands under Chief The Man Who Took the Coat. Indian Agent McDonald reported in early March 1885 that he had met with Chief The Man Who Took The Coat and the principal men of both Bands and that "Little Mountain, the Principal Head Man of Band No. 77, said that he and the followers of their late Chief had decided to recognize 'The Man Who Took the Coat' as their Chief." The amalgamation of the two Bands was approved by the department on March 28, 1885. The Band was led by Chief The Man Who Took The Coat until his death in 1891, at which time he was succeeded by his brother, Carry the Kettle.

The final survey of the reserve at Indian Head took place in June 1885. Surveyor John C. Nelson reported that Chief The Man Who Took the Coat "had carefully examined the block of land set apart for the Assiniboine Indians, and would like to obtain that part of it which had been abandoned by Pie-a-Pot [Piapot having returned to the Qu'Appelle Valley], for he found both land and

156 A. McDonald, Indian Agent, to SGIA, July 6, 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883, 69-75 (ICC Exhibit 1a, p. 136).
157 Edgar Dewdney, Indian Commissioner, to SGIA, December 6, 1882, LAC, RG 10, vol. 37/4, file 29506-3 (ICC Exhibit 1a, p. 96), and Frederick White, Comptroller, Department of the Interior, NWMP Branch, to [recipient unknown], December 19, 1882, LAC, RG 10, vol. 57/4, file 29506-3 (ICC Exhibit 1a, pp.105-6).
158 A. McDonald, Indian Agent, to SGIA, July 6, 1883, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883, 69-75 (ICC Exhibit 1a, p. 136).
159 Edgar Dewdney, Commissioner, to SGIA, January 10, 1885, LAC, RG 10, vol. 370/4, file 17825 (ICC Exhibit 1a, p. 139).
160 A. McDonald, Indian Agent, to Indian Commissioner, March 4, 1885, LAC, RG 10, vol. 370/4, file 17825 (ICC Exhibit 1a, pp. 140-42).
161 Edgar Dewdney, Indian Commissioner, to SGIA, March 9, 1885, LAC, RG 10, vol. 370/4, file 17825 (ICC Exhibit 1a, p. 143), and unknown author to Dewdney, March 28, 1885, LAC, RG 10, vol. 570/4, file 17825 (ICC Exhibit 1a, p. 144).
162 ICC, Carry the Kettle First Nation: Cypress Hills Inquiry (Ottawa, July 2000), 7, reported 13 ICCP 209 at 221.
timber good, and preferred it to any farther west.\textsuperscript{163} The survey of the reserve was completed on June 16, 1885. The reserve was laid out nine miles from east to west, eight miles from north to south, and was situated seven miles south of the village of Sintaluta.\textsuperscript{164} Surveyor Nelson described the physical features of the reserve as follows:

\begin{quote}
The north-eastern half of this reserve is partially wooded with poplar and willows, much of which, however, has been killed by fire. The soil is a black sandy loam, with some gravel and a few boulders on the surface. The south-western half is principally a high open undulating prairie, with some shallow ponds, and a soil of sandy clay loam, mixed with considerable gravel towards the south-west corner. The pasturage throughout is excellent.\textsuperscript{165}
\end{quote}

On May 17, 1889, Order in Council 1151 confirmed Nelson's survey of IR 76, which encompassed 73.2 square miles (46,854 acres) and was described as:

\begin{quote}
bounded by a line beginning at the post and mound on the fifth base line, at the north-east corner of section thirty-six, township sixteen, range eleven, west of the second initial meridian, and running west along said base line, seven hundred and twenty-eight chains, more or less, to the north-west corner of section thirty-four, township sixteen, range twelve; thence south six hundred and forty-three chains, more or less, to a post in mound; thence east seven hundred and twenty-eight chains, more or less, to a post and mound on the eastern boundary of section twenty-five, township fifteen, range eleven, and thence north six hundred and forty-three chains, more or less, to the point of beginning; containing an area of seventy-three and two-tenths square miles, more or less.\textsuperscript{166}
\end{quote}

The lands within IR 76 were withdrawn from the operation of the \textit{Dominion Lands Act} by Order in Council 1694, dated June 12, 1893.\textsuperscript{167}

\begin{flushright}
\textsuperscript{163} John C. Nelson, D.L.S., In Charge of Indian Reserve Surveys, to E. Dewdney, Indian Commissioner, December 5, 1885, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885}, 146-51 (ICC Exhibit 1a, p. 145).
\textsuperscript{165} Order in Council PC 1151, May 17, 1889, LAC, RG 2, vol. 419 (ICC Exhibit 1a, p. 181).
\textsuperscript{166} Order in Council PC 1151, May 17, 1889, LAC, RG 2, vol. 419 (ICC Exhibit 1a, p. 181).
\textsuperscript{167} Order in Council PC 1694, June 12, 1893, LAC, RG 2-1, vol. 575 (ICC Exhibit 1a, pp. 241-43).
\end{flushright}
Euro-Canadian Settlement of the Indian Head District

The settlement of the area surrounding IR 76 coincided with the first survey of the reserve in 1882. Dominion Lands in the Indian Head district were surveyed by the Department of the Interior in 1882 and, later that year, the Canadian Pacific Railway completed construction of the main line through the area. That same year, the municipality of Indian Head was established, incorporating townships 14, 15, 16, 17, 18, 19A, and 19, within ranges 11, 12, and 13, W of 2nd meridian (W2M). The town of Indian Head became the site of an experimental farm and the grain transportation centre for farms within a 20-mile radius.

Although Indian Head, situated north of IR 76, was the economic centre for the immediate area, members of Carry the Kettle Band had more frequent contact with the smaller settlement of Montmartre. This settlement was founded by the Foncier Society of Canada, a Paris-based colonization company. The society obtained lands south and west of IR 76 to be near Wolseley, an area of French-Canadian settlement. The first settlers arrived at Montmartre in May 1893, but it was not until the turn of the century that the colony became firmly entrenched. The arrival of the Canadian Northern Railway’s Brandon-Regina branch line in 1907 spurred the development of the town as local farmers no longer had to transport goods to Indian Head.

Agricultural Development of IR 76, 1895–1905

Between 1895 and 1905, reports of the Indian Agent and Inspector of Indian Agencies praised Carry the Kettle Band for its progress. In August 1895, Indian Agent W.S. Grant wrote to the Superintendent General of Indian Affairs, declaring:

I have much pleasure in being able to report that these Indians are making rapid progress towards civilization, having given up some of their old customs. ... These Indian worked hard last fall. They put up six hundred and fifty tons of hay for their

168 Bob Hart, “Indian Head History and Agricultural Background,” in Indian Head: History of Indian Head and District (Indian Head, SK, 1984), 1-2 (ICC Exhibit 8g, p. 3).
169 Bob Hart, “Indian Head History and Agricultural Background,” in Indian Head: History of Indian Head and District (Indian Head, SK, 1984), 8 (ICC Exhibit 8g, p. 5).
170 Romeo Bedard, History of Montmartre, Saskatchewan, 1893-1953 [Saskatchewan, 1953], 2 (ICC Exhibit 8c, p. 4).
171 Romeo Bedard, History of Montmartre, Saskatchewan, 1893-1953 [Saskatchewan, 1953], 2 (ICC Exhibit 8c, p. 4).
172 Romeo Bedard, History of Montmartre, Saskatchewan, 1893-1953 [Saskatchewan, 1953], 6 (ICC Exhibit 8c, p. 4).
173 Romeo Bedard, History of Montmartre, Saskatchewan, 1893-1953 [Saskatchewan, 1953], 52-53 (ICC Exhibit 8c, pp. 6-7).
cattle, cut, bound and stacked one hundred and forty-one acres of wheat. All this binding was done by hand. Some of the grain was cut with sickles and some of the hay with scythes. This kind of hard work will show what Indians can do when encouraged by pointing out to them the benefit they will have during winter of a good supply of both beef and flour of their own raising.\(^\text{175}\)

The Band was encouraged by Indian Agent Grant, and Farming Instructor Thomas Aspdin, to take up mixed farming. In addition to cultivating wheat, oats, potatoes, turnips, onions, and carrots, they raised cattle, sheep, pigs, and chickens.\(^\text{176}\) Reports reveal that band members were slow to engage in the raising of cattle due to the difficulty of obtaining water and the attraction of quick money from the sale of hay and wood.\(^\text{177}\) By 1903, however, Aspdin, now the Indian Agent, reported that the size of the cattle herd had doubled to 200 head over the previous few years.\(^\text{178}\) In June 1905, Aspdin reported that ambitious young men enjoyed mixed farming while older members preferred to sell hay.\(^\text{179}\) Wood and hay became a major source of income for band members as settlement increased and the supply of wild hay and wood was depleted.

On various occasions it was reported that the Band was able to provide all the meat, grain, and hay its members required. Surplus was sold to nearby settlers, providing individual band members with a source of income. The nearby railway towns of Wolseley and Indian Head, as well as smaller settlements like Montmartre and Sintaluta, provided a ready market for the hay and wood grown on the reserve.\(^\text{180}\) Band members also laboured for local settlers.\(^\text{181}\) Reports indicate that band members earned $788.82 in 1895 and $1,139.06 in 1896 from various activities.\(^\text{182}\)

\(^{175}\) W.S. Grant, Indian Agent, to SGIA, August 7, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895, 45-47 (ICC Exhibit 1a, p. 244).

\(^{176}\) W.S. Grant, Indian Agent, to SGIA, August 7, 1885, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895, 45-47 (ICC Exhibit 1a, p. 245); W.S. Grant, Indian Agent, to SGIA, July 21, 1896, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896, 138-40 (ICC Exhibit 1a, pp. 248-50).

\(^{177}\) Thos. W. Aspdin, Farmer in Charge, to SGIA, August 12, 1898, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898, 111-13 (ICC Exhibit 1a, p. 256).


\(^{179}\) Thos. W. Aspdin, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA), June 30, 1905, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905, 101-2 (ICC Exhibit 1a, p. 668).

\(^{180}\) W.S. Grant, Indian Agent, to SGIA, August 7, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895, 61-64 (ICC Exhibit 1a, pp. 240-47); Thos. W. Aspdin, Farmer in Charge, to SGIA, August 12, 1898, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898, 111-13 (ICC Exhibit 1a, p. 256).


\(^{182}\) W.S. Grant, Indian Agent, to SGIA, August 7, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895, 61-64 (ICC Exhibit 1a, p. 247); W.S. Grant, Indian Agent, to SGIA, July 21, 1896, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896, 138-40 (ICC Exhibit 1a, p. 250).
The most successful farmers on the reserve were often identified by departmental officials in their reports. In 1895, Indian Agent W.S. Grant named 22 families who were able to provide their own flour, eight of whom also provided their own beef. Subsequent reports remark on the purchases and improvements made by specific band members from their own moneys. For example, Charles Rider was able to purchase a wagon and workhorse in 1901. The Inspector of Indian Agencies also commented on the condition of Rider’s house and farm, among others. In a 1903 report, Indian Agent Aspdin commented favourably on individuals such as Daniel Kennedy and Charles Rider:

The progress of the Indians on this reserve has been most encouraging and more particularly in the case of several of the young men. The following are distinguished for progress during the year: Daniel Kennedy has fifty-six acres of wheat and eight of oats, also ten head of cattle; Chas. Rider has thirty-seven acres of wheat and eight of oats; Oaksheppy has twenty acres of wheat and five of oats; Medicine Rope has twenty-seven acres of wheat and three of oats; Frank Risingsun has twenty-four acres of wheat; Wesecan has twenty-three acres of wheat.

The reports of the Indian Agent and Inspector of Indian Agencies often provided a list of implements purchased by band members during the previous year. In 1896, Indian Agent W.S. Grant reported:

They are gradually becoming better off each year and are making steady progress in farming by increasing their fields and herds of stock; some of the more industrious have been purchasing implements, such as mowers, hay-rakes, wagons and bob-sleighs.
Between 1896 and 1905, it was reported that band members had purchased lumber, shingles, bedsteads, wagons, wire, seeders, harnesses, pumps, mowers, tools, and clothing.\textsuperscript{187}

The Band as a whole also purchased various implements for the use of members and to make improvements to its reserve. In 1899, Alex McGibbon, Inspector of Indian Agencies, reported that the Band purchased agricultural implements and was in a good financial state:

The band purchased a new binder, half paid this year and half next, cash price and no interest. These Indians are practically out of debt.

...The whole reserve was in a prosperous condition, and Mr. Aspdin was sparing no pains in helping his Indians in their work.\textsuperscript{188}

Upon his return in 1900, Inspector McGibbon reported that the Band was free of debt.\textsuperscript{189}

The Department of Indian Affairs also assisted the Band in its agricultural endeavours through monetary loans which facilitated the purchase of implements and supplies. In 1903, the Band, "through the kindness of the department," was able to purchase a threshing outfit of its own which, according to the Indian Agent, was "a great encouragement for further efforts. In the past the threshing was very discouraging, as we had to wait till every one else was done."\textsuperscript{190}

The request for a thresher had been presented to the department in the fall of 1902.\textsuperscript{191} An October 11, 1902, letter from the department to the Indian

\begin{thebibliography}{9}
\bibitem{188} Alex McGibbon, Inspector of Indian Agencies, to SGIA, August 18, 1899, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1899}, 194-96, 205 (ICC Exhibit 1a, pp. 258-61).
\bibitem{189} Alex McGibbon, Inspector of Indian Agencies and Reserves, to SGIA, August 7, 1900, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900}, 210-14, 221 (ICC Exhibit 1a, p. 280).
\bibitem{190} Thos. W. Aspdin, Indian Agent, to SGIA, August 15, 1903, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ending June 30, 1903}, 134-45 (ICC Exhibit 1a, p. 518).
\bibitem{191} J.D. McLean, Secretary, to D. Laird, Indian Commissioner, October 2, 1902, LAC, RG 10, vol. 4998 (ICC Exhibit 1a, p. 443).
\end{thebibliography}
Agent instructed the Agent to purchase a thresher as cheaply as possible on the understanding that it could not be paid for until July 1, 1903. As well, the department instructed that the Band was to refund the cost of the thresher in the manner suggested by the Indian Agent in previous correspondence.\(^{192}\) (This piece of correspondence has not been located). The Indian Agent purchased the equipment from Massey Harris for $820.00.\(^{193}\)

As early as January 1903, money had already been collected from band members for the thresher. In addition, it appears that around the same time the Indian Agent had erroneously forwarded a payment of $15.70 to the Massey Harris Company. The department requested that money not be deposited on this account and instructed the Indian Agent that, if the company returned the money to him, it should be directed to the department.\(^{194}\)

By October 1903, a report had reached the Deputy Superintendent General of Indian Affairs that the engine purchased from Massey Harris was unsatisfactory. Pedley wrote to Aspdin reminding him that:

> the authority for this purchase ... was given with the provise that the Company would guarantee the engine to give satisfaction. It is assumed that you acted upon the instructions which you received, and therefore it remains for the Company to now make good their guarantee. You should therefore insist upon the Massey Harris Company replacing the faulty engine by one thoroughly satisfactory. The Department I may inform you has no funds with which to purchase another engine.\(^{195}\)

The department secretary, J.D. McLean, reported in April 1904 that the Indian Agent had had the engine repaired, but that a "large up-to-date engine and separator with all improvements" was required.\(^{196}\) It is not known if the Indian Agent had acquired a guarantee on the engine and whether it was used to repair the engine.

It was reported in April 1904 that the Indian Agent had expressed concern that poor crops might prevent the Indians from keeping up with regular payments on the engine and had asked if livestock could be sold to pay for it;

\(^{192}\) S. Stewart, Asst. Secretary, to T.W. Aspdin, Indian Agent, October 11, 1902, LAC, RG 10, vol. 4998 (ICC Exhibit 1a, pp. 456-57).

\(^{193}\) [J.D. McLean], Secretary, to T.W. Aspdin, Indian Agent, December 22, 1902, LAC, RG 10, vol. 5004 (ICC Exhibit 1a, p. 475). See also Frank Pedley, DSGIA, to the Massey Harris Co., August 8, 1903, LAC, RG 10, vol. 5034, p. 287 (ICC Exhibit 1a, p. 516).

\(^{194}\) J.D. McLean, Secretary, to T.W. Aspdin, Indian Agent, January 22, 1903, LAC, RG 10, vol. 5006 (ICC Exhibit 1a, p. 977).

\(^{195}\) Frank Pedley, DSGIA, to T.W. Aspdin, Indian Agent, October 29, 1903, LAC, RG 10, vol. 5040, reel C-8577 (ICC Exhibit 1a, p. 530).

\(^{196}\) J.D. McLean, Secretary, to W.M. Graham, April 11, 1904, LAC, RG 10, vol. 5057, reel C-8583 (ICC Exhibit 1a, pp. 564-65).
the record of this inquiry does not indicate whether this requested was granted. The same correspondence indicates that the department had paid $220.00 in 1903–1904, and $300.00 in 1902–1903 toward the engine and separator.\footnote{J.D. McLean, Secretary, to T.W. Aspdin, Indian Agent, June 28, 1905, LAC, RG 10, vol. 5100 (ICC Exhibit 1a, pp. 666-67).}

In April 1905, the department approved the sale of the old engine with the moneys being applied to the purchase of a new one. In correspondence dated June 28, 1905, the department explained that a new engine could not be purchased until the surrendered sections of land had been sold and paid for. The Agent was instructed to obtain prices on engines.\footnote{J.D. McLean, Secretary, to T.W. Aspdin, Indian Agent, June 28, 1905, LAC, RG 10, vol. 5100 (ICC Exhibit 1a, pp. 666-67).} No further information is known about this transaction.

In 1904, the department loaned the Band money for the fencing of a pasture, which permitted the cattle to roam and feed overnight. The department advanced $500.00, which the Indian Agent proposed could be repaid at a rate of $100.00 a year. The department disagreed with this payment schedule and argued that the loan should be repaid in two years at 3 per cent interest.\footnote{J.D. McLean, Secretary, to D. Laird, Indian Commissioner, February 17, 1904, LAC, RG 10, vol. 5051 (ICC Exhibit 1a, pp. 560-61).} The Indian Agent reported in his Annual Report that the Band had been able to make a "substantial repayment of the money advanced" by August 1904.\footnote{Thos. W. Aspdin, Indian Agent, to SGIA, August 15, 1904, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904} (ICC Exhibit 1a, p. 595).}

\section*{REQUESTS FOR IR 76 LAND}

\subsection*{1901 Request for Land}

The first documented request for IR 76 lands came from A.H. Tremandan, a resident of Montmartre, Saskatchewan, in January 1901. In a letter to Dr J. Douglas, Member of Parliament, Mr. De Trem Andan asked the Crown to consider a surrender of land from the Assiniboine Reserve, stating:

\begin{quote}
It seems to us that the government should be anxious to help white settlers before Indians, chiefly that in our mind there is nothing but the wood that the Indians must find convenient in this particular Reserve.\footnote{A.H. de Trem Andan, to Dr J. Douglas, MP, January 1, 1901, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 322-25).}
\end{quote}
The availability of hay and wood in the southern quarter sections of IR 76 was especially attractive to settlers. According to de Trem Andan, farmers in the area used to cut willow on a section of land they believed to be Dominion Lands, but they had learned that it was reserve land when a complaint of trespass was made by the Carry the Kettle Band. He complained that settlers were now forced to travel eight miles for wood. De Trem Andan was also critical of the amount of hay that spoiled every year because the cost of a permit to cut it (50 cents per ton) was too high. 202 Tremandan and others had been convicted and fined for trespassing on the reserve in December 1900. 203

Douglas forwarded de Trem Andan’s letter to the Deputy Superintendent General of Indian Affairs, James A. Smart. 204 Smart was of the opinion that the Band would “decidedly object” to a surrender of any portion of its reserve. 205 In a letter to Douglas dated February 5, 1901, Smart suggested that the recent trespass might lead the Band to reject any requests for timber privileges, but promised to have the Agent look into the matter. 206 One week later, the Secretary of the Department of Indian Affairs, J.D. McLean, requested the Farmer in Charge of the Agency, Thomas Aspdin, to report on the availability of wood and the Band’s willingness to either sell the timber or any part of its reserve. McLean concluded the letter stating:

The Department is not at all desirous to urge the Indians to sell either [the timber or a portion of the reserve], and it would be well to get quietly the opinion of the Chief and the more intelligent members of the Band on the subject before replying to this communication. 207

After consulting the Band, Aspdin reported:

I have had the Chief and Headman along with many of the Indians together and submitted the proposal that was made for their consideration as to selling part of their reserve. The matter was discussed on the whole much intelligently and the unanimous opinion expressed was that not one acre should be sold and they wish

---

Having had the opportunity to review de Trem Aandan’s letter, Aspdin challenged several of de Trem Andan’s comments. Particularly, he disputed the claim that the settlers were too poor to pay for hay permits. Aspdin reported he had been overwhelmed by applicants and had to turn people away because they were cutting where the Indians made hay. He also rebutted de Trem Andan’s claim that no one lived on the southern portion of the reserve, explaining that the Indians preferred to build their houses in the shelter of the bluffs, but that the land in question was used for haying and a summer cattle run. Aspdin added that the Band’s farming and cattle operations were growing and the open prairie land would be required in the future.

As predicted by Aspdin, the Band’s settlement and farming operations did expand to the southern areas of the reserve. In a September 8, 1903, report on the Assiniboine Agency, Inspector of Indian Agencies L.J. Arthur Leveque reported "one hundred and ten acres were broken by four young married Indians who have commenced a colony of their own in the southern part of the reserve."

During the November 2006 and May 2007 community sessions conducted by the Indian Claims Commission, Elders of Carry the Kettle First Nation spoke about the location of settlements on the reserve. Elder Maurice Grey heard through his grandfather and other Elders that "the majority of the people lived in the north end." He also recalled hearing that Dan Kennedy lived in the south end. Elder Nancy Eashappie heard from her grandfather, Medicine Rope, and her uncles that, at the time of the surrender, "[t]here's about — well, 16, 18 houses" on the north side. Elder Percy Ryder also related that most people lived in the north. He explained:

209 Thos. Aspdin, In Charge, to Secretary, Department of Indian Affairs, February 25, 1901, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 340-43).
210 Thos. Aspdin, In Charge, to Secretary, Department of Indian Affairs, February 25, 1901, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 340-43).
211 L.J. Arthur Leveque, Inspector of Indian Agencies, to SGIA, September 8, 1903, Canada, Annual Report for the Department of Indian Affairs for the Year Ending June 30, 1903, 225 (ICC Exhibit 1a, p. 520).
212 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 119, Maurice Grey).
213 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 120, Maurice Grey).
214 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 80, Nancy Eashappie).
most of them lived – there was quite a few who lived in the north because of the
bush, eh? They prefer protection from wind and snow, and – but there was – like,
my dad, he – we lived right out in the prairie.

... there was only a couple of them, I guess, that – that lived on the southwest side
of the reserve. Most of them lived in the north where there was shelter and there
was lots of wood and hay and everything there.215

Mr. Ryder also heard the names of the families that lived on the south side
from Elders. He explained that his father, Charles Ryder Jr., had broken land
for the farmers in the south:

Ms. McGregor: Who were some of the people he went to go break up the land for?

Elder Percy Ryder: Well, there was Haywahes, there was Hugh and John Haywahe
and some other, you know, people, Frank Walking Sun and –

... They – and some of the people there that – the Eashappies, Donald Medicine
Rope, they broke up land for them too.

Ms. McGregor: Okay. Where did they have their farms, was it in the north part of
the reserve or the south?

Elder Percy Ryder: Most of them were in the south, but there was a few in the
north. Like, my grandfather farmed in the north, Donald Rope – Donald Medicine
Rope, he’s from the north. There was a few, but most of them – like, in the – in the
south side, southwest corner, it was all open prairie. There was no bush, and then
they – that’s where they – most of them had land, and during the – they farmed
that community farm, sort of on the west – on the west side of the reserve. They
broke up a bunch of land there.216

1904 Request for Surrender

According to the documentary record, Chief Carry the Kettle and the headmen
of the Band approached Indian Agent Aspdin in December 1904 to inquire
about surrendering a portion of their land. Aspdin reported to the Secretary of
the Department of Indian Affairs:

Their request is that the Dept. sell for them the nine most southern sections and
that in view of this that the Dept. do not press them for the money owing for the
threshing outfit and also for the pasture made last summer but that these liabilities

be paid out of sale of these lands and that the Dept. advance them enough at interest to pay the difference between the threshing engine now on hand and a new modern engine.217

Aspdin estimated the possible selling price:

I think it would sell for at least $5.00 per acre. This I consider rather a low estimate more especially as a line of railway is projected coming from some point in Manitoba to Regina. This line is looked upon as a certainty in the near future and will probably come as near as 2 or 3 miles to these lands and further appreciate their value.218

He also determined that the remaining reserve lands were enough for the requirements of the Band.

Elders Maurice Grey, Percy Ryder, and Bertha O’Watch related stories of the Band wanting to lease its land to get money to pay for equipment and support itself. Elder Maurice Grey recalled that:

well, the stories I heard at those meetings, the Indian Agent wanted to lease it or the – I don’t know if it was the Indian Agent, but I assumed that was what they were calling the fellow was the Indian Agent, to get money to buy farm equipment. And, in fact, more rations. And help farmers get going with machinery, cattle and whatever.219

Elder Bertha O’Watch recounted that she heard about her Uncles Ted Kennedy and Joe Jack being unable to pay back a debt. She explained, "[t]hose two, they get a lot – (speaking Nakoda) plows, everything, horses (speaking Nakoda) and they can’t pay it back. So that’s why they sell that land (speaking Nakoda).”220

Elder Percy Ryder also recalled hearing about the Band’s debt:

Well, I guess ... the Indian agent was our farm instructor. One of them was after them to – they owed money, and ... they had a community pasture, and they wanted supplies for the community pasture. And so they – the agent and them, they – the council, I guess – he was in the council at that time. They agreed to ... lease this land and get funding out of it to pay for some of these supplies because they didn’t – like, a lot of them didn’t really know the Treaties that good, so they figured well,
if — if we have to pay for this, our supplies, and they wanted some money — funding
to help the older people that were in — kind of destitute. They needed help. So ... they talked about when the agent mentioned that they could lease this land and ... get funding for it.221

The Band’s request for a surrender was communicated to W.M. Graham, Inspector of Indian Agencies, who visited the reserve in March 1905. According to Graham, the Band seemed anxious to sell the land. The Band submitted six conditions of surrender to Graham for consideration:

That the present indebtess [sic] on the threshing outfit of about $1200.00 be paid off at the earliest possible date, out of the proceeds of the sale.
That the Department be paid for the money advanced to purchase wire for the pasture fence, from the proceeds of the sale.
That lumber etc. be purchased to build a suitable shed to house the threshing machine and engine, out of the proceeds of the sale of land.
That the present engine, which was a second-hand one when purchased, be exchanged on a new engine and the difference be paid out of the proceeds of the sale of the land.
That Daniel Kennedy and one or two other Indians be paid compensation for any ploughing that should happen to be on the strip of land that it is proposed to surrender, out of the proceeds of the sale.
That the balance of the money be funded and managed by the Department as it sees fit.”222

As well, Graham supported an informal request from "[o]ne or two of the old people" who "expressed a desire that a portion of the money be spent at the beginning of each winter in the purchase of clothing and food for the very old who have no one to work for or look after them."223 He did not consider this request a term of the surrender.224 It is not known how Graham responded to band members at the time; he did, however, encourage the department to consider the request. The department agreed with the terms and, on the advice of W.A. Orr of the Lands and Timber Branch, decided to proceed with the surrender.225

---

221 ICC Transcript, May 24, 2007 (ICC Exhibit 5d, pp. 13-14, Percy Ryder).
222 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 638-40).
223 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 638-40).
224 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 30, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 638-40).
225 W.A. Orr to Deputy Minister, April 11, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 644)
1905 Surrender

On April 12, 1905, the Deputy Superintendent General of Indian Affairs, Frank Pedley, forwarded surrender forms to W.M. Graham and authorized Indian Agent Aspdin to take the surrender in accordance with the provisions of the Indian Act.\(^\text{226}\) A surrender for sale of 5,760 acres, composed of sections 25, 26, 27, 28, 29, and 30 in township 15, range 11, and projected sections 25, 26, and 27 in township 15, range 12, all W 2nd meridian (including road allowances), was signed on April 26, 1905. Chief Carry the Kettle and Headmen Broken Arm, Chas. Rider, and Eah Sickan, also known as The Saulteaux or David Saulteaux, signed the surrender by making x's beside their names. The Surrender Document includes the six conditions set out in Graham's letter of March 30, 1905.\(^\text{227}\) The Affidavit to the surrender was signed by Indian Agent Aspdin and Chief Carry the Kettle (again as a marksman), on May 3, 1905, before Justice of the Peace A.[J.] Ferguson.\(^\text{228}\) To date, no voters list has been located.

The sole documentary record of the surrender meeting is a May 3, 1905, letter from Indian Agent Aspdin to Inspector Graham. Aspdin reported, "[a]t the meeting there was a most decided majority in favour of the sale and there are a number of absentees whom it is known are favourable."\(^\text{229}\) He also wrote that a new matter was raised with regards to the compensation of Carry the Kettle band members who were not involved in agriculture and claimed not to receive any benefits from the surrender. Aspdin explained, "[a]s they earn a living and support their families without any help from the Department they cannot be considered as destitutes. They ask for a pro rata payment of either money or useful articles to offset the money paid to the others (meaning the pasture and threshing outfit)."\(^\text{230}\) Aspdin recommended that the idea be given full consideration.

Inspector Graham disagreed with Aspdin on the matter of compensation for those who did not farm. Graham forwarded the surrender and Aspdin's letter to the Secretary, DIA, on May 6, 1905. He explained:

---

\(^\text{226}\) Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, April 12, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 645).
\(^\text{228}\) Affidavit of Surrender, May 3, 1905, DIAND, file 675/30-12-76, vol. 1 (ICC Exhibit 1a, p. 651).
I cannot see that Indians who are not farming or raising cattle should receive special compensation. These people have the option of using the pasture and threshing machine any time they have occasion to do so.

The very old can be provided for with a portion of the funds, at the discretion of the Department as per section 6 on the surrender. 231

There was no further discussion regarding compensation for non-farming band members.

During an ICC community session on October 25, 1995, Elder Kay Thomson spoke of the pressure put on Carry the Kettle band members to surrender the land for sale. Elder Thomson explained:

It was told to us 95 years ago the European settlers wanted nine sections on the southern portion of the reserve. When Indian agent Aspdin ... approached the people, he told our people that they had to sell their land. During this time, the band members indicated that they did not want to sell their land.232

Elder Thomson also related that:

[the agent asked the people several times through the interpreter Dan Kennedy if they wanted to sell their land. When the people indicated to the interpreter that they were not interested, the agent took a different approach telling them that they were selling the – they were not selling the land, but leasing or lending the land to the settlers.233

Carry the Kettle Elders also recalled stories of Indian Agent Aspdin and Inspector Graham telling the Band that "there was a debt which had occurred from the band farmers for farming implements and fencing material" and "that this debt must be paid off and that rations were going to be cut off — that when this debt was paid off the rations which were cut off would be given again."234 Elder Thomson also told of the many stories of Agent Aspdin's and Inspector Graham's promises:

For example, there was a promise to pay off the debt incurred through the purchase of agricultural equipment ... As well [as] promises of more money to be made available to purchase more equipment, the tribe was promised that they would get money to buy equipment

231 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, May 6, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 653).
232 ICC Transcript, October 25, 1995 (ICC Exhibit 5a, p. 30, Kay Thomson).
233 ICC Transcript, October 25, 1995 (ICC Exhibit 5a, p. 31, Kay Thomson).
234 ICC Transcript, October 25, 1995 (ICC Exhibit 5a, p. 32, Kay Thomson).
which was ploughs, disks, another threshing machine, cattle, horses, buggies, housing material, and they received a promise of other money for the band, and that was yet another inducement.235

Another letter, sent by Aspdin to the Secretary of the Department of Indian Affairs, provides two more pieces of information on the taking of the 1905 surrender. The letter, dated May 15, 1905, requested payments of $1.00 each to Carry the Kettle band members Daniel Kennedy and Archie Thomson. Aspdin reported that Archie Thomson had travelled around the reserve summoning band members to the surrender meeting, and that Daniel Kennedy acted as an interpreter at the same meeting.236 Aspdin justified the need for an interpreter, stating, "I thought it best to use a good interpreter although I do not do so on ordinary occasions. There was a good deal of explanations to make to to [sic] be sure that every Indian thoroughly understood the matter."237

Further oral history of Carry the Kettle Elders gathered in November 2006 and May 2007 indicates there was no formal meeting held to discuss the surrender. Elder Percy Ryder explained:

a lot of them didn’t know that they were going to surrender. Like – and they called for a meeting for – to discuss this land, but nobody – nobody went. Nobody didn’t show up, so there was no meeting and no vote. It was – Mr. Aspdin went around from house to house taking names. I don’t know how many names he got, but that was what my grandfather talked about, that he came from house to house talking about it.

Ms. McGregor: Why didn’t the people go to the surrender meeting; do you know?

Percy Ryder: Well a lot of them didn’t care. They didn’t really – they couldn’t understand too much anyway. You know, they – a lot of them spoke the Assiniboine language, and that’s all they spoke.

... Yeah, they – called for a meeting, but nobody showed up – nobody came to the meeting, and they didn’t have a meeting, and ... there was no vote. They didn’t vote on anything. There was – either to lease it or anything. There was no vote.238

235 ICC Transcript, October 25, 1995 (ICC Exhibit 5a, p. 35, Kay Thomson).
236 Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 655).
237 Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 15, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 655).
Elder Percy Ryder continued:

the council ... had a meeting. There was five or six of them, but that was mostly the
council with — they're the only ones that had the meeting with — but there was
nothing — it turned into — around to nothing.

... Where they met, it was at the Indian agent's office.239

Elder Andrew Ryder recalled hearing that Dan Kennedy acted as the
interpreter for the Indian Agent and "told the people that this is going to be
leased, this land is going to be leased by — well, I could say it in Indian, in my
language, but you wouldn't understand."240 Mr. Ryder explained further:

When the people at that time, I’ve heard this, when there’s something that they
don’t want and they don’t like, they don’t go. If you called a meeting of them people
that long ago, the tribe, and they all talked Nakoda, if you don’t — if you don’t — if
they don’t like what they understood, they will not go.241

Elder Maurice Grey related that:

I used to sit in on — when I was a youngster, in some of the meetings they had, and
I heard them talk about the surrender, what we’re talking today. And at that time
they were talking that it — the land was to be leased. They were getting pressure
from the Indian Agent to lease it. It was — it had lots to do with rations at that time.
They were threatening to cut them off rations.242

Mr Grey also recalled:

I never heard them talk about a meeting. But I did hear from my other grandfather
about a meeting, David Saulteaux. They tried to have a meeting and there wasn’t
enough Band members at the Indian office to have a meeting. There was people
there and the Indian Agent called them in and they thought they were going to get
rations, but it wasn’t it was supposed to be to a meeting, but there wasn’t enough
there.243

Elder Nancy Eashappie remembered hearing that:

Dan Kennedy and his men were to go from house to house and get names, get
names asking — to ask them if they are in favour of leasing the land, but he never

242 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, pp. 103–4, Maurice Grey).
243 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 107, Maurice Grey).
approached these other people on the north side. So these are the ones that don’t know at all what was going on with the lease — the leasing of the land in 1905.244

The surrender of Carry the Kettle IR 76 land was submitted to the Governor General in Council on May 11, 1905.245 The surrender of nine sections of land, comprising an area of 5,760 acres, was approved by Order in Council PC 940, dated May 23, 1905.246

It appears the April surrender took place without the knowledge of key officials of the Department of Indian Affairs. On July 27, 1905, Assistant Indian Commissioner J.A.J. McKenna wrote to the Secretary of the Department of Indian Affairs, complaining that no one had informed the Indian Commissioner that a request for IR 76 land had been received, or that the Band had been asked to surrender land. McKenna wrote that he had only learned of the surrender during a visit to the Assiniboine Agency and stated:

It seems to me that the Commissioner should at least be kept advised of the taking of such surrenders, for it puts the Assistant Commissioner in rather an awkward position when he goes to an agency and learns for the first time of such important matters, and is given to understand that an Inspector has become the de facto administrator of a district. 247

McKenna’s letter also suggests that the Band was not kept informed of events after the surrender was taken in April 1905, stating "[t]he Agent informed me that the Indians were desirous of knowing what action had been taken thereon."248

**SURVEY AND SALE OF SURRENDERED LAND, 1905–1906**

**Subdivision and Valuation of Land**

J.K. McLean, Dominion Land Surveyor, carried out the subdivision of the surrendered portion of IR 76 in September 1905. He valued the lands at four to five dollars for third-class land, five to six dollars for second-class land, and seven to eight dollars for first-class land. 249 Those lands under cultivation in

---

244 ICC Transcript, November 29, 2006 (ICC Exhibit 5c, p. 79, Nancy Easkappie).
247 J.A.J. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, July 27, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 691).
248 J.A.J. McKenna, Assistant Indian Commissioner, to Secretary, Department of Indian Affairs, July 27, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 691).
section 28, township 15, range 11, W2M (28-15-11) received the highest upset prices, from seven to eight dollars. McLean suggested the land be sold by auction in November, writing:

The farmers have had a good crop this season. Many of them are looking for more land and I think some at least of them would be somewhat diffident about tendering while they would attend a sale.

The surveyor’s upset prices were reviewed and approved by both Samuel Bray and W.A. Orr, and the latter recommended the land be sold at auction in Indian Head on November 2, 1905.

1906 Auction Sale

Despite Orr’s recommendation, the Notice of Public Auction was not prepared until late December 1905, and the sale was scheduled to be held on February 14, 1906. Oral history provided by Elders Maurice Grey and Percy Ryder indicated that the band members were surprised by the sale. Elder Maurice Grey recalled:

They were all surprised that it was sold. And I heard them mention that the sale took place in Sintaluta, not on the reserve here. And the Indians didn’t even know there was a sale in Sintaluta.

Elder Percy Ryder heard that people were upset:

Well … there was a notice came out that there was going to be an auction in Sintaluta … to sell this land, and everybody was kind of upset about it. They didn’t think that it — they didn’t know it was being sold.

Instructions were issued to the King’s Printer that notices of the sale should be advertised in the Manitoba Free Press (Winnipeg), the Leader (Regina, SK), the News (Wolseley, SK), and the Prairie Witness (Indian Head, SK). Terms of the sale required cash or one-fifth cash to be paid at
the time of sale and the balance in four equal, annual installments with 5 per cent interest.257

The auction took place on February 14, 1906, at Sintaluta. In accordance with instructions issued by the Deputy Superintendent General of Indian Affairs, Inspector Graham took charge of the sale and Peter Smith, of Wolseley, acted as auctioneer.258

On February 20, 1906, Graham forwarded to Ottawa the pass book (in which the particulars of each sale were recorded), and two bank drafts totalling $7,069.09 (being one-fifth of the purchase price), along with his report on the sale:

The attendance was very small indeed. Nearly all the land was bought by outsiders, one quarter being bought by a local man.

Two quarters viz. N.E. quarter of 27 and N.W. quarter of 27 would not bring the upset price and were of course not sold.259

W.A. Orr informed the Deputy Minister of the sale results in March:

Sale was made of 34 quarter sections, realizing $35,345.45, one-fifth of which, was paid cash at time of sale, amounting to $7069.09.

Of the 34 quarter sections sold, 25 realized the upset price, and nine, more than the upset price.

The average upset price is $6.59 and the average price realized is $6.74.

... The two quarter sections which were not sold were put up at an upset price of $7.00 per acre, and Mr. Inspector Graham has submitted an offer of $4.00 per acre therefor, but I would recommend that nothing less than the upset price be accepted.260

The proceeds from the sale of surrendered IR 76 lands were to be spent according to the terms of the 1905 surrender. A debt of approximately $1,200.00 arising from the purchase of a thresher was to be paid off as early as possible, as well as the remaining debt incurred by the Band for fencing wire. The surrender also stipulated that the money received was to be used to purchase materials to build a shed and to purchase a new engine. A review of

259 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, February 20, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 760).
the ledger of Carry the Kettle Band trust account 145 for 1905–1906 reveals that, on March 2, 1906, $1,623.03 was debited from the capital account for the purchase of a new engine and shed material. The Auditor General’s report for the same year shows that $1,500.00 was spent on a Sawyer-Massie engine, $76.73 for material to construct a lean-to shed and $64.00 was debited for freight on a thresher. No further details of the First Nation’s debts are known, and there is no indication if the fencing debt was paid off.

Compensation for Improvements
The final stipulation of the surrender was the compensation of three band members for their improvements. At the time of the 1905 surrender, Daniel Kennedy, Joseph Jack, and The Saulteaux were farming on section 28-15-11-W2M. A few weeks after the surrender, Indian Agent Aspdin wrote to the Secretary of the Department of Indian Affairs regarding their compensation. In particular, Daniel Kennedy had requested an advance so that he might purchase feed grain to help see him through the task of breaking land elsewhere on the reserve. Kennedy farmed between 40 and 50 acres of land in section 28 for which he was promised compensation. The department approved an advance of $25.00 from the amount payable to Kennedy for his improvements on May 25, 1905.

The value of the improvements in section 28-15-11-W2M were established by Surveyor J.K. McLean at the time of the subdivision and valuation of surrendered lands in September 1905. McLean documented the improvements made by Daniel Kennedy, Joseph Jack, and The Saulteaux in his report to the Deputy Superintendent General of Indian Affairs, Frank Pedley. Surveyor McLean wrote that the land was "in a good state of cultivation, in fact in equally as good condition as that of any white settler." McLean explained that Daniel Kennedy had 46 1/5 acres under cultivation, Joseph Jack cultivated 16 ¼ acres, and The Saulteaux cultivated 14 ½ acres. He recommended they be compensated at the rate of $5.00 per acre for their improvements.

---

261 DIAND, Carry the Kettle First Nation Trust Fund #145 (ICC Exhibit 9c, p. 2).
263 Thos. W. Aspdin, Indian Agent, to Secretary, Department of Indian Affairs, May 19, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 657).
McLean based his recommendation on the current cost of breaking new land in the same area. With his report, McLean forwarded three statements signed by Kennedy, Jack, and The Saulteaux, agreeing to $5.00 per acre compensation and asking for payment by December 15, 1905.267

In November 1905, Inspector W. M. Graham requested an advance of funds so that compensation could be paid for the lands in section 28.268 Two weeks later, the Secretary of the Department of Indian Affairs, J. D. McLean, informed Graham "that the Department cannot at present advance amounts to any Indians on account of work done on the surrendered portion of the Assiniboine Reserve, there being no money available for the purpose until such time as the land is sold."269

Daniel Kennedy followed up on the issue of compensation in January 1906. In a letter to the department, he acknowledged receipt of a telegram dated December 30, 1905, informing him that the department would not be in a position to pay compensation until after February 14, the date of the auction. Kennedy further reminded the department that it had promised to acknowledge its indebtedness to the three band members should it be unable to pay on time. Kennedy concluded his letter stating that

interest of 7% or 8% was also to be allowed us after 15th Dec.
We took the proceedings of your Representative in good faith and on the strength of the foregoing agreement we have incurred liabilities which we were to meet on the 15 of Dec. These are overdue and my telegram was the result.
I have placed the whole business candidly before you and we are not in a position to wait for another exchange of letters besides your answer to this.
We wish to have your final decision as our Creditors won’t wait longer.270

Both the trust account ledgers and Auditor General’s records show that $388.75 was credited to the interest account in 1906 to pay compensation for improvements and was distributed to the three men.271 The department forwarded compensation cheques to W. M. Graham on March 3, 1906, for distribution. Joseph Jack received a cheque for $82.10; The Saulteaux a

268 W. M. Graham, Inspector of Indian Agencies to Secretary, Department of Indian Affairs, November 30, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 725).
269 J. D. McLean, Secretary, to W. M. Graham, Inspector of Indian Agencies, December 11, 1905, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 747).
270 Dan Kennedy to [unidentified recipient], January 8, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 753). Note that the telegram dated December 30, 1905, referred to in this letter is not on record.
271 DIAND, Carry the Kettle trust account 145 (ICC Exhibit 9c, p. 2); Auditor General, June 30, 1906, Canada, Auditor General’s Report, 1905-1906, 6-7 Edward VII., A. 1907, vol. 1, J-114-J-155 (ICC Exhibit 1a, pp. 790-98).
CARRY THE KETTLE FIRST NATION: 1905 SURRENDER INQUIRY

cheque for $73.25; and, Daniel Kennedy a cheque for $208.40; this being the amount due plus 5 per cent interest. In the letter accompanying the cheques, McLean explained that "[i]n Kennedy’s case the amount paid represents the value of his improvements less $25.00, which amount has been retained to pay for grain which was furnished to him." The total compensation received by Kennedy for his improvements was $233.40. Graham acknowledged the distribution of the cheques and forwarded receipts to the department on March 23, 1906.

Requests for the Distribution of Trust Fund Money
Between 1907 and 1917, Carry the Kettle band members sent five petitions to the Department of Indian Affairs requesting annual, per capita payments from the Band’s trust account. Their requests were based on their understanding of the 1905 surrender conditions and the economic conditions on the reserve.

First Petition
On April 8, 1907, a petition signed by 26 members of Carry the Kettle First Nation was sent to the Department of Indian Affairs. In it, members inquired when they might receive the interest money from the sale of the surrendered land. The band members asserted: "According to the agreement filed with the Department at the time of the surrender of the land, we got the understanding that the Government would allow us an annual interest of 3% on the Capital, which would be at our disposal annually to be used as we see fit." They went on to request "an equal distribution in cash annually, on the same basis as our Treaty money." This petition was forwarded to the Secretary of the Department of Indian Affairs by Indian Commissioner David Laird who, being unaware of the terms of the surrender, was unable to respond to the Band. Secretary J.D. McLean clarified the terms of the surrender in a letter to Laird dated April 23, 1907:

275 W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, March 23, 1906, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 776).
276 Assiniboine Band to [unidentified recipient], April 8, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 866).
277 Assiniboine Band to [unidentified recipient], April 8, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 866).
I beg to say that the terms of surrender did not stipulate that interest was to be paid to the Indians. The provision made was to the effect that the balance of the money be funded for the benefit of the band, and managed by the Department as deemed best in their interests.  

As well, Inspector W.M. Graham, who had been present at the March 1905 meeting where the conditions of surrender had been discussed, confirmed in a letter to Laird dated April 30, 1907, that there had been, "no condition that there was to be a distribution of the interest money, but there was an understanding that part of the Principal could be drawn on from time to time with the approval of the Supt. General for the relief of any special cases of destitution." Graham recommended that the interest be allowed to accumulate until the fall, at which time it could be used to purchase clothing and rations for the old and destitute. Graham felt that the older band members who did not farm should get some benefit from the land sale. The department agreed with Graham and advised the Indian Agent accordingly.

A year later, Indian Agent W.S. Grant informed the department that he was unable to answer questions posed by band members regarding their capital and interest account. On April 28, 1908, Grant reported that band members had met for the purpose of inquiring about the moneys received from the land sale. Grant reported the members’ belief that they were being treated unfairly and requested the following information on their behalf:

1) A statement of Trust-fund account more especially relating to the lands.
2) If the 10% for indebtedness [sic] was all expended in the purchase of Thresher and the pasture.
3) How the Interest on the land up to the present has been expended.
4) What the gross sales of land amounted to?
5) Would it be possible for them to obtain the Interest on notes and other paper given by the purchasers of this

278 J.D. McLean, Secretary, to David Laird, Indian Commissioner, April 23, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 873).
279 W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, April 30, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 874).
280 W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, April 30, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 874).
281 J.D. McLean, Secretary, to D. Laird, Indian Commissioner, May 10, 1907, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 882).
282 W. S. Grant, Indian Agent, to Secretary, Department of Indian Affairs, April 25, 1908, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 944).
land and are yet unredeemed?283

J.D. McLean replied to Grant on May 26, 1908, stating the gross revenue from the land sale amounted to $35,345.26 and that "[t]he interest on unpaid balances is placed to the credit of the Capital Account and can only be extended for permanent improvements."284 He also forwarded a copy of the Auditor General’s report for 1906–1907 showing the capital and interest account transactions.

Nine months later, R.S. Lake, Member of Parliament, requested information on Carry the Kettle trust account. In his reply, dated February 19, 1909, the Deputy Superintendent General of Indian Affairs, Frank Pedley, explained that the surrender had not provided for a distribution of cash.285 Lake approached the department a second time asking "whether the Government will pay the Indians of the Reserve, the annual interest of 3%, which I understand to be the general rule, with other reserves, although such interest was not specifically referred to in this particular case."286 Pedley replied to Lake that the department proposed to administer the interest funds in the best interests of the Band, but it was not a general rule to distribute the interest on capital in cash distributions.287

Second Petition
A second petition was sent to Frank Oliver, Minister of the Interior (and ex officio Superintendent General of Indian Affairs), in March 1909. This petition reaffirmed the Band’s understanding that it was to receive an annual distribution of interest money.288 The petitioners wrote:

Before surrendering our land we were lead to believe that not only would there come to us immediate benefit but that full interest for Feb. 1906 to Feb. 1907 would be distributed among us, and every year thereafter. No such benefit have we received.

283 W.S. Grant, Indian Agent, to Secretary, Department of Indian Affairs, April 28, 1908, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 945).
284 J.D. McLean, Secretary, to W.S. Grant, Indian Agent, May 26, 1908, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 951).
288 Chief and Headmen, Assiniboine Band to Frank Oliver, Minister of the Interior, [March 16, 1909], LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1025).
If there was any immediate benefit it was for a few as stipulated in the agreement. About ($3000.00) three thousand dollars was given for some 20 of our farmers for compensation for cultivated fields in portion of land surrendered, and for threshing outfit, and for wire fence ... 289

This petition was forwarded to Senator William Ross by the Reverend E. Mackenzie of the Hurricane Hills Mission. In the accompanying letter, Mackenzie described the disappointment felt by band members. He wrote, "[e]very man on the reserve expected and does expect a direct and fair share of the money accruing from the sale of the land." 290 Mackenzie also alluded to the living conditions on the reserve. He explained:

They aver that during the last 27 years more than half their numbers have died, and if they are cut away at that rate what is the use of money for future generations? The inference is that if they get money from their surrendered land they will be able to provide better food and better houses. There is certainly an earnest desire in many of them to build more sanitary dwellings.

... some of the young men have made a brave attempt at farming. But great failure in crop for the last two years has put a great strain upon them. 291

Ross forwarded Mackenzie's letter to Frank Oliver on March 22, 1909. 292

J.D. McLean replied to Senator Ross on April 3, 1909, explaining the department's position on cash distributions and fund management:

It is not stipulated in the surrender document that the interest is to be distributed to the Indians in cash nor is it considered to be in the interest of the Indians to do so. Instead, supplies which they require are being purchased for them and both their Agent and Inspector are agreed that in this way they will derive more benefit from this money than if they were handed the cash.

Those Indians have a Doctor to look after their medical wants and the Agent is one of our oldest and worthiest officials and is ever mindful of the wants of those Indians and does not allow any of them to suffer for want of proper food and clothing. The sick are provided with medical comforts and sent to the Hospital

289 Chief and Headmen, Assiniboine Band to Frank Oliver, Minister of the Interior, [March 16, 1909], LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1025).
when necessary and it is considered that in this way their wants are better relieved than if the cash were handed to them.293

Despite their experience with the 1905 surrender, some band members appear to have contemplated a further surrender of seven or eight sections of IR 76 land. In 1910, Charles and Tom Rider wrote to the department requesting information on surrender procedures, and inquiring about the possibility of a cash distribution from the proceeds of a land sale. The Riders wrote:

Owing to the rapid decrease of our numbers on this Reserve and the great amount of untitled lands now laying idle and drawing no revenue for us, we have been seriously considering to negotiate another surrender and sale of seven or eight sections of our Reserve. Five years ago we surrendered a portion of our reserve to the Department, but the dissatisfaction that followed the transaction owing to our misunderstanding, have made us careful and therefore, we wish to enquire beforehand all the rules and laws governing such transactions, before take the final step.294

There is no further information on record regarding this request.

The demand for a distribution of interest moneys was once again brought to the department’s attention in March 1913, when the Reverend Mr Mackenzie wrote to Levi Thomson, Member of Parliament for Qu’Appelle, requesting information on the proceeds of the 1906 land sale. In response, Thomson wrote to the Deputy Superintendent General of Indian Affairs, requesting the account information.295 In order to prepare a response for Thomson, the Deputy Superintendent General of Indian Affairs requested further information from the department accountant, F.H. Paget, who reported that the Band had $2,000.00 in its interest account and suggested that a $5.00 per capita distribution could be made. Paget’s notation placed the population of the band at 160 people. On that basis, Paget calculated that the distribution would amount to $800.00, leaving $1,200.00 for other requirements.296

294 Chas. and Tom Rider, Assiniboine Band, to Secretary, Department of Indian Affairs, February 14, 1910, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 1076-78).
296 Frank Pedley, DSGIA, to Accountant, April 3, 1913, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1226).
On April 4, 1913, Deputy Superintendent General of Indian Affairs Pedley wrote to Thomson and agreed to send the financial information to Mackenzie. Despite Paget’s suggestion, Pedley informed Thomson that there would be no cash distribution:

> When Indians have funds from the sale of their lands, it is only proper that these funds should be used towards their support and to some extent relieve the Government of appropriating money for their benefit. Capital Funds can only be expended upon a resolution of the Band by authority of the Governor General-in-Council and then only by for permanent improvements, or in the purchase of live stock.  

Contrary to Pedley’s comments of April 4, however, the department eventually decided to distribute a portion of the interest moneys. The trust account ledgers and interest distribution paylists for Carry the Kettle Band show that per capita interest distribution payments were made from 1913 until 1920 with a final distribution in 1923. There is no further information on record regarding the decision to make an interest distribution.

**Third Petition**

Another petition was sent to the department in October 1914. In it, the First Nation requested the equal distribution of the capital fund. The petition also highlighted a growing economic division between prosperous and poor band members. The petitioners wrote:

> We would like the fund to be fairly divided like this: let every family living here at time of the surrender of the land get its share according to the number of persons in it, each person getting an equal share. Then if any persons have died since, let their heirs inherit their shares. This plan would put an end to inequality and any attempt at grabbing. Whatever a family gets from this fund will be taken from its own account. For example, three years ago, seed wheat came for distribution, some of the farmers got more, some got less. One man got something like 200 bushels. That according to our proposal would be taken from his own account. But yet although considered a prosperous farmer, he has not paid a cent. During the last 30 years the training of the government and every other training has taught us to think like our White neighbours to a great extent, every man to do for himself to get prosperity for himself. Such a scheme [illegible] we propose will give a shew of

---


justice to all, and take away any grievance any of the old people may have. These
find the government allowance of rations very scant, an old man or old woman
getting only what is enough for two days ... We are thankful for the interest money
we have received the last two years, but we think our scheme would not interfere
with it. 299

On the same day, Chief Carry the Kettle wrote a letter to the department:

The ideas regarding the division of the land money that we suggest have gone
through and through my mind and I understand them clearly.

I am an old man 86 years of age and have little to depend on for a living and I am
interested in the matter of the land fund...

I am sorry to say that there are so many of my band who cannot do much for
themselves. 300

The Deputy Superintendent General of Indian Affairs responded to the letter
and petition on October 27, 1914, refusing to distribute the capital account
funds. 301

On October 28, 1914, Accountant F.H. Paget commented on the demands
made by Carry the Kettle Band. Paget stated that ”[t]he Indians do not appear
to understand that if they use their Capital funds they will receive less Interest
money annually.” 302 He suggested that the Indian Agent explain to the band
how the interest and capital accounts worked.

In a December 1914 letter to the department, Indian Agent Thomas
Donnelly reported that he had called a meeting of Carry the Kettle band
members to explain the Deputy Superintendent General of Indian Affairs’
letter of October 27. Donnelly was surprised to discover that a majority of the
band members were not aware that a petition requesting an equal distribution
of their capital funds had been sent to the department, and that some of those
who had supposedly signed the petition were unaware of its contents. 303

Donnelly attributed the petition to ”the doings and thoughts of certain persons
residing on this Reserve, but not in the employ of the Department. They are

299 Chief and Headmen, Carry the Kettle Band, to Department of Indian Affairs, October 12, 1914, LAC, RG 10, vol.
4001, file 208590-1 (ICC Exhibit 1a, pp. 1278-79).
300 Chief Carry the Kettle, to [unidentified recipient], October 12, 1914, LAC, RG 10, vol. 4001, file 208590-1
(ICC Exhibit 1a, pp. 1280-81).
301 Deputy Superintendent General of Indian Affairs to Chief Carry the Kettle, October 27, 1914, LAC, RG 10, vol.
4001, file 208590-1 (ICC Exhibit 1a, pp. 1282-84).
302 F.A. Paget, Accountant, to Mr. Scott, October 28, 1914, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a,
pp. 1285-86).
303 Thos. A. Donnelly, Indian Agent, to DSGIA, December 2, 1914, LAC, RG 10, vol. 4001, file 208590-1 (ICC
Exhibit 1a, p. 1287).
continually interfering with the Agent and staff, causing an agitation nearly all the time with the Band as a whole.”

Fourth Petition
Almost two years later, in February 1916, a fourth petition was sent to the department, in which the Chief and 25 band members wrote:

After discussing the matter fully we have arrived at the conclusion that it would be in the better interest of the Band, more especially the older people, if part of our Band Fund held in trust could be paid annually say for about five years together with the Interest money. We are quite familiar with the agreement made at the time we surrendered that portion of the land which was sold, but we now feel that the said agreement was not made for the best immediate interest of the Band.

Indian Agent Donnelly explained in an accompanying letter that the band members were "continuously worrying me about their Band Fund. The older people are the most anxious claiming that they understood at the time the agreement was made for the surrender of the land that they were to receive a yearly allowance together with the Interest." J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, replied to Agent Donnelly on February 26, 1916, drawing his attention to the letter sent on October 27, 1914, and reiterating the points made in that letter:

I beg to point out that the terms of the Surrender did not provide for a yearly allowance being paid to these Indians from Capital account ... it was pointed out that the conditions mentioned in clauses Nos. 1, 2, 3, 4, and 5 have been complied with, and that under the provisions of clause No. 6 the balance of the money was to be funded for the Indians' benefit and managed by the Department, as it seems best in their interests. This has been done and interest money has been paid to the Indians in cash and will be paid in the future.

In the letter in question the Chief was also told that if there are any aged people on the reserve who are in want and without friends or relatives to care for them, the Indian Agent will attend to their needs and see that they do not suffer. The Department also stated that it could not accede to the Chief's request to divide Capital funds and apportion to each family the amount it is entitled to, as apart from being contrary to the law, such a course would not result in any benefit to the Indians. It was also stated that the funds belong to the Band as a whole and must be

305 Chief and Councillors, Carry the Kettle Band, to Secretary, Department of Indian Affairs, February 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1338).
306 T.E. Donnelly, Indian Agent, to Secretary, Department of Indian Affairs, February 14, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1340).
administered so that not only the present but future generations will benefit therefrom. The main object is to keep the Capital intact so that there will always be interest available for use of the Band and if each Indians obtains his share of the interest, as arranged for, there can be no inequality.\footnote{J.D. McLean, Assistant, Deputy and Secretary, to T.E. Donnelly, Indian Agent, February 26, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 1341–42).}

**Fifth Petition**

Soon after this exchange, a fifth petition was prepared by Carry the Kettle band members asking for individual cash payments from the trust fund. The petitioners described the difficult living conditions of band members:

The long protracted winter has exhausted our hay and feed for stock, with the result that we have already lost between 45 and 50 head of stock through starvation and cold ... A number of treaty Indians on this reserve are now reduced to feeding themselves on carcasses of animals who have died from starvation, exposure and other such causes.\footnote{Chief and Councillors, Assiniboine Band, to Deputy Minister, Department of Indian Affairs, March 23, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1343).}

The petitioners also complained about the lack of revenue from the sale of fuel wood, an embargo placed by the government on the sale of hay, and the withholding of interest payments from band members who were indebted for the purchase of seed grain in 1912. The petition concluded with the following request:

As the Indian Act contains a clause allowing the taking of a vote for the payment out of a set sum from the Indian Trust Fund for aid and relief to needy Indians, we humbly beg that you have such a vote taken at the earliest possible date and payment made without delay if such vote carry favorably. In view of the fact that only a few Indians have sufficient feed for their stock and themselves shows how widespread the suffering is at the present time.\footnote{Chief and Councillors, Assiniboine Band, to Deputy Minister, Department of Indian Affairs, March 23, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, p. 1343).}

A month later, Indian Agent Donnelly provided Inspector W.M. Graham with more details about the petition sent to the department earlier that year. He attributed the situation to the visit of four Indians from the Blackfoot Reserve in January:

While here they created an agitation which had a bad effect on our people, by telling them that the whole of their Band were drawing rations from the storehouse at the agency, that wagons, horses and machinery were supplied to them when...
starting to farm and that they received an annual allowance from their Band Fund as well as their interest money.\textsuperscript{310}

According to Indian Agent Donnelly, disappointment generated by the department’s response in February 1916, had led Carry the Kettle band members, whom he described as “ex-pupils who are agitators” to prepare this petition. Donnelly indicated he had been told that Dan Kennedy prepared the petition, and the Chief and others had not attended the meeting nor did they sign the petition. The Agent went on to detail the standard of living of some of those who signed the petition, describing eight men as prosperous farmers or otherwise employed. The Agent concluded his letter by outlining Carry the Kettle band members complaints:

The Indians here feel very much aggrieved for several reasons – (1) that their dancing has been stopped; (2) that they have been forced to pay for seed-grain and other indebtedness; (3) that the Department has refused to grant them an annual payment from their Band Fund including interest.\textsuperscript{311}

\textsuperscript{310} Thos. E. Donnelly, Indian Agent, to W.M. Graham, Inspector of Indian Agencies, April 10, 1916, LAC, RG 10, vol. 4001, file 208590-1 (ICC Exhibit 1a, pp. 1377-80).

APPENDIX B

CHRONOLOGY

CARRY THE KETTLE FIRST NATION
1905 SURRENDER INQUIRY

1 Planning conferences
   Regina, April 12, 1995
   Regina, December 5, 2005

2 Community sessions
   The Commission heard a statement given by Kay Thomson on behalf of
   the Carry the Kettle First Nation Elders
   Carry the Kettle, October 25, 1995
   The Commission heard from Andrew Ryder, Nancy Eashappie, Maurice
   Grey, and Bertha O’Watch
   Carry the Kettle, November 29, 2006
   The Commission heard from Percy Ryder
   Video conference, Regina, May 24, 2007

3 Written legal submissions
   • Submission on Behalf of the Carry the Kettle First Nation, August 24,
     2007
   • Submission on Behalf of the Government of Canada, October 26,
     2007
   • Reply Submission on Behalf of the Carry the Kettle First Nation,
     November 13, 2007

4 Oral legal submissions
   Regina, November 20, 2007

5 Content of formal record
   The formal record of the Carry the Kettle First Nation: 1905 Surrender
   Inquiry consists of the following materials:

   • Exhibits 1 - 9 tendered during the inquiry
   • transcripts of community session (3 volumes) (Exhibit 5a, c, and d)
   • 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.
INDIAN CLAIMS COMMISSION

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP
INDIAN BANDS
NESKONLITH DOUGLAS RESERVE INQUIRY

PANEL
Commissioner Sheila G. Purdy (Chair)
Commissioner Daniel J. Bellegarde
Commissioner Jane Dickson-Gilmore

COUNSEL
For the Neskonlith and Adams Lake Indian Bands
Clarine Ostrove

For the Little Shuswap Indian Band
Arthur M. Grant / Allan C. Donovan

For the Government of Canada
Brian Willcott

To the Indian Claims Commission
John B. Edmond / Julie McGregor

JUNE 2008
CONTENTS

Issue 4   Outstanding Lawful Obligation  155

PART V   CONCLUSIONS AND RECOMMENDATION  156

APPENDICES
A Historical Background  159
B Neskonlith, Adams Lake & Little Shuswap Indian Bands: Neskonlith
   Douglas Reserve Inquiry – Interim Ruling, Blair Smith Report, July
   3, 2006  200
C Joint Indian Reserve Commission Allotments Described In The Returns
   From 1885  205
D Chronology  208
SUMMARY

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS
NESKONLITH DOUGLAS RESERVE INQUIRY
British Columbia


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 S.G. Purdy (Chair), Commissioner D.J. Bellegarde, Commissioner J. Dickson-Gilmore

British Columbia – Reserve Creation – Indian Settlement – Pre-emption – Joint Indian Reserve Commission; Pre-Confederation Claim – Reserve Creation; Reserve – Reserve Creation; Fiduciary Duty – Pre-Confederation Claim – Reserve Creation

THE SPECIFIC CLAIM

In March 1996, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that a reserve had been legally created for them in 1862 by the British Crown which was later unlawfully reduced. The federal government rejected the claim in March 1999. In May 2003, the Bands requested that the Indian Claims Commission (ICC) conduct an inquiry into their rejected claim. Following a planning conference, the ICC panel conducted a community session and site visit in July 2005. The panel issued an interim ruling in July 2006, declining to strike an expert report from the record, and later that month convened a hearing to examine the expert evidence of both parties. Having filed written submissions, the parties presented their legal arguments on June 19, 2007.
BACKGROUND

James Douglas was Governor of the mainland colony of British Columbia between 1858 and 1864, in the period prior to British Columbia's entry into Confederation. In 1860, Governor Douglas implemented a pre-emption law allowing settlers to acquire up to 160 acres of unoccupied Crown land. The law exempted from pre-emption any land that was an Indian reserve or settlement, a town site, or available for mining. At about the same time, Douglas embarked on a plan to settle the Indian tribes on reserves in the vicinity of their villages. He ordered officials to mark out the area and extent of the land as pointed out by the Indians.

In October 1862, William Cox, an Assistant Commissioner of Lands and Works (ACLW), travelled to the Kamloops region to investigate a complaint regarding settlers encroaching on an Indian’s cultivated fields. After completing his task but prior to leaving Kamloops, Cox was asked by Douglas to mark out all the Indian reserves in the neighbourhood. Chiefs Neskonlith and Gregoire of the Shuswap tribe northeast of the Kamloops area asked Cox to do the same for them because of settler encroachment. Cox later reported that he could not do so, but chalked out a reserve and gave the Chiefs notices to put up.

In 1865, Chief Neskonlith told an official that Cox had given them the authority to take up the land and had given them papers. After consulting with Cox, senior officials learned that they had no information at all on the location or size of the Shuswap reserve. When surveyor Walter Moberly was dispatched to the Shuswap area to investigate the Indians’ claim, the Indians told him that the land staked out was theirs, but Moberly also learned that Chief Neskonlith had placed most of the boundary stakes himself, in the absence of Cox. Officials questioned whether Cox had promised those boundaries to them and whether his agency was binding on the government, but concluded that the Shuswap reserve, as staked out by Chief Neskonlith, was entirely disproportionate to the numbers or requirements of the Indians. In 1866, the colonial government surveyed a number of reserves for the Shuswap tribe and gave public notice that the claim had been adjusted. In the summer of 1874, three years after British Columbia entered into Confederation, a delegation of Chiefs told the provincial Indian Commissioner about their land grievances. Chief Neskonlith complained that the good piece of land given to the Shuswap tribe by Cox had been replaced by smaller reserves. The federal government brought pressure on the BC government to provide more than 10 acres of reserve land per family; however, the province refused to enlarge any existing reserves, although it did agree to a formula of 20 acres per family for future reserves.

The Joint Indian Reserve Commission was established in 1875 to inquire into the Indians’ land grievances. After interviewing Shuswap Chiefs and band members, and reviewing Douglas’s instructions and Cox’s actions, the Commission determined
that the colonial government had decided that the Shuswap reserves were too large, that Cox's actions were not binding on the Crown, and that the government had the power to reduce reserves in any event. In addition to the reserves surveyed in 1866, the Commission added 11 more reserves. They were all were confirmed as reserves in 1930 by Order in Council.

ISSUES
Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?

If a colonial reserve was created, was it reduced by the colonial administration? If the reserve was created and then reduced, did the colonial Crown or the federal Crown breach the honour of the Crown or any fiduciary duty, trust duty, statutory duty, or duty of care to the Bands?

FINDINGS
On the central question of whether a reserve was created for the Bands in 1862, the panel finds that a reserve was not created by the colonial government. The law on reserve creation identifies the factors determining whether a reserve was legally created: the land must have been set apart for the Indians; the Crown must have intended to create a reserve, and that intention must be possessed by Crown agents with authority to bind the Crown, or who are reasonably seen by the band as having that authority; and, the band must have accepted the setting apart and started using the land.

Was the land set apart? Crown official William Cox did not mark out the Shuswap reserve lands after his meeting with Chiefs Neskonlith and Gregoire in 1862. It was Chief Neskonlith who alone placed the stakes defining the boundaries of the reserve. Cox, however, could not delegate this task to a person who did not represent the Crown. It was only in 1865 that Crown officials, including Cox, had any knowledge of the boundaries created by Chief Neskonlith. Although the Shuswap people knew the location of the land they used and occupied, there could be no setting apart of the land without both parties having knowledge and certainty regarding the boundaries.

Did the British Crown intend to create a reserve? Although Governor Douglas had the delegated authority to create reserves in the colony and intended to do so, he did not intend that the job of marking out land to identify its location and boundaries would constitute the only step in reserve creation. The marking out of Indian settlements protected land from pre-emption, but it was only the first of several steps to be taken in the reserve-creation process. Governor Douglas could exercise the royal prerogative to legally create reserves and did so, but his commission did not permit
him to delegate to subordinate officials the power to confirm land as a reserve. Thus, Cox, an Assistant Commissioner of Lands and Works, could not bind the Crown to create legal reserves.

The meeting between Cox and the Chiefs in 1862 was initiated by the Chiefs, who approached him looking for protection from settlers encroaching on their lands. It was in this context that Cox gave the Chiefs notices to put up. Cox also made it clear that he could not do the marking out at that time. In these circumstances, it would not be reasonable for Chief Neskonlith to believe that Cox could bind the Crown to create a reserve and that, by staking out the boundaries himself, the Chief could create that reserve.

The panel finds that the British Crown, through Governor Douglas, did not intend to create a reserve in 1862, and that it would not have been possible to form that intention without knowing the boundaries. From the outset, there was no meeting of the minds or common intention, either to create a reserve by marking out lands in 1862, or to create a reserve of the size claimed by Chief Neskonlith.

Did the Indians accept the land set apart and did they start using it? Having found that the Crown did not mark out or set apart the land in any respect, the question of the Bands’ acceptance of the land as set apart by the Crown becomes moot. There is no doubt, however, based on the Elders’ evidence, that the Shuswap people had a long history of using the territory demarcated by Chief Neskonlith.

Having found that a reserve was not legally created in 1862, the panel is not required to address the remaining issues in this inquiry.

**Recommendations**

That the claim of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands regarding the Neskonlith Douglas Reserve 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**

Treaties and Statutes Referred To
Proclamation No. 11 (131), December 2, 1858, RSBC 1871, App., 55; Proclamation No. 13 (166), February 14, 1859, RSBC 1871, App., 55; Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871 (British Columbia, Terms of Union), May 16, 1871; Proclamation by His Excellency James Douglas, Governor of British Columbia, January 4, 1860, in RSBC 1871, App., 63.

Other Sources Referred To

Counsel, Parties, Intervenors
KEY HISTORICAL NAMES CITED

Adam, Chief, identified as Chief of the Adams Lake Band (part of the Shuswap Tribe), c. 1866

Anderson, Alexander Caulfield, Commissioner, Dominion of Canada, Joint Indian Reserve Commission, 1876–78

Birch, Arthur, Colonial Secretary, c. 1864–65; Officer administrating the government of the colony of British Columbia, c. 1866 – date unknown

Carnarvon, [Henry Howard Molyneux Herbert], Earl of, Secretary of State for the Colonies, 1866–67

Cox, William Geo., Assistant Commissioner of Lands and Works (ACLW), Justice of the Peace, and Magistrate at Rock Creek, c. 1860–65

Dewdney, Edgar, surveyor, Royal Engineers, c. 1866 – date unknown

Douglas, Sir James, Chief Factor of the Hudson’s Bay Company at Fort Vancouver and Fort Victoria; Governor of the colony of Vancouver Island, 1851–64; and Governor of the colony of British Columbia, 1858–64

Gregoire, Antoine, Chief, identified one of the Chiefs of the Shuswap Tribe and father of Chief Leon Neskonlith, c. 1862

Joint Indian Reserve Commission (1876–78)
   Anderson, Alexander Caulfield, Commissioner, Dominion of Canada
   McKinlay, Archibald, Commissioner, Province of British Columbia
   Sproat, Gilbert Malcolm, Commissioner, joint appointment

Laird, David, Minister of the Interior and Superintendent General of Indian Affairs, Dominion of Canada, 1873–76

Lenihan, James, Indian Superintendent for mainland British Columbia for the dominion government, 1873–80

Lytton, Edward Bulwar-Lytton, 1st Baron, Secretary of State for the Colonies, 1858–59
McColl, William, Sergeant, Royal Engineers, and land surveyor, [1860–64]

McKinlay, Archibald, Commissioner, Province of BC, Joint Indian Reserve Commission, 1876–78

Moherly, Walter, Assistant Commissioner of Lands and Works, 1864 – date unknown

Moody, Richard Clement, Colonel, Royal Engineers [dates unknown]; Chief Commissioner of Lands and Works (CCLW) and Surveyor General, 1858–63

Neskonlith, Leon, Chief, identified as Chief of the Neskonlith Band (part of the Shuswap Tribe), c. 1862

Newcastle, [Henry Pelham Fiennes Clinton], Duke of, Secretary of State for the Colonies, 1859–64

Nind, Philip, Gold Commissioner and Magistrate of British Columbia, Cariboo District

Parsons, R.M., Captain, Royal Engineers, c. 1861

Powell, Israel Wood, Indian Superintendent (Vancouver Island and North West Coast) for the dominion government, 1872–80; Superintendent General for British Columbia, 1880–89

Seymour, Frederick, Governor of the colony of British Columbia, 1864–66; Governor of the united colonies of Vancouver Island and British Columbia, 1866–69

Trutch, Joseph, Chief Commissioner of Lands and Works and Surveyor General, 1864–71; Lieutenant Governor, 1871–76; Dominion Agent, 1880–89

Young, William A.G., Colonial Secretary, for the colony of Vancouver Island, 1859–66, and the colony of British Columbia, 1859–64; Colonial Secretary for the united colonies of Vancouver Island and British Columbia, 1866–67
BACKGROUND TO THE INQUIRY

The British colony of mainland British Columbia, established in 1858, was governed by James Douglas. Governor Douglas, who was also Governor of the colony of Vancouver Island, embarked on a plan to settle the Indian tribes on reserves in the vicinity of their villages. To that end, Douglas ordered officials to mark out the boundaries of these reserves. One of those officials visited the Kamloops area in October 1862, where he was asked by two Chiefs from the Shuswap area to mark off their lands to protect them from some settlers. The official stated that he could not comply with their request at the time but chalked out a sketch and gave the Chiefs notices to put up. Chief Neskonlith staked out the boundaries of the Shuswap reserve himself.

The Bands claim that a lawful colonial reserve was created for the Shuswap people in October 1862. They further assert that this reserve was unlawfully reduced in size in 1866. Canada maintains that marking out the boundaries was the first step in Governor Douglas’s reserve-creation plan, that his approval was required to constitute a legally created reserve, and that neither Douglas nor his successors approved a reserve or the boundaries as staked out by Chief Neskonlith. The historical background to this claim is set out in Appendix A of this report.

On March 14, 1996, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that a lawful reserve based on Chief Neskonlith’s boundaries had been created in 1862. Canada rejected the claim by letter dated March 24, 1999. In May 2003, the Bands requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim, which the ICC agreed to do. The ICC conducted a planning conference with the parties in November 2004. The panel attended a site visit and
Indian Claims Commission Proceedings

Community session to take the testimony of Elders on July 6 and 7, 2005. Following the Bands’ objection to the admissibility of a report by Canada’s land surveyor, the panel issued an interim ruling on July 3, 2006 (Appendix B), declining to strike the report from the record. On July 19, 2006, the panel convened a hearing in Vancouver to examine the expert evidence of surveyors Patrick Ringwood (for the Bands) and Blair Smith (for Canada) on questions related to maps and historical sketches on the record. By agreement of the parties, the panel also received the testimony of an Elder at this session.

The Bands’ written submission was provided on March 20, 2007; Canada’s submission on May 15, 2007; and the Bands’ reply on May 29, 2007. The panel heard legal arguments in Vancouver on June 19, 2007. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set out in Appendix D.

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.” ¹ 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. ² 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.


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 Indian Claims Commission Proceedings (ICCP) 171–85 (hereafter Outstanding Business).
iv) An illegal disposition of Indian land.³

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.⁴
The Neskonlith, Adams Lake, and Little Shuswap Indian Bands belong to the Shuswap Nation in British Columbia. The Bands are located northeast of Kamloops, along the Thompson River, Little Shuswap Lake, Shuswap Lake, and Adams Lake.

In May 1851, the British Imperial Government appointed James Douglas as Governor of the colony of Vancouver Island. He was given full authority to make laws for the colony, subject only to the instructions of the British Secretary of State, E.B. Lytton. In the spring of 1858, gold was discovered in the Fraser River, leading to an increase in hostilities among the Indian population, settlers, and miners over land. In August 1858, the British government created the colony of British Columbia on the mainland, naming Douglas as Governor of this colony in addition to Vancouver Island. Almost immediately, Douglas issued a proclamation giving himself the authority to grant Crown land on the mainland to any person.

In February 1859, Douglas issued another proclamation dealing with land, declaring that all the land, mines, and minerals in British Columbia belonged to the Crown, and granting the Executive the right to reserve unoccupied Crown land for any purpose. At the same time, Douglas planned to implement a law permitting British subjects to acquire or pre-empt up to 160 acres of unoccupied, unreserved, and unsurveyed Crown land in the colony. The Pre-emption Act was passed the following year.

In February 1859, Douglas told Lytton that he planned to create “anticipatory reserves” for the Indians. He proceeded to implement a plan to settle the Indian tribes on reserves at the location of their village sites, cultivated fields, and land in the vicinity required by them. These areas were to be staked out for the Indians’ use and benefit and, like other lands reserved by the government, were excluded from pre-emption under the Act.

In March 1861, Governor Douglas gave R.C. Moody, the Chief Commissioner of Lands and Works (CCLW), responsibility for marking out all
the proposed towns and Indian reserves in the colony. He also directed Moody to give instructions to the newly appointed Assistant Commissioner of Lands and Works (ACLW), William Cox, who was to carry out this work in the Rock Creek District. In addition, Douglas communicated directly with Cox, telling him that he would receive instructions from Moody to mark out the limits of Indian reserves according to the boundaries the inhabitants pointed out. Moody followed up with similar orders to Cox and also ordered him to scrutinize the Indians’ claims carefully. In April 1861, Douglas sent further instructions to Moody, requiring that the position and extent of all lands set apart as government and Indian reserves be published in three different places in the district and in local newspapers.

Cox started marking out Indian and other government reserves in the Okanagan in the summer of 1861. In October 1862, he was sent to the Kamloops region to investigate an Indian’s complaint of settlers encroaching on his cultivated fields. Later, when Cox was about to leave the area, Douglas requested that he mark out all the Indian reserves in the neighbourhood. After marking out the Kamloops reserve, Cox was approached by Chief Neskonlith and Chief Gregoire, from the Shuswap territory northeast of Kamloops, to do the same for them, as some settlers were encroaching on their land. Cox said he could not do so at that time, but he did chalk out the position and extent of a reserve and gave the Chiefs notices to post that warned persons not to cut timber, interfere, or meddle with the rights of the Indians on this reserve.

In January 1864, Governor Douglas addressed the Legislative Council on the subject of Indian reserves, explaining that the areas had been partially defined and set apart, and in no case exceeded 10 acres per family. Shortly thereafter, Douglas retired as Governor.

Magistrate Philip Nind was in the interior in 1865 when he met up with Chief Neskonlith, who told him that Cox had given the Indians authority to take up the land and also some papers. Nind in turn wrote to Cox asking him to explain his actions, which he did on July 16, 1865. Cox recounted his 1862 travels to the Kamloops area, provided Nind with a sketch of the reserve from memory, and remarked that his papers had probably been removed and the land allowed by him greatly increased. Nind immediately wrote to the Colonial Secretary, Arthur Birch, to tell him of the Shuswap Indians’ claim.

Joseph Trutch replaced Moody as ACLW and Surveyor General in 1864. When Trutch was asked for his opinion on the size of the Shuswap reserve, he replied that his department was without any information on its location or extent. Surveyor Walter Moberly was dispatched to the Shuswap area in November 1865 to investigate and was told by band members that their
ground had already been marked off by Cox pursuant to Governor Douglas's instructions, and that Chief Neskonlith had placed stakes himself at Great Shuswap Lake and at the north end of Adams Lake. Moberly's report included a sketch of the land claimed by Chief Neskonlith, showing stakes at Scotch Creek, Monte Creek, and north of Adams Lake, as well as a northern boundary near Dunn Peak.

In January 1866, Trutch advised the Colonial Secretary that the reserves at Shuswap Lake were entirely disproportionate to the numbers or requirements of the Indians. He asked whether Cox's agency in the matter was binding on the government, and whether the boundaries as claimed were those that Cox had promised them.

In the fall of 1866, Surveyor Edgar Dewdney, accompanied by the Chiefs, surveyed three reserves for the Bands, two for the Shuswap Indian Band and one reserve plus a small fishing station for the Adams Lake Indian Band. The Gazette notice of October 5, 1866, indicated that the claims of the Shuswap and Kamloops tribes had been adjusted, that new reserves would be surveyed, and that the remaining land would be opened up for pre-emption on January 1, 1867.

In 1871, British Columbia entered into Confederation pursuant to the British Columbia Terms of Union. The Indian Commissioner for the new province, I.W. Powell, wrote to the federal Minister of the Interior in 1873 about the unsatisfactory condition of many Indian reserves, noting in his letter that no Indian reserves had been made on the mainland except on the Fraser River, as well as in the Shuswap area, where they were incomplete.

In the summer of 1874, Powell met with some Chiefs assembled at Kamloops, including Chief Neskonlith, in order to hear their grievances regarding the size of their reserves. Chief Neskonlith added that Cox had given them a good piece of land but the surveyor replaced it with a smaller piece. When Powell asked former Governor Douglas if he had used a formula for acreage when setting apart Indian reserves, Douglas replied that he had not insisted on a specific number of acres, but that none of the reserves on the lower Fraser and Vancouver Island exceeded 10 acres per family. Regarding the Thompson River area, Douglas stated that the reserves had only been roughly traced out on the ground. He added that they were laid out on a large scale to allow sufficient range for cattle.

In late 1874, federal Superintendent James Lenihan advised the BC Secretary of the discrepancies in size among some of the Fraser River reserves, ranging from 14 acres per family to 92 acres per family. Lenihan recommended that the province adopt a more liberal and uniform policy,
especially toward Indians in the interior, who had large herds of cattle. He proposed a limit of 80 acres per family plus sufficient land for livestock. Minister of the Interior, David Laird, also criticized the former colonial government’s allowance of 10 acres per family, compared to the 80 or more acres per family allowed by the dominion.

In 1874, the federal government took its criticism of British Columbia’s Indian land policy to arbitration by the Secretary of State for the Colonies. Ultimately, the BC government agreed to transfer land equal to 20 acres per family to the dominion to be set aside for future reserves but refused to enlarge any existing reserves, relying on Governor Douglas’s 1864 statement that he had allotted 10 acres per family.

In February 1875, Powell sent a petition to the Minister of the Interior from the Chiefs of several tribes, including the Shuswap. The petitioners complained that their reserves were too small to support their families and animals, and that they had been laid out without their agreement.

In 1875, the BC and federal governments agreed to establish the Joint Indian Reserve Commission (JIRC) to inquire into the grievances related to Indian reserves. Its objective was to determine the number, size, and location of the reserves to be allowed to the Indians in British Columbia. The JIRC spent two months in 1877 interviewing Chiefs and members of the Shuswap Bands. After reviewing Douglas’s instructions and Cox’s actions in 1862, the JIRC concluded that the colonial government had apparently decided that the Shuswap reserves were too large, that Cox’s actions did not bind the Crown, and that, in any event, the government had the power to reduce reserves. The JIRC confirmed the three Shuswap reserves as set aside by Dewdney in 1866, and set aside a further 11 reserves for the three Bands. They were all confirmed as reserves in 1930 by Order in Council.
PART III

ISSUES

The Indian Claims Commission’s inquiry concerns these issues, as agreed to by the parties:

1 Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?
2 If a colonial reserve was created, was it reduced by the colonial administration?
3 If a colonial reserve was created, then reduced by the colonial administration,
   i did the colonial Crown breach the honour of the Crown, or any fiduciary duty, trust duty, statutory duty, or duty of care to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands?
   ii has the federal Crown breached any such duty?
4 In the circumstances of this claim, is there an outstanding lawful obligation on the part of Canada?
PART IV

ANALYSIS

ISSUE 1 CREATION OF THE NESKONLITH DOUGLAS RESERVE
1 Was a reserve created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862?

The central issue in this inquiry is whether a reserve was legally created in 1862, one that was binding on the British Crown and the Neskonlith, Adams Lake, and Little Shuswap Indian Bands. As there existed no executive order or other instrument confirming the land as a lawful reserve, this question can only be answered by examining in detail the facts and context of the times.

Background Facts
Use of “Reserve” in Pre-Confederation British Columbia

The word “reserve” and its variations were used in pre-Confederation British Columbia in a variety of circumstances by Crown officials. Governor Douglas’s 1859 Proclamation, for example, permitted the Executive to “reserve” portions of unoccupied Crown land for any purpose that it deemed advisable, including “Indian Reserves” and other “Government Reserves,” such as proposed towns and school lands. 5 In some documents, Crown land was referred to as having been “reserved” to signify that it was not available for pre-emption or purchase by private citizens. When discussing the facts, this report uses the word “reserve” as it was used in the historical documents.

5 Proclamation No. 13 (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p. 1).
Governor Douglas's Authority
The reserve-creation process at issue here was taking place in pre-Confederation British Columbia in the early 1860s, when the colony was still under British control. This process predated, and therefore was not governed by, the 1871 British Columbia Terms of Union or Canada's Indian Act.

The British Imperial Government appointed James Douglas Governor of the colony of Vancouver Island in 1851, with “full power and authority to make constitute[,] and ordain laws, statutes and ordinances, for the public peace, welfare, and good government” of Vancouver Island. In 1858, the Secretary of State for the Colonies, E.B. Lytton, wrote from London instructing Governor Douglas to consider the most humane means of dealing with the Indians of Vancouver Island, and to use his knowledge and experience to resolve any problems. Lytton further suggested that, when Douglas was striking bargains or treaties with the Indians for the cession of land, subsistence should be supplied to them.

The year 1858 also saw the appointment of Douglas as Governor of the newly created colony of British Columbia on the mainland. He was empowered to pass laws by proclamation, subject only to the direction of Secretary of State Lytton. Of importance here are two proclamations that Douglas issued almost immediately upon his appointment. Proclamation No. 11 in 1858 vested in Douglas the authority to grant any Crown land in the colony to any person, and Proclamation No. 13 in 1859 declared that the Executive had the power “to reserve” unoccupied Crown land for such purposes as the Executive deemed advisable.

Douglas's Policy on Reserve Creation
Governor Douglas was operating in the late 1850s and early 1860s under increasing pressure from settlers and miners for land rights, which in turn led to the threat of hostilities between the Indian and settler populations. When

---

6 Order of Her Majesty in Council admitting British Columbia into the Union (British Columbia Terms of Union), May 16, 1871, no file reference available (ICC Exhibit 6j, p. 6).
7 The first federal statute concerning Indians to apply to British Columbia after 1871 was An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, SC 1869, c. 6 (32–33 Vict.).
9 E.B Lytton to Governor Douglas, July 31, 1858, BCA, CO 410/1, pp. 147–59; Library and Archives Canada (hereafter LAC), RG 10, vol. 11028, file SRR-1 (ICC Exhibit 1a, p. 68).
10 Proclamation No. 11 (131), December 2, 1858, RSBC 1871, App., 55 (ICC Exhibit 6a, p. 1).
11 Proclamation No. 13 (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p. 1).
Lyttle requested advice on settling the tribes permanently in villages for their protection and civilization, Douglas proposed a plan:

8. *Anticipatory reserves* of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.12

Lyttle agreed with Douglas’s plan for the Indian tribes, but cautioned him:

whilst making ample provision, under the arrangements proposed, for the future sustenance and improvement of the Indian Tribes, you will, I am persuaded, bear in mind the importance of exercising due care in laying out and defining the several reserves so as to avoid checking at a future day, the progress of the white colonists.13

In 1860, Douglas had an opportunity to spell out his plans for reserves to some Indian bands while visiting the Okanagan and Lyttle areas. When he returned, Douglas provided a lengthy report to the Duke of Newcastle, repeating the message he gave to bands along the way:

I also explained to them that the Magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields, and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the Lakes and Rivers, and of hunting over all unoccupied Crown Lands in the Colony ...14

Thus, prior to the events of 1862, Governor Douglas had formulated a plan to establish, in his own words, “anticipatory reserves” wherever Indian tribes lived, to include village sites, cultivated fields, and all the land in the vicinity that could be tilled or was required for their support. He also acknowledged their right to fish and hunt on all unreserved and unoccupied Crown lands.

---


In later years, Governor Douglas spoke about his plan for setting apart Indian reserves. He addressed the Legislative Council in 1864, explaining that “[t]he areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned ...” Ten years later, Douglas clarified that, “in laying out Indian reserves, no specific number of acres was insisted on.” In addition to repeating the instructions given to officials at the time, Douglas added that they were “to include every piece of ground, to which [the Indians] had acquired an equitable title, through continuous occupation, tillage, or other investment of their labor.”

**Douglas’s Actions**

Concurrent with Governor Douglas’s plan to establish Indian reserves was his decision to introduce a pre-emption law that would enable British subjects and those having sworn allegiance to Her Majesty to lawfully acquire up to 160 acres of unoccupied, unreserved, and unsurveyed Crown land. Douglas issued a Circular in 1859 to gold commissioners and magistrates, directing them to “cause to be reserved, the Sites of all Indian villages, and the land they have been accustomed to cultivate, to the extent of several hundred acres round each village, for their special use and benefit.”

We note that, at around the same time, Douglas visited and personally approved of a reserve comprising 20 acres of land adjacent to the Yale town site. This reserve may have been the first reserve created on the mainland, although as governor of the colony of Vancouver Island, Douglas had created reserves pursuant to treaties negotiated in the period between 1850 and 1854 (the Douglas Treaties).

Douglas’s objective in setting apart Indian lands, townsites, and other public lands was driven in part by the desire to encourage newcomers to settle and take up farming. In early 1860, Douglas implemented his pre-emption policy when he enacted the *Pre-emption Act*. The lands available for pre-emption specifically excluded any “site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian Reserve or
In order to implement this law, and thereby reduce the conflicts between the Indian population and the settlers and miners, the colonial government needed to know which land was not available for pre-emption. Although surveys would have provided that certainty, Douglas and R.C. Moody, Chief Commissioner of Lands and Works (CCLW), agreed that they could delay the surveys until the colony had more money.

In 1861, Douglas initiated the process of having his subordinates stake out Indian reserves with a series of letters setting out his instructions. On March 5, Douglas sent a letter to William Cox, a newly appointed Assistant Commissioner of Lands and Works (ACLW):

You will receive instructions from the Chief Commissioner of Lands & Works to mark out the limits of the Indian Reserves according to the boundaries the inhabitants of each village and Settlement may point out, which is to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.21

On the same day, Douglas asked Moody to communicate with Cox, and:

give him any instructions as you may deem necessary in reference to the disposal of Crown Lands, and that you will furnish him with such information on this subject, as may enable him to work in perfect harmony with yourself.22

Douglas clearly trusted Moody to oversee the work of this new ACLW and to instruct him as Moody saw fit.

In a marginal note on the same letter Douglas told Moody to instruct Cox “to mark out distinctly all the Indian Reserves in his District and to define their extent as they may be severally pointed out by the Indians themselves.”23

This Moody did on March 6th when he wrote to Cox:

I have recd instructions from H.E. the Gov. to communicate with you on the subject & to request that “you will mark out distinctly all the Indian Reserves in your District and define their extent as they may be severally pointed out by the Indians themselves.” I would at the same time beg of you to be particular in scrutinising

20 Proclamation by His Excellency James Douglas, Governor of British Columbia, January 4, 1860, in RSBC 1871, App., 83.
22 Charles Good, Acting Private Secretary, New Westminster, to Chief Commissioner of Lands and Works, March 5, 1861, BCA, GR 15/72, file 65011/4c3; BCA, C/AB/30.1J/9, pp. 95–96 (ICC Exhibit 1a, pp. 436–40). Emphasis added.
23 Charles Good, Acting Private Secretary, New Westminster, to Chief Commissioner of Lands and Works, March 5, 1861, BCA, GR 15/72, file 65011/4c3; BCA, C/AB/30.1J/9, pp. 95–96 (ICC Exhibit 1a, pp. 436–40).
Moody’s direction to Cox “to scrutinize the claims of the Indians” is entirely consistent with Governor Douglas’s orders to Moody to provide instructions to Cox in marking off land.

On April 5, Douglas sent further instructions to Moody on setting apart land for all types of reserves. He advised Moody that “the position and extent of all spots of land, now set apart as Government or Indian Reserves, are to be forthwith published in three different places”\(^{25}\) in the relevant district and also in the local newspapers. Douglas also made it clear in the same letter that he anticipated circumstances that would render it “expedient to relinquish any such reserve,”\(^{26}\) in which case a two-month notice would be required prior to sale or occupation of the land. This statement speaks to Douglas’s assumption that, as Governor, he had the right to reverse the protected status of lands marked off as government or Indian reserves without undergoing a formal process.

Further, Governor Douglas exercised the right to unilaterally change boundaries of land marked out for reserves. On April 27, 1863, for example, Douglas wrote to Moody relaying the request of Indians in the Coquitlam River area to enlarge their reserve, even though it had been laid out following the wishes of the Indians themselves. Douglas instructed Moody “to inquire into such complaints and to enlarge all the Indian Reserves between New Westminster and the mouth of Harrison River,”\(^{27}\) before the surrounding land could be occupied by non-Indians.

25 William A.G. Young, Colonial Secretary, to Chief Commissioner of Lands and Works, April 5, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 457).
26 William A.G. Young, Colonial Secretary, to Chief Commissioner of Lands and Works, April 5, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 457).
Much of the work of marking or staking out Indian reserves was centered initially in the lower mainland and the Okanagan, where land pressures were greatest. Captain R.M. Parsons of the Royal Engineers was dispatched up the Fraser River in the spring of 1861 on orders from Moody, to “lay out the ‘Boundaries of Lands claimed by Indians’ from the Harrison River to the Sea.” 28 Parsons was unsure what the task entailed, including the amount of land to mark off at villages, and what to do with burial sites and potato patches, and so asked Moody’s advice. Moody repeated Douglas’s directions to do what the Indians pointed out, adding that it had to be “within reason. If anything extreme is asked for postpone decision until further communication with me.” 29 Moody also confirmed that Parsons could inform the Indians that the land as staked out was “bona fide allotted to that settlement.” 30 When Parsons delegated this job to his subordinate, Lieutenant-Corporal Turner, he clarified these instructions by saying that the Indians, not Turner, were to put down the stakes but that Turner was to look at them and report to Parsons the position and quantity of the land claimed. 31

Governor Douglas further articulated his plan in March 1862, in a reply to Colonel Moody, who was asking him for greater clarity regarding the government’s power to retake pre-empted land from a settler if it was required for public purposes. 32 Douglas took this opportunity to remind Moody of the orders for marking out distinctly the sites of proposed towns and Indian reserves:

> it being obviously of the utmost importance that the exact position of every Reserve should be known to the public at large that there may be no uncertainty as to the land open for pre-emption ... 33

Douglas reiterated that the boundaries were to be marked out by corner and intermediate posts and public notice given. He also required that in all cases reserves were to be marked on official maps of Moody’s department “as accurately as possible,” and, in particular, that the land around the Indian

---

28 R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).
29 R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 15, 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).
30 R.M. Parsons, Captain, Royal Engineers, to Moody, Colonel, Royal Engineers, and Commissioner, April 1861, BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 459–61).
31 R.M. Parsons, Captain, Royal Engineers, to Lieutenant-Corporal Turner, [April 30, 1861], BCA, C/AB/30.6J/5 (ICC Exhibit 1a, pp. 466–67).
32 R.C. Moody, Colonel, Royal Engineer, and Chief Commissioner of Lands and Works, New Westminster, to Colonial Secretary, December 31, 1861, BCA, F929[-10] (ICC Exhibit 1a, pp. 502–3).
villages at North Bentinck Arm near the coast “be marked upon the official maps as distinctly reserved, to the extent of [300] acres or more, at each Village ...”\textsuperscript{34} Finally, he reminded Moody that the ACLWs were to make all reserves of public land “at whatever points and to the extent you may deem necessary ...”\textsuperscript{35}

Douglas did not spell out a formula for the extent of lands to be marked off, but the record contains numerous examples of the type of land or acreage Douglas contemplated. His 1859 Circular to magistrates specified that the Indians’ cultivated lands be included up to several hundred acres around each village. In 1862 he quantified the size of the land around the North Bentinck Arm Indian villages at 300 acres or more. Douglas also instructed that 1,000 acres of country land be added to the Indian village sites adjacent to the town of Hope. In his 1864 speech to the Legislative Council explaining his plan of forming Indian reserves, Douglas spoke about the areas as “partially defined and set apart,”\textsuperscript{36} in no case exceeding 10 acres per family.

Ten years later, however, Douglas clarified that he had no specific number of acres in mind, leaving the selection of land to the Indians, but that he envisaged reserves consisting of village sites, cultivated lands, fishing stations, burial grounds, and every piece of land to which they had acquired equitable title through continuous occupation, tillage, or other investment of labour. He referred to reserves along the Thompson River as being large-scale to include grazing lands.\textsuperscript{37}

It was in the context of Douglas’s policy and actions that William Cox travelled to the Kamloops area in October 1862.

\textbf{Cox’s Actions}

William Cox was a Magistrate who was appointed in late 1860 as Justice of the Peace and Assistant Gold Commissioner for the District of Rock Creek, in the southern interior of British Columbia. In early 1861, Cox was also appointed Assistant Commissioner of Lands and Works (ACLW) for Rock Creek. Cox received a December 17, 1860, Circular from Governor Douglas, directing him and six others, in their capacity as ACLW, “to follow each instruction as

\textsuperscript{34} William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/ AB/30.1/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).
\textsuperscript{35} William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/ AB/30.1/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).
may be conveyed to you by the Chief Commr. [Moody] with respect to the sale or disposition of the Crown Lands, and you are to make all reports to him direct ....38 Cox was ordered by Douglas to mark out distinctly all the Indian reserves in his district, define their extent as pointed out by the Indians themselves, and report back to Moody. Cox was also ordered by Moody to scrutinize their claims carefully.

William Cox started the task of marking out townsites, Indian reserves, and other public reserves north of Okanagan Lake shortly after his appointment as ACLW.39 Cox appeared to understand his instructions and was gaining experience prior to his eventful trip to the Kamloops area in October 1862. In June 1861, for example, Cox reported to CCLW Moody that he had marked out an “Indian Reservation” at the north end of Lake Okanagan, the Indians “having selected the ground themselves & also named the Extent desired by them ...”40 Cox also noted that on his next visit, he hoped to report on the extent of the reservation, as he was not in a position to do so at the time. Cox added that the defining stakes were distinctly and prominently placed and that he was enclosing a rough sketch of the boundaries. On July 4, 1861, a letter was sent by an unidentified person, most probably Cox, reporting that he had succeeded in marking off an “Indian Reserve” in the Okanagan, the Indians having selected the location and pointed out where they wished the boundary stakes to be. The record includes a sketch showing the boundary lines of an Indian reserve adjacent to the north end of Okanagan Lake.41 This was likely the same reserve whose limits Cox had only roughly defined the previous month. Further, we know from Young’s letter to Moody on March 4, 1862, that, by the next spring, Cox had also marked out reserves for the Rock Creek Townsite, Shimilkameen Revenue Station, Prince Town, and a town at Ance de Sable, in addition to several Indian reserves.42

38 William Young to P. O’Reilly, December 17, 1860, BCA, British Columbia, Colonial Secretary, Correspondence Outward, July 1860–September 1861 (miscellaneous letters), pp. 155–54 (ICC Exhibit 1a, pp. 426–27).
39 William Cox, Assistant Commissioner of Lands, Rock Creek, to Chief Commissioner of Lands and Works, June 17, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).
40 William Cox to Chief Commissioner of Lands and Works, June 17, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).
41 [Author not identified] to [recipient not identified], July 4, 1861, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 481–83).
42 William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/AB/30.1J/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).
In October 1862, Cox was sent north, pursuant to Douglas's instructions, to investigate the complaint of Shimtikum, an Indian living on the Cerise River west of Kamloops, whose cultivated fields were under threat by two settlers. Cox was asked to mark out Shimtikum’s lands and inform the settlers that they could not encroach. Cox did so and also, marked off with posts some reserves on the Bonaparte River northwest of Kamloops.

What happened next, from the government’s perspective, is only explained three years later, in a copy of part of a letter and a sketch from Cox to Philip Nind, the Magistrate and Gold Commissioner for the Cariboo District. Cox explained that just before leaving Kamloops he received instructions from Douglas to mark out all the Indian reserves in the neighbourhood. On October 31, he gave Kamloops Chief Petite Louis a notice describing the “Kamloops Indian Reserve” bounded by the North and Thompson Rivers, as per the stakes and notices that defined the boundaries and warned persons not to encroach on the rights of the Indians.

Cox’s letter states that the Shuswap tribes called upon him to do the same thing for them, as some Frenchmen were encroaching on their grounds:

I could not mark off their boundaries at that time on the ground, but chalked out the position and extent of the Shouswap Reserve at Kamloops, for the Chief and gave him papers to post up. There could be no mistake. I shall send you herewith a sketch of same as well as I can recollect it. The probability is that the papers have been removed, and the ground allowed by me greatly added to.

There is no explanation in the record of the term “chalked out.” It is also not certain whether Cox chalked out the Shuswap Reserve while he was at Kamloops, as Cox stated, or whether he travelled east along the Thompson River with the Chiefs. This is because Cox provided Chief Neskonlith with a notice dated October 31, 1862, at “Shuswap,” warning persons “not to cut timber, interfere, or meddle in any way with the rights of the Indians on this Reserve.” Further, Cox’s statement that he prepared the sketch “at Kamloops” to give to the Chiefs conflicts with a later account by the Shuswap.

---

43 J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, October 6, 1862, BCA, C/AB/30.1J/4, pp. 316–17 (ICC Exhibit 1a, pp. 555–56); J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, Assistant Chief Commissioner, October 6, 1862, BCA, C/AB/30.1J/4, p. 316 (ICC Exhibit 1a, p. 557).
44 Also called “Che Louis.”
46 The term “chalk out” is defined as “sketch or plan a thing to be accomplished”: The Canadian Oxford Dictionary, ed. Katherine Barber (Toronto, Oxford University Press, 1998).
47 Copy of Notice, W.G. Cox, P. Magistrate, Shuswap, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 568).
Indians that in 1862 Cox had come up the river to a point on the little lake,\textsuperscript{48} likely a reference to Little Shuswap Lake.

In any event, unlike the Kamloops notice, the Shuswap notice given to Chief Neskonlith did not refer to any stakes or boundaries. Although Cox purportedly attached a sketch of the “Neskonlith, Little Shuswap and Adams Lake Reserves”\textsuperscript{49} in his October 31, 1862, report to Moody, he did not include a written description, whereas he did provide the details of the four other reserves he had marked out, including the Kamloops reserve. Cox’s record book, however, does contain the following entry:

\textsuperscript{45}

\begin{quote}
Indian Reserve
Shouswap Lake but not inspect [?] marked out.\textsuperscript{50}
\end{quote}

This entry did not describe any boundaries.

\textbf{Chief Neskonlith’s Role}

The Neskonlith, Adams Lake, and Little Shuswap Indian Bands traditionally comprised one Secwepemc\textsuperscript{51} or Shuswap “tribe” which belonged to the larger Secwepemc Nation.\textsuperscript{52} The latter is composed of many Secwepemc tribes, which acknowledge their relationship to the others and speak a common Secwepemc language, although some have developed their own dialect.\textsuperscript{53} The 1989 \textit{Shuswap Chronicles} describes the structure of the Secwepemc Nation based on a report by ethnographer James Teit, who interviewed Elders in the late 1800s. Teit described the Shuswap people as organized into seven divisions, each with two to seven bands. The Shuswap Lake division was made up of three bands – the Adams Lake Band or people of the Syxste’lln, the South Thompson Band or people of Hala’ut, and the Shuswap Band or people of Sxotcame’lp.\textsuperscript{54}

\begin{itemize}
\item \textsuperscript{49} The 1862 sketch has not been located.
\item \textsuperscript{50} Record of William Cox in “British Columbia Department of Land and Works, Record of land claims, government reservations, &c., by William George Cox, Esq., Magistrate, Rock Creek, BC. sheriff’s book, Lytton, 1867, copied from original in Public Archives of British Columbia, 1988, BCA, GR 0857 (ICC Exhibit 1a, pp. 579–82).
\item \textsuperscript{51} Secwepemc means “people of the spilling waters” or “people who travel far,” ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 91, J.S. Michel).
\item \textsuperscript{52} ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 107, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr M. Thomas).
\item \textsuperscript{53} ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 90–91, J.S. Michel).
\item \textsuperscript{54} North Shuswap Historical Society, \textit{Shuswap Chronicles} (Celista, BC, 1989) (ICC Exhibit 8a, pp. 5–6).
\end{itemize}
The Shuswap Chronicles informs us that Chief Adam, who died in 1867, was a hard bargainer who commanded respect from his people. Chief Antoine Gregoire, who died the following year and who was likely Adam’s eldest son, was equally powerful in the community. His son was Chief Leon Neskonlith. According to the Elders today, members of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands recognized Chief Neskonlith as their leader. Elder Joseph Michel of Adams Lake stated that Chief Neskonlith was “appointed as ... main spokesman of the people in negotiations with governments.” The oral history of the Bands also informs us that they were traditionally one Band but were later divided into three separate Bands (Neskonlith, Adams Lake, and Little Shuswap) by the Department of Indian Affairs.

Moberly’s Investigation

It was not until 1865 that Crown officials became aware of the location of the boundaries or the extent of the area staked by Chief Neskonlith. That year the Gold Commissioner and Magistrate for the Cariboo District, Philip Nind, was travelling in the interior when he met up with Chief Neskonlith, who told him that Cox had given them authority in 1862 to take up the land and had also given them some papers.

When Nind later asked Cox to provide an explanation of his trip, the latter wrote back on July 16, 1865, as we have noted, stating that he could not mark off their boundaries at that time. Cox included in his letter a sketch (1865 Cox sketch) based on his recollections, showing among other markings, a reserve at Little Shuswap Lake, a second reserve on both sides of the Adams River, and a fishery at the south end of Adams Lake. It soon became clear that Cox’s sketch bore little resemblance to the area Chief Neskonlith had described as having been reserved by Cox.

Nind immediately alerted Colonial Secretary Arthur Birch in a letter dated July 17, 1865:

---

55 North Shuswap Historical Society, Shuswap Chronicles (Celista, BC, 1989) (ICC Exhibit 8a, p. 6).
58 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 3, E. Philip); ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 112, J.S. Michel); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 146, Dr M. Thomas); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 21, S. Denault).
59 William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, Papers Connected with the Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 31 (ICC Exhibit 1a, p. 854); Sketch by W.G. Cox, c. 1865 (ICC Exhibit 7a, p. 3). See Map 2.
That branch of the Shuswap tribe which live on the Upper Thompson and Shuswap Lakes, numbering I am informed less than five hundred souls claim the undisputed possession of all the land on the north side between the foot of the Great Shuswap Lake and the North River a distance of nearly fifty miles ... 60

Nind’s letter was forwarded to Joseph Trutch, who was by then the Chief Commissioner of Lands and Works; he replied on September 20, 1865, that he could supply no data, “as this Department is entirely without official information as to the location or extent of any Indian reserves ... 61 Trutch recommended an inquiry throughout the colony to find out “what lands are claimed by Indians. What lands have been authoritatively reserved and assured to the various tribes, and to what extent such reserves can be modified with the concurrence of the Indians,” 62 with or without compensation. The Colonial Secretary balked at such a wide-ranging inquiry but allowed Trutch to send Walter Moberly, the colonial surveyor, to the Shuswap and Kamloops areas. He was to reduce the reserves if he could do so “without much dissatisfaction to the Indians.” 63 At the very least, Moberly was to collect as much information as possible so that the government would have “some data to go by” 64 in making a decision.

Moberly’s trip notes describe his meetings with Chief Neskonlith and others at Little Shuswap Lake in November 1865. These notes and his report to Trutch provide some insight into Cox’s actions in 1862 and Chief Neskonlith’s role. Moberly was told by the Chief and other Indians present that:

they did not wish me to mark off the ground, that it had been marked off by Mr. Cox who told them he had been instructed by Govr. Douglas to mark it off in the manner in which it was staked out ... [from the narrow strip of government land] to a point on the n. side of Gt. Shouswap Lake about 1 or 1 ½ miles in an easterly direction from the mouth of Adams Lake creek he had given to Nesquinnilth & had also had a stake put in at the northerly end of Adams Lake. 65

60 Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, pp. 855–57).
61 Joseph W. Trutch, CCLW and Surveyor General, to Colonial Secretary, September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11). Emphasis added.
62 Joseph W. Trutch, CCLW and Surveyor General, to Colonial Secretary, September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11).
63 Charles Good for the Colonial Secretary to Chief Commissioner of Lands and Works, September 26, 1865, BCA, file 942: GR 1372, file 334(2) (ICC Exhibit 1a, pp. 916–19).
64 Charles Good for the Colonial Secretary to Chief Commissioner of Lands and Works, September 26, 1865, BCA, file 942: GR 1372, file 334(2) (ICC Exhibit 1a, pp. 916–19).
When Moberly, however, asked if Cox had been to these lands himself:

the indians informed me he had not as he only came up the river to [illegible] point [illegible] the little lake. I then learnt from the indians that Nesquinnilth had placed the stakes himself; that Mr. Cox had told them that other lands not actually cultivated w[d.] do for them to raise cows and that no person cd. intrude on them & that Gov. Douglas had told Mr. Cox to tell them so.66

In addition, Moberly noted that some of the Indians present told him that “they also thought Mr. Cox had not laid off the ground as Gov. Douglas intended …”67

When Moberly visited the people at the south end of Adams Lake the next day, he was told that they did not agree with Chief Neskonlith’s stakes and believed that those stakes would not protect their gardens from settlers. They asked Moberly to mark off their lands so as to include their potatoes and also told him that they wanted to stay put, and not move down to Neskonlith’s area. Moberly commented that these “indians do not like Nesquinnilth.”68

Moberly told the Indians he would not mark off any lands until he had ascertained what Mr. Cox had told them, which stakes Cox had placed, and what Governor Douglas had authorized him to do.69 He did, however, draw a sketch (1865 Moberly sketch) based on Chief Neskonlith’s description of the boundaries. It contains the words “Sketch Showing Indian Claims on the North and Shouswap Rivers …”70 Moberly reported the Indians’ information to Trutch on December 22, 1865, noting as well that the area of the reserves claimed by the Shushwap Chiefs was approximately 600 square miles.71


70 “Sketch showing Indian Claims on the North and Shouswap Reserves to accompany my report on the same date,” W. Moberly, December 22, 1865, no file reference available (ICC Exhibit 7e, p. 1). See Map 3. The sketch shows both Chief Neskonlith’s claim and the claim of Che Louis, Chief of the Kamloops Band. It also incorrectly names the Thompson River as the “Shouswap River.”

Moberly concluded that after comparing the Indians’ description of the boundaries with Cox’s sketch, he was at a loss to draw any conclusions. 72

These facts form the background to the panel’s findings on the question of whether a reserve was legally created in 1862 in the Shuswap area.

The Law on Reserve Creation

The parties agree that the 2002 Supreme Court of Canada judgments in Ross River Dena Council Band v. Canada 73 and Wewaykum Indian Band v. Canada 74 represent the leading jurisprudence on the legal requirements for reserve creation.

Ross River concerns a claim by a Yukon band that its village of Ross River was a legal reserve under the federal Indian Act and, therefore, the band members were exempt from taxation. Instead, the Court found that, although lands had been set aside for the Band, the Crown did not intend to create a reserve. Consequently, no reserve was created. There are several differences between the Ross River case and this inquiry, in that the claim before us concerns bands in pre-Confederation British Columbia that were not governed by the Indian Act. The most significant difference, however, lies in the fact that the issues in Ross River did not include a dispute over boundaries or whether the land in question had been set apart. Nevertheless, the judgment lays down several principles for reserve creation applicable to this inquiry.

LeBel J, writing for the majority, 75 confirmed that the source of the Crown’s authority to create an Indian reserve is the royal prerogative, but this power, accorded by the common law to the Executive, may be limited in scope by statute. 76 The Court went on to apply an intention-based test for reserve creation:

Under the Indian Act, the setting apart of a tract of land as a reserve implies both an action and an intention. In other words, the Crown must do certain things to set apart the land, but it must also have an intention in doing those acts to accomplish the end of creating a reserve. 77

---

72 Walter Moberly, Surveyor General’s Branch, Ministry of Crown Lands, notebook 3, November 4–18, 1865; Royal Engineers Collection, tray 1, vol. 2; book 3; Maps and Plans Vault, Ministry of Crown Lands, 1865 (ICC Exhibit 7d, pp. 40–41, 48).
75 The Court was unanimous in finding that no reserve had been created but differed on whether the royal prerogative had been limited by statute in this case.
The Court concluded that, in general:

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 ... 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 ... 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.78

In determining the critical question of whether there was an intention to create a reserve on the part of persons with authority to bind the Crown, LeBel J explained:

To succeed, the appellants in this case have to show at least that land had been set apart for them. No real dispute arises with respect to the setting aside of land ... The key question remains whether there was an intention to create a reserve on the part of persons having the authority to bind the Crown. In other words, what is critical is whether the particular Crown official, on the facts of a given case, had authority to bind the Crown or was reasonably so seen by the First Nation, whether the official made representations to the First Nation that he was binding the Crown to create a reserve, and whether the official had the authority to set apart lands for the creation of the reserve or was reasonably so seen.79

On the question of whether the Crown agent could reasonably have been seen to have the authority to bind the Crown, the Court in Ross River relied on the Supreme Court's judgment in R. v. Sioui:

he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.80

Although the Sioui case dealt with creation of a treaty, LeBel J found the principle relevant to reserve creation. Further, he acknowledged that the

---

honour of the Crown is at stake when representations are made to a First Nation to induce it to accept a parcel of land. He cautioned the parties, however, that “not just any Crown agent will do. Many minor officials who are Crown agents could hardly be said to act to bind the Crown in this case or any other.”81

Ross River also stands for the proposition that the act of setting apart the land is not synonymous with legally creating a reserve. LeBel J concluded that “what happened in this case was the setting aside of lands for the use of the Band. No reserve was legally created.”82 The recent case of Montana Band v. Canada also referred to this distinction: “according to the [Ross River] decision ... the setting aside land for the use of an Indian band is not synonymous with setting the land apart as a reserve for that band.”83

The decision of the Supreme Court in Wewaykum Indian Band v. Canada, released shortly after Ross River, expanded on the content of the Crown’s fiduciary duty prior to reserve creation. The Wewaykum case concerned two BC bands that claimed each other’s reserve land. Although this decision concerned BC bands, it dealt with reserve creation long after British Columbia had joined Confederation. The Court in Wewaykum confirmed the legal requirements for reserve creation as set out in Ross River, but also addressed the Crown’s fiduciary duty. Justice Binnie, on behalf of a unanimous Court, stated:

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.84

Binnie J emphasized, however, that in exercising its public law function prior to reserve creation, the federal Crown 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 ...”85 He went on to state that “[a]n

84 Wewaykum Indian Band v. Canada, [2002] 4 SCR 245 at 289, para. 86.
assessment of the Crown’s discharge of its fiduciary obligations at the reserve-creation stage must have regard to the context of the times.”86

The Test to Be Applied
The factors governing the reserve-creation process are those articulated in 
Ross River and Wewaykum. Ross River confirmed that there is no single procedure for creating reserves, although an order in council has been the most common and clearest procedure used to date. Absent a clear instrument creating the reserve, the evaluation of the legal effect of the reserve-creation process “turns on a very contextual and fact-driven analysis.”87

Then, these are the key factors to consider in determining whether the Crown in 1862 legally created a reserve for the bands in the Shuswap area:

1 Steps must be taken in order to set apart land for the benefit of Indians. In particular, the Indian party must show that land had been set apart for them.

2 The Crown must intend to create a reserve, and that intention must be possessed by Crown agents with authority to bind the Crown, or those reasonably seen by the First Nation as having that authority.

3 The band must accept the setting apart and have started making use of the lands.

Position of Neskonlith, Adams Lake, and Little Shuswap Indian Bands
The Bands take the position that the British Crown, through Governor Douglas and his delegate William Cox, created a reserve referred to as the “Neskonlith Colonial Reserve” in the Shuswap territory in 1862. An important consideration, the Bands argue, were the representations made by Cox, and the Indians’ reliance on those representations to conclude that he could bind the Crown in creating a reserve. In particular, say the Bands, their predecessors relied on Cox’s undertaking that the reserve would be protected for their exclusive use and benefit, they accepted the land as staked out, and they were using the land.

Position of Canada
Canada argues that the Crown did not intend to create a legal reserve through its actions in 1862; rather, Douglas took an intermediary step to protect

Indian lands from purchase or pre-emption by settlers. In order to set apart land for the use of the Bands, states Canada, it would have been necessary for William Cox to see and define the location and extent of the lands, and the Crown to have published those details. Without seeing the boundaries as staked out by Chief Neskonlith, there could be no certainty in the Crown as to what land was set apart and, thus, no common intention to create a reserve. Canada further asserts that Cox did not have the power to exercise the royal prerogative and was authorized only to mark out Indian reserves; Douglas’s subsequent approval was required to create a reserve.

Panel’s Reasons

Was the Land Set Apart in 1862?

The majority in *Ross River* directed that “steps must be taken” by the Crown to set apart the land, and the Indian party must “show at least that land had been set apart for them.” The Court did not examine this issue further, as the boundaries of the Ross River Band’s village site were not in issue and the parties agreed that the land had been set aside pursuant to an administrative process. What they disagreed on was whether the process had resulted in a legally created reserve.

In this inquiry, the question of whether William Cox set apart the land is squarely before the panel. In the absence of an executive instrument, Governor Douglas’s approval, or other clear evidence confirming the status of the land, we take the language of *Ross River* as meaning that, at the very least, Cox’s actions must have had the effect of setting apart the land.

The record is clear that Cox was given the authority to mark out government and Indian reserves. Cox’s authority to bind the Crown and his representations to Chief Neskonlith will be addressed, but first we must decide whether Cox fulfilled the requirements that Douglas had laid down for marking out Indian reserves in the colony.

The Bands argue that Cox met the requirement of taking steps to set apart the land for the Indians on or about October 31, 1862, in accordance with Governor Douglas’s instructions. In particular, Cox gave Chief Neskonlith notices to post to protect the reserve from encroachment and stakes to mark the boundaries, personally witnessed the placement of a stake at Monte Creek, and recorded the reserve in his land register.88 Canada, in contrast, argues

88 Written Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, March 20, 2007, p. 145, para. 442. It should be noted that the record is not clear that Cox gave stakes as well as notices to Chief Neskonlith, that Cox travelled up the Thompson River from Kamloops in October 1862, or that Cox saw a stake at Monte Creek.
that Cox only “chalked out” the Shuswap boundaries, and that his entry in the record book suggests he neither marked out nor inspected any lands in the area of the Shuswap lakes. According to Canada, “Cox would have had to take the preliminary step of defining the extent of Indian lands ‘as they may be severally pointed out by the Indians themselves.’”

At the outset, it is important to note that Cox was in the Kamloops area in October 1862 for reasons unrelated to marking off all the reserves in the area. He was sent there to investigate a complaint of settler encroachment on land cultivated by an Indian at the Cerise River and to mark off that land to avoid any further encroachment upon it. The request to mark off other reserves came from Douglas just before Cox was leaving Kamloops. When Chief Neskonlith and Chief Gregoire asked Cox to mark off their land as well, to protect it from “some frenchmen,” it is conceivable that he did not have the time or resources to travel into the Shuswap hinterland. The fact that Cox made an entry for “Shuswap” in his record book, noting that he had not marked out, and possibly had not inspected, the land, is consistent with this version of events. So, too, is other evidence, namely the notices given to the Chiefs on October 31, which are silent on boundaries, and Cox’s report to Moody the same day that omits a written description of the Shuswap reserve. Even if Cox had travelled up the Thompson River to Little Shuswap Lake, he would have seen only the area claimed between Monte Creek and Little Shuswap Lake. Whether he viewed a stake at Monte Creek, as the Bands assert, is uncertain, but the record is patently clear that Cox did not see at least two of the three stakes, or three of the four stakes if a stake at Dunn Peak existed, placed in the ground by Chief Neskonlith.

When Cox explained in 1865 that he had only “chalked out” the position and extent of the land for the Chiefs, it is possible that he did just that, used chalk to draw a sketch based on their description. In any case, the record does not indicate that Cox saw any of the area claimed along Adams River, Scotch Creek, or Adams Lake. There is also no evidence from 1862 identifying a northern boundary, although Moberly’s sketch in 1865 shows that Chief Neskonlith claimed Dunn Peak as the northwest boundary, a view corroborated by the Elders’ testimony.

81 The word “inspect” in Cox’s statement “Shouswap Lake but not inspect [?] marked out.” is partially illegible.
In order to set apart an area of land for any purpose, the identification of the boundaries is the first priority. The Bands acknowledge that in the context of the Shuswap reserve creation, Douglas’s policy required that “the settlers ... know clearly what land was available for pre-emption and what lands were not available for pre-emption. And that’s why Chief Neskonlith had papers to post ...”\(^2\) Canada is even more explicit on the question of boundaries:

the personal viewing of stakes by a Crown official, “as pointed out by the Indians themselves,” was fundamental to the process of marking out the “position and extent” of lands claimed by Indian bands. In the absence of a survey or other viewing, it was impossible for the Crown to form the necessary intent to set apart land for the use of any band.\(^3\)

In our view, even though the notices posted by Chief Neskonlith may have been sufficient to keep settlers off the Shuswap land, we are doubtful that the steps taken by Chief Neskonlith alone would have been sufficient to set apart the land for a reserve or for any other purpose.

Although Douglas’s policy of reserve creation did not require surveys, it did require certainty on the Crown’s part. Douglas himself insisted in his instructions to Moody on March 5, 1861, that Cox mark out “distinctly” all the reserves in his district and “define their extent.” Given Douglas’s instructions to Moody to identify the marked-off reserves on official maps, that too may have been one of the required steps in reserve creation. We agree with Canada that, without the personal inspection of a Crown official, “there was no way to adjudicate disputes or to have any real certainty to guide the parties in terms of what land was available for pre-emption and what wasn’t.”\(^4\) Cox did not achieve even the minimum level of certainty required to set apart land when he met with the Chiefs in 1862.

Even if Cox had been given the authority to bind the Crown in any respect, he did not carry out the most basic step necessary to set apart land for a reserve. Cox was not a neophyte, having already marked out several government and Indian reserves in the Okanagan and Rock Creek areas in 1861. Presumably Cox continued to mark out more lands in the summer of 1862 in response to Douglas’s March 1862 instructions to “make any other reserves of land which you may deem necessary.”\(^5\) Yet, despite Douglas

---

\(^3\) Written Submission on Behalf of the Government of Canada, May 15, 2007, p. 25, para. 68.
\(^4\) ICC Transcript, June 19, 2007, p. 90 (Brian Willcott).
\(^5\) William Young, Colonial Secretary’s Office, to Chief Commissioner of Lands and Works, March 4, 1862, BCA, C/ AB/30/I/9, pp. 217–22 (ICC Exhibit 1a, pp. 514–19).
directly telling Cox to mark out reserves distinctly and define their extent — in other words the boundaries — as pointed out to him by the Indians, Cox did not carry out those instructions in this case. He left the task of placing the stakes entirely up to Chief Neskonlith. Except for a sketch that has never been found, Cox’s report to Moody contained no information on the position, boundaries, or size of the Shuswap Reserve, nor did he arrange to have notice of the reserved land and its boundaries published in three places in the district and in the newspapers. These tasks could not have been completed by Cox; he had no knowledge of the boundaries or the size of the reserved lands, as he had not been present when Chief Neskonlith staked the boundaries and had not at any time inspected those stakes.

Finally, Cox conducted no follow-up, either revisiting the area to identify the boundaries or warning Moody of what had transpired. In comparison, when Cox marked out a reserve at the north end of Okanagan Lake after the Indians identified the area, and stakes were placed, he sent a rough sketch of the boundaries to Moody to give him an idea of its form and bearings, stating that he would make another trip to the region and report back on the extent of that reserve.96

Even though Cox had experience on the ground marking out reserves, his failure to see and define the boundaries as agent for the Crown leads us to the conclusion that Cox acted outside his authority. The reasons why Cox failed to meet the minimum requirements for setting apart the land are not apparent. It may have been the onset of winter and the rough terrain that prevented him from carrying out his normal procedures. Alternatively, the simple explanation may be that Cox had not planned to mark out all the reserves near Kamloops or in the Shuswap on that trip and was thus ill prepared when asked by Douglas at the last minute to do so for the bands “in the neighbourhood.” Cox may have reasoned that, in those circumstances, he did what was possible by chalking out the Shuswap reserve and giving the Chiefs notices to post as a warning to settlers. Whatever the reason, the process broke down at the first step, and he did nothing to rectify it except to note in his record book that the reserve had not been marked out.

When Cox was asked by Nind in 1865 to explain the size of the reserve claimed by Chief Neskonlith, Cox believed that his papers had probably been removed and the area allowed by him “greatly added to.” Although the Bands question Cox’s memory and credibility, we do not find any evidence that Cox

96 William Cox, Assistant Commissioner of Lands, Rock Creek, to Chief Commissioner of Lands and Works, June 17, 1864, BCA, GR 1372, file 376 (ICC Exhibit 1a, pp. 479–80).
was under pressure to change his story or that his memory had failed after three years.

We find that Cox erred in not following the orders of his superiors and in thinking he could transfer the Crown’s role in setting apart land to a person who did not represent the Crown. In the end, Cox did not succeed in marking out or in any way setting apart the Shuswap lands. This finding could be interpreted as fatal to the Bands’ claim, given the Ross River principle that claimants must “show at least that land had been set apart for them.”97 However, as the question of setting apart land was not an issue in Ross River and as the case did not concern reserve creation in the context of pre-Confederation British Columbia, it is important that we answer the fundamental question posed by the Court; was there Crown intention to create a reserve in 1862?

**Did the Crown Intend to Create a Reserve in 1862?**

Ross River emphasizes that if the land had been set apart, “[t]he key question remains whether there was an intention to create a reserve ...”98 Proving Crown intention in the context of the times demands that we look to the evidence in several quarters: did Douglas have authority to bind the Crown?; did he intend to create reserves in the colony of British Columbia?; what were Douglas’s intentions in “marking out” lands?; did Cox have authority to bind the Crown?; and, did Chief Neskonlith have a reasonable belief that Cox could bind the Crown to create a reserve?

**Did Douglas Possess Authority to Bind the Crown?**

In our view, there is no doubt that the British Crown delegated to Governor Douglas the authority to grant or reserve portions of Crown land as he saw fit. Douglas was required to heed the advice of one person, Secretary of State Lytton, whose only caution was that Douglas exercise “due care” in laying out reserves to avoid slowing the progress of settlers. In general, Lytton did not question Douglas’s proclamations asserting the Executive’s authority to make any laws in the public interest. On the contrary, Lytton made it clear to Colonel Moody, when he approved Moody’s appointment as Chief Commissioner of Lands and Works, that Governor Douglas inspired his complete confidence.

---

and it was “essential for the public interests that all powers and responsibilities should centre in [Douglas] exclusively.”99

We find that Governor Douglas, as a representative of the British Crown, had the authority to bind the Crown in land transactions in the colony.

Did Douglas Intend to Create Reserves by Marking Out the Land?
When Governor Douglas embarked on the creation of Indian and government reserves, he did not utilize legal instruments for the most part, and, for financial reasons, did not order surveys to confirm the boundaries of lands set aside. Had Douglas taken these steps, they may have been persuasive of the Crown’s intention to create particular reserves. Instead, Douglas set about to create, in his own words, “anticipatory reserves” for the Indians that would include their cultivated fields, village sites, and sufficient land for grazing their animals. In a report to the Duke of Newcastle, Douglas clarified that the Indians should have as much land in the vicinity of the villages and fields as they could till or was needed for their support.

Douglas did not define what he meant by “anticipatory reserves”; however, he was about to implement a pre-emption law to encourage colonists to take up agricultural Crown land in the colony, and he knew that conflicts had arisen between settlers and Indians over land. In order to implement his pre-emption law, Douglas had to act quickly to exempt certain Crown lands needed for public uses, townsites, and Indian reserves. Once identified, those lands had to be publicized as unavailable to prospective purchasers.

In addition, Douglas took for granted his authority to reverse the status of land that had been reserved, when he advised Moody that circumstances could arise in which reserved land would need to be relinquished. If so, he stated, two months’ notice would be sufficient before the land could be sold. In a similar vein, Douglas unilaterally enlarged some of the Indian reserves marked off on the lower Fraser River when he realized that the Indians had requested or were given, too little land.

With the authority to bind the Crown in land transactions in the colony, there is no reason to believe that Douglas could not legally create Indian reserves. In fact, he intended to accomplish that objective over time. The question is whether Douglas intended that marking out a reserve would be sufficient to legally create a reserve.

99 E.B. Lytton, Principal Secretary of State, to R.C. Moody, Colonel, Royal Engineers, October 29, 1858, BCA, GR 1327, file 1149a/2 (ICC Exhibit 1a, p. 207).
In order to protect certain Crown lands from pre-emption, they first had to be identified. William Cox and other ACLWs were instructed by Douglas to "mark out" both government and Indian reserves “distinctly” and to “define their extent.” It was only practical, in our view, that Cox and other officials undertaking the work of marking out land would be told to ask the Indians to point out their villages, burial grounds, cultivated fields, gardens, pastures, and other land in the vicinity of their villages that they needed. Moody, who was Cox’s superior and answerable to Douglas, repeated Douglas’s instructions to Cox and added that he should scrutinize the Indians’ claims carefully.

The evidence is persuasive that Douglas intended “marking out” to be the first step in reserve creation, not the only step. Douglas retained the power to confirm, deny, or alter the boundaries of reserved lands or to reverse their status altogether, which probably explains why he was somewhat cavalier in letting the Indians point out the extent of the land they wanted. The initial step of marking out the land was to be followed by a report to CCLW Moody, further investigation if the reserve appeared unreasonable; and, public notice on the ground and in newspapers; identification on official maps; and, evidence of some type of public approval or confirmation by Governor Douglas. Although the reserve-creation process in pre-Confederation British Columbia was less well defined than later on, when surveys became standard practice for setting apart land, the evidence indicates that Douglas intended his officials to follow a procedure that started with the marking out of the land.

While it is true that Chief Neskonlith and other members of the Shuswap tribe could readily identify their interest in the land and knew full well where they lived, travelled, and carried on traditional pursuits, in the important matter of Indian reserve creation, there had to be a meeting of minds. In this case, the parties’ expectations regarding the steps required to create a reserve were very different.

The parties were also far apart in their respective understanding of the extent of traditional territory that was to be encompassed by a reserve. Based on the available evidence, we are satisfied that Douglas did not intend to create reserves of the size claimed by Chief Neskonlith. Notwithstanding Douglas’s remarks in 1864, he did not insist on a per capita formula of 10 acres per family. Still, all the evidence points to reserves described as being in the range of 20 acres to several thousands of acres, but not in the hundreds of thousands of acres, as claimed by Chief Neskonlith. When Moody ordered that
the lands be marked out “within reason,” he was acting within the authority delegated to him by Douglas.

We conclude that, although Douglas intended that reserves be legally created for the Indians in the colony, he did not intend that they be created by the actions of his subordinates in marking out the land or comprise the extent of land claimed by Chief Neskonlith.

**Did Cox Have the Authority to Bind the Crown?**

Even though Governor Douglas intended that reserve creation in the colony involve a process, it was not Governor Douglas but William Cox who interacted with Chief Neskonlith and Chief Gregoire in October 1862.

As Assistant Commissioner of Lands and Works, Cox was a subordinate of the Chief Commissioner, Colonel Moody, who reported directly to Governor Douglas. In addition to giving general directions on marking off reserve lands, Douglas advised Cox that if he (Douglas) personally gave him any instructions, Cox was to report them to Moody and take Moody’s direction on the steps to be taken. It is obvious that Cox was at least two levels junior to Douglas in the colonial hierarchy. Furthermore, Cox was not the only ACLW, there being at least six others engaged in the task of marking off government and Indian reserves throughout the colony.

Could Cox bind the Crown in reserve creation? Cox was an intermediate official sent into the field to mark off the grounds. Once the land was set apart, its status as a legal reserve had to be approved by someone with the authority to bind the Crown. In pre-Confederation British Columbia, that person was Governor Douglas, who had been given the explicit authority by the British Crown to create Indian and public reserves on Crown land. The parties do not disagree strongly on this point, but Canada emphasizes that, although Douglas had the authority to reserve Indian lands from pre-emption through the exercise of the royal prerogative, there is insufficient evidence that he exercised that authority in this case, or intended to create a reserve on the Shuswap lands in 1862.100

The parties do disagree, however, on whether the creation of lawful reserves on Crown land, being an exercise of executive authority, could be further delegated to a more junior official, in this case, an ACLW. Douglas himself could exercise the royal prerogative to create a reserve, states Canada, giving as an example his order approving Indian reserves at the mouth of the

---

Coquihalla River and at Cornish Bar on the Fraser River. Still, Canada argues, Douglas’s authority as Governor was limited to his commission, which did not confer upon him the right to delegate the prerogative power to create a reserve. Consequently, “unless a power is expressly or impliedly indicated to be capable of delegation, such as the ability to make appointments and discipline public officers, it could not be delegated.” The Bands take the position that Douglas could delegate his reserve-creation power to Cox, relying on the case of Attorney-General of British Columbia v. Attorney-General of Canada, a 1906 decision of the Privy Council regarding the establishment of a military reserve in the 1860s on Deadman’s Island in Burrard Inlet.

The Deadman’s Island case states three propositions of interest to us: the case confirms that Douglas had autocratic power to reserve land in the colony; Douglas could also act through Moody to create a reserve; and Corporal Turner, who was engaged in survey work in the area and reported to Moody, had no power to make a reserve. The Bands argue that Governor Douglas could exercise the power of reserve creation through Cox in the same way that Douglas acted through Moody in the Deadman’s Island case. We respectfully disagree with this interpretation and instead understand Cox’s role as an ACLW sent out to mark off lands to be equivalent to that of the surveyor, Corporal Turner, not that of Moody. Moody was not only the head of the Lands Department but also, according to the Deadman’s Island case, the vice-governor of the colony in the absence of the governor. Consequently, we do not agree that this case supports the Bands’ position that Douglas could exercise his autocratic power to create a reserve through the person of Cox. Canada’s interpretation, that Cox was a “lesser official” acting pursuant to the instructions of both Douglas and Moody, and who was relied on to do the preliminary work of meeting with bands and marking off the ground, makes more sense.

In conclusion, Cox did not have the authority to bind the British Crown. He did have the authority to mark off the land for the benefit of the Indians, but

---

106 The possibility that Moody could exercise the royal prerogative to create reserves in addition to Governor Douglas was not explored in this inquiry.
Douglas could not delegate to him the prerogative authority to create a reserve.

**Did Chief Neskonlith Reasonably Believe Cox Could Bind the Crown?**
We have found that Governor Douglas could not delegate to Cox the authority to create reserves. Nevertheless, according to the *Ross River* case, we must examine Cox’s actions in 1862 because he was the official representing the Crown in an important matter involving Indian lands. If Chief Neskonlith had a reasonable belief that Cox could bind the Crown, and if Cox represented to him that he was responsible for creating permanent reserves, it would constitute some evidence of Crown intention to create a reserve. *Ross River* acknowledges the impact of the fiduciary duty in reserve creation in light of the *sui generis* nature of native land rights but does not examine the fiduciary duty in detail.107 *Wewaykum*, however, squarely addresses the duty in a pre-reserve-creation context, recognizing that it may exist and, if so, 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.”108

The language of *Ross River* suggests that, if Cox had made representations to Chief Neskonlith that would cause him to reasonably believe that Cox could create a reserve binding on the Crown, the honour of the Crown would turn on its willingness to live up to those representations. We are also mindful of LeBel J’s caution that “not just any Crown agent will do,” and that many minor officials can hardly be said to bind the Crown.

In *Ross River*, no evidence was tendered to prove that Crown agents made representations that they had authority to create reserves.109 In contrast, the Bands in this inquiry argue that it was reasonable for Chief Neskonlith to believe that Cox had authority to create a reserve for them; for example, Cox gave the Chief notices to put up warning people not to interfere “with the rights of the Indians on this Reserve.”110 Further, Moberly reported in 1865 that the Indians told him that:

---

110 Copy of Notice, W.G. Cox, P. Magistrate, Shuswap, October 31, 1862, BGA, file 944 (ICC Exhibit 1a, p. 568).
they claim these lands by virtue of certain papers given them by Mr. W.G. Cox, who
they say told them at the time he made the above reservations that he was acting
under instructions received by him from Governor Sir James Douglas 111.

Even though William Cox was not at the top of the colonial hierarchy, it
stands to reason that Indians who only occasionally met with Crown officials
would believe that Cox, as ACLW, had the power at least to protect their land
from outsiders. Unfortunately, the record does not confirm whether Cox
explained to the Chiefs what exactly he was authorized to do. We also cannot
assess whether Chief Neskonlith understood the difference between protecting
Indian land by marking it off and creating a reserve approved by the Crown.
The crux of the question, however, is the manner in which Cox represented
his authority and his job to Chief Neskonlith.

To answer this question, it is important to understand the reason why Chief
Neskonlith and Chief Gregoire decided to approach Cox in 1862. They must
have heard that Cox was in the Kamloops area marking off land for the Indians
and decided to meet with him. The only record explaining their trip is found
in Cox's 1865 account, in which he states that the Shuswap tribes asked him
to do the same for them as he had done for others, "as some frenchmen were
encroaching upon their grounds." 112 At the very least, it suggests that the
Shuswap lands were under immediate threat from some settlers, and the
Chiefs were looking to the government for protection of their lands. They may
well have been disappointed that Cox did not spend the necessary time in
Shuswap territory to mark out a reserve, but, at that moment, it appears that
their priority was to get notices posted warning settlers not to encroach on
their territory.

Based on the scant information available to us, it is impossible to know if
the Chiefs believed Cox was creating lawful reserves or merely marking out
the land, pursuant to Douglas' instructions. We are not convinced, however,
that Cox misrepresented his authority or the task with which he was charged.
It was the Chiefs who approached him, asking for protection for their land,
not Cox attempting to induce the Indians to agree to a land transaction.
Although Cox erred in not completing the job then or later, he did provide the
Chiefs with the minimum necessary to warn settlers to stay off the land.

111 Walter Moberly, New Westminster, to Joseph Trutch, Chief Commissioner of Lands and Works, New
Westminster, December 22, 1865, BCA, GR 1372, file 1145b (ICC Exhibit 1a, p. 954–52).
112 William George Cox to Philip Nind, July 16, 1865, reprinted in British Columbia, Papers Connected with the
Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wolfenden Government Printer, 1875; reprinted
with supplement, 1987), 31 (ICC Exhibit 1a, p. 854).
It is also important that the Indians themselves told Moberly that Cox had not seen two of the stakes for the Shuswap reserve and that Chief Neskonlith had put down the stakes himself. In our estimation, if Chief Neskonlith had thought he could protect the Shuswap land from encroachment by marking out the land himself, that would be a mistaken but reasonable belief. But if Chief Neskonlith also believed that he alone was responsible for defining the permanent boundaries of a reserve and that his placement of boundary stakes, unknown even to Cox, would be sufficient to create the reserve, we must conclude that it was not a reasonable belief in the circumstances of this claim.

We find that the Crown did not intend to create a reserve at Shuswap in 1862. Although Governor Douglas could legally create reserves in the colony and intended to achieve that objective by means of a defined process, he did not intend that the actions of his Assistant Commissioners of Lands and Works would result in legally created reserves when he ordered them to mark out the lands. Nor did Douglas intend to create reserves of the extent claimed by Chief Neskonlith. Further, ACLW William Cox did not have authority to bind the Crown to create reserves, and, although the record is deficient on the question of whether Chief Neskonlith had a reasonable belief that Cox could bind the Crown in reserve creation, the fact that he sought out Cox to ask him to protect his lands from settlers is some indication that his immediate priority was to safeguard the Indian lands from encroachment. If Chief Neskonlith believed that he alone could legally create a reserve by placing stakes in places unknown to the Crown, it would not be a reasonable belief.

**Did the Bands Accept the Setting Apart and Had They Started Using the Lands?**

The panel has found that Cox failed in the fundamental task of seeing and defining the boundaries of the Shuswap reserve in 1862, and that the lands therefore could not have been set apart by the Crown. Chief Neskonlith could not set apart the lands unilaterally by placing boundary stakes and posting notices without Crown oversight. Consequently, the question of the Bands accepting the lands as set apart by the Crown becomes moot. The record suggests some dissension between the Adams Lake and Neskonlith people regarding placement of the stakes, but the Elders testified that in those days they were one people under the leadership of Chief Neskonlith.

Before leaving Issue 1, the panel wishes to comment on the Bands’ use of the lands as demarcated by Chief Neskonlith.
Oral Testimony on Land Use

In this inquiry the panel heard very extensive evidence of the historical use of the lands encompassed by the boundaries claimed by Chief Neskonlith and illustrated in the Moberly sketch. Several Elders provided detailed descriptions of their travels and those of their ancestors throughout this territory, as well as their connection to the land beyond their village sites, cultivated fields, gardens, and fishing stations; lands that were used for hunting, trapping, gathering, spiritual ceremonies, or grazing cattle. Elders also displayed an impressive knowledge of the Secwepemctsin or Shuswap words for significant landmarks.

Our task was to determine several narrow questions relating to the Shuswap territory, the first of which was, did the British Crown create a lawful reserve in 1862 when William Cox was instructed to mark off lands for a reserve? We have concluded that the Crown did not intend to create a reserve that was legally binding on the Crown in 1862. This is not to say, however, that the panel questions or dismisses the importance of the Elders’ testimony of their ancestors’ use and knowledge of the lands encompassing Monte Creek, Scotch Creek, Adams Lake, and north to Dunn Peak.

Ernie Philip of the Little Shuswap Band testified about his people’s connection to the waterways and the mountains:

Waters [were] very, very sacred with our Native people in the past. And again water is our way of travelling at one time. It was just like a big highway, right?

Tod Mountain is very sacred and very spiritual with our people in the past. You know, it’s so sacred [for] even the animals, the birds and anything in that area. And Tod Mountain was used a lot of times what we call Estsk'a7, training people to go out there among them to cleanse themselves.”

Dr. Mary Thomas of the Neskonlith Band also spoke eloquently about how the mountains and valleys got their Indian names, and that Tod Mountain is now the location of Sun Peaks ski resort. The range leading from the mountain down to the Thompson River near Monte Creek is called Tsqwmemek or Pregnant Belly Mountain. She remembered her father working with his brother in their large fields near Chase, ploughing and seeding corn, peas, beans, and potatoes. Dr. Thomas also recalled that the Indians had a lot of cattle and horses in the place called Skunk Hollow, now Neskonlith Flats, which, she testified, was used for rodeos and gathering places for her people.

Dr. Mary Thomas of the Neskonlith Band also spoke eloquently about how the mountains and valleys got their Indian names, and that Tod Mountain is now the location of Sun Peaks ski resort. The range leading from the mountain down to the Thompson River near Monte Creek is called Tsqwmemek or Pregnant Belly Mountain. She remembered her father working with his brother in their large fields near Chase, ploughing and seeding corn, peas, beans, and potatoes. Dr. Thomas also recalled that the Indians had a lot of cattle and horses in the place called Skunk Hollow, now Neskonlith Flats, which, she testified, was used for rodeos and gathering places for her people.

113 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 32–33, Ernie Philip).
Dr. Thomas had many other stories, including people finding arrowheads at Tum Tum Lake, north of Adams Lake, and people going to Bear Creek on Adams Lake to pick huckleberries.114

Jimmy Arnouse from Little Shuswap Band testified that he often went hunting or fishing with his father Bill Arnouse near Tum Tum Lake, to the west of Adams Lake, Tod Mountain, Seymour Arm, and in the Scotch Creek area. It was in this context that Mr Arnouse discussed seeing two cairns, one at an old bridge north of Adams Lake and one at Scotch Creek.115

Joe Michel of Adams Lake Band pointed out settlements at Adams Lake Point and Squaam Bay, where his grandfather Alex Michel had a plot of land. His grandfather also had a trapline in the Gannett Lake Valley and spent a great deal of time trapping there and in the Cayenne Valley northeast of Adams Lake. Mr Michel also confirmed that the majority of his people used to live at Adams Lake, and that, before 1860, Squaam Bay was their principal settlement and headquarters of their chiefs.116

Sarah Denault also spoke at length about the long history of her people's connection to Tod Mountain, Baldy Mountain, and Pregnant Woman mountain range near the southwest corner of the claim area.117

It is apparent from the oral history testimony that the Shuswap tribe made use of the lands demarcated by Chief Neskonlith's boundaries and also lands outside those boundaries. In some cases, primarily near the southern boundary, there is ample evidence regarding settlements, gardens, fields, and spiritual areas, although the record regarding the location of grazing lands and the size of the Bands' herds at the time remains unclear. Also, the oral history and the documentary record do not present a clear picture of how frequently the remote northern area of the reserve claimed by Chief Neskonlith was used, but the Elders did speak of hunting and trapping northwest of Adams Lake, and no doubt their ancestors travelled throughout the whole territory.

These and other Elders who spoke to the panel provided valuable testimony on the traditional and modern uses of the land.

**Conclusion**

In answer to Issue 1, whether a reserve was created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian

---

114 ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 123–26, 127, 131–33, Dr. Mary Thomas).
115 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 55–66, Jimmy Arnouse).
116 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 86, 89, Joe Michel).
Bands in or about 1862, the panel concludes that a reserve was not legally created in 1862.

**ISSUE 2  REDUCTION OF THE NESKONLITH DOUGLAS RESERVE**

2 If a colonial reserve was created, was it reduced by the colonial administration?

The panel has concluded that a colonial reserve was not created. It is, therefore, not necessary to respond to this question.

We note, however, that the reserve-creation process and the process of confirming the location, acreage, and boundaries of Indian reserves in British Columbia continued for decades after the province joined Confederation in 1871. The record indicates that the Joint Indian Reserve Commission (JIRC), in existence between 1876 and 1878, was empowered “to fix and determine the number, extent, and locality of the Reserve or Reserves to be allowed to the Indians of British Columbia” \(^{118}\). In particular, the JIRC confirmed the Bands’ three reserves as surveyed by Edgar Dewdney in 1866, and assigned 11 additional reserves to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands. \(^{119}\) The record in this inquiry does not describe the later reserve commissions, in particular, the McKenna-McBride Commission, in effect from 1912 to 1916, and the Ditchburn-Clark Commission in the early 1920s, and their role, if any, in reviewing the Shuswap reserves, as questions related to these later commissions were not before the panel. \(^{120}\)

**ISSUE 3  BREACH OF FIDUCIARY DUTY OR HONOUR OF THE CROWN**

3 If a colonial reserve was created, then reduced by the colonial administration:  

i did the colonial Crown breach the honour of the Crown, or any fiduciary duty, trust duty, statutory duty, or duty of care to the Neskonlith, Adams Lake and Little Shuswap Indian Bands?

---

\(^{118}\) Minutes of Decision, Alexander Anderson, Archibald McKinlay, and G.M. Sproat, Joint Indian Reserve Commissioners, Indian Reserve Commission, August 13–16, 1877, no file reference available (ICC Exhibit 1a, pp. 1540–41).

\(^{119}\) British Columbia, Sessional Papers, 4th Parl., 3rd Sess., “Return of Indian Reserves,” February 20, 1885, 894–95 (ICC Exhibit 1a, pp. 1638–39). Appendix C is a chart prepared by the ICC summarizing the JIRC allotments described in the Returns from 1885.

\(^{120}\) The Historical Background to this report makes reference to other ICC inquiries into BC specific claims in which the recommendations of the McKenna-McBride and Ditchburn-Clark commissions were in issue.
has the federal Crown breached any such duty?

As the panel has concluded that a colonial reserve was not created, it is not necessary to respond to these questions.

The panel notes that the Bands raised an alternative claim in their written submission that had not been agreed to by the parties. The Bands state that if the ICC finds that a reserve was not lawfully established, the colonial Crown nevertheless had a fiduciary duty to complete the reserve-creation process. Further, the federal Crown had a fiduciary duty to ensure the reserve was confirmed as a reserve or was liable for the colonial Crown’s failure to do so. Canada objected to the introduction of this issue, arguing that it was outside the mandate of the ICC to consider an issue not before Canada when the claim was rejected. At the oral hearing, the panel did not strike the Bands’ arguments; however, after reviewing all the submissions, the panel concludes that this issue was not canvassed by both parties in sufficient detail to permit the panel to make findings.

ISSUE 4 OUTSTANDING LAWFUL OBLIGATION

4 In the circumstances of this claim, is there an outstanding lawful obligation on the part of Canada?

As a result of the panel’s findings in Issue 1, this question is answered in the negative.

In answer to Issue 1, whether a reserve was created for the pre-Confederation predecessor(s) of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in or about 1862, the panel concludes that a reserve was not legally created in 1862.

The first step in the creation of a legally binding reserve is the setting apart of the lands by the Crown. We find that Assistant Commissioner of Lands and Works (ACLW), William Cox, did not mark out the lands on behalf of the Crown in 1862. Consequently, the Crown had no knowledge of the boundaries staked by Chief Neskonlith. Although the Shuswap people knew where the boundary stakes were located, and the extent of the land they used and occupied, there could be no setting apart of the land without certainty by both parties as to the location of the boundaries.

The second factor in reserve creation is determining whether the Crown intended to create a reserve in 1862. Governor Douglas had the delegated authority to exercise the royal prerogative to legally create reserves, and intended to accomplish that objective, but his immediate priority was the identification of Indian and certain other Crown lands to protect them from pre-emption. Marking out lands by Assistant Commissioners of Lands and Works was the first of several steps in reserve creation, the most important of which was some evidence of Douglas's approval of the land as a reserve. This approval could not be delegated to a subordinate official at the rank of ACLW. William Cox had the authority to mark off the lands but he did not have authority to legally create reserves. Moreover, he could not delegate his authority to a person not representing the Crown, in this case Chief Neskonlith. Without the Crown knowing the boundaries, there was no meeting of the minds or common intention to create a reserve.

The Chiefs sought out Cox in 1862 to ask him to do for their people what he was doing for other bands. Their immediate priority appeared to be to safeguard their lands from encroachment by some settlers. In these
circumstances, it would not be reasonable for Chief Neskonlith to believe that by placing boundary stakes without the presence of a Crown official, a permanent reserve, binding on the Crown, would be created.

As the lands were not set apart and the Crown did not intend to create a lawful reserve in 1862, it is not necessary to address other aspects of reserve creation, including acceptance by the Bands of the land set apart by the Crown and proof that they started to use that land.

Based on the panel’s conclusion that a reserve was not created in 1862, it is unnecessary to address the remaining issues in this inquiry.

We therefore recommend to the parties:

That the claim of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands regarding the Neskonlith Douglas Reserve not be accepted for negotiation under Canada’s Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Sheila G. Purdy  
Commissioner (Chair)

Daniel J. Bellegarde  
Commissioner

Jane Dickson-Gilmore  
Commissioner

Dated this 24th day of June, 2008.
APPENDIX A

HISTORICAL BACKGROUND

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS: NESKONLITH DOUGLAS RESERVE INQUIRY

INDIAN CLAIMS COMMISSION
CONTENTS

Introduction  163
Colonial British Columbia and the Indian Land Question  164
    Douglas and the Colony of Vancouver Island  164
    Douglas and the Colony of British Columbia  165
Cox, Assistant Commissioner of Lands and Works  166
Land Policies Revisited  168
Settlement of the Claim Area  170
A New Indian Land Policy for the Colony  173
Reduction of Neskonlith, Adams Lake, and Little Shuswap Reserves  174
    Cox’s 1862 Meeting with Chief Neskonlith Revisited  174
    Moberly’s Trip to the Shuswap Area, 1865  177
Stakes Placed by Chief Neskonlith  180
Dewdney Survey, 1866  183
Reductions on the Lower Fraser  186
Confederation, 1871  189
Joint Indian Reserve Commission, 1876–78  197
Later Reserve Commissions  198
INTRODUCTION

The reserves of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands are located approximately 50 to 60 kilometres northeast of Kamloops, along the shores of the South Thompson River, Adams Lake, and Little Shuswap Lake in south-central British Columbia.

The Neskonlith, Adams Lake, and Little Shuswap Indian Bands comprise one Secwepemc, or Shuswap “tribe,” which belongs to the larger Secwepemc Nation. The Secwepemc Nation is composed of several tribes, which acknowledge their relation to the others and speak a common Secwepemc language, although some have developed their own dialect. At a community session held in July 2005, the then Chief of the Adams Lake Indian Band, Ron Jules, described the contemporary Secwepemc Nation as follows: “[T]oday we are 17 tribes left in the Secwepemc Nation. From Williams Lake to Cache Creek, Bonaparte to Invermere, over toward Jasper and back to Williams Lake, and there are 17 Chiefs.”

Traditionally, the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, as one tribe, divided the lands they occupied among family groupings in a number of “settlement areas.” The oral history of the community indicates that, during the period with which this inquiry is concerned, the members of that tribe recognized Chief Leon Neskonlith as their leader. Furthermore, oral history indicates that the Shuswap tribe was later divided into three separate bands (Neskonlith, Adams Lake, and Little Shuswap) by the Department of Indian Affairs.

Before British Columbia joined Confederation in 1871, administration of the lands within the region occupied by the Neskonlith, Adams Lake, and Little Shuswap Indian Bands was the responsibility of the mainland colony of British Columbia, which was created in 1858 primarily to deal with increasing settlement resulting from the Fraser River gold rush. For the most part, no treaties were negotiated with the resident tribes by either the government of the colony of British Columbia or, after 1871, the Canadian government, and...
traditional band lands were never formally surrendered or ceded. Furthermore, no systematic survey of the colony was undertaken by the colonial government, despite steady settlement. This situation culminated in what has been referred to as the “Indian Land Question,” which, simply put, was: how to manage Bands and their lands while encouraging and accommodating the settlement of the colonies.

**COLONIAL BRITISH COLUMBIA AND THE INDIAN LAND QUESTION**

**Douglas and the Colony of Vancouver Island**

The establishment of the colony of Vancouver Island preceded development of the colony of British Columbia on the mainland. On May 16, 1851, Sir James Douglas was appointed Governor of Vancouver Island by the British government. Governor Douglas was informed that:

> Her Majesty’s Gov’t especially rely on your knowledge and experience obtained in your long service under the Hudson’s Bay Co. You may rely on their support in the execution of such reasonable measures as you may desire for the protection of the Natives, the regulation of their intercourse with the Whites ...

Governor Douglas was granted:

full power and authority to make constitute and ordain laws, statutes and ordinances, for the public peace, welfare, and good government of Our said Island and its dependencies, and the people and inhabitants thereof ... which said laws, statutes and Ordinances are not to be repugnant, but as near as may be agreeable to the laws and statutes of this Our United Kingdom of Great Britain and Ireland.

On July 31, 1858, Governor Douglas was instructed by the Secretary of State for the Colonies, E.B. Lytton, “to consider the best and most humane means of dealing with the Native Indians” in the colony of Vancouver Island, while cautioning that “[t]he feelings of this Country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them.” Lytton was of the opinion that:

---

10 Transcript of Letters Patent, Her Majesty of the United Kingdom of Great Britain and Ireland to James Douglas, Vancouver Island, May 16, 1851, British Columbia Archives (hereafter BCA), CO 381/77, pp. 81–103 (ICC Exhibit 1a, p. 28).

11 E.B. Lytton to James Douglas, Governor, August 14, 1858, BCA, CO 60/1, pp. 38–49 (ICC Exhibit 1a, pp. 79–80).


13 E.B. Lytton to Governor Douglas, July 31, 1858, BCA, CO 410/1, pp. 147–59; Library and Archives Canada (hereafter LAC), RG 10, vol. 11028, file SRR-1 (ICC Exhibit 1a, p. 67).
this question is of so local a character that it must be solved by your knowledge and experience, and I commit it to you in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened [sic] humanity can suggest. Let me not omit to observe that it should be an invariable condition to all bargains or treaties with the Natives for the cession of Lands possessed by them, that subsistence should be supplied to them in some other shape ... 14

On March 14, 1859, Governor Douglas reported as follows:

I have the honour to acknowledge the receipt of your Despatch ... containing many valuable observations on the policy to be observed towards the Indian tribes of British Columbia, and moreover your instructions directing me to inform you if I think it would be feasible to settle those tribes permanently in villages;

... 8. Anticipatory reserves of land for the benefit and support of the Indian races will be made for that purpose in all the districts of British Columbia inhabited by native tribes. Those reserves should in all cases include their cultivated fields and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land.

9. In forming settlements of natives, I should propose, both from a principle of justice to the state and out of regard to the well-being of the Indians themselves, to make such settlements entirely self-supporting ... 15

Douglas and the Colony of British Columbia

The discovery of gold in the Fraser River in the spring of 1858 and the gold rush that ensued prompted the establishment of a government presence in the area. 16 On August 2, 1858, An Act to Provide for the Government of British Columbia was passed which, in part, established a separate government under British law in the new colony (previously known as New Caledonia), set out its boundaries, and exempted the colony of Vancouver Island from the Act. 17 On September 2, 1858, an Order of the Queen in Council was issued “empowering the Governor of British Columbia to make Laws and to provide for the Administration of Justice in the said Colony.” 18

In November 1858, James Douglas was appointed Governor of the colony of British Columbia. Douglas also retained his commission as Governor of Vancouver Island, but the two colonies were administered separately until 1866. On November 27, 1858, at a ceremony held in the community of Langley, BC, Governor Douglas proclaimed “English Law to be the law of the Colony” of British Columbia, and also proclaimed An Act to Provide for the Government of British Columbia to be in effect. 19 On December 2, 1858, Governor Douglas issued Proclamation No. 11, vesting in himself the authority, as Governor, “to grant to any person or persons any Land belonging to the Crown in the ... Colony [of British Columbia].” 20 A short time later, in February 1859, Governor Douglas issued Proclamation No. 13, which declared that “[a]ll the lands in British Columbia, and all the mines and minerals therein, belong to the Crown in fee” 21 and that the Executive had the authority to “reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.” 22

Cox, Assistant Commissioner of Lands and Works

William Cox, who was a Magistrate, Justice of the Peace, and Assistant Gold Commissioner for the Rock Creek District, 23 was appointed Assistant Commissioner of Lands and Works (ACLW) at Rock Creek in February 1861. 24 Cox received a circular containing the following instructions: 25

I have to communicate to you by direction of His Excellency the Governor the following rules and regulations for your guidance in your capacity as Assistant Commissioner of Lands, and in your dealings in that capacity with the Chief Commissioner.

19 James Douglas, Governor, to Edward Bulwar Lytton, Secretary of State, November 27, 1858, BCA, CO 60/1, pp. 437–39 (ICC Exhibit 1a, pp. 233–35). Also see An Act to Provide for the Government of British Columbia, August 2, 1858 (ICC Exhibit 6b).
20 Proclamation No. 11 (131), December 2, 1858, RSBC 1871, App., 55 (ICC Exhibit 6a, p. 1).
21 Proclamation No. 13 (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p.1).
22 Proclamation No. 13 (166), February 14, 1859, RSBC 1871, App., 55 (ICC Exhibit 6c, p.1).
23 The present-day community of Rock Creek is located approximately 300 kilometres southeast of Kamloops, between the towns of Osoyoos and Greenwood in the southern Okanagan region, near the international boundary. Historical documents indicate that Rock Creek was the base of Cox’s operations.
24 William Cox, Assistant Commissioner of Lands and Works (ACLW), Rock Creek, BC, to Colonel Moody, Chief Commissioner of Lands, February 12, 1861, BCA, GR 1372, file 375/3a (ICC Exhibit 1a, p. 429).
25 These instructions were addressed to Peter O’Reilly on December 17, 1860 (referenced at footnote 23), who was similarly appointed. A marginal note on the document states that a “Similar Circular to the above sent to ... W.[G]. Cox Rock Creek.”
1st. You are on all occasions to follow such instructions as may be conveyed to you by the Chief Commr. with respect to the sale or disposition of the Crown Lands, and you are to make all reports to him direct, furnishing him with such returns as he may from time to time require.26

In a letter to Assistant Commissioner Cox dated March 6, 1861, R.C. Moody, the Chief Commissioner of Lands and Works (CCLW), wrote:

I have recd. instructions from H.E. the Gov’r. to communicate with you on the subject & to request that “you will mark out distinctly all the Indian Reserves in your District and define their extent as they may be severally pointed out by the Indians themselves.”27

Although Assistant Commissioner Cox had not yet marked out any reserves in the Rock Creek area, his superior, R.C. Moody issued instructions to Captain R.M. Parsons of the Royal Engineers, explaining how reserves were to be marked out on the ground. Moody instructed that reserves were to be “Mark[ed] out successively [and] as early as practicable by posts [and] in any other clear [and] permanent ways Boundaries of Lands claimed by Indians.”28 R.M. Parsons replied to the CCLW on April 15, 1861, asking a number of specific questions. Parsons’s questions and Moody’s answers are quoted at length below:

With reference to your Order to lay out the “Boundaries of Lands claimed by Indians” from the Harrison River to the Sea. I have the honor to ask information on the following points.

1. What extent of land is allowed for each Village? or what proportion is it to be as to the number of male occupants?
   [Marginalia/answer – ] What the [illegible word] of the village points out – within reason. If anything extreme is asked for postpone decision until further communication with me.

2. Many Indian families having Summer and Winter residences widely separated in what way should the land be appropriated?

...  

4. Indian Potato patches are likewise scattered [but] most portions of tolerably open grounds, when these are in groups and manifestly are in occupation by a neighboring village what allowance is to be made for them?

26 William Young to P. O'Reilly, December 17, 1860, BCA, British Columbia, Colonial Secretary, Correspondence Outward, July 1860–September 1861 (miscellaneous letters), pp. 153–54 (ICC Exhibit 1a, pp. 426–27).
27 R.C. Moody, Chief Commissioner of Lands and Works (CCLW), to William Cox, ACLW, March 6, 1861, BCA, GR 2900, vol. 2, pp. 144–45 (ICC Exhibit 1a, pp. 443–45).
28 R.C. Moody, Colonel Royal Engineers and CCLW, to Parsons, Captain, Royal Engineers, April 13, 1861, BCA, C/AB/50.69/7 (ICC Exhibit 1a, p. 458).
Marginalia/answer — As claimed.
5. When the Posts or Marks are inserted in the ground is it to be explained to
[illegible] village that the Land so staked out is [bona] fide allotted to that
settlement?
[Marginalia/answer —] [yes]
carrying out this order?
[Marginalia/answer —] In this you must use your own discretion and the
greatest Economy communicating [to me] from time to time.29

Parsons then instructed his subordinates to do the same, with one addition.
Captain Parsons stated: “Colonel Moody desires that the Indians shall put
down the Stakes themselves and that you look at them and report to him the
position and quantity of the land claimed.”30

LAND POLICIES REVISITED
As those instructions were being issued, Governor Douglas continued to work
toward his preferred permanent solution to the Indian land question, which
was to purchase Aboriginal interest in lands. In March 1861, Governor
Douglas wrote to the Duke of Newcastle, explaining his vision for the
settlement of the colony of Vancouver Island and the setting aside of reserves
for Indian bands:

I have the honour of transmitting a Petition from the House of Assembly of
Vancouver Island to Your Grace, praying for the aid of Her Majesty’s Government
in extinguishing the Indian Title to the public lands in this Colony; and setting forth,
with much force and truth, the evils that may arise from the neglect of that very
necessary precaution.

2. As the native Indian population of Vancouver Island have distinct ideas of
property in land, and mutually recognize their several exclusive possessory rights
in certain Districts, they would not fail to regard the occupation of such portions of
the Colony by white settlers, unless with the full consent of the proprietary Tribes,
as national wrongs, and the sense of injury might produce a feeling of irritation
against the Settlers, and perhaps disaffection to the Government that would
endanger the peace of the country.

3. Knowing their feelings on that subject, I made it a practice, up to the year
1859, to purchase the Native rights in the land, in every case, prior to the
settlement of any District: but since that time in consequence of the termination of

29 Captain R.M. Parsons, Royal Engineers, to Colonel Moody, Royal Engineers and Commissioner, April 15, 1861,
BCA, CAB/30/6j/5 (ICC Exhibit 1a, pp. 459–61).
30 Captain R.M. Parsons, Royal Engineers, to Lieutenant-Corporal Turner, [April 30, 1861], BCA, CAB/30/6j/5
(ICC Exhibit 1a, pp. 466–67). Original emphasis. Captain Parsons issued similar instructions to Sapper
Turnbull; see R.M. Parsons, Captain, Royal Engineers, to Turnbull, Sapper, [Royal Engineers], May 1, 1861,
the Hudson’s Bay Company’s Charter, and the want of funds, it has not been in my power to continue it. Your Grace must indeed be well aware that I have, since then, had the utmost difficulty in raising money enough to defray the most indispensable wants of Government.31

Governor Douglas went on to propose that the imperial government fund the purchase of Indian lands through a loan to the colony of £3,000, eventually to be repaid through the sale of the colony’s Crown lands.32 The British government apparently concurred with Governor Douglas’s opinion that the Indians’ interest in the land should be extinguished by payment of monetary consideration, but it disagreed with the Governor’s proposal that the imperial government fund such purchases, either through a loan or other means. A marginal note found on Governor Douglas’s proposal reads as follows:

The early settlement of this matter is of much importance. I frequently am called upon to see at this office persons of all [classes] desirous of settling in V.C. Isl. or B. Columbia, and one of the questions proposed to me is generally how the claims of the natives to Land are arranged. To which I have had to [ans.] that I concluded they w[ould] have to be bought up. But this has not been quite satisfactory to an enquiring settler ... Therefore if these Indian claims c[ould] be fairly extinguished the arrangement w[ould] facilitate immigration. But [buying] them by means of a loan from the British Exchequer is probably questionable. I do not see why a loan sh[ould] not be raised in the Colony, the amount wanted being only £3000.33

On June 12, 1861, a second appeal was made to the imperial government to provide the estimated £3,000 required to purchase the Indians’ interest in lands in the colony. In a letter originating from the Immigration Office, J.W. Murdoch stated:

The assembly represent that nearly three years ago many Colonists purchased land over which the Native Title has not yet been extinguished, at the rate of £1 per acre that the natives, being well aware of the sum paid to other natives for the extinction of their title refuse to allow the Colonists to take possession of the Land that any attempt to do so by force would produce collisions and render the natives, who are numerous and warlike, hostile to settlers, and that the existence of the

33 Marginalia to Mr Eliot found on James Douglas, Victoria, Vancouver Island, to Duke of Newcastle, March 25, 1861, BCA, B390-B48, CO 305/17 (ICC Exhibit 1a, p. 455).
native title has deterred many persons from settling in the Island. The House of Assembly express an opinion that the Imperial Government is bound to extinguish the Native Title, and pray that early steps may be taken for that purpose.\footnote{J.W. Murdoch, Immigration Office, Lands, Vancouver Island, to Sir Frederic Rogers, June 12, 1861, BCA, B390/B408, CO 305/18 (ICC Exhibit 1a, pp. 470–72).}

Again, marginalia recorded on this letter indicates that the imperial government agreed that underlying Aboriginal interests should be extinguished, although officials were reluctant to commit the imperial government to the costs associated with the extinguishment.\footnote{See marginalia on J.W. Murdoch, Immigration Office, Lands, Vancouver Island, to Sir Frederic Rogers, June 12, 1861, BCA, B390/B408, CO 305/18 (ICC Exhibit 1a, p. 477).}

By October 1861, a decision was reached regarding Governor Douglas's proposal that the imperial government spend the requisite £3,000 to purchase Aboriginal lands in the colony. In a letter dated October 4, 1861, the decision of the Treasury was communicated:

\[\text{[I]t appears that the Lords Commissioners of the Treasury to whom the matter had been submitted, are not prepared to purchase up the native Title at the expense of this Country and do not view the present application as one for a loan, since the House of Assembly had asserted the liability of the Home Government to bear the charge of extinguishing the Title. Their Lordships moreover consider that the Governor's best course would be to follow his previous practice of purchasing the native rights over such land only as was immediately required for settlement, and not on so large a scale at once as to require that a loan should be raised for the purpose.}\footnote{Walcott, Emigration Office, [author not identified further], to Sir Frederic Rogers, [Undersecretary of State for the Colonies], October 4, 1861, BCA, B390–B408, CO 305/18 (ICC Exhibit 1a, pp. 492, 493–95).}

On October 19, 1861, the Duke of Newcastle informed Governor Douglas that his application of March 25, 1861, was rejected and that the colonial legislature should not expect financial assistance from the imperial government.\footnote{Newcastle to Governor James Douglas, October 19, 1861, [BCA, file reference unavailable] (ICC Exhibit 1a, pp. 500–1).}

\textbf{SETTLEMENT OF THE CLAIM AREA}

Settlement activity in the Rock Creek District continued into 1862, although William Cox had not yet set aside any land for the Neskonlith, Adams Lake, and Little Shuswap Indian Bands.\footnote{R.C. Moody, Colonel, Royal Engineers, and CCLW, to Colonial Secretary, March 12, 1862, [BCA, file 390] (ICC Exhibit 1a, pp. 530–31).} On June 9, 1862, Colonial Secretary
William A.G. Young wrote to R.C. Moody, CCLW, stating that Governor Douglas:

was under the impression that the work of marking out (*not surveying*) the Indian Reserves had been long ago carried out, where requisite, under the instructions conveyed to you by His Excellency on the 5th March, 1861. ... [I]t appears to His Excellency that for all present purposes, the marking of such Reserves by conspicuous posts driven into the ground would be sufficient, and that the survey thereof could be postponed until the Colony can better afford the expense.  

In the fall of 1862, William Cox was sent to the Kamloops area to investigate a complaint by an Indian, Shimtikum, that settlers were encroaching on his cultivated fields, and to mark out the lands. On that trip, Cox also met with “Petite Louis, Chief of Kamloops Indians,” and Chiefs “Care-goire [Gregoire] & son Nesquimilth” of the Shuswap tribe. During this visit, Cox provided them with “Notices” reading as follows: “All persons are hereby cautioned not to cut timber, interfere, or meddle in any way with the rights of the Indians on this Reserve.”

Unlike those given to the Kamloops Chief, however, the notice given to Chiefs Gregoire and Neskonlith contained no description of the boundaries. Cox’s record book from 1862 records that Indian Reserve (IR) 45 at Shuswap Lake was “not inspect [?] marked out” and again failed to describe the boundaries. Cox reported the locations of some of the newly reserved lands in a letter to the CCLW Moody, dated October 31, 1862, but he did not mention a reserve being set aside at Shuswap Lake.

In 1863, complaints made by bands at Coquitlam River drew Governor Douglas’s attention to the fact that some bands were dissatisfied with the size of their reserves and, as well, the possibility that the Governor’s policy was not being implemented according to instructions. In that instance, Governor Douglas agreed that the Coquitlam reserves were indeed too small and took

---

40 J.J. Young, Acting Private Secretary, Ferry Thompson River, to William Cox, October 6, 1862, BCA, C/AB/30.1J/4, pp. 316–17 (ICC Exhibit 1a, pp. 555–57).
41 Notice, W.G. Cox, Justice of the Peace, Kamloops, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 570). See also Notice, W.G. Cox, Justice of the Peace, Kamloops, October 31, 1862, BCA, GR 1372, file 377/256 (ICC Exhibit 1a, p. 567).
42 Notice, W.G. Cox, Justice of the Peace and Magistrate, Shuswap, October 31, 1862, BCA, file 944 (ICC Exhibit 1a, p. 568).
43 Notes, William George Cox, Magistrate, Rock Creek, BC, c. 1862, BCA, GR 0857 (ICC Exhibit 1a, p. 582).
44 William George Cox, Kamloops, to R.C. Moody, Colonel and CCLW, October 31, 1862, BCA, GR 1372, file 377/25b (ICC Exhibit 1a, pp. 572–77).
the opportunity to reiterate his policy regarding setting out reserves. Douglas wrote to the CCLW on April 27, 1863, stating:

Notwithstanding my particular instructions to you, that in laying out Indian Reserves the wishes of the Natives themselves, with respect to boundaries, should in all cases be complied with, I hear very general complaints of the smallness of the areas set apart for their use.

I beg that you will take instant measures to inquire into such complaints, and to enlarge all the Indian Reserves between New Westminster and the mouth of Harrison River, before the contiguous lands are occupied by other persons.45

In his reply to the Governor’s letter, Colonel Moody, CCLW, disagreed with the complaints of the Bands:

The reserve in question was most carefully laid out, the Indians being present, and after they had themselves marked according to their own wishes the bounds, the area was further enlarged. I resisted the appeal of the neighbouring settler, and acceded to the amplest request of the Indians.

... I have never yet received, nor heard from any source whatever, a complaint from the Indians in reference to the extent of their boundaries. In fact, in every case the wishes of the Indians are carefully consulted, and the bounds are widely extended beyond the limits marked out by themselves.

Any statement, contrary to the above, made to Your Excellency from whatsoever quarter is absolutely without foundation. ... The interests of the Indian population are scrupulously, I may say jealously, regarded by myself and every officer and man under my command.46

Repling to Moody, Governor Douglas reiterated the policy to which he expected complete adherence by his staff:

2. In reply thereto I am to acquaint you that His Excellency considers that the instructions contained in his letters to you of 5th March and 5th April, 1861, and 27th April, 1863, cover the whole question, and he requests that those instructions may be carried out to the letter, and in all cases where the land pointed out by the Indians appears to the officer employed on the service to be inadequate for their support, a larger area is at once to be set apart.47

45 James Douglas, Governor, to CCLW, April 27, 1863, BCA, GR 30/1J/9, pp. 397–98 (ICC Exhibit 1a, pp. 585–86).
46 R.C. Moody, Colonel, Royal Engineers, and CCLW, to Governor, April 28, 1863, BCA, GR 29/00, vol. 9, pp. 282–83 (ICC Exhibit 1a, pp. 589–90). Original emphasis.
47 William A.G. Young, Colonial Secretary’s Office, to CCLW, May 11, 1863, BCA, GR 13/72, file 3314 (ICC Exhibit 1a, pp. 596–97). Young handled Governor Douglas’s correspondence.
James Douglas retired as Governor of both the colony of British Columbia and the colony of Vancouver Island in April 1864. In one of his last addresses to the Legislative Assembly, Governor Douglas proudly recounted the colony's accomplishments with regard to setting aside Indian reserves:

The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favorite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the natives. The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.

The Indians themselves have no power to sell or alienate these lands, as the Title will continue in the Crown, and be hereafter conveyed to Trustees, and by that means secured to the several Tribes as perpetual possession.

That measure is not however intended to interfere with the private rights of individuals of the Native Tribes, or to incapacitate them, as such, from holding land; on the contrary, they have precisely the same rights of acquiring and possessing land in their individual capacity, either by purchase or by occupation under the Pre-emption Law...

I have been influenced in taking these steps by the desire of averting evils pregnant with danger to the peace and safety of the Colony, and of confirming by those acts of justice and humanity, the fidelity and attachment of the Native Tribes to Her Majesty's rule.48

A NEW INDIAN LAND POLICY FOR THE COLONY

Following the retirement of Governor Douglas, the imperial government appointed Frederick Seymour as Governor of the colony of British Columbia and Edward Kennedy as Governor of the colony of Vancouver Island.49 Shortly after Governor Seymour's appointment, the Legislative Council of the colony of British Columbia unanimously passed a resolution which contrasted significantly with the address Douglas made before the council five months earlier. The resolution, dated May 3, 1864, reads as follows:

---


49 Jacques Siegrist, “Establishment and Reduction of the Pre-Confederation Neskonlith, Adams Lake, and Little Shuswap Lake Band[s] Indian Reserves,” Specific Claims Branch Historical Review, undated, p. 3; edited from Dorothy Kennedy, “The Establishment and Reduction of Cox Reserves in the Shuswap Area,” for the BC Indian Language Project (ICC Exhibit 3a, p. 4).
Resolved, That whereas certain reservations in the valley of Chilwayhook and elsewhere throughout the Colony are being made for the benefit of the Indians, and whereas said reservations are considered to be unnecessarily large (10 acres to each family), and in several instances including lands already pre-empted and improved by actual settlers, thereby seriously interfering with the development of the agricultural resources of the Colony; be it resolved that His Excellency be respectfully requested to give the matter his consideration at as early a date as convenient, in order to avoid difficulties between the Settlers and the Indians.

In an address to the Legislative Council on May 4, 1864, the new Governor stated “[y]our resolution of yesterday’s date ... respecting the Indian Reserves, shall have, as it deserves, my anxious consideration. I have not yet sufficient experience to deal with the question.”

Two days later, on May 6, 1864, Governor Seymour appointed Joseph William Trutch as Surveyor General for the colony of British Columbia, replacing R.C. Moody. Trutch also held the position of Chief Commissioner of Lands and Works (CCLW).

**REDUCTION OF NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP RESERVES**

**Cox’s 1862 Meeting with Chief Neskonlith Revisited**

In the summer of 1865, the Gold Commissioner and Magistrate for the Cariboo District, Philip Nind, travelled through the Rock Creek region to investigate the sale of alcohol to Indian persons, as well as to attempt to capture a fugitive. After meeting with Chief Neskonlith during his travels, Nind wrote to William Cox, inquiring about the reserves Cox “set aside” for Chief Neskonlith in 1862:

The Indians in support of their claim say that you gave them authority to take up this land and that they hold papers from you wh. however I have not seen. Can you give me any information on this point as I see there will be a good deal of trouble.

---

52 Frederick Seymour, Governor, Colony of BC, to unidentified recipient, May 6, 1864, BCA, GR 1372, file 932 (ICC Exhibit 1a, pp. 768–70).
53 Arthur Birch, Colonial Secretary, Colonial Secretary’s Office, to Joseph W. Trutch, May 12, 1864, BCA, C/AB/30 1/10 (ICC Exhibit 1a, p. 771).
54 Philip Nind to A. Birch, July 12, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, p. 842).
55 P.H. Nind to William Cox, July 3, 1865, BCA, GR 1372, file 1256/6 (ICC Exhibit 1a, p. 841).
56 Philip Nind to A. Birch, July 12, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, p. 843).
ahead when this part of the country comes to be settled. These Indians seem to be well disposed now, but I think they might prove troublesome & formidable.\footnote{P. H. Nind to William Cox, July 3, 1865, BCA, GR 1372, file 1256/6 (ICC Exhibit 1a, p. 841).}

On July 16, 1865, Cox responded to Nind, recounting his 1862 travels through the area:

Just before leaving Kamloops, I received instructions from Governor Douglas to mark out all the Indian Reserves in the neighbourhood. ... The Shouswap tribes called upon me to do the same for them, as some frenchmen were encroaching upon their grounds. I could not mark off their boundaries at that time on the ground, but chalked out the position and extent of the Shouswap Reserve at Kamloops, for the chief, and gave him papers to post up. There could be no mistake.\footnote{William George Cox to Philip Nind, July 16, 1865, in British Columbia, \textit{Papers Connected with the Indian Land Question, 1850–1875, 1877} (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 51 (ICC Exhibit 1a, p. 854).}

Cox went on to state: “I shall send you herewith a sketch of same as well as I can recollect it. The probability is that my papers have been removed, and the grounds allowed by me greatly added to.”\footnote{William George Cox to Philip Nind, July 16, 1865, in British Columbia, \textit{Papers Connected with the Indian Land Question, 1850–1875, 1877} (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 51 (ICC Exhibit 1a, p. 854). Sketch by W.G. Cox, c. 1865 (ICC Exhibit 7a, p. 3). See Map 2.}

On July 17, 1865, following the receipt of Cox’s sketch and report, Nind wrote to Arthur Birch, Colonial Secretary and officer in charge in Governor Seymour’s absence, informing him as follows:

That branch of the Shuswap tribe which live on the Upper Thompson and Shuswap Lakes numbering I am informed less than five hundred souls claim the undisputed possession of all the land on the north side between the foot of the Great Shuswap Lake and the North River a distance of nearly fifty miles where lie thousands of acres of good arable and pasture land admirably adapted for settlement. ... Another branch of the same tribe not so numerous as the first claim all the available land on the North River, extending northward many miles above the mouth, which also possesses attraction to the settler. These Indians do nothing more with their land than cultivate a few small patches of potatoes here and there – they are a vagrant people, who live by fishing, hunting and bartering skins, as the cultivation of the ground contributes no more to their livelihood than a few days digging of wild roots but they are jealous of their possessory rights, and are not likely to permit settlers to challenge them with impunity; nor, such is their spirit and unanimity would many settlers think it worth while to encounter their undisguised opposition. This then has the effect of putting a stop to settlement in
these parts. Already complaints have arisen from persons who have wished to take up land in some of this Indian territory, but who have been deterred by Indian claims. At present all the land pre-empted is on the south side of Thompson Valley for no other cause than this. ...

It seems to me undesirable that the principle of a settler purchasing or acquiring his right to land from the natives should ever be admitted. I assume that this is the prerogative of the Government of the Colony which should alone be able to confer an indefeasible [sic] title to its lands. Certainly what one man might obtain by influence over a chief or intermarriage with a tribe or other means more questionable might be refused to another who yet carried out all the requirements of the law. One would live in security; the other would always be subject to molestation and danger.60

Nind went on to recommend that:

the only method of settling this matter satisfactorily and with equity to both Indians and whites will be for the Government to extinguish the Indian claims, paying them what is proper for so doing and giving them certain reservations for their sole use. These Indians are now quiet and not ill-disposed to the whites but they are capable of giving a good deal of trouble if they imagine their rights are invaded.61

Following the receipt of Nind’s letter, the Colonial Office asked the CCLW and Surveyor General, Joseph Trutch, for his opinion on the size of the Shuswap reserves. On September 20, 1865, Trutch wrote:

I have the honor to state that the settlement of the boundaries of Indian Reserves is, in my opinion, a question of very material present and prospective importance, and should engage immediately the attention of all interested.

I quite concur in Mr. Nind’s remarks on the Kamloops and Shuswap Reserves, taking for granted that the premises in which they are founded are correct, but as this Department is entirely without official information as to the location or extent of any Indian Reserves, I am unable to supply any exact data on this subject.

It appears most advisable that it should be at once constituted the definite province of some person or persons, duly authorized for that purpose, to make a thorough enquiry into this subject throughout the Colony. To ascertain as exactly as practicable what lands are claimed by Indians. What lands have been authoritatively reserved and assured to the various tribes, and to what extent such Reserves can be modified with the concurrence of the Indians interested in them — either with or without money or other equivalent.

I am satisfied from my own observation that the claims of Indians over tracts of land, on which they assume to exercise ownership, but of which they make no

60 Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, pp. 855–57).
61 Philip Henry Nind to A. Birch, Colonial Secretary, July 17, 1865, BCA, GR 504, file 1 (ICC Exhibit 1a, p. 857).
real use, operate very materially to prevent settlement and cultivation, in many
instances besides that to which attention has been directed by Mr. Nind, and I
should advise that these claims should be as soon as practicable Enquired into and
defined.62

Moberly’s Trip to the Shuswap Area, 1865
The Colonial Secretary concurred with the recommendation that the Shuswap
reserves be reduced, but was not willing to commit to a systemic review of the
acreages of reserves in the colony. On September 26, 1865, Trutch was
informed that:

    His Honor is fully impressed with the importance of defining these Reserves
throughout the Colony, but he is not prepared at this late season of the year to
commence a General System such as you recommend. His Honor however thinks it
very desirable that the Shouswap and Kamloops Reserves should be reduced,
without further delay, to reasonable limits As it would perhaps be a matter of
greater difficulty to settle the affair should the route to Kamloops become the main
thoroughfare to the Columbia River, I am therefore to request you to inform Mr.
Moberly that the Governor is very desirous of reducing the reserves to which
Mr. Nind makes allusion in his letter of the 17th July, last, and of which I forward a
Copy for your information and guidance and that you will authorize Mr. Moberly to
make enquiries on his way down, and to reduce these reserves if he is of opinion
that it can be effected without much dissatisfaction to the Indians. If however he
should be of opinion that difficulty will arise from such a course his duty will be to
collect on the spot all the information he can on the subject, and furnish you with a
full Report thereon, in order that the Government may have some data to go by in
coming to a decision in the matter.

    His Honor further suggests that Mr. Nind be at once requested to furnish
Mr. Moberly with a Copy of a Report from Mr. Cox on this subject ...63

    In accordance with those instructions, Walter Moberly, Assistant
Commissioner of Lands and Works,64 was provided with a copy of the 1865
Cox sketch and the report from Nind on October 5, 1865.65 Following this, on
October 10, 1865, Moberly received the following instructions from Joseph
Trutch, CCIW and Surveyor General:

62 Joseph W. Trutch, CCIW and Surveyor General, Department of Lands and Works, to Colonial Secretary,
September 20, 1865, BCA, file 942, folder 17 (ICC Exhibit 1a, pp. 909–11).
63 Charles Good for the Colonial Secretary to CCIW, September 26, 1865, BCA, file 942; GR 1372, file 334(2)
(ICC Exhibit 1a, pp. 916–19).
41, 46–49, 60–65 (ICC Exhibit 1a, p. 967).
65 Philip Henry Nind, Lytton, to W. Moberly, October 5, 1866, BCA, GR 1372, file 1259/42 (ICC Exhibit 1a,
pp. 928–29).
The Indian Reserves at Kamloops and Shuswap laid out by Mr. Cox being considered entirely disproportionate to the numbers and requirements of the Indians residing in those Districts His Honor has instructed me to direct you to make an investigation of the subject on your way back from the Columbia and to report on your return to this place whether in your opinion arrangements can be made to reduce the limits of these Reserves, so as to allow part of the lands now uselessly shut up in these Reserves to be thrown open to Preemption.66

Moberly arrived at the Indian reserve at Shuswap Lake in November 1865. The first meeting between Moberly and Chief Neskonlith occurred on November 7, 1865. Moberly recounted this initial visit as follows:

I explained to them that I had received instructions from the Government to ascertain where they had lands cultivated and then if agreeable to them that I would mark them off at once so that they should always know which were their lands where no other persons could intrude. They appeared quite willing that I should do so & having learnt from them that there were several Indian gardens on Adams Lake I told them I should go there & see them in order to know definitely what to do so that all their grounds should be properly marked off & secured to them at the same time.67

On November 8, 1865, Chief Neskonlith and some other band members told Moberly “that they did not wish me to mark off the ground, that it had been marked off by Mr. Cox who told them he had been instructed by Govr. Douglas to mark it off in the manner in which it was staked out.”68 This entry in Moberly’s notebook continued as follows:

On my enquiring if Mr. Cox had been to see these lands the Indians informed me he had not as he only came up the river to [illegible] point [illegible] on the little lake. I then learnt from the Indians that Nesquinilth had placed the stakes himself, that Mr. Cox had told them the lands not actually cultivated would do for them to raise cows on & that no person could intrude on them & that Gov[ernor] Douglas had told Mr. Cox to tell them so.69

66 Joseph W. Trutch, New Westminster, to W. Moberly, October 10, 1865, BCA, GR 1372, file 1259 (ICC Exhibit 1a, pp. 930–31).
Moberly then explained to the Band:

that if the Government authorized any officer to mark out grounds that it was the duty of the officer to see the grounds & also the stakes & that they were properly placed and that no officer could give lands unless sanctioned by the Government that it was my opinion that Government Douglas had authorized Mr. Cox to lay out reserves for them but that Mr. Cox had not laid them out as Government Douglas intended they should be & if so that the stakes as placed at present would amount to nothing. I also told them that the wish of the Government was to preserve to them all lands that they at present cultivated & to have them properly marked so that both Indian & white should know which were Indian lands & which were not, that at present the Government did not know, that the Indians were in doubt, and that the whites also were in doubt, that as the Indians did not wish me to lay off their lands I should not do so at present until I had definitely ascertained what Mr. Cox had told all the Indians, what status he had placed & what Government Douglas had authorized him to do. ... some of the Indians told me they also thought Mr. Cox had not laid off their ground as Government Douglas intended & they seemed quite convinced that what I told them about an officer first actually seeing the land & then seeing the stakes actually placed was as it ought to be & that he should not give lands he had never seen.70

On November 9, 1865, Moberly visited with band members at Adams Lake. Moberly reported that he:

showed them Mr. Cox’s sketch & explained that what he described in his sketch & note did not at all agree with the stakes set up by Nesquinilth & that therefore their garden here and on the opposite side & north end of Lake were not secured to them except by Nesquinilth’s stake which would not prevent the whites taking them. They told me Nesquinilth wanted them very much to move down to his place but they wanted to stay where they had always lived. I told them to stop then & that I would see the Government & have arrangements made so that their lands should not be intruded upon until properly staked out. ... They wished me to mark off their grounds as I showed them so as to include their potatoes & having told me this they hoped I would [illegible] them done. I explained to them that I wished to see all the Indians as far as Kamloops & let them all thoroughly understand what I wanted to do & what the status of plans by me would mean & then I would have their lands marked off.71


Walter Moberly reported on his November visit to the Kamloops and Shuswap Indian Reserves in a letter to CCLW Joseph Trutch, dated December 22, 1865:

When in possession of the above information and such as I gathered from the different letters and papers I enclose, as I found that Mr. Cox’s sketches and descriptions did not agree with the position of the marks set up I was quite at a loss what conclusion to arrive at with regard to them.  

With his letter, Moberly enclosed a copy of a sketch he prepared during his visit, depicting the lands staked and claimed by Chief Neskonlith and his followers as their reserve. Walter Moberly did not stake out any lands for any of the Bands at that time, but he explained to Chief Neskonlith and his followers that “their lands as now circumstanced w[oul]d not be intruded upon until staked out & that when staked out they would have permanent & undisturbed possession of them.” In his notebook, Moberly recorded that Chief Neskonlith “told me the Indians did not want to be deprived of the lands where they were.”

STAKES PLACED BY CHIEF NESKONLITH

The sketch provided by Walter Moberly in 1865 shows the locations of three stakes: one at Scotch Creek, one at Monte Creek, and the third at the north end of Adams Lake. At the community session, testimony was heard regarding the placement of stakes by Chief Neskonlith.

Elder Isaac James Arnouse, appearing on behalf of the Little Shuswap Indian Band, testified that, while hunting and fishing with his father as a child, he had regularly viewed rock cairns at the north end of Adams Lake, although

73 “Sketch showing Indian Claims on the North and Shuswap Reserves to accompany my report of the same date,” W. Moberly, December 22, 1865, no file reference available (ICC Exhibit 7e, p. 1).
77 Also referred to as “pins,” “posts,” or “pegs” in the community session testimony.
not where the stake is commonly marked on maps, and another at Scotch Creek. Elder Arnouse testified that he understood that the pins were placed under the cairns, although he never actually saw the stakes at either of these locations. Testimony was heard explaining that the rock cairns were erected to symbolize locations of special significance and protect the pins. The cairns were later cemented by William (Bill) Arnouse for further protection.

Elders Emery and Elton Arnouse, on behalf of the Little Shuswap Indian Band, also told of stories they had heard as children about a pin at Scotch Creek. Elder Emery Arnouse testified that he had the opportunity to view the pin before the cairn was erected. He described it as a “square pin ... about a half inch ... made of Metal [or] steel...flush to the ground.”

Elder Elton Arnouse testified that he often visited a rock cairn at the north end of Adams Lake as a child and was repeatedly told by his grandfather “to remember this place because some day somebody’s going to be asking you about it.” Elder Elton Arnouse testified that he had never seen the pin which he believes lies beneath the rock cairn and which, until it was washed away, was located at the north end of Adams Lake.

Elder Jones Ignace, appearing on behalf of the Adams Lake Band, testified that he had heard stories about a stake in the neighbourhood of Monte Creek, on the north side of the Thompson River. Elder Ignace further stated that Elder Anthony August:

“talked about that in the Douglas Reserve where the stakes were put in by Governor Douglas’s men. The two stakes, one in Scotch Creek and one in Monte Creek, that one I just mentioned. And the two that were supposed to be put in, were supposed to be put in by our people back in — way back in areas back, I guess it would be north, I guess.

... The top end of Adams Lake.”

80 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 57, 58, I.J. Arnouse).
81 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 16, 73, E. Arnouse).
82 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 55–60, I.J. Arnouse).
84 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 72–73, E. Arnouse).
85 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, p. 60, I.J. Arnouse).
86 ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 17–18, E. Arnouse; pp. 73–74, E. Arnouse).
87 ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 177, J. Ignace).
88 ICC Transcript, July 7, 2005 (ICC Exhibit 5a, p. 178, J. Ignace).
At the community session, Chief Ron Jules of the Adams Lake Band testified that the north corner of Chief Neskonlith’s reserve is located at Dunn Peak. Chief Jules described the boundary as follows:

across from the mouth of Monte Creek straight up north is right dead in line with Dunn Peaks, or Dunn Peak, which is one of the highest peaks in that mountain range. I’m not sure what mountain range. From there it goes over to the North Adams, and then down to Scotch Creek.

Browne Johnson Land Surveyors were hired during the inquiry to locate the three iron stakes identified by Moberly. With the assistance of James and Emery Arnouse from the Little Shuswap Band, Joe Johnson attempted “to locate the positions of petroforms and the location of stakes identified by members of the First Nation and to provide ... coordinates of these locations for mapping purposes.” Johnson found no evidence of an iron post, or of a rock cairn at the Adams Lake location. Evidence of a rock cairn was found at the Scotch Creek location; however, no evidence of an iron post was found. At Monte Creek, the third and final location, no evidence of a rock cairn or iron post was found; however, a petroform was located at this site.

Elder Sarah Denault, appearing on behalf of the Neskonlith Indian Band, stated that when Chief Neskonlith staked out the reserve for his followers, he did so for all three Bands. Furthermore, Elder Denault testified that, when Chief Neskonlith staked out the reserve, he “was not alone because he had other chiefs, you know, like – you know, saying yes, you need this, that’s good.” Elder Denault also testified that “the surveyor was there” as well, although she was unable to identify the surveyor. According to Elder Denault, Chief Neskonlith understood that he was staking out the boundaries of a reserve. During the community session, considerable testimony was

89 ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 196, Chief R. Jules).
90 ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 196, Chief R. Jules).
96 ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 25, S. Denault).
97 ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 37, S. Denault).
heard from Elders about the Bands’ use of the area staked by Chief Neskonlith.\footnote{ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 63–64, I.J. Arnouse; p. 14, E. Arnouse; p. 78, E. Arnouse; pp. 26–28, 32–33, E. Philip; pp. 82, 89, J. S. Michel); ICC Community Session, Map of Neskonlith Douglas Reserve area with reference numbers, prepared by Steve Murphy, GIS Analyst, Natural Resources Department, Adams Lake Indian Band (ICC Exhibit 5b, p. 11); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 162–73, J. Ignace; pp. 192–93, Chief R.Jules); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 43, S. Denault).}

\section*{DEWDNEY SURVEY, 1866}

On January 17, 1866, Joseph Trutch, CCLW and Surveyor General, wrote to the Colonial Secretary, reporting the results of Moberly’s visit. Trutch stated that the reserves at Shuswap Lake are “entirely disproportionate to the numbers or requirements of the Indian tribes.”\footnote{Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 982).} In advancing plans to reduce the reserves, Trutch advised as follows:

Two points remain to be determined. 1st. Whether or not Mr. Cox’s agency in the matter is binding on the Government; and Secondly, Are the boundaries of the Reserves now claimed by the Indians, those which Mr. Cox really gave them assurance of?

On the first point I cannot form an opinion as I am without any information as to the instructions given to Mr. Cox on the subject, but on the second I think there is reason to believe from what Mr. Cox stated to Mr. Birch in my presence, in August last at Richfield, and from the rough sketch furnished in his own handwriting, a copy of which is enclosed – that the extent of one at least, of these Reserves, that of the Shuswap tribe, has been largely added to, by the changing of the position of the boundary stakes by the Indian claimants.\footnote{Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 983–84).}

Trutch suggested, however, that if the government decided:

that Mr. Cox’s Reserves are to be observed, and that the tracts claimed by the Indians are only those which were actually made over to them by him, there will remain only to be determined whether it is advisable to purchase back from them such portions of these lands as are valuable for settlement.\footnote{Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 985).}

The next day, January 18, 1866, Arthur Birch, the officer in charge in the absence of the governor, addressed the Legislative Council, at which Joseph Trutch was present, on the issue of the Executive’s power regarding various matters, including Indian reserves. Birch stated:

\begin{itemize}
\item[99] ICC Transcript, July 6, 2005 (ICC Exhibit 5a, pp. 63–64, I.J. Arnouse; p. 14, E. Arnouse; p. 78, E. Arnouse; pp. 26–28, 32–33, E. Philip; pp. 82, 89, J. S. Michel); ICC Community Session, Map of Neskonlith Douglas Reserve area with reference numbers, prepared by Steve Murphy, GIS Analyst, Natural Resources Department, Adams Lake Indian Band (ICC Exhibit 5b, p. 11); ICC Transcript, July 7, 2005 (ICC Exhibit 5a, pp. 162–73, J. Ignace; pp. 192–93, Chief R.Jules); ICC Transcript, July 19, 2006 (ICC Exhibit 10e, p. 43, S. Denault).
\item[100] Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 982).
\item[101] Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 983–84).
\item[102] Joseph Trutch, CCLW and Surveyor General, Lands and Works Department, to Colonial Secretary, January 17, 1866, BCA, file 944; GR 2900, vol. 11, pp. 21–22 (ICC Exhibit 1a, p. 985).
\end{itemize}
Unforeseen obstacles have retarded the Government in carrying out the Resolution, adopted by this Council, as regards the Survey of Pre-empted Lands throughout the Colony. Arrangements are, however, in progress which will, I trust, enable the Chief Commissioner of Lands and Works to undertake this work without further delay. Measures will, at the same time, be taken to alter the present unsatisfactory system of Indian Reserves. I am in no way convinced of the necessity of any Legislative enactment for this purpose. In all matters connected with the Native Race a large discretionary power must necessarily, in my opinion, be left in the hands of the Executive.103

The Legislative Council acknowledged Birch’s address and, in concurring with his statements, replied: “We wait with much pleasure the determination expressed by Your Honor to carry out an early and definitive survey and settlement of our agricultural lands and to adjust the Indian Reserves.”104

One month later, the Legislative Council requested the Executive Council officials “inform this Council what steps have been or are to be taken with reference to the extensive Indian Reserves on the Okanagan Lake and Thompson River” as set aside by William Cox.105 The British Columbian newspaper recounted the Acting Colonial Secretary’s response as follows:

The hon. the Acting Colonial Secretary said that under a previous administration, large tracts of land had been laid off as Indian Reserves in the districts alluded to. The present Government considered these reserves excessive ... With respect to the Thompson River country, very large reserves had also been made and a surveyor was sent out last summer with instructions to reduce them, if it could be accomplished in a quiet and peaceable way. It was found, however, that these Indian[s] conceived that what had been granted to them by Sir James Douglas was irrevocably theirs, and they evinced no disposition to cede any portion of it to the Government, so that it was not deemed prudent to press the matter.106

By July 1866, reports of hostilities between the Indians and settlers and prospectors were received by the colonial government. A.G. Pemberton, a settler on the South Thompson River, wrote that the First Nations in that district “will not allow anyone to do anything on the land they claim, which is most inconvenient to intending settlers. They prevented us from even cutting down trees, and say they don’t want anything to be done until they see

104 Legislative Council, January 18, 1866, BCA, C/AB/20.1A/1, p. 236 (ICC Exhibit 1a, p. 999).
106 British Columbian, February 14, 1866 (ICC Exhibit 1a, pp. 1020–21).
you." On July 27, 1866, CCLW and Surveyor General Joseph Trutch reported that Surveyor Edgar Dewdney would be in the area of Kamloops, Shuswap, and Adams Lakes during the fall of 1866. Trutch also planned to visit the Shuswap reserves personally.

The documentary record indicates that CCLW and Surveyor General Trutch visited the Shuswap reserves sometime between July and September 1866. Although no official report penned by Trutch regarding this visit is included in the record of this inquiry, reference is made to it in subsequent correspondence.

In September 1866, Edgar Dewdney, accompanied by the Chiefs, surveyed three reserves for the Shuswap and Adams Lake Indian Bands. The Shuswap Indian Band received two reserves; Shuswap Indian Reserve 1 located on the South Thompson River, and Shuswap IR 2 on “Little Lake,” now referred to as Little Shuswap Lake. The Adams Lake Indian Band received one reserve on Adams Lake and an additional “15 chains square of land situated on the West shore of Lake about 12 miles from the outlet of Adams River.” In his report, however, Dewdney stated that he “gave them fifteen square chains,” without either distinguishing between the meanings of the two phrases or clarifying his intent. Dewdney also wrote that he did not survey the allotment, but gave the band members a marker stating “Adams Lake Indian Reserve 15 square chains.”

On October 5, 1866, a Gazette notice was issued which stated:

The Officer Administering the Government desires it to be notified that the claims of the Kamloops and Shuswap Indian Tribes to the tract of land extending for over forty miles along the right bank of the South Branch of Thompson River,
from Kamloops to the Great Shuswap Lake, have been adjusted, and three portions thereof appropriated as reserves for the use of these tribes, viz:—

... For the Shuswap Tribe—Two tracts of land.

The first tract reserved is situated at the locality known as the Two-Creeks, about twenty-nine miles from Kamloops up the South Branch of Thompson River, extending two miles along the right bank of said river from the upper of the Two-Creeks, and about two miles back from the bank of the river to the shore of a large lake.

The second reserve is situated at the upper end of the Little Shuswap Lake on its north shore, and extends about two miles eastward from a small creek running into the lake half a mile west of the Indian Village, and about one mile back from the shore, including the Village Chapel and graveyard.

The Indian Reserves above described will be exactly surveyed and staked off immediately, and the remainder of the land hitherto claimed by the Indians along the north bank of the South Branch of Thompson River will be open to pre-emption from the 1st of January, 1867, before which date however no pre-emption records thereon will be received.114

In 1866, the imperial government united the colonies of Vancouver Island and British Columbia.

REDUCTIONS ON THE LOWER FRASER

The Legislative Council continued to complain about the size of Indian reserves into the year 1867. At its February 11, 1867, meeting, the Legislative Council resolved that the Governor be addressed, “urging the desirability of having the Indian Reserves of the Colony reduced to what is necessary for the actual use of the Natives, and to have such Reserves properly defined, the remainder to be thrown open for settlement.”115 At the same meeting, the Council amended this resolution to specifically refer to the reserves “on the Lower Fraser,”116 instead of the entire colony. The Daily British Colonist reported that the resolution was opposed by the Chief Commissioner of Lands and Works and others on the “grounds of expense and not being urgent.”117

Another newspaper, the British Columbian, reported that the complaints of the Legislative Council did not pertain to the reservations made in the

114 Public Notice, Joseph W. Trutch, CCLW and Surveyor General, October 5, 1866, reprinted in British Columbia, Papers Connected with the Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wolfenden Government Printer, 1875; reprinted with supplement, 1987), 164 (ICC Exhibit 1a, p. 1047). It is not clear why the Adams Lake reserve and additional lands were not included in this Gazette notice.

115 Legislative Council, Minutes, 4th Session, February 11, 1867, BCA, C/AB/20.1A/1 (ICC Exhibit 1a, p. 1068).

116 Legislative Council, Minutes, 4th Session, February 11, 1867, BCA, C/AB/20.1A/1 (ICC Exhibit 1a, p. 1068).

117 Daily British Colonist, February 12, 1867 (transcript), no file reference available (ICC Exhibit 1a, p. 1075).
Thompson River country and praised the “success” in reducing the size of those reserves during the preceding year. On February 14, 1867, a petition signed by over 70 Chiefs, primarily from the Fraser River area, was forwarded by Governor Frederick Seymour to the Earl of Carnarvon, Secretary of State for the Colonies. The petition asked, among other things, that their lands not be reduced.

On August 28, 1867, CCLW and Surveyor General Joseph Trutch, wrote to the Acting Colonial Secretary regarding the surveys of Indian reserves in the lower Fraser area. The official who had marked out these reserves with stakes in 1864 as pointed out by the Indians was Land Surveyor William McColl. Trutch blamed the “unsatisfactory” situation of Indian reserves on the lower Fraser on the policies of former Governor James Douglas, which were in effect during Cox’s visit with Chief Neskonlith in 1862. Trutch stated:

The subject of reserving lands for the use of the Indian tribes does not appear to have been dealt with on any established system during Sir James Douglas’ administration.

The rights of Indians to hold lands were totally undefined, and the whole matter seems to have been kept in abeyance, although the Land Proclamations specially withheld from pre-emption all Indian Reserves or settlements.

No reserve of lands specially for Indian purposes were made by Official Notice in the Gazette and those Indian Reserves which were informally made seem to have been so reserved in furtherance of verbal instructions only from the Governor, as there are no written directions on this subject in the correspondence on record in this Office.

Trutch recommended:

that the extent of the Indian Reserves along the lower Fraser River should be definitely determined, and the boundary lines thereof surveyed and exactly marked out on the ground as soon as possible ...

Trutch compared his recommended actions to the colonial government’s disavowal of Cox’s authority to set aside large areas in the Thompson River district, following which colonial officials reduced those reserves in 1865. Trutch presented two options to the colonial government to settle the matter

118 British Columbian, February 13, 1867 (ICC Exhibit 1a, p. 1079).
119 Petition to Governor Frederick Seymour, c. February 1867, BCA, CO 60/27 (ICC Exhibit 1a, pp. 1092–93); Frederick Seymour to Earl of Carnarvon, February 14, 1867, BCA, CO 60/27 (ICC Exhibit 1a, pp. 1086–88).
120 Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit a, pp. 1096–97).
121 Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, pp. 1096, 1100).
of the extensive reserves marked out by McColl: to disavow absolutely his authority to make these reserves, or to buy back some of the land from the Indians. 122 Trutch used the government’s reduction of the Kamloops and Shuswap reserves in 1865 as an example of the first option, stating:

The former of these systems was carried out last year in the reduction of the Kamloops and Shuswap Indian Reserves where tracts of land of most unreasonable extent were claimed and held by the local tribes under circumstances nearly parallel to those now under discussion; and I think that a similar course may be very fairly and expeditiously adopted in this case. 123

On November 6, 1867, Governor Seymour ordered that the reserves on the lower Fraser be reduced in size. The Governor ordered:

5. All those Reserves that have been laid out of excessive extent should be reduced as soon as may be practicable. The Indians have no right to any land beyond what may be necessary for their actual requirement, & all beyond this should be excluded from the boundaries of the Reserves. They can have no claim whatever to any compensation for any of the land so excluded, for they really have never actually possessed it, although perhaps they may have been led to view such land as a portion of their Reserve through Mr. McColl so loosely reserving such large tracts of land, out of which at some future day the various Indian Reserves would have to be accurately defined. 124

The CCLW and Surveyor General, Joseph Trutch, followed these instructions to the point of meeting with Chiefs of bands on the lower Fraser to discuss the reduction of their reserves, but did not effect the reduction. 125 On November 19, 1867, Trutch reported that he told each band that “McColl had no authority for laying off the excessive amounts of land included by him in these reserves, and that his action in this respect was entirely disavowed.” 126

122 Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, p. 1100).
123 Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, to Acting Colonial Secretary, August 28, 1867, BCA, GR 1372, file 951/4 (ICC Exhibit 1a, p. 1100).
124 William A. Young, Colonial Secretary’s Office, to CCLW, November 6, 1867, BCA, C/AB/30.1J/10, pp. 194–95 (ICC Exhibit 1a, pp. 1113–14).
126 Joseph W. Trutch, CCLW and Surveyor General, Lands and Works Department, New Westminster, BC, to Colonial Secretary, November 19, 1867, reprinted in British Columbia, Papers Connected with the Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wollenden Government Printer, 1875; reprinted with supplement, 1987), 46 (ICC Exhibit 1a, p. 1118).
In late 1869 and early 1870, the colony of Vancouver Island was criticized by a Mr William Sebright Green, in a letter to the Aborigines' Protection Society for, in his opinion, not implementing an Indian policy. Responding to this criticism in January 1870, Joseph Trutch acknowledged that no such policy existed but explained, among other things, the colonial government’s approach to setting apart land for Indian reserves:

The Indians have, in fact, been held to be the special wards of the Crown, and in the exercise of this guardianship Government has ... set apart such portions of the Crown lands as were deemed proportionate to, and amply sufficient for, the requirements of each Tribe, and these Indian Reserves are held by Government, in trust, for the exclusive use and benefit of the Indians resident thereon.

CONFEDERATION, 1871

Sir Anthony Musgrave was appointed Governor of the colony of British Columbia in 1869, following the death of Governor Seymour, and the focus of British Columbia's political discourse shifted from settlement of the colony to the colony's union with the Dominion of Canada. British Columbia entered into Confederation in 1871. Section 13 of the Order of Her Majesty in Council admitting British Columbia into the Union (otherwise known as the British Columbia Terms of Union) stated:

The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

127 W.S. Sebright Green, Victoria, BC, to F.W. Chesson, Secretary, Aborigines' Protection Society, June 24, 1869, BCA, CO 60/37 (ICC Exhibit 1a, p. 1170).
129 Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871 (British Columbia, Terms of Union), May 16, 1871, no file reference available (ICC Exhibit 6j, p. 6).
Consequently, the dominion began to consider its role within the new province's system of allotting Indian reserves, the “liberal” Indian land policy it had inherited upon union, and the ensuing controversy regarding management of Indian reserves in British Columbia.

On October 14, 1872, Joseph Trutch, by then Lieutenant Governor of British Columbia, wrote to Prime Minister Sir John A. Macdonald, offering his opinion on how the dominion government should set aside Indian reserves in the province and administer Indian policy generally:

I am of opinion -- and that very strongly that for sometime to come at least the general charge and direction of all Indian affairs in B.C. should be vested in the Lt. Governor – if there is no constitutional objection to such arrangement ...

Then as to Indian policy I am fully satisfied that for the present the wisest course would be to continue the system which has prevailed hitherto only providing increased means for educating the Indians -- and generally improving their condition moral and physical. The Canadian system as I understand it will hardly work here. We have never bought out any Indian claims to lands nor do they expect we should – but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to the lands of B.C. -- you would go back of all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the districts now settled and farmed by white people equally with those in the more remote and uncultivated portions. Our Indians are sufficiently satisfied and had better be left alone as far as a new system towards them is concerned ...

... By such a course you would secure through the Lt. Governor the benefit of the experience of those who during the past 15 or 14 years have managed the Indian affairs of the country.130

In 1872, Israel Wood Powell was appointed Indian Commissioner responsible for the administration of federal Indian legislation in the province of British Columbia. On December 3, 1873, Powell wrote to the Minister of the Interior outlining the resources required by his office. With respect to Indian reserves, Powell stated:

The Reservations of the Province are at present most unsatisfactory to the Indians -- in many instances inadequate to the needs of the occupants and a fruitful source of dispute among them. No regular system seems to have been followed in setting them aside -- no individual allotment has ever been made and no census of Indian

population by which a correct knowledge of their just requirements in regards to
land might be ascertained, has been procured. [Some] uniform plan of dividing
existing Reserves and giving each occupant of an allotment or his heirs a right to
hold the same would be productive of much good and highly satisfactory to all
concerned.131

Powell went on to note that the reserves “in the Shuswap Neskonlith ... are
incomplete. There is therefore constant employment for a competent Surveyor
for some time to come.”132

The dominion government and the provincial government disagreed on
how best to administer Indian land policy in the new province and, by 1874,
came to adopt different approaches to setting aside Indian reserves. On
February 4, 1874, Indian Commissioner Powell, having already reported on
the unsatisfactory condition of Indian reserves in the province, stated:

Again meddlesome white people have informed these Indians of the very liberal
concessions made the Manitoba Indians in the late treaties with them by the
Dominion Government and as British Columbia Indians were now under the same
authority, they were entitled on demand to similar considerations. The late
Colonial Government never made any treaty with the Indians of the Province nor
am I aware of any assistance or encouragement that has ever been extended them.
On the contrary their prior rights to land have always (except by the Hudson [sic]
Bay Company) been ignored and they were told instead that they were British
Subjects, though the full rights of such have never been granted them.
... When I had the honor last June, to make application to the local
Government for 80 acres of land to be set aside for each Indian family, attention
was called to the fact that the Dominion Government by the Terms of Union was not
called upon to treat the Indians more liberally in this respect than they had been
treated by the Colonial Government and the quantity was decreased to “20 acres
for each family of five” persons.133

In the summer of 1874, Powell met with a number of Chiefs assembled at
Kamloops, including Chief Neskonlith and Chief Louis of the Kamloops First
Nation. At that time, the Indian Commissioner heard their grievances
regarding the size of their reserves and lack of general and specific assistance

131 I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, December 3,
132 I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, December 3,
1873, LAC, RG 10, vol. 3604, file 2521 (ICC Exhibit 1a, pp. 1234–35).
133 I.W. Powell, Indian Commissioner, British Columbia, to Minister of the Interior, Indian Branch, February 4,
1874, LAC, RG 10, vol. 3604, file 2813 (ICC Exhibit 1a, pp. 1242–44).
from the colonial, and then the provincial, governments. Chief Neskonlith told the Indian Commissioner:

that his people were given a good piece of land by Mr. Cox (then stipendiary magistrate) but some white people thought it was too good and the Surveyor came and a smaller piece between whites was given me instead. These whites also took half of my Creek which was given me by the Governor ... We want you to give us some of the adjoining land, or make a Reserve in another place ... In the fall of 1874, Indian Commissioner Powell wrote to former Governor James Douglas inquiring if Douglas had decreed “any particular basis of acreage used in setting apart Indian reserves.” Douglas replied that:

in laying out Indian Reserves, no specific number of acres was insisted on — The principle followed in all cases, was to leave the extent and selection of the land, entirely optional with the Indians, who were immediately interested in the Reserve — The surveying Officers having instructions to meet their wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations; and Burial Grounds, cultivated land, and all the favorite resorts of the Tribes; and, in short, to include every piece of ground, to which they had acquired an equitable title, through continuous occupation, tillage, or other investment of their labor. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint, on the ground of unjust deprivation of the land indispensable for their convenience or support, and to provide, as far as possible, against the occurrence of agrarian disputes with the white settlers.

Douglas went on the mention that:

The Indian Reserves in the pastoral country east of the Cascades, especially in the Lytton and Thompon’s [sic] River districts, where the natives are wealthy, (having in many instances, large numbers of horses and cattle), were, on my retirement from office, only roughly traced out upon the ground by the Gold Commissioners of the day:— the regular surveys not having been completed.

These latter Reserves were, necessarily, laid out on a large scale, commensurate with the wants of these Tribes, to allow sufficient space and range for their cattle at all seasons.138

On October 15, 1874, James Lenihan, the dominion government’s newly appointed Superintendent of the Fraser (Mainland) Superintendency in British Columbia, wrote to the Provincial Secretary, responding to specific statements made by the government of British Columbia in defence of its Indian land policy and its responsibility for setting aside Indian reserves since joining Confederation:

You are also pleased to say, “In the meantime I desire to call your attention to the fact that all that is ‘reasonable and just’ to demand from the Provincial Government is, that the 13th Section of the Terms of Union Act should be faithfully observed.”

The Section referred to sets forth – “That the charge of the Indians, and the Trusteeship and management of the lands reserve for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.”

... A careful reading of this section, taken and considered in connection with all the other sections of the Terms of Union Act, and taking into account the very liberal provisions and stipulations of the same in favour of British Columbia, leads me to the conviction that the most liberal and enlightened interpretation should be given to the spirit and meaning of this particular section.139

Lenihan compared the size of reserves allotted to two bands in the Fraser River district, and stated that British Columbia’s “‘policy and practice’ which has hitherto been observed” in setting aside Indian reserves “has been neither well defined, uniform, or regular.”140 Lenihan concluded:

Therefore, in view of these facts, I most respectfully submit that a more liberal, well defined, and uniform “policy” should be adopted by the Government of British Columbia on the question of Indian Reserves, and more especially towards those Indians of the interior of the Mainland having a large number of horses and cattle, and with whom it appears no treaty has yet been made to

138 James Douglas, late Governor BC, James Bay, to Powell, Indian Commissioner, Victoria, October 14, 1874, LAC, RG 10, vol. 10031 (ICC Exhibit 1a, pp. 1302–3).
139 James Lenihan, Victoria, to Provincial Secretary, October 15, 1874, reprinted in British Columbia, Papers Connected with the Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wollenden Government Printer, 1875; reprinted with supplement, 1877), 148 (ICC Exhibit 1a, p. 1304).
140 James Lenihan, Victoria, to Provincial Secretary, October 15, 1874, reprinted in British Columbia, Papers Connected with the Indian Land Question, 1850–1875, 1877 (Victoria: Richard Wollenden Government Printer, 1875; reprinted with supplement, 1987), 149 (ICC Exhibit 1a, p. 1305).
extinguish the titles to their lands, which justice and equity should secure to them as the original owners and occupants of the soil.141

One month later, the Minister of the Interior, David Laird, penned a memorandum addressed to the Governor General, outlining the “the present unsatisfactory state of the Indian Land question in the Province of British Columbia.”142 Laird explained:

The policy heretofore pursued by the Local Government of British Columbia toward the red men in that Province, and the recently expressed views of that Government in the correspondence herewith submitted, fall far short of the estimate entertained by the Dominion Government of the reasonable claims of the Indians.

... When the framers of the Terms of admission of British Columbia into the Union inserted this provision, requiring the Dominion Government to pursue a policy as liberal towards the Indians as that hitherto pursued by the British Columbia Government, they could hardly have been aware of the marked contrast between the Indian policies which had, up to that time, prevailed in Canada and British Columbia respectively.

Whereas in British Columbia, ten acres of land was the maximum allowance for a family of five persons, in old Canada the minimum allowance for such a family was eighty acres: and a similar contrast obtained in regard to grants for education and all other matters connected with Indians under the respective Governments. Read by this light, the insertion of a clause guaranteeing the aborigines of British Columbia the continuance by the Dominion Government of the liberal policy heretofore pursued by the Local Government, seems little short of a mockery of their claims.143

Minister Laird went on to state that Section 13 of the Terms of Union was “plainly altogether inadequate to satisfy the fair and reasonable demands of the Indians” and recommended the dominion and local governments “be
governed in their conduct towards the aborigines by the justice of their claims, and by the necessities of the case.  

Eventually, the dominion government decided to seek arbitration by the Secretary of State for the Colonies. On December 2, 1874, the Earl of Dufferin, Governor General of Canada, wrote to the Earl of Carnarvon, describing the dilemma as follows:

6. ... the conception formed by the Dominion and the Provincial Governments as to the rights and requirements of the natives, as well as of their own obligations towards them, appears to be fundamentally opposed.

7. In Canada the accepted theory has been that while the sovereignty and jurisdiction over any unsettled territory is vested in the Crown, certain territorial rights, or at all events rights of occupation, hunting, and pasture, are inherent in the aboriginal inhabitants.

8. As a consequence the Government of Canada has never permitted any lands to be occupied or appropriated, whether by corporate bodies, or by individuals, until after the Indian title has been extinguished, and the Districts formally surrendered by the Tribes or bands which claimed them for a corresponding equitable consideration.

9. In British Columbia this principle seems never to have been acknowledged. No territorial rights are recognized as pre-existing in any of the Queen’s Indian subjects in that locality.

A letter dated December 26, 1874, from an unidentified author to Lord Carnarvon, described the controversy which had arisen between the provincial and dominion governments:

[T]he inconsiderate manner in which the terms of union were framed they only provide in fact that the Dominion government shall use towards the Indians a policy as liberal as that previously pursued by British Columbia (namely an illiberal policy--) and that the Province shall for this purpose furnish tracts of land of such extent as it has hitherto been the practice to appropriate for Indian purposes (namely small and inadequate tracts of land.) -- And the Secretary of State is to decide any disagreement between the Dominion and the Provincial Governments respecting the quantity of such land to be granted.

It appears to me therefore that if the province is determined to be illiberal and to refuse to compromise, it may argue that the Secretary of State cannot require it to give larger grants of land per family than used to be given before the union. But the only wise course would be to give considerably larger grants; and consequently

there may be necessity to put some moral pressure on British Columbia to accept an award not strictly within the terms of arbitration.\footnote{Unidentified author [illegible signature] to Lord Carnarvon, December 26, 1874, BCA, CO 42/730 (ICC Exhibit 1a, pp. 1352–53). Original emphasis.}

The Secretary of State for the Colonies opted to await British Columbia’s response to the dominion government’s criticisms before intervening in the matter.\footnote{E.B., [author not identified further], to Herbert, [recipient not identified further], January 28, 1874, BCA, CO 42/730 (ICC Exhibit 1a, p. 1360).}

Meanwhile, on February 12, 1875, the Indian Commissioner for British Columbia, I.W. Powell, forwarded a petition from the “Chiefs of the Indian tribes of Adams Lake, Shuswap Lake, South Thompson River, Kamloops, Deadman’s Creek, Bonaparte River, North Thompson river” to the Minister of the Interior, in which the Chiefs again protested the size of their reserves, saying “we consider ourselves as having been wronged in the way our reservations have been laid out, it has generally been done without our agreement.”\footnote{Petition attached to I.W. Powell, Indian Commissioner, Indian Office, BC, to Minister of the Interior, February 12, 1875, LAC, RG 10, vol. 3617, file 4590C (ICC Exhibit 1a, p. 1373).}

In August 1875, the Government of British Columbia officially responded to the dominion government’s criticism of its Indian land policy and provided its interpretation of section 13 of the \textit{Terms of Union}. In a report by Attorney General George A. Walkem, the discontent of BC bands and the “unsatisfactory” state of reserves set aside for them was blamed on the dominion government, which he said had not comprehended “the physical structure of this country and of the habits of the Indians.”\footnote{Memorandum of Geo. Walkem in “Report of the Government of British Columbia on the Subject of Indian Reserves,” August 18, 1875, Canada, \textit{Annual Report of the Department of the Interior for the Year Ended 30th June 1875}, Special appendix F, ii (ICC Exhibit 1a, p. 1382).}

Walkem went on state that, during negotiations between the provincial and federal governments to settle the Indian land question:

\begin{quote}
it would appear that [the provincial officials] were fully justified in hesitating to accede to propositions [made by the Dominion Government] which might not only retard the future settlement of the Province, but prove to be both ill-judged and ill-timed in the interests of the present settlers and of the Indians themselves.\footnote{Memorandum of Geo. Walkem in “Report of the Government of British Columbia on the Subject of Indian Reserves,” August 18, 1875, Canada, \textit{Annual Report of the Department of the Interior for the Year Ended 30th June 1875}, Special appendix F, iii (ICC Exhibit 1a, p. 1363).}
\end{quote}

Although few details are known of these negotiations, the provincial government agreed to transfer, in the future, larger tracts of land (amounting
to 20 acres per family of five) to the dominion to be set aside as Indian reserves. However, the provincial government refused to enlarge any existing reserves, including the Neskonlith, Adams Lake, and Little Shuswap Reserves.151

Regarding the provincial government’s interpretation of section 13 of the Terms of Union, it is recorded:

it remains for the Provincial Government to consider what assistance in the shape of land they will give to the Dominion Government to carry out their Indian policy. The 13th Article binds the Province to give the same quantity of land as in practice the Crown Colony gave. This quantity seems to have been settled at ten acres to each Indian family, as appears by … the Speech of Governor Douglas to the Legislative Council in 1864.152

JOINT INDIAN RESERVE COMMISSION, 1876–78

Although the documentary record for this inquiry does not indicate if the Secretary of State for the Colonies ever intervened between the provincial and dominion governments in the matter of Indian reserves in British Columbia, the two governments came to an agreement, later in 1875, on the “Indian land question.” As part of that agreement, a Joint Indian Reserve Commission (JIRC) was established and charged with inquiring into bands’ grievances related to their reserves.153 The Commission consisted of A.C. Anderson, appointed by the dominion government; Archibald McKinlay, appointed by the provincial government; and, Gilbert Malcolm Sproat, appointed as Joint Commissioner by both governments.

The JIRC visited the Neskonlith, Adams Lake, and Little Shuswap Indian Bands in late July and early August 1877.154 Joint Commissioner Gilbert Malcolm Sproat reported on the JIRC’s role with the Bands as follows:

The question of the Land Reserves for the Shuswaps has been bungled in times gone by, as you will see by reference to the Papers on The Indian Land Question in British Columbia, published by the Provincial Government in 1875 (pages 26, 29 and following). A Mr. Cox, who then was in the service of the Colonial Government gave them reserves of such an extravagant extent as would practically have for the

153 Indian Claims Commission, Williams Lake Indian Band: Village Site Inquiry (Ottawa, March 2006), 8–9.
154 Diary of Archibald McKinlay, Commissioner, Joint Indian Reserve Commission, July 30—August 17, 1877, BCA, no file reference available (ICC Exhibit 1a, pp. 1525–39).
most part, been useless to the Indians and have totally prevented white settlement in a place which from its good climate, and central position may have a considerable future before it.

The reserves were afterwards reduced to what may have been apparently sufficient for the people, but which the Commissioners now find is insufficient, considering the possible increase of their numbers, the industrial progress they have achieved and the probable numbers of their stock in a few years.155

The JIRC confirmed Neskonlith IR 1, Shuswap IR 2, and the Adams Lake Indian Reserve, as set aside by Edgar Dewdney in 1866, with some slight deviation.156 The JIRC also set aside 11 other reserves for the use and benefit of the three Bands.157 In total, the JIRC assigned 14 reserves to the Neskonlith, Adams Lake, and Little Shuswap Indian Bands.

LATER RESERVE COMMISSIONS

The record in this inquiry does not extend to the joint reserve commissions in British Columbia that followed the JIRC; however, a number of ICC reports can provide the reader with the details of the McKenna-McBride Commission and the Ditchburn-Clark Commission, both of which were concerned with resolving the serious differences between the federal and BC governments respecting Indian reserves.

The ICC report in *Mamaleleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry* describes the mandate of the 1912 McKenna-McBride Commission as securing

[a]n agreement between the federal and British Columbia governments towards the “final adjustment of all matters relating to Indian Affairs in the province of British Columbia.”158 ... Subject to the approval of the federal and provincial governments, five commissioners, including Canada’s Special Commissioner, J.A.J. McKenna, were empowered to adjust the acreage of Indian reserves in the province.159

---

155 Gilbert Malcolm Sproat, Joint Commissioner, Joint Indian Reserve Commission, to Superintendent General of Indian Affairs, August 27, 1877, LAC, RG 10, vol. 3653, file 8701 (ICC Exhibit 1a, pp. 1512).
The Esketemc First Nation: Indian Reserve 15, 17, and 18 Inquiry report informs us that in spite of the agreement by both governments to implement, as they considered reasonable, the McKenna-McBride recommendations, they decided instead to launch a joint review of the Commission’s work by W.E. Ditchburn and J.W. Clark. This step was taken largely owing to British Columbia’s dissatisfaction with the McKenna-McBride recommendations.160

The Ditchburn-Clark review, commonly called the Ditchburn-Clark Commission, was comprised of “representatives of the two governments ... for the purpose of adjusting, readjusting, confirming and generally reviewing the report and recommendations of the [McKenna-McBride] Royal Commission.”161 The end result was a report that was “in general agreement and largely confirmed the report of the Royal Commission ‘with a few amendments, additions and deductions to the Reserves confirmed, cut-offs and new reserves.’”162

The final step in the reserve-creation process for the Neskonlith, Adams Lake, and Little Shuswap Indian Bands was confirmation of their reserves by Order in Council 208, dated February 3, 1930.163


July 3, 2006

Clarine Ostrove
Mandell Pinder
Barristers and Solicitors
500 - 1080 Mainland Street
Vancouver, B.C.
V6B 2T4

Arthur Grant
Grant Kovacs Norell
Barristers and Solicitors
400-900 Howe Street
Vancouver, B.C.
V6Z 2M4

- And -

Allan Donovan
Donovan & Company
Barristers and Solicitors
73 Water Street, 6th Floor
Vancouver, B.C.
V6B 1A1

Brian Willcott
DIAND Legal Services
10 Wellington Street, 10th floor
Gatineau, QC
K1A 0H4

Dear Counsel:

Re: Neskonlith, Adams Lake and Little Shuswap Indian Bands
Neskonlith-Douglas Reserve Claim
ICC File: 2109-32-01

The panel has considered the objections made on behalf of the Bands to the report of Mr. Blair Smith, BCLS, CLS, dated March 13, 2006, and offered on behalf of Canada. I am directed to convey to you their ruling on these objections.

The panel has considered the submission on behalf of the Bands dated May 18, 2006; the submissions in response on behalf of Canada dated

Objections:
The Bands’ objections to Mr. Smith’s report were summarized in their submissions as follows:

1. Mr Smith has stepped outside the scope of his expertise, namely, that of a professional surveyor and mapper;
2. Mr. Smith has provided opinions and made determinations of fact on matters that include some of the ultimate issues before the Panel;
3. Mr. Smith has demonstrated bias and lack of objectivity and has therefore disqualified himself as an expert witness; and,
4. Mr. Smith has failed to state the facts and assumptions that he relied upon in arriving at the conclusions in his Report and it is not possible to determine with any certainty how he arrived at the opinions stated in that report.

The Bands ask that the report be ruled inadmissible in its entirety. In the alternative, they request the following remedy:

- That the first full paragraph on page 2, all of page 4 and all of page 5 be ruled inadmissible and excised from the report, and,
- That the panel direct Mr. Smith to revise his report so as to outline all the facts and assumptions he relied upon in arriving at his interpretations and opinions, and indicate how his interpretations and opinions relate to these facts and assumptions.

Disposition:
The panel notes that it has consistently been held that commissions of inquiry are not bound by the strict rules of evidence that apply in the courts. For example, Mr. Justice Cory, speaking for a unanimous Supreme Court in *Canada (Attorney General) v. Canada (Commission of Inquiry on The Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 34., approved the following passage in the decision of the Federal Court of Appeal in *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C. 527, at para. 23:
A public inquiry is not equivalent to a civil or criminal trial. . . . In an inquiry, the commissioners are endowed with wide-ranging investigative powers to fulfil their investigative mandate. . . . The rules of evidence and procedure are therefore considerably less strict for an inquiry than for a court.

Guided by this principle, the panel is not prepared to grant the remedies sought by the bands. The panel considers that, with the benefit of cross-examination, it will give appropriate weight to the various elements of Mr. Smith’s report, and disregard, if necessary, any portions for which it is established that Mr. Smith is not qualified or that are otherwise inappropriate. The panel does not intend to allow its role as fact-finder to be usurped, but is also not prepared to rule the report or any portion of it inadmissible on the basis of the submissions made. The panel does intend, however, to require the experts’ qualifications to be presented to them at the hearing, and to hear any objections to, or proposed limitations on, their respective expertise to be briefly made at that time.

With respect to the third remedy proposed by the Bands, that Mr. Smith be required to revise his report so as to set out more fully the facts and assumptions he relies upon, the panel is mindful of the significant delays in obtaining the now agreed-on date of July 19, 2006, for this report and other evidentiary matters to be heard. While the panel accepts that the remedy proposed might relieve the Bands of some burden, it does not believe that the Bands will be unduly prejudiced by the need to conduct a more exhaustive cross-examination in this regard. Any slight prejudice in this regard is more than offset by the desirability of moving on with this inquiry with reasonable dispatch.

Accordingly, the panel directs me to advise that the remedies sought by the Bands are denied. The procedure for the presentation of the evidence of the experts in this inquiry will be as follows:

– Qualification of expert by counsel presenting expert;
– Opportunity for objection to qualifications by counsel for other party(ies);
– Examination in chief of expert;
– Cross-examination;
Submissions as to weight may of course be included in the subsequent written submissions of the parties.

John B. Edmond
Commission Counsel

c.c. Anne Cullingham, Mandell Pinder
   Richard Yen, DIAND, Specific Claims Branch
   Chief Arthur Anthony, Neskonlith Indian Band
   Chief Nelson Leon, Adams Lake Indian Band
   Chief Felix Arnouse, Little Shuswap Indian Band
APPENDIX C

JOINT INDIAN RESERVE COMMISSION ALLOTMENTS DESCRIBED IN THE RETURNS FROM 1885¹

<table>
<thead>
<tr>
<th>Name of Tribe, and Location of Reserve</th>
<th>Name of Reserve*</th>
<th>Approximate Acreage</th>
<th>Date of Indian Commissioner’s Decision</th>
<th>Surveyed or Unsurveyed</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Thompson [Neskonlith Indians] – South Thompson River (right bank)</td>
<td>Nis-kamilth No. 1</td>
<td>3164</td>
<td>August 13, 1877</td>
<td>Surveyed</td>
<td>Old reserve confirmed**</td>
</tr>
<tr>
<td>South Thompson [Neskonlith Indians] – South Thompson River (left bank)</td>
<td>Nis-kamilth No. 2</td>
<td>2489</td>
<td>August 13, 1877</td>
<td>Surveyed</td>
<td></td>
</tr>
<tr>
<td>South Thompson [Neskonlith Indians], Little Shuswap and Adams’ Lake [in common] – Great Shuswap Lake</td>
<td>Shuswap Lake</td>
<td>not given</td>
<td>August 13, 1877</td>
<td>Unsurveyed</td>
<td>Old reserve confirmed</td>
</tr>
<tr>
<td>South Thompson [Neskonlith Indians], Little Shuswap and Adams’ Lake [in common] – West shore of Great Shuswap Lake, about 12 miles from outlet of Adams River</td>
<td>Shuswap Lake</td>
<td>abt. 22.50</td>
<td>August 13, 1877</td>
<td>Unsurveyed</td>
<td>Old reserve confirmed</td>
</tr>
<tr>
<td>Adams Lake – Adams River – Point formed by the lake and Adams River</td>
<td>Adams River</td>
<td>not given</td>
<td>August 13, 1877</td>
<td>Unsurveyed</td>
<td></td>
</tr>
<tr>
<td>Adams Lake – At junction of Adams River and Shuswap Lake</td>
<td>Adams River</td>
<td>abt. 15.00</td>
<td>August 13, 1877</td>
<td>Unsurveyed</td>
<td>Fishing station</td>
</tr>
<tr>
<td>Adams Lake – South Thompson River</td>
<td>Sabbahilkum</td>
<td>not given</td>
<td>August 13, 1877</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The names and locations of some of the reserves have since changed.

**Minutes of Decision, Alexander Anderson, Archibald McKinlay, and G.M. Sproat, Joint Indian Reserve Commissioners, Indian Reserve Commission, August 13–16, 1877, no file reference available (ICC Exhibit 1a, p. 1542).
APPENDIX D

CHRONOLOGY

NESKONLITH, ADAMS LAKE, AND LITTLE SHUSWAP INDIAN BANDS
NESKONLITH DOUGLAS RESERVE INQUIRY

1 Planning conference  
Vancouver, November 30, 2004

2 Community session  
Neskonlith, BC, July 6–7, 2005


Vancouver, July 19, 2006

The Commission heard from Elder Sarah Denault.

3 Evidentiary hearing  
Vancouver, July 19, 2006

The Commission heard from Blair Smith, Patrick Ringwood.

4 Written legal submissions

Written submissions to objections made on behalf of the Bands to the report of Mr. Blair Smith

- Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, May 18, 2006
- Submission on Behalf the Government of Canada, June 2, 2006
- Reply Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, June 8, 2006
Written submissions to oral session

- Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, March 20, 2007
- Submission on Behalf the Government of Canada, May 15, 2007
- Reply Submission on Behalf of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands, May 29, 2007

5 Oral legal submissions  
Vancouver, June 19, 2007

6 Interim rulings / mandate challenge

Ruling into the objections made on behalf of the Bands to the report of Mr. Blair Smith, BCLS, CLS, dated March 13, 2006, and offered on behalf of Canada, July 3, 2006

7 Content of formal record

The formal record of the Neskonlith, Adams Lake, and Little Shuswap Indian Bands: Neskonlith Douglas Reserve Inquiry consists of the following materials:

- Exhibits 1 – 10 tendered during the inquiry
- Transcripts of community session (3 volumes) (Exhibit 5a and 10e)
- Transcript of evidentiary hearing (1 volume) (Exhibit 10e)
- 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.
INDIAN CLAIMS COMMISSION

NADLEH WHUT'EN FIRST NATION
LEJAC SCHOOL INQUIRY

PANEL
Commissioner Daniel J. Bellegarde (Chair)
Commissioner Alan C. Holman

COUNSEL
For the Nadleh Whut'en First Nation
Clarine Ostrove

For the Government of Canada
Vivian Russell

To the Indian Claims Commission
Diana Kwan

DECEMBER 2008
### CONTENTS

**SUMMARY**  215

**PART I**  **INTRODUCTION**  221  
  Background to the Inquiry  221  
  Mandate of The Commission  223

**PART II**  **THE FACTS**  226

**PART III**  **ISSUES**  230

**PART IV**  **ANALYSIS**  232  
  Was the use of IR 4 for a residential school lawful in 1921?  232  
  Positions of the Parties  233  
  Panel’s reasons  235  
  Remaining issues  244  
  Position of the Parties  244  
  Panel’s Reasons  245

**PART V**  **CONCLUSIONS AND RECOMMENDATIONS**  247

**APPENDICES**  
  A  Historical Background  249  
  B  Chronology  306
SUMMARY

NADLEH WHUT’EN FIRST NATION
LEJAC SCHOOL INQUIRY
British Columbia

The report may be cited as Indian Claims Commission, Nadleh Whut’en First Nation: Lejac School Inquiry (Ottawa, December 2008), reported (2009) 24 ICCP 211.

This summary is intended for research purposes only.
For greater detail, the reader should refer to the published report.

Panel: Commissioner D. J. Bellegarde (Chair), Commissioner A.C. Holman

Band Council - Band Council Resolution; British Columbia; Compensation -
Loss of Use; Fiduciary Duty - Reserve Creation; Reserve - Compensation

THE SPECIFIC CLAIM

The Nadleh Whut’en First Nation submitted a claim to the Specific Claims Branch of the Department of Indian and Northern Affairs on May 13, 1992, alleging there was a failure to meet the statutory requirements surrounding the taking of reserve lands (IR 4) for school purposes. On September 5, 1995, Canada issued a preliminary rejection of the claim. The First Nation submitted additional arguments to Canada on February 5, 1997. On June 8, 2002, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its claim. The ICC agreed to the request on August 6, 2002. The First Nation submitted revised claim submissions to Canada in September, 2003. While the inquiry was never formally put into abeyance, there were a number of delays as Canada reviewed the supplemental issues that had been brought forward by the First Nation. The First Nation’s supplementary submissions were formally rejected by Canada on July 11, 2007.

The ICC conducted a community session in November, 2007 to receive Elders’ testimony. Following written submissions, an oral hearing was held in Vancouver on April 10, 2008. Initially, the panel was composed of three members: Commissioner Daniel J. Bellegarde (Chair), Commissioner Alan C. Holman, and Commissioner Jane Dickson-Gilmore; however, Ms. Dickson-Gilmore was unable to attend the Vancouver oral session and thus withdrew from the panel before oral submissions were made.
Therefore, the panel’s findings concerning this claim have been reached by Commissioners Bellegarde and Holman alone.

BACKGROUND

The Nadleh Whut'en Band, known as the Fraser Lake Band until 1990, is part of the Carrier group of First Nations. It is located in the northern interior of British Columbia. Indian Reserve Commissioner Peter O’Reilly set aside Indian Reserves 1-4 for the Band on August 31, 1892, and the lands were surveyed in 1894.

Initially the Nadleh Whut’en Band was part of the Babine and Skeena River Agency of the Department of Indian Affairs but in 1910 came under the administration of the Stuart Lake Agency. The focus of this inquiry involves Indian Reserve (IR) 4, also known as the Seaspunktut Reserve. In 1938, title to these reserve lands was transferred to the federal government by the Province of British Columbia by provincial Order in Council 1036.

In the early 1900s salmon stocks on the Fraser and Skeena Rivers were diminishing. Settlers in the area, who were operating a thriving salmon canning industry, alleged that the reduction in the fish stocks was caused by the fish weirs, or barricades, traditionally used by the First Nations in the region to catch their fish. At this time there were also requests that the federal government establish a school for the children of the bands in the region. In the fall of 1906, some of the bands and the federal government concluded an agreement (the Babine Proposition) whereby the bands would give up the use of their fish weirs in return for a number of conditions being met. Among the items included in the Babine Proposition of 1906 was Canada’s agreement to provide an industrial school in the district. It is not clear from the documentary record whether or not the Nadleh Whut’en Band was part of this agreement. However, five years later, the Band was part of the Fort Fraser Barricade Agreement, signed on June 15, 1911, under which Canada agreed to establish a school within the Stuart Lake Agency.

During this period, the Oblates of Mary Immaculate (OMI), an Order of the Roman Catholic Church, continually petitioned the government for a school to serve the children of the First Nations in the region. The OMI was prepared to operate a boarding school if there was government funding available, but at this time the department’s preference was for day schools. In the summer of 1913, when he turned down a 1912 request from the OMI for a 100-pupil boarding school, Indian Affairs Secretary J.D. McLean said such an undertaking would not be possible until there was a rail line to bring in supplies. However, he indicated the department would give consideration to establishing one or two day schools. The following summer, in 1914, a day school opened at Stuart Lake. In 1915, the federal government agreed to fund the operations of an Indian residential school at Fort St. James in the Fraser
Lake Agency if the OMI would fund its construction. In February, 1917, a residential school for 50 boys opened in a temporary building at Stuart Lake.

The OMI continued to press the government for a larger boarding school at Fraser Lake and in July, 1920, an Order in Council was passed for the construction of a boarding school, with both the Indian agent and the OMI agreeing that the best location for the school was on the Seaspunkut Reserve, IR 4. However, it was not until March, 1921, that the Indian Agent for the Fraser Lake Band was instructed to obtain a Band Council Resolution (BCR) from the Band setting aside land for school purposes. On April 12, 1921, Indian Agent McAllan reported he met with the male members of the Band and that, in a BCR signed by the chief and headmen, they had agreed to set aside 260 acres on the eastern side of IR 4 for a school.

The school opened in January, 1922 and in March, Indian Agent McAllan reported the school was operating at its full capacity of 125 students. From its inception, the school operated a farm (to feed the students) and cut wood (for heating and cooking) from the surrounding land. It was run by the OMI and over the years the school was used for retreats and other OMI functions.

A review of admission records shows that, in addition to children from Nadleh Whut’en attending the school, there were children from other bands in the Stuart Lake Agency along with some from bands outside the agency. In the fall of 1938, Indian Agent R.H. Moore of the Stuart Lake Agency complained to Ottawa that the enrolment of children from elsewhere at the Lejac Residential School (as the Fraser Lake school had been renamed) was affecting the enrolment of children from within his agency. The concerns of the Stuart Lake bands and Indian agents that there was not enough room at the school for the agency’s children persisted. By 1946, there was an acknowledgement from the Indian Affairs department that the Lejac School was not meeting the needs of the children of the Stuart Lake Agency and consideration was given to establishing day schools in the agency. However, it took until 1954 to establish a day school at Nadleh Whut’en. In 1976, the Lejac School closed and the lands and assets thereon reverted to the Band.

**ISSUES**

1) Was the Band Council Resolution of April 12, 1921 ("1921 BCR.") lawful and sufficient under the *Indian Act*, RSC 1906 as amended, to allow Canada to take and use approximately 260 acres of IR No. 4 (the "Lands") for the purpose of the Lejac School?

2) If the 1921 B.C.R was lawful and sufficient under the *Indian Act*, did Canada breach its fiduciary obligations arising at common law and/or under the *Constitution Act*, 1867 and/or under the *Terms of Union*, 1871 by: (a) failing to obtain the consent of Band membership and/or the Governor-in-Council prior to taking and using the Lands for the purpose of the Lejac School, (b) failing to...
compensate the Band for the use of the Lands between 1921 - 1976, and (c) failing to ensure that school-aged children from the Band would be granted admission to the Lejac School? 3) Did Canada, due to the fact the school was located on reserve land set aside for that purpose, have a duty to ensure that all school-age children of the Nadleh Whut'en First Nation (formerly the Fraser Lake Indian Band) had the opportunity to be enrolled in the former Lejac Industrial School? 4) If the answer to 3) is yes, did Canada breach that duty? 5) Did Canada have a duty to ensure that the former Lejac Industrial School was used only for school purposes? 6) If the answer to 5) is yes, did Canada breach that duty? 7) If the answer to 5) is no, did Canada have a duty to ensure that compensation was paid to the Band when the school was used for other than school purposes? 8) Did Canada have a duty to protect the reserve land from any detrimental effects caused by the construction and use of a sewage lagoon on land set aside for the school? 9) If the answer to (8) is yes, did Canada breach that duty? 10) Did Canada have a duty to ensure the Band received compensation for timber cut from the school and school farms?

FINDINGS
The panel agrees with counsel for both the Nadleh Whut’en First Nation and the Crown that the crux of this claim is not about school or education but rather the use of reserve land without compensation. The panel finds that the Band had a cognizable interest in the lands at IR 4 at the time the school was created. It finds that the federal Crown had a fiduciary duty between 1921, when the First Nation passed a BCR consenting to the use of reserve lands as a school, and 1938, when title to its reserve lands was transferred by British Columbia to Canada, to exercise fiduciary obligations of loyalty, good faith and ordinary prudence with a view to the best interests of the First Nation. After 1938, once the Indian Act applied to the lands, the Crown’s fiduciary duty expanded to include the protection and preservation of the Band’s interest from exploitation. These fiduciary duties were breached when the Crown allowed 260 acres of lands set aside for reserve to be used for school purposes without any compensation to the Band. The fact that the Band passed a BCR agreeing to have the school constructed on its lands is not sufficient to remove the Crown’s fiduciary obligations, and there is no evidence that the Band had been informed, when it provided the BCR requestd of it, that it knew the extent to which its lands would be used or that compensation would not be forthcoming. Given this finding, the panel concludes that the First Nation is entitled to compensation for the use of its lands between 1922 and 1976.
RECOMMENDATION
That under Canada’s Specific Claims Policy, Canada negotiate with the Nadleh Whut’en First Nation for compensation regarding the loss of the full use and enjoyment of the eastern portion of Indian Reserve 4 lands that were set aside for school purposes.

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

ICC Reports Referred to

Treaties and Statutes Referred to
Indian Act, RSC 1906.

Other Sources Referred to
DIAND, Outstanding Business: A Native Claims Policy - Specific Claims (Ottawa: Minister of Supply and Services, 1982).

COUNSEL, PARTIES, INTERVENORS
Clarine Ostrove for the Nadleh Whut’en First Nation; Vivian Russell for the Government of Canada; Diana Kwan to the Indian Claims Commission.
PART I

INTRODUCTION

Background to the Inquiry

The Nadleh Whut’en Band, known as the Fraser Lake Band until 1990, is located in the northern interior of British Columbia. Indian Reserve Commissioner Peter O’Reilly set aside Indian Reserves 1-4 for the Band on August 31, 1892, and the lands were surveyed in 1894.

Initially the Nadleh Whut’en Band was part of the Babine and Skeena River Agency of the Department of Indian Affairs, but in 1910 came under the administration of the Stuart Lake Agency. The focus of this inquiry involves IR 4, also known as the Seaspunkut Reserve, located on the south shore of Fraser Lake. In 1938, title to these reserve lands was transferred to the federal government by the Province of British Columbia.1

In the early 1900s salmon stocks on the Fraser and Skeena Rivers were diminishing. Settlers in the area, who were operating a thriving salmon canning industry, alleged that the reduction in the fish stocks was caused by the fish weirs, or barricades, traditionally used by the First Nations in the region to catch their fish. At this time there were also requests that the federal government establish a school for the children of the bands in the region. In the fall of 1906, some of the bands and the federal government concluded an agreement (the Babine Proposition), whereby the bands would give up the use of their fish weirs in return for a number of conditions being met. Among the items included in the Babine Proposition of 1906 was Canada’s agreement to provide an industrial school in the district. It is not clear from the documentary record whether or not the Nadleh Whut’en Band was a part of this agreement. However, five years later, the Band was part of the Fort Fraser Barricade Agreement, signed on June 15, 1911, under which Canada agreed to establish a school within the Stuart Lake Agency.

1 The Order in Council effecting this transfer of title was not placed in evidence; however, it is referred to by Canada in its Responding Submissions, at para. 34 which states that “Provincial Order-in-Council 1036 was passed on July 29, 1938, allowing for formal reserve creation of Seaspunkut IR No. 4 by Canada.” The 1938 Order in Council is also referred to in Wewaykum Indian Band v. Canada, [2002] 4 SCR 245.
In 1914, a day school opened at Stuart Lake. In 1915, the federal government agreed to fund the operations of an Indian residential school at Fort St. James in the Fraser Lake Agency if the Oblates of Mary Immaculate (OMI), an Order of the Roman Catholic Church, would fund its construction. In February, 1917, a residential school for 50 boys opened in a temporary building at Stuart Lake.

In July, 1920, an Order in Council was passed for the construction of a boarding school, with both the Indian agent and the OMI agreeing that the best location for the school was on the Seaspunkut Reserve, IR4. On April 12, 1921 Indian Agent McAllan reported he met with the male members of the Band and, in a Band Council Resolution signed by the chief and headmen, they agreed to set aside 260 acres on the eastern side of IR4 for a school.

The school opened in January, 1922. From its inception the school operated a farm (to feed the students) and cut wood (for heating and cooking) from the surrounding land. It was run by the OMI and over the years the school was used for retreats and other OMI functions. In addition to children from Nadleh Whut'en attending the school, there were children from other bands in the Stuart Lake Agency as well as some from bands outside the agency. In the fall of 1938, Indian Agent R.H. Moore of the Stuart Lake Agency complained to Ottawa that the enrolment of children from elsewhere at the Lejac Residential School (as the Fraser Lake school had been renamed) was affecting the enrolment of children from within his agency. In 1976, the school closed and the lands and assets thereon reverted to the Band.

The Nadleh Whut'en First Nation submitted a claim to the Specific Claims Branch of the Department of Indian and Northern Affairs on May 13, 1992, alleging that there was a failure to meet the statutory requirements surrounding the taking of reserve lands (IR 4) for school purposes. On September 5, 1995, Canada issued a preliminary rejection of the claim. The First Nation submitted additional arguments to Canada on February 5, 1997. On June 8, 2002, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its claim and the ICC agreed to do so on August 6, 2002. The First Nation submitted revised claim submissions in September, 2003. While the inquiry was never formally put into abeyance, there were a number of delays as Canada reviewed the supplemental issues that had been brought forward by the First Nation. The First Nation’s supplementary submissions were formally rejected by Canada on July 11, 2007.

The ICC conducted a community session in November, 2007, to receive Elders’ testimony. Following written submissions, an oral hearing was held in
Vancouver on April 10, 2008. Initially, the panel was composed of three members: Commissioner Daniel J. Bellegarde (Chair), Commissioner Alan C. Holman, and Commissioner Jane Dicks on-Gilmore; however, Ms. Dickson-Gilmore was unable to attend the Vancouver oral session and thus withdrew from the panel. Therefore, the panel’s findings concerning this claim have been made by Commissioners Bellegarde and Holman alone.

**Mandate of The Commission**

The Indian Claims Commission (ICC) was established through Order in Council on July 15, 1991 as an interim measure in the federal specific claims process. The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy - Specific Claims*. The Commission itself was announced and established in 1993.

The Commission’s mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1st, 1992. The Order in Council directs:

that our Commissioners proceed 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 upon:

(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and,

(b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister’s determination of the applicable criteria.

---

2 A specific claim is considered to comprise the non-fulfilment of a treaty or agreement between Indians and the Crown; breach of an obligation arising under the *Indian Act* or any other statute concerning Indians, or the regulations thereunder; breach of an obligation arising from the Government of Canada’s administration of Indian funds or other assets; illegal disposition of Indian land; failure to provide compensation for reserve lands taken or damaged by the Government of Canada or any of its agencies, and fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of Canada where such a fraud can be clearly established.


In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in Outstanding Business:

The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

i) The non-fulfilment of a treaty or agreement between Indians and the Crown.

ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulation thereunder.

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

iv) An illegal disposition of Indian land.5

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or 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 demonstrated6

5 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.

PART II

THE FACTS

The Nadleh Whut'en Indian Band is located in the northern interior of British Columbia. The Band is part of the Carrier Group of First Nations and was included in the Hoquilet Division of the Babine and Skeena River Agency until 1910, when it became part of the Stuart Lake Agency. In 1892, Indian Reserve Commissioner O'Reilly set aside reserves for the Fraser Lake Indian Band, including IR 4, Seaspunkut, a 630-acre reserve on Fraser Lake. The reserves were surveyed in the summer of 1894, and the plan of the reserves was approved by the provincial Chief Commissioner of Lands and Works in December, 1895. In 1938, title to the reserve lands was transferred by the Province of British Columbia to Canada.

In 1910, Indian Agent McAllan reported that the First Nations in the Stuart Lake Agency wanted a day school established in the area. His correspondence indicated a conflict with Father Coccola, who was opposed to a day school and advocated for an industrial school. Eventually, the establishment of a day school at Stoney Creek was opened.

The following year, the Fort Fraser Barricade Agreement was concluded. The First Nations in the Stuart Lake Agency, including Nadleh Whut'en, agreed to stop fishing with weirs in exchange for benefits including the provision of nets, seeds, farm equipment, fishing stations and the establishment of a boarding school in the Stuart Lake Agency. However, the Department was not prepared to undertake construction of a boarding school in the Stuart Lake Agency until the Grand Trunk Pacific Railway was completed and operational.

In 1917, a school was opened at Stuart Lake, approximately 40 miles north of Fraser Lake, under Father Joseph Allard, of the Order of the Oblates of Mary Immaculate (OMI). The Stuart Lake School opened as a day school, but was converted to a boarding school in 1917. In February, 1919, Father

7 The Nadleh Whut'en Indian Band was known as the Fort Fraser Band, Fraser's Lake Band, or the Fraser Lake Band, until 1990.
Allard advised the government that the accommodations at the Stuart Lake School were not adequate.

A month later, Indian Agent McAllan recommended that a school be located on Seaspunkut Indian Reserve (IR) No. 4. The reserve contained 506 acres with only two families present, and it was felt that 300 acres could easily be appropriated for the school. The location of the school on IR 4 was approved by Reverend Bunoz.

In July 1920, an Order in Council awarded a construction contract for an Indian boarding school at Stuart Lake to a Mr. Moncrieff. In March, 1921, J.D. McLean, the Assistant Deputy Superintendent General and Secretary of Indian Affairs, wrote to Indian Agent McAllan and instructed him to obtain a Band Council Resolution (BCR) setting aside 300 acres of IR 4 for the school.

In April 1921, Indian Agent McAllan reported that a meeting of the male members of the Band had been held, the Band had agreed to set aside 260 acres on the east half of the reserve, and a BCR had been signed by the Chief and principal headmen setting aside 260 acres for the erection of an Indian school and farm ground. In addition to the BCR, McAllan enclosed a sketch of IR 4 showing cultivated land and Indian houses on the west half and the school on the east half. On the BCR, McAllan’s signature appears under his name. The names of the Chief and Head Men are handwritten in the same hand, and the "X"s accompanying the names appear to be written in the same hand.

McAllan did not report regarding the circumstances of the meeting; therefore, it is not known how people were notified of the meeting; how much notice was received; the number or identity of Band members present at the meeting; whether a vote occurred; and, if so, who voted for or against the location of the school on IR 4. Also, the BCR does not mention compensation for the use of the land on the Seaspunkut reserve, nor is there any record that the 260 acres "set aside" for the school was ever surveyed.

On January 17, 1922, the Fraser Lake Indian Boarding School opened with 80 students attending. The school was renamed in 1931 as the Lejac Indian Residential School. Most, if not all, of the students enrolled the first year were from bands within the Stuart Lake Agency. However, data regarding school enrollment is incomplete, and it is not clear how many children from Nadleh Whut'en attended the school as the information from many years of the school’s operation relates to the Stuart Lake Agency as a whole, rather than on an individual band level. Throughout its operation, the school was often full, and there were many requests for additional funding. These requests were either refused, or funding was slightly increased.
A.V. Parminter, Regional Inspector of Indian Schools examined the issue of schooling in the Stuart Lake Agency in 1954. He confirmed that Lejac was overcrowded, and endorsed the government’s plans to build a three classroom block and open a day school at Lejac to operate simultaneously with the residential school. Parminter noted 32 school-age children in the Band, of whom 12 were not attending school because of lack of accommodation. The day school was opened in 1956, and the 1957 Agency Return on Pre-School and School Age Children for June 30, 1957, showed for the Fraser Lake Band, 30 school-age children, all of whom were attending “Indian Day School”.

Over the years, the OMI used the school for retreats and other non-school related functions. At one point, Bishop Coudert, the Coadjutor Bishop appointed to assume Bishop Bunoz’s role, advised the Deputy Superintendent General of Indian Affairs that he had moved to Lejac, and requested approval to build his residence. His request was investigated by Indian Agent Moore, who reported that it would be best to have the visiting priests not living at the school. He considered that should the project go ahead, proceeds from the sale or lease should benefit the Band. MacKenzie instructed Indian Agent Moore to place the matter before the Indians and to advise the Department of their wishes, as the Bishop’s plans exceeded the purpose set out in the 1921 BCR.

Bishop Coudert objected to this process, expressing his belief that Canada held title to the land. However, the Indian Affairs department advised that the land was to be used solely for school purposes, and that if it was no longer required for school purposes, the land would be returned to the Band. Otherwise, any other use required Band approval. Bishop Coudert left Lejac in 1937-38. There is no evidence that an OMI residence was constructed.

In the 1930’s, the Lejac School began to have problems with its septic system. The problem became critical in 1959, when effluent began to contaminate the water supply. A sewage lagoon was recommended, so that the sewage from all of the school buildings would flow into the lagoon. Construction of the lagoon began in August 1959, and was completed a year later. However, the lagoon was also problematic and affected the school's water supply. In 1967, the George family, resident on the west side of IR 4 since 1949 and located about 400 feet from the lagoon, wrote to the Indian Affairs department complaining about odours from the sewage lagoon. The Georges were relocated and paid $16,000.00.

To ensure that Band members would not move into the vicinity of the sewage lagoon, a BCR was passed, which assigned Lot 2 containing 12.9 acres
on IR 4 to Indian Affairs for "an indefinite period". In April 1969, title to Lot 2 was registered in the name of the Branch. There is no record that the Band was paid compensation for the loss of use of Lot 2 on IR 4.

An issue surrounding the use of timber arose in 1955, when the Lejac School applied to the Province to cut timber for hay sheds and for sale. Principal Kelly had understood that the lands were not reserve lands. The question of the status of the lands was referred to W.S. Arneil, Indian Commissioner, by Superintendent Howe, who also assumed that the Crown held the lands.

Questions regarding the status of the school lands continued. There was uncertainty as to whether the Band should receive compensation for a road right of way being constructed across the reserve. Principal Kelly agreed to accept $100.00 per acre as compensation for the right-of-way; however, eventually, the Band was paid the compensation as Indian Commissioner Arneil acknowledged that any compensation for the use of reserve lands should be credited to the Band. In 1969, on the question of the Band's entitlement to receive lease revenue from the Indian Affairs department for the use of reserve land for the school, R.M. Hall, the Regional Superintendent of Education, advised that there was no precedent for compensation. However, in 1970, Chief Peter George wrote to Indian Affairs Minister Jean Chretien advising him that none of the Band children attended the school, and he requested that Indian Affairs pay rent for the use of the reserve. Departmental officials investigated the matter and concluded that nothing in the original agreement allowed for compensation to the Band for use of the land.

In 1975, the Lejac School ceased operating as a school, and the lands and assets thereon reverted to the Band. The school remained open as a residence for Indian children. Students from the Fraser Lake Band thereafter attended the Fraser Lake Public School.

At the Community Session conducted at Nadleh Whut'en First Nation on November 22, 2007, there was little oral history on how the school came to be located on IR 4, or how the Band permitted the use of the reserve. Elder George George Sr. stated that although his father was a chief of the reserve until 1956, his father did not know of any meetings held concerning the school. Elder Jack Lacerte stated that he was told that the Ketlo family had turned over some of the land for the school.
PART III

ISSUES

1. Was the Band Council Resolution of April 12, 1921 ("1921 BCR") lawful and sufficient under the Indian Act, R.S.C. 1906 as amended, to allow Canada to take and use approximately 260 acres of IR No. 4 (the "Lands") for the purpose of the Lejac School?

2. If the 1921 BCR was lawful and sufficient under the Indian Act, did Canada breach its fiduciary obligations arising at common law and/or under the Constitution Act, 1867 and/or under the Terms of Union, 1871 by:

   (a) failing to obtain the consent of Band membership and/or the Governor in Council prior to taking and using the Lands for the purpose of the Lejac School;
   (b) failing to compensate the Band for the use of the Lands between 1921 - 1976?
   (c) failing to ensure that school aged children from the Band would be granted admission to the Lejac School?

3. Did Canada, due to the fact that the school was located on reserve land set aside for that purpose, have a duty to ensure that all school-aged children of the Nadleh Whut'en First Nation (formerly Fraser Lake Indian Band) had the opportunity to be enrolled in the former Lejac Industrial school?

4. If the answer to (3) is yes, did Canada breach that duty?

5. Did Canada have a duty to ensure that the former Lejac Industrial School was used only for school purposes?
6. If the answer to (5) is yes, did Canada breach that duty?

7. If the answer to (5) is no, did Canada have a duty to ensure that compensation was paid to the Band when the school was used for other than school purposes?

8. Did Canada have a duty to protect the reserve land from any detrimental affects caused by the construction and use of a sewage lagoon on land set aside for the school?

9. If the answer to (8) is yes, did Canada breach that duty?

10. Did Canada have a duty to ensure the Band received compensation for timber cut for school and school farms?
PART IV

ANALYSIS

The history of Indian residential schools in Canada dates back to the early 1900's. The Lejac Indian Residential School, originally named the Fraser Lake Industrial School, was one of the earliest residential schools in British Columbia.

This inquiry focuses on the taking and use of reserve lands for an Indian residential school. The panel is of the view that the 10 issues agreed upon for inquiry can be collapsed into two issues, one of which can be viewed as an alternative:

1. Was the use of IR 4 for a residential school lawful in 1921?
The panel notes that the first two issues in the Statement of Issues are covered by this general issue. In other words, this issue encompasses the issues of consent and compensation at the time the lands were given up in 1921.

2. In the alternative, if the use of IR 4 was lawful, then should the Nadleh Whut'en Band receive compensation for the use of the land and resources for school purposes?

Issues 3-10 are covered by this second issue. The panel notes that the First Nation framed issues 3-10 in the further alternative in its written submissions. As such, if the panel concludes that the use of IR 4 was not lawful in 1921, then compensation will follow, and issues 3 to 10 need not be dealt with.

WAS THE USE OF IR 4 FOR A RESIDENTIAL SCHOOL LAWFUL IN 1921?

Issue 1 Was the Band Council Resolution of April 12, 1921 ("1921 BCR") lawful and sufficient under the Indian Act, R.S.C. 1906 as amended, to allow Canada to take and use approximately 260 acres of IR No. 4 (the "Lands") for

8 Written Submission on Behalf of the Nadleh Whut'en First Nation, February 11, 2008, at para. 186.
the purpose of the Lejac School?

**Issue 2** If the 1921 BCR was lawful and sufficient under the *Indian Act*, did Canada breach its fiduciary obligations arising at common law and/or under the *Constitution Act, 1867* and/or under the *Terms of Union, 1871* by:

(a) failing to obtain the consent of Band membership and/or the Governor in Council prior to taking and using the Lands for the purpose of the Lejac School

(b) failing to compensate the Band for the use of the Lands between 1921 - 1976?

**Positions of the Parties**

In its written submission, the First Nation argued that IR 4 was not an actual reserve at law, but rather, a *de facto* reserve. It submits that as a result, IR 4 was administered as a reserve at law based on the *Indian Act*. Because IR 4 was set aside as a reserve, occupied by the Band, and was treated as a reserve at law, the Band argues that it had a cognizable interest in the IR 4. As the Band had a cognizable interest in IR 4, the Band further argues that Canada owes basic fiduciary duties with respect to dealings with IR 4 and that Canada breached these duties by failing to properly oversee, supervise and approve the transaction that resulted in the establishment of Lejac School.

More specifically, the Band argues that the 1921 BCR did not properly authorize the establishment of the school. It alleges that the BCR is not indicative of the First Nation’s intentions as the First Nation had nothing to do with the location of the school and completely relied on the Indian Agent to advise and guide them. It submits that the school was a third-party use of the reserve which required the approval of the Crown, of which there is no record. Alternatively, the Band states that if the taking of the lands was lawful in 1921, then after 1938, the taking was unlawful because IR 4 then became a reserve at law and a taking of lands under the *Indian Act* required the approval of the Crown, of which there is no record. Following 1938, once IR 4 became a lawful reserve, it further argues that Canada was responsible to protect and preserve the Band’s interest in IR 4. At this point, it submits that Canada’s fiduciary obligations included a duty to place the Band’s interests above all others; to ensure that the Band was fairly compensated for lands and

---

9 Written Submissions on behalf of the Nadleh Whut’en First Nation, February 11, 2008 at para. 196.
10 Written Submissions on behalf of the Nadleh Whut’en First Nation, February 11, 2008 at para. 7.
timber taken for school purposes; to compensate for any negative impacts of
the school on the remainder of IR 4; to act in good faith; and, to avoid any
appearance of sharp dealings. The First Nation also submits that the Crown
has breached its duty of loyalty and the honour of the Crown.

In response, Canada argues that the Indian Act had no application to
these lands prior to 1938, and the 1921 BCR was sufficient to authorize use of
the lands as a school. Canada asserts that a formal surrender of the lands
for school purposes was not required, arguing that the school was built to
fulfill a term of the Fort Fraser Barricade Agreement, and the First Nation
wanted a school to be built. Because the Band requested the school, Canada
argues that there can be no wrongful taking of the land. It submits that the
Band’s decision must be respected and that, as a result, the 1921 BCR was
sufficient authorization.

Because the reserves had been allotted, surveyed, approved, and
occupied, and being administered by the Crown, Canada acknowledges that a
cognizable interest existed and that IR 4 had some administrative protection.
However, while Canada may have had pre-reserve creation fiduciary
obligations, these obligations are limited to loyalty, good faith, etc., and
Canada submits that these duties were fulfilled.

Canada also argues that the Indian Act did not apply to IR 4 until 1938. In
1938, s. 9 of the Act permitted the establishment of schools on reserve lands
for the children of the reserve or any reserve in the district. As a result, it
asserts that Canada did not have a statutory duty to ensure that children from
the First Nation were enrolled at the Lejac School.

On the issue of compensation, the Band states that this claim is not about
schools and education; the claim is about the use of 260 acres of reserve
lands by third parties without proper compensation to the Nadleh Whut’en
Indian Band. The key point of this claim, it suggests, is that the Crown
permitted third-party use of reserve land for free.

In their legal submissions to the panel, both the First Nation and Canada
agreed that Issues 3-10 were peripheral to the central tenet of the claim. The
Band’s counsel submitted that this claim "is not about schools and not about
education. This claim is about the use of reserve lands ... It's about the use of
lands without compensation." Canada’s counsel agreed that, "it was clear

11 Written Submissions on behalf of the Government of Canada, March 17, 2008 at para. 5.
14 Written Submissions on behalf of the Nadleh Whut’en First Nation, February 11, 2008 at para. 21.
15 Oral Submissions, Counsel for the Nadleh Whut’en First Nation, Transcripts of the Oral Hearings, Vancouver,
B.C., April 10, 2008, pp. 5-6.
that really all the peripheral issues... are all really tied to the use of the reserve land and whether it was properly authorized and whether Canada breached some duty in allowing that to happen...what we're talking about here is the use of part of IR 4 for the school without compensation to the First Nation."16

Because of this consensus, the panel has not fully outlined the position of the parties on issues 3-10, instead taking the approach we have outlined, namely, to address the issues of consent and compensation, since by doing so, the other issues will also be resolved for the most part.

Panel's reasons
Both the First Nation and Canada agree on the background to the fiduciary relationship between the Crown and First Nations. This fiduciary relationship was first acknowledged by the Supreme Court of Canada in Guerin v. The Queen.17 In Guerin, the Musqueam Band surrendered reserve land for lease to a golf club; however, the Band later learned that the terms of the lease obtained by the Crown were significantly different from those the Band had agreed to and were less favourable. The Court unanimously found that, by unilaterally changing the terms of a lease originally agreed to by the Band, Canada had breached its duty to the Band. Dickson J, with the concurrence of Beetz, Chouinard, and Lamer JJ, stated the following regarding fiduciary principles:

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

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.18

17 Guerin v. The Queen, [1984] 2 SCR 335.
18 Guerin v. The Queen, [1984] 2 SCR 335 at 376.
In identifying a fiduciary relationship, Dickson J quoted Professor E.J. Weinrib’s statement that “the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.” This description has been supported in other Supreme Court of Canada judgments.

Although the courts have recognized that a fiduciary relationship exists between the Crown and Aboriginal people, the courts have also noted that not all aspects of the fiduciary relationship will give rise to fiduciary obligations. To date, the Supreme Court of Canada has recognized certain fiduciary obligations on the Crown which arise prior to a surrender of reserve lands, following a surrender of reserve lands, before the expropriation of reserve lands, or as a result of the regulation or infringement of a constitutionally protected Aboriginal or treaty right. More recently, the Supreme Court of Canada has recognized the existence of a fiduciary duty in relation to reserve creation in Ross River, and more importantly, in Wewaykum Indian Band v. Canada. Wewaykum is the Supreme Court of Canada’s most recent statement regarding the Crown/Aboriginal fiduciary relationship and when the fiduciary relationship gives rise to a corresponding fiduciary duty.

In Wewaykum, which dealt with the setting aside of reserve lands in British Columbia before 1938, the Supreme Court said the following:

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.

---

19 Guerin v. The Queen, [1984] 2 SCR 335 at 384.
22 Blueberry River Indian Band v. Canada (1995), 130 DLR (4th) 193 (SCC). In a concurring judgment, McLachlin J observed that, prior to consenting to a surrender proposed by an Indian Band, the Crown has a fiduciary duty limited to preventing exploitative bargains (at 208).
23 Guerin v. The Queen, [1984] 2 SCR 335.
24 Oxoyoos Indian Band v. Oliver (Town), [2001] 3 SCR 746.
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.27

Essentially, the Supreme Court has confirmed that the Crown/Aboriginal relationship is a fiduciary relationship, but that "not all obligations existing between the parties to a fiduciary relationship are fiduciary in nature."28 The Court also acknowledged that "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."29 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, where the Crown acts as the exclusive intermediary with the province, also triggers 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.30

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. Moreover, it found that 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.) 31

In this inquiry, the parties agree that at the time the school was created, IR 4 was not a reserve at law. Instead, in applying principles from *Wewaykum*, the parties agree that the First Nation had a cognizable interest in IR 4, such that the lands had been set aside for the Band, and were being occupied and used by the Band. As a result of this cognizable interest, it is clear that Canada and the First Nation had a fiduciary relationship in the pre-reserve-creation era that gives rise to fiduciary duties limited to loyalty, good faith, full disclosure appropriate to the subject matter, and ordinary prudence, exercised with a view to the best interests of the Indians.

In determining the extent of these duties, even though the Indian Act did not apply, there are relevant *Indian Act* sections relating to residential schools that are instructive. For example, section 9 of the 1906 *Indian Act* states:

9(1) The Governor in Council may establish:

(a) day schools in any Indian reserve for the children of such reserve;
(b) industrial or boarding schools for the Indian Children of any reserve or reserves or any district or territory designated by the Superintendent General.32

In addition, s. 194(2)(f) of the *Indian Act*, in reference to a band council, states:

2. The council may also make by-laws, rules and regulations, approved and confirmed by the Superintendent General, regulating all or any of the following subjects and purposes, that is to say:

(f) The construction and repairs of school houses, council houses and other buildings for the use of the Indians on the reserve, and the attendance at school of children between the ages of six and fifteen years33;

These sections permit schools to be established on reserve, but do not mention the use or taking of reserve lands for school purposes. However,
s. 11 of the 1906 *Indian Act* states:

11. The Governor in Council may take the land of an Indian held under location ticket or otherwise, for school purposes, *upon payment to such Indian of the compensation agreed upon*, or in case of disagreement such compensation a may be determined in such manner as the Superintendent General may direct.  

This section specifically identifies that where there is a location ticket, or where land is otherwise held by an Indian, compensation is required if this land is taken for school purposes. The panel notes that the lands were not held under a location ticket on the facts in this inquiry, and that prior to 1938, the *Indian Act* did not apply to IR 4; however, the principle of compensation for lands taken for such purposes is clearly set out in the legislation.

The question facing the panel is whether or not the pre-reserve-creation fiduciary duties required by law were fulfilled in 1921 with respect to the taking of 260 acres of IR 4 for the Lejac Indian residential school. In other words, the panel must ask itself what the Crown should have done in 1921 to fulfil the basic fiduciary duties required by law with respect to the establishment of the school. The panel’s approach to this question, as outlined earlier, deals with consent and compensation.

In examining whether or not the First Nation provided appropriate consent to the use of lands set aside as reserves for a school, the panel is guided by Exhibit 3c, a report entitled *B.C. Residential School Lands: Draft Historical Report* prepared by Public History Inc. during the course of this inquiry. This report covers the establishment of 20 residential schools in BC, eight of which were established on lands set aside as Indian reserves. These schools include Kamloops Residential School, Kitamaat Residential School, Kuper Island Residential School, Lytton Residential School, Matlaakatla Residential School, Port Simpson Boys Residential School, and the Sechelt...
School\textsuperscript{42}. The circumstances of how each of these schools were created is unique in each case. Only one school was established on lands that were clearly surrendered\textsuperscript{43}. Otherwise, there was no consistent method in taking lands set aside as reserves for residential schools.

For further guidance, the panel examined a memorandum written by J.D. McLean, then Assistant Deputy Superintendent General and Secretary of Indian Affairs, dated November 25, 1910\textsuperscript{44}. The memorandum was the result of a meeting to re-negotiate the funding arrangement between the federal government and the churches in operating schools.

Originally, when formal Indian education was first initiated in the 1880’s, the department preferred industrial schools over boarding schools.\textsuperscript{45} However, industrial schools were located far from First Nation communities, and to compensate for the distance, boarding schools were built.\textsuperscript{46} A new funding arrangement was concluded with an increasing number of boarding schools.\textsuperscript{47} The memorandum sheds some light on the operation of residential schools, but again, there is no reference to the use of lands set aside for reserves for such schools. However, it is clear to the panel from this document that the churches operated the schools and the federal government provided the funding.

There was no clear articulation of the policy regarding the use of reserve lands for school purposes until 1954, when the department responded to the OMI’s query regarding title to the lands on reserve. It wrote:

\begin{quote}
The Department has consistently held the view that it is unwise to alienate small parcels of Reserve land lying within the confines of Indian Reserves. If this is done, islands are created within the Reserve over which we have no control and there have been instances in the past where title to such islands, if I may call them that, has passed from the original grantee to persons whose presence within the
\end{quote}

\textsuperscript{42} B.C. Residential School Lands: Draft Historical Report, prepared by Public History Inc. for Indian and Northern Affairs Canada, Specific Claims Branch, November 21, 2003 (ICC Exhibit 3c, p. 65).
\textsuperscript{43} Kamloops Residential School, B.C. Residential School Lands: Draft Historical Report, prepared by Public History Inc. for Indian and Northern Affairs Canada, Specific Claims Branch, November 21, 2003 (ICC Exhibit 3c, p. 30).
\textsuperscript{44} J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6445, file, 881-1, part 1 (ICC Exhibit 1a, p. 109).
\textsuperscript{45} J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6445, file, 881-1, part 1 (ICC Exhibit 1a, p. 109).
\textsuperscript{46} J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6445, file, 881-1, part 1 (ICC Exhibit 1a, p. 109).
\textsuperscript{47} J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6445, file, 881-1, part 1 (ICC Exhibit 1a, pp. 109-110).
boundaries of the Reserve was most prejudicial to our administration and the welfare of the Indians. ...

It is because of these factors that over the years the practice has grown up of simply asking Band Councils to reserve for the use of churches designated areas, on the understanding that the said area may be used by the church in question for so long as it is required for church purposes. In practice, we receive Council resolutions to that effect and simply approve the resolution and write a letter to the Superintendent in question advising him of such approval.

While that is the practice today and was undoubtedly carried out in some cases in the past, we know that there are many instances where there is no record of anyone having approved the occupation of Reserve lands for church purposes. Presumably the Indians consented to such use in these cases, but there is no record of such consent. We have no up-to-date record of all church sites on Reserves in Canada and if you wish to supply a list by Indian Reserves, we could check our records in an endeavour to ascertain the basis of the occupation. We would estimate that in some few cases outright title may have been granted; in others there may have been consent by a letter, but that in a majority of the cases there would be no record of formal approval of the occupation.  

From this document, it seems clear that surrenders of parts of a reserve for the use of schools within the reserve were not usually obtained and were not the preferred means of allowing churches to use lands set aside as reserves. Instead, the department wished to retain control and administration of the entire reserve, for the benefit of the Indians. More importantly, while the department maintained control and administration of the reserve lands, it acknowledged that in some cases, proper consent for the use of the reserve by a church may not have been obtained, and that if consent had been given, there was often no formal record of that consent.

In this inquiry, the First Nation argues that the BCR was not sufficient authority to set aside 260 acres of lands that had been set aside for a reserve, and that further formal approval was required. Canada argues that the First Nation had requested a school, and consented to the use of the lands for a school. As a result, Canada argues that the BCR was sufficient authority and no further formal approval was required.

With respect to the issue of consent, the panel notes that until 1938, the Indian Act did not apply to the reserve, according to Weywaykum. Instead, Canada owed pre-reserve-creation fiduciary duties to the Band in the form of loyalty, good faith in the discharge of its mandate, full disclosure appropriate

48 H.M. Jones, Director, Indian Affairs Branch, Department of Citizenship and Immigration, to Rev. G. Laviolette, General Secretary, Indian and Eskimo Welfare Commission, OMI, University of Ottawa, Ontario, February 10, 1954, OMI Deschales Archives HR6111.C73R5 (ICC Exhibit 1a, pp. 1424-25) [emphasis added].
to the subject matter, and ordinary prudence with a view to the best interests of the Band.

As IR 4 had been set aside for the Band, the Band was occupying IR 4, and IR 4 was confirmed as a reserve in 1938, the panel concludes, as it did in the ICC’s Lower Similkameen Report, that IR 4 was at its highest pre-reserve-creation state. At the very least, the Crown had to oversee all of the Band’s decisions and manage the Band’s affairs with ordinary prudence and due diligence during that period of time. There is no evidence before us to indicate that the government took any steps to review or approve the Band’s decision to set aside lands for school purposes. Instead, the only formal approval before us is an Order in Council dated July 3, 1920 authorizing the establishment of the school some ten months before the Band’s BCR.

The fact that there was a BCR evidencing that the Band’s agreement to set aside lands for a school on reserve lands is not, in and of itself, sufficient to establish informed consent or to remove the Crown’s fiduciary obligations of ordinary prudence and good faith.

Given its fiduciary duties, we find that the Crown had to manage the Band’s affairs as it would have managed its own. It was Canada that entered into the funding agreement with the church, not the Band, therefore the arrangements entered into by Canada had to take into consideration such matters as compensation, as this would be ordinarily prudent to do. The Crown, in our view, had an obligation to ensure that reserve lands that were to be used by third parties for an indefinite period of time for school purposes, particularly where the students attending might not be from the reserve itself, would be the subject of reasonable compensation. Canada’s failure to do so was a breach of the ordinary prudence required of it as a fiduciary before 1938. Its failure to do after 1938 was a breach of its fiduciary obligations to protect and preserve the Band’s quasi-proprietary interest in the reserve from exploitation, as outlined in Wewaykum.

Furthermore, according to Wewaykum, prior to 1938, Canada had a fiduciary obligation to provide “full disclosure appropriate to the subject matter.” It was thus required to disclose relevant information to the First Nation before seeking its consent by BCR to the establishment of the school on lands set aside as a reserve. The First Nation was entitled to be informed, before it gave its agreement, if Canada did not intend to compensate the First Nation for the use of its lands or timber and if students from other First

49 ICC, Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry (Ottawa, February 2008) at p. 32
Nations would be attending the school. Whether the school would be adequate for the Nadleh Whut’en pupils was another relevant consideration that should have been discussed before consent to set aside lands for a school was sought from the First Nation. However, we have no evidence to indicate that there were any discussions with the Band concerning these matters. Thus, it does not appear that the Band received full disclosure of relevant information, but whether it did or not, there is little doubt that Canada failed to ensure that reasonable compensation would be paid to the Band for the use of lands to which the Band was entitled.

On this latter point, the panel notes that this requirement is found at common law as well. As we stated in our Lower Similkameen Report:

While not raised by the parties, the Crown has a common law duty to compensate not only in cases of taking of title but also in cases where "enjoyment of possession" is eliminated or depreciated by actions of the Crown:

[T]here would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." 50

The Crown, and not the Lower Similkameen Band or its members, had title to the right of way taken, so that taking of title is not at issue. However, the Band, or its members, did have the right to "enjoyment of its possession," which was taken from them. This loss provides another basis on which compensation was due. The compensation is to be "full." 51

The panel notes that there is a common law duty to provide compensation for lands taken. This common law duty finds its way into statutes, including the Indian Act. Section 11 of the Indian Act, which requires compensation to be paid to the holder of a location ticket for lands taken, embodies this principle.

In this inquiry, we find that the Band’s full use of IR 4 was affected. The panel finds that the eastern portion of IR4, including the use of the shoreline for a fishing station, together with the use of the soil for agriculture, the use of

50 Manitoba Fisheries Ltd. v. Canada, [1979] 1 SCR 101 at 110, Ritchie J, quoting Lord Radcliffe in Belfast Corporation v. O.D. Cars Ltd., 1960 AC 49 at 523 (HL(NI)).
the timber, and the enjoyment and possession of the land, were taken from the Band without Canada negotiating any compensation in return.

The panel does not accept the premise put forward by Canada that just because the Nadleh Whut’en Band signed the Fort Fraser Barricade Agreement and had expressed its desire for a school to educate their children, the Crown was relieved of its responsibility to ensure compensation was paid for the loss of use of the land taken in IR 4. Other bands wanted their children educated and other bands signed the same Agreement. These bands also benefitted from the Lejac school but they did not have to give up their reserve land to have their children educated.

In addition, the panel believes it is unlikely that the Crown, if it were in the same position as the Nadleh Whut’en Band, would have permitted the long-term use of a large amount of land without any compensation being paid. This failure to ensure compensation was paid to the Band is a breach of the Crown’s basic pre-reserve-creation fiduciary duties and the ordinary prudence expected of it in its dealings with the Band’s reserve lands pre-1938. After 1938, its failure to do so was exploitive, particularly when children from other Bands, and not only those from Nadleh Whut’en were attending the Lejac School.

REMAINING ISSUES

Issue 3 Did Canada, due to the fact that the school was located on reserve land set aside for that purpose, have a duty to ensure that all school-aged children of the Nadleh Whut’en First Nation (formerly Fraser Lake Indian Band) had the opportunity to be enrolled in the former Lejac Industrial school?

Issue 4 If the answer to (3) is yes, did Canada breach that duty?

Position of the Parties
The Band argues that Canada had a duty to ensure that school-aged children of the Band had access to the Lejac School. It argues that failing to do so was a breach of Canada’s fiduciary duties of ordinary diligence, full disclosure, good faith, and loyalty to the Band. Canadians’s response is that as there was no reserve in existence prior to 1938, no duty arose, and that after 1938, section 9 of the Indian Act "allowed for the establishment of schools on reserve for

52 Written Submissions on behalf of the Nadleh Whut’en First Nation, February 11, 2008 at paras. 231-232.
the Indian children of any reserve or reserves. Canada further submits that there is only one document that refers to overcrowding, and that without corroborative evidence, that document is insufficient to establish a breach of fiduciary obligation.

Panel's Reasons

We note that the data concerning enrolment at the Lejac School is incomplete, and that information from many years of its operation relate to the Stuart Agency as a whole.

There are references in the historical record to overcrowding in the school in 1954. In a letter from W.S. Arneil, the Indian Commissioner for British Columbia to the Indian Affairs Branch in May, 1954, for example, he comments that the construction of three additional classrooms at Lejac would relieve the overcrowding and allow for the discharge of 25 residential school pupils, thus providing beds "for this number of children who are not now attending any school." A.V. Parminter, Inspector of Indian Schools for the province responded by noting that the Lejac school, which was equipped to accommodate 150 children, had been housing over 180. He confirmed the Department's plans to erect a three classroom building at Lejac in order to alleviate that overcrowding.

Once the day school was opened, very few Nadleh Whut'en students enrolled as residential school students. By 1957, 30 were attending the day school. In the circumstances, we cannot say that Canada did not live up to its obligations. We have insufficient evidence on the record to conclude that Canada refused or denied admission to the Lejac School, or to find that it failed to take steps to ensure that Nadleh Whut'en students had access to the Lejac School.

Issue 5 Did Canada have a duty to ensure that the former Lejac Industrial School was used only for school purposes?

Issue 6 If the answer to (5) is yes, did Canada breach that duty?

Issue 7 If the answer to (5) is no, did Canada have a duty to ensure that compensation was paid to the Band when the

53 Written Submissions on behalf of the Government of Canada, March 17, 2008 at paras. 133-134.
54 Written Submissions on behalf of the Government of Canada, March 17, 2008 at par. 132.
55 W.S. Arneil, Indian Commissioner for B.C., to Indian Affairs, May 19, 1954 (ICC Exhibit 1a, pp. 1429-1430)
56 A.V. Parminter, Inspector of Indian Schools for B.C., to W.S. Arneil, June 17, 1954 (ICC Exhibit 1a, p. 1431-1435)
school was used for other than school purposes?

Issue 8 Did Canada have a duty to protect the reserve land from any detrimental effects caused by the construction and use of a sewage lagoon on land set aside for the school?

Issue 9 If the answer to (8) is yes, did Canada breach that duty?

Issue 10 Did Canada have a duty to ensure the Band received compensation for timber cut for school and school farms?

Issues 5, 6, 7, and 10, have been implicitly addressed in our findings on the issues of consent and compensation. We have found that the consent provided by the Band did not remove the Crown’s fiduciary obligations, and that the First Nation was entitled to be compensated for the use of its lands for school purposes.

With respect to Issues 8 and 9, the panel is of the view that if adequate compensation had been paid to the First Nation for the use of its lands, these issues would not have been put forward. Also, with respect to Issue 10, our conclusion to the effect that the Nadleh Whut’en First Nation lost the full use and enjoyment of the eastern portion of IR 4 (approximately 260 acres) between 1921 and 1976, applies to the use of the timber from those lands as well.
PART IV

CONCLUSIONS AND RECOMMENDATIONS

The panel concludes that the Crown owed fiduciary duties to the Nadleh Whut’en First Nation to ensure that its lands and resources were managed properly and were in the First Nation’s best interests. Before 1938, those duties were limited to basic obligations of loyalty, good faith, full disclosure, and acting with ordinary prudence with a view to the best interests of the Aboriginal beneficiaries. After 1938, once IR 4 was created, the Crown’s fiduciary duty expanded to include the protection and preservation of the Band’s quasi-proprietary interest in its reserve lands from exploitation. In our view, when it obtained a BCR from the First Nation agreeing to set aside 260 acres for school purposes, the Crown failed to provide the Nadleh Whut’en First Nation with full disclosure of how those lands would be used, and that the Band would not receive compensation for those uses. Its failure to ensure that the First Nation was fairly compensated for the use of its lands by third parties was not in the best interests of the First Nation, and does not reflect ordinary prudence in the management of such affairs.

The Band Council Resolution of April 12, 1921 is not sufficient to remove the Crown’s obligations in this regard. There is nothing in the BCR to suggest that the Band consented to the use of its lands without compensation. The Crown cannot rely on the BCR as evidence of the Band’s consent to the use of its lands without compensation when there is no evidence that the Crown had disclosed to the First Nation that it would not be compensated for its land and resources, or that the school constructed on its reserve would be used by students from other bands.

Furthermore, Canada had an obligation, as part of its fiduciary duties of "ordinary prudence," to ensure that the Band would be fairly compensated for the use of its lands by third parties.

The Crown had both a fiduciary and common law duty to ensure that the First Nation was not deprived of the use of its lands without compensation. With the transfer of title to IR 4 by British Columbia to Canada in 1938, the Indian Act then applied to the lands in question and the Crown’s fiduciary duty
required it to use diligence to protect the Band’s interests in its lands from exploitation. Even with this change, Canada did nothing to ensure that the First Nation was paid compensation for the use of its lands, thus depriving the First Nation of the compensation to which it was entitled.

On the evidence presented to the panel, we conclude that the Nadleh Whut’en First Nation lost the full use and enjoyment of the eastern portion of IR 4 (260 acres) from the spring of 1921 until the fall of 1976, when the lands reverted to the First Nation. The Crown, having taken this land for school purposes, and having entered into funding agreements with the OMI, had a duty to fully compensate the Band for its loss. Its failure to do so, for the reasons outlined, breached the Crown’s fiduciary duties.

Regarding issues 3 and 4, we have insufficient evidence to show that Canada denied or refused admission to Nadleh Whut’en children, or even why Nadleh Whut’en students did not attend the school. Therefore, we cannot conclude that Canada failed in its duties.

As for the issues 5-10, our findings with respect to consent and compensation address them for the reasons we have outlined. Our conclusions apply equally to the timber cut on reserve lands for school purposes as to the use of IR lands for the school itself.

The panel therefore recommends:

That under Canada’s Specific Claims Policy, Canada negotiate with the Nadleh Whut’en First Nation for compensation regarding the loss of the full use and enjoyment of the eastern portion of Indian Reserve 4, lands that were set aside for school purposes.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde (Chair) Alan C. Holman
Chief Commissioner Commissioner

Dated this 16th day of December, 2008.
APPENDIX A

HISTORICAL BACKGROUND

NADLEH WHUT’EN INDIAN BAND
LEJAC SCHOOL INQUIRY

INDIAN CLAIMS COMMISSION
CONTENTS

Introduction 253
  Nadleh Whut'en’s Requests for Industrial School 254
  Fishing Controversy 255
  Establishment of the Stuart Lake Agency and Indian Education: 1910 256
  Fort Fraser Barricade Agreement of 1911 259
  Establishment of The Lejac Indian Residential School 263
  The School, the Band and IR 4 266
Enrolment of Nadleh Whut’en Students at the Lejac Indian Residential School 269
Construction and use of the Sewage Lagoon 291
Timber and the Lejac School and School Farm 295
Use of School by the Oblates of Mary Immaculate 301
INTRODUCTION
The Nadleh Whut'en Indian Band is located in the northern interior of British Columbia. The Band has been identified as being part of the Carrier Group of First Nations and was included in the Hoquelget Division of the Babine and Skeena River Agency until 1910.

On August 31, 1892, Indian Reserve Commissioner Peter O'Reilly set aside four Indian Reserves, (hereafter abbreviated as IR), 1 - 4 for the Band. The focus of this inquiry involves IR 4, also known as the Seaspunkut Reserve, located on the south shore of Fraser Lake. When first surveyed by F. A. Devereux in July and August 1894, IR 4 contained 470 acres. The Lejac Indian Residential School was located on Seaspunkut IR 4 and opened in 1922.

At the community session, Elder George George Sr. explained that "the word Nadleh, in our language, ... means, 'comes back every year', referring to the salmon." Elder George Sr. also stated "[b]efore the school was built, IR4 ... was a fishing town, where people used to have fishing settlements down by the lake... . [T]here was a small settlement on the west end, with maybe two, three families living there." There is a small lake on Seaspunkut IR 4 where the band would fish for suckers.

In 1922, government policy regarding Indian education was to establish industrial schools, and provide annual funding on a per capita basis for the maintenance of the school, while the day-to-day management of the school was delegated to various religious organizations. At the Lejac Indian...

---

57 The Nadleh Whut'en Indian Band was known as the Fort Fraser Band, Fraser's Lake Band or the Fraser Lake Band until 1990.
58 R. E. Loring, Indian Agent, Babine and Upper Skeena Agency, Hazelton, BC to Superintendent General of Indian Affairs, Ottawa, July 11, 1898, Canada, Annual Report of the Department of Indian Affairs for the year ended 30th June 1898, Queen's Printer, 1899, pp. 57-47.
59 Peter O'Reilly, Indian Reserve Commissioner to Deputy Superintendent General of Indian Affairs, February 23, 1893, no file reference available (ICC Exhibit 1a, p. 11-14).
60 F. A. Devereux, Surveyor to Indian Reserve Commission, Department of Indian Affairs, Victoria, BC to P. O'Reilly, Indian Reserve Commissioner, November 17, 1894, Canada, Annual Report of the Department of Indian Affairs for the year ended 30th June 1894, Queen's Printer, 1895, p. 236 (ICC Exhibit 1a, p. 33); Plan BC 100 CLSR, "Plan of Fraser Lake Indian Reserves, Coast District, British Columbia", surveyed by F.A. Devereux, PLS in 1894, approved December 14, 1895 (ICC Exhibit 7a).
61 Plan BC 100 CLSR, "Plan of Fraser Lake Indian Reserves, Coast District, British Columbia", surveyed by F.A. Devereux, PLS in 1894, approved December 14, 1895 (ICC Exhibit 7a).
62 Originally, the school was named the Fraser Lake Industrial School. Over time, the school gradually became known as the Fraser Lake Indian Residential School. In 1931, the school’s name was officially changed to the Lejac Indian Residential School in honour of oblate missionary Father Lejac, well known to the area. Much later in the history of the school, its name was changed to the Lejac Sen Student Residence when its function as a 'residential school' as defined by government policy, was terminated.
63 Seaspunkut is spelled a number of ways in the historical documents on record for this inquiry. Often, it is spelled 'Seasbunkut' or 'Seaspunket'. For consistency, it will be spelled 'Seaspunkut' in this history, which is as it appears on the reserve general register of Indian and Northern Affairs Canada.
64 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 17, G. George Sr.).
65 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 12, G. George Sr.).
66 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 19, G. George Sr.).
Residential School, the federal government provided annual funding to the Oblates of Mary Immaculate, (hereinafter referred to as ‘OMI’), who managed the daily operation of the school. The OMI was expected to provide, from the per capita grant or church contributions, educational facilities for the pupils enrolled; provide for the clothing during the ten months ... of each year when they are in residence; provide food; provide for heating and lighting of the building; provide the salaries of the staff members required to operate the building and the farm. (If there is one in connection with the school). 67

The Lejac Indian Residential School operated a farm on the school grounds.

**Nadleh Whut’en’s Requests for Industrial School**

On December 15, 1905, Bishop A. Dontenwill, OMI, forwarded a petition addressed to the Superintendent General of Indian Affairs on behalf of “the Indians of Stuart's Lake District” for a school.68 Although the petition is missing from the historical document file,69 Bishop Dontenwill’s covering letter states that the petition was ”for an Industrial school for their District. They request me to forward the same to you”.70 Dontenwill supported the request, saying:

I have no hesitation to join them, for I am convinced that they are [in] real earnest and that they will make as good a use as any Indians have ever made, of the opportunities that shall be afforded them when a school shall be given them.

The only kind of school that shall be of real benefit to them is an industrial school. [Illegible] the distance at which they are from convenient shipping points, supplies will be so expensive that it would be useless to think of any other grant as sufficient except an Industrial School grant.71

A.W. Vowell, Indian Superintendent for BC, forwarded Bishop Dontenwill’s letter and the petition to the Department of Indian Affairs on December 27,
1905. Vowell’s correspondence suggests that there were already ongoing discussions with respect to establishing a school at Stuart Lake:

With reference to your letter of the 27th of last October and other correspondence on the subject of the condition of the Indians of Stuart’s Lake and particularly in relation to the question of the advisability of establishing an Industrial school at Stuart’s Lake for the children of the Indians there residing, I have the honor to forward herewith for the information of the Department a communication dated the 15th instant, recently received from His Lordship the Roman Catholic Bishop of New Westminster... .

Fishing Controversy

In the early 1900s, salmon resources in the Fraser and Skeena Rivers in central British Columbia were beginning to diminish. As a result of depleting resources, conflict arose between settlers who operated a thriving canning industry and the First Nations who had been fishing the Fraser and Skeena Rivers for generations. Settlers opposed the First Nations’ use of fishing weirs or barricades, alleging that the resulting large catches of fish were the cause of declining resources.

Official negotiations were held between the Minister of the Interior, the Department of Indian Affairs, the Department of Marine and Fisheries, Chief Big George and Chief William Tszak of the Babine area to settle the controversy. In the fall of 1906, the Babine Proposition of 1906 was concluded; the First Nations agreed to retire their fishing barricades if the government provided “one industrial school in the district”, among other things. At that time, the Nadleh Whut’en Indian Band was still part of the Babine and Upper Skeena Indian Agency. It is not clear from the documentary record of this inquiry, however, whether the Nadleh Whut’en Band was a party to the Babine Proposition.

---

72 A.W. Vowell, Indian Superintendent for BC, Indian Office British Columbia, to Secretary, Department of Indian Affairs, December 27, 1905, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 62).
74 Babine Proposition attached to memo from unidentified author to unidentified recipient, November 10, 1906, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 67) [underlining in original]. The proposition also stipulated that the government furnish the First Nations with netting for continued fishing practices, arable land, and certain specified farming implements.
A day school was eventually established at Stuart Lake. While R.E. Loring, Indian Agent for the Babine and Upper Skeena Agency, reported on this day school in 1907, 1908 and 1909, the documentary record does not indicate whether this school received federal funding. There are also reports of “several very successful day schools in operation” in the Babine Agency.

Establishment of the Stuart Lake Agency and Indian Education: 1910
In 1910, the Stuart Lake Agency was created, and responsibility for the Nadleh Whut’en Indian Band, (then called the Fraser Lake Band), was transferred to this agency. W. J. McAllan, the first Indian Agent for the Stuart Lake Agency, reported that the agency consisted:

...of an irregularly shaped territory of about 60,000 square miles in central British Columbia, lying north of the 53rd parallel and occupying almost the whole depression between the Rocky mountains and the coast range from the 53rd to the 57th parallel.

... The total extent of the reserves within the agency is 23,391 acres. The total Indian population is 1,391.

In the same report, Indian Agent McAllan also reported on the Fraser Lake Band:

Tribe. - These Indians belong to the Carrier tribe.
Reserves. - The reserves of this band are four in number; three at the east end of Fraser lake and one on the south shore, seven miles from the east end.
The total acreage is 1,949. ...
Population. - This band numbers 67.

---

77 R.E. Loring, Indian Agent for the Babine and Upper Skeena Agency, to Frank Pedley, Deputy Superintendent of Indian Affairs, April 1, 1907, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1907, King’s Printer, 1907, 190-199 (ICC Exhibit 1a, pp. 69-78); R.C. Lorring, Indian Agent for the Babine and Upper Skeena Agency, to Frank Pedley, Deputy Superintendent of Indian Affairs, April 4, 1908, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31st, 1908, King’s Printer, 1909, 200-209 (ICC Exhibit 1a, p. 79-88); R.C. Lorring, Indian Agent for the Babine and Upper Skeena Agency, to Frank Pedley, Deputy Superintendent of Indian Affairs, March 31, 1909, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31st 1909, King’s Printer, 1909, 204-215 (ICC Exhibit 1a, p. 89-98).
78 J.D. McLean, Secretary, to W.J. McAllan, Indian Agent, September 21, 1910, LAC, RG10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 101).
79 W. J. McAllan, Indian Agent, Stuart Lake Agency, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 24, 1911, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1911, King’s Printer, 1911, 257-262 (ICC Exhibit 1a, pp. 130-135).
80 W. J. McAllan, Indian Agent, Stuart Lake Agency, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 24, 1911, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1911, King’s Printer, 1911, 257 (ICC Exhibit 1a, p. 130).
81 W. J. McAllan, Indian Agent, Stuart Lake Agency, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 24, 1911, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1911, King’s Printer, 1911, 260 (ICC Exhibit 1a, p. 133).
McAllan identified the following bands as being part of the Stuart Lake Agency: Yucutce, Tatcee, Pintce, Grand Rapids, Tsislainli (Trembleur Lake), Stuart Lake, Stella, Francois Lake, Chislatta, Fraser Lake, Stoney Creek and Laketown, Blackwater, Fort George, McLeod’s Lake, Fort Graham, Fort Connelly, Naanees (two bands). 82

On August 30, 1910, then acting Indian Agent McAllan reported to J.D. McLean, Secretary, Department of Indian Affairs, that First Nations within the newly established Stuart Lake Agency requested that the government establish a school in the agency. McAllan wrote:

In my visit[s] to the different Indian bands in this Agency I am met with a very urgent request by the chief & more intelligent Indians, that the question of the education of the children be taken up and I am asked to bring this matter to the notice of the Department and to point out that there is not one Indian School in the whole of this Agency.

The Indians urge the earnest consideration of this matter by the Department. 83

Secretary McLean replied that:

Some four or five years ago an application was made for the establishment of an industrial school at Stuart Lake. The Department is not, however, prepared to extend the industrial school system, but it is willing to establish day schools where it can be shown that there is a prospect of conducting them with success and where the services of efficient teachers can be had. 84

McLean instructed Acting Indian Agent McAllan

...to report upon the conditions on any of the reserves in your Agency where there is a sufficient number of children to justify the establishment of a day school and where the Indians are so located that their children could take advantage of such a school if established. You should also report upon the probability of the Department being able to secure competent teachers; not necessarily teachers with professional training, but those who would be interested in Indian work. 85

82 W. J. McAllan, Indian Agent, Stuart Lake Agency, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 24, 1911, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1911, King’s Printer, 1911, 257-262 (ICC Exhibit 1a, pp. 130-135).

83 W. J. McAllan, Acting Indian Agent, Stuart Lake Agency, to J.D. McLean, Secretary, Indian Department, Ottawa, August 30, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 99).

84 J.D. McLean, Secretary, to W.J. McAllan, Acting Indian Agent, September 21, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 100).

85 J.D. McLean, Secretary, to W.J. McAllan, Acting Indian Agent, September 21, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 100).
On October 28, 1910, Acting Indian Agent McAllan reported that the First Nations of the Stuart Lake Agency were "anxious" to have a day school established in the area. However, McAllan noted that the First Nations' "Spiritual advisor, Father Coccola is uncompromisingly opposed to Day Schools and how much he may use his influence to kill the project and how far he may be successful are problematical." McAllan concluded "that an Industrial boarding ... school would give good results, but the cost of establishing & maintaining same would be staggering. The Department's decision not to extend this system is I take it final and probably wise."

At this time, the government's Indian schools policy was undergoing review. On November 25, 1910, J.D. McLean, then Assistant Deputy Superintendent General and Secretary of Indian Affairs, distributed "information relating to Indian Boarding schools and draft of contract which it is proposed that the authorities responsible for the maintenance and conduct of Indian Boarding schools shall become a party to in order to entitle such schools to Government aid." McLean explained:

When Indian education was taken up seriously in Western Canada in the eighties the policy of the Government was to establish Industrial Schools, erected at the cost of the Government, to be conducted under the auspices of the several religious bodies interested; the Government contributing to the maintenance of the schools a fixed sum per head. In pursuance of what was then believed to be sound policy these schools were generally speaking, located at points distant from Indian reserves and for this reason there was frequently considerable difficulty in securing a sufficient attendance of Indian pupils to earn the grant adequate for their up-keep.

To meet the educational needs of the Indian children who could not for one reason or another be provided for in the Industrial schools already mentioned, from time to time boarding schools were established on a number of reserves at the charge of the various religious bodies. It was a foundation principle in the case of the Industrial schools that the Government erected the buildings at Government cost, while in the case of the boarding schools the Church erected the buildings at the cost of the Church. ...

As time went on it became more and more apparent that the Boarding schools were filling a want that the Industrial schools had not filled, and for this reason

---

86 W.J. McAllan, Acting Indian Agent to J.D. McLean, Secretary, Department of Indian Affairs, October 28, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 102).
87 W.J. McAllan, Acting Indian Agent to J.D. McLean, Secretary, Department of Indian Affairs, October 28, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 103).
88 W.J. McAllan, Acting Indian Agent to J.D. McLean, Secretary, Department of Indian Affairs, October 28, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 104).
89 J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 108).
instead of the number of Industrial schools having been increased the number of boarding schools has been increased. ...

... Realizing the importance of the educational work being done by the boarding schools and the serious burden that the support of these schools is upon the various Churches interested in them the Government concluded and the conference agreed that it would be wise to substantially increase the grant per head to boarding schools conducted under Church auspices, but in doing this it was necessary that the unbusinesslike lack of arrangement whereby the Government repaired and added to mission buildings and met deficiencies in mission management should cease.90

Fort Fraser Barricade Agreement of 1911
As had occurred in the Babine and Supper Skeena regions in 1906, demands that First Nations abandon their fishing barricades in the area of "Stuart River and Fraser Lake, tributaries of the Fraser River" escalated in 1911.91 However, when the barricade controversy resurfaced, First Nations in the Stuart Lake Agency and OMI officials renewed in their requests for an industrial school in their new agency. On February 11, 1911 Reverend Coccola wrote to Fishery Officer Horan and advised:

Stuart Lake people promise me to abandon the barricades on the following conditions -

1st. That the Government will consent to open and provide a boarding school for their children, boys and girls, where at least their offspring would be free from starvation, and [l]et parents free to go to their trappings as far as game can be found, which they could not do if all the family had to be packed or follow.92

On February 28, 1911, Indian Agent McAllan reported that OMI officials agreed to the establishment of a day school at Stony Creek, despite an OMI preference towards industrial schools.93

In June 1911, two agreements detailed the conditions under which the First Nations were prepared to abandon the use of fishing barricades. The first agreement, the ‘Fort Fraser Barricade Agreement’ or the ‘Fort Fraser Agreement’, was concluded on June 15, 1911. It was signed by "Chief Antoine,

90 J.D. McLean, Assistant Deputy Superintendent General and Secretary, Department of Indian Affairs, to representatives of various religious bodies, November 25, 1910, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 109-111).
92 N. Coccola, Stuart’s Lake, to H.P. Horan, February 11, 1911, LAC, RG 23, file 583 at 590 (ICC Exhibit 1a, p. 124).
of [the] Stoney Creek [Band], Chief George, of [the] Fort Fraser [Band]
(Nadleh Whut'en Indian Band), and Chief Isidore, of [the] Stella [Band]." 94
This agreement stipulated that:

We, The undersigned, acting in the capacity of Chiefs and representing our
respective bands, in the Stuart Lake agency, do hereby agree, that for, and in
consideration of the following concessions herein enumerated, we will abandon
The [sic] method known as barricading the rivers of The [sic] Northern interior
for the taking of salmon ...

... List of concessions or demands:-

... (4) The Government will be required to locate, erect, maintain, and operate, a
school, within the Stuart Lake agency.95

The Fort Fraser Barricade Agreement also stipulated that the government
provide the First Nations with nets, farming implements, garden seeds,
additional assistance in times of famine and destitution, and fishing stations
for their use and benefit.96

The second agreement was signed at Fort St. James on June 19, 1911 and
is known as the 'Fort St. James Barricade Agreement'. This agreement was
signed by representatives of the Nakazle Band, Pinche Band and the Tacha
Band, also of the Stuart Lake Agency.97 It is very similar to the Fort Fraser
agreement and it also included a school provision.98

Concurrently, the Oblates of Mary Immaculate continued to prepare for
the opening of a boarding school in the Stuart Lake Agency. On August 10,
1911, Bishop E.M. Bunoz, Prefect Apostolic of the Yukon, reported to
Assistant Deputy Superintendent General McLean that he had:

just returned [sic] from my visit to the indians [sic] of the interior of B.C. from
Hazelton to Fort George, I hasten, according to my promise [sic], to communicate

94 Fort Fraser Barricade Agreement', June 15, 1911, LAC, RG 23, file 583, part 1, roll 24 at 624 and 633 (copy)
(ICC Exhibit 1a, pp. 139, 141).
95 Fort Fraser Barricade Agreement', June 15, 1911, LAC, RG 23, file 583, part 1, roll 24 at 624 and 633 (copy)
(ICC Exhibit 1a, pp. 138, 140).
96 Fort Fraser Barricade Agreement', June 15, 1911, LAC, RG 23, file 583, part 1, roll 24 at 624 and 633 (copy)
(ICC Exhibit 1a, pp. 138, 140).
97 Fort St. James Barricade Agreement', June 19, 1911, LAC, RG 23, file 583, part 1, roll 24 at 622-620 and 631-
630 (copy) (ICC Exhibit 1a, p. 146).
98 Fort St. James Barricade Agreement', June 19, 1911, LAC, RG 23, file 583, part 1, roll 24 at 622-620 and 631-
630 (copy) (ICC Exhibit 1a, pp. 147-148).
to you the results of my observations with regard to providing these 2000 indians with the blessing of a suitable education.

1) I was glad to realise that the parents are all anxious to send their children to school. They are perfectly willing to part with them during the period necessary to their education. There are over 200 children of school age.

2) ... In fact there would be pupils enough to fill up two boarding schools. One could be located at Taylorville or close by, the other around Fraser Lake. Both places are centrally located, on the [C.P.R.] and adapted to the purpose intended [sic].

3) As the needs are urgent one boarding school ought to be erected next year.

In reply to Bishop Bunoz, J.D. McLean stated:

your suggestion with reference to the establishment of a boarding school or schools has been noted. The matter will receive thorough consideration when the estimates for the next year are being prepared. As you are aware this matter has also come up in connection with the question of the fisheries regulations. I wish to again assure you that this matter will not be lost sight of although at the present time the Department is not in a position to give you a definite promise that action will be taken next year to put up a boarding school.

In contrast with McLean’s vague assurances, Duncan Campbell Scott, (who held the combined positions of Chief Accountant and Superintendent of Indian Education), informed the Deputy Superintendent of Indian Affairs Frank Pedley in correspondence dated January 1912, that the Department was not inclined to invest in a boarding school at Stuart Lake until the Grand Trunk Pacific Railway line was completed in that area. Scott also noted that "[t]here has been no positive promise that the building would be erected at any special date".

Despite the Department’s apparent preference for day schools, Assistant Deputy Superintendent General J.D. McLean and Bishop Bunoz continued work towards establishing a boarding school. In April 1912, McLean instructed Bishop Bunoz "to let the Department have full information

---

99 E.M. Bunoz, Prefect Apostolic, OMI Annunciation Church, to J.D. McLean, Assistant Deputy Superintendent of Indian Affairs, August 10, 1911, LAC, RG 10, vol. 6445, file 881-1, part 1 (ICC Exhibit 1a, p. 158). “The Yukon prefecture was created in 1908; McNally, Distant Vineyard, p. 265. There are three types of ecclesiastical districts: prefectures, vicariates and dioceses. Prefect Apostolic govern areas where no dioceses with resident Bishops exist.” [quoted in footnote No. 29, Nadleh Whut’en First Nation Lejac School Historical Report, prepared by Public History Inc. for Indian and Northern Affairs Canada, Specific Claims Branch, November 30, 2004, p. 5 (ICC Exhibit 3b, p. 11)].

100 J. D. McLean, Assistant Deputy and Secretary, to Rev. E.M. Bunoz, OMI, October 5, 1911, LAC, RG 10, vol. 6445, file 881-1, part 1 (ICC Exhibit 1a, p. 160).

101 D.C. Scott, Chief Accountant to Pedley, January 1, [1912], LAC, RG 10, vol. 6445, file 881-1, part 1, (ICC Exhibit 1a, p. 162).
respecting the location that you consider best for a school of this kind, [and] the number of children for whom accommodation might be provided. 102

On June 21, 1912 Bishop Bunoz advised the Department that:

the best location for the intended boarding school in the interior of North B.C. would be at the East end of Fraser Lake, on the South bank of the Nechaco river, opposite to the actual Fort Fraser [sic] village. That location offers the advantages of good water, rich farming [sic] land and facility of communications, being close to the Fraser Lake townsite. ...

I beg moreover to recommend a boarding school capable of accommodating [sic] 100 pupils as there are fully 200 children of school age in that district who will depend on thatm [sic] institution for their education. 103

More than a year later, on July 24, 1913, Assistant Deputy and Secretary J.D. McLean notified Bishop Bunoz that

in view of the remoteness of the situation at the present time, the Department is of opinion that it would be quite impossible to consider erecting a building until such time as supplies can be taken in by rail. ... In the meantime the Department would be pleased to give consideration to the question of conducting one or two day schools in some of the villages of the district where the Indians are permanently located and engaged in such occupations as do not call them away from the reserve to any great extent. 104

Bishop Bunoz replied on August 7, 1913, suggesting that day schools be opened at "Babine, Stewart's [sic] Lake and Hagwelget." 105 On April 13, 1914, a new day school was opened at Stuart Lake. 106 There is no documentation in the record of this inquiry to indicate how many, if any, Nadleh Whut'en children were enrolled at this day school. In 1916, the government agreed to fund the operation of a residential school at Fort St.

102 J.D. McLean, Assistant Deputy and Secretary, to Rev. E.M. Bunoz, OMI, Annunciation Church, April 15, 1912, LAC, RG10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 163).
103 E.M. Bunoz, OMI, to J.D. McLean, Assistant Deputy and Secretary, Indian Department, June [21], 1912, LAC, RG10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 164).
104 J.D. McLean, Assistant Deputy and Secretary, to Rev. E.M. Bunoz, OMI, Annunciation Church, July 24, 1913, LAC, RG10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 189).
105 E.M. Bunoz, Prefect Apostolic, OMI, Annunciation Church, to J.D. McLean, Assistant Deputy and Secretary, Indian Department, August 7, 1913, LAC, RG10, vol. 6062, file 163-16-1, part 1 (ICC Exhibit 1a, p. 190).
106 Research indicates that this school was most likely known as the Stuart Lake Indian Day School mentioned earlier and administered by the OMI under Reverend J. Allard. This school was located approximately 40 miles north of Fraser Lake. [See School Statement, March 31, 1915, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1915, 140-141 (ICC Exhibit 1a, pp. 210-11); School Statement, March 31, 1918, Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1918, 86-87 (ICC Exhibit 1a, pp. 255-56)].
James in the Fraser Lake Agency if the OMI paid to have the school constructed.  

On February 2, 1917, a residential school opened at Stuart Lake with 39 boys enrolled and the expectation that 50 boys would soon be enrolled. With government support, church officials “decided to erect a temporary building to start the education of as [many] as could be accommodated” while Canada participated in the Great War. The Stuart Lake Indian Day School (at Fort St. James) continued to operate temporarily while the residential school at Stuart Lake was modified to provide for accommodation of 50 girls. OMI officials stated that “[o]ver 200 children of school age justify the existence of this school”, although the evidentiary record of this inquiry does not indicate how many, if any, Nadleh Whut’en children attended this industrial school.

Establishment of The Lejac Indian Residential School

The OMI continued to press the government for an industrial school at Fraser Lake. On December 4, 1918, Bishop Bunoz wrote to Deputy Superintendent General of Indian Affairs Duncan Scott reminding him “of the promise made to me and to the Indians of the Fraser Lake Agency that the first Indian [sic] school to be erected after the war would surely be the school of the above named agency.” Bishop Bunoz sent another reminder of the government’s ‘promise’ to erect a school on January 21, 1919. After being advised that money might not be available that year or the next for construction of a boarding school at Fraser Lake, Bishop Bunoz wrote to Duncan C. Scott stating:

I never expected that the Canadian Government would thus delay the fulfilling of their part in a bilateral contract when the Indians have fulfilled theirs ten years ago. I so far depended upon the justice of the case but begin to lose hope and confidence.  

Meanwhile, conditions at the temporary Stuart Lake Boarding School were deteriorating and OMI officials were pressing the Department for a new building for that school as well. At the Department, discussions regarding the construction of a permanent boarding school at Stuart Lake institution occurred. On January 21, 1919, Assistant Deputy and Secretary McLean wrote to Indian Agent McAllan, stating:

The Rev. Father Bunoz of Prince Rupert has written the Department in regard to the erection of an up-to-date building for the Stuart Lake Boarding School to replace the temporary one now in use. He also wishes permission to take in one hundred pupils, fifty boys and fifty girls.

With regard to the number of pupils for which a grant shall be paid I beg to say that the Department will be willing to allow a per capita grant for all they can accommodate up to one hundred pupils.

On March 14, 1919, Department of Indian Affairs Architect R. M. Ogilvie reported that "improvements cannot be economically made" to the temporary Stuart Lake Boarding school. Ogilvie suggested "it should be definitely determined if a more advantageous site for the Stuart Lake Boarding School could not be obtained ... near [the] railway.

On March 31, 1919, J.D. McLean instructed Stuart Lake Indian Agent McAllan to examine fully into the conditions and merits of the locations proposed, namely, Stuart Lake and Fraser Lake. You should furnish the Department with a full report, giving your views and your reasons therefore, as to which, in your opinion, is the better and more suitable location for the boarding school. ...

Before arriving at your decision, the following points should be taken into consideration, the quantity and quality of the land with a view to future farming.

---

118 R.M. Ogilvie, Architect, Department of Indian Affairs to Scott, March 14, 1919, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 293).
119 R.M. Ogilvie, Architect, Department of Indian Affairs to Scott, March 14, 1919, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 294).
operations; adequate water supply and drainage facilities; the most central point for recruiting pupils for the future carrying on of the work, as it is not desirable, owing to the cost of transportation, that children be taken long distances to and from the school. The question, too, of the present cost of transportation of building material and the obtaining of the same for the erection of the new building, also the future cost involved in the transportation of supplies, should be considered. 120

Indian Agent McAllan wrote back to the Department on March 31, 1919, reporting

that I favour [the boarding school’s] location on Se-as-bunkut [sic] Reserve (No 4) on the south side of Fraser Lake about midway between the stations of Fraser Lake and Encombe. Advantages of this location may be summarized as follows - The G.T.P. Railway runs through the reserve and as stated in the fifth paragraph of your letter, if a siding were put in cars of building material etc could be unloaded right on the spot and I think it might easily be arranged with the railway people (Govt. road now) to stop passenger trains at any time when there were children or other passengers for the School aboard.

The reserve contains 506 acres with only two Indian families resident so that 300 acres could easily be appropriated for School lands. Soil is of excellent quality, is mostly timbered with growth of poplar willow and some spruce, but small open parky spots occur. Ten to twenty [acres] could easily be got under cultivation the first [year] without much expense in clearing. Water could be pumped from [Fraser] Lake or perhaps a well could be sunk. Building site and drainage good. Consult the Agency map and you will notice this point is not far removed from its geographical centre.

The Reserve is under the jurisdiction of the Department which I think is important. 121

On April 10, 1919, D.C. Scott the Deputy Superintendent General of Indian Affairs, wrote to Bishop Bunoz informing him that Indian Agent McAllan preferred Seaspunkut IR 4 as the location of the new school over that of the existing location at Stuart Lake. 122 After inspecting Seaspunkut IR 4, Bishop Bunoz wrote to Deputy Superintendent General Scott on May 5, 1919, approving IR 4 as the location of the new school. 123 Bunoz reported "the indians[sic] interested in that reserve are very pleased to surrender the greater part of it for that purpose. In fact they have never used it to any extent

120 J.D. McLean, Assistant Deputy and Secretary, to W.J. McAllan, Indian Agent, March 21, 1919, LAC, RG10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, pp. 295-96).
in the past.” Bishop Bunoz did not describe any conversations he may have had with the Nadle Whut’en Indian Band during his inspection.

On February 5, 1920, the plans for the “Stuart Lake Roman Catholic Boarding school building” were completed. Deputy Superintendent General Scott reported that the department had prepared plans for a building to accommodate 150 pupils. Due economy has been shown and the construction is in no way extravagant or beyond our needs for that number of pupils.

A memorandum dated June 28, 1920 indicates that there were more than 150 school-aged children in the Stuart Lake Agency. The detailed break-down was recorded as follows:

According to the last census (1916) there were 24 bands in the Stuart Lake Agency with 278 children of school age (6 to 15 years), 142 boys and 136 girls. These children are all Roman Catholics, and, except the Stuart Lake Boarding School, there is no Indian school in the agency. The new boarding school will be situated in a central part of the agency, near railway facilities, and the greater number of children in the agency will be accessible to the school.

On July 3, 1920, Order in Council P. C. 1410 awarded the contract to construct “the Indian boarding school at Stuart Lake” to R. Moncrieff of Vancouver. The OIC incorrectly affiliated Stuart Lake (either as an agency or band) with the Babine Agency and as the location of the school. Government and OMI officials had already established that IR 4 would be the location of the school. The school was officially named the Fraser Lake Boarding School in July 1920.

The School, the Band and IR 4
On March 10, 1921 Assistant Deputy and Secretary J.D. McLean instructed Indian Agent McAllan

---

125 Duncan C. Scott, Deputy Superintendent General, Department of Indian Affairs to Meighen [recipient not identified further], February 5, 1920, LAC, RG 10, vol. 6444, file 881-5, part 4 (IOC Exhibit 1a, p. 328).
126 Duncan C. Scott, Deputy Superintendent General, Department of Indian Affairs to Meighen [recipient not identified further], February 5, 1920, LAC, RG 10, vol. 6444, file 881-5, part 4 (IOC Exhibit 1a, p. 328).
127 Unidentified author to Scott [recipient not identified further], June 28, 1920, LAC, RG 10, vol. 6443, file 881-1, part 1 (IOC Exhibit 1a, p. 332).
to secure from the male members of the band interested a resolution setting aside the use of 300 acres of this reserve for school purposes, and a description thereof should be furnished sufficient for identification on plan.130

Indian Agent McAllan met with the Nadleh Whut'en Indian Band and reported back to the department on April 12, 1921, stating:

I had a meeting of the male members of the band to-day and the matter was gone into. It was agreed to set aside the East half of the reserve containing approximately 260 acres for this purpose and a resolution to that effect was signed by the Chief and principal headman. I may say it is not thought that the center line when run will cut off any Indian improvements from the West half where the Indians have their houses but if it should the Indians wish it clearly understood that the line is to be diverted at that point to leave these improvements on the West portion of Reserve.131

In his report, McAllan did not offer any further details on the meeting, but did identify band member’s homes on the western half of IR 4 on the sketch he prepared and attached to his report.132

The 1921 Band Council Resolution setting aside land on IR 4 for school purposes states:

We, the undersigned, Chief and Councillors of the Fraser Lake Band of Indians owning the reserve No 4, Seaspunkut, on Fraser Lake, in the Stuart Lake Agency in the Province of British Columbia, at a council summoned for the purpose according to the rules of the band, and held on the said reserve this 12th day of April 1921, in the presence of the Indian Agent for the said reserve, representing thereat the Superintendent General of Indian Affairs for the Dominion of Canada;

Do, hereby for ourselves, and on behalf of the Indian owners of the said reserve, agree and request that the East half of the aforesaid No 4 reserve and approximately amounting to 260 acres be set aside for the purposes of the erection of an Indian School and farm and grounds therefor.133

130 J.D. McLean, Assistant Deputy and Secretary, to W.J. McAllan, Indian Agent, March 10, 1921, LAC, RG10, vol. 6/443, file, 881-1, part 1 (ICC Exhibit 1a, p. 340).
132 Sketch attached to W.J. McAllan, Ind. Agt., Indian Agent’s Office, to Asst. Dep. and Secy., Dept. of Ind. Affrs., April 12, 1921, LAC, RG10, vol. 6/443, file, 881-1, part 1 (ICC Exhibit 1a, p. 343) and Untitled sketch showing proposed location of “school” on “East ½” of No. 4 Reserve, Seaspunkut, prepared by Indian Agent W.J. McAllan, c. 1921, LAC, RG10, vol. 6/443, file 881-1, part 1 (ICC Exhibit 7e).
At the Community Session, the Elders could not testify how the school came to be built on IR 4 or the details of the Band’s permission to do so. However, Elder George George Sr. stated:

[i]n 1920, my dad ... was a hereditary chief, so they settled here and my dad became a chief here, and he was a chief here until 1956. I'm just bringing that up because at the time of the - - when it was decided that a school would be built at Indian Reserve Number 4, they weren't involved, so they didn't tell - - they never told me of any meetings that was held regarding the school, so I couldn't, like I say, there weren't - - they weren't in the vicinity at that time, eh, until the twenties, when after - - after the was in the process of being built.134

Elder Jack Lacerte was told that the Ketlo family "turned over some of the land for the school". 135

Much later in the history of the Lejac School (1954), the OMI wanted to obtain legal title to the reserve lands on which the OMI had erected churches and chapels. The Department denied this request and explained how they had approved church use of reserve lands:

The Department has consistently held the view that it is unwise to alienate small parcels of Reserve land lying within the confines of Indian Reserves. ... that before any part of a Reserve can be alienated, it must be surrendered by the Indians and as a basis for surrender we must have a legal description of the land, that is, a description based on a survey. In many cases it would be difficult, if not impossible, to secure a surrender from the Indians. Furthermore, we would require that the survey be carried out at the expense of the applicant and in many areas this would prove a costly undertaking and might often result in the moneys being wasted, if the Indians refused to surrender.

It is because of these factors that over the years the practice has grown up of simply asking Band Councils to reserve for the use of churches designated areas, on the understanding that the said area may be used by the church in question for so long as it is required for church purposes. In practice, we receive Council resolutions to that affect and simply approve the resolution and write a letter to the Superintendent in question advising him of such approval.

While that is the practice today and was undoubtedly carried out in some cases in the past, we know that there are many instance where there is no record of anyone having approved the occupation of Reserve lands for church purposes. Presumably the Indians consented to such use in these cases, but there is no record of such consent. We have no up-to-date record of all church sites on Reserves in Canada and if you wish to supply a list by Indian Reserves, we could check our records in an endeavour to ascertain the basis of the occupation. We

134 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 32-33, G. George Sr.).
135 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 59, J. Lacerte).
would estimate that in some few cases outright title may have been granted; in others there may have been consent by a letter, but that in a majority of the cases there would be no record of formal approval of the occupation.136

The Fraser Lake Indian Boarding School (which was later renamed the Lejac Indian Residential School137) opened on January 17, 1922, more than 10 years after the signing of the Fort Fraser Barricade Agreement.138 Indian Agent McAllan reported:

80 children were transferred from Stuart Lake ... Arrangements are now being made to add additional children from the various bands until the housing capacity of the institution is reached.

... Nearly 300 acres of land from the No 4 Reserve have been set apart for School purposes. When cleared up this area will make farm and garden lands of the finest quality.139

ENROLMENT OF NADLEH WHUT’EN STUDENTS AT THE LEJAC INDIAN RESIDENTIAL SCHOOL

Indian Agent McAllan reported that, by March of 1922, the school was operating at its full capacity of 125 students.140 From Agent McAllan’s report, it appears most of the students enrolled in 1922 were from within the Stuart Lake Agency, but specific band affiliations were not identified.141 Official attendance and admission records, with band affiliations listed, are only available for the years 1938 to 1953 and 1965 to 1972.142 Similarly, there are no records on the documentary record which indicate the number of Nadleh


137 The Department of Indian Affairs approved changing the school’s name from ‘Fraser Lake Indian Boarding School’ to the ‘Lejac Indian Residential School’ in 1931[See Russell Ferrier, Supt. of Indian Education, to W.E. Ditchburn, Indian Commissioner, December 30, 1931, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 483)]. In this history, the school will be referred to as the ‘Fraser Lake Indian Boarding School’ for the years prior to the name change and the term ‘Lejac’ will be used for years following the name change, as well as when speaking about the school generally.

138 W.J. McAllan, Ind. Agt., to Secretary, Department of Indian Affairs, January 26, 1922, LAC, RG 10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 54). The school is also referred to as the ‘Fraser Lake (Indian) Industrial School’ in the historical documents.

139 W.J. McAllan, Ind. Agt., to Secretary, Department of Indian Affairs, January 26, 1922, LAC, RG 10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 54).

140 W.J. McAllan, Indian Agent, to Secretary, Department of Indian Affairs, February 16, 1922, LAC, RG 10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 34).

141 W.J. McAllan, Indian Agent, to Secretary, Department of Indian Affairs, February 16, 1922, LAC, RG 10, vol. 6443, file, 881-1, part 1 (ICC Exhibit 1a, p. 34).

Whetu’en children eligible for enrolment in each year, or what characteristics or policy were used to determine their eligibility. Furthermore, there is no indication as to what methods were used by the OMI, the Royal Canadian Mounted Police or the local Indian Agent in locating and enrolling children.

A preliminary analysis of available attendance and admission records indicates that the preferred age for admission to the school was between 7 and 13, and the average age for discharge was approximately 16 years of age.\(^\text{143}\) This preliminary analysis also indicates that the Fraser Lake Boarding School enrolled children from other Indian Bands as well as from Bands outside the Stuart Lake Agency. Children from the following bands are recorded as being enrolled in the Fraser Lake Boarding School throughout its existence: Telegraph Creek, Squamish, Kitselas, Fort Babine, Atlin, Hazelton, Morricetown.\(^\text{144}\) It is also evident that children were admitted to, and discharged from the school throughout the school year, so the overall attendance at the school fluctuated during the course of any given school year.\(^\text{145}\)

At the Community Session, Elder Rita Morin testified that, during her tenure as a student at Lejac, only three or four girls out of the 30 in her dormitory were from the Nadleh Whetu’en Band.\(^\text{146}\) Elder George George Sr. testified that children from Telegraph Creek, Atlin, Burns Lake, Hazelton, Fort Ware, Prince Rupert, Cheslatta, Fort St. James, Tache, Takla, Lheidli as well as non-Aboriginal students attended Lejac from 1943-1949.\(^\text{147}\) Elder George Sr. also testified that in the 1960s the school "didn’t have room for our children to go to school there" so his children were bussed to Vanderhoof for school.\(^\text{148}\)

According to the documentary record, there are a multitude of reasons why Nadleh Whetu’en children were not enrolled at the Lejac school. One reason was mentioned by N. Coccola, Reverend Principal of the Fraser Lake Boarding School in his report for the quarter ending September 30, 1927. He stated: "[a]s usual we had to go around the camps to gather them [students],

\(^\text{146}\) ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 75, R. Morin).
\(^\text{147}\) ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 29-30, G. George Sr.).
\(^\text{148}\) ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 20, 26, 30-31, G. George Sr.).
the generality of parents do not appreciate yet the advantage of education, they would rather keep their children with them.  

The Lejac Indian Residential School consistently enrolled more students than the per capita grant financed, resulting in the denial of requests for enrolment. On April 21, 1930, Principal Coccola requested the per capita grant be increased. He stated:

we have in our institution 80 boys and 90 girls, but the Department grant has been, so far, for 150 pupils only. Is there any hope to see the grant extended to the actual number of pupils.

Should we refuse to accept children when offered, I fear the parents would, afterwards, find an excuse for not sending them when asking for them.

This request was denied by the Department, citing a lack of funds. Principal Coccola repeated his request for an increase in the grant for the school at the beginning of the 1931 school year to allow more children to attend. In his quarterly report, Coccola also mentioned:

The re-opening of the school was fixed to the [28th] of August and on the [19th] the first [truck] from Stuart Lake brought in a good contingent. With the two trucks loaded on the following day the majority of the pupils were in the house. The R. C. M. Police saw that the balance were brought in also. The number of the new recruits is fifty-two. Many more children would be willing to come if we had room for them.

In June of 1932, at the end of the school year, G.S. Pragnell, Inspector of Indian Agencies, recorded a total pupilage of 163 boys and girls at the Lejac Indian Residential School on the date of his visit. He also intimated that haying might be impeding attendance at the school and/or the prompt return of students in September. Pragnell reported that:

152 Rev. N. Coccola, OMI, Principal, Fraser Lake Industrial School, to R.H. Moore, Indian Agent, September 30, 1931, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 476).
The Rev. Principal contends that the summer holidays should officially be made two months and Mr. Moore is inclined to agree with him. Apparently, owing largely to long distances travelled to their homes, and the fact that haying in the agency takes place late, it is almost impossible to get the children back at the prescribed time.\textsuperscript{155}

In March of 1934, Principal L.H. Rivet, Reverend Coccola's successor, again requested an increase in the per capita funding from the department; this time to cover 175 pupils. In his letter to Indian Agent Moore, Rivet stated:

In going over the quarterly reports the Department will note that the number of pupils in residence at the school is far in excess to the quota for which they allow a per capita grant. Also, word has come to me that the Indians are anticipating sending many more children for admission with the next Fall reopening. From the different camps, throughout the agency, there are many more pupils to be admitted or who should be put in the school.

Under the present conditions it will be almost impossible to accept the increase due to the number to be admitted being larger than the number to be discharged.

... As the school is capable of accommodating 175 pupils, easily, would it not be possible to have our quota raised to that number and a per capita grant given for same.\textsuperscript{156}

The Department denied this request on April 25, 1934, but stated that it would re-consider the request in the 1935-36 fiscal year.\textsuperscript{157}

Principal Rivet reported the 1934-35 school year began with 147 students enrolled, including "[a] number of new arrivals",\textsuperscript{158} although, the band and/or agency affiliation of these children was not reported. Principal Rivet also reiterated his request for increased funding when he reported:

Word has recently reached us that in the near future we may expect an influx of new pupils. From the report given it is to be expected that the school will be overcrowded according to the present quota capacity. Under the conditions of the present per capita grant we are not in a position to cope with the situation but nevertheless some sacrifice has to be made as many of these children, all of school

\textsuperscript{156} L.H. Rivet, OMI, Principal, Indian Residential School, to R. H. Moore, Indian Agent, March 24, 1934, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 495).
\textsuperscript{157} A.F. MacKenzie, Secretary, to R. H. Moore, Indian Agent, April 25, 1934, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 500).
\textsuperscript{158} L.H. Rivet, OMI, Principal, Indian Residential School, to R. H. Moore, Indian Agent, September 30, 1934, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, pp. 510-511).
age, cannot be turned away on account of the home conditions and it therefore leaves us with a heavy burden to bear. The timely assistance already promised by the Department for the next fiscal year will come as a very welcome aid in lessening our worries.159

In December of 1934, Principal Rivet further informed Indian Agent Moore that

At the present time the school is housing, at its own expense, a number of pupils over the allotted number. Other children, who should be receiving the schooling are remaining at home. Requests have been made for their entrance into the school but due to the heavy expense involved we have had to refuse them. ... [T]here is no reason why more children should not be allowed the privileges afforded by the institution.160

On January 2, 1935, Principal Rivet sent a similar letter to the Deputy Minister of Indian Affairs explaining that pupils had been denied admission to the school due to the inadequate per capita grant.161 Principal Rivet stated:

At the present time we are housing over the school’s quota without assistance and many parents are asking admittance for their children but due to lack of funds we have had to refuse. Inasmuch as the building is capable of caring for a larger number, and the children are plentiful in the different camps, it is rather unfortunate that some means cannot be undertaken to give these youngsters the education they so sorely require.162

During the 1934-35 school year, the Lejac Indian Residential School received a per capita grant for 150 pupils.163 The evidentiary record of this inquiry indicates that grant was increased to 160 pupils during the 1935-36 school year.164 The Department of Indian Affairs denied the school’s requests for a further increase from 160 pupils to 175 pupils in January of 1936.165

162 L.H. Rivet, OMI, Principal, Indian Residential School, to Deputy Minister of Indian Affairs, January 2, 1935, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, p. 519).
164 A.F. Mackenzie, Secretary, to R. H. Moore, Indian Agent, February 6, 1934, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, p. 522); L.H. Rivet, Principal, OMI, Indian Residential School, to R. H. Moore, January 18, 1935, attached to R. H. Moore, to Secretary, Department of Indian Affairs, January 22, 1936, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, pp. 543-544).
Under-funding and its effect on enrolment would continue to plague the school for the duration of its existence.

On New Years Day in 1937, tragedy struck the Lejac Indian Residential School; five young male students had run away from the school and four of them had perished on their attempt to return home to "Nautley Indian Village". Due to what was described as a "local feeling over tragedy", the Indian Affairs Branch launched an investigation into the incident and the conditions at the school in general. At its conclusion, the investigation "found indications of unrest and resentment [however] this was mostly confined to the relatives and friends of the dead children." Oblate officials at the school characterised this event as an "accident".

During a tuberculosis scare, in March of 1937, it was reported that OMI officials were sending children from the Stikine Agency to the Lejac School without notifying Stikine Indian Agent Harper Reed. Describing the situation as "a bad state of affairs", Reed indicated "[n]o more Indian Children are now being sent out of the Agency for schooling purposes". By December 1937, 147 children were in attendance at the school.

Tuberculosis was a grave concern at the Lejac Indian Residential School. In February of 1938, Indian Affairs Secretary T. R. L. MacInnes, wrote to Indian Agent Moore saying "the Department expects to have additional funds in the new fiscal year for tuberculosis control among the Indians." This control was meant to prevent children with active tuberculosis from being admitted to residential school. MacInnes also acknowledged that children from outside agencies were attending the Lejac School. He stated:

166 D.M. MacKay, Indian Commissioner for BC, Department of Indian Affairs, to H.W. McGill, Director, Indian Affairs Branch, Depart. of Mines and Resources, March 25, 1937, LAC, RG 10, vol. 6+4+5, file 881-1, part 2 (ICC Exhibit 1a, pp. 608, 611).

167 D.M. MacKay, Indian Commissioner for BC, Department of Indian Affairs, to H.W. McGill, Director, Indian Affairs Branch, Depart. of Mines and Resources, March 25, 1937, LAC, RG 10, vol. 6+4+5, file 881-1, part 2 (ICC Exhibit 1a, p. 608).

168 D.M. MacKay, Indian Commissioner for BC, Department of Indian Affairs, to H.W. McGill, Director, Indian Affairs Branch, Depart. of Mines and Resources, March 25, 1937, LAC, RG 10, vol. 6+4+5, file 881-1, part 2 (ICC Exhibit 1a, p. 608).


170 Harper Reed, Indian Agent, Stikine, Telegraph Creek, BC to Secretary, Indian Affairs, March 9, 1937, LAC, RG10, vol. 6+4+6, file 881-13, part 2 (ICC Exhibit 1a, p. 607).

171 Harper Reed, Indian Agent, Stikine, Telegraph Creek, BC to Secretary, Indian Affairs, March 9, 1937, LAC, RG10, vol. 6+4+6, file 881-13, part 2 (ICC Exhibit 1a, p. 607).


174 T.R.L. MacInnes, Secretary to R.H. Moore, Indian Agent, February 14, 1938, LAC, RG10, vol. 6+4+6, file, 881-13, part 2 (ICC Exhibit 1a, p. 710).
The Fraser Lake Indian Residential School brings its pupils from various parts of British Columbia and the Department has had reason to think that pupils have been admitted, who would not have been accepted if they had had [sic] a more thorough examination from the standpoint of tuberculosis.\textsuperscript{175}

At the end of the first quarter of 1938, 157 students were enrolled at Lejac.\textsuperscript{176} According to the documentary record of this inquiry, residential school admission procedures changed in approximately 1938, possibly because of the tuberculous scare. Students were required to apply for admission to the Lejac Indian Residential School. A medical examination was conducted, following which the Department would consider the application for admission.\textsuperscript{177}

In November 1938, Indian Agent Moore wrote to the Department commenting that the enrolment of children from elsewhere was affecting the enrolment of children at Lejac from within his agency. He reported:

The point that I wish to bring to your attention is the system which exists at present whereby the Department authorises Agents of other Agencies to send children from their Agencies to school and which I know nothing about until after they arrive. I refer particularly to six or eight children whose applications for admission were sent in by Agent Mortimer and approved by the Department, and again in the case of Agent Reed of the Stikine Agency having received authority direct from the Department to send two children from his Agency down here.

The point is that these children from other Agencies come to school and owing to the fact that the school is not receiving a grant for a large enough number of the children of this Agency are being allowed, of necessity, to remain at home with their parents or guardians when they really should be at the school. The school authorities are not against taking a certain number of children over and above the number that they are given a grant for but it is unreasonable to expect them to take too many, especially as crowding is likely to result.\textsuperscript{178}

On November 17, 1938, the Chief of the Training Division of the Indian Affairs Branch Philip Phelan, notified Indian Agent Mortimer of for the Hazelton Indian Agency "that the number of children of school age in the Stuart Lake Agency is increasing and consequently it is found difficult to

\textsuperscript{175} T.R.L. MacInnes, Secretary to R.H. Moore, Indian Agent, February 14, 1938, LAC, RG10, vol. 6446, file, 881-13, part 2 (ICC Exhibit 1a, p. 710).

\textsuperscript{176} Rev. W. Byrne-Grant, OMI, Principal, Lejac Indian Residential School, to R.H. Moore, Indian Agent, [March 31, 1938], LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, p. 715).

\textsuperscript{177} G.C. Mortimer, Indian Agent, Babine Agency, Indian Affairs Branch, to Secretary, Indian Affairs Branch, October 2, 1938, LAC, RG10, vol. 6445, file, 881-10, part 5 (ICC Exhibit 1a, p. 752).

\textsuperscript{178} R.H. Moore, Indian Agent, to Secretary Indian Affairs Branch, November 3, 1938, LAC, RG10, vol. 6445, file, 881-10, part 5 (ICC Exhibit 1a, p. 759).
provide accommodation for children from other agencies." 179 Phelan instructed Indian Agent Mortimer:

when you receive and application for the admission of any child from your Agency to the Lejac school you should first communicate with the Principal and ascertain if he can provide accommodation. In this event you should forward the application form and certificate of health to the Department for our approval. 180

A letter from Principal Simpson indicates that children from the Stuart Lake Agency were denied admission due to over-enrolment and lack of funding. Writing to the Department in October 1938, Simpson stated:

Sylvester Patrick, an Indian of the Fort Fraser Reserve, has approached me with the request that I take his two young children into the school.

... I told Sylvester that I would refer the case to you. At the present time we have 168 children residing at the school, 8 over our per capita allowance; and there is the probability that this number will be increased by the return to the school of some of the children who did not come back after the holidays.

Nevertheless, I would be willing to accept these two children if the Department will give me some pecuniary assistance in taking care of them. Otherwise it would mean depriving other children, perhaps, who have a legal right to be at the school, of some of the things that they need. 181

The 1939-40 school year ended with 180 pupils enrolled. In his general report for the quarter ending June 30, 1940, Principal Simpson stated

it will be necessary to reduce the number of children for the next school year to about 150. Probably, no more children will be accepted from outside of the Stuart Lake Agency, except in the case of orphans or destitute children. 182

The Lejac school continued to receive admission applications from destitute or otherwise neglected children from the Babine and Stikine Indian Agencies. 183 Some years later, as many as 30 neglected and/or destitute children from the Stikine Agency were enrolled at Lejac. 184 By the end of the 1939-40 school year, the Lejac School was facing reduced funding while

requests for admissions from the Stuart Lake Agency continued to be received.\(^{185}\) As a possible remedy, the Indian Affairs Branch suggested that eligible students "be discharged and in this manner vacancies would be created for those actually in need."\(^{186}\)

In September 1940, Reverend Principal Simpson reported that

> Considerable difficulty has been experienced this year in bringing the children back to school. At the orders of the Department, we tried to have the parents bring their children at least part of the way into school; but they obstinately refused. Finally the services of the Mounted Police had to be requested. We are still about 30 children short of the desired number.\(^{187}\)

The 1943-44 school year began with "considerable reluctance on the part of the parents, to send their children back to school."\(^{188}\) In September of 1943, Indian Agent Howe reported that:

> The 1943-44 term at the Lejac Indian Residential school opened September 2nd. I regret to advise that 85 pupils failed to return. It was necessary to prosecute Adanas Alexis, one of the Leading members of the Stony Creek Band under Section 10 of the Indian Act. This Indian not only refused to send his children to school, but counselled others to do likewise.

> Rounding up the absentees entailed a considerable amount of work and expense. ... At the time of writing the school quota is complete.\(^{189}\)

An explanation for this reluctance came on October 18, 1943 when Chief Isadore of the Stella or Stellaquo Band (also in the Stuart Lake Agency) wrote from Fraser Lake to the Indian Affairs Branch complaining about the curriculum at Lejac. Chief Isadore wrote:

---

183 S. Mallinson, Indian Agent, Babine Agency, to Secretary, Indian Affairs Branch, Department of Mines and Resources, February 10, 1941, LAC, RG 10, vol. 6445, file 881-10, part 5 (ICC Exhibit 1a, p. 948); Harper Reed, Indian Agent, Stikine, Telegraph Creek, BC, to Secretary, March 18, 1941, LAC, RG 10, vol. 6445, file 881-10, part 5 (ICC Exhibit 1a, p. 951).

184 J.L. Coudert, OMI, Bishop of Whitehorse, Catholic Missions of the Yukon and Prince Rupert, to Hon. T.A. Crerar, Minister of Mines and Resources, October 10, 1944, BCA, Oblates of Mary Immaculate, St. Paul’s Province, MS-1513, box 17, folder 19 (ICC Exhibit 1a, p. 1044).


I am going to make remarks about Indian School at Lejac, directed under Oblate Fathers, the children are working on the farm and religious, instead of attending school, the Government is spending a large sum of money under Oblate Fathers scheme, the children should be educated and discipline like the public school.190

Chief Isadore wrote again to the department on May 18, 1944. This time, Chief Isadore threatened a community-wide boycott of the school. He wrote:

I wish to inform you about Indian Residential School at Lejack B.C., which every manager did unjustly in charge of that school ever since it was opened to the Indian children.

... Ever since that school was opened, Indian boys were imposed to do mostly heavy work on farm. The little boys were carrying the heavy wood to the boiler engine and kitchen. Men, who were employed were not doing much.

Therefore we are decided that this coming July holiday, we will never allow any children to go back to school.

Before the school was built. The Priests requested to have a residential school there. We were not asked about it. And if we knew this school were going to be wrong. We would have been asked for a day school.191

Oblate officials largely discounted Chief Isadore’s accusations. According to the OMI, "Chief Isadore's motive in writing this letter is a purely selfish one."192 Indian Agent Howe also dismissed Chief Isadore’s complaints, saying "[a] number of older Indians do not realize the benefit and need of an education."193

First Nations continued to state their complaints. In his report for the month of August, 1944, Indian Agent Howe noted that, before the start of the school year,

The Chiefs from Stony Creek, Fraser Lake, Necoslie and Stellaquo Bands called at the office on the 26th instant for a meeting in which several complaints were submitted in connection with the Lejac Indian Residential School and urgent

190 Chief Isadore, Fraser Lake BC to Director, Indian Affairs Branch, October 18, 1943, LAC, RG 10, vol. 881-1, part 2 (ICC Exhibit 1a, p. 1027).
191 Chief Isadore, Fraser Lake BC to Indian Department, May 18, 1944, LAC, RG 10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, pp. 1031-32).
193 R. Howe, Indian Agent, Stuart Lake Agency, to Indian Affairs Branch, Department of Mines and Resources, June 14, 1944, LAC, RG 10, vol. 6445, file 881-1, part 2 (ICC Exhibit 1a, p. 1037).
requests were made for day schools to be established on the respective reserves.\footnote{194}

At the Community Session, Elder Edgar Ketlo gave testimony describing his daily routine at Lejac. He stated:

[M]y day would start at four o’clock in the morning, probably, I remember that, with Brother Anderson, and we started the - - there’s kitchen fires that was all the cooks stoves, so we had to start the fires early so that they’d be warm for the cooks when they came in around 6:00, probably. And then after that, we’d probably go have breakfast, then I’d go to work on the farm getting milk and cream for the - - separate milk from cream. They had a little workshop there. So that’s what we did in the morning, I did, anyway in the morning.

And then I would spend one or two hours in the school. ...\footnote{195}

Elder George George Sr., gave testimony detailing the daily routine of a male student at Lejac. He stated,

We got up probably 6:30 in the morning, said our morning prayers, went to church probably about seven o’clock, attended mass, which lasts maybe half and hour. 45 minutes. We came out of church, went back down to the recreation hall, then we went for breakfast, said our prayers before breakfast. ... Said our prayers after breakfast, went back to recreation hall.

And we went to class about probably nine o’clock , got into class ... said our prayers, and about 10:00, 10:30 we used to have a break, a 10-, 15-minute break, said our prayers before we went, and then 15 minutes later we went back in there and said prayers again.

And before noon we’d say our prayers and leave class and then go the dining hall around noon ... say our prayers before food. We’d have our food and then we’d wash the dishes and stuff like that, say our prayers and then leave, and we’d have a break.

About one o’clock we’d go to work whatever - - whatever place, you know, like we’d bring boiler wood or go work on the farm, prigery, chicken house, garden in the summer, carpenter shop, ... do repairs on any repairs that need to be done. ...

We’d work until 3:00, 3:30, then we’d come in and go to class at four o’clock, say our prayers before going to class, go to class for an hour, have a little break, and then go to class until six o’clock. Six o’clock we’d go in for supper, say our prayers before supper, say our prayers after supper, and then go back to

\footnote{194 R. Howe, Indian Agent, Stuart Lake Agency to unknown recipient, August 1944, LAC, RG 10, vol. 6445, file 881-1, part 2 (ICC Exhibit 1a, p. 1041).}
\footnote{195 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 79, Edgar Ketlo).}
recreation room. ... until 8:00, 8:30, we'd go to our dormitories and say our prayers before bed and then go to sleep around... nine o'clock. 196

In September 1944, Indian Agent Howe reported 80 absentees at the beginning of the 1944-45 school year. 197 Howe also reported that the absentees were eventually collected, bringing the school's total enrollment to 169 pupils, 9 pupils over the authorized number. 198

The Lejac School maintained high attendance levels despite the actions of parents in the Stuart Lake Agency. Pupils from other Indian agencies continued to be enrolled at the school, at times in higher numbers than in previous years. 199 In April of 1945, Stikine Indian Agent R.H.S Sampson admitted that "[d]uring recent months more parents have asked for admission of children to Lejac school but this is becoming unfair to the agencies near the school, which still have many children who could be admitted." 200 In July of that year, Stuart Lake Indian Agent Howe reported that "[d]ue to lack of accommodation, there are approximately 200 children in this agency not receiving education." 201 Howe did not record the band affiliations of the 200 children. A report dated July 30, 1945, however, indicated that, of the 181 pupils enrolled at Lejac during the 1944-45 school year, 141 were from various First Nations within the Stuart Lake Agency. 202

The Lejac school also began to house "indigent and neglected" pupils from various agencies over the summer months if they were orphans or their homes were considered to be too distant or remote to warrant the cost of

196 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 45-47, G. George Sr.).
197 R. Howe, Indian Agent, Stuart Lake Agency to unknown recipient, September 1944, LAC, RG 10, vol. 6443, file 881-10, part 7 (ICC Exhibit 1a, p. 1042).
198 R. Howe, Indian Agent, Stuart Lake Agency to unknown recipient, September 1944, LAC, RG 10, vol. 6443, file 881-10, part 7 (ICC Exhibit 1a, p. 1042).
200 R.H.S. Sampson, Indian Agent, Stikine Agency, to unknown recipient, April 1, 1945, LAC, RG 10, vol. 6445, file 881-10, part 7 (ICC Exhibit 1a, p. 1052).
their return.\textsuperscript{203} In September of 1945, Principal Simpson reported, with respect to the Lejac School, that,

\begin{quote}
[a] the time of writing there are 182 children in school. Although a number of the children who were present during the past school year have not returned we are already 22 over our allotted number of 160. Consequently, we are obliged to refuse admission to any more applicants, except, of course, for those who may be neglected or indigent.\textsuperscript{204}
\end{quote}

Parents in the Stuart Lake Agency continued their efforts to change the conditions and curriculum at Lejac. In September 1945, they contacted W. Irvine, Member of Parliament for Cariboo, and stated their concerns. Irvine, in turn, wrote to the department as follows:

\begin{quote}
I met a delegation of Indian representatives at Vanderhoof. I desire to place before you the burden of their plea.

1 - They protest that T.B. spreads rapidly amongst the children who attend the local school. ...

2 - They protest that education is neglected to make the school farm pay ...

3 - The Indians in question strongly urge that they be permitted to establish public schools for Indian children on the same basis as that of schools for white children.

4 - They want some assistance in clearing more land. ...

... So far as I was able to investigate there seemed to be good cause for the unrest among the Indians.\textsuperscript{205}
\end{quote}

In response to Irvine’s representations, the Indian Affairs Branch contacted Principal Simpson. On October 17, 1945, Simpson responded as follows:

\begin{quote}
1. 'Education is neglected to make the school farm pay.' The Department cannot be ignorant of the fact that some of the children do a certain amount of work on the farm, not only in this school but in every other school that I know of. This is supposed to be part of their training. As to making the school farm pay, every cent of revenue from the farm goes into the school funds; without this we could not operate the school. Our annual grant amounts to $29,600, we have 188
\end{quote}

\textsuperscript{203} Rev. Alex R. Simpson, OMI, Principal, Lejac Indian Residential School, to R. Howe, Indian Agent, June 22, 1945, LAC, RG 10, vol. 6445, file 881-10, part 7 (IOC Exhibit 1a, p. 1094).
\textsuperscript{204} Rev. Alex R. Simpson, OMI, Principal, Lejac Indian Residential School, to unidentified recipient, September 30, 1945, LAC, RG 10, vol. 6443, file 881-1, part 2 (IOC Exhibit 1a, p. 1074).
\textsuperscript{205} W. Irvine, Member of Parliament (Cariboo), House of Commons, to T.R.L. MacInnes, Indian Affairs Branch, September 14, 1945, LAC, RG 10, vol. 6443, file 881-1, part 2 (IOC Exhibit 1a, p. 1070-71).
children in school, so our per diem grant amounts to 43.1 cents per child. To feed and clothe a child on 43 cents per day is impossible.

If reference is made to my quarterly reports for the past year or so, you will find that I complain of the small number of boys who are old enough to be of assistance in the farm work.

2. 'The children learn only to pray and to milk cows.' ... I think that the above complaint is groundless.\(^{206}\)

This controversy prompted Indian Affairs to consider the state of the Lejac Indian Residential School as well as other Indian residential schools in British Columbia. On November 15, 1945, D.M. MacKay, Indian Commissioner of BC wrote:

> On July 30th last Mr. Howe wrote me reporting on the lack of school accommodation in his Agency, advising that there were in excess of two hundred children of school age for whom the necessary facilities were not available. Following receipt of the Agent’s letter I wrote to him requesting that he make a survey of the situation supplying the necessary information in detail... .

Similar surveys have been made in the Kamloops, Williams Lake and Lytton Agencies in response to instructions issued from here and the information secured is being held for the immediate use of the Inspector of Schools... . The situation in these Agencies may be summarized as follows:

<table>
<thead>
<tr>
<th>Agency</th>
<th>Children of school age</th>
<th>Pre-school age children</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>not attending school</td>
<td></td>
</tr>
<tr>
<td>Kamloops</td>
<td>150</td>
<td>214</td>
</tr>
<tr>
<td>Lytton</td>
<td>47</td>
<td>79</td>
</tr>
<tr>
<td>Stuart Lake</td>
<td>249</td>
<td>358</td>
</tr>
<tr>
<td>Williams Lake</td>
<td>20</td>
<td>102(^{207})</td>
</tr>
</tbody>
</table>

On January 7, 1946, Indian Agent Howe wrote to the Indian Affairs Branch, requesting that day schools be constructed "at Stony Creek IR and Necoslie IR to make accommodation at Lejac for underprivileged children from northern bands."\(^{208}\) Howe also noted that the school had 192 students enrolled at that time.\(^{209}\) The Indian Commissioner for BC agreed that the Lejac Indian Residential School was not meeting the needs of the Stuart Lake Agency and

---


the branch began to consider establishing day schools in the agency to accommodate the agency's children.  

The Stellaquo Band was not the only First Nation from the agency to object to the operations and curriculum of the Lejac Indian Residential School. In January 1946, the Nadleh Whut'en Indian Band submitted the following motion to the Indian Affairs Branch:

[a] meeting of the Fraser Lake Band of Indians at the Nautley Reserve, was held on January 5th 1946, and a motion was unanimously [sic] endorsed by all that a complaint was justified that when children were sick at the residential school at Le Jac, they were not kept separate from the other children. Also the school children were not allowed inside when the weather was cold, and we believe the educational system at Le Jac [sic] is not satisfactory. Therefore We the Fraser Lake Band of Indians are submitting an earnest request for a day school to be built on this reserve so that we can have our children at home and at the same time see that they get the best education possible, and able to compete in life with the white race in their future life.  

Truancy levels of Stuart Lake pupils remained high during the 1946-47 school year. Indian Agent Howe reported 100 absentees in September 1946. He also reported:

[t]he Indians list a number of grievances, such as the time spent by pupils in manual labour, and religious instruction, and also, their desire for Day Schools, as reasons for keeping the children at Home. The antagonism and opposition displayed by the Indians towards the Lejac Residential School is more marked in recent months than at any time since I took over the Agency 8 years ago.

I have patiently discussed the situation with the Chiefs and Headmen of the Bands concerned and advised them that in all probability in the not too distant future, changes will take place, particularly in relation to education and establishment of Day Schools where practicable, and that they are defeating their own ends by their present attitude.

The Stony Creek Band, where there are 40 absentees are particularly adamant, and positively refuse to return the children to school. ... 

In view of the determined attitude of the parents I feel that in order to ensure attendance at Lejac Residential School, action should be taken under the Truancy Section of the Indian Act. I have already served written notices on about 15 parents

---


211 'Motion' by Fraser Lake Band of Indians, Nautley Reserve, January 17, 1946, LAC, RG 10, vol. 6446, file 881-13, part 2 (ICC Exhibit 1a, p. 1113).

212 R. Howe, Indian Agent, Stuart Lake Agency, Indian Affairs Branch, to Indian Affairs Branch, September 12, 1946, LAC, RG10, vol. 6446, file 881-1, part 2 (ICC Exhibit 1a, p. 1157).
in accordance with Sec. 10, sub-sec. 3 of the Act, but before proceeding to issue summonses, I would like to have the Department's advice and approval.

I would strongly recommend that when the new School Inspector is appointed for B.C., that he meet the Chiefs and Headmen of this Agency to discuss and investigate their complaints at the first opportunity.213

An analysis of available attendance and admission records indicates that between 1945, (when parental complaints were voiced and the boycott began), and 1950, 81-18 children from the Nadleh Whut'en Band were enrolled at the Lejac Indian Residential School with an average attendance of approximately 207 students.214

A report issued in October 1948 by Inspector Davey characterized the dormitories at Lejac as "definitely overcrowded" and suggested "the authorized enrolment ... should be only 150." Davey supported the proposed construction of a day school at Fort St. James to alleviate the over-crowded conditions at Lejac. OMI officials, however, were not entirely supportive of the idea of building the Fort St. James day school. OMI official A. Jordan wrote to D.M. MacKay, Director of Indian Affairs and stated:

The enrollment [sic] at Lejac just now is 180. The number of pupils from Stuart Lake district of which Fort St. James is the central mission is over 80 and this number includes boys and girls from the Fort itself (52), from Tachi (10), Portage (15), Trembleur Lake (4), Pinchi (1). It is only natural to suppose that parents from other places will expect to send their children to Fort St. James... .

... Is it reasonable to suppose that the residential school can be successfully operated with a greatly reduced number of pupils? If it be answered that steps would be taken to make up for the withdrawal of the other children by bringing them in from places like Cheslatta, Takla, Fort Grahame, Ware, it seems pertinent to remark that the whole policy of the Department in recent years has been to avoid sending children hundreds of miles from home. It seems to me that if the problem of Indian education is adequately to be solved, a start might be made with outlying areas... where so many children are not getting schooling at all. To open a

213 R. Howe, Indian Agent, Stuart Lake Agency, Indian Affairs Branch, to Indian Affairs Branch, September 12, 1946, LAC, RG10, vol. 6443, file, 881-1, part 2 (ICC Exhibit 1a, p. 1157).
day school at Fort St. James is hardly fundamental to the problem; rather it seems the easiest of all possible steps that could have been taken... 217

On June 17, 1954, the Lejac Indian Residential School was inspected by A. V. Parminter, Regional Inspector of Indian Schools in BC, after reports of overcrowded conditions and consequential enrolment issues were received from local church and department officials. 218 Parminter reported:

At the present time the Department operates Roman Catholic Day Schools at Moricetown, Fort Babine, Stoney Creek and Fort St. James, all within this general area, and a reasonable pupilage is enrolled at all of these. Moreover, on checking with the two Superintendents involved, I have been informed that no pupils of these villages who should actually be in Day Schools are enrolled in Residential Schools. Further, a number of pupils have been enrolled in Provincial schools in this area.... In spite of full enrolment at our Indian Day Schools and the enrolment of some children in Provincial schools, the Lejac Residential School, which is equipped to accommodate comfortably 150 children, has been consistently housing over 180 pupils.

This problem has probably not been heretofore noted as acute because of a long standing reticence on the part of some of the Indian parents to send their children to the school at Lejac, because interest of those people in education is only now in the process of development and because of the remote nature of the localities involved.

From an examination of Agency census lists and discussion with Superintendent Howe and his Assistant, Mr. Gallagher,... I am convinced that there are close to 100 children in the Agency not receiving schooling. 219

Attached to Inspector Parminter’s report is a chart detailing the "projected school-age population" for the Fort Fraser Band, which projected that the Fort Fraser Band would have 32 school-aged children, (ages seven through 16), during the 1954-55, 1955-56, and 1956-57 school years; 35 during the 1957-58; 33 during the 1958-59 school year; 36 during the 1959-60 school year and 34 during the 1960-61 school year. 220

Parminter supported a proposal to construct a three-room school house on Lejac Indian Residential School grounds to operate as a day school, and cited several advantages to that plan, which he outlined as follows:

218 A. V. Parminter, Regional Inspector of Indian Schools in BC, Indian Affairs Branch, to W.S. Arneil, June 17, 1954, LAC, RG 10, vol. 8708, file 965/6-1, part 3 (ICC Exhibit 1a, p. 1431).
INDIAN CLAIMS COMMISSION PROCEEDINGS

1. The present overcrowding in the four classrooms will be alleviated.
2. A number of children will be able to live with their parents.
3. Three of the seven classrooms will be adequate for present day educational needs.
4. Space will be created in the Lejac dormitories for children who are at present not able to attend school.\textsuperscript{221}

According to Inspector Parminter, the proposed Lejac day school would serve "43 Day scholars" while the residential school would continue to operate at an enrolment of 181 residential pupils, allowing a total 224 children to be educated in the Stuart Lake Agency.\textsuperscript{222} Authorization for the construction of the three-room day school came on June 24, 1954 from R.F. Davey, Superintendent of Education.\textsuperscript{223}

Once the day school was opened at Lejac, very few students from the Nadleh Whut'en Indian Band were enrolled as residential students. Records from June 1957 indicate that 30 children from the Nadleh Whut'en Indian Band were attending the "Indian Day School" and none were enrolled as residential students.\textsuperscript{224} Furthermore, 151 children from other First Nations within the Stuart Lake Agency were attending residential school and 24 children were attending provincial schools.\textsuperscript{225} In February 1958, Principal Kelly reported that 174 students were receiving residential education at Lejac.\textsuperscript{226}

The Agency Return regarding school aged children for the quarter ending January 1, 1959 identified 35 children from Nadleh Whut'en as school age (6-16 years old) and 30 of those 35 children were enrolled in "other schools".\textsuperscript{227} The Agency Return regarding school aged children for quarter ending January 1, 1960 identified 24 children from the Nadleh Whut'en Band as being of school age, of which 19 were attending "non-Indian school".\textsuperscript{228}

\textsuperscript{221} A. V. Parminter, Inspector of Indian Schools in BC, Indian Affairs Branch, to W.S. Arneil, June 17, 1954, LAC, RG 10, vol. 8708, file 965/6-1, part 3 (ICC Exhibit 1a, p. 1432).
\textsuperscript{222} A. V. Parminter, Inspector of Indian Schools in BC, Indian Affairs Branch, to W.S. Arneil, June 17, 1954, LAC, RG 10, vol. 8708, file 965/6-1, part 3 (ICC Exhibit 1a, p. 1433).
\textsuperscript{224} Agency Return on Pre-School and School Age Children as of June 30, 1957, Stuart Lake Agency, E. J. Underwood, Superintendent, unknown date, no file reference available (ICC Exhibit 1c, p. 796).
\textsuperscript{225} Agency Return on Pre-School and School Age Children as of January 1, 1959, Stuart Lake Agency, E. J. Underwood, Superintendent, unknown date, no file reference available (ICC Exhibit 1c, p. 796).
\textsuperscript{226} G.F. Kelly, OMI, Principal, Lejac Residential School, to W.S. Arneil, Commissioner, Indian Affairs Branch, February 17, 1958, LAC, RG 10, vol. 8709, file 965/6-1, part 5 (ICC Exhibit 1a, p. 1518).
\textsuperscript{227} Agency Return on Pre-School and School Age Children as of January 1, 1959, Stuart Lake Agency, W. E. Grant Superintendent, unknown date, no file reference available (ICC Exhibit 1c, p. 805).
\textsuperscript{228} Agency Return on Pre-School and School Age Children as of January 1, 1960, Stuart Lake Agency, W. E. Grant Superintendent, unknown date, no file reference available (ICC Exhibit 1c, p. 815).
In September 1962, the Indian Affairs Branch and the OMI negotiated a new agreement which provided the branch greater control over the management of the Lejac Indian Residential School, including principalship, admissions, inspections and general rules of operation. Two months later, the Stuart Lake Agency Return identified 31 children of school age, of which 4 were "day pupils", 3 were "res. pupils", and 21 were attending "non-Indian schools".

Between 1965 and 1970, approximately 40-50 children per year were enrolled as day pupils at the Lejac School. The record of this inquiry suggests that some children from the Nadleh Whut'en Band were enrolled during this time since records indicate that transportation from IR 1 to the school was provided. The quarterly returns of government-owned residential schools do not identify band affiliation for day pupils.

During the 1960s, the Department of Indian Affairs reevaluated its residential school policy. The department had been experimenting with the integration of local Lejac students in "non-Indian schools" (provincial parochial schools) and opening or reopening religious day schools in the area. Under the new education philosophy of the branch, residential schools were discouraged. Some began to operate as student residences, "providing a well-rounded home and community environment", rather than as educational institutions. The documentary record indicates, however, that Lejac continued to operate as a school despite it being referred to as a residence rather than a residential school in correspondence.

In 1969, a new admissions policy was conceived by the department. The new policy outlined six categories under which the personal circumstances of prospective students would be assessed and their placement approved or

---

229 "Agreement for the Operation of the Lejac Indian Residential School", September 25, 1962, BAC, Oblates of Mary Immaculate, St. Paul's Province, MS-1513, box 17, folder 17 (ICC Exhibit 1a, p. 1702-07).
230 Agency Return on Pre-School and School Age Children as of November 1, 1962, Stuart Lake Agency, unknown date, no file reference available (ICC Exhibit 1c, p. 817).
232 D.R. Urquhart, to Zone Director, Miller Bay Zone, October 28, 1969, LAC, Government Records Branch, Vancouver, file 965/6-1-012, vol. 3 (ICC Exhibit 1a, p. 2172).
denied.\footnote{Admissions Policy for Indian Student Residences, June 1969, attached to memo from W.E. Armstrong, Director, Operations Branch, Social Affairs Program, Department of Indian Affairs and Northern Development, to Chiefs, Band Councils, Regional Directors and Superintendents of Indian Agencies, June 9, 1969, IRSR, file 965/25-1, vol. 1 (ICC Exhibit 1a, p. 2086).} For example, category one students were eligible for residence because their "home is isolated and removed from day school service."\footnote{Admissions Policy for Indian Student Residences, June 1969, attached to memo from W.E. Armstrong, Director, Operations Branch, Social Affairs Program, Department of Indian Affairs and Northern Development, to Chiefs, Band Councils, Regional Directors and Superintendents of Indian Agencies, June 9, 1969, IRSR, file 965/25-1, vol. 1 (ICC Exhibit 1a, p. 2086).} Category two students were eligible because their "[p]arent or guardians are migratory."\footnote{Admissions Policy for Indian Student Residences, June 1969, attached to memo from W.E. Armstrong, Director, Operations Branch, Social Affairs Program, Department of Indian Affairs and Northern Development, to Chiefs, Band Councils, Regional Directors and Superintendents of Indian Agencies, June 9, 1969, IRSR, file 965/25-1, vol. 1 (ICC Exhibit 1a, p. 2086).} An advisory committee, made up of parents, band council members, and department officials, among others, was charged with advising the department regarding admission and "preferred alternatives to institutional placement."\footnote{Admissions Policy for Indian Student Residences, June 1969, attached to memo from W.E. Armstrong, Director, Operations Branch, Social Affairs Program, Department of Indian Affairs and Northern Development, to Chiefs, Band Councils, Regional Directors and Superintendents of Indian Agencies, June 9, 1969, IRSR, file 965/25-1, vol. 1 (ICC Exhibit 1a, p. 2086).} Parental or guardian consent was mandatory for the admission of students to the residences.\footnote{Admissions Policy for Indian Student Residences, June 1969, attached to memo from W.E. Armstrong, Director, Operations Branch, Social Affairs Program, Department of Indian Affairs and Northern Development, to Chiefs, Band Councils, Regional Directors and Superintendents of Indian Agencies, June 9, 1969, IRSR, file 965/25-1, vol. 1 (ICC Exhibit 1a, p. 2086).}

On April 1, 1969, the Department assumed operational control of the Lejac School.\footnote{G. Cromb, Director, Education Branch, to M. Blanchard, Head, Secretariat, Indian-Eskimo Bureau, October 14, 1970, INAC, MRO, file 965/36-4, vol. 2 (ICC Exhibit 1a, p. 2211).} On the same day, the Fraser Lake Indian Band issued a Band Council Resolution giving notice that the Band intended to reassume "for their own use and benefit all farm land and unimproved areas of the Seaspunket [sic] IR No. 4 no longer used by the Lejac Indian Residential School".\footnote{Band Council Resolution, Fraser Lake Band, Stuart Lake Agency, April 1, 1969, INAC, British Columbia Regional Office, file 965/36-4-012, vol. 1 (ICC Exhibit 1a, p. 2051).}

On September 28, 1970, Chief Peter George of the Nadleh Whut'en Indian Band wrote to the Minister of Indian Affairs explaining that the Lejac Indian Residential School and the land set aside for it was not, in his opinion, being used for the purpose for which the Band had authorized; namely, to educate children from the Nadleh Whut'en Indian Band. Chief George requested that the department pay a yearly rental to the Band for the use of the land as well as $17,600.00 to cover lost revenue covering the years 1958-68 when the OMI operated the farm on school lands.\footnote{Chief Peter George, Fraser Lake Band, to Hon. Jean Chretien, Minister, Department of Indian Affairs and Northern Development, September 28, 1970, INAC, British Columbia Regional Office, file 965/36-4-012, vol. 1 (ICC Exhibit 1a, p. 2210).} The department concluded that no
clause in the original agreement (i.e. the April 12, 1921, Band Council Resolution) specified that compensation would be paid to the First Nation for the use of the land. On October 26, 1970, J.D. Bergevin, the Assistant Deputy Minister of Indian Affairs, wrote to Chief Peter George, saying,

[with regard to the transfer of the land to this Department for residential school purposes in 1921, there was nothing in the original agreement which specified that the Department would pay the Indian Band for the use of the land. Presumably the advantages to the Band of having their children accommodated at the residence were considered to be fair compensation for the use of the property.]

We would consider transferring the farm lands at the Residence back to your Band, with this Department retaining only that relatively small amount of land required for the residence and playground area. However, we do not feel that the Department should pay rent for the school properties located on Indian lands. After all, they are there to provide services to the Indian people.

In September of 1974, the Nadleh Whut’en Band Council passed a Band Council Resolution requesting the reversion to the Band of all lands not required for the operation of the student residence. In December of that year, the Lakes District Council, (formerly the Stuart Lake Agency), unanimously passed two Resolutions regarding the fate of the Lejac Indian Residential School. The first Resolution set out the Chiefs’ vision of the school, stating,

WHEREAS Lejac Residential School serves the Lakes District in a very real way academically as well as socially

and

WHEREAS the need for such an institution as the Lejac Residential School will not cease in the near future

therefore

BE IT RESOLVED THAT the Department of Indian Affairs recognize this fact and plan for the continued existence of the Lejac Student Residence for at least ten years.

244 J.B. Bergevin, Assistant Deputy Minister, (Indian and Eskimo Affairs), Department of Indian Affairs and Northern Development to Chief Peter George, Fort Fraser, October 26, 1970, INAC, British Columbia Regional Office, file 965/36-4-012, vol. 1; INAC, British Columbia Regional Office, file E5600-7-612-07472, vol. 2 (ICC Exhibit 1a, pp. 2230-31).
246 V.E. Rhymer, District Supervisor, Lakes District, Indian and Northern Affairs, to L.E. Wight, Regional Director, British Columbia Region, December 10, 1974, LAC, Government Records Branch, Vancouver, file 965/1-13, vol. 1 (ICC Exhibit 1a, p. 2377).
The second Resolution set out the condition upon which the school should operate for the next ten years, stating,

WHEREAS Lejac Residential School does not provide academic facilities diverse enough to cater to the complete needs of an Indian child, for example; shop, gymnasium, library, etcetera
and
WHEREAS Lejac Residential School is too insulated from the outside world to provide realistic, practical and first-hand education to an Indian child
and
WHEREAS Lejac Student Residential School does not provide and cannot provide a real world standard towards which an Indian child can strive,
therefore
BE IT RESOLVED THAT as of September, 1975, Lejac Residential School be a residence with the children being bussed to a local school.247

The evidentiary record of this inquiry indicates that the Lejac Indian Residential School ceased to operate as a school in 1975. While the Lejac dormitories continued to be used as a residence for First Nation children248, those students began to attend Fraser Lake Public School, which operated within the provincial education system.249 On June 30, 1976, the Lejac Student Residence was closed and IR 4 was no longer used for school purposes.250

On July 2, 1976 it was reported that "fifteen youth from the Stellaquo (Stella) and Fraser Lake Bands have barricaded the gate off the highway into Lejac Residence. ... The motive is to prevent the removal of any asset from the Residence."251 On July 30, 1976, the Nadleh Whut’en Indian Band passed two Band Council Resolutions requesting "[that] the land and buildings held by the Crown for the Student Residence at Lejac be turned over to our Band"252 and "[that] the inventory and non-inventory item at the Lejac Student Residence be turned over to our Band."

247 V.E. Rhymer, District Supervisor, Lakes District, Indian and Northern Affairs, to L.E. Wight, Regional Director, British Columbia Region, December 10, 1974, LAC, Government Records Branch, Vancouver, file 965/1-13, vol. 1 (ICC Exhibit 1a, pp. 2377-78).
248 Larry Wright, Regional Director, British Columbia Region, to District Supervisor, Lakes District, January 17, 1975, LAC, Government Records Branch, Vancouver, file 965/1-13, vol. 1 (ICC Exhibit 1a, p. 2400).
251 J.L. Homan, District Manager, Prince George District, to Director General, British Columbia Region, July 2, 1976, IRSR, file E4965-1283, vol. 1, (ICC Exhibit 1a, p. 2412).
252 Band Council Resolution, Fraser Lake Band, July 30, 1976, INAC, British Columbia Regional Office, file 985/6-1-012 (ICC Exhibit 1a, p. 2419).
Residence be turned over to our Band.²⁵³ In August of 1976, the Nadleh Whut'en Band passed another Band Council Resolution which stated that the Nadleh Whut'en Band was willing to accept the buildings, improvements, inventory and non-inventory items of the Lejac School and accept responsibility for all future maintenance and repairs.²⁵⁴ Those assets were transferred to the Nadleh Whut'en Indian Band on November 24, 1976, at no cost, "conditional upon acceptance in an ‘as is’ state with no further maintenance responsibility to the Department of Indian Affairs and Northern Development."²⁵⁵

**CONSTRUCTION AND USE OF THE SEWAGE LAGOON**

Initially, sewage disposal at the Lejac Indian Residential School and its outbuildings was achieved though a septic tank system whereby effluent was discharged into the ground "in a bed of natural gravel."²⁵⁶ On October 9, 1924, the school’s engineer, H. Allen, reported to Reverend Father Plamondon that he had "inspected the Septic Tank, and find it in first class condition".²⁵⁷ By the 1930s, however, the septic system was in a state of disrepair. On April 16, 1937, Principal Byrne-Grant reported:

> As the overflow from the sceptic tank [sic], which is not functioning well, drains in the direction of the pump house and as the surface soil in the vicinity of the pump house is exposed to contamination from various sources, I think it my duty to point out that under present conditions, the water supplied to the school cannot be considered safe....

> ... I understand that the big trouble in connection with the sceptic [sic] tank is that no provision was made for a separate outlet from the laundry and the kitchen, with the result that the [soaps] and fats going into the sceptic tank as well as the heavy flow of water from the laundry, prevent the normal functioning of the tank, with the resulting contamination of the field below and the foul smell which comes from the tank. I believe that it has been suggested that there would be no trouble from the tank if it were cleaned out at regular intervals, but experience has proven that this is not the case and the only remedy [sic] seems to be to have a separate outlet from the laundry. I do not know whether the foul odors [sic] from the tank

²⁵⁵ [illegible signature], A/Regional Director, Indian and Eskimo Affairs, BC Region, November 24, 1976, INAC, British Columbia Regional Office, file 985-6-1-012 (ICC Exhibit 1a, p. 424).
are dangerous as far as the health of the children is concerned. The boy's [sic] playground is near the tank, and they are constantly breathing the contaminated air, and on certain days when there is little wind the whole grounds and even the interior of the school is affected [sic] by odors [sic].

Between the years 1939 and 1943, numerous attempts were made by the department to identify and repair problems with the septic tank. None of those attempts, however, provided a permanent solution to the problems.

On March 11, 1959, V.G. Ulrich, Civil Engineer, Indian Affairs Branch, submitted a memorandum to Indian Commissioner Arneil regarding what Ulrich characterised as the "public health hazard" created by the Lejac School's septic system. Ulrich wrote:

Sewage treatment and disposal was originally designed to be by septic tank and tile field. However, as the top soil horizon in the area is a tight, dense clay, the tile field failed to perform and was abandoned. The septic tank effluent was simply piped away from the septic tank in a Westerly direction and disposed of in a field without further treatment.

... It is apparent that the tank is only one third as large as it should be or is equal in volume to a 12 hour sewage flow, but allows no sludge storage.

... It is undesirable however, to have raw undiluted septic tank effluent flowing anywhere near the school. Not only is it likely to cause an odour problem, but it is also an attraction for flies. These in turn act as carriers for any pathogenic germs or organisms which may, from time to time be present in the sewage.

Furthermore, as the overload on the tank increases, an excessive solids carry-over and a resultant lower grade of sewage reaching the lake may be expected. This would increase the threat to the water supply.

Ulrich recommended that a sewage lagoon be constructed at the school, "[w]est of the present buildings and overlooking the [Fraser] lake, on property already owned by the school." Ulrich explained that "as 'lagooning' consists of both primary and secondary treatment, the public health hazard and the threat to the water supply would be materially reduced." Ulrich’s recommendation was supported by Commissioner Arneil, subject to available funding.

Construction of the sewage lagoon began in August 1959 and progressed into the winter. According to the proposed plan, construction of the lagoon required the excavation of 1.36 acres of surface area. In December of 1959 it was reported that construction of the lagoon would be completed the following season.

On December 2, 1964, J.S. Wishart, District Engineer, filed an inspection report concerning the lagoon, in which he stated,

2. At the time of the visit the writer walked in bright sunshine round the lagoon to the outfall.... The lagoon was overflowing to the ditch and effluent was tending to pond long the C.N.R. embankment. There was no odour from the pond or the effluent.

3. The existing water supply system is not satisfactory from a health standpoint for the following reasons:-
   a. The supply is taken directly from a lake which is subject to pollution from farm land drainage and to seasonal local pollution, by effluent from the school’s sewage lagoon via a nearby C.N.R. culvert.... and by boating and swimming activities by the school pupils at the recreation float adjacent to the water intake.
   b. The water is not disinfected.

4. It is recommended therefore, that the water supply be chlorinated. ...
In July of 1966, the sewage lagoon was inspected again by T.J. Tevendale, Engineer, Department of National Health and Welfare. Tevendale noted that the lagoon constituted "a definite hazard to the residential school water supply."269 As a result, Tevendale recommended chlorination of the school’s water supply begin as soon as practicable.270

The sewage lagoon continued to be problematic into 1967. Band members living on Lot 2 of the western portion of Seaspunkut IR 4 began to complain about the negative effects the lagoon had on their occupation of the land. The George family had been living on the western portion of IR 4 since 1949, some ten years before the lagoon was built approximately 400 feet from their home.271 On May 21, 1967, Agnes George wrote to Stuart Lake Indian Agent A.C. Roach, complaining of the odour emanating from the lagoon.272

In June of 1967, the branch conceded that the lagoon was posing "a very real problem" for the George family.273 In March of 1968, it was recommended that the George family be paid $16,000.00 to relocate their home and other buildings within two years.274 A Quit Claim of rights to land in Lot 2 of IR 4 was signed by Patrick George on February 24, 1969.275

In March of 1969, the Nadleh Whut’en Indian Band passed a Band Council Resolution assigning approximately 12.9 acres of Lot 2 to the branch for “an indefinite period.”276 The BCR provided that the Indian Affairs Branch would

273 W.G. Robinson, BC Regional Engineer, to Regional Superintendent (Development) and Regional Superintendent (Education), June 1, 1967, LAC, Government Records Branch, Vancouver, file 965/6-1-012, vol. 1 (ICC Exhibit 1a, p. 1875).
allow the land to be used "by written permission".\textsuperscript{277} The Band Council Resolution and Quit Claim were approved in April of 1969.\textsuperscript{278}

Meanwhile, the lagoon continued to be troublesome. In July of 1969, the lagoon was inspected again by an engineer from the branch, who determined that it had caused "severe pollution of the [Fraser] lake".\textsuperscript{279}

As mentioned earlier, IR 4 ceased to be used for school purposes in 1976. The eastern portion of IR 4 and the assets thereon reverted to the First Nation in 1976. In 1989, the Nadleh Whut'en Band formally requested the return of Lot 2 of IR 4, which the George family had been forced to vacate and which had subsequently been assigned to the branch on a temporary basis.\textsuperscript{280} In 1990, however, it was decided that an environmental screening was required before those lands could be returned to the Band.\textsuperscript{281} At the Community Session, Elder George George Sr. stated the lagoon is still at IR 4.\textsuperscript{282}

\textbf{TIMBER AND THE LEJAC SCHOOL AND SCHOOL FARM}

When F.A. Devereux surveyed Seaspunkut IR 4 in 1894, he indicated that "[s]pruce and poplar" trees on the northern half of IR 4.\textsuperscript{283} In 1921, when IR 4 was chosen as the site of the residential school, Indian Agent McAllan described the land as "mostly timbered with growth of poplar willow and some spruce, but small open parky spots occur."\textsuperscript{284} At the Community Session, Elder J. Lacerte stated that the site of the school had been covered with "fairly good-sized spruce."\textsuperscript{285}

When the school was opened in 1922, it operated under the government's residential/industrial school policy, which required male students to learn trades and farming techniques, (mixed farming, carpentry, blacksmithing, furniture making, cabinet making, etc.), and to assist in the operation of the

\textsuperscript{279} W. G. Robinson, BC Regional Engineer, to Regional Superintendent (Education), July 28, 1969, LAC, Government Records Branch, Vancouver, file 965/6-1-012, vol. 3 (ICC Exhibit 1a, p. 2135).
\textsuperscript{281} A.J. Broughton, Senior Lands Advisory Officer, Lands Directorate, Indian and Northern Affairs Canada, to Peter Keltie, Manager, Indian Lands, British Columbia Region, May 24, 1990, INAC, British Columbia Regional Office, file E5630-07242, vol. 1 (ICC Exhibit 1a, p. 2548).
\textsuperscript{282} ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 28, G. George Sr.).
\textsuperscript{283} Plan BC 100 GSR, "Plan of the Fraser Lake Indian Reserves, Coast District, British Columbia", surveyed by F.A. Devereux, PLS in 1894, approved December 14, 1895, (ICC Exhibit 7a).
\textsuperscript{285} ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 65, J. Lacerte).
school by providing fuel and constructing buildings as part of their curriculum and daily chores. In October of 1924, A. F. MacKenzie, Acting Assistant Deputy and Secretary of the Department of Indian Affairs, instructed W.J. McAllan, Indian Agent at Stuart Lake,

that the Department considers the older boys should be at work six half days per week. Care should be taken that work beyond their physical powers is not expected. The lighter duties in connection with clearing of land and the provision of fuel may be assigned. The principal should be asked to see that the type of work for the boys is changed often enough, so that it will not become laborious [sic].

Quarterly reports filed by the school’s various principals indicate that carpentry, building construction, furniture making and cabinet making trades were taught as an aspect of school’s manual training curriculum. These trades may have required timber resources. The reports indicate that the male students were productive in learning such trades. On March 31, 1933, the principal of the Lejac School reported that,

[the children engaged in Manual work show and adaptness [sic] to their duties. The bigger boys have given splendid results in the making of desks, waste paper baskets, and other pieces of household furniture, while the younger boys are fast learning how to handle the tools in order to replace the boys to be discharged.]

It is not clear if the timber used to teach these trades came from IR 4.

Operation of the Lejac School’s farm required the clearing of the land. As stated above, one reason why Indian Agent McAllan favoured the Seaspunkut

---


287 A. F. MacKenzie, Acting Asst. Deputy and Secretary, to W. J. McAllan, Indian Agent, October 20, 1924, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 404).


IR 4 as the site for a school was because the soil was of "excellent quality." 290 In September of 1922, the Superintendent of Indian Education, Russell Ferrier, indicated that the farm was expected to eventually comprise 350 acres. 291 Only 260 acres, however, were set aside for the school compound by the Nadleh Whut’en Indian Band. 292 There is no indication of the actual acreage of the school compound and farm. That acreage is not an issue in this inquiry.

At the Community Session, Elder George Sr. stated "the children cleared the land as you see it the way it is now ... it was tree’d [sic] with spruce" 293 Elder George Sr. characterized the spruce trees as a "spruce grove." 294 Elder Lacerte remembered the school site being covered with trees. He stated,

[i]it was a lot. As you’re looking at the maps, now, the - - most all - - the white part was mostly spruce trees, and the only - - the only part in front of the school and - - only the part in front of the school - - was cleared out, and that’s the part that the priest and the children and the people utilized, because it was clear. 295

Elder Lacerte further stated the spruce trees were used for timber "and they cut it up for wood." 296 Elder R. Morin testified that the timber cut on the school grounds was used "[m]ostly for firewood." 297 Elder E. Ketlo stated he cut timber as a part of his chores while attending the Lejac school. He testified,

I was working there, packing that boiler wood. They were about four feet long. When I was there it wasn’t too far away from the school, okay, so we were cutting quite a bit of poplar, at that time, use it for boiler - - boiler wood. I remember them chopping the wood too, you know, they use wedges, they call it, was steel wedges, they used that to cut the - - split the wood. They were four feet long. I remember doing some of that. 298

293 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 20, 21, G. George Sr.).
294 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 57, J. Lacerte). See ICC Exhibit 7aa for map referred to here.
295 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 65, J. Lacerte).
296 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 75, R. Morin).
297 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 81, E. Ketlo).
Expanding on the school’s need for boiler wood, Elder George Sr. further testified that the school used to have a couple big boilers. They had a boiler room and there was couple big - - actually, there was three, but there was always two that were being used, big furnaces, where the water tank attached to the furnace was probably 15 and 20 feet long and six, seven feet in diameter. And it was heated by - - with - - the furnaces were fired by wood. And we used to cut - - sometimes we’d cut boiler wood four foot long and we used to – every day we used to carry boiler wood to the furnace room ...

... And some children would - - would take care of what we call kitchen - - kitchen wood, which is only six - - six - - 16 - inch in length.

In the mid forties, or 1945 or so, they start - - they quit using boiler wood and they start using coal to fire these furnace. 299

The documentary record indicates that the clearing of the school land occurred throughout its early existence. In its first year of operation, the Lejac School farm comprised 80 acres of cleared land.300 The school’s principal reported that "some more acres" were cleared in 1925.301 In March of 1931, Principal Coccola reported "10 acres of new land have been cleared and fenced ready for seeding."302 In 1934, Principal Rivet reported that: "[b]reaking activities have commenced on our newly cleared 20 acre field and also on two smaller plots comprising about 20 acres".303 In January of 1935, Principal Rivet reported that "[f]orty-five extra acres of land are ready for cultivation next year".304 In his June 1937 quarterly report, Principal Byrne-Grant reported: "[w]e hope to be able to finish clearing and to put into winter wheat, ten acres of land south of the highway. This will leave us about twenty acres of land to be cleared." 305 In October of that year, Principal Byrne-Grant reported that 123 acres were under cultivation.306 In an article published at about the same time, the Victoria Times newspaper reported that

299 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 22-23, G. George Sr.).
300 Memorandum to file, Russell T. Ferrier, Supt. of Indian Education, September 1, 1922, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 357).
301 N. Coccola, OMI, Principal, Industrial School, to R.H. Moore, Indian Agent, December 31, 1925, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 409).
304 L.H. Rivet, OMI, Principal, Indian Residential School, to Deputy Minister of Indian Affairs, January 2, 1935, LAC, RG10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 520).
Here are approximately 225 acres of land, of which 155 are now under cultivation. Fifty-five acres are seeded to alfalfa. ... Thirty acres were in wheat this season, and the balance of cultivated land in oats and peas for green feed, potatoes, garden and hay land.  

That newspaper article also stated that the school had rented "four hundred and eighty acres of additional land ... for pasture and cereal grains." Documents from 1954 indicate that the Lejac Indian Residential School rented 110 acres of additional farm land outside of the school's grounds in that year.

The documentary record of this inquiry indicates that, during its years of operation, the Lejac Indian Residential School was in an almost constant state of repair and construction. Many of the documents on the record deal with OMI requests and departmental approval/denial for various repairs to the school and construction of new structures within the school compound. The documentary record also indicates that the school did purchase lumber and materials related to the construction and/or improvement of buildings on at least five occasions.

In March of 1955, the Lejac Indian Residential School applied to the British Columbia Forest Service to cut "a few thousand feet of lumber on the school property" to be used in the construction of hay sheds as well as for sale to "cover costs of cutting." OMI officials maintained that "the section [of Seaspunkut IR 4] provided for school use was transferred from being an Indian Reserve to a Dominion Govt. title" and that "Indian Reserve No. 4 begins on the Western boundary of school property." Subsequent

310 For example, see: N. Coccola, OMI, Principal, to Duncan Scott, Deputy Minister of Indian Affairs, October 21, 1922, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 363); W.J. McAllan, Indian Agent, to Secretary, Department of Indian Affairs, June 16, 1923, LAC, RG 10, vol. 6443, file 881-5, part 2 (ICC Exhibit 1a, p. 380).
312 G.F. Kelly, OMI, Principal, Lejac Indian Residential School, to R Howe, Supt., Indian Affairs Branch, March 25, 1955, no file reference available, (ICC Exhibit 1a, p. 1447).
313 G.F. Kelly, OMI, Principal, Lejac Indian Residential School, to R Howe, Supt., Indian Affairs Branch, March 25, 1955, no file reference available, (ICC Exhibit 1a, p. 1447).
correspondence indicates that Stuart Lake Superintendent (Indian Agent) R. Howe "presumed[d] the school land was surrendered by the Indian owners years ago and that the title is in the name of the Dominion Government." \(^{314}\)

The documentary record indicates that the school did not cut the timber as proposed.\(^{315}\) In 1957, R. F. Davey, Superintendent of Education stated, "[t]he postponement affords some satisfaction since it should permit those concerned to become better acquainted with the status of the land and the procedures applicable to the cutting of timber on Indian land." \(^{316}\) Davey also stated that: "[y]ears ago it was usual to assign land to a school for fuel-wood cutting".\(^{317}\) It is not known if the Lejac Indian Residential School was assigned such lands, or whether the Nadleh Whut'en Band received any compensation for timber taken from the school lands. The Department of Finance's audit report of the school for 1954-55 calculated the school's use of IR 4 lands as follows:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>School Land</td>
<td>160 acres</td>
</tr>
<tr>
<td>Rented Land</td>
<td>110 acres</td>
</tr>
<tr>
<td></td>
<td>270 acres</td>
</tr>
<tr>
<td>Under Cultivation</td>
<td>170 acres</td>
</tr>
<tr>
<td>Rough lands</td>
<td>100 acres</td>
</tr>
<tr>
<td></td>
<td>270 acres  (^{318})</td>
</tr>
</tbody>
</table>

According to the Stuart Lake Agency Superintendent, A.C. Roach, "[i]n or around the year 1958, the Branch had a change of policy which abolished the farm, the Branch assuming financial responsibility to operate the school." \(^{319}\)

At a meeting with officials of numerous churches held in August of 1958, Indian Affairs officials expressed the department's desire that financial records for school operations and farm operations be maintained

---

\(^{314}\) R. Howe, Superintendent, Indian Affairs Branch, to W.S. Arneil, Indian Commissioner for BC, March 28, 1955, no file reference available (ICC Exhibit 1a, p. 1448).

\(^{315}\) W.S. Arneil, Indian Commissioner for BC, Indian Affairs Branch, to Indian Affairs Branch, January, 4, 1957, no file reference available (ICC Exhibit 1a, p. 1482); R.F. Davey, Superintendent of Education to W.S. Arneil, Indian Commissioner for British Columbia, January 8, 1957, no file reference available (ICC Exhibit 1a, p. 1483).


Independently.\textsuperscript{320} An Audit report from 1959 indicates that: "[i]n 1959 the Oblate Fathers took over operation of the farm, absorbing all costs, and billing the school for produce produced."\textsuperscript{321}

**USE OF SCHOOL BY THE OBLATES OF MARY IMMACULATE**

According to the documentary record, the Oblates of Mary Immaculate held events at the school which were not directly associated with school operations. For example, in 1929, the OMI used the school as part of its celebration of the Reverend Principal Coccola’s "fifty years in the ministry."\textsuperscript{322}

In October of 1936, Jean-Louis Coudert, OMI, Bishop of Rhodiapolis, Coadjutor of Yukon and Prince Rupert, (Bishop E.M. Bunoz’s replacement), advised the Indian Affairs Branch that he had taken up his winter residence at the Lejac School and that he had aspirations that the school could be used to host official Oblate business.\textsuperscript{323} In writing to the Dr. McGill, Deputy Minister and Superintendent of the department, Bishop Coudert stated:

\begin{quote}
In regard to our residence here, allow me to approach Your Department concerning a plan I have in mind, as a result of the survey I made of the conditions of living of our Missionaries here as well as in the surrounding district.

1. - I found it very inconvenient for Father Principal as well as for the other priests connected with the work at the school not to have any separate living quarters outside of the School Building proper.

2. - My presence here is the occasion of more numerous visitors coming from the surrounding mission district; much to my regret I feel quite unable to give them the appropriate hospitality in the very restrained quarters set apart for us in the School.

3. - As Fraser Lake is the most central place of meeting for all our Missionaries working among the Catholic Indians of Northern British Columbia, it is my most earnest desire to have a large residence established here, wherein occasionally I could gather all the priests of the region interested in Indian work for their annual Retreat and Convention.\textsuperscript{324}
\end{quote}

\textsuperscript{320} Minutes of meeting between Indian Affairs Branch and various church representatives, August 26, 1958, OMI Archives Deschatelets HR 6116.67.389. (ICC Exhibit 1a, p. 1558).

\textsuperscript{321} E. Latham, Treasury Auditor, Office of the Comptroller of the Treasury, West Coast Region, Audit Services Division, Department of Finance, to G. H. Cheney, Director, July 12, 1960, LAC, RG 10, file 965/16-2, part 2, accession 1999-01431-6, box 369 (ICC Exhibit 1a, p. 1648). Other documents have dated this event as occurring in 1955.

\textsuperscript{322} R.H. Moore, to Secty., Dept. of Indian Affairs, November 30, 1929, LAC, RG 10, vol. 6443, file 881-1, part 1 (ICC Exhibit 1a, p. 452).

\textsuperscript{323} Jean-Louis Coudert, OMI, Bishop of Rhodiapolis, Coadjutor of Yukon and Prince Rupert, Indian Industrial School, Lejac, BC to Dr. McGill, Deputy Minister and Superintendent of the Dept. of Indian Affairs, October 22, 1936, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, p. 555).

\textsuperscript{324} Jean-Louis Coudert, OMI, Bishop of Rhodiapolis, Coadjutor of Yukon and Prince Rupert, Indian Industrial School, Lejac, BC to Dr. McGill, Deputy Minister and Superintendent of the Dept. of Indian Affairs, October 22, 1936, LAC, RG10, vol. 6443, file 881-1, part 2 (ICC Exhibit 1a, p. 555).
Bishop Coudert continued, saying,

[i]n consideration of the above stated reasons, I beg to ask you whether it would be possible for the Department to sell or to lease to the Oblates of Mary Immaculate for an indefinite period of time a portion of the land owned by the School, so that we might build, at our own expense, within a reasonable distance of the Indian School, the projected residence, which would be used both by the Personnel affected to the School and by the other Missionaries of the district.

I would suggest as the most suitable location for our Residence the portion of the School property located East of the School Building extending down the bank as far as the C.N.R. track. The said piece of land can be easily made independent from the rest of the School Property; would have an outlet to the station; and would mean no practical loss to the Department.325

The department looked into Bishop Coudert’s proposal and reviewed the 1921 Band Council Resolution passed by the Nadleh Whut’en Indian Band, which set aside land for the school. On November 24, 1936, A. F. MacKenzie, Secretary wrote to Indian Agent Moore and stated:

[i]n view of the fact that the resolution of the Fraser Lake Indians ... states that ‘260 acres be set aside for the purposes of the erection of an Indian School and farm and grounds therefor’, it is considered that, before leasing any land to Bishop Coudert for the erection of a residence for himself and other Roman Catholic missionaries, the consent of the Indians should be obtained.

As soon as you can conveniently do so, you should place this matter before the Indians and advise the Department of their wishes.326

Responding to MacKenzie’s November 24 letter, Bishop Coudert wrote, on December 12, 1936,

[w]ith reference to this communication, I cannot help expressing to your Department my great surprise at your action, whereby you requested this matter to be placed before the Fraser Lake Indians.

1.-After all the trouble taken by the Department to secure the deed signed April 12, 1921 (as per your copy) by the Fraser Lake Indians, I did not think that the Department could possibly entertain any scruple about the legitimacy of its title over the said land.

2.-Should the Department entertain any scruple concerning the reasons advanced before the Indians to secure aforesaid land, I beg to remark that the

lease I am applying for falls exactly within the School purposes mentioned in your deed with the Fraser Lake Indians. If you will kindly refer to my letter of October 22d, you will see that the first reason I advanced in my request was to have a piece of land whereon to build appropriate quarters for the Principal and Staff of the School.

Of course, if the Department is willing to go through such expenses as to build a house for our Principal, as apparently was done in other Schools, I will immediately withdraw my request, and will be satisfied with any location, whereon the Department will choose to set up the said building.

3.-Unless the Fraser Lake Band of Indians has been of late prejudiced against us by some man antagonistic to our work, I can positively assure the Department that, to the best of my knowledge, none of the said Indians will object to my residing at the School. Most of these Indians come and visit me weekly at the School, and all have expressed their great satisfaction to see me residing there in order to supervise more carefully the work conducted at the School by the Sisters and Fathers under my care. In the mind of these Indians my presence near the School is so intimately connected with the work of the School that they will certainly fail to see the distinction between the School work and my work.

On December 30, 1936, the Secretary of Indian Affairs, T.R.L. MacInnes, wrote to Bishop Coudert, saying,

[this land, a part of the Fraser Lake Reserve No. 4, was surrendered and set aside by the Indians of the Band for the purpose of the Lejac School only, and, in the event, at any time, of it not being further required for school purposes, the land would revert to the Band. It is therefore necessary, before leasing a portion of this land for other than school purposes, that the consent of the Indians be obtained. ... May I say, further, that the Department understood, from previous correspondence, that the house you intend to erect is for the use of yourself and the Oblate missionaries of the district. It is now noted, from your letter, that this house is for the use of the Principal and staff of the Lejac School. We understand that accommodation for the staff and suitable living quarters for the Principal are provided in the school building.

The documentary record of this inquiry provides no evidence that the proposed residence was ever constructed or that the Nadleh Whut’en Indian Band was consulted. By 1937-38, Bishop Coudert no longer resided at the Lejac School.
There is evidence on the documentary record that the Oblates of Mary Immaculate did use the Lejac School for their annual retreats, as Coudert suggested. These retreats were held during the years 1937, 1949, 1951 [Eucharistic Congress], 1953, 1960, 1963 and perhaps 1965. At the Community Session, Elder George Sr. recalled

there was times that there was an influx of priests. I don’t know what they were doing, but there was priests that didn’t take part - - that were there but didn’t take part in teaching of the children, but they were just there....  

... The Bishop used to live there at times.

At the same session, Elder R. Morin was asked if she remembered "any time when there seemed to be more priests then were there normally? Elder Morin recalled:

Yes, there was. I seen about 20 priests. I was wondering how come there was so many ...The were having a retreat or something.

... I remember, now you talk about that, the sisters used to make us be quiet when we were going down the hallway going to our classrooms, they make us be quiet, because the priests were in the chapel and they were having their retreat or something.

The 1960 retreat was noted by A. V. Parminter, Inspector of Indian Schools, in his inspection report dated May 18, 1960. Parminter reported:

[d]uring my visit to Lejac I was unable to observe the children at meal time under normal circumstances since classes had not resumed on the specified date following the Easter vacation. The delay was the result of a retreat for the clergy of the area held at Lejac for several days. Over thirty priests were in attendance thus necessitating delay in school opening as dining room and kitchen facilities would

---


331 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 38, G. George Sr.).

332 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, p. 74, Commissioner A. Holman).

333 ICC Transcript, November 22, 2007 (ICC Exhibit 5a, pp. 74-76, R. Morin).
have been quite inadequate to cope with the usual enrollment [sic] and the visitors.

The teachers did not work on Monday, April 25th. Since I expected to find them engaged in teaching, I presumed the department had granted permission to either Bishop O’Grady or Father Kelly to suspend classes on that date and that no deductions from teachers salaries will be made. Will you kindly confirm this? For my future guidance I should appreciate knowing what financial arrangements are made between the church authorities and the Department when such a large number of visitors are domiciled in one or our schools during a retreat.\textsuperscript{334}

\textsuperscript{334} A. V. Parminter, Regional Superintendent of Indian Schools, to R. F. Davey, Indian Affairs Branch, May 18, 1960, LAC, RG 10, vol. 8710, file 965/6-1, part 10 (ICC Exhibit 1a, p. 1642-43).
APPENDIX B

CHRONOLOGY

NADLEH WHUT'EN INDIAN BAND
LEJAC SCHOOL INQUIRY

1 Planning conference  
Vancouver, March 18, 2003

2 Community session  Nadleh Whut'en First Nation, November 22, 2007

The Commission heard from George George, Sr., Jack Lacerte, Rita Morin, Edgar Kello.

3 Written legal submissions

- Submission on Behalf of the Nadleh Whut'en First Nation, February 10, 2008
- Reply Submission on Behalf of the Nadleh Whut'en First Nation, March 31, 2008

4 Oral legal submissions  
Vancouver, April 10, 2008

5 Content of formal record

The formal record of the Nadleh Whut'en Inquiry consists of the following materials:

- Exhibits 1 - 9 tendered during the inquiry, including transcripts of the community session
- transcript of oral session

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

STURGEON LAKE FIRST NATION
1913 SURRENDER INQUIRY

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

COUNSEL
For the Sturgeon Lake First Nation
David Knoll

For the Government of Canada
Douglas Faulkner

To the Indian Claims Commission
Valerie Richer

DECEMBER 2008
CONTENTS

SUMMARY 315
KEY HISTORICAL NAMES CITED 321

PART I INTRODUCTION 325
Background to the Inquiry 325
Mandate of the Commission 327

PART II THE FACTS 328

PART III THE ISSUES 333

PART IV ANALYSIS 334
Issue 1 Irregularities in the Surrender Process 334
   The Law 334
   Panel’s Reasons 338
      Surrender Meeting 338
      Date of Surrender 338
      Signatures of Cardinal and Ballendine 339
      Second Affidavit by Big Head and Moosehunter 341
      Conclusion 342
Issue 2 Did a Majority of Eligible Voters Assent to the Surrender? 343
   Positions of the Parties 343
   Panel’s Reasons on Eligibility of Voters 344
   Eligibility by Residency 345
      The Mink, #49 345
      Charles Twatt, #122 346
      Charles Campbell Cardinal, #130 347
   Eligibility by Age 348
      Napoleon Charles, #132 348
      Solomon Naytowonhow, #133 349
      Simon (Simon Peter), #136 350
      William Charles, #138 351
      George Charles, #139 351
STURGEON LAKE FIRST NATION: 1913 SURRENDER INQUIRY

Map 1

Claim Area Map

Sturgeon Lake
IR 11A
School
Treaty No. 6, N.W.T.

Indian Reserve
Nº 101
at Sturgeon Lake.

Chief Whtwatt

Surveyed by
E. Stewart, L.I.S.
Aug. 8th, 1878

Area 31 4 sq. miles

Surveyor:

For Indian Land Survey

Ottawa, 23rd June 1878

Dated:

572,50-1 Mol 2

Map 2

Sturgeon Lake H. 101, Circa 1878
Map 3  Sturgeon Lake IR 101, 1913, Portion to be Surrendered
SUMMARY

STURGEON LAKE FIRST NATION
1913 SURRENDER INQUIRY
Saskatchewan


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

Treaties – Treaty 6 (1876); Reserve – Surrender – Surrender for Exchange; Indian Act – Surrender; Evidence – Oral History; Contract – Mistake; Saskatchewan

THE SPECIFIC CLAIM

In December 1913, the Sturgeon Lake Band surrendered a portion of Indian Reserve (IR) 101 in exchange for an equivalent amount of haylands. The First Nation submitted a specific claim to the Department of Indian and Northern Affairs in 1993, contesting the validity of the surrender on the basis that a majority of the eligible voters had not been present at the 1913 surrender meeting. In June 1995, the government rejected the First Nation’s specific claim, whereupon it requested in August 1996 that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim on the issues of voter eligibility and irregularities in the surrender process. At the First Nation’s request, the inquiry was placed in abeyance pending completion of additional research. After Canada rejected the claim for a second time, in May 1998, the ICC held a planning conference with the parties. Subsequently, the inquiry was again placed in abeyance pending completion of Elder interviews.

After resumption of the inquiry in December 2002, the ICC conducted a second planning conference. The First Nation brought forth an additional issue based on contract law principles and submitted a supplementary submission on this issue to the government in April 2004. Following extensive discussions and a third planning
conference in June 2005, Canada agreed that the Elders could give evidence regarding the new issue in order to preserve their knowledge, despite the fact that Canada had not formally responded to it. The community session and site tour took place on December 6 and 7, 2006. Canada rejected the First Nation’s supplementary submission based on contract law principles in May 2007. The parties filed their written submissions in April and May, 2008, and presented their legal arguments on May 13, 2008 in Saskatoon.

BACKGROUND

Chief William Twatt signed Treaty 6 near Fort Carlton in August 1876, on behalf of the William Twatt’s Band, currently Sturgeon Lake First Nation. Indian Reserve (IR) 101, which is traversed by Sturgeon Lake, was surveyed for the Band in 1878, and confirmed by Order in Council in 1889.

The Sturgeon Lake Band was reputed to be skilled and successful in raising cattle and horses, which led to increasing herds and a corresponding shortage of hay on the reserve. Band members were also expert woodsmen, who earned money in the lumber industry and by selling timber. In 1906, the Band surrendered all the spruce on the reserve ten inches and over at the stump in return for money to pay for a thresher.

As early as 1895, the Band and various Indian Agents recognized the Band’s need for more hayland to feed their animals. The Band also advised officials that the Marquis of Lorne had promised in 1881 to give the Band four sections of hayland, should it be required. The department, however, found no record of this promise, although it did recognize the Band’s need for more hay.

In 1907, Indian Agent Jackson submitted a report and map to the department identifying land north of Sturgeon Lake that the Band was willing to exchange for four sections of hayland. In 1912, Indian Agent Borthwick renewed discussions with the Band on the option of exchanging a portion of the reserve for an equal amount of hayland. In July 1912, the Band held two meetings, at which time it decided to surrender two sections at the southwest corner, and two sections at the southeast corner of the reserve in exchange for the same four sections of hayland. In May 1913, Borthwick asked the Band to confirm the land it wished to give up. As a result, the Band decided to inspect the land again, after which it decided instead to give up the land north of the lake. Indian Agent Borthwick reported that a surrender meeting and vote took place on December 22, 1913. His report stated that there were 28 eligible voters in the Band, 16 of whom attended the meeting, and that all 16 voted in favour. A voters list and results of the vote were attached to his report.
ISSUES
With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under the 1906 Indian Act? Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote? If the answer to either question is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender? Do contract principles apply in determining the First Nation’s understanding and intentions in the 1913 surrender, and if so, did their understanding and intention result in the invalidity of the 1913 surrender?

FINDINGS
The irregularities surrounding the 1913 surrender process include, first, Indian Agent Borthwick’s reporting letter following the surrender. He states that the surrender was obtained at a general meeting of the Band, instead of indicating that the meeting was summoned for the purpose of a surrender vote. Second, Agent Borthwick inserted December 17, 1913 on the Surrender Document, whereas his reporting letter states that the surrender took place on December 22. Third, the First Nation claims that discrepancies between the original and copies of the surrender documents raise serious questions about the surrender, and, in particular, the signatures of two band members are indicative of forgery. Fourth, the First Nation questions the legitimacy of the second Affidavit of Surrender because of conflicting evidence regarding the signatories’ eligibility and presence at the surrender meeting. The panel finds that, individually or collectively, these irregularities do not call into question the validity of the 1913 surrender. They may have been the result of carelessness or human error, but they were not the result of deception, fraud, or conduct designed to manipulate the results of the surrender vote. Thus, the relevant surrender provisions of the 1906 Indian Act were met.

On the question of the total number of eligible voters at the time of the 1913 surrender vote, and the number of those voters who attended the surrender meeting, the panel finds that there were 33 eligible voters. Seventeen of those attended the meeting, thereby complying with the requirement in the Cardinal case that a majority of eligible voters must attend the surrender meeting. Sixteen out of the seventeen who attended voted in favour of the surrender, with one abstention. No one was recorded as voting against the surrender. Thus, in accordance with the Indian Act requirements, a majority of male members of the Band of the full age of 21 years, habitually resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender.
With respect to the applicability of contract law principles to surrenders of Indian reserve land, the panel concludes that in a small minority of claims within the Specific Claims Policy, most likely where insufficient evidence exists to prove a breach of the Crown’s fiduciary duty, reliance on contract law principles may be the preferred or only option available to a First Nation to prove its true intention when it surrendered reserve land. Here, the First Nation has chosen to advance its claim based on the law of mistake in contract, and should not be barred from doing so. In such cases, however, the Crown may avail itself of defences based on contract law, unless they are prohibited by the Specific Claims Policy.

The panel concludes that the Sturgeon Lake voters in 1913 were not confused with a previous timber surrender and did not misunderstand the nature and consequences of the surrender when they cast their votes for the surrender. The Elder evidence stands in stark contrast to a very detailed written record of the events leading up to the surrender. This record reveals consistent leadership in the Band at the time; band members’ knowledge of the timber industry; a long-standing need to add more haylands to the reserve; and, the considerable time the Band took to make a final decision on the land it wished to give up in exchange for the haylands. The panel finds that the voters themselves fully intended to exchange land for land, not timber for land.

**RECOMMENDATION**
That the claim of the Sturgeon Lake First Nation regarding the 1913 surrender of a portion of Indian Reserve 101 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**

**ICC Reports Referred to**

Treaties and Statutes Referred To
Royal Proclamation of October 7, 1763, RSC 1970, App. 2; Treaty No. 6, in Alexander Morris, The Treaties of Canada with the Indians (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991); An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, SC 1868; Indian Act, RSC 1906; An Act to amend the Indian Act (designated lands), 1988.

Other Sources Referred To

COUNSEL, PARTIES, INTERVENORS
D. Knoll for the Sturgeon Lake First Nation; D. Faulkner for the Government of Canada; V. Richer to the Indian Claims Commission.
STURGEON LAKE FIRST NATION: 1913 SURRENDER INQUIRY

KEY HISTORICAL NAMES CITED

Ah-yah-tus-kum-ik-im-um (also Ayahtuscumicamin, William Twatt), Chief, Sturgeon Lake First Nation in 1876.

Borthwick, Thomas, Indian Agent, Carlton Agency, 1906 - 1907 and 1908 - 1914.

Christie, W.J., Treaty Commissioner, Treaty 6, 1876.

Chisholm, W.J., Inspector of Indian Agencies, Battleford Inspectorate, 1904 - 1906.

Coombs, J.S., Timber Inspector, Department of the Interior in 1912.

Coté, N.O., Controller, Land Patents Branch, Department of the Interior, in 1908 - 1916.

Coté, J.A., unknown position, Department of the Interior in 1913.

Cory, W.W., Deputy Minister, Department of the Interior in 1913.

Deville, Edouard, Surveyor General, Department of the Interior, 1885 - 1992; Director General, Bureau of Surveys, 1922 - 1924.


Forget, A.E., Assistant Indian Commissioner, August 1888 - October 1895; Indian Commissioner, October 1895 - October 1898.

Goodfellow, W.B., Indian Agent, Carlton Agency, 1898 - 1902.

Jackson, T. Eastwood, Acting Indian Agent, Carlton Agency, in 1907; formerly a clerk in the Carlton Agency, 1900 - 1907.

Keith, Hilton, Indian Agent, Touchwood Agency 1887 - 1892; Carlton Agency, 1893 - 1898.

Keyes, P.G., Secretary, Department of the Interior in 1907.
Laird, David, Lieutenant Governor of the North-West Territories, 1876 - 1881; Indian Superintendent for the North-West Superintendency, 1877 - 1878; Indian Commissioner, 1879 - 1888 and 1898 - 1914.

Loo-sou-am-ce-kwakn, Headman, Sturgeon Lake First Nation in 1876.

MacArthur, James, Indian Agent, Carlton Agency, 1902 - 1903; Duck Lake Agency, 1904 - 1910.

McKay, James, Treaty Commissioner, Treaty 6, 1876.

McKechnie, W.S., Dominion Lands Agent, Department of the Interior in 1912.

McLean, J.D, Secretary for the Department of Indian Affairs; later promoted to Assistant Deputy and Secretary for the same department.

Milligan, Silas, Indian Agent, Carlton Agency, 1914 - 1915.

Morris, Alexander, Lieutenant Governor of Manitoba, 1872 - 1876; Treaty Commissioner, Treaty 6, 1876.

Nees-way-yak-ee-nah-koos, Headman, Sturgeon Lake First Nation, 1876.

Oo-sahn-us-kee-nee-kik, Headman, Sturgeon Lake First Nation, 1876.

Pedley, Frank, Deputy Superintendent General of Indian Affairs, November 1902 - October 1913.

Pereira, Lyndwode, Assistant Secretary, Department of the Interior in 1912.

Ponton, A.W., Dominion Lands Surveyor, surveyed IR 106A for the Montreal Lake and Lac La Ronge Bands in 1897. Provided feedback on Agent Keith’s request for additional hayland for the Sturgeon Lake First Nation.

Scott, Duncan Campbell (D.C.S.), Chief Accountant, Department of Indian Affairs, in 1913.

Sifton, Clifford, Superintendent General of Indian Affairs and Minister of the Interior, November 1896 - February 1905.
Stewart, Elihu, Dominion Land Surveyor, surveyed IR 101 for the Sturgeon Lake First Nation in 1878.

Stewart, Samuel, Assistant Secretary, Department of Indian Affairs in 1907.

Yay-yah-too-way, Headman, Sturgeon Lake First Nation in 1876.
PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY
In August 1876, Chief William Twatt and three headmen signed Treaty 6 near Fort Carlton on behalf of the members of William Twatt’s Band, currently the Sturgeon Lake First Nation. Indian Reserve (IR) 101, containing 22,042 acres, or 34.4 square miles, was surveyed for William Twatt’s Band two years later and was confirmed by Order in Council in 1889.

Early in the history of the Sturgeon Lake Band, it was recognized by the Band and Indian Agents that the Band required more haylands on the reserve to accommodate their growing herds of cattle and horses. Band members were also known to be expert woodsmen, who earned money by cutting and selling timber. On January 30, 1906 the Band agreed to a surrender for sale of all the spruce on the reserve over ten inches at the stump.

The Band and Crown officials discussed over several years the option of exchanging some reserve land for an equivalent amount of hayland. In December 1913, the Band surrendered a portion of its reserve north of Sturgeon Lake in exchange for two sections of land adjacent to the northeast corner and two sections approximately seven miles west of the reserve.

On October 22, 1993, the Sturgeon Lake First Nation submitted a specific claim to the Department of Indian and Northern Affairs, alleging that a majority of the eligible voters had not been present at the 1913 surrender meeting. On June 17, 1995, Canada advised the First Nation of its position that the surrender requirements of the 1906 Indian Act had been met with respect to the 1913 surrender of a portion of Indian Reserve (IR) 101, and that the surrender was therefore valid.

In August 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim, based on voter eligibility and irregularities in the surrender process. The ICC agreed to the request. The First Nation submitted further research on voter eligibility and Canada began conducting confirming research. In December 1996, the First
Nation requested that the inquiry be placed in abeyance pending the completion of the research. On May 26, 1998, Canada again rejected the First Nation's claim and the inquiry was resumed the following month. A planning conference with the parties was held in September 1998; however, in December 1999, the inquiry was placed in abeyance a second time, at the request of the First Nation, so that it could complete interviews with the Elders.

The inquiry resumed in December 2002, and in March 2003, the ICC conducted a second planning conference with the parties. At that time, the First Nation indicated that it planned to rely on documents containing the Elder interviews rather than hold a community session to receive the Elders' testimony. The First Nation also raised the question of whether the voters understood that they were surrendering land in 1913. Although Canada did not formally object, it expressed serious reservations that a new issue was being introduced into the inquiry. On April 16, 2004, the First Nation filed a revised supplementary submission claiming that the 1913 surrender could be challenged on the basis of contractual principles, in particular, the law of mistake. In June 2005, the Commission conducted a third planning conference. Subsequently, the First Nation decided to hold a community session. Canada ultimately agreed that the Elders could give evidence in relation to the 2004 supplementary submission in order to preserve their testimony, despite the fact that Canada had not yet formally responded to this issue.

The community session and site tour took place on December 6 and 7, 2006. On May 18, 2007, Canada rejected the First Nation’s supplementary submission based on contract law principles.

The written legal submission of the First Nation was filed on February 29, 2008; Canada filed its submission on April 11, 2008, and the First Nation filed a Reply on April 26, 2008. The parties presented their arguments at an oral hearing on May 13, 2008 in Saskatoon, Saskatchewan. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is detailed in Appendix B.
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.”1 The 1973 Specific Claims 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.2 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.3

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.4


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 Indian Claims Commission Proceedings (ICCP) 171–85 (hereinafter Outstanding Business).

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

PART II

THE FACTS

In August 1876, Chief William Twatt and three headmen signed Treaty 6 near Fort Carlton on behalf of the members of what was known as William Twatt’s Band, currently the Sturgeon Lake First Nation. Treaty 6 included a provision for reserves of one square mile (or 640 acres) for each family of five, or in that proportion for larger or smaller families. Indian Reserve (IR) 101, containing 22,042 acres, or 34.4 square miles, and traversed by Sturgeon Lake, was surveyed for William Twatt’s Band two years later. Surveyor E. Stewart commented at the time that the location of the reserve was well-chosen, with an abundance of timber on the north side of Sturgeon Lake, sufficient haylands in the valleys, and excellent whitefish and ducks on the reserve. IR 101 was confirmed by Order in Council in May 1889, and was withdrawn from the operation of the Dominion Lands Act in 1893.

In 1881 the Governor General, the Marquis of Lorne, conducted a tour of western Canada, at which time he held councils with the Indians. The Marquis’ representative reported that Chief Twatt requested some amenities such as thread, and also asked for an agent who could speak his language in order to assist in the sale of wood from the Sturgeon Lake reserve. There is no record of a request for additional haylands at that meeting.

Several years later, in 1895, the Indian Agent for the Carlton Agency, H. Keith, requested more haylands for the Sturgeon Lake Band, but was advised by the Dominion Land Surveyor, A.W. Ponton, that nothing could be done until a survey of the area was completed. Ponton reported in 1898 that the lands requested by Keith were found to be within the area surveyed for other bands, namely, the Montreal Lake and Lac La Ronge Bands. Ponton suggested, as an alternative, that the Sturgeon Lake Band consider exchanging an equal amount of its reserve land for land at the northeast corner of the reserve comprising 14 square miles of haylands, located in township 51, range 27 and fractional range 28, west of 2nd meridian. He recommended this exchange, observing that the existing reserve was, for the greater part, sandy.
and wooded with jack pine, hampering the Band’s attempts to engage in stock-raising and agriculture, whereas the land he suggested contained good soil and plentiful hay meadows.

In the early 1900s, there appears to have been two distinct groups of band members, one living at the east end of the lake and another to the west at a place called the Narrows. The latter group was considered to be more prosperous, but officials reported that the group from the east was preparing to move to the Narrows, which would bring them closer to the school and the center of the reserve.

In the years leading up to 1906, when the Band surrendered timber on the reserve for monetary compensation, band members were reputed to be expert woodsmen, who earned money by working in lumber camps. In those years, the Band entered into several agreements to sell timber and railway ties, sometimes insisting that band members be hired to do the work. In 1905, it was reported that the Band was anxious to sell some of its timber to pay for a thresher, and on January 30, 1906, the Band agreed to a surrender for sale of all the spruce on the reserve over ten inches at the stump. Headmen Ayatawayo and Kayaykeemat (Moosehunter), and principal members Kawechemaytawaymat (Big Head), Kaisiwanayo, Nehtowkapow, Meyohnahtowakew, Thomas, Willie Duck, and Jumbo signed the Surrender Document. Ayatawayo also swore the accompanying Affidavit of Surrender.

The Sturgeon Lake Band was also reputed to be skilled and successful in raising cattle and horses, which in turn created ongoing pressure to obtain more hayland for the reserve. Indian Agent T.E. Jackson reported in late 1907 that the Band claimed to be entitled to four additional sections of haylands should they be required. He supported their request for more haylands, confirming that the hay supply on the existing reserve continued to be insufficient. Jackson wrote a letter identifying sections 35 and 36, in township 51, range 1, and sections 10 and 15, in township 51, range 3, all west of 3rd meridian, as being potential haylands for the Band that could yield up to 200 tons of hay. Jackson also attached a map of the reserve highlighting land north of Sturgeon Lake that, according to Jackson, the Band was willing to exchange for the four new sections. In response, although the department supported the Band’s need for more hay, it denied any entitlement to additional land, stating that the Band had already received 3,226 acres more reserve land than its entitlement under Treaty 6.

When Jackson’s replacement, Indian Agent Thomas Borthwick, approached the department on behalf of the Band in early 1908, repeating the request for additional haylands, he explained that band members told him the
Marquis of Lorne had promised during their interview with him in 1881 to grant their request for four sections of hayland. The department responded that it had no record on file of the Marquis’ promise and suggested the notion of a land exchange such as the one proposed in 1898.

In 1912, following a request from a timber company to harvest timber on land, some of which had been identified as available in future to the Sturgeon Lake Band, the Department of the Interior responded that the Band had not yet indicated which reserve land it wanted to exchange for the haylands. The Department of Indian Affairs then followed up with Agent Borthwick, asking if the Band still desired to obtain sections 35, 36, 10, and 15, described above, and if so, to indicate the land it was prepared to give up.

Agent Borthwick reported that on July 10 and 18, 1912, the Band held two meetings to discuss the matter and advised him that the majority wished to proceed. In particular, the Band stated that, instead of giving up reserve land north of Sturgeon Lake, it had decided to surrender two sections at the southwest corner of the reserve and two sections at the southeast corner, in exchange for the four sections of land previously identified. After much discussion between the departments of Indian Affairs and the Interior, by December 1912 sections 10 and 15 were confirmed as available for exchange once they were removed from a third party’s timber berth. The Department of the Interior expressed some reluctance to add sections 10 and 15 to the reserve because they were almost seven miles from the reserve’s western border, but Superintendent General of Indian Affairs D.C. Scott responded in August 1913 that it was a serious matter that the Band obtain more hay for its herd of 400 head of cattle. He reasoned that Indian Agent Borthwick, whom he called a man of good judgement, was probably not able to get any decent hay meadows closer to the reserve.

In his annual report for 1912-13, Indian Agent Borthwick described the northern portion of the Sturgeon Lake reserve as heavily timbered, compared to the land south of Sturgeon Lake where long and excellent areas of farm land existed, offering great opportunities to the Indians who were engaged in farming and stock raising. Borthwick also commented that the long and narrow lake was bounded by high, wooded banks, especially to the west of the reserve. He noted that the Band’s herds of cattle and horses, numbering 492 animals, had increased dramatically in the previous five years.

In March 1913, after the Secretary of the Department of Indian Affairs asked Indian Agent Borthwick to confirm that the southwest and southeast corners of the reserve were to be cut off the reserve, Borthwick met with the Band to discuss the matter. He reported on June 5, 1913, that the meeting did
not take place until May 28, as the majority were away rat hunting and log driving. At the May 28 meeting, however, band members were not ready to confirm their decision. They wanted to make another inspection of the reserve land they wanted to exchange before finally coming to an agreement. When Borthwick received the Band’s final decision, he wrote to the Secretary on June 16 that the Band had changed its mind; it no longer wished to exchange the southwest and southeast corners of the reserve, but rather the portion lying directly northwest of the lake. Borthwick confirmed that this area was approximately equal in size to the haylands the Band wanted. According to Borthwick, the land northwest of the lake was still heavily brushed, adding that although the soil was good, it would be years before any settlers would use this land.

Consequently, on September 24, 1913, 2,217.40 acres – comprising sections 35 and 36 and portions of sections 25 and 26, all in township 51, range 1, W of 3rd meridian, as well as sections 10 and 15 in township 51, range 3, W of 3rd meridian – were withdrawn by Order in Council from the Dominion Lands Act. The Order in Council stated that insufficiency of hay for the reserve’s 400 cattle was the reason for exchanging a portion of reserve land for the described lands.

Once the haylands were available to be added to the reserve, the department gave Indian Agent Borthwick instructions for taking a surrender. Borthwick was provided with the details of the land the Band desired to exchange, a surrender form in duplicate, and authorization to submit the surrender to the Sturgeon Lake Band in accordance with the provisions of the Indian Act. In addition to instructing Borthwick on the requirements of the documents, the department also told him that he should report back on the number of eligible voters, the number voting for the surrender, and the number voting against it.

Borthwick advised the department on November 21, 1913 that he had been unable to hold a surrender meeting because the majority of male band members were on rat hunting expeditions. On December 24, 1913, Borthwick wrote to the department advising that the surrender form was submitted to the Sturgeon Lake Indians on December 22 at a general meeting of the band, in accordance with the provisions of the Indian Act. He enclosed with his letter the completed form of surrender in duplicate and a report giving the names of the 28 eligible voters, and stating that 16 of them attended the meeting and that they all voted in favour of the exchange of land. In early January 1914, the department returned the documents to Borthwick, complaining that he had failed to have the Affidavit of Surrender of Ayatawayo,
Kaisiwanayo, and Borthwick sworn before a stipendiary magistrate or justice of the peace. He had erred by using a commissioner of oaths. On January 31, 1914, a second Affidavit was sworn, this time by Big Head and Moosehunter, before a justice of the peace.

At the time of the 1913 surrender the Band did not have a Chief. William Twatt had been Chief of the Band from 1876 until his death in 1895. In the twenty years between 1895 and 1915, when Thomas Charles was elected Chief, the leadership was maintained by two or three experienced headmen at a time.

The Governor General in Council approved the surrender on February 20, 1914, by Order in Council, which included the Minister’s statement that the surrender was taken with a view to the proposed exchange being effected, as well as his recommendation that the original be returned to Indian Affairs and the duplicate be kept in the Privy Council Office. The Order in Council referred to the date on the Surrender Document as December 13, 1913; the Surrender Document itself stated December 17, 1913; and, Indian Agent Borthwick’s letter reporting the surrender meeting stated that he took the surrender on December 22.

In April 1914, the Chief and principal members of the Sturgeon Lake Band told the new Indian Agent, S. Milligan, that the Band believed that they would be receiving section 36, township 51, fractional range 28, W of 2nd meridian, not section 35 in township 51, range 1, W of 3rd meridian. Although the Band stated that the error was theirs, the department reasoned that it was probably caused by the land surveyor having given the same section number to two adjoining sections. On November 27, 1915, an Order in Council authorized the amendment of the February 20, 1914, Order in Council, substituting section 36 and part of section 25, both in township 51, fractional range 28, W of 2nd meridian, for section 35 and a portion of section 26, both in township 51, range 1, W of 3rd meridian. As a result, 712.90 acres were exchanged for 528.20 acres. Once the amendment was finalized, the Band did not raise any further complaints about the surrender itself.
PART III

THE ISSUES

The Indian Claims Commission’s inquiry concerns these four issues, as agreed to by the parties:

1 With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under s. 49 of the Indian Act, RSC 1906, c. 81?

2 Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote?

3 If the answer to either question 1 or 2 is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender of 2145.47 acres of the Sturgeon Lake Indian Reserve (IR)101?

4 Do contract principles apply in determining the First Nation’s understanding and intentions in the 1913 surrender? If so, did their understanding and intention result in the invalidity of the 1913 surrender?
PART IV

ANALYSIS

ISSUE 1 IRREGULARITIES IN THE SURRENDER PROCESS

With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under s. 49 of the Indian Act, RSC 1906, c. 81?

Issue 1 concerns compliance with certain provisions of the 1906 Indian Act for taking a surrender of Indian reserve land. The First Nation alleges numerous irregularities in the documentary record of the surrender, arguing that the number and nature of the irregularities in the surrender process call into question the validity of the surrender. The panel will address the following alleged irregularities: the purpose for summoning the meeting; conflicting evidence on the date of the surrender meeting; the veracity of the signatures of Cardinal and Ballendine on the Surrender Document; and, the propriety of the second Affidavit of Surrender, sworn by Big Head and Moosehunter.

The Law

The earliest law on the surrender of Indian reserves is found in the Royal Proclamation of 1763. The proclamation required, among other things, that Indian nations wishing to sell reserve land to private interests first surrender the land to the Crown, which would then sell it for the Indians’ benefit. This provision was intended to protect Indian bands from being seriously disadvantaged in direct negotiations with purchasers:

We have thought proper to allow Settlement: but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie.5
Treaty 6, signed by Chief William Twatt and other chiefs and headmen in 1876, also provided that bands’ reserves could:

be sold or otherwise disposed of by Her Majesty’s Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

The rules on who could vote and how the surrender process was to be conducted were codified in 1868 in federal legislation that became the precursor to successive Indian Acts. Numerous amendments to this Act over the years resulted in the 1906 Indian Act, which governed the process in taking the 1913 surrender. The relevant portions of section 49 are set out here:

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

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

3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, ...

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

The principle that the Crown has a duty to interpose itself as a safeguard between Indians and prospective purchasers of reserve land has survived to the present day in the legislation and has been reinforced through court judgements, notably, the 1888 Privy Council decision in St. Catherine’s

5 Royal Proclamation of October 7, 1763, RSC 1970, App. 2, pp. 4-5.
7 An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, SC 1868, (31 Vict.), c. 42.
8 Indian Act, RSC 1906, c. 81, s. 49.
Milling and Lumber Co., and the 1984 judgement of the Supreme Court of Canada, Guerin v. The Queen.

In addition, two Supreme Court of Canada cases have interpreted the surrender requirements in the Indian Act. The leading case on surrender remains the 1995 judgement in Blueberry River Indian Band v. Canada, referred to as Apsassin. In this case, the Court dealt with a number of subjects, including the fact that the Crown did not comply with section 49(3) when the Affidavit of Surrender was executed. That is, instead of personally certifying the surrender on oath, the Chiefs told the commissioner they wished to proceed with the surrender, which the commissioner then certified on oath. In concluding that section 49(3) was not a mandatory requirement, Justice McLachlin reasoned that sections 49(3) and (4) are intended to ensure that the surrender was validly assented to:

> 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 ... 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 section 51 [section 49 in the 1906 Act] of the Indian Act therefore does not defeat the surrender.

Justice McLachlin agreed with the findings at the trial and court of appeal levels:

Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed.

This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory.

In separate reasons, Justice Gonthier emphasized the importance of giving legal effect to the intention of the band members rather than relying on technicalities.
The second Supreme Court judgement interpreted the voting requirements of a surrender, found in section 49(1) of the Indian Act. In *Cardinal et al. v. The Queen*, the Court held that section 49(1) means:

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.¹⁴

The rule in *Cardinal* has become known as the “double-majority rule”: for a surrender to be valid, a majority of the eligible voters must attend the surrender meeting and a majority of those in attendance must vote in favour.

Both parties are in agreement that section 49(1) is mandatory. Further, Canada divides the surrender requirements of section 49 into five mandatory and four directory steps, the latter representing, according to Canada, administrative procedures to confirm that the first five conditions were met.¹⁵

The five mandatory requirements are: a majority of the male band members, twenty-one years of age or older, must assent to the surrender; they must be habitually resident on or near and interested in the reserve; the meeting must be summoned according to the rules of the Band; and, the meeting must be conducted in the presence of the Superintendent General, or his authorized officer. In response to a question by Commissioner Holman at the oral hearing, counsel for Canada confirmed Canada’s position: “The first five steps of 49 are mandatory, a majority must attend, a majority must vote in favour. If the determination of the Commission is that a majority did not vote in favour, it’s not valid.”¹⁶

Both parties acknowledge the courts’ assessment that section 49(3) dealing with the Affidavit of Surrender is directory only, such that failure to comply with the provision does not render the surrender invalid.¹⁷ The First Nation’s view is qualified, however, by its position that “where serious questions are raised not only about compliance with the mandatory provisions but to the affidavit attesting to the validity of the surrender meeting, ... this throws into question the whole transaction.”¹⁸

¹⁸ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 40.
Panel's Reasons

**Surrender Meeting**

The First Nation alleges that the surrender was improperly obtained in that the meeting took place at a general meeting of the Band, not, as section 49(1) of the *Indian Act* requires, at “a meeting or council ... summoned for that purpose.” The evidence supporting the First Nation’s position is found in Indian Agent Borthwick’s reporting letter following the surrender meeting, in which he stated:

> I have the honor to return herewith the form of surrender in duplicate which was duly submitted to the Indians of the Sturgeon Lake, Band 101, on the 22 inst, at a general meeting of the band, in accordance with the provisions of the Indian act.

Canada takes the position that to conclude that the Indian Agent did not follow the prescribed surrender process, on the basis of his description of the meeting as a “general meeting,” is speculative and not supported by the evidence. The First Nation’s claim that Indian Agent Borthwick’s wording proves that the meeting was not called specifically to deal with a surrender, is without merit. The relevant wording requires that the surrender be assented to “at a meeting or council thereof summoned for that purpose;” but, notwithstanding Borthwick’s wording in the reporting letter, sufficient evidence exists to prove that the meeting was called for the purpose of considering a surrender. In addition to the words “at a general meeting of the band,” Borthwick’s letter contains a reference to the meeting being in accordance with the provisions of the Act, a list of the eligible voters, the number in attendance, and the results of the vote.

The panel concludes that Indian Agent Borthwick called the meeting for the express purpose of holding a surrender vote. As such, he did not breach that provision in section 49(1) of the Act.

**Date of Surrender**

The First Nation points out that the Surrender Document is dated December 17, 1913, whereas Indian Agent Borthwick’s reporting letter to the

---

19 *Indian Act*, RSC 1906, c. 81, s. 49. See Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, paras. 26(f), 110.
20 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).
21 Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 120.
22 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).
department states that the surrender took place on December 22nd. The
difference of five days, argues the First Nation, is a further reason to question
the validity of the surrender.23

Canada suggests a possible explanation for the discrepancy in dates: in
early October, the department sent Borthwick the printed surrender form in
duplicate covering the portion to be surrendered. According to Canada,
Borthwick likely started to fill in information on the form, including the date
of the surrender meeting, anticipating that he would call the meeting for
December 17. He had to delay it for several days, however, as many of the
voters were away hunting. Further, states Canada, numerous documents
support the conclusion that the surrender meeting was actually held on
December 22.

The panel notes, as do the parties, that Indian Agent Borthwick committed
more than one error in taking the 1913 surrender, but we can find no
evidence that he had any reason to intentionally misrepresent the fact that he
held the surrender meeting on December 22 when he wrote December 17 on
the form. Borthwick had been specifically instructed by the department, when
it sent the surrender forms on October 3, to report on the number of male
members over the age of twenty-one, resident on the reserve and entitled to
vote on the surrender.24 It is plausible that Borthwick believed the majority of
eligible voters would be available on the 17th, changed his plans when he
realized most were away, and failed to amend the date. Regardless of whether
it is the correct scenario, nothing turns on a finding that the meeting
happened on the 17 or the 22. Not one of the extant documents in the years
following the surrender raises a suspicion regarding the date of the surrender
meeting, or the fact that it took place.

The panel concludes that the discrepancy between the date given in the
reporting letter and the date written on the Surrender Document is an
example of an error that, while evidence of carelessness on Borthwick's part,
is a minor irregularity. In accordance with Apsassin, such a technical error
would not call into doubt the validity of the surrender.

**Signatures of Cardinal and Ballendine**
The First Nation raises a serious allegation with respect to the signatures of
Charles Campbell Cardinal and Frederick Ballendine on the Surrender
Document. Three sets of documents relating to the 1913 surrender exist in
the records of the Department of Indian Affairs, and in the National Archives, two of which the First Nation points to as containing serious discrepancies.

The first set of documents, referred to as the DIAND documents, contains a Surrender Document with the word “Original” typed at the top of the page. Of the sixteen band members who signed the document, fourteen signed with the designation “his X mark”, whereas Cardinal and Ballendine signed with their signatures. The first seven signatures on the document also have seals adjacent to their marks. On the other set of documents, referred to as the RG 10 documents, the Surrender Document does not contain the word “Original” or seals, and all the signatories, including Cardinal and Ballendine, appear to be written by the same person with the designation “his X mark” adjacent to all of the names. The First Nation considers the Surrender Document in RG 10 to be the original, and claims that the discrepancy in the two sets of documents suggests “that the signatures of Cardinal and Ballendine were forged since they were capable of signing their own names.”

Canada responds that this irregularity is also speculative in nature and is not supported by persuasive evidence.

We do not agree with the First Nation’s interpretation of the documents and the allegation of forgery. First, we are at a loss to understand why the First Nation assumes the Surrender Document in RG 10 to be the first or original document, when it is the DIAND version that contains the word “Original” and the seals. Further, in comparing the DIAND and RG 10 versions, but without the benefit of a handwriting and document expert, we find it most probable that the RG 10 version was typed later, likely by a departmental employee who wrote in the names of all the signatories, including Cardinal and Ballendine, and who erred by writing “his X mark” beside all sixteen names. Other errors also support our interpretation that the RG 10 version was not the original document, but rather a typed-out copy: in the RG 10 version the word “Original” is missing; “Sturgeon” is misspelled as “Strugeon;” errors exist in the description of the lands; it appears that only one person wrote in all the names, including the names of witnesses; and, this person’s handwriting is clearly different from the handwriting on the DIAND version.

The existence of two or more sets of documents relating to important events was the usual practice for federal government records; the original and copies were kept at the head office, the Privy Council Office, and possibly a

25 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 26(b).
26 Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 120.
regional office. The many discrepancies between originals and copies of historical documents exemplifies not forgery, in our view, but human error in typing copies of originals in the days before the advent of photocopying.

In this case, there exists no evidence on the record to support an allegation of fraud, or dishonesty by the Indian Agent, or any other Crown official in the taking of the surrender.

**Second Affidavit by Big Head and Moosehunter**

Indian Agent Borthwick made an error in having the Affidavit of Surrender sworn before a commissioner of oaths instead of a stipendiary magistrate or justice of the peace, as instructed by the department and as required by the *Indian Act*. As a result, the department sent back the surrender documents to Borthwick on January 7, 1914, instructing him to have the Affidavit retaken in accordance with the Act. This Borthwick did on January 31, 1914, but the band members swearing the second Affidavit were Big Head and Moosehunter, not Ayatawayo and Kaisiwonayo, who had sworn the first Affidavit. The First Nation points out that the voters list prepared by Indian Agent Borthwick shows that Big Head was marked as absent at the surrender meeting; further, Moosehunter was not included in Borthwick’s voters list and was therefore not eligible to vote and not present at the meeting.

Canada argues that Moosehunter, whose Cree name was Kayaykeemat, was one of the original members of the Sturgeon Lake Band and was the second signatory on the Surrender Document. Canada explains the Agent's omission of Moosehunter’s name on the voters list as a simple oversight, as Moosehunter’s son John Moosehunter was listed as an eligible voter and marked as present. The elder Moosehunter, states Canada, was clearly an eligible voter, who was probably present at the meeting with his son John, and was thus a proper signatory to the second Affidavit of Surrender.

In Issue 2, the panel concludes that Moosehunter, a headman, was an eligible voter who was present at the surrender meeting. As such, it was proper for him to sign the second Affidavit attesting to the fact that he was entitled to vote at the meeting, that the vote took place in his presence, and the surrender was assented to by a majority of eligible voters.

There is no dispute over the voter eligibility of Big Head, whose Cree name was Kawechemaytahwaymat, as he was also a leader of the Band, having been a headman for five years. Further, Canada does not provide any evidence to

27 Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243); *Indian Act*, RSC 1906, c. 81, s. 49(5).
counter the claim that Big Head may have been absent, as was shown on the
voters list. Nevertheless, an affidavit is a statement in writing on oath, which is
sworn before someone who has the authority to administer it, such as a justice
of the peace. Although some Elders interviewed in 1973 recounted that
Moosehunter and Big Head could not speak English, 28 a notation near the
signature of the justice of the peace on the second Affidavit states that it was
“read over and explained to the said Big Head and Moose Hunter in the Cree
language and they seemed perfectly to understand the same and made their
marks thereto in my presence.” 29

The 1906 Indian Act provides that the Affidavit of Surrender shall be
certified by the officer authorized to attend the surrender meeting, in this case
Indian Agent Borthwick, and “by some of the chiefs or principal men present
thereat and entitled to vote ...”. 30 If Big Head was not present, his sworn
statement is not accurate; however, the case law is clear that section 49(3) of
the Act is directory, not mandatory. Absent persuasive evidence that would
raise serious doubts about the surrender meeting and the results of the vote,
irregularities in the technical requirements of section 49, such as the Affidavit
of Surrender, do not nullify the surrender.

In addition, the panel’s finding in Issue 2 that Moosehunter was eligible
and present at the surrender meeting leads to the further conclusion that if the
second Affidavit was sworn correctly by only one principal man, it would still
meet the requirements of the 1906 Act. As this Commission concluded in the
Canupawakpa Dakota First Nation inquiry report, the wording “‘some’
principal men can, by definition, mean ‘one’ principal man.” 31

Conclusion
The panel has examined the following irregularities in the surrender process
alleged by the First Nation as invalidating the surrender: the purpose for
summoning the surrender meeting; conflicting evidence on the date of the
meeting; the veracity of the signatures of Cardinal and Ballendine; and, the
propriety of the second Affidavit of Surrender.

We find that, individually or collectively, these irregularities do not call
into question the validity of the 1913 surrender. They may have resulted from

28 Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, pp. 356-357); interview with John
Naytowhow, January 26, 1973 (ICC Exhibit 1a, p. 375).
29 Affidavit of Surrender, January 31, 1914, LAC, RG 2, vol. 1082, PC. S10/1914, 20 February 1914, and DIAND,
file 672/50-9, vol 1 (ICC Exhibit 1a, pp. 265, 266).
30 Indian Act, RSC 1906, c. 51, s. 49(3).
31 ICC, Canupawakpa Dakota First Nation Inquiry: Turtle Mountain Surrender Claim (Ottawa, July 2003),
reported (2004) 17 ICCP 263 at 327.
carelessness or human error by the Indian Agent or other officials in the department, but they were not the result of deception, fraud, or other conduct designed to manipulate the results of the surrender vote. Consequently, we conclude that, in spite of the irregularities in the documents and the surrender process, the requirements of section 49 of the Indian Act for the 1913 surrender of reserve land were met.

ISSUE 2  DID A MAJORITY OF ELIGIBLE VOTERS ASSENT TO THE SURRENDER?

2. Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote?

The process of surrendering reserve land is governed by the Indian Act, which sets out a number of requirements to ensure that a surrender is properly taken by the Crown. The Indian Act provisions and the common law interpreting the surrender process have been canvassed in Issue 1 and will not be repeated here.

Issue 2 deals with the requirement in the Act that a majority of the eligible voters must have attended the surrender meeting and a majority of those must have voted in favour of the surrender.

Positions of the Parties

There are two questions inherent in Issue 2: what was the true number of eligible voters; and, how many of them attended the 1913 surrender meeting? In order to answer these questions, we turn to the facts concerning the individual band members whose eligibility or attendance is disputed by the parties. If a majority of male band members of the full age of twenty-one, habitually resident on or near the reserve and interested in the reserve, did not attend the surrender meeting, the 1913 surrender would be invalid.

The parties agree that there were 29 eligible voters in the Band in December 1913, when the surrender vote was taken. The First Nation claims, however, that Indian Agent Borthwick omitted from the voters list the names of seven band members who should have been eligible to vote, either by age or residency. The First Nation also argues that one band member (Charles Campbell Cardinal), whose name appeared on the list of eligible voters, was in fact ineligible. As a result, says the First Nation, the true number of eligible voters was 36, not 27, as appears on the voters list. Further, it argues that only
12 or 13 of those on the list were actually present at the meeting. The result, according to the First Nation, is that fewer than a majority of the eligible voters attended the surrender meeting.

Canada takes the position that there were 30 eligible voters, including Mr. Cardinal, whom the First Nation claims is ineligible, and that 17 of the eligible voters were present at the surrender meeting.

**Panel’s Reasons on Eligibility of Voters**

Indian Agent Borthwick listed 27 names of band members who were eligible to vote on the 1913 surrender. His report following the surrender contains an error, in that he counted 28 names on his list of eligible voters.32

Today, the parties have agreed on the names of 29 persons who were eligible voters in 1913. The First Nation argues, however, that seven additional names should have been on that list, either because they were habitually resident on the reserve and interested in it, or because they were 21 at the time of the surrender meeting. In one case only, that of Charles Campbell Cardinal, whose name did appear on the voters list, the First Nation argues that he was in fact ineligible to vote.

Canada disagrees with the First Nation’s assessment of the eligibility of seven additional persons, and maintains that Charles Campbell Cardinal was eligible and that Borthwick was correct in placing his name on the voters list.

The names of persons in dispute concerning their eligibility to vote are represented in Table 1, followed by the facts pertinent to each of them:

**Table 1:**

<table>
<thead>
<tr>
<th>Names in Dispute</th>
<th>First Nation</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Mink, #49</td>
<td>Eligible by residency</td>
<td>Ineligible by residency</td>
</tr>
<tr>
<td>Charles Twatt, #122</td>
<td>Eligible by residency</td>
<td>Ineligible by residency</td>
</tr>
<tr>
<td>Charles Campbell Cardinal, #130</td>
<td>Ineligible by residency</td>
<td>Eligible by residency</td>
</tr>
<tr>
<td>Napoleon Charles, #132</td>
<td>Eligible by age</td>
<td>Ineligible by age</td>
</tr>
<tr>
<td>Solomon Naytowonhow, #133</td>
<td>Eligible by age</td>
<td>Ineligible by age</td>
</tr>
<tr>
<td>Simon (Simon Peter), #136</td>
<td>Eligible by age</td>
<td>Ineligible by age</td>
</tr>
<tr>
<td>William Charles, #138</td>
<td>Eligible by age</td>
<td>Ineligible by age</td>
</tr>
<tr>
<td>George Charles, #139</td>
<td>Eligible by age</td>
<td>Ineligible by age</td>
</tr>
<tr>
<td>Names to add to voters list (FN)/retain on voters list (Can)</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Names agreed on by parties</td>
<td>Plus 29</td>
<td>Plus 29</td>
</tr>
<tr>
<td>Total number of eligible voters</td>
<td>36</td>
<td>30</td>
</tr>
</tbody>
</table>

32 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).
Eligibility by Residency

The Mink, #49

According to the First Nation, The Mink, who was in his seventies in 1913, ought to have been on Borthwick’s list of eligible voters on the basis that he was habitually resident on or near the reserve and had an interest in it. The Mink, states the First Nation, was admitted to the Sturgeon Lake Band in 1896, was on the annuity paylists for 1913 and 1914, and remained at Sturgeon Lake until his death in 1922. Further, Elder James Settee signed a statutory declaration in 1996 that The Mink lived on the reserve, while Elder Sandra Long John declared that The Mink’s family died out on the reserve.33

Canada relies on the fact that Borthwick did not consider The Mink to be an eligible voter, that it is unclear whether he lived on the reserve, and that even if he was a resident, he was not engaged or “interested in” the reserve.34 Canada’s counsel also points out in oral argument that the Elders who gave evidence in 1973 had no knowledge of The Mink, and although he had a cabin on the reserve, he was likely leading a nomadic life.35

The panel considers the 1997 research report of Dorothy Lockhart concerning certain individuals in relation to the 1913 surrender to be particularly helpful in establishing that The Mink did have a connection and an interest in the reserve. Lockhart’s research shows that The Mink was living at Sturgeon Lake reserve in 1901. It is unknown how he lived or whether he travelled a lot, but although he may have died at Duck Lake, there is no evidence that he lived there. The panel also finds it significant that, according to Lockhart, The Mink’s wife remained at Sturgeon Lake until her death, and that one of their two daughters continued to live on the reserve.36 Finally, we are able to draw from the Commission’s 2005 James Smith Cree Nation: Chakastaypasin IR 98 Inquiry report, which recounted evidence from Elders that The Mink was a medicine man who travelled among the different reserves. There exists some conflicting evidence suggesting that in the late 1890s he lived either at Muskoday or Sturgeon Lake.37

34 Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(i).
36 Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 2).
The panel concludes that The Mink was habitually resident on or near the Sturgeon Lake reserve in 1913, and also had an interest in it. We think it quite likely that he did travel around the reserves in his role as medicine man, which may explain why he was not well-known as a Sturgeon Lake band member. Nevertheless, he transferred into the Band 17 years before the surrender, took his treaty payments at Sturgeon, and had a wife, daughter, and a cabin on the reserve. The Commission previously considered the meaning of “habitually resident on or near” the reserve in the *Duncan’s First Nation* and *Canupawakpa Dakota First Nation* inquiry reports. The panel in *Duncan’s* stated:

> [W]e take from these authorities [*Canard, Adderson*] that an individual’s “habitual” place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite “temporary or occasional or casual absences.” Although such residence entails “a regular physical presence which must endure for some time,” there is no fixed minimum period of time and the duration of residence, past or prospective, is only one of a number of relevant factors, the quality of residence being the overriding concern.\(^{38}\)

Sturgeon Lake was most likely the place he would return to when he was not moving around, either as medicine man or hunter. Similarly, we would be reluctant to disqualify a band member on the basis that he did not have an interest in the reserve, when there is undisputed evidence of the long-term connection of his family to the reserve.

The Mink, therefore, was eligible by reason of residency and interest in the reserve, and should have been included in the list of eligible voters.

**Charles Twatt, #122**

The First Nation claims that Charles Twatt’s name should have been on the voters list: he was on the 1913 and 1914 annuity paylists; he had a residence on the reserve, according to some Elders; he married a woman with three children from Big River (Kinemetayo); and, he did not transfer to Big River until 1922.

Canada argues that Charles Twatt was left off the voters list because he was likely not living on the Sturgeon Lake reserve at the time of the surrender.

---

According to Lockhart’s research, he asked to move to Big River in 1921 because he had already been a resident there for seven or eight years and had never moved his family to Sturgeon Lake.  

The evidence relating to Charles Twatt is inconclusive. Although he was on the Sturgeon Lake paylist in 1913 and up to 1920, Lockhart suggests the possibility that Charles had moved to Big River before the surrender took place. For one thing, Charles’ younger brother, Four Dollars, was listed on the voters list, whereas Charles was not. The fact that Charles married in 1913 but did not move his family to Sturgeon Lake is further evidence that he may have moved to Big River in that year.

The panel is not persuaded that Charles Twatt was habitually resident on the Sturgeon Lake reserve and an eligible voter.

**Charles Campbell Cardinal, #130**

Charles Campbell Cardinal’s name appeared on the voters list, but the First Nation claims that he was ineligible by reason of band membership and residency. Although Cardinal was on the 1913 and 1914 paylists, the First Nation relies on the testimony of the Sturgeon Lake Elders that Cardinal was from Mistawasis and further, that they were unable to locate his residence on a map of the Sturgeon Lake reserve.

Canada points to three relevant facts: Cardinal’s name did appear on the voters list; he was marked as having voted in favour of the surrender; and, he also signed the Surrender Document. On the balance of probabilities, states Canada, Cardinal was an eligible voter.

The panel notes that, in addition to the evidence proffered by the parties, the Cardinal family was originally from the Ahtahkakoop Band, but by 1909, Charles’ mother was a widow and married into the William Twatt Band, where she transferred with Charles and her three daughters. Charles was first paid on his own ticket in 1912 and he continued to be paid with the Sturgeon Lake Band until his death in 1922. In 1927, his widow remarried and transferred from Sturgeon Lake to Mistawasis.

The panel concludes that Cardinal was probably present at the surrender meeting, where the evidence shows that he voted and also signed the

---

40 Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 8).
41 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 78.
43 Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, pp. 4, 44–47).
44 Treaty Annuity Paylists for the years 1876 to 1955: Sturgeon Lake First Nation (ICC Exhibit 1b, pp. 140, 164).
Surrender Document. Had he been ineligible by reason that he was not a member of the Sturgeon Lake Band, it is likely that his presence at the meeting would have been challenged by the Sturgeon Lake voters. We are satisfied on the basis of the extant evidence that Charles Campbell Cardinal was an eligible voter, being both a band member of Sturgeon Lake and habitually resident on the reserve.

**Eligibility by Age**

The First Nation claims that five band members omitted from Indian Agent Borthwick’s list of eligible voters were in fact eligible because they had reached the age of 21 prior to the December 1913 surrender meeting. To be eligible to vote on the basis of age, male band members had to be born before December 1892. Canada contests all five names, arguing that they were under 21 and correctly omitted from the list of eligible voters.

**Napoleon Charles, #132**

Napoleon Charles was listed on the 1913 and 1914 paylists and the Elders identified him as a resident of the reserve. The First Nation also interprets Lockhart’s report as concluding that, based on the 1950 paylist that records his birth date as September 15, 1892, Napoleon was probably 21 in 1913.\(^45\)

Canada points out that Napoleon Charles’ name was not on the voters list, and also refers to Lockhart, who attempts to sort out which of the four sons of Thomas Charles, #44, was in fact Napoleon. Lockhart suggests that Napoleon was probably the son born in 1894 and as such was not 21 years of age at the time of the surrender.\(^46\)

The panel notes that on the July 17, 1906 census, Napoleon was listed as age 12, which would indicate that in December 1913, he was either 19 or 20, but not 21.\(^47\) We also understand Lockhart’s report to have concluded that it was Napoleon’s brother, William, who was probably born in 1892, making him 21 in 1913, and that Napoleon was born in 1894: “If Napoleon was, as it appears, the son born in 1894, he would not have been 21 at the time of the surrender and would not have been eligible to vote, on the occasion of the surrender.”\(^48\)

---

\(^{45}\) Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 73.

\(^{46}\) Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(iii).

\(^{47}\) Census of the Northwest Provinces, 1906, Saskatchewan District, District Number 16, Sub-district #2, Prince Albert Reserve 101, RG 31, Reel T-18561 (ICC Exhibit 1d, p. 1).

\(^{48}\) Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 10).
The panel concludes that the evidence points to Napoleon Charles’ age as 19 or 20 on the date of the surrender vote, thus making him ineligible to vote.

**Solomon Nayتونهون، #133**

The First Nation claims that Solomon Nayتونهون was 21 at the time of the surrender. He was recorded on the annuity paylists of 1913 and 1914; the 1952 annuity record and the 1949 membership list of the Montreal Band, where he transferred in 1938, show his date of birth as 1891; and, the Registered Indian Record shows his date of birth to be 1892. In either case, says the First Nation, he was born before December 1892 and was therefore eligible to vote.

Canada relies on the Lockhart report to conclude that although Nayتونهون took his own ticket in 1913 when he married, the census records indicate that he was born in 1893 or 1894, making him less than 21 on the date of the surrender.49

The panel notes that Solomon’s father, Nayتونهون, #27, married twice, the second time after his first wife died in 1892. His second wife, also widowed, transferred into the Sturgeon Lake Band with four daughters, according to the 1893 Sturgeon Lake paylist. By 1894, the family consisted of 3 boys and 2 girls. The 1896 paylist, however, noted that one of the girls was a boy, so the family actually had 4 boys and 1 girl. By 1900, only 2 boys and 2 girls were listed under Nayتونهون’s name. The 1901 census records the boy Waykeenowquunapew, or Solomon, as age 7. By 1904, 3 boys remained with the family, one of whom was born in 1903. The 1906 paylist shows that one boy, Alex, took his own ticket that year, and the 1906 census shows that another boy, Solomon or Waysiskowequay, was 13, and a third boy, Oosawayass, was age 5.

In tracing the paylists of Nayتونهون’s second wife’s family, Wawakahwaynew, #31, and the paylists of Nayتونهون’s family, #27, it appears that the boy who was incorrectly identified as a girl was Solomon Nayتونهون, who is recorded as being born a girl in 1889. If the panel is correct in this analysis, it would mean that the census of 1901 and 1906 are incorrect and that Solomon was actually 24 years old in 1913.

We find that the evidence put forward by the First Nation as to Solomon’s age, together with the paylist evidence showing that he may have been born in 1889, is sufficient on the balance of probabilities to conclude that he was over 21 in December 1913 and therefore eligible to vote.

Simon (Simon Peter), #136
Simon Peter and James Peter were two of five sons of Thomas Peter, #83. The First Nation claims that Lockhart’s research concludes that it is unclear whether Simon was the older or the younger of the two brothers. Although Lockhart states that the eldest son was born some time between October 1892 and March 1893, and the second son between November 1894 and October 1895, the First Nation argues that if Simon was the eldest and if he was born between October and December of 1892, he would have been 21 at the time of the surrender. The First Nation argues that since there is uncertainty in the documents whether Simon was the eldest or second son, such ambiguity should be resolved in favour of the First Nation, such that the panel should find Simon to be the older brother, born between October and December 1892, and therefore eligible to vote.50

Canada acknowledges that it is unclear whether Simon was the older brother, but relies on the 1901 census that indicates the two sons were 8 and 6 at the time. Consequently, states Canada, both sons would have been under 21 at the time of the surrender.51

The panel observes that the 1906 census referred to “Simeon,” a name similar to Simon, as being age 11 and an older son age 13.52 We also note that Lockhart’s research into the Anglican Church records indicate that Simon was baptised on October 15, 1913, the same day he was married, and that his age was recorded as 18 on that day. With respect to James, the church records state that he was baptised the day before his second marriage on June 3, 1918, and that he was 25 at that time. These records, according to Lockhart, suggest that James was two years older than Simon; thus, Simon would have been too young to vote in December 1913.

We do not agree with the First Nation that the evidence in Simon Peter’s case is ambiguous. It is strongly weighted toward a finding that Simon was the younger brother of James. Simon was most probably born between November 1894 and October 1895, was 6 years old at the time of the 1901 census, and was 18 in October 1913, the year of the surrender. We are satisfied that Simon was ineligible to vote.

50 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 75.
52 Census of the Northwest Provinces, 1906, Saskatchewan District, District Number 16, Sub-district 42, Prince Albert Reserve 101, RG 31, Reel T-18561 (ICC Exhibit 1d, p. 2).
William Charles, #138
William Charles was the son of Thomas Charles, #44, who was the eldest son of headman Ayatawayo. The First Nation claims that William was 21 at the time of the surrender; the Registered Indian Record lists his date of birth as September 9, 1892, and the 1949 Indian Affairs Band Membership list records him as 57, which supports a birth date of 1892.

Canada relies on the 1915 paylist, which indicates that William took his own ticket that year. In the information in the 1915 paylist under William’s own name and under his father’s name, William is described as “now of age.” This evidence, states Canada, is an indication that he was not an eligible voter in 1913.

Contrary to Canada’s position, the panel is of the view that sufficient evidence exists to indicate that William was likely 21 in December 1913. One boy is shown to have been born as of the 1893 paylist, but since births were only recorded at the time of the annuity payments, this boy, who it appears turns out to be William, could have been born any time between the dates when the 1892 and 1893 paylists were created. The 1901 census shows this same boy, who is called Bertie, as age 9, and the 1906 census shows Bertie as age 14. Further, as the First Nation points out, the Registered Indian Record lists William’s date of birth as September 1892, and the 1949 Band Membership list confirms his birth year as 1892.

The panel concludes, on the balance of probabilities, that William Charles was 21 in December 1913 and was therefore eligible to vote on the surrender.

George Charles, #139
George Charles was the son of James Charles, #87, who was the son of Ayatawayo. George and William Charles were therefore cousins. The First Nation argues that the 1951 paylist records George’s date of birth as May 1892, and the 1949 Band Membership list shows him as 57, thereby corroborating a birth date of 1892 and thus making him eligible to vote on the surrender.

Canada relies on the evidence that George Charles was entered on the 1915 paylist under his own ticket because of marriage, not because he was now of age, as was the case with his cousin William. Canada also states that

53 The First Nation mistakenly identifies William Charles as the son of James Charles, Thomas Charles’ brother.
54 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 76.
56 The First Nation mistakenly identifies George Charles as the brother of William Charles.
57 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 77.
the paylists indicate that George was born between October 10, 1892 and October 5, 1893, the dates of the respective paylists, but since he was not paid under his mother’s or grandmother’s entry on the 1892 paylist, he was likely born in 1893. The National Registration Records, showing George having been born May 18, 1893, corroborates Canada’s view that he was probably 20 in 1913.58

The panel looks to Lockhart’s report to further explain the conflicts in the evidence:

James Charles [George’ father] had taken his own ticket in 1893 and was recorded as having married and as having had a son born (year of birth 1892-’93). This paysheet was dated October 5th, 1893. The paylist in 1892 was dated October 10th, which would indicate that the child was born after October 10th. 1892. The census records of 1901 record that James and his wife, Nancy, had a son George who was 8 years old at that time. This would indicate a year of birth of 1892-’93. The 1951 paylist records George’s birthdate as May of 1892. This would mean that there was an error in the year of his birth, as listed in 1951, or that the family did not claim payment for George in 1892 when he was 6 months old. He was not paid in 1892 with his mother and grandmother under ticket #40 either. It is unclear whether Charles was 20 or 21 at the time of the 1913 surrender.59

The extant evidence on George Charles’ date of birth is unclear, as Lockhart concludes; however, the fact that the evidence is ambiguous does not mandate a finding that such ambiguity should be resolved in favour of the First Nation. It is for the First Nation to make a case, on the balance of probabilities, that Indian Agent Borthwick erred in omitting George Charles’ name from the voters list. If he was born after October 1892, as Lockhart suggests, there existed only a very short time frame in which Charles could have turned 21 and been eligible to vote on the surrender. We find it more probable that George was born in 1893, making him ineligible to vote in December 1913.

Conclusion
The panel finds that the total number of eligible voters was 33, comprising the 29 names agreed to by the parties, plus The Mink, Charles Campbell Cardinal, Solomon Naytownhow, and William Charles.

58 Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(vi)
59 Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 5).
Panel’s Reasons on Number of Voters Present

Of the eligible voters who attended the surrender meeting, the parties agree on 13 names. Prior to the parties’ written and oral submissions, they were in disagreement over five other persons but now appear to agree on the fifth person in dispute. The five names are set out in Table 2:

### Table 2: Eligible Voters Present at Surrender Meeting

<table>
<thead>
<tr>
<th>Disputed Names Listed as Present</th>
<th>First Nation</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charles Campbell Cardinal, #130</td>
<td>Absent</td>
<td>Present</td>
</tr>
<tr>
<td>Moosehunter (Kayaykeemat), #26</td>
<td>Absent</td>
<td>Present</td>
</tr>
<tr>
<td>Fred Ballendine, #114</td>
<td>Absent</td>
<td>Present</td>
</tr>
<tr>
<td>Daniel, #80</td>
<td>Absent</td>
<td>Present</td>
</tr>
</tbody>
</table>
| Albert McDougall, #110           | Absent       | Probably Absent

- Names to add: 0 4
- Names agreed on re attendance: 13 13
- Total number in attendance: 13 17
- Total number of eligible voters: 36 30
- Total number of eligible voters in attendance: 13/36 17/30
- Result: Majority did not attend Majority attended

**Charles Campbell Cardinal, #130**

The panel has found that Cardinal was an eligible voter on the basis of his residency and band membership. The question remains whether he was present at the surrender meeting.

The First Nation relies on a discrepancy between the DIAND and the RG 10 versions of the voters list. The former shows Cardinal present and voting in favour; the latter shows him present but abstaining. The First Nation also points out a discrepancy between the DIAND and RG 10 versions of the Surrender Document, whereby the former shows Cardinal’s signature and the latter shows that he signed with an X mark.

Canada relies on the fact that Cardinal signed the Surrender Document, and that one version of the voters list shows him voting in favour. Thus, says Canada, on the balance of probabilities, Cardinal was present and voted in favour of the surrender.62

---

60 The First Nation stated that the RG 10 version listed Cardinal as neither absent nor for the surrender but the document indicates that he was present but did not vote.
61 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 83.
The panel acknowledges the several discrepancies between the DIAND and RG 10 versions of the voters list. We discussed these irregularities more fully under Issue 1, and need only state here that it is not surprising that differences exist between the original documents and copies of same, given that copies were created by hand in that era and were thus subject to human error.

Although Cardinal’s signature on the Surrender Document is not conclusive proof that he was present and voted, in a case in which the vote was virtually unanimous, with sixteen band members having signed the Surrender Document, we are satisfied on the balance of probabilities that Cardinal was one of those present at the meeting and voted in favour of the surrender.

**Moosehunter, #26**

The First Nation claims that Moosehunter, or Kayaykeemat, did not appear on either version of the voters list and did not sign the Surrender Document. Even though Moosehunter did swear the second Affidavit of Surrender, attesting to the fact that he was present at the surrender meeting, the First Nation concludes that it is highly unlikely that Moosehunter was present.63

Canada points out that Moosehunter’s name does appear on the Surrender Document as the second signatory. This evidence, coupled with the fact that he was one of the original members of Sturgeon Lake Band, leads to the conclusion that the omission of his name on the voters list was an oversight. He was probably present with his son John Moosehunter, states Canada, but only one of them was listed.64

Although the evidence is contradictory, Moosehunter’s status in the Band, his sworn statement before a justice of the peace that he was present at the surrender meeting, and his name, “Kayaykeemat, H.M.” on the Surrender Document, indicating that he was Kayaykeemat, the Headman, persuades us that the older Moosehunter attended the meeting in addition to his son.

**Fred Ballendine, #114**

The First Nation argues that it is an open question whether Fred Ballendine was present at the surrender meeting. He is marked on both versions of the voters list as being both absent and voting in favour. Clearly, one is wrong. The fact that the DIAND version of the Surrender Document, with the notation
“Original” at the top of the page, includes the signature of Fred Ballendine, whereas the RG 10 version is different in that his name is written as having signed with an X mark, also raises a question whether he was present.\(^{65}\)

Canada points to Ballendine’s signature on the Surrender Document, as well as the mark on the voters list that he voted in favour, to conclude that showing him as absent on the list was likely a result of an inaccuracy in recording attendance.\(^{66}\)

The panel is of the view that the First Nation has not made a convincing argument that Fred Ballendine was absent from the meeting. It is an equally plausible scenario that he was marked absent but arrived later, in time to vote on the surrender. It is also significant that Ballendine signed the Surrender Document. We conclude, on balance, that Fred Ballendine was present at the surrender meeting.

**Daniel, #80**

The First Nation assumes that both voters lists show Daniel as absent and not voting for or against the surrender. Also, Daniel did not sign the Surrender Document.\(^{67}\)

Canada points out that Daniel was likely present but possibly abstained on the vote, as there is no mark indicating that he voted one way or the other.\(^{68}\)

The panel pointed out to the First Nation at the oral hearing that both voters lists indicate that Daniel was in fact present. There is no reason not to accept this evidence, especially when both lists are consistent. Likewise, both lists show that he did not vote. Thus, we are driven to the conclusion that Daniel was present at the surrender meeting but likely abstained on the vote.

**Albert McDougall, #110**

Albert McDougall, like Fred Ballendine, is shown on both the DIAND and RG 10 versions of the voters list as being both absent and voting in favour. The First Nation argues that, unlike Ballendine but like Daniel, McDougall did not sign the Surrender Document, meaning that he was probably absent.\(^{69}\)

Given the confusing information about Daniel and Albert McDougall, whose names were listed one after the other on the voters list, Canada agrees

---

\(^{65}\) Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 85.


\(^{67}\) Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 86.

\(^{68}\) Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 117.

\(^{69}\) Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 86.
with the First Nation that Albert McDougall was likely absent from the meeting.\textsuperscript{70}

In comparing McDougall and Ballendine, both of whom were listed on the DIAND and RG 10 versions of the voters list as absent but voting in favour of the surrender, we conclude that because Ballendine signed the Surrender Document, he was most likely present at the meeting. McDougall, however, did not sign the Surrender Document, and for that reason, we conclude that the preponderance of the evidence supports the parties’ assessment that McDougall was probably absent from the surrender meeting.

\textit{Conclusion}

The panel finds that out of 33 eligible voters, 17 were in attendance at the surrender meeting, comprising the 13 names agreed to by the parties plus Charles Campbell Cardinal, Moosehunter, Fred Ballendine, and Daniel. Albert McDougall, however, was probably absent from the meeting. Consequently, a majority of the eligible voters, 17 out of 33, were in attendance, thereby meeting the “first majority” requirement of the \textit{Cardinal} case. Since we have found that Daniel likely abstained from voting, we conclude that 16 out of 17 voted in favour of the surrender, thereby meeting the “second majority” requirement in \textit{Cardinal}.

In answer to Issue 2, we find that a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender at a meeting summoned for the purpose of a surrender vote.

\textbf{ISSUE 3: CANADA’S LAWFUL OBLIGATION IN TAKING THE SURRENDER}

3 If the answer to either issue 1 or 2 is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender of 2145.47 acres of the Sturgeon Lake Indian Reserve (IR) 101?

In answer to Issues 1 and 2, the panel has concluded that the surrender requirements of section 49 of the \textit{Indian Act} for the 1913 surrender of reserve land were met. Therefore, Canada did not breach its lawful obligation when it took the surrender.

\textsuperscript{70} Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 117.
ISSUE 4 CONTRACT LAW

Do contract principles apply in determining the First Nation’s understanding and intentions in the 1913 surrender? If so, did their understanding and intention result in the invalidity of the 1913 surrender?

Application of Contract Principles to Surrenders

The first question, whether contract law principles can be used to determine if a surrender of Indian reserve land to the Crown was valid, is a question of law. To our knowledge, the courts have not dealt with a reserve land claim in which the First Nation, not the Crown, pleads the right to rely on contract law to resolve a dispute involving the surrender of reserve land; nevertheless, the Supreme Court of Canada has considered generally the applicability of contract law principles to Indian Act surrenders in three judgements: Guerin v. The Queen in 1984, St. Mary’s Indian Band v. Cranbrook in 1997; and, the 1995 case of Blueberry River Indian Band v. Canada, also known as Apsassin.

The Law

The 1984 Guerin judgement of the Supreme Court of Canada examines in detail the Indians’ interest in their land and the Crown’s obligations to a band once that interest is surrendered. This decision marked a milestone in the jurisprudence concerning the Crown’s fiduciary duty when dealing with surrendered land on the band’s behalf. Dickson J. describes the Indian interest in land as sui generis, and defines the Crown’s obligation while holding the surrendered land as similar, but not identical to, the law of trusts and the law of agency:

But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown’s authority to act on the Band’s behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown’s principal. I repeat, the fiduciary obligation which is owed to the Indians is sui generis.71

The 1997 judgement of the Supreme Court in St. Mary’s Indian Band v. Cranbrook (City) deals squarely with the question of whether contract law can be applied to a surrender of Indian reserve land. In 1966, the St. Mary’s Band surrendered for sale a portion of its reserve to the Crown, which leased it to the City of Cranbrook for a municipal airport. The Band received fair

71 Guerin v. The Queen, [1984] 2 SCR 335 at 387.
market value for the land, plus a condition in the Surrender Document that the land would revert to the Band free of charge if it was no longer used for public purposes. The Indian Act limits a band's property tax power to reserve land, but the Act was amended in 1988 to provide that lands surrendered “otherwise than absolutely” would still be reserve land. The Band started to levy property taxes against the City in 1992, claiming that its reversionary interest made the transfer other than absolute.

The city refused to pay on the grounds that the surrendered land was no longer reserve land. The central question for the Court was whether the surrender was made “otherwise than absolutely;” if so, it would mean that the land remained reserve land subject to taxation by the Band. The Court found that the Band had intended to surrender the land absolutely; in arriving at this decision, the Court considered whether the sui generis nature of Indian land rights means that common law real property principles do not apply to reserve surrenders. It held that, in principle, a court must go beyond the common law and examine the intentions of both the band and the Crown in a reserve surrender. The Court also stated that its paramount concern in rejecting the application of property law was the protection of the Indian interest in its land:

The reason the Court has said that common law real property concepts do not apply to Native lands is to prevent Native intentions from being frustrated by an application of formalistic and arguably alien common law rules.

The Court went on to reflect on the principles espoused in its 1995 judgement in Blueberry River Indian Band, known as Apsassin:

All of the members of the Court that sat on Blueberry River acknowledged the need to pierce the veil of real property law in adjudicating Native land rights disputes. As Gonthier J. asserted ... the Court must look to the “true purpose of the dealings”. McLachlin J. similarly proclaimed ...:

The basic purpose of the surrender provisions of the Indian Act is to ensure that the intention of Indian bands with respect to their interest in their reserves is honoured.

72 St. Mary’s Indian Band v. Cranbrook (City), [1977] 2 SCR 657 at 661, para. 5. See the definition of “designated lands” in Indian Act, SC 1988, c. 23, s. 1, now RSA, 1985, c. 17, s. 2. (4th Supp.). The 1988 amendment became known as the “Kamloops Amendments.”

73 An Act to amend the Indian Act (designated lands), 1988, c. 17 (4th Supp), s. 1(2).

74 St. Mary’s Indian Band v. Cranbrook (City), [1977] 2 SCR 657 at 668, para. 16.
What then, was the true intention of the St. Mary’s Indian Band when it surrendered the airport lands to the Crown in 1966?75

Taken together, Guerin, St. Mary’s Indian Band, and Apsassin confirm the principle that First Nation land rights are sui generis, and an intention-based approach to a band’s decision to surrender reserve land is to be preferred to the application of common law rules.

Positions of the Parties
The First Nation argues that, notwithstanding the Supreme Court of Canada’s view that real property principles do not apply to surrenders of reserve land, the Sturgeon Lake surrender claim can be distinguished from the prevailing case law. In St. Mary’s and Apsassin, there was no question that the Bands intended to surrender their reserve land, but technical arguments were raised to frustrate their clear intention, whereas here, the First Nation is raising serious questions about the Sturgeon Lake Band’s true intentions.76 In short, says the First Nation, the Supreme Court refused to apply contract law because to do so would have been unfair and prejudicial to the First Nation claimants. In the case of Sturgeon Lake, however, it is the First Nation that wishes to rely on the principles of contract law in order to make the case that it was mistaken in 1913 when it surrendered a portion of its reserve. The First Nation explains that to suggest that a First Nation cannot use real property concepts to challenge a surrender:

would mean the First Nation, who has a sui generis interest in its lands, could never question in law whether it legitimately intended to surrender its interest in those lands. It would appear inconsistent with a principle just articulated by the Supreme Court to suggest that the Court, while trying to protect the special interest First Nations have in their lands from challenges based on real property principles, would deny the First Nation the legal ability to protect its special interest in those very lands when its intent to surrender is thrown into question.77

The First Nation argues that to deny it the ability to use common law real property principles means that it is denied the right to challenge a transaction based on a misunderstanding between the parties.

Canada argues that the surrender of reserve land by a Band to the Crown is not a contractual transaction. In the context of sui generis land transactions,

75 St. Mary’s Indian Band v. Cranbrook (City), [1977] 2 SCR 657 at 668, para. 17.
76 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 102.
such as the surrender of reserve land, traditional real property concepts and contract law doctrine are of limited application and not appropriate, in particular, where a clear factual record surrounding the surrender exists.\textsuperscript{78}

Canada relies on \textit{St. Mary's Indian Band} in support of its argument that real property and contract principles do not apply to surrenders. As counsel for Canada explained at the oral hearing:

> I think the case law is fairly clear that bringing in 16, 17, 18th century British real property law, which is what exists in all of Canada's provinces, except Quebec, with its arcane and complex rules, it's simply not appropriate in terms of trying to understand First Nation land surrenders.\textsuperscript{79}

Accordingly, in Canada's opinion, the arguments advanced by the First Nation, grounded in the law of contract, do not disclose an outstanding lawful obligation.

Canada's counsel adds that a misunderstanding could be the result of a breach of the Crown's fiduciary duty if the Crown failed to disclose or inform the band of the terms of the surrender; counsel suggests that there are "other ways and means where that misunderstanding could be the subject of a proper finding that the surrender was invalid without going to contract law principles."\textsuperscript{80}

\textbf{Panel's Reasons}

The case law to date has dealt with factual situations in which the application of "formalistic and arguably alien common law rules," as the Court stated in \textit{St. Mary's Indian Band}, would have frustrated the band’s true intention underlying its decision to surrender reserve land. The Supreme Court of Canada has, thus, protected First Nations from the complex rules of contract law that could be used to defeat their land claim at common law.

Neither party has located any case law similar to the situation here, in which it is the First Nation, not the Crown, that is relying on contract law principles to prove a surrender invalid. Still, the panel is persuaded that to deny a First Nation the right to plead common law principles would be unjust and not what the Supreme Court intended in \textit{St. Mary’s Indian Band}. At the same time, we recognize that in the vast majority of surrender cases, questions of disclosure, informed consent, innate incapacity, inducement,

\textsuperscript{78} Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 127.
\textsuperscript{79} ICC Transcript, May 13, 2008, pp. 118-19 (Douglas Faulkner).
\textsuperscript{80} ICC Transcript, May 13, 2008, p. 120 (Douglas Faulkner).
illiteracy, trickery, and other contract-like issues are properly subsumed within the law of the Crown’s fiduciary obligation to a band in a surrender process. Because the law of fiduciary obligation acknowledges the sui generis nature of the Indian interest in land, the Crown’s duty goes well beyond the duties of a party to a contract.

Consequently, if a First Nation claims it did not intend to surrender its reserve land, we would look first to the conduct of the Crown to determine if it failed to adequately disclose essential information to the First Nation or, in other respects, breached a fiduciary duty, resulting in the voters’ lack of understanding and intention to approve a surrender. If, however, there is little or no evidence of a breach of the Crown’s fiduciary duty, and the First Nation chooses to argue that it simply made a mistake when it surrendered the land, the First Nation should be able to avail itself of contract law principles to prove its case. In other words, it would appear that contract law principles might be brought to bear to determine the matter, based on a state of affairs in which the First Nation’s true intentions were not carried out, but the Crown nevertheless exercised reasonable diligence to determine those intentions.

**Conclusion**

We conclude that in a small minority of claims within the specific claims policy, reliance on contract law principles may be the preferred or only option available to a First Nation in asserting its true intention in a surrender, but we emphasize that such cases are most likely to be found where insufficient evidence exists to prove a breach of the Crown’s fiduciary duty to the First Nation. Further, a First Nation that alleges a breach of contract in a surrender is open to Crown defences based in contract law, unless such defences are not permitted by the policy.81 In the circumstances surrounding the 1913 surrender, the Sturgeon Lake First Nation has chosen to advance its claim based on the law of mistake in contract, and we see no reason why it should be barred from doing so.

---

81 The Specific Claims Policy, *Outstanding Business*, prohibits the federal government from relying on the statutes of limitation and the doctrine of laches in specific claims’ negotiations. The policy states that “the government is not going to refrain from negotiating specific claims with Native people on the basis of [the statutes of limitation or under the doctrine of laches]”: 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 at 180.
Did the Band’s Understanding and Intention Invalidate the 1913 Surrender?

Having found that the First Nation has the right to argue that contract principles apply in determining the Band’s true intention in 1913, we now turn to the parties’ arguments regarding the facts underpinning the First Nation’s claim, and the application of the law of mistake in contract.

Positions of the Parties

The First Nation relies on the law of mistake by one party to a contract. In particular, the First Nation claims that the Sturgeon Lake voters were mistaken in surrendering a portion of their reserve in 1913 in exchange for an equivalent area of hayland.82

The First Nation asks the panel to apply one of the following three principles defining the law of mistake in contract in order to nullify or negative the surrender: no *consensus ad idem*, or no “meeting of the minds” as to the terms of the contract; mistake by one party regarding the terms of the contract; and *non est factum*, meaning “this is not my deed,” in which a party to the contract did not understand what he or she was signing and is therefore not bound by the transaction.83 The First Nation argues that the Elders’ testimony alone raises the distinct possibility that the voters were simply mistaken by reason of one or more of these principles.

The basis for the First Nation’s claim that it made a mistake when it voted in favour of a surrender in 1913 is the oral history that has been passed down from generation to generation. Counsel for the First Nation acknowledged at the oral hearing that “there’s no documentary record that there was any mistake on the part of the First Nation as to what this transaction was all about.”84 Nevertheless, many Sturgeon Lake Elders gave evidence at the community session of this inquiry, or made statements in 1973 and 1996 to the effect that the voters believed that they were only surrendering the timber on the sections of reserve land north of Sturgeon Lake, not the land itself, in exchange for hayland.85

Canada alleges that present day oral evidence is contrary to the documentary evidence of years of overt action by the Band to obtain haylands and the process whereby the Band finally chose the land it wished to

---

82  Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 90.
83  Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 90.
85  Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 106; see also Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, pp. 3-5.
surrender, indicating they fully understood the nature of the transaction.\textsuperscript{86} Canada points to an extensive documentary record evidencing the following: numerous requests for additional haylands by the Band over an 18-year period; several instances when the Band changed its mind about the land to be surrendered in exchange; the Band’s previous experience with timber sales and a timber surrender; the absence of any written record suggesting that the Band confused a surrender of land in exchange for land with a surrender of timber for land; and, the fact that a surrender of the timber, already harvested pursuant to the 1906 timber surrender, would have been of limited value, compared to 2000 acres of haylands.\textsuperscript{87} Canada also points out that the record discloses no support for a mistake regarding the subject matter of the surrender for approximately 80 years.\textsuperscript{88}

In response to the First Nation’s reliance on the Elders’ testimony, Canada takes the position that the:

oral history is not sufficiently cogent, persuasive or demonstrates the required validity to, on the balance of probabilities, meet the legal test to set aside the \textit{prima facie} documentary evidence that the Sturgeon Lake First Nation knew it was exchanging land for land, not trees for land.\textsuperscript{89}

\textbf{Panel’s Reasons}

\textbf{Oral History Evidence}

Given the reliance of the First Nation on the Elders’ testimony that the band members who voted for the surrender in 1913 believed they were surrendering timber only, the panel’s first task is to review that testimony.

Joe Daniels, born in 1922, made a written statement during interviews conducted by A. Turner with Elders of Sturgeon Lake Indian Band in 1973:

only “Timber” was sold on that portion of land which was at one time part of the reserve. - That that portion of land was never sold. - That I never heard the elder of our reserve make mention of the signing of a document or the existence of a document to the effect that the land was surrender [sic] for sale. - That the Indians were promised additional hay fields and were led to believe they would get these hay fields. - That through a misunderstanding the Indians were induced to trade a portion of the reserve for hay fields.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{86} Written Submission on Behalf of the Government of Canada, April 11, 2008, paras. 122, 126.
\item \textsuperscript{87} Written Submission on Behalf of the Government of Canada, April 11, 2008, paras. 122, 125.
\item \textsuperscript{88} Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 126.
\item \textsuperscript{89} Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 122.
\item \textsuperscript{90} Statement by Joe Daniels, Sturgeon Lake Indian Band, January 11, 1973 (ICC Exhibit 1a, pp. 361-62).
\end{itemize}
George Ermine, born in 1906, also stated in 1973 that “only the Timber was sold, not the land, - That [he] was present at a meeting where they discussed the sale of Timber but not the land and no papers or documents were signed on that day, ....”

John Naytowhow provided similar evidence at the 1973 interviews, adding that “the Indians did not use documents, all transactions were verbal as they could not read nor write, nor did they know how to speak english, ...”

In 1996, Hannah Kingfisher, who was 91 at the time, made the following statutory declaration:

The people had no haylands for their cattle. They had lots of cattle and horses. They agreed to exchange some timber for haylands. There was no land surrender; just an exchange of timber for haylands. There was no Chief when the timber exchange took place. There were two headmen Ayatawayo and Soosawaymekwan. The people understood that they were exchanging timber for hayland. They never agreed to give up the land.

Other Elders and band members, including John Daniels, Baptiste Turner, Lloyd Moosehunter, Gordon Bighead, and Sidney Naytowhow, gave similar evidence in 1996. Sandra Long John also attested to the fact that the people did not understand what was going on at the time, and that her grandfather and mother did not believe there was a land surrender.

At the community session of this inquiry in December 2006, the testimony of the Elders confirmed for the most part the statements made in 1973 and 1996. Elder Baptiste Turner, who was 94 in 2006, testified through an interpreter that “there was a big misunderstanding – well not a big – there was a misunderstanding (Speaks in Cree) literally translated, it was a misunderstanding that this land was given up. But that was not the case.”

Elder Wesley Daniels, who was 60, also gave evidence that George Charles, who hunted with him and his father, said that the land “was not traded, it was not given, it was not released, it was a trade for timber for haylands. He said because we had so many cattle we had no hay lands.” When asked by

---

91 Statement by George Ermine, Sturgeon Lake Indian Band, January 11, 1973 (ICC Exhibit 1a, p. 363).
95 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 63, Baptiste Turner).
96 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 45, Wesley Daniels).
Commissioner Holman whether they exchanged the timber for hay or the timber for other land, Mr. Daniels replied: “The way he [George Charles] said it, it was timber, timber for hay lands.”

The Elders who gave evidence at the community session and those who earlier gave statements on the subject were firm in their convictions. There is no reason to question the sincerity of their beliefs or the fact that, as counsel for the First Nation stated, they have been troubled by the 1913 surrender for many years:

I might say within the community there’s been a lot of discussion about it, but there’s nothing in the written record. As the Chief mentioned, the Elders were after them for years and years about this and then finally decided to file the claim.

Canada points out that the quotations from Elders relied on by the First Nation illustrate that the Elders were not unanimous in their recollections: Robert Ermine believed from his father and other Elders that they exchanged lands; and Howard Bighead suggested that it was land given up for Sucker Lake.

The Elders’ testimony stands in stark opposition to the documentary history, which reveals no confusion by either party over whether land or timber was being surrendered. The First Nation asks the question, “how can this be reconciled with the overwhelming evidence from the Elders that their understanding of the transaction was that this was an exchange of timber for haylands?”

In order to answer this question, the facts at the time of the surrender must be examined, in particular, the Band’s requests for more haylands; band leadership, the experience of band members in timber sales and surrender; and, the evidence that the Band changed its mind regarding the land it wished to surrender before making a final decision.

Requests for Haylands
The Sturgeon Lake Band had good reason to ask for more haylands. Beginning in 1895, several requests were made by Indian Agents on behalf of the Band, or by the Band itself for more land where they could cut hay to feed their increasing numbers of cattle and horses. By 1907, discussions were
taking place between the Band and the Indian Agent regarding the precise lands to be exchanged. Indian Agent Jackson’s letter to the department in September 1907 identified the haylands requested by the Band as sections 35 and 36 at the northeast corner of the reserve, and sections 10 and 15 about seven miles west of the reserve. In the same letter, Jackson attached a map indicating land north of Sturgeon Lake that the Band was willing to exchange for these four sections. The land identified on Agent Jackson’s map appears to be roughly the same as the land surrendered in 1913.

Band leaders had originally believed that they were entitled to receive four additional sections of hayland, owing to a promise they said was made to them by the Marquis of Lorne in 1881. The department denied the Band's request, however, claiming that it could find no record of the Marquis' promise, and further, that the Band's treaty land entitlement had already been met. Still, Indian Agents Jackson, his replacement, Thomas Borthwick, and other officials agreed that the Band required more hayland if it was to prosper in ranching and farming. Eventually, the Band decided to discuss another option that would give them this badly needed land — an exchange of a portion of existing reserve land for an equal amount of hayland.

Indian Agent Borthwick reported that the Band met twice in July 1912, after which he was told that the majority was ready to proceed. They still wanted the four sections identified in 1907 — sections 35, 36, 10 and 15; however, according to Borthwick, instead of surrendering the land north of Sturgeon Lake, they decided to give up two sections at the southwest corner and two sections at the southeast corner. A year later, the Band revisited this decision and advised Borthwick that they wished to inspect the land before making it final. Borthwick reported to the department in June 1913 that the Band had changed its mind and instead of the southwest and southeast corners, they would exchange the portion lying directly northwest of Sturgeon Lake. This was the land they had first identified in 1907 as land they were prepared to exchange for haylands, and this is the portion of the reserve that was eventually surrendered.

The record is clear that the Sturgeon Lake Band needed more hayland, considered and discussed the option of a land exchange well in advance of a surrender meeting, and changed its mind twice before settling on the portion of reserve land it would surrender. Yet, the testimony of the Elders reveals that they were told that only the timber on that land was exchanged for the four

101 T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 106-107).
sections of hayland, not the land itself. According to the First Nation, it is possible that the voters made a mistake, having confused the terms of the 1913 surrender with the 1906 surrender for the sale of timber on the same portion of land:

The almost universal understanding of the Elders is that what transpired was inconsistent with what was intended, namely, to surrender the timber and not the land in exchange for hay lands. Perhaps, coupled with the questionable activities surrounding the 1913 surrender, this perception is understandable given the fact that timber was available and the First Nation had just been through [a] timber transaction in 1906.102

We are, therefore, required to assess the likelihood that the voters intended to surrender only the timber on the land in 1913, but as a result of misunderstanding or mistake, surrendered the land instead.

Band Leadership during the 1906 and 1913 Surrenders
Following the death of Chief William Twatt in 1895, the Sturgeon Lake Band did not have a chief until 1915, but leadership was maintained by headmen, usually two or three at a time. In 1897, Shooshoyahmegook, Ayatawayo, and Neeshoyahnagoot were appointed headmen; Painpak-lay-wee-kanapew was elected as headman in 1885. One of the Band's leaders at the time of the 1913 surrender, Kayaykeemat (Moosehunter), was elected as headman in 1901 to replace Neeshoyahnagoot, who had died. Another leader at the time of the 1913 surrender was Kawechemaytahwaymat (Big Head), who became headman in 1908 after the death of Shooshoyahmegook. Between 1908 and 1915, when Chief Thomas Charles was elected, three experienced headmen – Ayatawayo, Kawechemaytahwaymat (Big Head), and Kayaykeemat (Moosehunter) – led the Sturgeon Lake Band. Two of the three were instrumental in the 1906 timber surrender and all three were involved in the 1913 surrender of land in exchange for hayland.

Even though the record illustrates strong leadership in the Band before and after the 1913 surrender, the First Nation argues that many of the Elders referred to the fact that:

they didn’t understand what was going on, were illiterate, didn’t understand English, couldn’t read the documents, didn’t have a Chief at the time, didn’t have

102 Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 112.
an interpreter and that the Indian Agent controlled everything and they did what he said or be punished.103

The Elders who remarked on the absence of a Chief included Hanna Kingfisher, John Daniels, and Victor Daniels, who were interviewed in 1996.104 Two Elders in particular, Earl Ermine and Barry Kingfisher, gave detailed testimony at the 2006 community session on the absence of a Chief at the time of the 1913 surrender. The panel also questioned the witnesses on the role of headmen. In response to Commissioner Dickson-Gilmore’s question to Earl Ermine whether headmen could offer leadership in the absence of a Chief, Mr. Ermine replied:

not understanding the dynamics of the old system, I think that they certainly would be looked up to by the community, you know, because they are, in effect, in a leadership role.105

In our view, the absence of a Chief when the band is in the process of making important decisions, such as the decision to surrender reserve land, does not necessarily signal an absence of strong leadership. It depend on the facts of the claim. In the Commission’s inquiry into the Kahkewistahaw First Nation’s 1907 surrender, the panel there found that there existed a leadership vacuum in the Band after the deaths shortly before the surrender of Chief Kahkewistahaw – a powerful leader who had repeatedly rejected a surrender – and two headmen.106 The Sturgeon Lake Band, in comparison, exhibited strong leadership throughout 20 years without a Chief. Headmen Ayatawayo and Kayakeemat (Moosehunter) provided continuous leadership for most of that period, while Kawechemaytahwaymat (Big Head) joined them as headman in 1908. It appears that Nehtowkapow was also a leader, who spoke for the group of band members living in the east of the reserve. The Sturgeon Lake Band was not left vulnerable by a sudden lack of leadership, as was the case with the Kahkewistahaw Band. We conclude that the headmen at Sturgeon Lake provided the necessary leadership to band members during the years when the timber surrender and land exchange surrender were being considered.

103 Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 13.
104 Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 3.
105 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 36, Earl Ermine).
Sturgeon Lake headmen were instrumental in both the 1906 timber surrender and the 1913 land surrender. We shall examine their role in these surrenders in order to assess the level of understanding that they had about surrenders, and in particular, their knowledge of the differences between the 1906 timber surrender and the 1913 land surrender.

Band Experience in Timber Sales and Timber Surrender

The 1906 timber surrender is not in issue in this inquiry. It is canvassed, however, for two reasons. This was a Band whose members had expertise in timber sales and had gone through a surrender process in 1906 when it surrendered timber for monetary compensation. Second, since the First Nation claims that the voting band members possibly confused the 1913 land exchange surrender with the 1906 timber surrender, it is important to know which leaders were instrumental in one or both surrenders.

The Sturgeon Lake Band’s reserve was well situated for forestry operations, as it contained an abundance of timber on the north side of Sturgeon Lake. It is undisputed that band members were highly successful entrepreneurs who used their expertise as woodsmen to earn money; they worked as lumbermen and sold timber on numerous occasions. When it was reported in 1905 that the Band wanted to surrender all the spruce timber on the reserve in order to buy a thresher, Indian Agent Charles Fisher met twice with the Band to determine the conditions for a surrender of the timber.

The meeting to vote on a timber surrender took place on January 30, 1906, at which time the voters agreed to surrender all the spruce on the reserve measuring 10 inches and over at the stump. Later that year, however, the Band complained to the new Indian Agent, Thomas Borthwick, that they had understood the surrender to cover only the timber north of Sturgeon Lake. In response to Borthwick’s complaint on behalf of the Band to the department in August, the department responded that the Band had discussed the option of reserving some of the timber from the surrender, but in the end, passed a resolution that all the spruce timber on the reserve except trees less than 10 inches at the stump, would be sold. The

107 John McGee, Clerk, Privy Council Office to Superintendent General of Indian Affairs, March 8, 1906, INAC, First Nations Land Registry, Instrument No. XI6416 (ICC Exhibit 1a, pp. 79-85); see also “Sturgeon Lake First Nation: 1906 Timber Surrender Documents” (ICC Exhibit 1n, pp. 12-19).

108 Thomas Borthwick, Indian Agent to Secretary, August 10, 1906, LAC, RG10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 21-22).

department, having already called for tenders for the whole quantity of timber, refused to amend the terms of the surrender.

In the case of the band resolution preceding the 1906 timber surrender, the signatories included Ayatawayo, Kayaykeemat (Moosehunter), Nehtowkapow, Thomas, Jumbo, Alex Badger, and Squealing John (Kaisiwanayo). The subsequent 1906 timber surrender was negotiated by headmen Ayatawayo and Kayaykeemat (Moosehunter), who signed the Surrender Document. Nehtowkapow, who reportedly was a leader of the group living at the east end of the reserve, was also a signatory, as were Kawechemaytawaymat (Big Head), Kaisiwanayo, Thomas, Willie Duck, and Jumbo. Ayatawayo also signed the accompanying Affidavit of Surrender. Some of these same individuals were also signatories of the 1913 Surrender Document, including Ayatawayo, Kayakeemat, Kaisiwanayo, and Nehtowkapow. Ayatawayo and Kaisiwanayo swore the first Affidavit, whilst Kawechemaytawaymat (Big Head) and Kayaykeemat (Moosehunter) swore the second Affidavit.

The core leadership during the 1906 and 1913 surrenders was represented by Ayatawayo and Kayaykeemat in the western group on the reserve and Nehtowkapow, who was said to be the leader of the eastern group. Kaisiwanayo and Kawechemaytawaymat (Big Head) were also involved in the discussions around the surrender for timber and the land surrender seven years later. The involvement of the same headmen and band members in both events makes it more likely than not that they understood the nature of granting a surrender to the Crown, as well as the difference between a surrender of timber for compensation and a surrender of one parcel of land in exchange for another. The evidence of the Band’s expertise in timber cutting and sales reinforces the likelihood that the voters understood the nature and consequences of their decision in 1913.

Band’s Decision to Change the Lands to be Surrendered

Over a year before the 1913 surrender, the department asked Indian Agent Borthwick to find out if the Band was still interested in obtaining haylands in exchange for the surrender of an equal area of reserve land. As we have mentioned, Indian Agent Borthwick reported that the Sturgeon Lake Indians

110 Chief and Principal men of Twatt's Band of Indians (Sturgeon Lake, No. 101) to His Majesty The King, January 30, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 12-14).
111 Affidavit of Surrender, February 1, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 15).
112 Some names of signatories were spelled differently on the three documents.
held two meetings in July 1912, at which time the majority decided to surrender two sections at the southeast corner and two sections at the southwest corner of the reserve, in exchange for the four sections the Band had selected. When Borthwick was asked a year later to confirm again the reserve lands that the Band was willing to give up, the Band told him that they wanted to inspect the lands one more time. According to Borthwick, the Band decided in June 1913 not to surrender the southwest and southeast corners, but instead, the portion of reserve land north of Sturgeon Lake.

The Band’s decision to change its mind regarding the lands it wished to surrender is important in understanding the Band’s true intention. The Band took its time to make a final decision by inspecting the options it had already identified and, presumably, by discussing the options amongst themselves. Even more significant is the fact that the Band had initially selected sections of the reserve in the south that were not heavily timbered, a fact that suggests the Band was looking at land to exchange, not timber. When asked at the oral hearing to explain why, if the Band’s intention was to surrender timber only, it was considering surrendering the sections at the southwest and southeast corners, counsel for the First Nation acknowledged that the southern sections did not contain much spruce timber compared to the northern part of the reserve. Counsel also confirmed that the record contains scant information on the timber that may have grown on the southern sections; however, he suggested that the Band may have realized that there was insufficient timber on the southern sections, which is why they turned their focus to the timber to the north.113

With respect, the evidence does not support this interpretation of the facts. The Band had several meetings with the Indian Agent over a lengthy period to confirm its willingness to proceed and to define the conditions of an exchange acceptable to the Band. The record indicates that the subject of these meetings was to finalize the Band’s choice of reserve land to be surrendered and its choice of land that it wanted in exchange. Other than the Elders’ testimony, there is nothing on the record to suggest that during this period the band members even contemplated a plan of exchanging timber for the desired haylands.

It seems highly unlikely that band members were considering a surrender of timber only on the southern corner sections of the reserve. Although the record does not describe in detail these sections, the south of the reserve was

113 ICC Transcript, May 13, 2008, pp. 52-54 (David Knoll).
described in 1913 as containing “long and excellent stretches of farm-
lands,” compared to the heavily timbered lands in the north of the reserve.

The clear and undisputed evidence that the Band initially decided to
surrender the southern corners of the reserve, then changed its mind, adds
considerable weight to Canada’s argument that the Band in 1913 knew it was
a land-for-land exchange.

Mistake in Contract
The documentary evidence strongly points to a conclusion that the voters
themselves were not mistaken when they agreed to the surrender. The First
Nation, however, asks the panel to consider whether one or more of the
principles of mistake in contract law could apply in these circumstances. We
thus make these observations.

First, the plea that there was no meeting of the minds (consensus ad
idem) is based on a rule that if the offer and acceptance do not correspond,
no contract arises in the first place.115 The preponderance of the evidence in
this inquiry, however, confirms that there was a meeting of the minds that land
would be surrendered in exchange for other land. There is no basis on which
to conclude that a surrender agreement did not come into existence.

Second, it would appear that contract law dictates that a mistake by one
party only, in this case the Band, would not void the surrender unless the
other party had been at fault in inducing the mistake in the mind of the Band.
The First Nation suggests a similar approach, when it states that if a mistake is
unilateral, a contract will be void if the other party knew or ought to have
known about the mistake.116 Here, even if the Band had made a mistake, we
find no evidence that the conduct of the Crown intentionally or inadvertently
caused a misunderstanding in the minds of the voters as to what was being
surrendered. Nor was the Crown apprised of the alleged mistake for almost
80 years.

Third, the principle of non est factum in contract law applies primarily to
those who are unable, through no fault of their own, to understand the
meaning of a particular document, whether it be from lack of education,
ilness, innate incapacity, or from having been tricked into signing the

114 Thomas Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General, April 1, 1913, Canada,
Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913, 136 (ICC Exhibit
1a, p. 205).
116 Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 11.
document. We do not dispute the Elders’ testimony that many band members in 1913 were illiterate and did not understand English. Although no evidence exists confirming or denying the presence of an interpreter at the surrender meeting, there is evidence that Indian Agent Borthwick used interpreters when meeting with the Sturgeon Lake Band. We note that the second Affidavit of Surrender states that the document was read over and explained to Big Head and Moose Hunter in the Cree language, who “seemed perfectly to understand the same ...” Further, one Elder at the community session recalled his father saying that there was an interpreter present when they were talking about a land exchange. Even though some Elders testified that the voters who spoke only Cree failed to understand the meaning of the surrender, and the particular document they were agreeing to, we think it highly unlikely that Indian Agent Borthwick would conduct the surrender meeting without an interpreter.

The totality of the evidence persuades us that the voters, regardless of their knowledge of the English language, understood the terms and consequences of the surrender. Contrary to the oral testimony that Indian Agent Borthwick actively deceived the Band, the panel finds no evidence that he engaged in trickery or took advantage of the language barrier to obtain a surrender. Nor had he any motivation to do so. Consequently, the plea of “non est factum” cannot succeed.

Given the majority of the evidence in this inquiry, the panel is unable to apply any of the principles of the law of mistake in contract – consensus ad idem, unilateral mistake, or non est factum – to the band members who voted in 1913.

Conclusion

The Elders’ evidence from the community session and earlier interviews contradicts in every respect a very detailed record of the events leading up to the 1913 surrender. The oral evidence illustrates an almost unanimous belief held by the Elders and their ancestors that the Band did not intend to surrender land in 1913. Yet, when the written record of the Band’s involvement in the decision to grant a surrender in 1913 is examined, it is evident that the voters themselves understood the difference between a

---

119 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 91, R. Ermine).
surrender of timber for monetary compensation and a surrender of land in exchange for other land. The written record demonstrates that the Band fully intended to proceed with a surrender of the portion of reserve land north of the lake in order to obtain the desired haylands. Moreover, nothing in the record leads the panel to suspect that the Crown exercised any pressure on the Band to surrender the land or in any respect manipulated the surrender process to achieve this result.

In an inquiry in which the oral evidence is in stark contradiction to a detailed written record, the panel must decide which evidence carries more weight given all the circumstances of the claim. We are not convinced on a balance of probabilities that the voters misunderstood the nature and consequences of their decision when they voted in 1913 to surrender land in exchange for other land. The Band had consistent leadership during this period and many of the voters were knowledgeable and experienced in these matters. The panel is not in a position to explain how it came to pass that the Elders hold a sincere belief that their ancestors in 1913 were mistaken about the nature of the transaction. Nevertheless, if the voters had made such a fundamental mistake, it is likely that they would have complained to the Indian Agent. This is so because the Band did complain within two years of the surrender, when band leaders realized that they had made a mistake in wrongly identifying one section of hayland they had chosen. As a result, the government amended the Order in Council to correct the error.

The question before the panel was the understanding and intention of the voters themselves in 1913, and in that regard, we are satisfied that the voting band members understood the basis of the surrender. They intended that a portion of the Band’s reserve land would be surrendered in exchange for an equivalent amount of hayland. The voters were not mistaken or confused, and in accordance with Apsassin, their decision must be respected.
The irregularities surrounding the 1913 surrender documents do not call into question the validity of the surrender. They illustrate carelessness or human error, but were not the result of deception, fraud, or other conduct designed to manipulate the results of the surrender vote. In spite of irregularities in the surrender process, the relevant provisions of the Indian Act governing the surrender of reserve land were met.

A majority of male members of the Band of the full age of twenty-one years, habitual resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender at a meeting summoned for the purpose of a surrender vote. There was a total of 33 eligible voters. In addition to the 13 persons whose attendance was agreed to by the parties, four others were present and one was probably absent from the meeting. Thus 17 out of 33 eligible voters were in attendance at the surrender meeting, thereby meeting the “first majority” requirement of the Cardinal case. With one abstention, 16 out of the 17 voted in favour of the surrender, thereby meeting the “second majority” requirement in Cardinal.

With respect to the applicability of contract law principles to reserve land surrenders, in a small minority of cases within the Specific Claims Policy, reliance on contract principles may be the preferred or only option available to a First Nation in asserting its true intention in a surrender. Such cases, however, are most likely to be found where insufficient evidence exists to prove a breach of the Crown’s fiduciary duty to the First Nation. Given the stark contradiction between the Elders’ evidence and the written record, the Sturgeon Lake First Nation has chosen to advance its claim based on the law of mistake in contract, and we see no reason why it should be barred from doing so.

Although the First Nation is entitled to claim that the voters made a mistake in 1913, when believing that they were surrendering timber in exchange for land, not land for land, the panel concludes that the voters were not confused...
or mistaken. In spite of an almost unanimous belief held by the Elders that the Band did not intend to surrender land in 1913, an examination of the written record demonstrates that the Band fully intended to proceed with a surrender of a portion of reserve land north of Sturgeon Lake in order to obtain the desired haylands. Nothing in the record leads the panel to suspect that the Crown exercised pressure on the Band to surrender the land, or in any respect manipulated the surrender process to achieve this result.

In light of the Elders’ testimony, the central question is whether the voters misunderstood the nature and consequences of their decision when they voted in 1913 to surrender land in exchange for other land. The totality of the evidence, however, is persuasive that the voting band members did not err. They understood the basis of the surrender and they intended to surrender land, not timber, in exchange for haylands. As such, their decision must be respected.

We therefore recommend to the parties:

That the claim of the Sturgeon Lake First Nation regarding the 1913 surrender of a portion of Indian Reserve 101 not be accepted for negotiation under Canada’s Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

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

Dated this 31st day of December, 2008
APPENDIX A

HISTORICAL BACKGROUND

STURGEON LAKE FIRST NATION
1913 SURRENDER INQUIRY

INDIAN CLAIMS COMMISSION
STURGEON LAKE FIRST NATION: 1913 SURRENDER INQUIRY

INTRODUCTION
The Sturgeon Lake First Nation occupies the Sturgeon Lake Indian Reserve No. 101 (IR 101), located approximately 180 km north of Saskatoon, Saskatchewan. The nearest city is Prince Albert, Saskatchewan, which is about 45 km southeast of IR 101. This report will focus on the 1913 surrender of a portion of IR 101. Historically, the affairs of the Sturgeon Lake First Nation were administered under the Carlton Agency of the Department of Indian Affairs. Although often referred to by its previous name, William Twatt’s Band, the First Nation will be referred to herein as the Sturgeon Lake First Nation, except in direct quotes.

Treaty 6 -1876
Treaty 6 was concluded between Canada and the Plains and Wood Cree at a series of conferences on August 23 and 28, 1876, in the vicinity of Fort Carlton, and on September 9, 1876, near Fort Pitt. Lieutenant Governor Alexander Morris, together with fellow treaty commissioners James McKay and W.J. Christie, negotiated the treaty on Canada’s behalf. Chief Ah-yah-tus-kum-ik-im-un (also known as William Twatt) and his headmen, Oo-sahn-asku-nukip, Yay-yah-too-way, Loo-sou-am-ee-kwakn, and Nees-wah-yak-eenah-koos, signed Treaty 6 on behalf of the members of what was then called William Twatt’s Band, currently known as the Sturgeon Lake First Nation. In return for the cession of title to their traditional lands, Treaty 6 provided that reserves would be set apart by the Crown for each signatory band, with the area of those reserves not to exceed “one square mile for each family of five, or in that proportion for larger or smaller families.”

Survey of Indian Reserve (IR) 101 (Sturgeon Lake)
In August and September of 1878, Dominion Lands Surveyor Elihu Stewart surveyed Indian Reserve No. 101 (hereafter IR 101) at Sturgeon Lake for Chief William Twatt. IR 101 originally contained 22,042 acres, or 34.4 square miles, which was sufficient land for a population of 172 under the provisions of Treaty 6.
Stewart’s report on the survey reveals that there had been difficulties in laying out the boundaries of the reserve. Writing to the Minister of the Interior, Surveyor Stewart reported:

the Indians were not satisfied with the way I was instructed to lay it off; and it was not till they had interviewed His Honor Lieut Governor Laird and had succeeded in getting the Reserve extended farther West on the South side of the Lake than was originally intended that I was enabled to meet their views in the matter.124

Stewart indicated that all the First Nation’s improvements had been included in the reserve, and he considered the location “exceedingly well chosen for an Indian Settlement.”125 Stewart continued to say:

[1]he land around the Lake is generally good but the soil between it and the Saskatchewan so far as I saw was almost worthless; so that in all probability their hunting grounds will not be encroached upon by the Whites for many years to come. They have abundance of timber on the north side of the Lake and sufficient hay land in the valleys of the Shell and Net-setting Rivers. The Lake also abounds with excellent whitefish, and ducks are found in great numbers in the numerous ponds scattered over the Reserve. These people are commencing to till the soil and to devote considerable attention to the care of the cattle and horses supplied them by the Government. They nearly all live in houses but so far have learnt only a few of the comforts of civilized life.126

During a 1973 interview, Sturgeon Lake Elder George Charles remembered the wealth of resources at Sturgeon Lake. According to Elder Charles, members of the First Nation were able to draw sustenance from trapping, hunting and fishing in years when the crops failed.127 He said, “[s]ometime we use to make a cage in the river and then we would pour oil up the river. Boy we used to kill a lot of fish, 100 to 150 in one catch.”129

123 Order in Council, PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, pp.19-21); Natural Resources Canada, Plan 1032 CLSR SK, Plan of the Sturgeon Lake Indian Reserve, North of the Prince Albert Settlement in Treaty No. 6, North West Territory, surveyed by E. Stewart, August and September 1878 (ICC Exhibit 7c).

124 Natural Resources Canada. Field Book 454. Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory. Surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, pp. 32-33).

125 Natural Resources Canada, Field Book 454, Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory, surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, p. 33).

126 Natural Resources Canada, Field Book 454, Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory, surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, p. 33).

127 Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, p. 353).
Hannah Kingfisher recalled her grandfather, Ayatawayo, speaking about the selection of the reserve site:

... we were told to choose which reserve lands to take. That is what he said. I choose Sturgeon Lake so my grandchildren and future grandchildren would not go hungry, because there were a lot of fish in the lake, is what he said. This will be their plate. And there were trees there too, ...

... This was a good, great choice because there was a lot of wood, to live off of ... 129

IR 101 was confirmed by Order in Council P.C. 1151 on May 17, 1889.130 The Order in Council described the reserve as follows:

[i]n the south-eastern part the surface is chiefly rolling and covered with poplar, most of which is small and scrubby, and jack-pine. There is little open ground, some tamarac muskegs occur. The soil is a sandy loam containing much vegetable fibre. North of the lake there are stretches of open land well adapted for farming. The western extremity is heavily timbered with spruce of superior quality. Sturgeon Lake is a long narrow expansion of Sturgeon or Net-Setting River, and runs easterly, across the reserve. This stretch of water has high bold shores, and abounds in fish and fowl. It is used by lumbermen to get out timber.131

IR 101 was withdrawn from the operation of the Dominion Lands Act by Order in Council PC 1694, dated June 12, 1893.132

Departmental reports written before 1913 generally extolled the virtues of IR 101. In 1900, Indian Agent W.B. Goodfellow reported that “the north side is well wooded, chiefly of spruce of a size valuable for building and lumbering purposes, while the south side is largely prairie, interspersed with poplar bluffs.”133 In September 1905, Indian Agent Charles Fisher wrote, “it is traversed by the Sturgeon lake, which provides excellent fish and in sufficient quantity for the use of the band; its northern limits contain splendid timber, spruce and poplar, while the remainder of the land is more or less suitable for agricultural purposes.”134

128 Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, p. 354).
129 Transcript of Hannah Kingfisher Interview, March 2007, pp. 22, 26 (ICC Exhibit 2d, pp. 26, 30).
130 Order in Council PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 19-21).
131 Order in Council PC 1151/1889, May 17, 1889, DIAND file 672/50-9, vol. 2 (ICC Exhibit 1a, p. 20).
132 Order in Council PC 1694/1893, June 12, 1893, no file reference available (ICC Exhibit 1a, p. 22).
133 W.B. Goodfellow, Indian Agent, to Superintendent General of Indian Affairs, September 12, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 140 (ICC Exhibit 1a, p. 44).
134 Charles Fisher, Indian Agent, to Deputy Superintendent General, September 2, 1905, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905, 116 (ICC Exhibit 1a, p. 73).
Economic Endeavours of the Sturgeon Lake First Nation

Between 1900 and 1913, the population of the Sturgeon Lake First Nation increased from 149 to 164 people, the majority of whom lived at two locations on IR 101: one group living at the east end of the lake, and another at the “Narrows” on the west side. Indian Agent Charles Fisher and Inspector of Indian Agencies W.J. Chisholm both remarked on the relative prosperity of the group living at the Narrows. In particular, Chisholm reported in 1904 that the group at the Narrows was “more advanced and prosperous ... occupying... more comfortable houses.” Those living to the east were negatively affected by their proximity to the main road leading to the lumber camps, which increased their contact with lumbermen and alcohol. In 1906, Inspector Chisholm reported that a group from the east was preparing to move to the Narrows, closer to the school and the centre of the reserve. Chisholm remarked that “[t]he movement, even though limited to a few, will have a beneficial effect.”

To support themselves and their families, members of the First Nation continued to hunt and fish after they settled on IR 101. In addition, they were encouraged to farm, and they worked in local lumber camps, which provided an important source of income. Some members were employed as log drivers and earned as much as $1.50 to $2.00 a day. The lumber camps were also an important market for produce grown on the reserve.
Chisholm reported a “[l]arge and ready demand throughout fall and winter for all their surplus farm products, hay, grain, and roots.”142 In 1913, Indian Agent Thomas Borthwick reported that 26 people were engaged in farming and had threshed almost 8000 bushels of oats, wheat and barley in the last season.143

In addition to cultivating grain, Sturgeon Lake members were also involved in raising cattle and horses. In 1905, their stock consisted of 264 cattle and 70 horses; by 1913, there was a total of 492 animals, including both horses and cattle, on the reserve.144 Elder Robert Ermine said “every household had cattle, maybe 30, 40 head, maybe even more. Some people even had 80 head.”145

Elders at the 2006 community session provided testimony about stock-raising and requirements for hay.146 In particular, the growth of the Sturgeon Lake First Nation’s livestock operations depended in large part on the ability of its members to feed the animals over the winter.147 Their success at ranching, however, meant that there was often a shortage of hay.148 Some members obtained hay from fields in the northeast corner and south-central area of the reserve,149 but the growing number of cattle and horses put pressure on the reserve’s available resources, and there was often not enough hay to go around.150 Members of the First Nation stated that they could raise and breed cattle, but were not permitted to sell or slaughter them without the approval of the Indian Agent.151 The Agent also issued permits to leave the

142 W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904, p. 191 (ICC Exhibit 1a, p. 63).
143 T. Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 1, 1913, Canada, Annual Report of the Department of Indians Affairs for the Year Ended March 31, 1913, 136 (ICC Exhibit 1a, p. 205).
144 T. Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 1, 1913, Canada, Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913, 137 (ICC Exhibit 1a, p. 206); and Charles Fisher, Indian Agent, to Deputy Superintendent General of Indian Affairs, September 2, 1905, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905, 117 (ICC Exhibit 1a, p. 74).
145 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 88, R. Ermine).
146 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 15, 17, E. Ermine); ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 101, B. Kingfisher).
147 W.J. Chisholm, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 30, 1909, Canada, Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1909, 168 (ICC Exhibit 1a, p. 136).
149 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 17-19, E. Ermine).
151 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 47-48, W. Daniels; p. 62, B. Turner; p. 82, S. Naytowhow).
reserve. One Elder recounted that he was told by his father that Thomas Borthwick, who was Indian Agent at the time of the surrender, was “very strict and he followed the Indian Act, I guess, to a “T” and he followed the permit system very carefully.”

Leadership at Sturgeon Lake, 1895-1915

Elders spoke of the period of about 20 years when there were no elected chiefs at Sturgeon Lake. Elder Earl Ermine associated the events of the 1885 Rebellion and the circumstances that followed with the tightening of departmental control over Sturgeon Lake, saying:

[d]uring the latter part of the 1880s there was an absence of a chief in our community until the early 1920s, so in the span of maybe 20-25 years, the community didn’t have a chief.

... My understanding of the situation was that people, Indian Affairs, discouraged the elections. My understanding from what I’ve heard is that Indian Affairs officials or Indian agents or farm instructors, as they were known as well, had total control of what happened in our communities.

In the wake of the 1885 Rebellion, the department implemented, at the suggestion of Assistant Indian Commissioner Hayter Reed, several new policies intended to avoid problems with Indian leadership in the future. Among these, Reed suggested that “[t]he tribal system should be abolished in so far as rebel Indians are concerned by doing away with Chiefs or Councillors.” It appears that the Superintendent General of Indian Affairs agreed with Reed’s proposal. It is important to recognize, however, that there is no evidence on the record to indicate that this policy was applied to Sturgeon Lake First Nation. The annual report of the Department of Indian Affairs for 1885 indicates that the Sturgeon Lake First Nation had been “loyal” during the rebellion.

152 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 118-119, H. Bighead).
153 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 90, R. Ermine).
154 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 28, E. Ermine; p. 65-66, B. Turner; p. 102, B. Kingfisher).
155 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 15-17, E. Ermine).
156 Hayter Reed, Assistant Indian Commissioner, to Indian Commissioner, July 13, 1885, LAC, RG10, vol. 3584, file 1130 (ICC Exhibit 1m, p. 5).
157 L. Vanloughnet, Deputy of the Superintendent General of Indian Affairs, to E. Dewdney, Indian Commissioner, October 28, 1885, LAC, RG10, vol. 3584, file 1130, part 1B (ICC Exhibit 1m, p. 15).
158 John A. MacDonald, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885, xxviii (ICC Exhibit 1m, p. 2).
In addition, although the record indicates that after Chief William Twatt died in 1895,159 and a new chief was not elected until 1915, consistent leadership in the Band was maintained by several headmen at a time. For example, in 1897, Indian Agent Hilton Keith advised the department that three persons—Shooshoyahmegook, Ayatawayo and Neeshooyahnagoot—had been appointed headmen at William Twatt's Band at the signing of the Treaty, and that a fourth, Painpak-lay-wee-kanapew, had been elected headman in 1885.160 The term of service for all four headmen was “[d]uring good behaviour, life.”161 Thus, between 1895 and 1898, leadership was maintained by headmen Shooshoyahmegook (Ticket No. 3), Neeshooyahnagoot (No. 4) and Ayatawayo (No. 5).162 In 1901, the department granted permission to hold an election to replace Neeshooyahnagoot, who had died in 1899,163 as a result, Kayakeemat (known as Moosehunter, No. 26) was elected headman.164 Kawechemaytahwaymat (known as Big Head, No. 41) became a headman in 1908, two years after Shooshoyahmegook died.165

Thus, from 1908 until 1915, when Chief Thomas Charles was elected,166 the First Nation’s leadership consisted of headmen Ayatawayo, Kawechemaytahwaymat (Big Head) and Kayakeemat (Moosehunter).167

1895 REQUEST FOR HAYLANDS

Correspondence between Indian Agent Keith and the Indian Commissioner suggests that the Department of Indian Affairs was considering additional

159 See treaty annuity paylist, William Twatt’s Band paid at Sturgeon Lake, October 23, 1895, LAC, RG 10, vol. 9428 (ICC Exhibit 1b, p. 35).

160 H. Keith, Indian Agent, to Deputy Superintendent General, August 11, 1897, LAC, RG 10, vol. 7937, file 32107 (ICC Exhibit 1a, pp. 31-32).

161 H. Keith, Indian Agent, to Deputy Superintendent General, August 11, 1897, LAC, RG 10, vol. 7937, file 32107 (ICC Exhibit 1a, pp. 31-32).

162 See treaty annuity paylists, William Twatt’s Band paid at Sturgeon Lake, 1895-1898, LAC, RG 10, vol. 9428, vol. 9429, vol. 9430 and vol. 9431 (ICC Exhibit 1b, pp. 35-43). Several variations for the spelling of “Ayatawayo” are evident in the documentary record. “Ayatawayo” will be used in this history except where quoted. There are also several variations for the spelling of “Kayakeemat.” “Kayakeemat” will be used in this history except where quoted.

163 See D. Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, March 22, 1899, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, p. 53); J.D. McLean, Secretary, to David Laird, Indian Commissioner, April 24, 1899, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, pp. 34-35); and J.B. Lash, Secretary to the Indian Commissioner, to Secretary, Department of Indian Affairs, September 30, 1901, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, p. 56).


165 See treaty annuity paylists, William Twatt’s Band paid at Sturgeon Lake, 1906-1908, no file reference available (ICC Exhibit 1b, pp. 61-75).

166 S.A. Milligan, Indian Agent, to Secretary, Department of Indian Affairs, April 20, 1915, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1a, p. 287).

167 See treaty annuity paylists, William Twatt’s Band paid at Sturgeon Lake, 1908-1915, no file reference available (ICC Exhibit 1b, pp. 70-106).
Indians Claims Commission Proceedings

Haylands for the Sturgeon Lake First Nation as early as 1895. On August 28 of that year, Indian Agent Keith wrote:

The township which includes the haylands under consideration has not yet been surveyed.

These could however be easily located by a surveyor as they are not far from the 3rd. P.M., being situated in Twp. 52, R 27, while the intervening Range (28) is, in that Twp., only one mile wide.\(^{168}\)

In May 1897, Keith wrote again to the Indian Commissioner, suggesting that the presence of a departmental surveyor in the vicinity of the Sturgeon Lake Reserve presented a “favourable opportunity for the survey of some swamp-land for them.”\(^{169}\) In turn, Indian Commissioner Forget directed that Surveyor A. Ponton should look into the matter of additional haylands for the Sturgeon Lake First Nation when he was in the area and to “take such action as he may deem advisable and time will admit of.”\(^{170}\)

Ponton advised the department in April 1898 that the lands Indian Agent Keith desired for the Sturgeon Lake First Nation were found to be within the area surveyed for the Montreal Lake and Lac La Ronge Bands.\(^{171}\) Ponton suggested, however:

That an effort should be made to obtain the following Sections, coloured yellow, on which hay abounds, in exchange for an equal area to be surrendered, and cut off the original Sturgeon Lake Reserve -

Viz:- Sections 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 in Township 51 Range 27.-

The portion of Section 25 outside of Reserve No. 101, and Section 36 in Township 51, Fractional Range 28- all West of the 2nd Initial Meridian and

The portion of Section 25 outside of Reserve No. 101., and Section 36 in Township 51, Range 1 West of the 3rd Initial Meridian- Containing in all 14 square miles.-\(^{172}\)

Ponton explained his reasons for proposing this exchange of lands, stating:

---

\(^{168}\) H. Keith, Indian Agent, to Recipient not Identified, August 28, 1895, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 25).

\(^{169}\) H. Keith, Indian Agent, to Indian Commissioner, May 7, 1897, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 26).

\(^{170}\) A.E. Forget, Indian Commissioner, to unknown recipient, May 15, 1897, DIAND file 672/30-9, vol.1 (ICC Exhibit 1a, p. 29).

\(^{171}\) A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 35).

\(^{172}\) A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 35-36).
the Sturgeon Lake Reserve, as it now stands, is, for the greater part, sandy, and wooded with Jack Pine, which precludes the Indians engaging successfully in either stock raising, or agriculture. The land, which it is proposed to obtain by exchange, is generally wooded with poplar, the soil is good, and hay meadows abound. 173

J.D. McLean, Secretary of the Department of Indian Affairs, acted on Surveyor Ponton’s suggestion later that month, writing to the Department of the Interior to inquire whether the land identified by the surveyor was available to “be transferred to this Department in exchange for an equal area to be surrendered and cut off the Sturgeon Lake Reserve, No. 101.” 174 McLean noted that “the proposed exchange is not likely to cause friction with white settlers as none occupy lands within ten miles of the immediate neighbourhood.” 175 The Surveys Branch of the Department of the Interior noted shortly thereafter that the lands requested by McLean were not available, as portions were to be included in the reserve for the Montreal Lake and Lac La Ronge Indians. 176 No further action was taken with regard to obtaining the land suggested by Ponton.

Despite not receiving additional haylands, the Sturgeon Lake First Nation was able to continue raising livestock with both the Indian Agent and Farming Instructor carefully monitoring its progress. In 1904, Inspector Chisholm reported that farming instructor Patrick Anderson had prevented the First Nation from “selling themselves short of hay” and that the herd had wintered well as a result. 177

1906 TIMBER SURRENDER AND SALE 178

In March 1905, Secretary J.D. McLean instructed Indian Commissioner David Laird to investigate a report that the Sturgeon Lake First Nation was “anxious” to sell some of the timber from IR 101 and use the proceeds to purchase a

173 A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30/9, vol. 1 (ICC Exhibit 1a, p. 36).
174 J.D. McLean, Secretary, Department of Indian Affairs, to the Secretary, Department of the Interior, April 25, 1898, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 38).
175 J.D. McLean, Secretary, Department of Indian Affairs, to the Secretary, Department of the Interior, April 25, 1898, LAC, RG 10, vol. 672/30-9, vol. 1 (ICC Exhibit 1a, p. 39).
176 Memo, Surveys Branch, Department of the Interior, April 28, 1898, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 41).
177 W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904, 190-191 (ICC Exhibit 1a, pp. 62-63).
178 It should be noted that the 1906 timber surrender by the Sturgeon Lake First Nation is not at issue in this inquiry. Details of the transaction are included to provide context for the 1913 surrender.
thresher. After determining the amount of timber available (five million feet with stumps greater than 10 inches in diameter), Secretary McLean inquired whether the First Nation wanted to surrender all the timber or only the spruce. Members of the First Nation met with Agent Charles Fisher on October 31, 1905, and informed him that they wished to reserve some of the timber for their own use. Since the Agent failed to get a resolution from the First Nation, the department directed Fisher to meet with the members again and determine exactly what their conditions were.

Fisher subsequently advised that he had held another meeting on November 25, with 18 members of the Sturgeon Lake First Nation in attendance. Councillors Ayatawayo and Kayaykeemat stated that some timber should be reserved for the First Nation’s own housing needs. Nehtowkappow, who was referred to as the “Leading man at the East end of Reserve,” recommended keeping five years’ worth of timber; saying, “during the interval all those young trees will have grown to a serviceable size.” He also voiced his concerns about the potential fire hazard created by the dense growth. A resolution was then passed, stating that all the spruce timber over 10 inches at the stump would be sold, “without reserving any.” The resolution was signed by the two headmen, Ayatawayo and Kayaykeemat, as well as by Nehtowkappow, Kaisikonay, Thomas, Jumbo, Alex Badger and Squeaking John.

On January 30, 1906, the Sturgeon Lake First Nation surrendered for sale “the spruce timber on the aforesaid Reserve [IR 101], measuring ten inches and over at the stump.” The surrender document was signed by headmen Ayatawayo and Kayaykeemat and the following “Principal members of the Band”: Kawechemaytawaymat, Kaisikaway, Nehtowkapow, Meyohnahtowakew, Thomas, Willie Duck, and Jumbo. Ayatawayo also

179 Secretary to D. Laird, Indian Commissioner, March 3, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 1). Although this letter indicates that Inspector Chisholm stated in his 1904 inspection report that the Sturgeon Lake First Nation was “anxious” to sell its timber, no such statement appears in the report on the record. See: W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904, 190-191 (ICC Exhibit 1a, pp. 62-63).

180 J.A.J. McKenna, Assistant Indian Commissioner, to Secretary, September 11, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 3).

181 Secretary to David Laird, Indian Commissioner, October 6, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 4).

182 D. Laird, Indian Commissioner, to Secretary, November 11, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 5).

183 Author not identified [report], November 25, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 6-8).

184 Chief and Principal men of Twatt’s Band of Indians (Sturgeon Lake, No. 101) to His Majesty The King, January 30, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, pp. 12-14).
signed the accompanying affidavit, dated February 1, 1906. The surrender was approved by Order in Council dated March 8, 1906.

Five months later, Sturgeon Lake members complained to the department that they “distinctly understood” that only the timber on the north side of the lake had been surrendered. Secretary J.D. McLean replied that, according to the surrender terms, all spruce measuring over 10 inches at the stump would be sold, and he instructed Agent Borthwick to explain to the First Nation “that the Department was quite justified in calling for Tenders for the whole quantity.”

The timber surrender brought the issue of hayland to the attention of the department once again. A week after the timber issue was resolved, Indian Agent Borthwick wrote to Indian Commissioner David Laird, expressing a concern raised by the farming instructor on the Sturgeon Lake Reserve. Borthwick stated:

Farmer Sanderson reports that the advertised conditions of the sale are expressly stated to be identical with those governing the sales of timber berths by the Department of the Interior. In all such sales by that Department the hay found on those berths becomes the property of the purchaser of the timber. In consequence the sale as it now stands actually conveys to the lumber man who secures the timber the exclusive privilege of cutting the hay on the reserve. This is a serious point as the hay supply on the Sturgeon Lake Reserve is insufficient for the needs of the band; and they are compelled to cut hay on the New Reserve.

The “new reserve” refers to Little Red River IR 106A, located northeast of Sturgeon Lake IR 101, which was confirmed as a reserve for the Montreal Lake and Lac La Ronge Indians by Order in Council dated October 16, 1899. The farmer’s concerns were relayed to the department by Indian Commissioner David Laird. On September 5, 1906, Department of Indian Affairs Secretary J.D. McLean advised Commissioner Laird that the timber had

---

185 Affidavit of Surrender, February 1, 1906, DIAND, First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 15).
187 Thomas Borthwick, Indian Agent, to Secretary, August 10, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 21-22).
188 J.D. McLean, Secretary, to Thos. Borthwick, Indian Agent, August 21, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 26).
189 Thomas Borthwick, Indian Agent, to David Laird, Indian Commissioner, August 27, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1a, p. 93; ICC Exhibit 1n, p. 28).
190 Clifford Sifton, Minister, Department of the Interior, to the Governor General in Council, October 16, 1899, LAC, RG 15, vol. 619, file 229293 (ICC Exhibit 1a, p. 43).
already been sold, but that the sale did not include the hay, which was reserved for the use of the Indians.  

1907 REQUEST FOR HAYLANDS

In September 1907, Acting Indian Agent T. Eastwood Jackson again reported the Sturgeon Lake First Nation’s need for additional haylands. Jackson wrote to the Secretary of the Department of Indian Affairs, stating that “the hay supply on the Sturgeon Lake Reserve has for some years proved insufficient.” Jackson also revealed that the Sturgeon Lake First Nation claimed “that at the time of the location of their reserve they were entitled to 4 square miles more than was then given them: that area being withheld for the purpose of providing them with additional hay ground should such prove to be required.” Jackson reported that the First Nation had requested that they be provided with this land, specifically:

that 2 miles of it be the unsurveyed territory lying between the New Reserve (106A) and the Northern part of the Sturgeon Lake Reserve, west of the 3rd principal meridian, which when surveyed will be found to be Sections 35 & 36, Tp. 51, R1, W 3rd; and that for the benefit of those Indians settled at the “End of the Lake” (that part of the Western portion of the reserve lying in Tp 51, R 2, W of 3rd Mer.) to whom the meadows just mentioned are inaccessible —, Sections 10 & 15 in Tp 51, R 3, W of 3rd Mer. be set apart for the remaining 2 miles understood to be coming to them. These sections contain hay meadows from which upwards of 200 tons of hay can be cut, and the Indians to be benefited would undertake any drainage made necessary by wet seasons.

Jackson indicated his support of the First Nation’s request, if the claim was just, and suggested that the matter could be arranged before the lands were sought by settlers. Jackson also stated, “[i]t is undoubtedly a most important matter in the interests of the cattle industry of this reserve, and I would beg the most favorable consideration possible of the Indians’ request.”

Upon receipt of Jackson’s letter, Department of Indian Affairs Secretary J.D. McLean wrote to P.G. Keyes, Secretary of the Department of the Interior,
articulating the desirability of securing more hayland for the Sturgeon Lake First Nation. McLean indicated that “[t]he question as to whether these Indians are entitled as they claim to extra land will be carefully looked into.”\footnote{J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 108).} McLean also stated that the First Nation might acquire the land “by grant or by exchanging an equal area of their present reserve.”\footnote{J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 108).}

Before receiving any definitive reply from the Department of the Interior, however, the Assistant Secretary of the Department of Indian Affairs, S. Stewart, responded to Acting Indian Agent Jackson’s letter on October 10, 1907, saying that the First Nation had received, at the time IR 101 was surveyed, some 3,226 acres more than it was entitled to receive under treaty, “[u]nless there is some other reason unknown to the Department, no step will be taken towards obtaining more land for the band.”\footnote{S. Stewart, Assistant Secretary, to T.E. Jackson, Acting Indian Agent, October 10, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 111).}

Acting Indian Agent Jackson responded to the department’s rejection by reiterating the importance of the cattle industry to the First Nation. He wrote:

my recent travels over and outside their reserve—measuring their hay stacks—has convinced me of the very great necessity of securing more hay meadows for their use. The cattle industry is of the utmost importance to those Indians; their surplus beef bringing them this season from 7¢ to 9¢ per lb: and I should say that at least one-third of this year’s supply has from necessity been cut off the reserve, in meadows which will soon be lost to them through encroaching settlements.\footnote{T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, November 5, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 114).}

Jackson inquired if additional land could be secured through a surrender and exchange of an equal area of Sturgeon Lake IR 101 land.\footnote{T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, November 5, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 114).}

In the meantime, the request of the Department of Indian Affairs for four sections of land for the Sturgeon Lake First Nation received the attention of the Topographical Surveys Branch of the Department of the Interior. In a memorandum to the Secretary of the Department of the Interior, Surveyor-General E. Deville wrote that “[n]o objection is known as far as surveys are concerned to the carrying out of the wishes of the Department of Indian Affairs.”\footnote{E. Deville, Surveyor-General, to Secretary, Department of the Interior, October 30, 1907, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 112-113).} The Surveyor-General also asked the Secretary to clarify with the
Department of Indian Affairs whether it had any intention of securing the lands requested in April of 1898, as no action had been taken.  

Sturgeon Lake members continued to raise the issue of additional haylands with the Indian Agent when he visited IR 101. On February 11, 1908, the new Indian Agent, Thomas Borthwick, wrote to the Secretary of Indian Affairs informing him of land allegedly promised to the First Nation in 1881 by the Marquis of Lorne, then Governor General. Borthwick reported that Chief Ayahhuscumicamin and his headmen claimed to have met with the Marquis of Lorne in 1881 to express their grievances, and said that they had specifically requested additional haylands. Borthwick wrote:

"[t]hey claim that during the interview they were asked if they had any grievances; that they stated in reply that their reserve had too little hay for their requirements and submitted a request for 4 sections of hay land comprising sections 35 and 36 Tp. 51, R.1 W. 3rd Mer. with others now covered by the New Reserve; that a definite promise was thereupon made by His Excellency that their request would be granted..."  

Borthwick emphasized that "[t]he question of the hay supply for this band is a most serious one and I therefore submit this latest plea advanced by them for the consideration of the Department."  

On February 21, 1908, Department of Indian Affairs Secretary J.D. McLean responded to Borthwick's letter, informing the Indian Agent that there was no record on file of the promise allegedly made to the Sturgeon Lake First Nation by the Marquis of Lorne. McLean stated that the department would not grant additional lands as it did "not see its way to endeavour to obtain a grant of extra land." McLean also stated, however, that a surrender of an equal amount of reserve land in exchange for haylands would be considered by the department.  

In March 1908, the Secretary of the Department of the Interior, P.G. Keyes, informed J.D. McLean of his department's decision regarding the additional land requested for the Sturgeon Lake First Nation. Keyes wrote:

202 E. Deville, Surveyor-General, to Secretary, Department of the Interior, October 30, 1907, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 112-113).
203 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, February 11, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, pp. 121-122).
204 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, February 11, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 122).
205 J.D. McLean, Secretary, to Thomas Borthwick, Indian Agent, February 21, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 125).
206 J.D. McLean, Secretary, to Thomas Borthwick, Indian Agent, February 21, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 125).
there would appear to be no objection to allowing the Indians of this Reserve to acquire by exchange such sections as adjoin the reserve, but it will not be possible to permit them to take lands elsewhere, for instance in Range 3, which is situated some six or seven miles from the Reserve.\textsuperscript{207}

Keyes also inquired what IR 101 lands might be exchanged in return. Internal correspondence reveals that, although a timber berth license had been granted for lands in range 3 (including sections 10 and 15, township 51), the Department of the Interior expected that the license would be abandoned within two years.\textsuperscript{208} A timber berth is a parcel of land set aside under the \textit{Dominion Lands Act} for the harvesting of its timber resources. Despite the apparent willingness of both the Department of Indian Affairs and the Department of the Interior to consider an exchange of land, nothing further was done in the matter until 1912.

\textbf{1912 Proposal for a Land Exchange}

In early 1912, the Department of the Interior received an application “for a portable sawmill permit to cut timber on one square mile situated immediately North and adjacent to Sturgeon Lake Indian Reserve No.101.”\textsuperscript{209} This request included a portion of section 35, township 51, range 1, W of 3rd meridian, which the Department of Indian Affairs had previously requested as additional haylands for the Sturgeon Lake First Nation.\textsuperscript{210} An employee of the Department of the Interior, A.A. Pinard, suggested that the Department of Indian Affairs “be asked to take some action in relation to an exchange of lands mentioned in the Departmental letter of the 7th March, 1908.”\textsuperscript{211} The Assistant Secretary of the Department of the Interior brought the matter to the attention of the Department of Indian Affairs on May 22, 1912.\textsuperscript{212} The department then instructed the Indian Agent to report whether the Sturgeon Lake First Nation was still interested in obtaining the additional haylands in

\begin{thebibliography}{9}
\bibitem{207} Secretary, Department of the Interior, to J.D. McLean, Secretary, March 7, 1908, DIAND, file 672/30-9, vol. I (ICC Exhibit 1a, p. 126).
\bibitem{208} N.O. Govi, Controller, Land Patents Branch, Department of the Interior, to J.W. Greenway, Commissioner of Dominion Lands, January 18, 1908, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 118-120).
\bibitem{209} A.A. Pinard, Department of the Interior, to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146).
\bibitem{210} A.A. Pinard to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146).
\bibitem{211} A.A. Pinard, Department of the Interior, to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146); A.A. Pinard, Department of the Interior, to Mr. York, May 1, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 147-148).
\bibitem{212} Lyndwode Pereira, Assistant Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, May 22, 1912, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 149).
\end{thebibliography}
exchange for the surrender of an equal area of IR 101.\textsuperscript{213} Agent Borthwick responded on August 20, 1912, writing:

the Indians at Sturgeon Lake held two meetings in connection with this matter, one on July 10\textsuperscript{th} and on the 18\textsuperscript{th}. I have now been informed that the majority wish to obtain this concession; and the Band have agreed to surrender two Sections on the S.E. Corner of the reserve and two on the S.W. corner in exchange for the property mentioned, viz., Sections 35 & 36, Township 51, Range 1, and Sections 10 and 15, Township 51, Range 3, W. 3\textsuperscript{rd} M.\textsuperscript{214}

On August 27, 1912, the Assistant Deputy and Secretary of the Department of Indian Affairs, J.D. McLean, informed the Secretary of the Department of the Interior of the Sturgeon Lake First Nation’s desire to proceed, and inquired whether the proposed exchange of lands would be permitted, considering that the Department of the Interior had previously rejected the idea of the First Nation acquiring lands in range 3. McLean asked that the previous decision be reconsidered, saying, “the land[s] in question are especially required for hay purposes and the business of stock raising is an important one for this band.”\textsuperscript{215}

In October 1912, the Department of the Interior inspected sections 10 and 15, township 51, range 3, W of 3rd meridian, to determine whether the land could be withdrawn from the timber berth held by the Prince Albert Lumber Company.\textsuperscript{216} Timber Inspector J.S. Coombs reported:

I find that all the merchantable timber has been cut off both these sections. Section 15. is principally large hay swamps having very little agricultural lands on it. On Section 10. there is a small quantity of black Poplar. The soil is a rich black loam very suitable for agricultural purposes. There is no one in residence and no improvements on the land. I would recommend [sic] that these two sections be withdrawn from the Timber [berth] and disposed of as the Department sees fit.\textsuperscript{217}

\begin{flushright}
\end{flushright}

\begin{itemize}
\item\textsuperscript{213} J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, May 28, 1912, LAC, RG 10, vol. 1619 (ICC Exhibit 1a, p. 151).
\item\textsuperscript{214} Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, August 20, 1912, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 167). See also map at Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, June 16, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 216).
\item\textsuperscript{215} J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, August 27, 1912, LAC, RG 15, Series D-H-1, vol. 747, file 471750 and DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 170-171).
\item\textsuperscript{216} S. Brough to Deputy Minister, Department of the Interior, October 7, 1912, LAC, RG 15, Series D-H-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 177-178).
\item\textsuperscript{217} J.S. Coombs, Timber Inspector, to W.S. McKechnie, Dominion Lands Agent, October 23, 1912, LAC, RG 15, Series D-H-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 182).
\end{itemize}
On December 21, 1912, a memorandum from an unknown author to the Deputy Minister of the Department of the Interior stated:

there would not appear to be any objection to allowing the Indians of this Reserve to acquire, by exchange, such sections as adjoined the reserve. ... I recommend that the permittees [of the timber berth] be advised of the withdrawal of the sections from their berth. This will place the Patents Branch in a position to deal with the application for exchange received from the Department of Indian Affairs.\(^{218}\)

The Prince Albert Lumber Company was informed on December 28, 1912, that sections 10 and 15, township 51, range 3, W of 3rd meridian, had been withdrawn from the company's timber berth.\(^{219}\)

In March 1913, the Department of the Interior contacted the Department of Indian Affairs to clarify the lands involved in the proposed exchange. In a letter dated March 8, 1913, N.O. Coté, the Controller of the Land Patents Branch, Department of the Interior, asked the Assistant Deputy and Secretary of the Department of Indian Affairs, J.D. McLean, to identify the reserve land being offered, and advised that the land applied for in sections 35 and 36, township 51, range 1, W of 3rd meridian, did not adjoin IR 101. Coté noted that a strip of land lay between the northern boundary of IR 101 and those two sections, and asked if the Department of Indian Affairs wanted to acquire that strip as well.\(^{220}\) In a reply dated March 13, 1913, J.D. McLean confirmed that the Department of Indian Affairs wished to acquire the strip of land, as well as the four sections previously discussed, and said the lands to be relinquished by the Sturgeon Lake First Nation would be determined later.\(^{221}\) On the same day, McLean wrote Indian Agent Borthwick, asking him to identify the land to be exchanged.\(^{222}\) McLean also advised Indian Agent Borthwick of the strip of land lying between the northern boundary of IR 101 and sections 35 and 36, township 51, range 1, W of 3rd meridian, indicating it was the intention of the department to acquire this strip.\(^{223}\) The Indian Agent did not reply to

\(^{218}\) Memorandum to the Deputy Minister, [Department of the Interior], December 21, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 190).

\(^{219}\) Assistant Secretary, Department of the Interior, to Prince Albert Lumber Co. Ltd., December 28, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 192).

\(^{220}\) N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 8, 1913, DIAND, file 672/50-9, vol. 1 (ICC Exhibit 1a, pp. 198-99).

\(^{221}\) J.D. McLean, Assistant Deputy and Secretary, to Secretary, Department of the Interior, March 13, 1913, DIAND, file 672/50-9, vol. 1 and LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 201-202).

\(^{222}\) J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, March 13, 1913, DIAND, file 672/50-9, vol. 1 and LAC, RG 10, vol. 1619, p. 432 (ICC Exhibit 1a, pp. 203-204).

\(^{223}\) J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, March 13, 1913, DIAND, file 672/50-9, vol. 1 and LAC, RG 10, vol. 1619, p. 432 (ICC Exhibit 1a, pp. 203-204).
McLean’s request until June 5, 1913, at which time Borthwick advised McLean:

I attended a meeting of the Sturgeon Lake Indians in connection with the matter referred to on the 28th inst.

The meeting could not be arranged earlier, as the majority were away rat hunting and log driving.

It was stated that nothing definite could be decided upon, until probably two weeks further had elapsed, as the Indians were desirous of making another inspection of the land they wished to exchange, before finally [sic] coming to an agreement.”

Eleven days later, Indian Agent Borthwick informed McLean that the First Nation had decided to surrender lands on the north side of Sturgeon Lake in exchange for the proposed additions, rather than the sections at the southeast and southwest corners of IR 101, as had previously been suggested. Borthwick wrote:

[The portion they agree to exchange does not appear to be either of the sections indicated by yellow and green lines as was originally suggested; but the portion which lies directly north west of the lake. This section of land, which is bounded by the north-east of Section 9, Township 51, Range 1 and on the south-east of Section 15, contains approximately the exact amount of land they wish to exchange. The land is bounded on the south by the lake, and on the north and west by the Reserve line.

I believe the greater part of this land is heavily brushed; in fact at one time [it] formed part of the timber limit which extends a great distance north of the Sturgeon Lake; and although the soil is no doubt very heavy and good, yet it is very likely, many years will pass before it can be used to any advantage by settlers."

This information was subsequently forwarded to the Land Patents Branch of the Department of the Interior. In a memorandum to W.W. Cory, Deputy Minister of the Department of the Interior, Controller N.O. Coté commented, “[t]he lands which they now desire to exchange are hatched in red on the plan beneath containing an approximate area of 4 square miles, and those which they wish to acquire are coloured pink, are available according to the

---

224 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, June 5, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 213).
225 Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, June 16, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 214-215). See also map at Order in Council P.C. 2379 with attachments, September 24, 1913, DIAND, file 672/50-9, vol. 1 (ICC Exhibit 1a, p. 239).
226 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, June 27, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 217-219).
records of this Department and contain an aggregate area of 2200.2 acres.”\(^{227}\)

J.A. Coté (whose position is unknown, but presumed to be another employee of the Department of the Interior) recommended an exchange for sections 35 and 36, township 51, range 1, W of 3rd meridian, but expressed concern about the distance between IR 101 and sections 10 and 15, township 51, range 3, W of 3rd meridian. In an internal memo dated August 13, 1913, addressed to Mr. Mitchell, Coté wrote:

I would recommend an exchange in so far as the two sections adjoining the Reserve is concerned, but I doubt whether it would [be] advisable to allow the Indians to acquire the two other sections that are situated 7 miles from the Reserve.\(^{228}\)

In addition, Coté stated that one of those parcels, section 10, township 51, was “most suitable for agricultural purposes” and recommended that “the Indians should be required to select other lands, if possible, nearer the Reserve.”\(^{229}\)

The Department of Indian Affairs justified its request for sections 10 and 15 in a letter from Duncan Campbell Scott to Mr. Mitchell. Scott wrote:

We require this land from which to obtain hay for the Indians. The matter is a very serious one for them. We have nearly 400 head of cattle and in the most favorable seasons they can cut only about 240 tons of hay. I presume that the Agent would not select lands any farther from the Reserves than was necessary and he probably could not get good hay meadows closer than the locality which has been chosen. As our Agent there is a man with pretty good judgment, I think we could take this for granted.\(^{230}\)

In another memorandum written by an unknown author within the Department of the Interior, dated August 22, 1913, J.A. Coté was instructed that the exchange should proceed by way of an Order in Council.\(^{231}\)

\(^{227}\) N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister, Department of the Interior, August 8, 1913, LAC, RG 15, vol. 747, file 471750 (ICC Exhibit 1a, p. 222).

\(^{228}\) J.A. Coté to Mr. Mitchell, August 13, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 223).

\(^{229}\) J.A. Coté to Mr. Mitchell, August 13, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 224).

\(^{230}\) D.C.S., Department of Indian Affairs to Mr. Mitchell, [Department of the Interior], August 15, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 226).

Order in Council PC 2379 - September 24, 1913
Order in Council PC 2379, dated September 24, 1913, provided for the withdrawal of 2,217.40 acres of land from the operation of the Dominion Lands Act in exchange for a proposed surrender of a portion of IR 101 containing 2,145.46 acres by the Indians of the Sturgeon Lake IR 101.

Order in Council PC 2379 describes the proposed exchange of lands as follows:

...the lands applied for shall be and the same are hereby withdrawn from the operation of the said Act and set aside for the use of the Indians of the Sturgeon Lake Indian Reserve No. 101, - such lands being described as follows:-
Firstly; the whole of sections 35 and 36, and those portions of sections 25 and 26, all in township 51, range 1, west of the 3rd meridian, which lie to the North of Sturgeon Lake Indian Reserve No. 101, as shown upon the plan of survey of the said township, containing by admeasurement 1425 acres, more or less, and Secondly; all those portions of sections 10 and 15, in township 51, range 3, west of the 3rd meridian, which are not covered by any of the waters of Lakes numbered 5, 6, 7, and 8 as shown upon the plan of survey of the last mentioned township, containing by admeasurement together 792.40 acres, more or less, the above parcels being shown coloured pink on the plan hereto attached and containing together an area of 2217.40 acres.

The Minister of the Interior states that the lands which are to be surrendered by the Indians of the said Reserve in order that they may be vested in the Department of the Interior in exchange for the lands above mentioned are described as follows:
All that portion of Sturgeon Lake Indian Reserve No. 101, as surveyed by E. Stewart, Dominion Land Surveyor, and set apart by Order in Council of the 17th May, 1889, which may be more particularly described as follows:
Commencing at the intersection of the East boundary of Section Twenty-eight, in Township 51, Range 1, West of the 3rd Meridian with the North boundary of the said Indian Reserve; thence Southerly on the production of the said East boundary to its intersection with the North shore of Sturgeon Lake; thence South-Westerly and North-Westerly following the said North Shore to its intersection with the West boundary of the said Indian Reserve; thence Northerly following the said West boundary a distance of Thirty- three chains, more or less, to an iron post at the most Westerly angle of the said Reserve; thence on a bearing of Eighty-nine degrees and Fifty-nine minutes, following a portion of the North boundary of the said Reserve, a distance of One hundred and eighteen chains and thirteen links to an Iron Post at an angle in the North boundary of said Reserve; thence on a bearing of Six minutes following the West boundary of the said Reserve a distance of One hundred and twenty chains and Six links to an Iron post at the North-West angle of the said Reserve; thence Easterly following the said North boundary of the said
Reserve a distance of Fifty-eight chains and Eighteen links, more or less, to the place of commencement, containing an area of 2145.47 acres, more or less... 232

SURRENDER OF IR 101 LANDS

Events Prior to the Surrender
On October 3, 1913, the Deputy Superintendent General of Indian Affairs, Frank Pedley, informed Indian Agent Borthwick that the Order in Council had been passed:

authorizing the exchange desired by the Sturgeon Lake Band, No. 101.

The lands to be received in exchange are the whole of Sections 35 and 36, and those portions of Sections 25 and 26, Range 1, W-3-M, which lie to the North of Sturgeon Lake Indian Reserve and all those portions of Sections 10 and 11, in Township 51, Range 3, W-3-M, which are not covered by the water of certain lakes numbered upon the plan of survey of the Township 5, 6, 7, and 8 containing a total area of 2217.40 acres. You will note that these are the lands indicated on the map which accompanied your said letter, excepting that the small strip consisting of portions of Sections 25 and 26, Township 51, Range 1, are also included. The portion to be surrendered in exchange is the same as that indicated in the said map which accompanied your letter... 233

It should be noted that Pedley's letter erroneously describes section 11 instead of section 15, township 51, range 3, W of 3rd meridian, as well as the location of the lakes referred to in Order in Council PC 2379.

In this same letter, Pedley enclosed duplicate forms of the surrender document and authorized Indian Agent Borthwick to take the surrender of IR 101 lands in accordance with the provisions of the Indian Act, stating:

If the Indians assent to surrender, you should fill in the date and have the documents signed by a number of the Indians in your presence, and an affidavit of execution made by yourself and two members of the band, before a stipendiary magistrate or a justice of the peace, and then return both documents to the Department.

You should report the number of male members of the band over twenty-one years of age resident on or near the reserve and entitled to vote, and as also the number of voting members present at the meeting and the number voting for the surrender and the number voting against. 234

232 Order in Council PC 2379, September 24, 1913, DIAND, file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 233-235).
233 Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243).
234 Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243).
On November 21, 1913, Indian Agent Borthwick advised the Secretary that “owing to the absence of the major portion of the male members of the band, apparently on rat hunting expeditions, I have been unable to hold a meeting so that the surrender forms can be completed.” Borthwick said he expected the meeting would be held in early December, when the members of the First Nation “invariably” returned home.

The Surrender Meeting

On December 24, 1913, Agent Borthwick wrote to the Secretary of the Department of Indian Affairs, saying:

I have the honor to return herewith the form of surrender in duplicate which was duly submitted to the Indians of the Sturgeon Lake, Band 101, on the 22 inst, at a general meeting of the band, in accordance with the provisions of the Indian act.

In view of their assent to the surrender I am attaching a report [ie. the voters list; to be discussed in detail later] giving the names of the male members of the band over twenty-one years of age resident on or near the reserve and entitled to vote, 28 names in all, sixteen of these attended the meeting, all of which voted in favor of the exchange of the land referred to, their signatures or marks being duly witnessed in conformity with governing regulations.

According to the surrender document, dated December 17, 1913, the First Nation members agreed to surrender 2,145.47 acres “to be exchanged for other lands.” The description of the lands being surrendered corresponds with that contained in Order in Council PC 2379. The document does not describe the lands being received in exchange, but includes a sketch on which the subject lands (both the surrendered parcel and those being received in exchange) are outlined. The surrender was signed by headmen Ayatawayo and Kayaykeemat, as well as by Jumbo Turner, Kaisikwayonayo, Charles Ermine, Kayomeetawakaw, David Anderson, Alex Badger, Long John, Alex Naytowonhow, Joe Peter, Neetaakepoow, Frederick Ballandine, Charles Campbell Cardinal, John Kayaykeemat, and Charles Kingfisher.
Agent Borthwick’s letter indicated that he submitted the surrender to the First Nation on December 22, five days after the date on the surrender form.

The Affidavit of Surrender, or Affidavit of Execution, was dated December 22, 1913, and was signed by Agent Borthwick and two members of the Sturgeon Lake First Nation, Kaisiwonayo and Headman Ayatawao. It was sworn before William Godfrey, Commissioner of Oaths for the Province of Saskatchewan. The Affidavit, however, did not meet the standard set out by the Indian Act. On January 7, 1914, Secretary McLean wrote to Indian Agent Borthwick, returning the Affidavit to be sworn “before a stipendiary magistrate or a justice of the peace.” Borthwick was admonished for failing “to carry out the specific instructions of the Department, thereby entailing unnecessary correspondence and delay in this matter.”

Indian Agent Borthwick swore another Affidavit before a justice of the peace for the province of Saskatchewan on January 31, 1914. The Affidavit attesting to the surrender meeting procedures was also sworn by headmen Big Head (alias Kayweekematahwaymat) and Moose Hunter (alias Kayaykeemat). A notation appearing near the (illegible) signature of the justice of the peace indicates that the document was “read over and explained to the said Big Head and Moose Hunter in the Cree language and they seemed perfectly to understand the same and made their marks thereto in my presence.” The document does not specify the name of the interpreter present at the swearing of the Affidavit. The Surrender Document and Affidavit of Surrender were returned by Agent Borthwick to the department on February 4, 1914.

Order in Council PC 510 - February 20, 1914

The surrender was accepted by Order in Council PC 510, dated February 20, 1914. On March 19, 1914, the Department of the Interior was informed by J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, that the surrender of IR 101 lands had been approved.
In May 1914, Indian Agent Borthwick reported, “the Indians of the Sturgeon Lake reserve Band 101, desire to know if their recent exchange of land is now complete. That is to say can these Indians consider the haylands which they surrendered a portion of their reserve for, as their own property.” Borthwick resigned shortly thereafter. His replacement, Silas Milligan, was informed on June 9, 1914:

the Indians may now consider the lands which they have received in exchange for the surrendered portion of the reserve as being their own property. You may therefore cut and use the hay from them without interference.

Elders’ Testimony Regarding the Surrender Terms
According to many Sturgeon Lake Elders, the members of the First Nation did not understand, at the time of surrender, that it was intended to be a cession of title to their lands, but thought it was a mutually agreed-upon transaction whereby the First Nation would receive the haylands and outside parties could cut timber on the IR 101 lands north of the lake. Referring to the Elders’ knowledge of their ancestors’ belief, Elder Earl Ermine said at the 2006 community session:

they used to talk about timber, they used to call it mistik soniyas. ...they always talked about it as being, kind of wondering whatever happened to that land because there was never any giving up of that land.

...The English language might interpret it as, you know, money that resulted from an arrangement because of timber that was taken from that lands ... my understanding it was monies that resulted from the exchange of timber for that hay land.

Elders Baptiste Turner, Howard Bighead and Wesley Daniels all testified at the community session that it was only the timber that was surrendered in exchange for additional haylands, not the land itself. Elder Bighead acknowledged that there was a serious need in the community for haylands,
but asked “why didn’t Indian affairs go and lease some land instead of ... trading it off ... I can’t see my way clear to how, what the thinking was ... to sell valuable land for land such as Sucker Lake that I’ve seen is useless except for hay at the time.” 251 In addition to the timber, the surrendered portion of IR 101 was used by Sturgeon Lake First Nation members for berry picking, as a source of medicinal plants, and for hunting.252

Elder Hannah Kingfisher described the 1913 surrender somewhat differently: “They had mutually loaned land was what my grandfather said, ...”253 Barry Kingfisher said, “What [my father] indicated to me was we never did sell this land. He always said, ’E’kimohta’makowiya’, he always said that, it was stolen from us.” 254 That phrase was echoed by Earl Ermine, whose father told him, “’E’kimohta’makowiya askiy,’ the land that was stolen from us,”255 and, with some variation, by Wesley Daniels, who stated that George Charles told him, “we did not trade the land, only the timber.” 256

Elder Hannah Kingfisher also stated that when she asked her grandfather (Ayatawayo) why they gave away the trees, he responded:

We never did, we were deceived into it. And this Sucker Lake, they told us, it was a trade, it was like a loan, it was loaned to them, it wasn’t given away. The farm instructors and Indian Agents wrote it out so that it looked like we were giving up the land.257

Elder Baptiste Turner testified at the community session that Chief Thomas Charles told him that “those who had signed the papers, those were the ones that (Speaks in Cree) how would I translate that? Misled, I guess would be the word.” 258 When Elder George Charles was asked in 1973 if he knew Moosehunter and Big Head, he responded that “it was him and bighhead that trade the land,” that “[t]hey didn’t understand anything,” and that “[t]hey only spoke Cree.” 259 When Robert Ermine was asked at the community session whether anyone acted as a translator when discussing a land exchange, he recalled that his father, George Ermine, told him: “There was an

---

251 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 115-16, H. Bighead).
253 Hannah Kingfisher Interview - Revised Transcript, March 2007, pp. 21, 26 (ICC Exhibit 2d, pp. 25, 30).
254 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 96, B. Kingfisher).
256 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 47, W. Daniels).
257 Hannah Kingfisher Interview - Revised Transcript, March 2007, p. 21 (ICC Exhibit 2d, p. 25).
258 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 72-73, B. Turner).
259 Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, pp. 356-357).
interpreter but I don’t know the name, the name of the person. Because I remember him saying that there was an interpreter, ‘"otitwestamakew’.”  

**SUBSTITUTION OF LAND EXCHANGED IN 1913**

As mentioned earlier, Indian Agent S.A. Milligan wrote to the Secretary of the Department of Indian Affairs on April 22, 1915, advising that it was not the intention of the First Nation to acquire section 35 in township 51, W of 3rd meridian. Milligan wrote:

> they admit that the error occurred through their own fault. Section 35, Township 51, is not made up of any hay land, the major portion of it being high and dry and covered with heavy poplar. It appears that this hay land is Section 36, immediately East of Section 36, Township 51. This is one of the quarters that the Indians thought they were receiving in exchange. Section 36, Township 51, they were under the impression was Section 35, Township 51, as it is most unusual to find two quarter sections adjoining each other with the same number, the cause no doubt being that an error was made when the land was first surveyed, Section 36, East of Section 36, Township 51, above referred to being a correction. However, as the Indians failed to discover this oversight until long after their first application had been received and accepted, it only remains to be said that they now wish to surrender Section 35, Township 51, W 3rd, for Section 36, shown on both diagrams I am enclosing and possibly might be described by saying it is sandwiched between Section 36, Township 51, W 3rd, and Section 31, Township 51, E 3rd.

J.D. McLean wrote to N.O. Coté, Controller, Land Patents Branch of the Department of the Interior, on May 4, 1915, informing him of the error and saying, “it now appears that the Indians, on account of there being two sections numbered 36 adjoining each other, made a mistake in stating the lands they desired.” McLean requested an Order in Council be passed amending the Order in Council of September 24, 1913, by substituting section 36 and a portion of section 25, lying north of IR 101, both in township 51, range 28, W of 2nd meridian, for section 35 and a portion of section 26, both in township 51, range 1, W of 3rd meridian, also lying north of IR 101. McLean concluded by saying, “[i]t is especially desired as the section which

---

260 ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 91, R. Ermine).
261 S.A. Milligan, Indian Agent, to Secretary, Department of Indian Affairs, April 22, 1915, DIAND, file 672/50-9, vol. 1 (ICC Exhibit 1a, pp. 288-289).
STURGEON LAKE FIRST NATION: 1913 SURRENDER INQUIRY

was asked for in error by the Indians, appears to be practically useless to
them, and the section as above stated, is the one they intended to ask for.\textsuperscript{263}

\textbf{Order in Council PC 2771/1915}

After reviewing the status of sections 36 and 25, the Department of the Interior
sought to amend the original Order in Council. On November 27, 1915, Order
in Council PC 2771/1915 was authorized, amending Order in Council PC
2379/1913 of September 24, 1913, by substituting:

\begin{quote}
for the aforesaid section 35 and portion of Section 26 in Township 51, Range 1,
West of the 3rd Meridian, the lands described as follows, that is to say,-
\begin{quote}
All of fractional section 36, and that portion of section 25,
lying North of the Sturgeon Lake Indian Reserve, No. 101.,
and of the production easterly of the Northern Boundary of
the said Reserve, containing five hundred and twenty-eight
and twenty hundredths acres.\textsuperscript{264}
\end{quote}
\end{quote}

It appears, however, that the Department of Indian Affairs was not
immediately advised that the Order in Council of November 27, 1915, had
been approved. J.D. McLean, Assistant Deputy and Secretary of the
Department of Indian Affairs, wrote to the Department of the Interior in
January of 1916 to inquire whether the amendment and exchange had been
made.\textsuperscript{265} A month later, N.O. Coté responded to McLean, forwarding a copy of
the confirmed Order in Council.\textsuperscript{266} In the meantime, however, Coté wrote to
the Dominion Lands Agent in Prince Albert with instructions that section 35
and that portion of section 26 situated outside of IR 101, both in township 51,
range 1, W of 3rd meridian, should be opened to homesteaders.\textsuperscript{267}

In March 1916, the Assistant Deputy and Secretary of the Department of
Indian Affairs, J.D. McLean, wrote to the Department of the Interior to confirm
the description of the land added to IR 101, as the Order in Council of
November 27, 1915, was silent in that respect. McLean wrote:

\begin{quote}
\textsuperscript{263} J.D. McLean, Assistant Deputy and Secretary, to N.O. Coté, Controller, Land Patents Branch, Department of the
\textsuperscript{264} Order in Council PC 2771, November 27, 1915, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 313).
\textsuperscript{265} J.D. McLean, Assistant Deputy and Secretary, to N.O. Coté, Controller, Land Patents Branch, Department of the
\textsuperscript{266} N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and
Secretary, February 25, 1916, DIAND, file 672/30-9 (ICC Exhibit 1a, p. 329).
\textsuperscript{267} N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to Agent of Dominion Lands, Prince
\end{quote}
It is noted that the said Order-in Council is not quite definite. No amendment is required if it is perfectly understood in your Department which lands are now constituted a part of the Indian Reserve.

The said lands which now constitute part of the Indian Reserve are fractional section 36 and that portion of section 25, lying North of the Sturgeon Lake Indian Reserve No. 101, in Tp. 51, R. 28, W.2.M and section 36 and fractional section 25, North of the reserve in Tp. 51, R. 1, W.3.M.268

N.O. Coté confirmed on March 24, 1916, that the lands set apart by the November 27, 1915, Order in Council are:

fractional Section 36 and that portion of section 25 lying north of the Sturgeon Lake Indian Reserve No. 101 and of the production easterly of the North boundary of the said Reserve, in Township 51 Range 28 West of the 2nd Meridian and section 36 and fractional section 25 lying North of the Reserve, in Township 51-1 West of the 3rd Meridian, and have been so noted in the records of this Department.269

268 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, March 9, 1916, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 331).

269 N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 24, 1916, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 333).
APPENDIX B

CHRONOLOGY

STURGEON LAKE FIRST NATION
1913 SURRENDER INQUIRY

1 Planning conferences
September, 1998
March, 2003
June, 2005

2 Community session
Sturgeon Lake, December 6 and 7, 2006

The Commission heard from Chief Henry Daniels, Earl Ermine, Wesley Daniels, Baptiste Turner, Alexander Dietz, Sidney Naytowhow, Robert Ermine, Barry Kingfisher, and Howard Bighead.

3 Written legal submissions
   • Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008
   • Submission on Behalf of the Government of Canada, April 11, 2008
   • Reply Submission on Behalf of the Sturgeon Lake First Nation, April 26, 2008

4 Oral legal submissions
Saskatoon, May 13, 2008

5 Content of formal record

The formal record of the Sturgeon Lake First Nation: 1913 Surrender Inquiry consists of the following materials:

   • Exhibits 1 - 9 tendered during the inquiry, including the transcript of the community session
   • transcript of oral session

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

RED EARTH AND SHOAL LAKE CREE NATIONS
QUALITY OF RESERVE LANDS INQUIRY

PANEL
Commissioner Sheila Purdy (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan Holman

COUNSEL
For the Red Earth and Shoal Lake Cree Nations
William A. Selnes

For the Government of Canada
Vivian Russell

To the Indian Claims Commission
Michelle Brass

DECEMBER 2008
CONTENTS

SUMMARY 415

PART I INTRODUCTION 420
Background to the Inquiry 420
Mandate of the Commission 422

PART II THE FACTS 427

PART III ISSUES 439

PART IV ANALYSIS 440
Issue 1: Treaty 5 Promise to Provide Farming Lands 440
   Panel’s Reasons 440
Issue 2: Content of the Treaty 5 Obligation to Provide Farming Lands 441
   First Nations’ Position 441
   Canada’s Position 442
   Background 442
   The Law 447
   Panel’s Reasons 449
   Step Two: Examination of the Historical and Cultural Backdrop 451
   Conclusion 455
Issue 3: Fulfilling the Treaty 5 Obligation to Provide Farming Lands 456
   First Nations’ Position 456
   Canada’s Position 456
   Background 457
   Panel’s Reasons 466
   Conclusion 471
Issue 4: Is there an Outstanding Obligation in respect of Farming Lands? 472
   Fairness in the Result: Our Supplementary Mandate 472

PART V CONCLUSIONS AND RECOMMENDATIONS 477
## APPENDICES

<table>
<thead>
<tr>
<th>A</th>
<th>Historical Background 481</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry: Interim ruling on request of the Treaty 8 First Nations of British Columbia to intervene in mandate challenge, December 15, 2005 545</td>
</tr>
<tr>
<td>C</td>
<td>Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry: Interim ruling on Canada’s objection to jurisdiction, September 26, 2006 554</td>
</tr>
<tr>
<td>D</td>
<td>Notice of Application, Federal Court of Canada, October 25, 2006 587</td>
</tr>
<tr>
<td>E</td>
<td>Red Earth and Shoal Lake Cree Nations: Interim ruling on Canada’s objection to proposed testimony of two non-elder witnesses, October 11, 2007 591</td>
</tr>
<tr>
<td>F</td>
<td>Chronology 593</td>
</tr>
</tbody>
</table>
SUMMARY

RED EARTH AND SHOAL LAKE CREE NATIONS
QUALITY OF RESERVE LAND INQUIRY
Saskatchewan


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

Treaties – Treaty 5 (1875); Treaty Interpretation – Reserve Clause – Farming Lands; Saskatchewan

THE SPECIFIC CLAIM

In May 1996, the Red Earth and Shoal Lake Cree Nations jointly submitted a specific claim to the Department of Indian and Northern Affairs Canada, alleging that Canada had breached the terms of Treaty 5 and the 1876 Adhesion by not providing “farming lands” to the Red Earth and Shoal Lake Cree Nations. In June 2004 the First Nations requested that the Indian Claims Commission (ICC) conduct an inquiry into their claim, despite not having received a decision from the Minister on the claim’s validity. The ICC agreed to hold the inquiry on the basis that the claim had been constructively rejected.

In April 2005, Canada formally challenged the ICC’s jurisdiction to conduct an inquiry into a claim that had not been rejected by the Minister. Subsequently, the Treaty 8 First Nations of British Columbia sought to intervene in the mandate challenge; this application was denied in December 2005 (see Appendix B to the report). In September 2006 the panel dismissed Canada’s motion on the mandate challenge, ruling that it is within the ICC’s jurisdiction to accept constructively rejected claims for inquiry, and that on the facts of the Red Earth and Shoal Lake First Nations’ claim, the conduct of
Canada was tantamount to a rejection of that claim (see Appendix C to the report). Canada applied for judicial review of the ICC’s ruling on jurisdiction (see Appendix D to the report) but withdrew the application following the Minister’s formal rejection of the claim in December 2006.

In October 2007, the panel conducted a site visit and community session at the Red Earth and Shoal Lake reserves. Following receipt of the parties’ written submissions, the panel conducted an oral hearing in May 2008, in Saskatoon, to receive the parties’ legal arguments.

**BACKGROUND**

The Pas Band signed an Adhesion to Treaty 5 on September 7, 1876 at The Pas. Treaty 5 specifically provided for reserves to be set aside for “farming lands” and “other reserves” for the benefit of the Indians. At the time, The Pas Band was made up of members living at The Pas and at other locations, including the Pas Mountain (Red Earth and Shoal Lake) in Saskatchewan, within Treaty 6 territory. The Pas Band agreed to adhere to Treaty 5 on condition that the Band receive reserves where they desired. The adhesion document specified not only that a reserve would be set aside at The Pas, but that in order to provide the Band with more land fit for cultivation, reserves would also be created at the Pas Mountain and Birch River. In January 1884, The Pas Band followed up with a petition asking the government to make up its shortfall of reserve land by surveying reserves at the Pas Mountain where there was farm land. Surveys of the Red Earth and Shoal Lake reserves were completed in 1884 following consultations with these two groups.

In 1892, the government agreed to Red Earth’s request that land that had been set aside for The Pas Band at Flute Creek be exchanged for a second reserve at Red Earth. Over several decades the Red Earth and Shoal Lake Bands requested and, with few exceptions, were granted additions to their reserves and exchanges of land. In 1946 the two Bands sent a petition to the government requesting additional reserve land suitable for farming and producing hay. They explained that when their reserves were established, they did not provide for cultivation of the land, but that the people at the time were content because they could continue hunting and trapping.

**ISSUES**

Did Canada have a lawful obligation to provide “farming lands” to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5? If so, what was that obligation? Was the obligation met? Does Canada have
an outstanding obligation to either or both Cree Nations in respect of farming lands?

**FINDINGS**
The reserves set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The panel interprets the reserve clause in the Treaty as contemplating that reserves would contain some “farming lands” and some “other reserves.” Within the category of “farming lands,” at least some of that land was intended to be cultivatable land; but the remaining “farming lands” could be land suitable only for cattle-raising, growing hay, or other farming uses. Furthermore, and important to bands at the time of treaty, reserves were also to contain “other reserves,” meaning land suitable for traditional activities or other non-farming uses. The proportion of cultivatable land to be set aside for bands was intentionally not defined in the Treaty, in order to enable bands and the Crown to select reserves suitable to a band’s individual needs, priorities, and location within the vast territory of Treaty 5. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis.

The common intention of the parties to Treaty 5 and the 1876 Adhesion was to provide reserves for multiple uses. This would enable bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture. The priority of The Pas Band was to receive land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that band members were already pursuing at Red Earth and Shoal Lake. This interpretation of common intention is the one that best reconciles the interests of both parties at the time of treaty.

The Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with “farming lands” pursuant to the terms of that Treaty. The evidence is persuasive that both Red Earth and Shoal Lake were provided with sufficient good-quality, cultivatable land to grow crops for subsistence living. Their reserves were places where they successfully cultivated a range of crops and raised cattle for decades.

**Supplementary Mandate**
Despite the panel’s finding that the Crown fulfilled its treaty obligation to provide “farming lands” to the Red Earth and Shoal Lake Cree Nations, the reserves are no longer viable places to grow crops and raise animals due to the increase in water levels. From the Elders’ testimony, the panel is struck by the possibility that the lands have been changed by forces which could not
have been anticipated by these Bands or the Crown at the time of treaty and for several decades afterward. Consequently, the panel urges Canada to initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems caused by the condition of their reserve lands.

**RECOMMENDATIONS**

That the claim of the Red Earth and Shoal Lake Cree Nations regarding the provision of “farming lands” in Treaty 5 not be accepted for negotiation under Canada’s Specific Claims Policy.

That Canada initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems resulting from the condition of their reserve lands.

**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**


**ICC Reports Referred To**


**Treaties and Statutes Referred To**

Canada, *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957).

**Other Sources Referred To**

COUNSEL, PARTIES, INTERVENORS
W.A. Selnes for Red Earth and Shoal Lake Cree Nations; V. Russell for the Government of Canada; M. Brass to the Indian Claims Commission.
PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY
Treaty 5 was signed by a group of Saulteaux and Swampy Cree in September 1875. One year later, on September 7, 1876, the leaders of three bands, including the Chief and Councillors of The Pas Band, signed an Adhesion to Treaty 5 at The Pas. The territory encompassed by Treaty 5 extended throughout central Manitoba and also included small areas in Saskatchewan and Ontario. In 1908 Treaty 5 was expanded to cover almost all of northern Manitoba. Treaty 5 provided for 160 acres of reserve land for each family of five and specifically promised that reserves would be set aside for “farming lands” and “other reserves.”

The Red Earth and Shoal Lake Cree Nations are located along the Carrot River in Saskatchewan near the Manitoba border. When The Pas Band adhered to Treaty 5 in 1876, the Red Earth and Shoal Lake people, living at the Pas Mountain, were included as part of The Pas Band. The Adhesion provided that a reserve would be set aside for The Pas Band at The Pas, and, because the land fit for cultivation was limited in that area, the balance of its reserve would be established at the Pas Mountain (Red Earth and Shoal Lake) and at Birch River. Reserves for The Pas Band were surveyed first at The Pas, then Birch River, and in 1884, Red Earth and Shoal Lake. Over time, the Red Earth and Shoal Lake Bands were recognized as bands separate from The Pas Band and distinct from one another.

In May 1996 the Red Earth and Shoal Lake Cree Nations jointly submitted a specific claim to the Department of Indian and Northern Affairs Canada (INAC), alleging that Canada had breached the terms of Treaty 5 and its Adhesion by not providing farming lands to the Red Earth and Shoal Lake Cree Nations.

Canada conducted confirming research into the specific claim; however, in 2004, when the Minister had not yet made a decision either to accept or reject the claim for negotiation, the First Nations requested that the Indian
RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

Claims Commission (ICC) undertake an inquiry into their claim. On June 3, 2004, the ICC agreed to conduct the inquiry on the basis that the claim had been constructively rejected by the Minister. A planning conference was held in February 2005; however, Canada declined to participate in the inquiry or to provide funding to the First Nations for the inquiry process.

Canada objected to the ICC’s decision to commence the inquiry and notified the ICC in March 2005 that it would challenge the ICC’s jurisdiction (“mandate challenge”) to do so. On April 7, 2005, Canada filed a Notice of Motion requesting a ruling from the panel on whether the Commission had jurisdiction to conduct an inquiry into a claim that had not yet been rejected by the Minister. On May 20, 2005 Canada filed its legal submission on the motion. In support of the motion, Canada also filed the Affidavit of Veda Weselake, Director, Research and Policy Directorate, Specific Claims Branch, INAC. Counsel for the First Nations conducted a cross-examination of Ms. Weselake in the presence of the panel, on August 19, 2005.

Meanwhile, on July 13, 2005, the Treaty 8 First Nations of British Columbia1 (Treaty 8 First Nations) applied for leave to intervene in Canada’s mandate challenge. The Treaty 8 First Nations filed their written submission on July 13, 2005; Canada filed its submission on September 30, 2005; and the Treaty 8 First Nations filed their reply in October 2005. By letters dated September 13 and 30, 2005, the Red Earth and Shoal Lake Cree Nations, through their counsel, indicated their consent to the application for intervention, subject to certain conditions. The panel issued a ruling on December 15, 2005, denying the Treaty 8 First Nations’ application to intervene: see Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry – Ruling on the Request of the Treaty 8 First Nations of British Columbia to Intervene in the Mandate Challenge, at Appendix B.

On October 4, 2005, the Cree Nations filed their written submission in response to Canada’s Notice of Motion on the mandate challenge; Canada filed its reply on October 21, 2005; and the panel conducted an oral hearing into the question of the ICC’s jurisdiction in Saskatoon on February 9, 2006. The panel ruled on September 26, 2006 that it is within the ICC’s jurisdiction to accept constructively rejected claims for inquiry, and that on the facts of the Red Earth and Shoal Lake First Nations’ claim, the conduct of Canada was tantamount to a rejection of that claim: see Interim Ruling: Red Earth and

1 The Blueberry River First Nations, Doig River First Nation, Fort Nelson First Nation, Halfway River First Nation, Prophet River First Nation, Saulteau First Nations and West Moberly First Nations are described collectively in the Notice of Motion as the “Treaty 8 First Nations of British Columbia.”
Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry – Ruling on Canada’s Objection to Jurisdiction, at Appendix C.

In October 2006, the Attorney General of Canada filed a Notice of Application in the Federal Court of Canada, requesting an Order setting aside the ICC’s September 26, 2006 decision and prohibiting the Commission from continuing the Red Earth and Shoal Lake inquiry: see Federal Court: Notice of Application, October 26, 2006, at Appendix D. However, on December 20, 2006, Canada formally rejected the specific claim of the Red Earth and Shoal Lake Cree Nations and later withdrew its application in the Federal Court.

In response to Canada's objection to the proposed testimony of two non-elder witnesses at a community session scheduled for October 2007, the panel ruled that, in accordance with the ICC’s “Guidelines to Parties,” the non-elder witnesses would be permitted to testify, subject to cross-examination by Canada’s counsel: see letter from Michelle Brass, October 11, 2007, at Appendix E.

The inquiry proceeded on October 16 and 17, 2007, with site visits of the Red Earth and Shoal Lake reserves and a community session at Shoal Lake to hear the testimony of Elders and other witnesses from both Cree Nations. The Red Earth and Shoal Lake Cree Nations filed their written legal submission on March 6, 2008; Canada filed its submission on April 17, 2008, and the First Nations filed their reply on May 1, 2008. The panel conducted an oral hearing to receive the parties’ legal arguments on May 15, 2008 in Saskatoon.

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.” The 1973 Specific Claims Policy is outlined in a 1982 booklet published by the Department of Indian Affairs and Northern Development, and titled Outstanding Business: A Native Claims Policy – Specific Claims. It states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government. 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.

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.

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 Indian Claims Commission Proceedings (ICCP) 171–85 (hereinafter Outstanding Business).

4 Outstanding Business, 20; reprinted in (1994) 1 ICCP 179.

Map 1  
Claim Area Map

PART II

THE FACTS

A group of Saulteaux and Swampy Cree signed Treaty 5 on September 20, 1875. The Treaty covered the central region of Manitoba, extending south as far as the southeastern tip of Lake Winnipeg and north to a point on the Nelson River, northeast of Thompson. Treaty 5 also took in a small area of land in mid-Saskatchewan, and a region of northwestern Ontario, west of Sandy Lake. In 1908, Treaty 5 was extended through an Adhesion to cover all of northern Manitoba except a small triangular piece of land adjacent to Hudson Bay. Treaty 5, like Treaties 1 and 2, provided for reserves to be set apart for the signatories and their followers, to the extent of 160 acres for each family of five, or 32 acres per person. Unlike Treaties 1 and 2, however, Treaty 5 specifically made reference to the setting apart of reserves for “farming lands” and “other reserves” for the benefit of the Indians.

Prior to the signing of Treaty 5 in 1875, the Minister of the Interior, David Laird, advised the Lieutenant Governor of the Northwest Territories, Alexander Morris, that the primary object of concluding a treaty that year was to meet the wishes of certain bands with a view to the early selection of their reserves. If at all possible, consultation with the Indians on reserve selection was to take place immediately.

The Red Earth and Shoal Lake First Nations are located along the Carrot River in Saskatchewan: the Red Earth Indian Reserves (IR) 29 and 29A are located approximately 77 kms east of the Town of Nipawin; Shoal Lake IR 28A is located approximately 20 kms east of the Red Earth reserves. The Pas, Manitoba, lies approximately 120 kms east of Shoal Lake. In the 1800s, the Shoal Lake people, who are Swampy Cree or Muskegoy, had marriage ties with The Pas Band, while the Red Earth people, who are Plains-Woodland Cree, associated with Crees at Fort à la Corne, Saskatchewan. However, by the end of the 1800s, the Red Earth and Shoal Lake people had grown closer socially and through intermarriage, which in turn resulted in fewer ties with Fort à la Corne and The Pas.
Treaty annuity paylists indicate that the Red Earth and Shoal Lake people, who were referred to as the Pas Mountain Indians, were considered to be part of The Pas Band. The first paylist for The Pas Band, in 1876, included 13 families who were identified as the Pas Mountain Indians. For the next two years, the Pas Mountain Indians had a separate paylist but received annuities at The Pas. From 1879 to 1885 they were again listed on The Pas Band paylist, and, except for two years during that period, were not distinguished from other Pas Band members. When the Pas Mountain people complained about having to make the long journey to The Pas to receive their treaty annuities, a separate “Pas Band” paylist was created for them in 1886 and they started to be paid at Shoal Lake. Starting in 1903, Red Earth and Shoal Lake each had its own paylist in which they were called the “Red Earth Band” and the “Shoal Lake Band.” Thus, when The Pas Band signed the 1876 Adhesion to Treaty 5, and in subsequent years when reserves were being set aside for The Pas Band under treaty, Red Earth and Shoal Lake were considered to be part of The Pas Band who lived west of The Pas, along the Carrot River at the Pas Mountain.

The Pas Band, Cumberland Band, and Moose Lake Band signed the Adhesion to Treaty 5 at The Pas on September 7, 1876. It appears that a few representatives of the Pas Mountain group (Red Earth and Shoal Lake) were also present at the treaty discussions. Although The Pas Band was within the Treaty 5 territory, the Red Earth and Shoal Lake groups resided and continue to reside within Treaty 6 territory.

The three Bands each named the Chiefs and Headmen who would represent their people at the treaty discussions. The Crown’s representative, Commissioner Thomas Howard, reported that he encountered some difficulty in the negotiations with the Bands on account of their knowledge of Treaty 6, which had been signed two weeks previously. Treaty 6 provided for 640 acres of reserve land for each family of five, whereas The Pas, Cumberland, and Moose Lake Bands were told that Treaty 5 provided only 160 acres per family of five. When asked why Treaty 5 did not offer similar terms, Howard responded that the land they would be giving up would be useless to the Queen, compared to the Treaty 6 land that the Plains Indians had given up. The Pas and the other Bands then agreed to the terms of Treaty 5, but on condition that Howard give them reserves where they desired. According to Howard, he listened to the various requests for reserve land and made inquiries as to the extent of farming land in each place. With respect to The Pas Band, he reported that very little land fit for cultivation could be found at The Pas and the good land had already been cultivated.
In the Treaty 5 Adhesion document, the Pas Band signatories were described as the Band of Saulteaux and Swampy Cree Indians, known as “The Pas Band,” and residing at the “Pas,” Birch River, the Pas Mountain and File Lake. The Crown agreed to lay off a reserve for the Pas Band on both sides of the Saskatchewan River at The Pas, but because the area fit for cultivation was limited and was insufficient to meet the Band’s requirements, the Adhesion specified that the balance of the reserve was to be situated at Birch River and the Pas Mountain. Chief John Constant of The Pas Band soon requested surveys of reserves at The Pas, the Pas Mountain and Birch River. He also requested the farming implements and livestock promised in the Treaty, but the Indian Agent believed that ploughs and harrows would be useless until the Indians first received the cattle promised to them.

Inspector Ebenezer McColl reported in 1878 that the bands, including The Pas Band, were eager to adopt agriculture, but that many reserves, presumably including the reserve at The Pas, were not well adapted for agriculture, being marshy, rocky, or both. McColl added that settlers were encroaching on their reserves; that the government had supplied them with inferior cattle and supplies; and that they were receiving seed grain and potatoes too late in the season. At the same time, the government was aware that hunting and fishing were in decline.

L. Vankoughnet, Deputy Superintendent of Indian Affairs, reported to Superintendent General of Indian Affairs, Sir John A. Macdonald, in 1878 that the Indians of the newer provinces and territories should be given instruction in farming, or herding and raising cattle, depending on the character of the country inhabited by the different tribes. In August 1879, Vankoughnet instructed that The Pas Band should receive all the implements and cattle owed to them under the Treaty. He also clarified in October 1879 that the department considered it prudent not to survey reserves for the Indians until they expressed a desire to have their reserve set apart, thus indicating that they were ready to settle on the lands and cultivate them. In the same year, Inspector McColl reported that the full complement of cattle had been supplied to the Treaty 5 Indians, and that they had received good-quality twine, ammunition, and farming implements. He also stated that the government had been prompt in exchanging reserves that were unfit for cultivation for more suitable ones.

From the beginning the Indians of The Pas Band were consulted on the location of their reserve land. For one thing, The Pas, Cumberland, and Moose Lake chiefs would only agree to the terms of Treaty 5 if they were permitted to choose the locations of their reserves. Commissioner Howard
confirmed that after they agreed to adhere to Treaty 5, he reviewed with them the reserve sites they had chosen. Red Earth and Shoal Lake Elders also confirmed that their ancestors chose reserves for their proximity to hunting grounds, fishing, and trapping, and because they were the traditional gathering places at a time when their people were living a nomadic lifestyle.

In 1882 plans were made to conduct surveys of all Treaty 5 reserves, including reserve land for The Pas Band. Dominion Land Surveyor (DLS) W. A. Austin was instructed to meet with the Indian Agent, Angus Mackay, prior to commencing his work, to find out if any of the bands wished to change the location of their reserves. Austin was also instructed to consult with band leaders on their preferred point of commencement for the survey. According to Indian Agent Mackay, the population of The Pas Band in 1882, including the groups living at the Pas Mountain and Birch River, was 642; however, he later amended this figure to 669 band members — 448 at The Pas, 70 at Red Earth, 61 at Shoal Lake, and 90 at Birch River. Mackay also reported the same year that Red Earth had a common potato garden and fine herds of cattle and horses, commenting that the land at both Red Earth and Shoal Lake was good enough for farming.

In the 1880s The Pas Band included one or more Councillors from the Pas Mountain group. In addition to Samuel Moore, whom the record shows was a Councillor on The Pas Band council beginning in 1882, Baptiste Young was elected a Councillor representing the Pas Mountain in 1885, and another Councillor from Red Earth was elected in 1889. From the paysheet evidence, it appears that this arrangement was maintained until 1902, except between 1895 and 1899 when the positions were discontinued.

Austin conducted surveys of reserves at The Pas and Birch River in 1882. He reported the following year that he had laid out at The Pas reserve all the good land that the Indians pointed out and that could be found. At the conclusion of the surveys of reserves for The Pas Band at The Pas and Birch River, Austen calculated that it was still owed 3,246.57 acres, owing to the impossibility of setting aside enough good land near The Pas to fulfill the Band’s reserve land entitlement under Treaty 5. Austin’s recommendation was that the acreage owed to The Pas Band be used to create reserves for the two groups of Pas Band members (Red Earth and Shoal Lake) living at the Pas Mountain.

The Pas Band agreed with this recommendation. In January 1884, it petitioned the government to make up its shortfall of land by surveying reserves at the Pas Mountain, referred to as “Oopasquaya Hill.” This area, they argued, had farm land and was fit for farming. Of the 10 petitioners, two
men were from Red Earth and one, a Councillor, was from Shoal Lake. The petitioners were supported in their request by the Reverend J. Settee of The Pas Mission, who argued that the only good farm land he was aware of was located at the Pas Mountain. Although Inspector McColl had no personal knowledge of the Pas Mountain, he checked with others and told Vankoughnet in March that the Pas Mountain was suitable for cultivation. In turn, Vankoughnet wrote to the Deputy Minister to support the petitioners’ request for reserves at the Pas Mountain; he argued that, unlike land near The Pas, which was unsuitable for farming purposes, the land at the Pas Mountain was the reverse, being fertile and thus a desirable location for an Indian reserve.

A letter from Vankoughnet, marked “draft,” to Dominion Land Surveyor Thomas Green in May 1884 contained instructions similar to those given to DLS Austin in 1882, notably, to find out if any bands wanted to change their reserve location, and to consult with the leadership on the starting point of the survey. Vankoughnet’s letter to Green also contained additional directives to the surveyor: he instructed Green to survey The Pas Band's outstanding acreage as indicated by the Chief, or the Headman if the Chief was absent; and he confirmed that the Red Earth and Shoal Lake reserves were occupied by people belonging to The Pas Band.

By June 1884 the department had decided to send Indian Agent J. Reader to inspect the land that The Pas Band wished to have set apart, but first he met with the Band to determine how to allocate the shortfall of 3,246.57 acres. They decided to set apart 1,500 acres at the Pas Mountain, an additional 1,500 acres northwest of the reserve already surveyed at The Pas, and 246.57 acres as timber land along the Carrot River.

Reader travelled by boat down the Carrot River, first stopping at Red Earth. He described the land near the river as swampy but gradually rising toward the southwest to a fine, arable flat of 10 acres of excellent soil. He cautioned that this land could be in danger in seasons of exceptionally high water. Once into the woods, Reader found that the Indians had cultivated small patches of land. He remarked that the soil there was of the finest class, that hay was plentiful in some places, but that some of the arable land would need draining. The next day Reader continued exploring the land and was informed that after five miles, it opened out into a fine tract of land, covered with bushes and fruit trees, along the banks of the Flute River.

After Agent Reader continued down the Carrot River – he reckoned about 20 miles – he came to Shoal Lake, where he reported finding another camp of Indians belonging to The Pas Band. He saw small patches of cultivated ground and observed that the land was more open, well adapted to farming purposes,
and with a potential to yield large crops. He cautioned, however, that some salt springs were in the area and that some of the land would require draining. Reader concluded his report by recommending three reserves—one each at Red Earth and Shoal Lake, where the Indians had already settled, and along Flute River (Flute Creek), where band members living at The Pas who had expressed a desire to settle at the Pas Mountain could relocate. He added that it was the wish of the Indians themselves. When Indian Agent Mackay filed his annual report for 1884 on Indian affairs in Treaty 5, he stated that the land was good along the Carrot, Birch and Saskatchewan Rivers, and very good at Red Earth and Shoal Lake. He praised the Red Earth Indians, in particular, for their stock-raising, gardens, root cellars, and a building where the common implements were stored. He added that the Red Earth people were requesting more farm tools.

In 1884, DLS Green surveyed the 2000-acre Flute Creek reserve southwest of Red Earth. He described the land to be of excellent quality, with one-quarter of the land clear and ready for cultivation. Green noted that an Indian from Red Earth had an excellent patch of potatoes there. Green’s survey plan was titled “For Band at Pas Mission” and his sketch of the Flute Creek reserve bore the title, “Pas Mountain Division.” A hand-written note on the survey plan indicates that it was cancelled by Order in Council in 1895, and no confirmation of the Flute Creek land as an Indian reserve has been found.

When Green surveyed the Shoal Lake reserve the same year, he found a considerable amount of first-class land, as well as two saltwater streams that flowed through the western part of the reserve. Band members boiled the water to obtain salt. Green’s plan of Shoal Lake indicated a total of 2,190 acres, which he described on the plan as containing 1,751 acres arable land, 119 acres sandy beach and 320 acres marsh. Thus, according to the surveyor in 1884, 79% of the land at Shoal Lake was considered arable land.

At Red Earth, Green reported that the majority of the 2,711.64-acre reserve surveyed southwest of Red Earth Lake was of good quality but rather flat for grain; he added that Red Earth Lake was dry that year. The Red Earth survey plan did not describe the types of land but did contain a note that the soil was first class in the northeast part of the reserve. Along the northern boundary, Green also noted the presence of a large tract of wet and useless land, while above the northeast boundary, he wrote the word “swamp.”

Surveyor Green reported in August 1884 that his surveys of Red Earth, Shoal Lake and other locations were complete, remarking that these reserves
consisted of nearly all first-class soil. He noted that because a considerable amount of land had been cleared already, the bands could start cultivating the land immediately. It thus appears from the record that by 1884, land had been set aside as reserves for The Pas Band at The Pas, northwest of The Pas, Birch River, Red Earth, Shoal Lake, and Flute Creek, as well as some timber land.

The winter of 1885 was extremely harsh. According to Indian Agent Reader, the Pas Mountain, Birch River, and The Pas Indians suffered keenly. The next year Reader reported that the Shoal Lake Indians were not doing well at farming, although, as he said, the land was almost all that could be desired to produce excellent crops. Reader began to instruct both the Shoal Lake and the Red Earth Indians in cultivating the land and worked alongside them. The results at Shoal Lake were mixed: the potato crop was good but the wheat and barley crops failed for the most part. In comparison, at Red Earth he found excellent crops of wheat and potatoes. Reader described Red Earth as probably the finest reserve in the agency, which, he added, was fortunate because the low water levels would probably mean no fish the next winter. He concluded that the only way to prevent want amongst the Pas Mountain Indians was to cultivate the rich soil on their reserves.

From the mid-eighties to the early nineties, the Pas Mountain Indians continued to produce potatoes and barley, and raise cattle as well. By 1890 Red Earth was producing one-third of the potatoes grown by the entire Pas Agency of one thousand Indians. Indian Agent Reader continued to commend Red Earth for its advancement toward self-sufficiency and success in farming and cattle-raising, for which, he said, the land was excellent. Reader was more concerned with Shoal Lake, however; although they were advancing in cattle-raising, they had made little progress in cultivating the soil. By 1892 Reader recognized that the Shoal Lake people would prosper chiefly with cattle, for which, he said, the land was excellent. The following year he reported that the Red Earth Indians had supplied Shoal Lake with their excess potatoes, and that the Shoal Lake Indians had started to work more inland where the soil was excellent and a few already had fine gardens.

In 1892, the Pas Mountain group, now referred to as the Pas Mountain Band of Indians, requested that the land set aside for The Pas Band at Flute Creek be exchanged for reserve land along the Carrot River at Red Earth, where the people were actually living. The original Red Earth reserve (IR 29) had been set aside south of the Carrot River, on land where the Indians farmed but did not live. The Pas Mountain Band also requested a timber limit a few miles west of Red Earth along the river. In forwarding the Band’s request to Inspector McColl, Reader recommended the exchange for the reason that
Flute Creek would likely not be used for many years by either the Pas Mountain or The Pas Indians, whereas the desired land at Red Earth was excellent for farming and building, and very rarely flooded for any length of time.

The government approved the exchange of land at Flute Creek for a second Red Earth reserve. Inspector McColl advised Vankoughnet in late 1892 that, compared to Flute Creek, Red Earth was on superior and higher ground, although it was still somewhat low, the banks of the river measuring only five feet above the low-water mark. His recommendation to approve the exchange was also based on his impression that the Red Earth portion of the Pas Mountain Band was most industrious, having a large herd of cattle and a large crop of potatoes every year.

In the mid-1890s the Shoal Lake reserve, IR 28, was re-surveyed with the objective of exchanging a portion of the existing reserve for land the Band wanted, some of which was already under cultivation, adjacent to the eastern end of the reserve. The reconfigured reserve became IR 28A, comprising 2,236 acres. Surveyor Samuel Bray reported in December 1894 that the Shoal Lake Councillor was pleased with the adjustment to the reserve. Bray also stated that the Chief of The Pas Band wanted Shoal Lake's share of the Flute Creek reserve to be set apart as grass land at Shoal Lake; however, Bray confirmed that all of the Pas Band's rights to Flute Creek would be transferred to the new reserve to be created at Red Earth. Bray believed that Shoal Lake did not require any additional grass land at that time, but told the Shoal Lake Councillor that they should request it again if the herd became large. He had also been informed by Indian Agent Reader that the department was interested in moving the Shoal Lake people to Red Earth, although nothing more was heard about that idea.

When Bray reported on the actual surveys of the adjusted Shoal Lake reserve and the new Red Earth reserve in January 1895, he confirmed that he “invariably” held a council with the chief and councillors of each Band prior to starting the survey to decide on the boundaries. He also told the leadership to advise him if anything did not appear to be correct or what they desired.

Agent Reader observed in his reports between 1895 and 1897 that the Red Earth and Shoal Lake groups had the advantage of first-class soil, especially at Red Earth; with clearing and cultivation, they could grow all kinds of grain and vegetables. He added that at Red Earth, they possessed many cattle and excellent gardens and lived chiefly on potatoes and milk, whereas the fishing was limited and the fish inferior. The Red Earth Indians, he said, were at the head of all the bands, and they had received some
assistance to encourage them to cultivate more land. Reader continued to believe that Shoal Lake was a good place for cattle, although the hunting was not very good.

A change in Indian agents did not produce a different view of the two Pas Mountain bands; Indian Agent Joseph Courtney reported in 1899 that Red Earth, located at the north-eastern extremity of the fertile belt, had soil that was all that could be desired. Courtney described the Shoal Lake soil, where cleared, as deep sandy loam, yielding large crops of potatoes, and also mentioned the salt springs that produced good, pure salt. Potatoes and hunting large game, he added, were the means of sustenance, but noted in the report that game was getting scarce and the Indians were starting to realize they must clear more land and give more attention to their cattle.

In 1900, however, the Inspector of Indian Agencies, S.R. Marlatt visited the Shoal Lake and Red Earth Bands. He found the Shoal Lake reserve land to be very low, with much of it covered in spruce; the soil, he said, was spongy, damp, and not well adapted for gardening. The Red Earth reserve land, on the other hand, was much higher, with good soil that was dry and free of stones. He recorded the population of both reserves at 184, two-thirds of whom lived at Red Earth. Marlatt found the Bands to be a fine lot of Indians but observed that their isolation led to few opportunities and often great privation.

Like Marlatt, Indian agents in the early 1900s continued to speak well of the quality of the land at Red Earth. Agent Courtney commented that although most of the land was still covered with timber, some would make good farming land if cleared. The remainder he described as swamp and hay land. In 1906, Courtney observed that most of Red Earth’s 4,769 acres was well adapted for mixed farming, and that the Indians had large gardens and were growing excellent crops of potatoes. Shoal Lake continued to be described as a reserve with a lot of pasture and hay land, ideal for cattle ranching, although the people there were also growing large crops of potatoes.

In 1908 the Shoal Lake Band requested that a quarter-section of land north of the Carrot River be added to the reserve, pointing out that it was impossible to get sufficient hay on the reserve in a year of high water. A similar request was made by the Red Earth Band, for land on which they could obtain more hay and timber. Surveyor Bray called the requests very reasonable and recommended their approval in spite of the fact that the Bands were not entitled to more land under the Treaty. He also reminded the Deputy Minister that Treaty 5 had provided only 160 acres per family. These requests were quickly approved by the government. In May 1908 Indian Agent Fred Fischer was sent to mark off the additional land at Shoal Lake but was prevented from
doing so because the Carrot River had flooded its banks. Nevertheless, he reported that the Indians were pleased to learn that the government had agreed to grant their request. In fact, the government had agreed to set aside a half-section, or 320 acres, but later approved one section, or 640 acres. In the end, 651 acres was set aside.

Meanwhile, at Red Earth, Agent Fischer reported that the people were also pleased the government had approved additional lands for them. They asked for two separate tracts of 160 acres each, one tract containing hay land at the western boundary of the reserve and one containing timber at the eastern end. Fischer also recommended that the entire Red Earth reserve be reconfigured to incorporate the changes requested by the Band. The Band agreed in August 1910, in a “Letter of Surrender for Exchange,” that they would accept the new, amended boundaries of IR 29, known as the Red Earth reserve, in exchange for a surrender of the old IR 29. The second reserve on the Carrot River, IR 29A, was to be called the Carrot River reserve.

Dominion Land Surveyor H.B. Proudfoot completed the survey of additional reserve land at Shoal Lake in the fall of 1911, although not without some difficulty. He noted that he consulted with “Albert Moore Chief” and “Councillor Francis Bear,” regarding the lands to be surveyed. Proudfoot also re-surveyed Red Earth IR 29 at the same time, noting that he conferred with “Chief Jeremiah” regarding the location of the desired land. The reconfigured Red Earth IR 29 contained 3,595.95 acres, representing an increase of 884.31 acres, which was more than the Band had requested. In July 1912, the expanded Red Earth reserve, IR 29, was approved by Order in Council.

Despite the survey at Shoal Lake having been completed, J.D. McLean, Secretary of the Department of Indian Affairs, was asked to justify to the Department of the Interior the decision to add more reserve land at Shoal Lake. McLean responded in August 1913: with a population of 89, Shoal Lake was entitled under treaty to receive 2,848 acres of reserve land; the original reserve comprised 2,237 acres; and the addition of 651 acres would give Shoal Lake 2,888 acres. This was 40 acres more than its entitlement under treaty. In McLean’s opinion, compared to the much larger reserves provided for bands under some other treaties, Shoal Lake’s request was very reasonable. In 1913, the addition to Shoal Lake IR 28A was approved by Order in Council.

As a result of serious flooding in the spring of 1913, the Red Earth Band asked Inspector of Indian Agencies S.J. Jackson if the Band could move to Flute Creek. The department replied to Jackson that Flute Creek had already
been exchanged for the Carrot River reserve at the Band’s request, because they considered the Flute Creek reserve to be too low and wet.

In December 1914 the Red Earth Band asked for an additional 320 acres of hay land, complaining that there was little hay on the reserve and none in years of high water. The Indian agent in charge, W.R. Taylor, supported this request and urged the department to act quickly in order to protect the 320 acres from settlers who were taking up land along the Carrot River. Secretary McLean, however, refused the request for additional land because the Band’s treaty land entitlement had already been surpassed by almost 650 acres.

McLean inquired whether the Red Earth Band would consider instead exchanging a portion of its reserve land for other land more suitable for their needs. The record contains no response to the suggestion of a land exchange.

In 1914, the Shoal Lake Band asked for an addition to IR 28A that would encompass a burial ground. Concerned that the 200-acre plot of land would soon be appropriated by the Pasquia Hills Forest Reserve, the government passed an Order in Council in June 1914 confirming the addition of 200 acres to IR 28A, for the purpose of the Band’s burial grounds.

After a major flood hit Red Earth in May 1921, resulting in the death of most of the cattle and horses, the department began a search of possible areas where the Red Earth people could relocate. McLean commented that this flood was very unusual, as the Red Earth people had been living there for many years without such an experience. In late June, however, Indian Agent J.W. Waddy reported that after the flood had passed, the band members decided against relocating. He was told by the Chief that in future the Band would move its cattle to higher ground in the spring.

When, in the same year, the Red Earth Band asked for an additional 640 acres of hay land to be added to its reserve, Waddy suggested instead an exchange of land, but the Band was not interested in a trade. Waddy recognized, however, that Red Earth had no hay land on its reserve and recommended to the department that a half-mile strip of hay land along the Carrot River be procured for the Band. The department confirmed in 1921 that it was open to an exchange of land, but that it would not consent to adding more reserve land.

Five years later, in 1926, the Shoal Lake Band requested a surrender of 640 acres of a shallow lake and swamp on the reserve, in exchange for an equal amount of land containing timber and hay, northeast of IR 28A. The request was approved in the same year and a surrender for exchange was taken in June 1927. In subsequent years, minor adjustments were made to the
boundaries of the Shoal Lake Band’s reserve by agreement of the Band and the Crown.

In 1946, the Red Earth and Shoal Lake Cree Nations sent petitions to the Minister responsible for Indian Affairs, requesting additional reserve land suitable for farming and producing hay. The petitions focused on the need to have sufficient land for farming and to provide fodder for livestock. They also acknowledged that in that part of the country, livestock was an important part of farming operations. The petitions stated that when the reserves were established, they did not provide for cultivation of the land, but the people were content being in a location where they could continue their traditional livelihood of hunting and trapping. Furthermore, the petitions acknowledged that, with the advent of settlers, the Bands would have to look to the land for support, as the wooded lands would soon be cleared. The Red Earth Band’s petition stated that with the increase in population at Red Earth, it would need an additional two townships of land for farming, and a further township for hay lands. This request, if granted, would have added over 69,000 acres to Red Earth’s reserve. The petition explained that the request for a large amount of land was based on the fact that almost every section in that area contained considerable wasteland. The Shoal Lake Band’s petition was similar in content. The Band requested an additional one and one-half townships of land, or about 34,500 acres, adjacent to its reserves, as well as more farm implements and livestock. This, the Band stated, would provide for a reasonable number of livestock and contain some land suitable for cultivation.

Indian Agent Samuel Lovell was charged with investigating both these petitions, but the record only contains a report on Shoal Lake. Lovell reported in November 1946 that he visited and discussed with the Band the problems inherent in living 75 miles from the nearest market, the inability to get in or out of the reserve in the spring and fall, and the resulting difficulty of competing with other growers. Lovell also observed that the Shoal Lake Band was producing most of its own vegetables but was having to buy oats for the horses. He encouraged them to work toward self-sufficiency and offered to help them break and seed the land with oats the following spring. Lovell also reported that he would give them all the assistance possible. There is no record of any further action by the department in response to the petitions.
The Indian Claims Commission is inquiring into the following four issues as agreed to by the parties:

1. Did Canada have a lawful obligation to provide “farming lands” to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5?

2. If so, what was that obligation?

3. Was that obligation met?

4. Does Canada have an outstanding obligation to either or both Cree Nations in respect of farming lands?
PART IV

ANALYSIS

ISSUE 1: TREATY 5 PROMISE TO PROVIDE FARMING LANDS

1 Did Canada have a lawful obligation to provide “farming lands” to the Red Earth Cree Nation and Shoal Lake Cree Nation pursuant to the terms of Treaty 5?

Panel's Reasons

Treaty 5 contains an undertaking by the Crown 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, ...” The First Nations have asked the panel to interpret the meaning of “farming lands” and determine whether this undertaking was met.

Issue 1, as stated, asks only whether the Crown had a lawful obligation pursuant to Treaty 5 to provide farming lands to the Red Earth and Shoal Lake Cree Nations. The simple answer is, yes, the wording of the Treaty is clear that the Crown had a lawful obligation to provide “reserves for farming lands.” On that question, both parties can agree. The Crown, however, also promised that bands would receive “other reserves” in addition to “farming lands.” The panel notes that the Treaty does not explain either of these terms, nor does it provide any guidance for determining the proportion of farming land necessary to meet the Crown’s treaty obligation, and the point at which that obligation is fulfilled.

Having agreed with the parties that the Crown was obliged to provide farming lands when setting aside reserves under Treaty 5, the panel now turns to Issue 2, which asks us to determine the meaning of “farming lands,” given the wording of the Treaty and the context of the times.

6 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Sicampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76).
If Canada had a lawful obligation to provide “farming lands,” what was that obligation?

First Nations’ Position
It is the position of the Red Earth and Shoal Lake Cree Nations that Canada had and continues to have an outstanding lawful obligation to provide “farming lands” to both Bands pursuant to the terms of Treaty 5. The First Nations argue that, in accordance with the principles of treaty interpretation enunciated in the 1999 Supreme Court of Canada judgement, R. v. Marshall, Canada was obligated to provide reserves to the Bands that were capable of being farmed. In particular, Canada had to provide land suitable for farming to enable the Bands to make the transition from a traditional lifestyle to one of farming. According to the Elders’ evidence, reserves were created in areas which the Bands already occupied prior to the Treaty and which met the Bands’ requirements at the time, essentially to live by hunting, fishing, and other traditional ways.

The First Nations argue that reserves for farming purposes were not created for them in the early 1880s precisely because they were not yet ready to take up farming, and the petitions from 1946 confirm that fact. In other words, Canada undertook at the time of treaty-making to provide farm land only when the Indian people were ready to be farmers. Indian leaders also knew that future generations would have to turn to farming, which is why they agreed to a provision for “reserves for farming” in the Treaty. Treaty 5 is not ambiguous, argue the First Nations. If the parties had intended that reserve land would be selected without any regard for opportunities for farming, the Treaty would not have made a reference to “farming lands.” Having received only 160 acres of reserve land per family of five pursuant to Treaty 5, none of which was farming lands, the First Nations are now entitled to reserves made up of 100% farming land, 100% of which is cultivatable land.

---

8 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 450.
9 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 452.
10 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 453.
11 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 529.
12 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 542.
Canada’s Position
Canada agrees that it had a lawful obligation to provide “reserves for farming lands;” however, “other reserves” must be factored into the equation. The provision of “other reserves,” states Canada, informs our understanding that only a proportion of a band’s reserve entitlement was intended to be “farming lands.” Furthermore, within the category of “farming lands,” argues Canada, the Treaty contemplates that some land would be suitable for cultivation while other land, such as land for hay and pastures, would support other farming uses. Canada contends that the First Nations’ interpretation of “reserves for farming lands” as meaning reserves of exclusively top-quality, arable land is not supported by the wording of Treaty 5 or the intention of the parties. Canada suggests that the quantity and quality of “reserves for farming lands” set aside for bands within the Treaty 5 territory likely varied from case to case. The common intention of the parties at the time of the Treaty, states Canada, was not to provide lands solely for cultivation; rather, in consultation with the signatory bands, the Crown was required to provide reserves that were capable of supporting the diverse activities contemplated by the parties at the time of signing Treaty 5 and the 1876 Adhesion.

Canada and the First Nations both agree that the Marshall decision provides the authoritative guide to treaty interpretation. The parties also suggest that the panel employ the two-step process for treaty interpretation enunciated in Marshall: first, the words in the Treaty must be examined to determine their facial meaning; and second, the meaning or different meanings which have arisen from the examination of the wording must be considered against the Treaty’s historical and cultural backdrop.

Background
The panel considers the following facts to be especially important in the interpretation of the reserve clause in Treaty 5.

Red Earth and Shoal Lake Indians’ Membership in The Pas Band
The first recorded evidence that the Red Earth and Shoal Lake people living at the Pas Mountain were members of The Pas Band appears in the text of the 1876 Adhesion to Treaty 5, which identifies The Pas Band as a Band of...
Saulteaux and Swampy Cree Indians residing at The Pas, Birch River, the Pas Mountain, and File Lake. Furthermore, The Pas Band’s first paylist, dated September 7, 1876, the same day as the signing of the Adhesion, includes 13 families who were identified as the Pas Mountain Indians. It also appears that at least a few of the individuals from the Pas Mountain group named in the paylist were present at The Pas for the treaty Adhesion discussions. Had the Pas Mountain people not been part of The Pas Band during that period, it is unlikely that their representatives at the treaty talks would have permitted The Pas Band to be described in the Adhesion as a Band that included Indians residing at the Pas Mountain.

Beginning in 1882, the Pas Mountain group was represented in The Pas Band council by one Councillor from Shoal Lake; throughout the 1880s other Councillors representing Shoal Lake, Red Earth, or both were elected to the band council and participated in at least one election for a new Chief for The Pas Band. It was only in 1903 that Red Earth and Shoal Lake were each given their own paylist and referred to as the Red Earth Band and the Shoal Lake Band. The record does not clarify when Red Earth and Shoal Lake were formally recognized as separate from The Pas Band and separate from each other; nevertheless, starting in 1913 Chiefs and Councillors of the Red Earth and Shoal Lake Bands were identified as such on the treaty annuity paylists.

The preponderance of the available evidence suggests that during the period in issue the Red Earth and Shoal Lake people living at the Pas Mountain were, indeed, members of The Pas Band and considered themselves to be part of the Band. Over time they lost that close connection to The Pas Band and by 1913 at the latest, were treated as bands in their own right.

20 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p.10 (ICC Exhibit 1a, p. 82).
21 Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).
22 Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).
24 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1885, Canada, Annual Report of the Department of Indian Affairs for the year Ended 31st December 1885, 64 (ICC Exhibit 1a, p. 449).
25 Joseph Courtney, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1903, LAC, RG 10, vol. 8139, file 573/28-5, vol. 1 (ICC Exhibit 1a, p. 751).
The Pas Band’s Condition for Signing the 1876 Adhesion to Treaty 5

Commissioner Howard reported to Lieutenant Governor Morris that when he met in early September 1876 at The Pas with the three bands interested in adhering to Treaty 5 – The Pas Band, Cumberland Band, and Moose Lake Band – the Chiefs were aware that Treaty 6, which had been concluded only two weeks previously, provided 640 acres of reserve land per family of five, compared to the 160 acres promised by Treaty 5. Consequently, they questioned why the Crown was reluctant to give them the same terms. According to Howard, this problem “acted most prejudicially ... against the successful carrying out of [his] mission; ...”27 Howard explained to them that the land they would be giving up would be useless to the Queen, whereas the land ceded by the Plains Indians in Treaty 6 territory would be valuable for settlement.28 According to Howard, the Chiefs then agreed that if he gave them reserves “where they desired,”29 they would accept the terms of Treaty 5. Howard added that after listening to their demands for reserves, they arrived at a satisfactory understanding the same day. The following afternoon, September 7, the Adhesion was read to the Indians and signed.

The evidence of the negotiations surrounding the signing of the treaty Adhesion, while limited, suggests that the Chiefs of the three Bands, including Chief Constant of The Pas Band, made it a pre-condition to signing the Adhesion that the Bands have the right to determine the location of their reserves.

Scope and Wording of Treaty 5 and the 1876 Adhesion

On September 7, 1876, the Chiefs and Councillors of The Pas Band, Cumberland Band, and Moose Lake Band signed an Adhesion to Treaty 5 that incorporated the terms of Treaty 5.

The Indian signatories to Treaty 5 in 1875 ceded their rights to a vast territory of land, most of which was in central and north-central Manitoba. In 1908, Treaty 5 was extended further by means of an Adhesion to cover all of northern Manitoba, except for a piece of land adjacent to Hudson Bay. The


terms of Treaty 5 in 1875, its Adhesions in 1876, and the extension of Treaty 5 in 1908, provided that the signatory bands would receive reserves to the extent of 160 acres for each family of five or in that proportion for larger or smaller families. The Treaty also promised that the bands would maintain the right to hunt and fish throughout the ceded land, subject to government regulations and lands taken up for settlement or other purposes.

The treaty wording to be interpreted in this inquiry is contained in the statement:

Her Majesty the Queen hereby agrees and undertakes 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, ...30

In order to interpret the nature and content of the Crown’s undertaking to provide reserves, it is helpful to understand this statement in relation to other wording in the Treaty and the 1876 Adhesion.

In addition to the promise of reserve lands and annuity payments, the Crown promised $500 yearly for the purchase of ammunition and twine for the said Indians. The Crown and the Indian parties also agreed to the following terms:

the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the lands, that is to say: Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, ...31

After enumerating various tools to be given, such as axes, saws, and augers, the list continues:

also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows – all the aforesaid articles to be given once for all for

30 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76). Emphasis added.

31 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).
the encouragement of the practice of agriculture among the Indians.32

The terms of Treaty 5 were adhered to by The Pas, Cumberland, and Moose Lake Bands the following year, on September 7, 1876. The Pas Band is described in the Adhesion as,

the Band of Saulteaux and Swampy Cree Indians, residing at the “Pas,” on the Saskatchewan River, Birch River, the Pas Mountain and File Lake, and known as “The Pas Band”;33

The Adhesion also contained explicit directions with respect to the location of the reserves to be surveyed:

For the “Pas” Band, a reserve on both sides of the Saskatchewan River at the “Pas”; but as the area of land fit for cultivation in that vicinity is very limited, and insufficient to allow of a reserve being laid off to meet the requirements of the Band, that the balance of such reserve shall be at “Birch River” and the “Pas Mountain”;34

The inclusion of this wording in the document suggests that prior to The Pas Band’s agreement to enter into Treaty 5, consultations took place between the Crown’s representatives and the Chief and Councillors of The Pas Band. It is apparent that Commissioner Howard agreed with the Band beforehand that one reserve would be set aside at The Pas and, recognizing the scarcity of cultivatable land at that location, agreed to their request to set apart the balance of their reserve land at Birch River and the Pas Mountain.

In his reporting letter of October 10, 1876, Commissioner Howard described the various reserves agreed to by the bands and noted that he made inquiries as to the extent of farming land in each locality mentioned in the adhesion text.35 With respect to The Pas Band, he explained that at The Pas, the available land – consisting of a vegetable garden and one field attached to the Mission, plus a few patches of potatoes – was already cultivated. Howard

32 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).
33 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 10 (ICC Exhibit 1a, p. 82).
34 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 10 (ICC Exhibit 1a, p. 82).
also reported that on both banks of the Saskatchewan River at The Pas and south-east as far as Che-ma-wa-win, less than 150 acres of land was fit for cultivation, as inland there was marsh both north and south of the river.

The historical evidence and the wording of Treaty 5 and the 1876 Adhesion lead to a number of factual findings. The Red Earth and Shoal Lake people, known as the Pas Mountain group, were members of The Pas Band at the time of its adhesion to Treaty 5. The Chief of The Pas Band made it a precondition to signing the Adhesion that the Band have the right to receive reserve land where they chose. Howard agreed to this demand but was also cognizant of the Crown’s obligation to include farming lands as a component of the Band’s reserve. Although Howard’s report and the Adhesion itself do not go into further detail, the agreement to set apart a reserve for The Pas Band at three different localities – The Pas, Birch River and the Pas Mountain – suggests that Howard canvassed The Pas Band leaders regarding the extent of farming land at each place, and concluded based on the information he received from the leadership, that the three areas taken together would provide sufficient land fit for cultivation for the Band. Both the text of the Treaty 5 Adhesion and Howard’s report confirm that he consulted with The Pas Band throughout the treaty negotiations.

The Law
The principles of treaty interpretation, articulated in a number of Supreme Court of Canada judgements in the 1980s and 1990s, were confirmed and summarized by the Supreme Court in its 1999 judgement, R. v. Marshall.36 This case concerned the question of whether the appellant, Donald Marshall, a Mi’kmaq Indian, possessed a treaty right to catch and sell fish that exempted him from compliance with federal fisheries’ legislation. The Marshall decision addressed both the principles of treaty interpretation and the process to be followed in establishing the meaning to be ascribed to disputed wording in a treaty.

The principles of treaty interpretation are set out by Madame Justice McLachlin in the minority decision in Marshall:

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 be 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: ...

McLachlin J then outlines a two-step process for treaty interpretation which reflects these principles:

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: ...

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. 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.

The majority decision in Marshall also affirms the rule of evidence that should be applied in treaty interpretation cases: “in the context of a treaty document that purports to contain all of the terms, ... extrinsic evidence of the historical and cultural context of a treaty may be received even absent

any ambiguity on the face of the treaty.”

Panel’s Reasons
For the reasons set out below, the panel finds that the obligation under Treaty 5 to provide reserve land of a particular quality would be met, at a minimum, if the reserve set aside for a signatory band contained cultivatable land, land suitable for other farming purposes, and land suitable for non-farming uses. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis. Furthermore, we find that the common intention of the parties at the time of the Treaty was to enable bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture.

Step One: Examination of the Words
Treaty 5 contains a reserve clause promising that the Crown would “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, ...” In order to apply the principle stated in Marshall — that these words must be given the sense that they would naturally have held for the parties at the time — it is necessary to interpret the term “farming lands” as it is used in the text of the Treaty. The text does not define the proportion of the total reserve allocation that had to be “farming lands.”

“Farming Lands”
On the face of it, the promise of “farming lands” to each signatory band cannot have meant, in our view, a requirement that the total reserve entitlement consist of land for farming purposes. This is so because the words “and other reserves” follow in the same sentence, to wit: “farming lands; due respect being had to lands at present cultivated by the said Indians, and other reserves.” Based on this clause alone, the apparent promise was to provide a totality of reserve land comprising land suitable for a variety of purposes, both farming and other uses. The First Nations’ argument that 100% of the reserve entitlement under Treaty 5 had to be “farming lands” ignores the

40 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Scampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76).
41 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Scampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 4 (ICC Exhibit 1a, p. 76). Emphasis added.
reality that some reserve land would be needed for other priorities of the band, such as hunting and trapping on the reserve. Although the Treaty does not define the proportion of the total reserve that had to consist of “farming lands,” we find it reasonable to conclude that the percentage mix of land types would necessarily depend on a number of factors, including the band’s traditional location within the Treaty 5 territory, its priorities, and the results of consultations held with the band regarding its preferred site or sites for reserve land. The one requirement was that some quantity of land within the total reserve entitlement had to be “farming lands.”

“Farming”
The examination of the term “farming lands” does not end here, however. The next question in understanding the facial meaning of the term is to ask what Treaty 5 meant by “farming” when it promised “farming lands.” Because there is no explanation in the treaty document of the word “farming,” the parties devote much of their argument to the proper interpretation of that word. The First Nations argue that the word “farming,” within the category of “farming lands,” means that 100% of the farming land had to be land that could be cultivated to grow crops. Canada takes the position that the word “farming” supports multiple types of land for agricultural purposes, including land that could be cultivated for crops, land for hay production, land for rearing and pasturing livestock, and other types of land for farm uses.

In order to apply a facial meaning to the word “farming” in the absence of any guidance in the treaty text, we must pay attention to certain other promises in the Treaty. Most important is the clause promising articles to the bands of Indians who were “cultivating the soil” at that time or who would “commence to cultivate the land.” The list, reproduced above, includes two hoes and a scythe for every family; one plough for every ten families; five harrows for every twenty families; and one yoke of oxen for each band. Each band would also receive enough wheat, barley, potatoes and oats to plant the land actually broken up for cultivation. Clearly, these items were intended for “cultivating the soil.”

What is noteworthy, however, is the inclusion of a promise to give one bull and four cows to each band. It is obvious that the parties to the Treaty also contemplated the raising of cattle. Moreover, the list concludes with a

---

44 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).
statement that all of these articles (implements for crop production and animals) were to be given once only, to encourage the practice of “agriculture” among the Indians.45 The meaning of the word “agriculture” is undisputed, in our opinion: it is the practice of cultivating the soil and rearing animals.46 We have no reason to believe that the core meaning of “agriculture” today is significantly different from the parties’ understanding of the word in 1875.

It would appear, therefore, that the parties to Treaty 5 in 1875 and the 1876 Adhesion understood “farming” to embrace more than just crop production. Although the First Nations make a valid point that one can pasture animals or grow hay on lands suitable for cultivation but one cannot grow crops on land that is only good for pasture or hay,47 the treaty text takes a more expansive view of “farming,” one that contemplates stock-raising and possibly other animal husbandry in addition to crop production. The enumeration of tools intended for cultivation and animals for stock-raising, followed by a general statement that all these articles were to be given to encourage the practice of “agriculture,” suggests strongly that the word “farming” in the Treaty meant that some land within the category of “farming lands” had to be capable of cultivation but not necessarily all or even a majority of the land.

Step Two: Examination of the Historical and Cultural Backdrop

Pursuant to the Marshall decision, the second step in treaty interpretation is to examine the historical and cultural context to determine which of the meanings arising from the wording of the Treaty comes closest to reflecting the parties’ common intention.

There is little historical data in the record to inform the panel of the policies of the Crown in the 1870s and 1880s toward the practice of agriculture among Indian bands in western Canada. Canada refers us to Alexander Morris’s text on the treaties of Canada, stating:

The Crown saw treaties as enabling the areas covered by treaty to be gradually settled and developed in a peaceful, orderly fashion. Reserves would also provide an economic base through which agriculture could teach the Indians to “adopt the

45 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swanpoy Cree Tribes of Indians at Beven’s River and Norray House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationery, 1957) p. 6 (ICC Exhibit 1a, p. 78).
habits of the whites, to till land and raise food." However, the choice of whether or not to adopt these ways was left to the Indians.48

As we have discussed, the text of Treaty 5 promised certain implements to bands who were already cultivating land or who would commence to cultivate the land, as well as some breeding animals to each band, all intended to encourage the practice of agriculture. At the same time, Treaty 5 recognized the right of the Indians to continue hunting and fishing throughout the surrendered tract, and further recognized the need to supply them with ammunition and twine for nets for those purposes. Although only three numbered treaties – Treaties 3, 5, and 6 – specifically refer to the provision of reserves for “farming lands” and “other reserves,” most numbered treaties promised implements to encourage the practice of agriculture, as well as ammunition and the right to continue hunting in the surrendered tract of land.

The First Nations contend that the Crown was required to provide them with lands suitable for farming “to enable them to make the transition from a traditional lifestyle to a farming lifestyle.”49 They argue that the parties to Treaty 5 intended “that each family should have its own farm, utilizing a collective warehouse of tools and a collective breeding stock of farm animals.”50 Through the provision of farming implements, tools, and animals, the Crown was assisting the First Nation families to become self-sufficient.51

Canada argues that the Treaty’s broad parameters describing the nature of reserve lands, which were to be suitable for both agricultural and traditional activities, plus the provision of ammunition and twine to assist bands to maintain their traditional activities, show that “the common intention of both parties was that First Nations would continue to use their reserves for a multitude of purposes.”52

In spite of the dearth of historical information on the Crown’s overall objectives, it is clear that the settlement of Indians on reserves was seen as a gradual process. Bands could decide whether or not to sign a treaty or adhesion. Moreover, it appears that the Crown’s approach was to consult the

49 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 450.
50 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 449.
51 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 448.
52 Written Submission on Behalf of the Government of Canada, April 17, 2008, para. 244.
Chiefs at the treaty talks to identify the desired location of their reserves, and to ask them afterward if they had changed their mind on the location. The Pas Band, for example, was consulted both before the Adhesion was signed and later, when they were asked if they had changed their mind on their desired location. When it came time to survey their reserve lands, the Band was again consulted on the placement of the reserve and asked to confirm the starting point of the survey.

It appears that the gradual process of settling the Treaty 5 Indians on reserves involved assisting them to adapt to subsistence farming. As the Anderson and Cerkowniak study points out, "farming was a different activity a century or more ago, with an emphasis on subsistence, raising crops for use on the farm, livestock kept for similar purposes, and so on."\(^{55}\) If bands were successful in producing enough crops or livestock, or both, to meet their own needs, the government’s objective of settlement and self-sufficiency would be met. The promise in the treaty text of certain farming equipment, animals, and seed crops did not contemplate, in our view, the growing of crops or the rearing of cattle on a scale beyond that of subsistence farming.

In respect of the needs and priorities of the Indian bands who signed Treaty 5 in 1875 or the Adhesions in 1876, one research report in the record explains that when the Treaty was signed, it was primarily the result of the insistence of the bands in that region that their aboriginal rights be recognized by the Canadian government, which had recently acquired title to their lands.\(^{54}\) The authors also state that in general:

Native people in western Canada were only too aware of the rapid changes facing their lands in the last quarter of the nineteenth century. Although they valued their harvesting life, they were not blind to the necessity for change in the face of non-Native settlement and economic restructuring. They believed the treaties would provide the means to survive the anticipated dislocations.\(^{55}\)

This historical report suggests that Canada and the First Nations had different but compatible reasons for entering into Treaty 5 in 1875.

We also note what must have been obvious to the parties negotiating Treaty 5 in 1875: the signatory bands and the Crown officials who travelled to Beren’s River and Norway House\(^{50}\) to negotiate the Treaty would have been
keenly aware that much of the land selected for reserves would be of mixed quality and best suited for diverse uses.

The extant evidence of the historical context leads the panel to a finding that it was the common intention of the Bands and the Crown at the time of the Treaty to select reserve lands that would support both traditional and farming uses; depending on the location and other factors, farming lands could include a smaller or larger proportion of cultivatable land.

This conclusion is consistent with the findings of the ICC panel in *James Smith Cree Nation: Treaty Land Entitlement Inquiry*. Although the main issue in that inquiry was treaty land entitlement, which is not the case here, the panel in *James Smith* interpreted the identical reserve clause, namely, the promise to provide “farming lands” and “other reserves” within the context of Treaty 6. Although the panel in *James Smith* was not required to define the content of “farming lands” per se, it concluded that the intention of the reserve clause was that a reserve would be set aside both for “a) farming land; and b) other purposes (without limitation).” In addition, it was intended that the band would be consulted on the location of the reserve land, and that its choice of location would be determined by the nature and quality of the land being selected. The panel also found that the James Smith Band chose land that would support multiple uses; some of this land “supported an agricultural use,” while other portions “supported band members’ desire to continue to hunt and fish.” Consequently, the Crown fulfilled the Treaty 6 requirement to provide reserve land of a specific quality. While acknowledging the significant differences between the history and the territories encompassed by Treaties 5 and 6, we find that the *James Smith* report’s examination of the clause promising “farming lands” and “other reserves” to be analogous to the issue before us and consistent with our findings.

---

56 Treaty 5 was concluded at Beren’s River on September 20, and at Norway House on September 24, 1875.
Conclusion

Having examined the facial meaning of the reserve clause in issue and the historical context in which Treaty 5 was signed, the panel finds that the First Nations have adopted an interpretation of “farming lands” that is unduly restrictive and not contemplated by the treaty text. The reserves to be set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The treaty document itself contemplates that reserves would contain some “farming lands” and some “other reserves.” Within the category of “farming lands,” the Treaty demands that at least a percentage of that land be cultivatable land; but the remainder of the land selected could be suitable only for cattle-raising or other farming uses.

Thus, according to the treaty text, the treaty obligation would be met, at a minimum, if reserves were set aside that contained cultivatable land, land suitable for other farming purposes, and land suitable for non-farming uses. The appropriate mix of land for each signatory band would be determined on a case-by-case basis.

In addition to our findings on the facial meaning of “farming lands” and “other reserves” in the treaty text, we conclude that it was the common intention of the parties to Treaty 5 at the time of treaty to provide reserves for multiple uses. The Pas Band and the other two bands who signed the 1876 Adhesion would only enter into Treaty 5 on condition that they could choose their own reserve lands. Also, there is no doubt in our minds that The Pas Band, for one, wanted reserve land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that their band members were already pursuing in various locations, including Red Earth and Shoal Lake. As the Marshall decision states, “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: ...”60 The common goal at the time of the Treaty was to enable the signatory bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture.

ISSUE 3: FULFILLING THE TREATY 5 OBLIGATION TO PROVIDE FARMING LANDS

3 Was that obligation met?

The panel has determined that Canada had an obligation under Treaty 5 to provide farming lands to the First Nations, and that cultivatable lands were to be one part of a treaty land entitlement which also included other types of farming lands as well as lands intended for non-farming uses, the proper proportions of which were determinable on a case-by-case basis. It remains now to determine whether that obligation was met with regard to the Red Earth and Shoal Lake Cree Nations.

First Nations’ Position

The First Nations have argued that the Crown has not met this obligation, and that the Red Earth and Shoal Lake First Nations were unable to take up farming because their reserves did not contain any land that was fit for farming. Instead the lands they were given were characterized by poor soil quality, inadequate drainage and periodic flooding, and were unsuited to any agricultural pursuits beyond gardening, which they assert is not synonymous with farming. It is their position that, in essence, the lands they were given were marshlands and, as such, cannot be counted as land for treaty land entitlement purposes. The First Nations further assert that these reserves were never chosen by them, nor were they consulted on the location of those lands. They argue that their reserves do not contain a mix of farming lands and other lands, as none of their reserve lands are capable of sustaining farming.

Canada’s Position

In response, Canada argues that it met its obligation to provide “reserves for farming lands” and “other reserves” as provided by Treaty 5 and requested by the bands at the time treaty was taken and afterward. While there is some imprecision in the Treaty with regard to the definition and distribution of “farming lands” and “other reserves,” this is intentional flexibility which permitted bands to influence the quality and distribution of lands set aside.

---

61 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 457.
62 Reply Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, May 1, 2008, para. 133.
63 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 455.
64 Written Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008, para. 27.
under Treaty. The lands provided to Red Earth and Shoal Lake were of mixed quality, and the evidence shows that the people cultivated and used those lands for stock-raising before and after the reserves were set aside, as well as for the traditional activities of hunting, fishing and trapping. The lands obtained by the Red Earth and Shoal Lake people pursuant to the Treaty 5 Adhesion, were an appropriate mix of lands. They agreed to the land being set aside by the Crown and intended that it would support a variety of activities relevant to their way of life. There is no evidence that during this period they were dissatisfied with the general quality of reserve land set aside for the practice of agriculture or the specific quantity of arable land included in the reserves. Thus, the obligation under the Treaty was met.

Background

Role of Red Earth and Shoal Lake People in Reserve Creation

When The Pas Band and two other Bands agreed in 1876 to accept the terms of Treaty 5, it was on the condition that the Crown “would agree to give them Reserves where they desired ...”. The Crown agreed to this stipulation. Treaty 5 made specific reference to the setting aside of reserves for “farming lands” and “other reserves” for the benefit of the Indians, and from the outset, The Pas Band was consulted on the location of those lands. Indian Commissioner Thomas Howard met with the Band in regard to the sites of their reserves at the time of the 1876 Adhesion, and reviewed with them the reserves they had chosen. As a result, Howard expressed concern that at The Pas there was very little land left among that requested by The Pas Band that was fit for cultivation and as yet uncultivated. In the end, it was agreed that the Band would make up the balance of its reserve land entitlement at the Pas Mountain (Red Earth and Shoal Lake) and Birch River. As the Adhesion and other documents reveal, the Pas Mountain people were considered to be members of The Pas Band during this period. The panel can find no evidence that the Red Earth and Shoal Lake groups disputed the decision to create reserves where they

70 Hon. Thos. Howard, Commissioner, to Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876, xviii (ICC Exhibit 1a, p.133).
71 Hon. Thos. Howard, Commissioner, to Alex. Morris, Lieutenant Governor, October 10, 1876, in Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1876, xviii (ICC Exhibit 1a, p.133).
72 Canada, Treaty No.5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p.82).
were living; on the contrary, evidence exists that some individuals representing the Pas Mountain were present at the treaty adhesion talks that led to a decision to create additional reserves at the Pas Mountain.\footnote{73 Treaty Annuity Paylist, Pas Band, September 7, 1876, LAC, RG 10, vol. 9351 (ICC Exhibit 1b, pp. 6-7).}

It is apparent from the evidence that in general, bands in the Manitoba Superintendency were ready to adopt agriculture, but faced certain challenges. Many reserves were not well adapted for agriculture; the bands had received inferior cattle and supplies from the department, and seed crops were arriving too late in the season for planting. To make matters worse, settlers were increasingly encroaching on reserved lands.\footnote{74 E. McColl, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, \textit{Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878}, 53-56 (ICC Exhibit 1a, pp. 163-167).} When The Pas Band specifically complained that they had not received their fair allowance of cattle and agricultural implements, the department ordered in August 1879 that The Pas and all other Treaty 5 bands be supplied that season with all the implements and cattle owed them under treaty.\footnote{75 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Department of the Interior, to [J.F.] Graham, Acting Indian Superintendent, August 18, 1879, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, pp. 180-181).} Inspector McColl soon confirmed that this action had been taken and also commented on the promptness with which the government exchanged reserves unfit for cultivation for more suitable ones.\footnote{76 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, \textit{Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879}, 61 (ICC Exhibit 1a, p.222).}

Consultations with the bands regarding their preferred reserve sites was not limited to the Treaty 5 negotiations. When it was decided in the fall of 1882 to survey all Treaty 5 reserves, Dominion Land Surveyor W.A. Austin was sent to meet with Indian Agent Mackay to determine whether any of the Treaty 5 bands were dissatisfied with their chosen sites and wished to change their location; Austin was also directed to consult with band leaders concerning their preferred point of commencement for the survey.\footnote{77 Jas. F. Graham, Indian Superintendent, to W.A. Austin, Dominion Land Surveyor (DLS), June 29, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, pp. 289-290).}

In January 1884, the Band petitioned the Crown to survey reserves at the Pas Mountain in the vicinity of “Oopasquaya Hill.”\footnote{78 Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 391-393).} The petitioners included two men from Red Earth and a Councillor from Shoal Lake. It was agreed by all involved, and confirmed by good report, that the lands at the Pas Mountain were the only remaining good farm land in the region.
The following June, Indian Agent Joseph Reader met with The Pas Band to inspect the lands selected by them for their reserves, and to determine how the land shortfall was to be distributed. Again there was consultation and agreement. The Band and Reader decided that 1,500 acres would be set apart at the Pas Mountain, a further 1,500 acres would be set apart northwest of the pre-existing reserve at The Pas, and 246.5 acres of timber land would be reserved along the Carrot River. As we have discussed, when Reader arrived by boat at Red Earth to inspect the land, he observed swamp and hay near the water, but as the land gradually rose from the shore, he found a 10-acre flat of fine, arable land and some gardens already cultivated in excellent soil. At Shoal Lake Reader met people who had also begun to cultivate the land, and he observed that the land there was more open and well adapted to farming purposes, although there were salt springs in the neighbourhood and some land that required draining.79

Reader also learned that the Shoal Lake Indians wished to have some timber land included in their desired reserve.80 In concluding his inspection report, Reader remarked,

... as to the settling of some of the Pas Indians on Reserves at the mountain I would venture to suggest if the Department see fit that the Shoal Lake Indians should be settled where they now are, and the Red Earth Indians where they have already built houses and those Indians now at the Pas who wish to be settled at the mountain should have a Reserve along the Flute River and such is the wish of the Indians themselves.81

Ten years later, when surveys of the new Red Earth IR 29A and the reconfigured Shoal Lake 28A were accomplished, surveyor Samuel Bray heard from the Chiefs and Councillors at Red Earth and Shoal Lake regarding any additional needs or requests they may have had regarding their reserves.82 Bray reported in January 1895:

... I invariably engaged the chief and councillors of each band as chainmen or axemen and always held a council the evening before to decide approximately on the lands to be surveyed ... and that if anything connected with them or did not

82 S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol.7537, file 27126-1-6 (ICC Exhibit 1a, pp.670-677).
appear to them to be correct or desirable with the surveys they were at once to point it out in order that there should not be any subsequent complaints.83

**Quality of Land at Red Earth and Shoal Lake**

In reporting on the Red Earth and Shoal Lake reserves in 1884, Indian Agent Mackay remarked that the land at both places was very good, and in particular, the Indians at Red Earth were doing very well, possessing fine cattle, gardens, and root cellars.84 Throughout the 1880s, similar reports praising the Red Earth and Shoal Lake Indians and the quality of their land persisted. For example, Shoal Lake was described as having a significant amount of first-class soil and Red Earth good-quality land, although rather flat for grain.85

In 1885, after Red Earth and Shoal Lake had experienced a severe winter which left Shoal Lake, in particular, struggling, Agent Reader commenced working along side both communities, providing instruction and support.86 Later that year, Reader was prompted to report that at Red Earth, which he described as possibly the finest reserve in the agency, the crops of wheat and potatoes were excellent.87

It appears that by 1889 at the latest, both Red Earth and Shoal Lake people were actively engaged in some form of farming. The Red Earth Indians were reported to be excellent farmers, whilst the Shoal Lake Band were focusing their efforts on raising cattle. Agent Reader observed that at Red Earth and Shoal Lake, “they put down about 140 bushels of potatoes, and three of barley, in some thirteen acres of land. Their returns of potatoes were 660 bushels ...”88 He asserted that “[i]f the Pas Mountain Indians cultivate the fine, rich soil of their respective reserves, they need never, under ordinary circumstances, suffer from starvation.”89

---

83 S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol.7537, file 27128-1-6 (ICC Exhibit 1a, pp.670-677).
84 A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884, 76-77 (ICC Exhibit 1a, pp.431-433).
86 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 73-79 (ICC Exhibit 1a, pp. 470-477).
87 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 73-79 (ICC Exhibit 1a, pp. 470-477).
88 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888, 74-77 (ICC Exhibit 1a, pp.537-539).
Over the ensuing years, the Red Earth and Shoal Lake people appear to have prospered. Reports of the Bands’ activities emphasized that “these two off-shoots from the Pas Band have the advantage of first-class soil, especially that at Red Earth, and it only needs clearing and cultivating to raise all kinds of ordinary grain and vegetables.” Reader described the Red Earth people in 1896 as “good gardeners, [who] live largely upon potatoes and milk, having a goodly number of private animals.” The people were given help that year to cultivate more land. Of Shoal Lake, Reader remarked that it was a good place for cattle, and the people “are thriving better than formerly, as is shown by some new houses which are, I think, the best in the agency, ...”

The sole exception to these good reports was that of S.R. Marlatt, Inspector of Indian Agencies, who visited Red Earth and Shoal Lake in 1900. Marlatt remarked that Shoal Lake was an isolated spot, characterized by damp and spongy soil which was not well adapted to gardening. Red Earth, while occupying higher ground than Shoal Lake, was also hard to get to, but had soil that was good, quite dry, and free from stones. Marlatt cited the principal occupations of both Red Earth and Shoal Lake as “hunting, gardening and cattle-raising; ...”

Indian Agent Reader’s replacement in 1899, however, continued the positive accounts of the Red Earth and Shoal Lake Indians and their reserves. Agent Joseph Courtney’s 1906 report praised Red Earth’s large gardens and excellent crops of potatoes, while observing that they had little interest in stock-raising. Courtney also praised Shoal Lake for its large pastures and hay lands, excellent for cattle-raising, as well as the fact that they grew large crops of potatoes on the reserve. He confirmed that some of the reserve was suitable for cultivation.

90 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895*, 192-194 (ICC Exhibit 1a, pp. 680-682).
Requests for Reserve Land Exchanges and Additions

In 1892, the Pas Mountain Indians requested that the land set aside at Flute Creek for a reserve for The Pas Band be exchanged for lands reserved along the Carrot River at Red Earth, where the Red Earth people had built their houses. Reader supported this request, and within two years the government had approved the exchange of lands at Flute Creek for a second Red Earth reserve, which eventually became known as the Carrot River reserve, IR 29A. The exchange seemed to have been a good one. Inspector McColl reported that Flute Creek had very good but low land, whereas the land at Red Earth was “very superior,” although it too, was “somewhat low.”

In the mid-1890s, the Shoal Lake people also requested an exchange: they asked for permission to surrender some reserve land in exchange for some cultivated land outside the reserve, and to create a small reserve at their grave site. The government agreed to re-survey the reserve and protect the grave site. It appears, however, that the burial ground was not incorporated into Shoal Lake IR 28A until 1914.

In 1908 the Shoal Lake Indians requested that the department add to their reserve an additional quarter-section of land to enable them to obtain much-needed hay “in a year [of] high water,” as the requested lands were “higher than the reserve and consequently free from the overflow.” Red Earth made a similar request, citing the need for “sufficient hay and spruce timber land.” The department acceded to the Bands' requests and sent Agent Fischer to mark out the requested land, although he was prevented from doing so in May of 1908 owing to spring flooding. The department also agreed to Red Earth's amended request that they receive two separate parcels of 160 acres each, one containing timber and the other hay. In August 1910, the Red Earth Band agreed to surrender the 'old' IR 29 in exchange for...
a ‘new’ IR 29 by way of a “Letter of Surrender for Exchange.”\textsuperscript{102} The survey of the reconfigured IR 29 was completed in 1911, following consultations with Chief Jeremiah.\textsuperscript{103} The reconstituted IR 29 contained 3,595.95 acres – 884.31 acres more than the addition requested by the Band.\textsuperscript{104} The new IR 29 was approved by Order in Council in July of 1912.\textsuperscript{105}

Similarly, the survey of additional reserve land at IR 28A was completed in the fall of 1911, with the full involvement of the Shoal Lake leadership, in particular, Chief Albert Moore and Councillor Francis Bear. Government approval, however, was not as easily achieved as for Red Earth; the Minister of the Interior questioned the need for more land at Shoal Lake and requested an explanation from Indian Affairs.\textsuperscript{106} Secretary McLean responded that with a population of 89, the addition of 651 acres to Shoal Lake would result in an addition of only 40 acres more than the Band’s entitlement under Treaty 5; compared to bands under treaties that allowed 640 acres per family, Shoal Lake’s request was very reasonable.\textsuperscript{107} This explanation sufficient, the 651-acre addition to Shoal Lake IR 28A was confirmed by Order in Council on August 30, 1913.\textsuperscript{108}

Two further requests for additions to the Shoal Lake and Red Earth reserves occurred in 1914. In the early months of that year the Shoal Lake Band approached the department for an addition to IR 28A of 200 acres which encompassed a burial ground. This request was hastily granted by the Department, as it involved lands which were sought to be included in the new Pasquia Hills Forest Reserve.\textsuperscript{109}

The following December, the Red Earth Band asked for an additional 320 acres of hay land, on grounds that their reserves contained little hay and what was available was lost completely in years of high water.\textsuperscript{110} Although the

\begin{footnotes}
\item[102] Letter of Surrender for Exchange, Red Earth Band, August 15, 1910, DIAND, 672/50-28, vol. 1 (ICC Exhibit 1a, pp. 785-786).
\item[103] H.B. Proudfoot, D.L. Surveyor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, in “Field Notes of Indian Reserve No. 29 Red Earth and Tie Line between I.R. No. 29 and the 14 Base,” surveyed by H.B. Proudfoot, D.L.S., October 9 - November 5, 1911, p. 25, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).
\item[106] N.O. Coté, Controller, Land Patents Branch, Department of the Interior, Ottawa, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, August 15, 1913, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 855).
\item[107] J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, August 20, 1913, LAC, RG 15, D-II-1, vol. 723, file 387790 (ICC Exhibit 1a, pp. 836-837).
\item[108] Order in Council, PC 2256, August 30, 1913, DIAND, Indian Lands Registry, Instrument No. XII394 (ICC Exhibit 1a, pp. 836-837).
\end{footnotes}
Indian Agent, W.R. Taylor, supported the Band’s request and argued its merits to the department, Secretary J.D. McLean demurred for the reason that the Band’s treaty land entitlement had already been exceeded by close to 650 acres. Although McLean later asked Indian Agent S.L. Macdonald to raise with the Red Earth Band the question of an exchange of a portion of their reserve for land “more suitable for their purposes,” the record contains no evidence that the Band considered a land exchange.

The Red Earth community was seriously impacted by flooding in 1913 and 1921. In the spring of 1913, Red Earth was subjected to a massive flood, and asked the agent to pursue a possible relocation to Flute Creek. This was not an option, however, as the Band had requested and obtained an exchange of the Flute Creek reserve in 1893 for the Carrot River reserve, on the basis that the former was considered to be too low and wet. In the spring of 1921 the Red Earth reserve was again flooded, with far more serious consequences. Indian Agent J.W. Waddy, reporting on news of the community brought to his office by a Shoal Lake Band member, advised the department that:

...practically all the cattle and horses are already drowned, and that the Indians are living on the top of the flat roofed barns. The Indians say that even the moose are drowned as the whole country is a flood. ... My reason for reporting this matter is that I understand that the Indians want to move to some other district and that they will probably bring the matter up at treaty time, June 18th, next, and if you had any place in mind where we could locate them I could talk the subject over with the band. Red Earth Reserve has about 140 people, all Crees. They live on the fringe of the river, a strip about 500 yards wide, the balance being swamp.

Although flooding of this magnitude was considered to be an aberration, the department agreed that a move was advisable. W.M. Graham, Indian Commissioner, requested J.D. McLean to contact Waddy and begin discussions with the Band on the matter of relocation:

---

110 W.R. Taylor, Indian Agent, The Pas, Manitoba, to Assistant Deputy and Secretary, Department of Indian Affairs, Ottawa, December 9, 1914 DIAND file 578/50-47-27A, vol.1 (ICC Exhibit 1a, p.854).
111 J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Acting Indian Agent, April 9, 1918, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 860).
112 J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Indian Agent, January 14, 1919, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 879).
113 J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol.1 (ICC Exhibit 1a, p.842).
114 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 16, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).
Will you be good enough to instruct the agent to the effect that the Indians should select a tract of land to which they can move and which may be available for the purpose of a new Reserve, and as soon as this Department is informed of it, steps will be taken to obtain it for them, if at all possible, in exchange for their present reserve.115

However, when Waddy travelled to Red Earth and met with the Band to discuss the matter of relocation, he found them unwilling to move. He reported that “[t]hey have had time since the high flood to have forgotten most of their troubles and they said that they did not want to move now.”116 What the Band did desire, however, was another addition to their reserves, this time in the form of a small strip of land lying adjacent to the Carrot River. This land, comprising a strip two miles long and one-half-mile wide on the west side of the river, was desired as hay lands for the Band. Waddy argued on their behalf that they “own no hay ground at all and if the district is settled, they will certainly require a little hay ground.”117 The Band also told Waddy that they were not interested in a trade of land. The department noted, however, that the Band was currently in possession of lands exceeding their treaty land entitlement by 1,155 acres, and that, unless “the band desires to make an exchange, ... there does not appear to be sufficient ground for making a request for additional land.”118

In 1926, the Shoal Lake Band requested and was granted an exchange of 640 acres of IR 28A, consisting largely of a shallow lake and swamp, for an equal amount of land containing timber and hay, northeast of the reserve.119 Nearly a decade later, this land, known as IR 28B, was exchanged, this time for land adjoining IR 28A.

In 1946 the Red Earth and Shoal Lake Cree Nations sent petitions to the Minister of Indian Affairs, requesting additional reserve land suitable for farming and producing hay. Red Earth Chief Robert McKay’s covering letter stated that they had no agricultural land on the reserve, and that on a small reserve, useless for farming, they would soon have no means of making a living.120 The Red Earth petition asserted that

115 J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).
116 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).
117 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).
118 A.F. Mackenzie, for Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, July 15, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 887).
119 J.W. Waddy, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, March 15, 1926, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 896).
When our Reserves were set apart for us we had no thought at that time of any change in our circumstances and were quite content to have a place set aside for us where we could live and continue our traditional method of living by hunting and trapping. With the approach of the settlers both from the East and from the West, the time will soon come when we will have to look to the land for our support. ...

We think, therefore, that we are entitled to consideration such as is granted to other Indian Bands in the country, that is, sufficient land to provide for farming for the support of our people and also sufficient land to provide fodder for livestock which in this part of the country would be a very important part of any farming operations which are undertaken. Our contention is that our Reserves, when they were set aside for us did not provide for cultivation of the land and no thought was given to the fact that we would now be forced to look in the direction for our future existence. We feel we should be granted whatever land is necessary so that the future of our people will be assured. ...

We are of the opinion that we should have two townships of land for farming and another township set aside for hay land. We might point out that in this northern area, there is only a percentage of each quarter section which is suitable for all farming purposes.\(^{121}\)

The petitions would have added three townships, or approximately 69,000 acres to Red Earth’s reserve lands, and in the case of the Shoal Lake’s petition, an additional one and one-half townships, or about 34,500 acres. Although Indian Agent Samuel Lovell reported that he conducted an inspection trip to both Shoal Lake and Red Earth, he described only Shoal Lake. Lovell discussed the challenges of their reserve’s isolated location and his willingness to work with them to improve farming on the land they currently held.\(^{122}\) There is no indication of any formal response to the petitions by the department.

**Panel’s Reasons**

The panel has been asked to enquire into whether there was an obligation on the Crown to provide farming lands to the Red Earth and Shoal Lake Cree Nations pursuant to the terms of Treaty 5, and if so, what was that obligation and was it fulfilled by the Crown. With regard to the first and second issues, it has been found that the Crown did have a duty to provide farming lands, but

\(^{120}\) Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND file 672/50-28, vol. 1 (ICC Exhibit 1a, pp. 935-939).

\(^{121}\) Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Red Earth Band, June 21, 1946, DIAND file 672/50-28, vol. 1 (ICC Exhibit 1a, pp. 935-939).

that the reserves which were to be set aside for the Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. The obligation contained within the Treaty contemplates that reserves would contain some “farming lands” and some “other reserves.” As such, the lands contemplated by Treaty 5 included a mix of land suited to cultivation, cattle-raising, and other farming purposes, as well as such other reserve land as was necessary to support a band whilst undergoing the transition to a self-sufficient, agrarian lifestyle. The actual nature of the land mix would vary across individual bands consistent with their location, needs and evolving subsistence, and was to be determined on a case-by-case basis.

The panel has also found that it was the common intention of the parties to Treaty 5 at the time the Treaty was signed to provide reserves for multiple purposes, only one of which was cultivating the land; as a result, the lands selected for reserves were of mixed quality and best suited for diverse purposes such as those outlined above.

Based on the evidence and oral testimony of this inquiry, and with due consideration to the appropriate legal principles, the panel concludes, for the reasons to follow, that the Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with “farming lands” pursuant to the terms of that Treaty.

Were the Red Earth and Shoal Lake People Consulted?

The historical record is clear that the Red Earth and Shoal Lake people were members of The Pas Band at the time the Band took treaty in 1876, and took part in a number of consultations to determine the location and parameters of their reserve lands. These consultations were initiated when The Pas Band stipulated as a condition for their entrance into Treaty 5 that the Crown “would agree to give them reserves where they desired.”123 In fulfillment of this undertaking, Commissioner Thomas Howard met with the signatory bands, listened to their requests for reserve land, and “made every inquiry as to the extent of farming land in each locality mentioned.”124 Although no evidence exists to confirm whether the representatives from Red Earth and Shoal Lake present at the 1876 treaty adhesion talks actively participated in the negotiations, the treaty wording that provides for additional reserve land at

---


the Pas Mountain suggests that they played a role in that request. Reserves of 160 acres per family of five were to be “granted at places selected for them by an officer of the Privy Council, with their approval.”

Consultation did not cease at this early juncture, however, and the record is clear that the Crown maintained open communication and consultation with the signatory bands regarding their reserve lands. Thus we see that, in the fall of 1882, when a surveyor was sent out to survey all Treaty 5 reserves, the surveyor met with band leaders to determine whether any of the bands were dissatisfied with their reserves and wished to change their location; he also consulted with those leaders on the preferred points of departure of the survey for each reserve. We note, in particular, that the January 1884 petition of The Pas Band, requesting the survey of additional reserve land at the Pas Mountain where there was farm land, contained the names of three petitioners from Red Earth and Shoal Lake. In June of 1884, Indian Agent Reader met with the Red Earth and Shoal Lake people at the Pas Mountain to inspect their lands. He concluded that reserves should be created for the two groups where they were already settled, and that any Indians living at The Pas who wanted to relocate to the Pas Mountain should have a separate reserve along the Flute River.

In 1892, when Red Earth wished to exchange lands at Flute Creek for land along the Carrot River at Red Earth, this request was supported by the Indian agent and approved by the Crown. Three years later, when surveyors arrived at Red Earth and Shoal Lake to document the altered boundaries of the reserves, Samuel Bray (Dominion Land Surveyor) met with the leadership of Red Earth and Shoal Lake to consult with them regarding any additional needs or requests they may have had regarding their reserves.

When the Shoal Lake Band wished to add a quarter-section of additional hay lands to their reserve in 1908, the agent and department again supported this request, and worked assiduously to achieve it. They were also diligent in communicating with the Red Earth Band in their efforts to add hay- and timber land to their reserve and were open to accommodating the Band’s request to add two separate parcels at opposite ends of their reserve, as opposed to their original request for one quarter-section of land on the north side of the Carrot River. In granting additional lands to Red Earth, the department proposed a re-configuration of Red Earth reserve IR 29, which

involved a surrender and exchange of those lands for a larger reserve to be known as IR 29A. This process and the subsequent surveying of the new reserve was completed in 1911 with the full consultation and involvement of the Bands.

In the wake of the flooding of the Red Earth reserve in 1921, the band requested relocation, initially to the surrendered reserve at Flute Creek, and later simply to higher ground. The department was supportive of this request, and in May of 1921, Secretary McLean directed that the Indian agent begin discussions with the Band regarding a possible move. Agent Waddy’s instructions were to ask the Band to select an available tract of land, which the department would obtain for them, if at all possible, in exchange for their present reserve.

Although the Red Earth Band subsequently decided not to move, it is noteworthy that in this case, as in so many of those previous, the Crown was clearly open to consultation with the Band on relocation. A similar open and supportive approach is evident in the numerous surrenders and exchanges which transpired after 1926 and until as late as 1968. Indeed there are only two contexts in which it appears the Crown did not engage with these Bands regarding their reserves, including the 1921 request for a strip of hay lands along the Carrot River, which was rejected because the Band’s two reserves already contained 5,635.95 acres, 1,155 acres in excess of their treaty land entitlement, and with regard to the 1946 petitions, which if agreed to, would have added close to 100,000 acres to the Red Earth and Shoal Lake reserves. Indeed, it is possible there was consultation even then, but the record is silent on this matter.

On the basis of this evidence, the panel finds that the Red Earth and Shoal Lake Bands were consistently consulted by the Crown on the location and boundaries of their reserves, and further, that the outcome of those consultations was, with limited exception, invariably positive for the Bands.

**Did Red Earth and Shoal Lake receive “Farming Lands” and “Other Reserves”**?

The historical record in this inquiry is clear that the Red Earth and Shoal Lake Bands received a mix of “farming lands” that were suitable for cultivation and for cattle-raising, as well as other reserve lands which would enable them to continue to practice traditional subsistence activities such as hunting and trapping whilst they engaged the transition to an agrarian economy.

Pursuant to the terms of the Adhesion to Treaty 5 and with the agreement of The Pas Band, lands were set aside for the Red Earth and Shoal Lake people
at the Pas Mountain in 1884. In fact, the Adhesion and a follow-up petition from The Pas Band urging the government to create reserves at “Oopasquaya Hill” indicate that they wanted part of their reserve entitlement fulfilled at the Pas Mountain precisely because it contained some land fit for cultivation. When Indian Agent Reader travelled down the river to inspect these lands, the reserves he described were characterized not only as lands containing excellent soil and well adapted to farming, but also a mixture of lands suited for diverse purposes which were anticipated by the Treaty. At Red Earth, he reported that the lands, while swampy near the river and possibly prone to flooding in seasons of high water, rose nicely to a fine, arable flat of 10 acres of excellent soil. In the wooded region of these lands, Reader encountered patches of land already cultivated by the Red Earth Indians, and noted that “here the soil is of the finest class;” he also observed an abundance of hay along the river as well as additional arable land which would benefit from draining. Twenty miles further along the river Reader came upon the Shoal Lake people, who had also begun to cultivate the land, observing that their land was “more open and well adapted to farming purposes[.] Large, flat pieces might easily be broken up and sown and would probably yield large crops. There are, however, some salt springs in the neighbourhood and some of the land require [sic] draining.” In consultation with the Shoal Lake Band, Reader learned of lands near the foot of the mountain which contained timber, and which the “Shoal Lake Indians wish to be included in their desired Reserve.” In concluding his report on the inspection of these lands and his consultations with the Red Earth and Shoal Lake people, Reader remarked that it was the wish of the Indians themselves that those settled at Red Earth and Shoal Lake should have reserves created for them there, while a third reserve should be created at Flute Creek for other Pas Band members. In reporting on these reserves later that year, Indian Agent A. Mackay, of the Beren’s River Agency, remarked that the Indians at Red Earth and Shoal Lake “are doing very well indeed; their cattle (which they purchased and raised themselves) are very fine looking; their gardens well attended to, with good root houses or cellars, and a building in which they store their implements in common.”

It is clear that, not only did the Red Earth and Shoal Lake Bands receive “farming lands” that included some cultivatable land, consistent with the terms of Treaty 5, but also that they were for many years highly successful in cultivating those lands. As discussed previously, it is also clear that when their reserves proved inadequate with respect to farming or hay lands, and they asked the Crown to rectify these limitations, whether by additions to reserves or land exchanges, the Crown supported the majority of these requests.

Conclusion
The panel finds that the Red Earth and Shoal Lake Bands were not only consulted about the location of their reserves, but were given a mix of farming and other lands, consistent with the terms of Treaty 5. The reserves that were set aside for them, initially as members of The Pas Band, were places where they successfully cultivated a range of crops and raised cattle for many decades after reserve creation.

The evidence detailed above is persuasive that at both Red Earth and Shoal Lake, the Bands had sufficient cultivatable land to grow crops for subsistence living at the time of the treaty adhesion and in the ensuing years.

The panel has been asked to answer the question of whether the Crown fulfilled its treaty obligation to provide “farming lands.” That obligation is not open-ended. In this case, the evidence points to a finding that the Treaty was fulfilled when the Red Earth and Shoal Lake people indicated that they were ready to take up farming — in fact were already doing so — and reserves containing cultivatable land were set aside with their approval. Moreover, in the years following reserve creation, Red Earth and Shoal Lake did not complain about the quality of their reserves, which suggests that they were

129 A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884, 76-77 (IOC Exhibit 1a, pp. 431-433).

130 See, for example, the report of T.D. Green in 1885 which reports that these reserves consisted of “first class soil” and considerable cleared lands which the bands had begun cultivating almost immediately (T.D. Green, Dominion Land Surveyor (D.L.S.), to Superintendent of Indian Affairs, March 9, 1885, LAC, RG 10, vol.3085, file 13033 (IOC Exhibit 1a, pp. 434-442)); reports of “excellent farmers” at Red Earth, and successful cattle-raising at Shoal Lake in 1889 and the bands’ production of 660 bushels of potatoes on “the fine, rich soil of their respective reserves” (J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1888, 74-77 (IOC Exhibit 1a, pp. 537-539)); in 1895 and 1896, reports emerged that the Shoal Lake people were “thriving better than formerly” and that the “advantage of first class soil, especially at Red Earth” held the potential “to raise all kinds of ordinary grain and vegetables” (Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895, 192-194 (IOC Exhibit 1a, pp. 680-682); and Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896, 126-128 (IOC Exhibit 1a, pp. 690-693)).
capable of providing for themselves through a mixed economy of agriculture and traditional activities such as hunting and trapping. Based on the documentary record of this inquiry, and informed by the relevant legal principles, the panel concludes that the treaty obligation of the Crown to provide “farming lands” to the Red Earth and Shoal Lake Bands was met.

ISSUE 4: IS THERE AN OUTSTANDING OBLIGATION IN RESPECT OF FARMING LANDS?

Does Canada have an outstanding obligation to either or both Cree Nations in respect of farming lands?

Based on the documentary record of this inquiry, and with due regard to the law and legal principles informing treaty interpretation, it is the finding of the panel that Canada fulfilled its obligation to both Cree Nations in the provision of “farming lands” pursuant to Treaty 5; thus, no outstanding treaty obligation in respect of farming lands remains.

FAIRNESS IN THE RESULT: OUR SUPPLEMENTARY MANDATE

Since its inception, the Indian Claims Commission has understood that it has a responsibility to fairness, both in the process of its inquiries and in their outcome. This responsibility entails not only the conduct of a full and fair hearing of the evidence, arguments and testimony from the parties to an inquiry within a process untainted by bias, but also a commitment to ensuring that, to the greatest degree possible, the end result of that process is fair and just. The latter is not always obtained by ensuring that the findings of inquiries accord with the law and the Specific Claims Policy; indeed, in some cases, the legally correct conclusion may not accord with a just outcome. In such cases, the Commission may invoke its Supplementary Mandate. This mandate, first articulated by the Minister of Indian Affairs in November 1991, provides that:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly, but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.

This direction was underscored two years later in a letter to the Commission from then Minister of Indian Affairs Pauline Browes, when she confirmed that

131 Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, Chief, Assembly of First Nations, November 22, 1991.
(1) I expect to accept the Commission’s recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission’s [sic] recommendations on how to proceed in cases where the commission [sic] concluded that the policy had been implemented correctly, but the outcome was nonetheless unfair.132

The Commission has only on rare occasions exercised this aspect of its authority,133 and only in cases where the circumstances of a claim are such that they give rise to a demonstrable inequity or unfairness which we feel strongly must be communicated to the Government of Canada in order that a First Nation may obtain a just resolution to its claim. Such is the situation of the Red Earth and Shoal Lake Cree nations with regard to the quality of their reserve lands.

The record in this inquiry is clear: the Government of Canada had an obligation to provide “farming lands” to the Red Earth and Shoal Lake Cree Nations, and this obligation required that they be provided with an appropriate mix of “farming lands” which, the panel has concluded, had to contain at least some land suitable for cultivation, but could also contain land fit for other farming purposes, and “other reserves” of non-farming land. Taken together, the reserves met the diverse uses necessary for these Bands to continue their traditional activities while gaining proficiency in agriculture. It is also clear that the First Nations were consulted not only on the location of their initial reserves, but that an open communication was maintained between them and the Crown from the time the Adhesion to Treaty 5 was taken until the present, and that in the great majority of cases, where those consultations pertained to additions or adjustments to reserve lands, the Crown was consistently supportive and assented to the Bands’ requests. Given this, we have found that the Government of Canada does not possess an outstanding treaty obligation to the Red Earth and Shoal Lake Cree Nations with regard to the quality of their reserve lands.

Although the Crown met its legal obligations to these First Nations, it is nonetheless clear that the lands they obtained under Treaty 5 have experienced considerable degradation over a lengthy period of time. Although

132 Paulines Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993.
these lands were initially able to support a robust subsistence lifestyle based on cultivation and stock-raising, it is clear that the high levels of moisture in spring, which characterized some parts of the reserves early on, have been exacerbated by a number of factors. Among these was the building of the E.B. Campbell Dam, formerly known as the Squaw Rapids Dam, which became operational in 1963, and which altered water levels in the region and may well have rendered much of the Red Earth and Shoal Lake Bands' lands untenable.

After the building of the dam, the occasional major floods which occurred early in the reserves' history became more frequent until, as Shoal Lake Elder Gerald Bear stated, "it's been steady now ... the lake here, it's flooded all year round now." Shoal Lake Elder Emil Flett, speaking through an interpreter, confirmed that he learned from his Elders that "[t]he soil was always good ...," but he spoke compellingly about the role of the E.B. Campbell Dam in diminishing the quality of their land:

in the springtime there used to be lots of flooding and that was the only time that they had flooding ... according to the Elders before [me]. And the land, they were able to use that land for hay land, to get hay. And then when they built the dam, ... that's when the waters came towards our area, and now there was water there all summer.

Elder Gilbert Flett added that "[i]t was around 1965 when they started receiving floods and all the people from near the lake moved up into the core area of the reserve," and "[e]very year since then they've been getting more water, and they've been getting it annually." Although one part of the Shoal Lake reserve was always known to contain two saltwater streams, several Elders recounted that the land no longer grows anything because it is too salty. Red Earth Elder Lizette McKenzie corroborated the testimony of other Shoal Lake Elders when she stated through an interpreter that the soil changed over time. She also stated that there were no floods before the dam. Elder Reta Nawakayas stated through an interpreter that her family was successful at growing gardens, but when the floods started, things got worse and both reserves IR 29 and IR 29A were under water.

134 ICC Transcript, October 16, 2007 (Exhibit 5, p. 38, Gerald Bear).
135 ICC Transcript, October 16, 2007 (ICC Exhibit 5, p. 24, Emil Flett). See also the testimony of Red Earth Elder Leona Head, who stated through an interpreter that at the time of her parents, the land was good to grow potatoes and other garden produce, but now, because of the flood, the land has changed and the houses are always flooded. ICC Transcript, October 17, 2007 (ICC Exhibit 5, pp. 224-225, Leona Head).
138 See, for example, ICC Transcript, October 16, 2007 (Exhibit 5, p. 73, Edith Whitecap; p. 34, Gerald Bear).
139 ICC Transcript, October 17, 2007 (Exhibit 5, pp. 203-204, Lizette McKenzie).
RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

It is possible that the rising water levels have also been caused in some measure by other dams and even climate change. Whatever the cause, the impacts of this phenomenon cannot be underestimated, and are readily apparent to visitors to the Red Earth and Shoal Lake reserves.

We undertook site visits to the reserves in October 2007, and were overwhelmed by what we witnessed there. While there was clear evidence of the efforts by these Bands to work with and improve the lands they possess, their efforts cannot help but be undermined by the persistently wet conditions. The communities have been riven by the rising waters, so that houses are clustered onto isolated pockets of dry land – even here, however, the basements and foundations are rotting from moisture.\(^{141}\) The land is no longer cultivated, and stock-raising is impossible due to the lack of pasture land. We observed horses crowded into small enclosures or onto patches of dryer land, where even then they stood in mud. Touring the reserves was made difficult as the roads had clearly been damaged by water and erosion, and it was easy to envisage that they could quickly be rendered impassable even by the slightest additional precipitation.

Many of the Elders asserted that, while keeping vegetable gardens, cattle, and horses was their ancestors’ way of life at the time they took treaty,\(^{142}\) they were also mindful of the need to continue to hunt, trap and fish, and that the lands they selected reflected these different priorities.\(^{143}\) In the present tense, however, trapping and fishing are limited, as is the hunt, and farming has been rendered virtually impossible by the rising water levels. At this juncture, then, it matters little that the ancestors of the Red Earth and Shoal Lake people were consulted and chose the lands they currently reside upon, or that the Crown was consistently supportive of their requests for additions to reserve – the lands have been changed by forces which could not have been anticipated by these Bands or the Crown at the time of treaty and for much of the time after it.\(^{144}\)

\(^{140}\) ICC Transcript, October 17, 2007 (Exhibit 5, pp. 184-186, Reta Nawakayas).

\(^{141}\) ICC transcript, October 16, 2007 (Exhibit 5, p. 39, Gerald Bear). Mr Bear spoke of the houses shifting every winter and the school, built six years ago, already rotting at the foundation.

\(^{142}\) See, for example, ICC Transcript, October 16, 2007 (ICC Exhibit 5, pp. 15-21, Emil Flett).

\(^{143}\) See, for example, the testimony of Charles Whitecap, Shoal Lake Cree Nation, who confirmed in direct examination that he was told the Shoal Lake reserve was chosen for the abundance of wildlife, water fowl, and trapping (ICC Transcript, October 16, 2007, p. 100, Charles Whitecap); and the testimony of Elder Hector Head, Red Earth Cree Nation, who stated that the main purpose for choosing the reserve at Red Earth was for hunting, fishing, and trapping (ICC Transcript, October 17, 2007, p. 169, Hector Head).

\(^{144}\) A report summarizing soil surveys since the 1950s, submitted by the First Nations for this inquiry, is a useful resource in understanding the impact of high water levels on the reserves and the resultant problems facing the Red Earth and Shoal Lake communities today. See Darwin W. Anderson and Darrel Cerkowniak, “Red Earth and Shoal Lake First Nations: Quality of Land Inquiry,” Saskatoon, February 5, 2008, prepared for the Red Earth and Shoal Lake First Nations (ICC Exhibit 9a).
While the Crown met its lawful obligations to these Bands under the Treaty, the present conditions on the reserves created by a combination of the limitations characterizing the land base and the damming of rivers upstream of their communities are unjust and should not be tolerated in Canada. We would thus urge Canada to meet with the Red Earth and Shoal Lake Cree Nations and initiate discussions on finding a long-term solution to the problems caused by the condition of their reserve lands. To do so would constitute a confirmation of the honour of the Crown in its dealings with the Red Earth and Shoal Lake people, and would ensure, upon the achievement of a consensus on an equitable outcome to the land quandary posed by these reserves, a lasting and just resolution of this land claim.
PART V

CONCLUSIONS AND RECOMMENDATIONS

In arriving at our interpretation of the disputed words in the reserve clause of Treaty 5, we are mindful of the principle stated in *Marshall* that “the words of the Treaty must be given the sense which they would naturally have held for the parties at the time ...” The reserves to be set aside for Treaty 5 bands were not intended to exist for the sole purpose of cultivating the land. We interpret the treaty document as contemplating that reserves would contain some “farming lands” and some “other reserves.” Within the category of “farming lands,” the Treaty demands that at least some of that land be cultivatable land; but the remainder of the “farming lands” could be land of a quality that was only suitable for cattle-raising, hay, or other farming uses. In addition, and important to bands at the time of treaty, reserves were to contain “other reserves,” which we interpret to mean land suitable for traditional activities such as hunting, trapping and gathering, or for other non-farming uses. Other wording in the Treaty, in particular, the modest list of farming implements, breeding animals and crops to be given to each band, strongly suggests that the objective was the attainment of self-sufficiency, not farming on a larger scale.

Thus, the treaty obligation would be met if reserves were set aside that contained at least some cultivatable land. Treaty 5 does not define the proportion of such land that must be set aside; but we find that the reserve clause was intentionally drafted broadly enough to enable bands and the Crown to select reserves suitable to a band’s individual needs, priorities, and location within the vast territory of Treaty 5. The appropriate mix of land for each signatory band was to be determined on a case-by-case basis.

The panel concludes that it was the common intention of the parties to Treaty 5 at the time of treaty to provide reserves for multiple uses. It was a precondition of The Pas Band and the other two bands who signed the 1876 Adhesion to signing Treaty 5 that they be able to choose their own reserve

---

lands. It is clear from this demand that the priority of The Pas Band was to receive reserve land on which they could pursue traditional activities as well as grow crops and raise cattle, activities that band members were already pursuing in various locations such as Red Earth and Shoal Lake. We find that the common goal at the time of treaty was to enable the signatory bands to continue their traditional pursuits while becoming self-sufficient over time through agriculture. This interpretation of common intention is the one that best reconciles the interests of both parties at the time of treaty.

The panel concludes that the Crown met its obligations under Treaty 5 to provide the Red Earth and Shoal Lake Bands with “farming lands” pursuant to the terms of that Treaty. The evidence is persuasive that at the time of treaty and reserve selection, both Red Earth and Shoal Lake were provided with sufficient good-quality, cultivatable land to grow crops for subsistence living. And this is what both Bands did. The reserves set aside for the Red Earth and Shoal Lake people, who were members of The Pas Band at the time, were places where they successfully cultivated a range of crops and raised cattle for many decades after reserve creation.

In spite of the panel's finding that the Crown fulfilled its treaty obligation to provide “farming lands” to the Red Earth and Shoal Lake Cree Nations, we have seen and the Elders have told us that the reserves are no longer viable places to grow crops and raise animals due to the increase in water levels on the land. In particular, Elders have spoken about the fact that since the building of the E.B. Campbell Dam in the 1960s, their land is consistently wet not only in spring but throughout the year. From the testimony of the Elders, the panel is struck by the possibility that the lands have been changed by forces which could not have been anticipated by these Bands or the Crown at the time of treaty and for several decades afterward. Consequently, the panel urges Canada to initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems caused by the condition of their reserve lands.
RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

We therefore recommend to the parties:

That the claim of the Red Earth and Shoal Lake Cree Nations regarding the provision of “farming lands” in Treaty 5 not be accepted for negotiation under Canada’s Specific Claims Policy.

That Canada initiate discussions with the Red Earth and Shoal Lake Cree Nations to find a long-term solution to the problems resulting from the condition of their reserve lands.

FOR THE INDIAN CLAIMS COMMISSION

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

Dated this 18th day of December, 2008
APPENDIX A

HISTORICAL BACKGROUND

RED EARTH AND SHOAL LAKE CREE NATIONS
QUALITY OF RESERVE LANDS INQUIRY

INDIAN CLAIMS COMMISSION
CONTENTS

Introduction 485
Background 485
  Treaty 5 (1875) 485
  Adhesion to Treaty 5 (1876) 490
  Treaty Annuity Paylists (1876 - 1885) 491
  Red Earth and Shoal Lake (Pas Mountain) People 491
  Territory of the Red Earth and Shoal Lake Cree 493
  Moving Toward Agriculture at The Pas 494
  The Pas Band at The Pas 499
Survey of Reserves at The Pas and Birch River (1882) 502
Survey of the Red Earth and Shoal Lake Reserves (1884) 505
  Separate Paylists (1886) and Leadership at Red Earth and Shoal Lake
    (1882 - 1902) 510
Farming and Development at Red Earth and Shoal Lake
  (1885 - 1891) 511
Red Earth Band Requests Exchange of Flute Creek for Carrot River
  (1892) 514
Addition of Carrot River Reserve and Re-Survey of Shoal Lake Reserve
  (1894) 516
Farming and Development at Red Earth and Shoal Lake
  (1892 - 1906) 520
Separate Paylists Created for the Red Earth and Shoal Lake Bands
  (1903) 526
Additions and Adjustments to the Red Earth and Shoal Lake Reserves
  (1908 - 1913) 526
Formal Survey of Additions to Shoal Lake IR 28A and Red Earth IR 29
  (1911) 529
Chiefs and Councillors Identified on the Paylists of the Red Earth and Shoal
  Lake Bands (1913) 532
Requests for Additions to the Red Earth and Shoal Lake Reserves
  (1914 - 1921) 532
Additions and Adjustments to Shoal Lake IR 28A (1926 - 1927) 535
Red Earth and Shoal Lake Cree Nations Petition the Government for Better
Indian Claims Commission Proceedings

Land (1946) 538
Final Adjustments to the Shoal Lake Reserve (1957 - 1968) 540
Oral Evidence Relating to the Quality of Red Earth and Shoal Lake Reserve Lands 541
INTRODUCTION
The Red Earth and Shoal Lake Cree Nations allege that the lands reserved for them, after their adhesion to Treaty 5, were of no agricultural potential, resulting in a breach of the government's treaty obligation to supply the First Nations with "farming lands."

BACKGROUND

Treaty 5 (1875)
In September 1875, Treaty 5 was signed between a group of Saulteaux and Swampy Cree and representatives of the Dominion of Canada at Beren's River and Norway House in what is now the central region of the Province of Manitoba.  

A treaty was desired by both the Dominion government and the Aboriginal people occupying what would become Treaty 5 territory. The government's interest lay in securing title to land for trade routes and future settlement, while the Aboriginal inhabitants were interested in receiving benefits similar to other groups who had already signed treaties.

Similar to Treaties 1 and 2, Treaty 5 provided for reserves to be set apart for the various First Nations to the extent of 160 acres for each family of five, or 32 acres per person. However, unlike Treaties 1 and 2, Treaty 5 specifically made reference to the setting apart of reserves for "farming lands." The Treaty states:

Her Majesty the Queen hereby agrees and undertakes 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, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families...
The Treaty also specified the regions where these reserves would be set apart for various signatory groups. Treaty 5 stipulated, for example, that the Saulteaux of the Beren’s River region would receive a reserve at the mouth of the Beren’s River on Lake Winnipeg, although a “reasonable addition” would be made to their reserve to compensate for swampy land in that region.\(^{150}\)

Treaty 5 also included promises to supply articles “for the encouragement of the practice of agriculture among the Indians”:

> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Two hoes for every family actually cultivating; also one spade per family as aforesaid; one plough for every ten families as aforesaid; five harrows for every twenty families as aforesaid; one scythe for every family as aforesaid, and also one axe; – and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone, and one auger for each band; and also for each Chief, for the use of his band, one chest of ordinary carpenter’s tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows – all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.\(^{151}\)

The Treaty also guaranteed “the right to pursue their avocations of hunting and fishing throughout the tract surrendered,” and promised yearly distributions of ammunition and twine for the First Nations in the Treaty area.\(^{152}\)

Shortly after the signing of Treaty 5, Alexander Morris, Lieutenant Governor of the Province of Manitoba and the North-west Territories, wrote to the Minister of the Interior to provide an overview of the treaty negotiations. Morris noted that the actual boundaries of the treaty area had been adjusted somewhat from those initially proposed by the Minister for a number of reasons.\(^{153}\)

The extended treaty boundaries encompassed the territory of The Pas Cree\(^{154}\) despite the fact that they were not signatories to the 1875 Treaty. That

---

150 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 4 (ICC Exhibit 1a, p. 76).

151 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 5-6 (ICC Exhibit 1a, pp. 77-78).

152 Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 5-6 (ICC Exhibit 1a, pp. 77-78).
being the case, Morris strongly urged that the Dominion government approach The Pas group in order to obtain its adhesion to the Treaty the following summer.155

Acting on Morris’s advice, in September 1876, the Dominion government sent Commissioners Thomas Howard and J. Lestock Reid to secure adhesions to Treaty 5 from the Swampy Cree of The Pas and other groups. Prior to their departure, the Commissioners received instructions from Morris for their task. Commissioner Howard was given the responsibility of securing an adhesion from the Indians of The Pas, Cumberland and Moose Lake:

Mr. Howard will secure the adhesion of the Indians at the Pas to the treaty providing that reserves of one hundred and sixty acres to each family of five will be granted at places selected for them by an officer of the Privy Council, with their approval; but it will probably be necessary to give them a reserve at the Pas where they reside, reserving carefully free navigation and access to the shores. As the extent of land there is very narrow, it may be desirable to indicate localities where farming reserves will be granted, subject to the approval of the Privy Council.156

On September 5, 1876, Howard arrived at The Pas (also known as Devon Mission), where he was to meet with the groups interested in adhering to...
Treaty 5. In his report to Alexander Morris, Commissioner Howard described the land from the southeast to The Pas as follows:

On entering the [Saskatchewan] river after leaving Cedar Lake the whole aspect of the country changes, and from there to the ‘Pas’, and, I understand, for fully one hundred miles above it, nothing but marsh can be seen; so much so that it was difficult along the bank of the river to find a spot dry enough to camp upon, and I was, consequently, obliged to eat and sleep in my boat.

At The Pas, situated on the south bank of the Saskatchewan River, the Church Missionary Society had constructed a church, school and parsonage, and the Hudson’s Bay Company operated a post. Howard noted that approximately 500 Indians had gathered to meet him for the proposed adhesion to treaty. He found that The Pas and Cumberland groups of Indians had selected representative Chiefs as previously instructed, while the Moose Lake group had not, owing to the fact that the Indians based at Che-ma-wa-win desired to be a distinct band, apart from Moose Lake. However, Commissioner Howard discouraged the division of the band as he had observed the “unfitness of the locality for a reserve” at Che-ma-wa-win, and had been told that a “suitable locality” existed at Moose Lake. Howard instructed each of the three bands (The Pas, Cumberland and Moose Lake) to
confirm their Chiefs and Headmen and prepare for discussions the following morning, on September 6, 1876.

That morning, the Commissioner encountered more difficulty than he had expected in the negotiations. The Indians were aware of the terms of Treaty 6, which had been negotiated with the Indians at Fort Carlton only two weeks previously, impeding Howard's efforts to have them agree to the less generous terms of Treaty 5. Howard explained to the Chiefs and Headmen the reason for the disparity between the two treaties, noting:

I at last made them understand the difference between their position and the Plain Indians, by pointing out that the land they would surrender would be useless to the Queen, while what the Plain Indians gave up would be of value to her for homes for her white children.161

Having received that explanation, the bands agreed to the terms of treaty provided by Commissioner Howard on the condition that he “would agree to give them reserves where they desired, ...”162 Howard listened to the bands’ requests for reserve lands and noted that he “made every inquiry as to the extent of farming land in each locality mentioned.”163 With respect to The Pas and Cumberland Indians, Howard stated that he had to mention several

---


localities in order to obtain agreement on land to be set aside.\textsuperscript{164} Howard noted:

\[\text{[a]}\text{ the Pas all the land obtainable is now cultivated, and consists of a vegetable garden and one field attached to the Mission, and a few patches of potatoes here and there. A short distance from the river the marsh begins, and extends to the south for miles, and the same thing occurs to the north. In fact, on both banks of the river at this point, and from the Che-ma-wa-win up to it, one hundred and fifty acres of land fit for cultivation cannot be found; and about Cumberland the country in every respect is similar.}\textsuperscript{165}\]

\section*{Adhesion to Treaty 5 (1876)}

On September 7, 1876, three groups of Saulteaux and Swampy Cree Indians, referred to as The Pas Band, the Cumberland Band and the Moose Lake Band, adhered to Treaty 5. The Pas Band was described in the adhesion as the “Saulteaux and Swampy Cree Indians, residing at the “Pas,” on the Saskatchewan River, Birch River, the Pas Mountain, and File Lake, and known as “The Pas Band”…\textsuperscript{166} The treaty adhesion also outlined the general locations of the reserves to be set apart for the bands. Regarding The Pas Band, the Dominion of Canada agreed to lay off

a reserve on both sides of the Saskatchewan River at the “Pas”; but as the area of land fit for cultivation in that vicinity is very limited, and insufficient to allow of a reserve being laid off to meet the requirements of the Band, that the balance of such reserve shall be at “Birch River” and the “Pas Mountain”…\textsuperscript{167}


\textsuperscript{166} Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p. 82).

\textsuperscript{167} Canada, Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions (Ottawa: Edmond Cloutier, Queen’s Printer and Controller of Stationary, 1957) 10 (ICC Exhibit 1a, p. 82).
The groups who took up reserve land in the vicinity of the Pas Mountain are the ancestors of the Red Earth and Shoal Lake Cree people.

**Treaty Annuity Paylists (1876 - 1885)**

The initial treaty annuity paylist for The Pas Band, dated September 7, 1876, identifies 13 families as “Pas Mountain Indians.”

In the following two years, these families were paid on a separate paylist entitled “Pas Mountain” (1877) and “Pas Mountain Band” (1878), but still received annuities at The Pas. In 1879, the members from the Pas Mountain were again paid treaty annuities on “The Pas Band” paylist, but were not distinguished from other band members. The names of those families continued to be recorded on the main Pas Band paylists from 1879 to 1885. They were not usually distinguished from other band members, except in 1883 and 1885, when notations beside their ticket numbers identified Red Earth, Shoal Lake and Birch River families. It should be noted that, beginning in 1882, the Pas Mountain group was represented among The Pas Band leadership by one Councillor from Shoal Lake.

**Red Earth and Shoal Lake (Pas Mountain) People**

In the early 1970s, anthropologist David Meyer conducted research at Red Earth with the aim of understanding “the changing subsistence-settlement patterns and social organization of the Crees in the Red Earth region.” Meyer tracked the origin of the Pas Mountain people, identifying the parent communities from which the Red Earth and Shoal Lake people originated. Meyer concluded that:

in the mid 19th century the local bands in the Red Earth area were part of a larger Cree group centred about Ft. a la Corne. Similarly, the Crees of the Shoal Lake area were members of a marriage universe centred about Opaskweyaw [The Pas]. By the end of the 19th century it is clear that both the Red Earth and Shoal Lake Crees were loosening their ties with their parent groups. In fact, by 1900 the Pas Mountain Indians were obtaining the majority of their marriage partners from...
within their own ranks. At this point it is no longer possible to assign the Red Earth Crees to the Ft. a la Corne group, the Shoal Lake Crees to the Opaskweyaw group or the Pas Mountain Indians as a whole to either of the parent bodies. 174

Meyer stated that, from around 1850 to 1870, three family groups belonging to the Fort à la Corne Crees spent their winters in the central Carrot River area (Red Earth region), where they had access to good populations of fur-bearing animals and moose. In the spring, the families reportedly moved back to the vicinity of Fort à la Corne, where fish were abundant in the Saskatchewan River. 175 Fort à la Corne (which lay in the vicinity of the current town of Nipawin, Saskatchewan) was situated west of Red Earth on the Saskatchewan River and had historically been a major seasonal gathering location, as well as the location of a Hudson’s Bay Company post. 176 According to Meyer, the patrons of Fort à la Corne were largely Plains Cree, with a territory extending south into the parklands and eastward to the western edge of the Saskatchewan River delta, which was the western boundary of the Opaskweyaw Cree of The Pas. 177

By the mid-1800s, the Opaskweyaw Cree were loosely situated in the region around The Pas. Meyer stated that a group of Swampy Cree occupied the Shoal Lake area at that time. 178 Meyer identified an individual by the name of Osawask as one of the first to settle at Shoal Lake around 1850, having selected the site for a base camp because of its remoteness from European settlement. 179 The Shoal Lake Crees exhibited a lifestyle characteristic of the northern Algonkians, “incorporating a summer subsistence pattern oriented to the exploitation of aquatic environments with the use of the canoe.” 180

Meyer concluded that, in the 1870s, the Red Earth and Shoal Lake people “differed in culture, acceptance of Christianity and relations with traders.” 181 With time, however, the two groups began to converge. They eventually

withdrew from the strong connections they had with their groups of origin, at Fort à la Corne and The Pas, to focus more on connections between the two communities. The increasingly close social relationship between these two groups was evidenced by an increase in intermarriage. 182

**Territory of the Red Earth and Shoal Lake Crees**

The Red Earth Cree Nation currently occupies two reserves: Indian Reserve (hereafter IR) 29 (Red Earth) and IR 29A (Carrot River). IR 29A is located approximately 77 km east of the Town of Nipawin, Saskatchewan, and contains an area of 2,040 acres bisected by the Carrot River. The main village of the First Nation is located on IR 29A, while IR 29 (containing 3,596 acres) is located approximately 2 km south of IR 29A.

The Shoal Lake Cree Nation occupies IR 28A, which is located approximately 20 km east of the Red Earth Reserves. IR 28A also straddles the Carrot River. 183 It should be noted that, although the Red Earth and Shoal Lake Cree Nations adhered to Treaty 5, their reserves actually lie within the territory of Treaty 6. 184

These reserves are located in the lower Saskatchewan River Valley, which traverses the Saskatchewan-Manitoba border, extending a distance of about 280 km from Squaw Rapids in the west to Lake Winnipeg in the east. The river valley is much longer than it is wide, extending only about 80 km north to south, from Namew Lake to the Pasquia Hills. 185 The Red Earth and Shoal Lake Crees occupy the southwestern extremity of the river valley. Meyer described the lowland occupied by the First Nations as:

> delta-like in its low-lying terrain, branching river channels and leveed stream borders. There is no land elevated above a few metres, the only dry land being the levees which border the water course. 186

Meyer added that the delta-like terrain was well-suited to the adapted practices of the northern Algonkians; during the summer months people with

---

small canoes could move between lakes and rivers with only small portages. However, the terrain of Red Earth IR 29 is somewhat influenced by the flank of the Pasquia Hills to the south. The hill flank is better drained than the lowlands and was attractive to the Red Earth people, as it allowed for easy overland movement in the summer and provided dry camping areas.

Red Earth and Shoal Lake First Nations Elders recall that the reserves eventually set aside for them were chosen for their proximity to traditional hunting grounds and because they included traditional camps and meeting places used by the ancestors of both First Nations. Shoal Lake Elder Edith Whitecap explained that the people were nomadic, and that the area of the present day Shoal Lake reserve “was one of the places where a lot of times they would meet other people,” “just like a campsite.” Similarly, Red Earth Elder Hector Head says that the main purpose of the lands chosen “was for hunting, fishing and trapping.” Red Earth member Ian McKay understands that the areas within IR 29 and 29A were among several traditional gathering sites.

Moving Toward Agriculture at The Pas
In the fall of 1877, Indian Agent Willoughby Clark wrote to the Department of Indian Affairs stating that Chief John Constant of The Pas Band had requested that the Dominion government survey reserves that were promised in the Treaty to his people at The Pas, the Pas Mountain and Birch River. In addition, the Band requested to be furnished with the farming implements and livestock promised under treaty. Referring to an apparent inquiry as to whether the Band was in a “condition” to receive the implements and cattle, Clark reported:

I have the honor to inform you, that the necessary articles of this description were furnished them this year, and I should say from my knowledge of their condition, that they were entitled to them, but of course the Ploughs and Harrows will be

189 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 77, Edith Whitecap).
190 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 77, Edith Whitecap).
192 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 261, Ian McKay).
193 Willoughby Clark, Indian Agent, to Lt. Col. J.A.N. Provencher, Indian Department, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 159).
RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY

useless to them, until they receive the Cattle stipulated for in the Treaty, which they are anxious to obtain.194

The following summer, Ebenezer McColl, Inspector of the Manitoba Superintendency of the Department of Indian Affairs, visited the bands under his jurisdiction (which included The Pas Band) and reported on their progress in agriculture. He stated that they understood the necessity of moving toward agriculture for their livelihood and relying less on hunting and gathering, as every year subsistence from the latter became more uncertain.195 As an example of their eagerness to adopt agriculture, McColl reported that:

[n]umerous instances can be cited where the members of Bands with ploughs and harrows, but without cattle or horses, have actually harnessed themselves and ploughed and harrowed their fields – ingenious use of ropes and portage straps.196

McColl also reported that the bands were making “urgent” requests for farmers to teach them how to cultivate land.197 Although McColl was pleased with the various bands’ eagerness to adopt agriculture and was optimistic about their future prospects, he felt that there were a number of things working against the Indians’ development in the region. McColl considered it unfortunate that many of the Reserves are not well adapted for agricultural purposes, the land being either marshy or rocky and often both. The expressed desire for a change of limit in such cases upon the part of the Bands is but reasonable and deserve[d] of consideration.

In listening to the complaints of the Chiefs and headmen of the several Bands, [1] found that considerable dissatisfaction is created by the encroachment of Whi[te] settlers upon their Reserves. I would therefore suggest the expediency of

194 Willoughby Clark, Indian Agent, to Lt. Col. [J.A.N.] Provencher, Indian Department, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, pp. 160-161).
196 E. Mc[co]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878, 54 (ICC Exhibit 1a, p. 165).
197 E. Mc[co]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878, 54 (ICC Exhibit 1a, p. 165).
surveying, at as early a date as practicable, the locations they had pointed out as reserved...

To say that the Indians are entirely satisfied with the manner in which the terms of the several treaties have been carried out, would be saying what is inconsistent with their character. To complain is a chronic feature of their nature. I am forced however to admit, from personal intercourse with them, and from abundant data at hand, that the manner treaty stipulations have been observed in this Superintendency in the past has given them just ground for complaint. They have been furnished – by no fault of the Government which paid the price of prime supplies and implements – with inferior and old worn out cattle, or cattle too wild for working or dairy purposes, and with supplies of all kinds of the most inferior quality, which would not be accepted at any price by the ordinary consumer.

... The Indians complain that seed grain, potatoes, &c., are received too late in spring for sowing and planting in time to mature. This might be considerably obviated by the purchase of these articles in the neighborhood of many of the Reserves. Thus securing their early delivery, as well as the saving of expensive freightage to distant points.198

The Dominion government appeared to recognize the necessity of farming and, in fact, encouraged First Nations people to take up agriculture, especially given the predicted decline in wildlife resources. In his annual report for the year 1878, the Deputy Superintendent General of Indian Affairs (hereafter DSGIA) L. Vankoughnet wrote of the challenges confronting the Indians of the “newer Provinces” and territories, stating:

as there is every indication of these Indians at an early date being deprived of the staples of life above referred to, it becomes incumbent upon the Government to adopt early and energetic measures to prepare them for the change in their mode of living and sustaining themselves and families, which must inevitably take place, when they can no longer kill sufficient buffalo and fish wherewith to feed themselves and families.

Instructions in farming, or herding and raising cattle (as the character of the country inhabited by the different tribes may indicate to be best) should be furnished to the Indians, and in such manner as will effectually accomplish, within the shortest period, the object sought for, namely, to make them self-supporting.199

198 E. McC[o]ll, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1878, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878, 54-55 (ICC Exhibit 1a, pp. 165-166).

199 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, Indian Branch, Department of the Interior, to John A. MacDonald, Superintendent General of Indian Affairs, December 31, 1878, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1878, 5 (ICC Exhibit 1a, p. 169).
On August 18, 1879, the DSGIA wrote to Acting Indian Superintendent J.F. Graham, informing him that he had received complaints from The Pas Indians that they had not yet received their fair allowance of cattle or agricultural implements. He instructed that any cattle due them, or any other Treaty 5 bands in a position to take care of livestock, should be furnished to them as soon as was possible.

At about the same time, members of the Cumberland Band, which signed an adhesion to Treaty 5 with The Pas and Moose Lake Bands, made detailed complaints regarding the Dominion’s failure to fulfil certain treaty obligations. Their first complaint was that no surveyor had been sent by the department to lay out the areas selected for reserves, which they were very anxious to have done. They stated that a great deal of the land was either rock or muskeg and that they wanted reserves set apart on the best land possible, recognizing that their future largely depended on raising crops and livestock. They also claimed that they never received the cattle and oxen promised them under the Treaty and, since they possessed no work animals, were required to pull the plough themselves. This information was conveyed by an individual named C.H. Brydges. A few days later, on September 11, 1879, Brydges wrote to Sir John A. Macdonald, commenting on the government’s failure to supply treaty Indians as promised. He stated that this obligation, “one of the main features of the Treaty, has been simply absolutely ignored for 5 or 6 years.”

On October 1, 1879, DSGIA Vankoughnet wrote to the Superintendent General of Indian Affairs (hereafter SGIA), Sir John A. Macdonald, with a lengthy response to some of the matters raised by Brydges the previous month. Vankoughnet stated that progress was being made in the region, with eight reserves in Treaty 5 territory having been surveyed, leaving five unsurveyed — although he did not identify those of either group. He noted that a prudent procedure was followed in setting apart reserves:


203 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 199-200).
The rule followed by the Department has been, when the Agent reports a Band to be desirous of having their Reserve set apart for them, which implies that they are prepared to settle down upon the Reserve, and cultivate the same, the application of the Agent is referred to the Surveyor General, for action.

There is no provision in the Treaty to which these Indians were parties for the Reserves being surveyed within any fixed period, and consequently the Department has considered it prudent not to have the Reserves surveyed until the Indians were prepared to settle on the lands and cultivate them.204

Concerning Brydges’ report that the First Nations of Treaty 5 did not receive the cattle they were promised, Vankoughnet noted that Inspector McColl of the Manitoba Superintendency had already set about to attend to the matter and that the farming implements required had been supplied.205 Vankoughnet also stated that, if there was any deficiency in the implements supplied, the problem would be remedied.206

In his annual report to the SGIA dated December 31, 1879, Inspector McColl stated that the “full complement of cattle” had been supplied to the Indians of Treaty 5 and that, having done so, “one of the most fruitful sources of their [the Indians] grievances is effectually removed.”207 McColl added that the twine, ammunition and farming implements supplied to the Indians were of the finest quality, and that complaints from The Pas and Cumberland originated from damage to provisions of flour, tea and tobacco, all of which were replaced.208

McColl stated that the government had also been prompt in exchanging reserves “unfit for cultivation” for more suitable ones, to the satisfaction of the inhabitants. He commented, however, that there was “some discontent among them created by the encroachment of other settlers upon their reserves” and that they had requested that the government immediately determine the boundaries of their reserves and prevent future trespass.209

204 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, p. 200).
205 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 201-202).
206 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to John A. Macdonald, Superintendent General of Indian Affairs, October 1, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 211-212).
207 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879, 61 (ICC Exhibit 1a, p. 222).
208 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, December 31, 1879, Canada, Annual Report of the Deputy Superintendent General of Indian Affairs for the Year 1879, 61 (ICC Exhibit 1a, p. 222).
On March 16, 1880, Indian Superintendent J.F. Graham informed DSGIA Vankoughnet that The Pas Indians, along with other Indians of Treaty 5, had been furnished with the cattle and farming implements they requested, provided they were considered to be in a position to properly care for them.\textsuperscript{210}

**The Pas Band at The Pas**

In the fall of 1877, Indian Agent Willoughby Clark wrote to the Department of Indian Affairs stating that Chief John Constant of The Pas Band had requested that the Dominion government survey reserves for his people at The Pas, the Pas Mountain and Birch River, and that the Band “be allowed at each place the amount [of land] agreed upon in their Treaty,” based on the number of people permanently residing at each of the localities.\textsuperscript{211} Two years later, in September 1879, The Pas Band again requested that their reserves be surveyed “in as good land as possible, as their living depended upon [fishing] and the crops they could raise.”\textsuperscript{212} Three more years elapsed, however, before a surveyor was sent to formally set apart reserve lands for the Band.

In 1880, however, Indian Agent A. Mackay wrote that Chief Constant and a number of other families living at The Pas had requested a transfer to better farm land at Fort à la Corne because it was “impossible to make a living by farming at the Pas.”\textsuperscript{213} In his annual report on The Pas Band the same year, Mackay noted that the whole region along the Saskatchewan River had been flooded, resulting in great difficulty for the people procuring hay for their cattle. Mackay also stated that 20 families belonging to The Pas Band resided at Birch River and described it as “altogether the most desirable location for an Indian reserve on the Lower Saskatchewan, good timber and excellent dry land, but only large enough for about forty families.”\textsuperscript{214} Mackay also mentioned the Pas Mountain Band, which he described as inhabiting a remote area of “[v]ery good land, high and dry, but very difficult to get to,” about 75 miles, by water, west of The Pas Mission.\textsuperscript{215}

\textsuperscript{210} J.F. Graham, Manitoba Superintendency, to L. Vankoughnet, [Deputy Superintendent General of Indian Affairs], March 16, 1880, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 227).
\textsuperscript{211} Willoughby Clark, Indian Agent, to Lt. Col. [J.A.N.] Provencher, Indian Superintendent, October 10, 1877, LAC, RG 10, vol. 3677, file 11528 (ICC Exhibit 1a, p. 159).
\textsuperscript{212} C.H. Brydges, Cumberland House, to [Unidentified recipient], September 8, 1879, LAC, RG 10, vol. 3700, file 17027 (ICC Exhibit 1a, pp. 182-183).
\textsuperscript{213} A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, September 21, 1880, LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1a, p. 232).
\textsuperscript{214} A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880, 322 (ICC Exhibit 1a, p. 257).
In his annual report for 1881, Mackay reported that the Indians residing on the Lower Saskatchewan River, including those at Birch River, the Pas Mountain, The Pas, and Cumberland, suffered greatly as a result of more flooding the previous winter and spring. Mackay stated that few of the Indians paid attention to farming and preparation for the winter months, planting only a few bushels of potatoes and other vegetable seeds. Together with the disappearance of fur-bearing animals in the district, the people found themselves lacking food by the end of the winter. The Agent again reported the desire of a number of families to relocate farther up the Saskatchewan River in the vicinity of Fort à la Corne where the land was better adapted for farming:

The rapid failure of the fisheries and hunt, in this part of the Treaty, is alarming these Indians, and compelling them to leave their old hunting grounds, they assert that, unless the Department allows them to go to better farming lands, they will be obliged to look to the Government for food in the future, as it is impossible to make a living by farming where they are at present, on account of the low, swampy and stony nature of the country.

On September 16, 1881, Indian Superintendent J.F. Graham sent the Minister of Indian Affairs a list of names of The Pas Band and Cumberland Band members who wished to relocate to the vicinity of Fort à la Corne. On October 5, 1881, Graham recommended to the SGIA that the transfers be granted.

On April 15, 1882, DSGIA Vankoughnet replied to Indian Superintendent Graham regarding the request of some members of The Pas and Cumberland Bands to be relocated to Fort à la Corne. Vankoughnet said he feared that “serious complications” would arise if Indians were allowed to move from the lands of one treaty to the lands of another, especially since the stipulations of

215 A. Mackay, Indian Agent, to J.F. Graham, Acting Indian Superintendent, November 26, 1880, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880, 322 (ICC Exhibit 1a, p. 257).
216 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881, 72 (ICC Exhibit 1a, p. 251).
217 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881, 73 (ICC Exhibit 1a, p. 251).
218 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1881, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881, 73 (ICC Exhibit 1a, p. 251).
the treaties in question (Treaties 5 and 6) differed considerably. In June 1882, Indian Agent Mackay was informed of the DSGIA’s objections to the transfer; however, five years later land was surveyed for some Cumberland Indians at Fort à la Corne.

It appears that at this time some individuals from the Pas Mountain were also living at or near Fort à la Corne, at least temporarily, although it is uncertain whether any settled on the Cumberland Indians’ reserve. Indian Agent Reader reported that, following the Northwest Rebellion of 1885, “some Pas Mountain Indians who, I believe had been living at or near Fort à la Corne, fled back to the mountain, not wishing to join the rebellion.” In the following year, 1886, two Pas Mountain families moved to Fort à la Corne. The treaty annuity paylists show that they were formally “transferred” there in 1888, although the widow of one man later returned.
Survey of Reserves at The Pas and Birch River (1882)

On June 29, 1882, Acting Indian Superintendent Graham instructed Dominion Land Surveyor W.A. Austin to proceed to The Pas, among other places, for the “purpose of Surveying and defining the boundaries of the several Indian Reserves which are indicated upon the map of part of Keewatin.” Graham also directed Austin to call upon Mr. Angus Mackay, Indian Agent at Grand Rapids, before commencing work explaining to him what is proposed to be done, and learning from him whether he is aware that any one of the Bands is likely to express a wish to have a change made in the locality of the Reserve of such land from the position indicated on the plan, ... also you are requested that you will in all cases before commencing the survey of a Reserve, confer with the Chief or, in the case of his absence, with the Head men of the Band interested and consult their wishes as to the point of commencement of the Survey of the land to be reserved.

I am to state that the Superintendent General of Indian Affairs considers it very undesirable that any change not absolutely required should be made, and it is hoped inasmuch as the localities of the several Reserves shown upon the plan here laid down from the description given by the Indians themselves, that it will not be necessary to make any changes of site at the present time.

To aid in his survey work, Austin was supplied with the population “of each band” requiring a reserve to be surveyed. In a note dated September 1882, Indian Agent Mackay informed the surveyor that there were 421 people at The Pas, 90 at Birch River, and 131 at Pas Mountain (642 people in total). A note in the margin divided the Pas Mountain group into Shoal Lake 55 and Red Earth 76. Later that month, however, Mackay amended those figures, stating that there were 448 people at The Pas, 90 at Birch River, 61 at Shoal Lake and 70 at Red Earth (669 people in total).

In his annual report of September 30, 1882, Indian Agent Mackay stated that, while passing through The Pas on September 7, he encountered Surveyor Austin, who was in the process of surveying the reserve at The Pas village, and learned that Austin intended to survey the Red Earth, Shoal Lake and Birch River reserves. In his report, Mackay also provided some description of the

227 Jas. F. Graham, Indian Superintendent, to W.A. Austin, DLS, June 29, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, pp. 289-90). The survey plan referred to in this correspondence has not been located.
228 A. Mackay, Indian Agent, to W.A. Austin, DLS, September, 1882, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, p. 289-90). The survey plan referred to in this correspondence has not been located.
229 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882, 47 (ICC Exhibit 1a, p. 301).
aforementioned “reserves.” He noted that, at Red Earth, there was a very nice common potato garden as well as very good land and timber, and stated:

"...the Indians here appear to take more interest in taking care of the implements supplied to them. This was the only reserve where I noticed that a building had been put up expressly for the purpose, and all the tools and implements snugly stored therein. Their cattle they had purchased themselves, and I must say that they were as fine a looking lot of animals of the kind as I have ever seen. They are also well stocked with native ponies of all of which they seem to take very good care."

As for Birch River, Mackay stated that their potato gardens were looking “unusually” good and that there was some very nice wheat and barley. He made little mention of Shoal Lake, but reported that the groups at Red Earth, Shoal Lake and Birch River found it difficult to make the 350 mile round trip to The Pas every year for annuity payments and had requested that, in following years, they be paid on their respective reserves. He did, however, state that “the land at both these places [Red Earth and Shoal Lake] was good enough for farming purposes.”

In the spring of 1883, Surveyor Austin provided the SGIA with an outline of the reserves surveyed the previous season in the Treaty 5 area. Despite the fact that Austin had indicated to Indian Agent Mackay the previous fall that he would travel to Red Earth and Shoal Lake to survey reserves there, it does not appear from Austin’s report that he ventured beyond Birch River. Austin reported in detail on the setting apart of reserves at The Pas and Birch River, but not at Red Earth and Shoal Lake.

At The Pas, Austin described the various locations he set aside for reserves. He noted that the land on the banks of the Saskatchewan River around The Pas, about half a mile in width, contained class 1 and 2 soil, but

---

230 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882, 47 (ICC Exhibit 1a, p. 301).
231 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882, 47 (ICC Exhibit 1a, p. 301).
232 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882, 47 (ICC Exhibit 1a, p. 301).
233 A. Mackay, Indian Agent, to Superintendent General of Indian Affairs, September 30, 1882, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882, 47 (ICC Exhibit 1a, p. 301).
was largely enclosed by swamp to the rear of it. Austin surveyed several portions of land for The Pas Band, which were largely pockets of good land surrounded by swamps.236 At Birch River, Austin described the land as “very good, being class No. 1” and noting that “[t]here is not a particle of stone on the Reserve.”237 He added that the Reserve contained the “finest gardens” that he had seen cultivated by Indians and that there was also an abundance of hay. He did note, however, that the spring freshets overflowed a large portion of the Reserve.238

After completing the survey at The Pas proper and Birch River, Austin noted that The Pas Band was still owed 3,246.57 acres. As it was “impossible to get good land for them near the [sic] Pas to complete the quantity needful for their Reserve,”239 he confirmed, after consulting with the Indian Agent, that the balance of the land entitled to The Pas Band would be set aside as two small reserves near the Pasquia Hills on the Carrot River.240 This plan was consistent with the agreement set out in the 1876 Adhesion to situate part of The Pas Band’s reserve at the Pas Mountain. The Pas Band’s reserve was laid out in several portions. Seven portions (A through G) were laid out at The Pas proper, ranging in size from 6.51 acres to 4,299.93 acres. Three additional portions (Nos. 1 to 3) were laid out at Indian Pear Island, as well as a 2,493.65-acre portion at Birch River.241 Austin indicated that The Pas Band had a population of 421, a figure acquired from Mackay (see above), and was therefore entitled to 13,472 acres of reserve land. As previously noted, however, Austin was able to survey only 10,225.43 acres, which left The Pas Band with an unfulfilled entitlement of 3,246.57 acres.242

At Birch River, Austin surveyed 2,880 acres for the 90 people belonging to the “Birch River Band,” whom he represented as a separate entity from The Pas Band.243 Therefore, the Birch River

236 W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April, 1883, in Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883, 162 (ICC Exhibit 1a, p. 328).
238 W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April, 1883, in Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883, 164 (ICC Exhibit 1a, p. 329).
241 W.A. Austin, D.L.S, to Superintendent General of Indian Affairs, April, 1883, in Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883, 166 (ICC Exhibit 1a, p. 330). See also: “Plan of Part of The Pas Indian Reserve, Saskatchewan River,” surveyed February 1883 by W.A. Austin, DLAS (ICC Exhibit 7a).
reserve contained a total of 5,373.65 acres, being the total amount allocated to the Birch River Band and The Pas Band at Birch River.\(^\text{244}\)

**Survey of the Red Earth and Shoal Lake Reserves (1884)**

By January 1884, The Pas Band had still not received the balance of its reserve lands (3,246.57 acres), which were to be surveyed for them. The Band sent a petition to the Superintendent General of Indian Affairs on January 3, 1884, asking that its remaining reserve land entitlement be surveyed for them toward the Oopasquaya Hill (Pas Mountain), where the land was thought to be more suitable for farming.\(^\text{245}\) The petition contained ten signatures, including those of one Councillor from Shoal Lake and two men from Red Earth.\(^\text{246}\)

The Band also claimed that they lacked seed for the coming spring, as frost had destroyed their crops the previous season. In addition, they submitted a request for numerous farming implements, oxen and cows.\(^\text{247}\) A letter of support for The Pas Band’s petition was sent by the Reverend J. Settee of The Pas Mission to Inspector E. McColl on January 9, 1884. Reverend Settee stated that he had lived at The Pas for 40 years and that the only good farm land he was aware of was located at Oopasquaya Hill. With respect to Birch River, Settee acknowledged that the land was “tolerably good” in dry seasons, but said that this was unusual, as the rains some years were “copious.”\(^\text{248}\)

On March 7, 1884, Inspector McColl wrote to the SGIA with his recommendations regarding The Pas Band’s petition. Although he said he had no personal knowledge of that area, McColl reported that he had been told by others that the Oopasquaya Hill, or Pas Mountain, was suitable for cultivation.\(^\text{249}\) Regarding the Band’s request for additional provisions of food, McColl recommended that “their petition in this respect be not entertained for the granting of it would only make them lazy paupers instead of thrifty farmers.”\(^\text{250}\) Noting the failure of the crops the previous year, McColl stated

\(^{244}\) Canada Lands Surveys Records (CLSR) SK Plan 244, “Plan of Birch River Indian Reserve South of the Great Saskatchewan River,” surveyed March 1883 by W.A. Austin, DLS (ICC Exhibit 7b, p. 2).

\(^{245}\) Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 391-393).

\(^{246}\) Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 392-393).

\(^{247}\) Chief John Bell and Petitioners, The Pas Band, to Superintendent General of Indian Affairs, January 3, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 393).

\(^{248}\) J. Settee, Devon or the Pas Mission, to E. McColl, January 9, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 402-403).

\(^{249}\) J. Settee, Devon or the Pas Mission, to E. McColl, January 9, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 402-403).

\(^{250}\) E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, March 7, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, pp. 404-405).
he had included an amount in the estimates for the purchase of 150 bushels of potatoes, 10 of wheat and 16 of barley, along with a number of farming implements. 251 On March 19, 1884, DSGIA Vankoughnet wrote to the Deputy Minister of the Interior, inquiring whether there was any objection to the balance of the land entitled to The Pas Band being granted at the Pas Mountain. 252 On that same day, Vankoughnet also wrote to Inspector McColl, requesting that Indian Agent Reader be sent to the Pas Mountain in the spring to inspect and report on the locality that The Pas Band wished to have set apart. 253

On June 6, 1884, Indian Agent Reader reported to Inspector McColl that, prior to leaving for the Pas Mountain, he had held discussions with members of The Pas Band about how the remaining 3,246.57 acres would be allocated to the Band. Reader stated that it had been decided that 1,500 acres would be set apart at the Pas Mountain, an additional 1,500 acres would be set apart northwest of the northern portion already surveyed at The Pas, and the remaining 246.57 would be reserved as timber land along the Carrot River. 254 These lands were to be set aside for The Pas Band.

Reader encountered considerable difficulty on his trip to see the reserve lands desired by the Red Earth people. After abandoning his journey by boat down the Carrot River (due to the river being blocked by trees), Reader and his companions traversed two and a half miles of swamp until the ground gradually began to rise toward the southwest. 255 Reader noted that the swamp eventually gave way to

a fine arable flat of some 10 acres of excellent soil which however in seasons of an exceptional high water might be in danger. Thence I proceeded into the woods (the ground gradually rising) where the Indians have already cultivated small patches of land. Here the soil is of the finest class. ... In places both here and along

252 [L. Vankoughnet], to A.M. Burgess, Deputy of the Minister of the Interior, March 19, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 408).
254 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 416).
255 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (ICC Exhibit 1a, p. 417).
the River there is an abundance of Hay; and some of the arable land requires draining.256

Afterwards, Reader left Red Earth for Shoal Lake. Along the way, he encountered a “fine piece of land” that ran along the banks of the Flute River, a stream that “runs out of the Carrot River toward the Mountain [Pasquia Hills].”257

Reader travelled down the Carrot River to Shoal Lake, where he found another camp of Indians belonging to The Pas Band. Upon arrival at Shoal Lake, he observed

small patches cultivated but for the most part very imperfectly. Here the land is more open and well adapted to farming purposes. Large flat pieces might easily be broken up and sown and would probably yield large crops. There are however some salt springs in the neighbourhood and some of the land require [sic] draining. Nearer the foot of the mountain there is some timber land which the Shoal Lake Indians wish to be included in their desired Reserve.258

Reader concluded his report by recommending that reserves be set apart for the groups of Indians of The Pas Band already settled at Red Earth and Shoal Lake, with an additional reserve at Flute River for the Indians at The Pas who wished to settle at Pas Mountain. He wrote:

If I may be allowed to make any remarks as to settling of some of the Pas Indians on Reserves at the mountain I would venture to suggest if the Department see fit that the Shoal Lake Indians should be settled where they are, and the Red Earth Indians where they have already built houses, and those Indians now at the Pas who wish to be settled at the mountain should have a reserve along the Flute River and such is the wish of the Indians themselves. One or two however of Red Earth Indians have this year planted potatoes near Flute River.259

Reader stated that, if reserves were allocated as recommended, he saw no reason why the Indians could not be self-supporting in a few years. He did suggest, however, that a yoke of oxen be supplied to each of the three reserves.260 A few months later, Indian Agent Mackay reported (presumably

256 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (IOC Exhibit 1a, p. 418).
257 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (IOC Exhibit 1a, p. 419).
258 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (IOC Exhibit 1a, p. 420).
259 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 11286 (IOC Exhibit 1a, p. 420).
on behalf of Indian Agent Reader) on the status of the Red Earth and Shoal Lake people and their reserves. He stated that the land on the banks of the Carrot River was very good and that, at Red Earth in particular, the Indians were thriving. They had cattle, which they purchased themselves, their gardens were well-tended, and they had good root cellars.261

On March 9, 1885, Dominion Land Surveyor Thomas Green reported to the SGIA on surveys conducted of Indian reserves the previous year (i.e. the summer of 1884). Included among those lands surveyed for The Pas Band was 2,000 acres at Flute Creek, situated approximately 30 miles southwest of Red Earth Lake. Green described the land to be of “excellent quality” and stated that 400 or 500 acres of it along the banks of the creek was clear of wood and ready to be cultivated.262 He commented that “[o]ne of the Indians from Red Earth had an excellent patch of potatoes here.”263 Plan 243 shows the “Pas Mountain Division” reserve (i.e. the Flute Creek reserve) surveyed “For Band at Pas Mission,” containing 2000 acres.264 No Order in Council confirming this land as an Indian reserve has been located.

Green also surveyed a reserve at Shoal Lake, where he stated that “a considerable amount of first class land is found.”265 He noted that two saltwater streams flowed through the western part of the reserve, and that the inhabitants boiled the water and obtained good salt from it.266

Green then proceeded to Red Earth to survey a reserve. He reported:

I surveyed a reserve for the band located there. The greater part of the land of this reserve is of good quality but is rather flat for grain and is situated South West of Red Earth Lake which was dry at the end of July last. These Indians appear to be very willing to work and are hardy and active looking men. The houses and improvements on the banks of the Carrot River were not included in the reserve as

260 J. Reader, Indian Agent, to E. McColl, Inspector of Indian Agencies, June 6, 1884, LAC, RG 10, vol. 3673, file 111386 (ICC Exhibit 1a, p. 421).
261 A. Mackay, Indian Agent, Beren’s River Agency, to Superintendent General of Indian Affairs, September 13, 1884, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884, 76-77 (ICC Exhibit 1a, p. 435). MacKay was the Agent for the Beren’s River Agency, which was created in 1885 from the part of the original Pas Agency.
262 T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13035 (ICC Exhibit 1a, p. 436).
263 T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13035 (ICC Exhibit 1a, p. 436).
265 T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13035 (ICC Exhibit 1a, pp. 436-437).
266 T.D. Green, DLS, to Superintendent General of Indian Affairs, March 9, 1885, LAC, RG 10, vol. 3685, file 13035 (ICC Exhibit 1a, pp. 436-437).
RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY

they were built before the treaty and the Indians claim that the government promised to recognize their rights to the same.267

While Green’s surveys of the Red Earth and Shoal Lake reserves were conducted in the summer of 1884, the first survey plans of the reserves are dated January 1885. Plan 245 shows the original configuration of the Shoal Lake reserve, containing a total of 2,190 acres, comprised of 1,751 acres arable land, 119 acres sandy beach and 320 acres marsh.268 Plan 4089 shows the original configuration of the Red Earth reserve, which contained a total of 2,711.64 acres.269 None of the available plans indicates the respective areas of arable land, beach or marsh on the Red Earth reserve. However, the land along the north boundary is labelled on the plans as a “large tract of wet and useless land,” and swampy areas are noted along other boundaries as well. At the northeast end of the reserve, the plans include a notation stating: “soil 1st class but flat.”270 No Orders in Council confirming these parcels as Indian reserves have been located.

The area of land surveyed by Surveyor Green for the Red Earth and Shoal Lake groups was not deducted from the outstanding reserve entitlement (3,250 acres) of The Pas Band. The reserves at Red Earth and Shoal Lake were set apart for them as individual bands, as was done at Birch River for the Birch River Band. The Pas Band’s remaining allocation was distributed as follows: 1,310 acres near the Indian Agent’s house at The Pas, 250 acres as a timber limit at the junction of the Carrot River and Mountain Point Creek, and the remaining 2,000 acres set apart at Flute Creek.271

269 CLSR SK Plan 4089 (Microplan 1224), “Treaty No. 6, Plan of the Indian Reserve at Red Earth, Saskatchewan District,” prepared January 1885 by T.D. Green, DLS (ICC Exhibit 7d, p. 2); see also, CLSR SK Plan 247, “Treaty No. 5, Plan of the Indian Reserve at Red Earth No 29, Saskatchewan District,” prepared January 1885 by T.D. Green, DLS (ICC Exhibit 7f, p. 2); and, DIAND, Indian Lands Registry, Plan 7662 (Microplan 882), “Treaty No. 5, Plan of the Indian Reserve at Red Earth No.29, Saskatchewan District,” surveyed January 1885 by T.D. Green, DLS (ICC Exhibit 7g, p. 2). 
271 T.D. Green to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 21, 1884, LAC, RG 10, vol. 3685, file 13053 (ICC Exhibit 1a, p. 430); see also: Natural Resources Canada, Plan 243, “Plan of Part of Indian Reserve for Band at Pas Mission, Treaty No. 5, Saskatchewan District,” surveyed by T.D. Green, D.L.S., season 1884 (ICC Exhibit 7)).
Separate Paylists (1886) and Leadership at Red Earth and Shoal Lake (1882 - 1902)

On September 4, 1885, Indian Agent Reader reported that the Pas Mountain Indians were anxious to receive treaty annuities at their own reserves, rather than making the long journey to The Pas at treaty time. In the following year, 1886, a separate “Pas Band” paylist was created for the members living at Red Earth and Shoal Lake.

As noted above, the Pas Mountain group was included in the leadership of The Pas Band beginning in 1882, with the election of one Councillor from Shoal Lake. In 1885, Indian Agent Reader reported that a “deputation” from Pas Mountain had recently participated in a Pas Band election:

In the month of April there was an election of a new chief for the Pas Band, and one councillor for the Pas Mountain, held at the Pas. Deputations came from the Pas Mountain and Birch River. On the 8th of April the Indians made their election in a very quiet, peaceable manner. Antoine Constant, jun., was elected chief for the whole band, and Baptiste Young as councillor for the Pas Mountain.

According to the paysheets, an additional Councillor from Red Earth was elected in 1889. It appears that this arrangement was maintained until 1902, except for a brief interlude from 1895 through 1899, when the positions were discontinued. A notation on the 1895 annuity paylists beside the former Red Earth and Shoal Lake Councillors' ticket numbers reads: “Term of office as Councillor completed, not to be re-elected. See letter ... 22 May 1895.” No further information regarding this decision is available, and this letter is not on the documentary record of this inquiry. The positions were apparently reinstated in 1900, when separate Councillors from both Red Earth and Shoal Lake were again identified on the paylists.
Despite the sometimes confusing terminology relating to the status of the Red Earth and Shoal Lake groups, it appears that the department still viewed them as part of The Pas Band as late as 1897. On August 3, 1897, the Chief of The Pas Band, Antoine Constant, signed a Consent of Band to Commutation of Annuity “on behalf of that portion of this Band settled at Shoal Lake Reserve Pas Mountain.”278

Farming and Development at Red Earth and Shoal Lake (1885 - 1891)

Indian Agent Joseph Reader reported that the winter of 1885 was very harsh. The Indians of The Pas, Birch River and Pas Mountain “suffered keenly,” and it was impossible to supply the food that was required by them as there was insufficient in the district.279

In his 1886 report, Agent Reader paid particular attention to developments on the Shoal Lake reserve. Arriving at Shoal Lake in the late fall of 1885, Reader reported:

[a]t Shoal Lake Reserve, at the foot of the mountain, the Indians had made but poor attempts at farming. The fact is that until recently they did not possess an ox, and they are not the men to labor hard with the hoe, although the land is almost all that could be desired to produce excellent crops. During my visit the subject of farming was plainly put before them, and I promised that I would again visit the reserve in the spring in order to teach and encourage them to cultivate the soil.280

In May 1886, Reader returned to Red Earth and Shoal Lake to instruct the inhabitants how to “cultivate the splendid soil on their reserves.”281 Reader began at the Shoal Lake reserve:

The plan generally followed, was as follows: First, the ground was cleared of rubbish, the corners and other parts not utilized were broken up with hoes, and the whole harrowed. Then I sowed the wheat, after which two of the boatmen

277 Treaty Annuity Paylist, “Pas Band paid at Shoal Lake,” July 30, 1900, LAC, RG 10, vol. 9375 (ICC Exhibit 1b, pp. 189 and 191). See ticket #199, Jeremiah Nawakayas and #200, Albert Moore Young. The documentary record only contains The Pas Band paylists up to 1893. Therefore, it is not possible to confirm the number of Councillors from the Red Earth and Shoal Lake identified on The Pas Band paysheets after 1893.
279 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1885, Canada, Annual Report of the Department of Indian Affairs for the year Ended 31st December 1885, 44 (ICC Exhibit 1a, p. 449).
280 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 74 (ICC Exhibit 1a, p. 472).
281 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 76 (ICC Exhibit 1a, p. 474).
followed with ox and harrow. One garden completed, another was treated in the same manner. Only a portion, however, of each garden was sown with wheat, the rest was reserved for potatoes. 282

Reader then proceeded to Red Earth, where similar work was to be done. He noted that there was great difficulty in arriving at the garden plots at Red Earth as everything had to be carried from the Carrot River through wood, mud or water. In the absence of oxen, the harrow had to be pulled by men. 283 After visiting Red Earth, Reader returned to Shoal Lake, where, in his absence, the Band had prepared two large pieces of land for ploughing and had drawn the plough themselves through half an acre of land. 284 Reader felt that the prospects for Red Earth and Shoal Lake were much brighter for the coming winter owing to the quantity of seed sown as compared to previous years. 285

In the summer of 1886, Reader returned to Red Earth and Shoal Lake to pay annuities and check on the progress of the Bands. At Shoal Lake, Reader observed “a fair crop of potatoes,” but noted that the wheat and barley, for the most part, had failed. Despite his previously optimistic expectation, Reader said he thought the Band would suffer from want of food during the approaching winter. 286 At Red Earth, however, Reader described quite a different situation:

Red Earth is probably the finest reserve in the agency. The crops here were excellent. The wheat sown in the spring promised good returns, while the potatoes the Indians themselves had preserved and planted were all that could be desired. It is a providential occurrence that these Indians have good crops, for they probably will have no fish next winter, owing to the very low stage of water. 287

Reader visited the Red Earth and Shoal Lake reserves again in the summer of 1887 to pay annuities and to examine the crops. At Red Earth he found some of the crops to be excellent, but one large field of potatoes

282 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 76-77 (ICC Exhibit 1a, pp. 474-475).
283 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 77 (ICC Exhibit 1a, p. 475).
284 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 77 (ICC Exhibit 1a, p. 475).
285 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 2, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886, 78 (ICC Exhibit 1a, p. 476).
286 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887, 85 (ICC Exhibit 1a, p. 482).
287 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 6, 1886, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1887, 86 (ICC Exhibit 1a, p. 483).
suffered from heavy rains. As well, all the barley seed that had been sent to the
Band in the spring had been eaten by band members in order to sustain them
while sowing their other seeds. While Reader did not comment specifically on
Shoal Lake, he concluded with a statement about the Pas Mountain generally:

[1]he Pas Mountain has hitherto been a bad place for Indians to live at, but the
increased cultivation of the soil is gradually placing them in a better position
hitherto to support themselves.288

In his annual report dated July 3, 1888, Indian Agent Reader noted that the
gardens at Shoal Lake were not well cared for, but their cattle were in
excellent condition, “there being excellent land everywhere.”289 At Red Earth,
he described the people as “more thrifty,” having better gardens, houses and
cattle than were to be found at Shoal Lake. Reader added,

[1]f the Pas Mountain Indians cultivate the fine, rich soil of their respective
reserves, they need never, under ordinary circumstances, suffer from starvation.
Efforts are made to induce them to do so, but it is by no means easy to wean them
from habits inherited from their forefathers.290

Indian Agent Reader’s annual report for 1889 was very similar to the
previous year’s, describing Shoal Lake’s gardens as being poor compared to
those at Red Earth. He noted, however, that the cattle at both localities were in
excellent condition, “for it would be difficult to surpass the
feed which is to be found at the Pas Mountain.”291

Reader repeated similar observations in his 1890 report. At Shoal Lake,
the only advancement he noted was with respect to cattle raising, while he
described the overall advancement toward self-sufficiency at Red Earth as
“remarkable,” adding that it was an “excellent place for farming and cattle-
raising.”292 Reader’s generally positive observations at Red Earth and Shoal
Lake, however, did not apply to The Pas Agency as a whole. In Inspector

288 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, September 12, 1887, Canada, Annual
Report of the Department of Indian Affairs for the Year Ended 31st December 1888, 72 (ICC Exhibit 1a, p. 502).
289 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, Annual Report of
the Department of Indian Affairs for the Year Ended 31st December 1888, 75 (ICC Exhibit 1a, p. 538).
290 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1888, Canada, Annual Report of
the Department of Indian Affairs for the Year Ended 31st December 1888, 76 (ICC Exhibit 1a, p. 539).
291 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, August 12, 1890, Canada, Annual Report of
the Department of Indians Affairs for the Year Ended 31st December 1890, 124 (ICC Exhibit 1a, p. 561).
292 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 11, 1889, Canada, Annual Report of
the Department of Indians Affairs for the Year Ended 31st December 1889, 50 (ICC Exhibit 1a, p. 568).
McColl’s 1890 report to the SGIA, McColl noted that little progress in farming was made by the Indians in the agency. He stated that they still largely earned their livelihood from hunting, as the surrounding marshes and forests had not yet been encroached upon by settlers.293

On July 6, 1891, Indian Agent Reader submitted his eighth annual report to the SGIA for The Pas Agency, again describing the progress at Red Earth and Shoal Lake quite differently:

The Indians at these two places are, strange to say, characterized by opposite tendencies; for while the Shoal Lake Band makes but little progress in cultivating the soil or in general improvement, the Red Earth Indians are thrifty, have a good supply of potatoes for food in winter and summer and for seed in spring, and present at the agent’s visit of inspection tidy houses and premises generally. It is remarkable what these Indians have done, so far removed from the outside world.294

Red Earth Band Requests Exchange of Flute Creek for Carrot River (1892)

On January 14, 1892, Indian Agent Reader reported in a letter to Inspector McColl that the “Pas Mountain Band of Indians” had requested that a tract of land, upon which the Red Earth group resided along the Carrot River, be set apart as a reserve in exchange for the reserve laid out for The Pas Band at Flute Creek. They also requested that a timber limit be surveyed in the vicinity of Red Earth in lieu of the proposed exchange.295 Reader noted that “the Red Earth Indians do not live but only farm in their Reserve of that name” (presumably IR 29, south of the Carrot River). He therefore recommended that their request be granted, as the land they desired on the Carrot River (although it was also susceptible to flooding at times) was excellent for farming and building.296 It should be recalled that the 2,000-acre Flute Creek reserve was set apart for The Pas Band in 1884, as part of its remaining treaty land entitlement.297 The request for exchange was forwarded by Inspector E. McColl to DSGIA Vankoughnet for consideration.298 Vankoughnet replied that

293 E. McColl, Superintending Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, November 18, 1890, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1890, 202-203 (ICC Exhibit 1a, p. 572).
294 J. Reader, Indian Agent, to Superintendent General of Indian Affairs, July 6, 1891, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891, 67 (ICC Exhibit 1a, p. 578).
McColl should investigate the matter further and provide a recommendation after he had formed an opinion.299

On December 16, 1892, Inspector McColl reported to the DSGIA, recommending that the exchange be approved:

I beg to inform you that the land at Flute River is very good but somewhat low, and in rainy seasons rather two [sic] such. The land at Red Earth is very superior but is also somewhat low, the banks of the river are about five feet above low water mark. At Red Earth [Carrot River] there are eleven dwelling houses, and ten stables, as well as eight gardens. On the reserve about five miles west of Red Earth there are fourteen garden patches of excellent potatoes raised on them.

The timber limit asked by them is about a mile or two west of Red Earth further up the river. The timber is principally spruce (white) and suitable for building, and for logs for making lumber by whip-saws for their houses.

As the Indians are most desirous for the exchange, and as they have built houses and stables at Red Earth and made considerable clearings around their dwellings, I would recommend that their request be granted, more especially as this portion of the Pas Mountain Band is most industrious having a large herd of cattle and raising a large crop of potatoes every year.300

On April 27, 1893, Assistant Surveyor Samuel Bray wrote the Deputy Minister of Indian Affairs regarding the exchange of the Flute Creek reserve for a reserve on the Carrot River for the Red Earth Band. Bray suggested that, because the Red Earth people were “exceptionally industrious,” their interests differed widely from those of the people at Shoal Lake. He explained that because of the distance between the two reserves, “trouble may ensue if they continue as one band and in the near future may prevent the surrender or subdivision of any of their reserves or of the execution of any measure requiring the vote of the entire band.”301 Therefore, he proposed that steps be taken “to permanently separate the two portions of the Pas Mountain Band into two separate bands.”302 On May 2, 1893, the DSGIA wrote to Indian Inspector McColl for his opinion on this suggestion.303 Following McColl's

---

298 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 27, 1892, DIAND, file 672/50-28, vol. 1 (ICC Exhibit 1a, p. 582).

299 [L. Vankoughnet] to E. McColl, Inspector of Indian Agencies, February 10, 1892, DIAND, file 672/50-28, vol. 1 (ICC Exhibit 1a, pp. 583-584). See the following plan for the original locations of the Red Earth and Flute Creek reserves: Department of Indian Affairs, “Sketch showing the positions of Red Earth and Flute River Reserves, traced from Map of Manitoba & NorthWest Territories issued by the Department of the Interior, June 1891,” traced by W.A. Austin on July 18, 1893 (ICC Exhibit 7j).

300 E. McColl, Inspector of Indian Agencies, Manitoba Superintendency, to Deputy Superintendent General of Indian Affairs, December 16, 1892, DIAND, file 672/50-28, vol. 1 (ICC Exhibit 1a, pp. 597-598).

301 Samuel Bray, Department of Indian Affairs, to Deputy Minister, April 27, 1893, LAC, RG 10, vol. 62-46, file 539-1, part 1 (ICC Exhibit 1a, pp. 607-608).

302 Samuel Bray, Department of Indian Affairs, to Deputy Minister, April 27, 1893, LAC, RG 10, vol. 62-46, file 539-1, part 1 (ICC Exhibit 1a, p. 608).
objection to the proposal, Vankoughnet advised the Lands Branch of the Department of Indian Affairs on June 13, 1893, that the Pas Mountain Band would not be formally separated to form the Red Earth and Shoal Lake Bands.\(^{304}\)

On May 4, 1893, the DSGIA asked A.M. Burgess, Deputy Minister of the Department of the Interior, if there was any objection to exchanging the “Flute River” reserve, which contained 2,008 acres, for an equal area at Carrot River, where the Red Earth Band resided.\(^{305}\) In response, the Department of the Interior asked to be furnished with a sketch of the proposed location of the reserve and commented that it was understood that a reserve had already been set aside for the Band in the Carrot River area.\(^{306}\) Vankoughnet replied that the reserve already surveyed for the Red Earth Band was situated three miles south from the proposed location of the additional reserve, and he enclosed a plan indicating the lands desired on the Carrot River in exchange for the “Flute River” reserve.\(^{307}\)

On June 30, 1893, Order in Council PC 1849 was approved, allowing for the exchange of the 2,008 acre “Flute Creek reserve” for an equal area of land at Red Earth on the Carrot River, for the use of the Pas Mountain Band.\(^{308}\)

Addition of Carrot River Reserve and Re-Survey of Shoal Lake Reserve (1894)

On July 26, 1894, Hayter Reed, now DSGIA, wrote to Indian Agent Reader, informing him of the survey work required within The Pas Agency. Reed reminded the Indian Agent that an Order in Council had authorised the exchange of the Flute River (Creek) reserve for an equal amount of land at Red Earth on the Carrot River, and that it had been agreed that a timber limit would also be set apart for the Pas Mountain Band. Reed instructed that those reserves were to be surveyed.\(^{309}\) In addition, Agent Reader was informed that an adjustment to the reserve at Shoal Lake was required, as it had been recommended that the Band be allowed to abandon part of its reserve in

---

304 [L. Vankoughnet], Deputy Minister, Department of Indian Affairs, to Lands Branch, June 13, 1893, LAC, RG 10, vol. 6246, file 539-1, part 1 (ICC Exhibit 1a, p. 627).
305 Deputy Superintendent General of Indian Affairs to A.M. Burgess, Deputy Minister of the Interior, May 4, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, p. 613).
306 Lyndwode Pereira, Assistant Secretary, Department of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, May 13, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, p. 622).
307 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, June 2, 1893, LAC, RG 15, vol. 686, file 329611 (ICC Exhibit 1a, pp. 624-626).
309 Hayter Reed, Deputy Superintendent General of Indian Affairs, to J. Reader, July 26, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 647-649).
RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY

exchange for better, adjacent land. 310 On July 27, Surveyor Samuel Bray was advised of the new surveys required at Red Earth and Shoal Lake. 311

The details of the changes to the Red Earth and Shoal Lake reserves were finalized in a meeting between Indian Agent Reader, Inspector McColl and Surveyor Bray on August 13, 1894. The following decisions were recorded in the minutes of that meeting:

The ‘Pas Band’

... 

A portion of Shoal Lake Reserve to be surrendered and a piece at the Easterly end of the same Reserve to be added to it, retaining that portion in the woods where the houses are – but cutting off the Westerly portion although there are houses on it.

The Flute Creek Reserve to be abandoned for a Reserve on the Carrot River at Red Earth Village including the Village and a portion of Carrot from the rear (prairie land) and a timber limit up the River (a few miles). 312

In November and December 1894, Bray re-surveyed the reserve at Shoal Lake and laid out the new Carrot River reserve for Red Earth. 313 In a memorandum recording an interview with Councillor Joseph Head of the “Shoal Lake Band,” Bray reported that the Councillor was pleased with the adjustments made to the Shoal Lake reserve. Bray also noted that “[h]is Chief, Antoine Constant (chief of the Pas bands) has written to him advising him to have his share of the abandoned Flute River Reserve” set apart as hay land. Councillor Head had therefore chosen a piece of land on the north side of the Carrot River and requested that it be surveyed. 314 Bray commented:

[m]y instructions are to lay out all the area of the Flute Creek Reserve at Red Earth; whatever rights he and his band had in the Flute Creek Reserve they would now have in the lands at Red Earth [now] about to be surveyed. In fact, the Department considered the Red Earth band and the Shoal Lake band to be only one band with two councillors* [Marginalia – “Pas Mountain Band”]. Between them they will

310 Hayter Reed, Deputy Superintendent General of Indian Affairs, to J. Reader, July 26, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 649).
311 Hayter Reed, Deputy Superintendent General of Indian Affairs, to Samuel Bray, DLS, Technical Branch, Department of Indian Affairs, July 27, 1894, LAC, RG 10, vol. 3920, file 116756 (ICC Exhibit 1a pp. 650-652).
312 Meeting Minutes, E. McColl, J. Reader & S. Bray, August 13, 1894, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 657). The timber limit at Mountain Point Creek was set apart for The Pas Band by Surveyor Green in 1884.
313 Diary, S. Bray, Assistant Chief Surveyor, August 3, 1894, to December 18, 1894, LAC, RG 10, vol. 3920, file 116756-2 (ICC Exhibit 1a, p. 654).
314 Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, p. 664).
therefore have three reserves, viz. the Shoal Lake Reserve, the Red Earth Reserve South of the Carrot River, and the Red Earth Reserve on the Carrot River.\(^{315}\)

Bray added that, if the Shoal Lake Band had a large number of cattle, he would take the responsibility to lay aside more hay land, but since they did not have many cattle and already possessed pasture land, he thought it unnecessary. The Councillor of the Shoal Lake group also asked Bray whether additional grass land would be laid out for the Band if the people were to acquire a large number of cattle. He replied that he could not make any promise that more land would be set apart, but thought that the Band “would not do wrong to ask.”\(^{316}\)

On January 23, 1895, the Assistant Chief Surveyor, Samuel Bray, reported to DSGIA Hayter Reed regarding the surveys at Red Earth and Shoal Lake. At Shoal Lake, Bray noted that the old reserve excluded some lands that were under cultivation and other lands that were desired by the Band. He described the old reserve as an irregular oblong lying northeast and southwest, which he re-surveyed to a nearly square block with boundaries parallel to the township lines.\(^{317}\) He noted that the new boundaries enclosed “all the lands desired by the Indians,” except for a small graveyard, which Bray surveyed “as a small separate reserve” of approximately half an acre.\(^{318}\) Bray also reported that he did not survey additional hay land for the Band, as requested by them, because there was no immediate use for it and “this action would probably retard the removal of these Indians to Red Earth which I understood from Agent Reader was the desire of the Department.”\(^{319}\)

Survey Plan 246, dated November 30, 1894, shows the resurvey of the Shoal Lake reserve (renamed IR 28A) set aside for the “Shoal Lake Band of Indians, a branch of the Pas Mountain Band,” and containing an area of 2,236 acres.\(^{320}\) This resurvey included a slight increase in area compared with the

\(^{315}\) Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, pp. 664-665).

\(^{316}\) Memorandum of Interview, S. Bray, Assistant Chief Surveyor, with Councillor Joseph Head, Shoal Lake Band, December 1, 1894, LAC, RG 10, vol. 7537, file 27128-1-8 (ICC Exhibit 1a, pp. 665-666).

\(^{317}\) S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 670-671).

\(^{318}\) S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 665-666). There are some discrepancies in the documentary record regarding the size of this small burial ground. While Bray’s report states that it contained approximately half an acre, Plan 246 shows an area of 1.00 acre. See: CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).

\(^{319}\) S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 671).

\(^{320}\) CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).
original reserve (IR 28), which had an area of 2,190 acres. The plan also shows the old reserve boundaries and includes notations stating that those parts of the old reserve that fell outside the new boundaries had been “abandoned.” Finally, the plan shows a small graveyard of one acre outside the southwest corner of the new reserve boundaries.321

After surveying the Shoal Lake reserve, Bray proceeded to Red Earth. He stated that it had been previously determined that three small separate reserves would be surveyed for the Band but, upon examination of the sites, Bray determined that “all the three localities could be enclosed in one reserve and the whole would not exceed the area of the abandoned reserve at Flute Creek.”322 Survey Plan 248, dated December 8, 1894, shows the new reserve allocated to the “Red Earth band of Indians, a branch of the Pas Mountain band” on the banks of the Carrot River, named the Carrot River IR 29A, containing a total of 2,040 acres. A notation on the plan states: “This Reserve is substituted for the abandoned reserve at Flute River.”323

In concluding his survey report, Bray commented that efforts were made to ensure that the Red Earth and Shoal Lake Bands were satisfied with the reserves as surveyed, stating:

I invariably engaged the chief and councillors of each band as chainmen or axemen and always held a council the evening before to decide approximately on the lands to be surveyed and I made these men thoroughly understand that I held them responsible for the correct location of the reserves and that if anything connected with them or with the surveys did not appear to them to be correct or desirable they were at once to point it out in order that there should not be any subsequent complaints.324

On August 8, 1895, the Department of the Interior was sent the new survey plans with the adjustments to the reserves in The Pas Agency.325 These changes were confirmed and the lands withdrawn from the Dominion Lands Act by Order in Council PC 3027 on October 18, 1895.326

321 CLSR SK Plan 246, “Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 30, 1894 (ICC Exhibit 7k, p. 2).
322 S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7557, file 27128-1-6 (ICC Exhibit 1a, p. 672).
323 CLSR SK Plan 248, “Treaty No. 5 Saskatchewan Red Earth Carrot River Indian Reserve No. 29A,” surveyed by S. Bray, December 8, 1894 (ICC Exhibit 7L, p. 2).
324 S. Bray, Assistant Chief Surveyor, to Hayter Reed, Deputy Superintendent General of Indian Affairs, January 23, 1895, LAC, RG 10, vol. 7557, file 27128-1-6 (ICC Exhibit 1a, p. 676).
325 S. Bray, to John R. Hall, Acting Deputy Minister of the Interior, August 8, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 678-679).
326 Order in Council PC 3027, October 18, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, pp. 685-686).
The Order confirmed IR 28A “for the Shoal Lake Band,” and the “Red Earth Reserve (No. 29A).” It also cancelled the former “Indian Reserves” that had been “abandoned by the Department of Indian Affairs,” including “The Pas Mountain Division Reserve at Flute Creek containing 2,008 acres” and the 2,237 acre former Shoal Lake reserve.\footnote{327}

A few Red Earth Elders recall hearing about a reserve at Flute Creek, although there is very little oral history evidence regarding what happened to it. Red Earth Elder John James Head recalls hearing about a meeting that resulted in “the transfer of Flute Creek” land to IR 29, although it is unclear exactly when that meeting took place.\footnote{328} Red Earth member Ian McKay recalls hearing his grandfather, Abel Head, speak about a time when he was staying at Flute Creek for one season. He said that a “leader” came back from a trip to The Pas and told him “to move from Flute Creek to 29A,” but that Abel did not understand the reason why he was asked to move.\footnote{329} The timing of this event is uncertain as well, although Mr. McKay stated during the Community Session that Abel Head was born in 1922.\footnote{330}

\section*{Farming and Development at Red Earth and Shoal Lake (1892 - 1906)}

On April 4, 1892, Indian Agent Reader wrote to the Indian Commissioner in Regina concerning the fortunes of the people residing at the Pas Mountain, and Shoal Lake in particular. He felt that the people at Shoal Lake would never prosper unless they could “be in a position to live chiefly by raising stock, and it is an excellent place for that.”\footnote{331} To meet this end, he recommended (as he had done some years previously) that a resident instructor be sent to Shoal Lake and Red Earth to instruct the people in agriculture.\footnote{332} A few months later, in June 1892, Agent Reader submitted his annual report for The Pas Agency, which reflected the same trends highlighted in previous years’ reports. Principally, he stated that Red Earth was thriving in comparison to its neighbours at Shoal Lake and added that “[f]or raising stock, agricultural operations, and carrying out the department’s instructions of sanitary measures, Red Earth Band is an example to the whole agency.”\footnote{333}

\begin{footnotes}
\item[327] Order in Council PC 3027, October 18, 1895, LAC, RG 10, vol. 7537, file 27128-1-6 (ICC Exhibit 1a, p. 686).
\item[328] ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 216-21, John James Head).
\item[329] ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 255, Ian McKay).
\item[330] ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 250, Ian McKay).
\item[331] J. Reader, Indian Agent, to Indian Commissioner, April 4, 1892, LAC, RG 10, vol. 1814, Series A (ICC Exhibit 1a, p. 589).
\item[332] J. Reader, Indian Agent, to Indian Commissioner, April 4, 1892, LAC, RG 10, vol. 1814, Series A (ICC Exhibit 1a, p. 589).
\end{footnotes}
In Indian Agent Reader’s 1893 report, his comments were similar to those of previous years. He noted that the Red Earth people were a model for the other reserves and that they “cultivate potatoes in abundance, and not only have sufficient for themselves, but some to spare for their less energetic neighbours at Shoal Lake.”334 He also remarked on the number of cattle and horses in their possession, many of which were acquired with their own money.335 As for Shoal Lake, Reader stated:

[These Indians have been too fond of camping near the lake and the river, depending upon fish and game. They have therefore, as a whole, made but little progress in the cultivation of the soil. They have now decided to work more inland, where there is excellent soil and where a few have fine gardens. Piles of rubbish have been burnt, and houses and premises generally present a much better appearance than formerly.336

In 1894, Acting Indian Agent H. Reader reported more favourably on the Shoal Lake Band. He noted that their condition was improving, they had fair gardens and had relocated their houses to higher ground. He added, however, that they would “do better along with their thrifty neighbours at Red Earth,” but stated that they were not interested in relocating.337 The Acting Indian Agent’s commentary on Red Earth was similar to previous years, describing them as “the cleanest and tidiest of all the Indians in this agency.”338 He noted that they raised “comparatively large quantities of potatoes” (presumably with respect to Shoal Lake) but were in need of farming implements. He concluded that “[w]ere they taught to farm properly, and raise stock (of which they already have a number of head), they would without doubt support themselves entirely.”339

---

333 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1892, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892, 165 (ICC Exhibit 1a, p. 594).
334 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893, 69 (ICC Exhibit 1a, p. 635).
335 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893, 69 (ICC Exhibit 1a, p. 635).
336 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 29, 1893, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1893, 69 (ICC Exhibit 1a, p. 636).
337 H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894, 192 (ICC Exhibit 1a, p. 661).
338 H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894, 193 (ICC Exhibit 1a, p. 661).
Indian Agent J. Reader’s 1895 annual report concerning Red Earth and Shoal Lake again echoed previous reports. He wrote:

[1] These two off-shoots from the Pas Band have the advantage of first-class soil, especially that at Red Earth, and it only needs clearing and cultivating to raise all kinds of ordinary grain and vegetables. The Red Earth Indians are more thrifty than their neighbours at Shoal Lake, and have a goodly number of cattle, as well as some excellent gardens. They raise large crops of potatoes upon which and milk they chiefly live, for there are but few fish there, and those of an inferior kind. There is no school at Red Earth, but one at Shoal Lake, which, however, is temporarily closed. The Indians at the latter place have done better since removing from the low, salty grounds to the woods where the soil is good.340

In the summer of 1896, Reader reported some positive developments on the Shoal Lake reserve. He noted that the Band was doing much better than formerly, citing the construction of new houses and the residents’ attention to sanitary issues. Reader commented that, while hunting was not very good at Shoal Lake, it was a good place for cattle.341 At Red Earth, Reader stated that the Band was progressing well, although his commentary was almost identical to the previous year:

The Red Earth Indian are, perhaps, at the head of all the bands in this agency for keeping their premises clean and tidy, and in supplying their houses with firewood. They are good gardeners, and live largely on potatoes and milk, having a goodly number of private animals. This year, as it was obvious they should cultivate the land to a greater extent than heretofore, they have received some assistance and this has been an encouragement to them.342

In the early summer of 1897, Indian Agent Reader submitted a report that was much more detailed than in previous years and examined topics including resources, health and sanitary conditions, education, religion, band characteristics, temperance and morality. Regarding the Shoal Lake reserve, Reader wrote that it “possesses some excellent patches for cultivation. Salt springs abound in the neighbourhood, and there is fine fodder for cattle.”345

339 H. Reader, Acting Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, August 20, 1894, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894, 193 (ICC Exhibit 1a, p. 661).
340 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, August 9, 1895, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1895, 193 (ICC Exhibit 1a, p. 681).
341 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896, 128 (ICC Exhibit 1a, p. 693).
342 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, July 3, 1896, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1896, 128 (ICC Exhibit 1a, p. 695).
He reported that the Shoal Lake people had not been very successful in cattle production, but this was improving.344 With respect to Red Earth, Reader described the Band’s reserves as well adapted for cultivation, with large crops of potatoes that sustained them most of the year.345 He stated that the Band possessed sixty head of cattle and some horses and described the people as “thrifty” and well dressed despite their remote location.346

The subsequent annual report for The Pas Agency was submitted on September 30, 1899, by the new Indian Agent, Joseph Courtney. Commenting on Shoal Lake, Courtney stated:

The soil of this reserve, where cleared, is a deep sandy loam, and yields large crops of potatoes, There are several salt springs in the neighbourhood that produce a good, pure salt.

The only means of support here has been confined to the potato crop and hunting large game; but, owing to the encroachment of civilization from the south and west, game is getting scarce, and the Indians are beginning to realize the necessity of clearing off and breaking up more land and giving more attention to their cattle.347

At Red Earth, Agent Courtney observed that the Band was apparently regressing somewhat with respect to agriculture. As in Indian Agent Reader’s reports, Courtney described the soil at Red Earth as “all that could be desired.”348 However, the Band’s cattle herd had dwindled to 30 head and their horses had all but disappeared. He noted that they depended largely on their potato crop and hunting large game for subsistence, but as with Shoal Lake, they recognized the necessity of concentrating more on farming.349

343 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897, 103 (ICC Exhibit 1a, p. 696).
344 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897, 103 (ICC Exhibit 1a, p. 696).
345 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897, 103 (ICC Exhibit 1a, p. 696).
346 Joseph Reader, Indian Agent, to Superintendent General of Indian Affairs, June 25, 1897, Canada, Annual Report of the Department of Indian Affairs for the Year Ended 30th June, 1897, 104 (ICC Exhibit 1a, p. 697).
347 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 90 (ICC Exhibit 1a, p. 715).
348 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 90 (ICC Exhibit 1a, p. 715).
349 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, September 30, 1899, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899, 90 (ICC Exhibit 1a, p. 715).
The following year, Courtney wrote similarly of the Red Earth and Shoal Lake Bands. He described the Shoal Lake reserve as “a most suitable piece of country for an Indian reserve,” and found that the band members occupied themselves by cultivating small gardens of potatoes, attending to their cattle, and hunting and trapping.350 Courtney described the Red Earth reserves as containing several hundred acres of land good for cultivation, with the rest being timber and hay lands. The agent commented that the cattle herd had not increased in some years, but that there was “a nice band of horses which they seem to prize more than cattle.”351

In the fall of 1900, S.R. Marlatt, Inspector of Indian Agencies for the Manitoba Superintendency, reported on the condition of the Red Earth and Shoal Lake Bands. Marlatt’s account differed from that of Indian Agent Courtney with respect to the Shoal Lake reserve, describing it as “very low; the greater part of it is covered with a heavy forest of spruce, the soil is spongy and damp and not well adapted for gardening.”352 By contrast, he noted that the soil at Red Earth was “good, quite dry enough and free from stones.”353

In his annual report, written in the summer of 1903, Indian Agent Courtney described the Shoal Lake reserve as largely covered with timber, with the remainder consisting of swamp or hay land. Courtney reported a marked improvement in the condition and development of the Shoal Lake Band in comparison to previous years, noting that the Band had taken “quite an interest in stock-raising,” and that the herd was increasing rapidly.354 Furthermore, he observed that the houses were well built and clean and that the Band was growing large crops of potatoes. Courtney stated that the Shoal Lake reserve “contains two thousand two hundred and forty acres, a large portion of which is covered with timber. The remainder consists of swamp and hay land.”355 However, he noted there existed “an inclination to be

350 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 31, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 92 (ICC Exhibit 1a, p. 720).
351 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 31, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 93 (ICC Exhibit 1a, p. 721).
352 S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 1, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 105 (ICC Exhibit 1a, p. 754).
353 S.R. Marlatt, Inspector of Indian Agencies, Manitoba Superintendency, to Superintendent General of Indian Affairs, October 1, 1900, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900, 105 (ICC Exhibit 1a, p. 754).
354 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, 91 (ICC Exhibit 1a, p. 753).
355 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, 91 (ICC Exhibit 1a, p. 753).
industrious... as far as their surroundings would permit.”356 Courtney’s depiction of the Red Earth Band was not as complimentary as it was for Shoal Lake. While pointing out that they raised large crops of potatoes, he stated that only a few individuals had cattle and were not inclined to increase their numbers. Nevertheless, he stated that the Band made a good living from the potatoes and hunting and trapping, which he deemed necessary as there was no opportunity for outside employment due to the remoteness of the reserve.357

In 1906, Indian Agent Courtney reported that the Shoal Lake Band had reached a population of 70 and described their reserve as having some land suitable for cultivation, and a “large extent” of pasture and hay land ideal for cattle ranching. Although band members produced large crops of potatoes and had a few cattle, he noted that hunting was the principal occupation of the Shoal Lake people. Courtney added that the reserve had “hay and pasture enough for several hundred head of cattle, but being so isolated and far from an outlet, there has been no inducement to increase the herd beyond their own requirements.”358

At Red Earth, Courtney assessed the Band’s population to be 123.359 He noted that they had large gardens and produced excellent crops of potatoes, on which they relied between hunting seasons, but stated that the “few cattle which they have on this reserve seem to be more trouble than benefit to them, and until radical change takes place, very little interest will be taken in stock-raising.”360

The DSGIA’s annual report for 1906 emphasized the importance of developing agriculture on reserves. While it was noted that First Nations devoted themselves to a variety of occupations, including hunting and trapping, farming and wage labour, agriculture was considered to have a comparative advantage over other occupations for its civilising effect.

356 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, 91 (ICC Exhibit 1a, p. 753).
357 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, July 6, 1903, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903, 92 (ICC Exhibit 1a, p. 754).
358 Joseph Courtney, Indian Agent, Pas Agency, to Superintendent General of Indian Affairs, June 30, 1906, Canada, Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906, 89 (ICC Exhibit 1a, p. 756).
Although it was difficult for the department to control which occupations certain bands dedicated themselves to, the DSGIA concluded that

[1]he only direction in which the department can appreciably control the selection of occupation is among those emerging from aboriginal conditions, for whom agriculture is clearly the best and often the only available employment.\footnote{Report of the Deputy Superintendent General of Indian Affairs, June 30, 1906, Canada, \textit{Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906}, xxxiii (ICC Exhibit 1a, p. 759).}

**Separate Paylists Created for the Red Earth and Shoal Lake Bands (1903)**

Prior to 1903, the Red Earth and Shoal Lake Bands had been described on the pay sheets as the ‘Pas Band paid at Red Earth and Shoal Lake.’ It was decided in that year, however, that, since those Bands had “no connexion [sic] with the Pas Band in any way whatever,” they would be given their own paylists.\footnote{Joseph Courtney, Indian Agent, to Secretary, Department of Indian Affairs, June 10, 1903, LAC, RG 10, vol. 8139, file 578/28-5, vol. 1 (ICC Exhibit 1a, p. 751).}

From that year forward, separate annuity paylists were maintained for the Red Earth and Shoal Lakes Bands.\footnote{See: Treaty annuity paylist for “Red Earth Band” and “Shoal Lake Band” 1903, LAC, RG 10, vol. 9378, pp. 379-384 and pp. 377-378 (ICC Exhibit 1b, pp. 207-209 and p. 240).}

From 1903-1912, one Councillor was identified on each Band’s paysheets.\footnote{Treaty Annuity Paylist, “Shoal Lake Band paid at Shoal Lake,” 1903-1912, LAC, RG 10, vol. 9378-9387 (ICC Exhibit 1b, pp. 246-55); Treaty Annuity Paylist, “Red Earth Band paid at Red Earth,” 1903-1912, LAC, RG 10, vol. 9378-9387 (ICC Exhibit 1b, pp. 207-229).}

**Additions and Adjustments to the Red Earth and Shoal Lake Reserves (1908 - 1913)**

In the spring of 1908, both the Shoal Lake and Red Earth Bands requested additions to their respective reserves. The Shoal Lake Band asked for approximately one quarter-section (160 acres) on the north side of the Carrot River opposite its existing reserve, because band members claimed to be unable to procure enough hay in years of high water.\footnote{Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 764).}

Similarly, the Red Earth Band requested the addition of a quarter-section of land north of the Carrot River for timber and hay lands. The Red Earth Band members claimed that they presently had to go outside their reserve boundaries to obtain adequate amounts of both hay and timber. They feared that, in the future, the encroachment of settlers would confine them to the reserve for those resources.\footnote{Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 765).}
In a memo to the Deputy Minister dated March 25, 1908, Chief Surveyor Samuel Bray recommended that the Bands’ requests be granted, saying he considered them “very reasonable,” and suggesting that the Indian Agent be instructed to delineate tracts of land not exceeding half a section (320 acres) to secure the lands until they could be surveyed in the regular manner.367

On March 27, 1908, the Secretary of the Department of Indian Affairs, J.D. McLean, instructed Indian Agent Fred Fischer to survey the additions to the Red Earth and Shoal Lake reserves. As a formal re-survey of the reserves was not likely to take place for some time, he was told to lay out the desired tracts of land to the best of his ability, not in excess of 320 acres for each Band. McLean stated that the Bands should be informed that the land was not finally secured for them until approval was given by Order in Council.368

Indian Agent Fischer attempted to mark out the additions to the reserves in May 1908. Due to extensive flooding in the region, however, it was impossible for him to undertake that work.369 With respect to Red Earth, Fischer wrote that the Band was pleased that its request had been granted and asked that the addition to its reserve be made as two tracts of 160 acres each because the hay and timber lands were located in different areas.370 The department agreed to this request and informed the Indian Agent, directing him to provide a sketch or plan of the requested lands as soon as possible.371

In May 1908, Agent Fischer suggested that, in order to distinguish between the two reserves belonging to the Red Earth Band, that the original reserve, which was traversed by Red Earth Creek, be referred to as Red Earth IR 29, and that the reserve on the Carrot River be called Carrot River IR (29A).372 These suggestions were subsequently approved by Secretary J.D. McLean.373

On March 26, 1910, Indian Agent Fischer submitted his sketch of the proposed addition to the Shoal Lake reserve to the department.374 The

---

367 S. Bray, Department of Indian Affairs, to Deputy Minister, March 25, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 767).
368 J.D. McLean, Secretary, to Fred Fischer, Indian Agent, March 27, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 768).
369 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, LAC, RG 10, vol. 7776, file 27128-10 (ICC Exhibit 1a, p. 769). See also: Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).
370 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).
371 J.D. McLean, Secretary, to Fred Fischer, Indian Agent, June 17, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 772).
372 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, May 29, 1908, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 770).
373 J.D. McLean, Secretary, to Fred Fischer, Indian Agent, June 17, 1908, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 772).
historical record indicates Fischer submitted a sketch of the hay lands requested by the Red Earth Band on the same day. Indian Agent Fischer had suggested to Secretary McLean that the lands already held by the Red Earth Band be re-configured to incorporate the changes requested by the Band. In response, the Indian Agent was instructed to ascertain all the changes requested and report on the necessity of those changes, to then be considered by the department. If the reconstruction was approved, Fischer was told the Band would have to surrender the old reserve in exchange for the new one. The matter was placed before the Red Earth Band at the time of the annuity payments. On August 15, 1910, the Red Earth Band signed a letter, agreeing to accept the new boundaries of Red Earth IR 29 in exchange for a surrender of the old IR 29. The letter was signed with ‘X’ marks by Councillor Jeremiah Nawakayas and twelve other members of the Red Earth Band.

On April 12, 1910, Secretary J.D. McLean wrote to the Secretary of the Department of the Interior, proposing an addition to the Shoal Lake reserve of one square mile (640 acres) north of the Carrot River. On July 12, 1910, the Assistant Secretary of the Department of the Interior acknowledged that the application for the addition had been received and stated that consideration of the proposal was pending the receipt of a survey plan for the area.

It appears that, by the fall of 1910, the addition to the Shoal Lake reserve and the re-construction (with additions) of the Red Earth reserve had been approved by the Department of the Interior. On October 14, 1910, Indian Agent Fischer wrote to the Department of Indian Affairs requesting that a surveyor be sent to those reserves to define the new boundaries.

---

374 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, March 26, 1910, No file reference available (ICC Exhibit 1a, p. 773).
375 Secretary, to Fred Fischer, Indian Agent, April 5, 1910, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 774).
376 Secretary, to Fred Fischer, Indian Agent, April 5, 1910, DIAND, file 672/30-28 (ICC Exhibit 1a, p. 774).
377 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, [September 1, 1910], DIAND, file 672/30-28 (ICC Exhibit 1a, p. 776).
380 J.D. McLean, Secretary, Department of Indian Affairs, to P.G. Keyes, Secretary, Department of the Interior, April 12, 1910, LAC, RG 15, D-II-1, vol. 723, file 387790 (ICC Exhibit 1a, p. 777).
381 Pereira, Assistant Secretary, Department of the Interior, J.D. McLean, Secretary, Department of Indian Affairs, July 12, 1910, LAC, RG 10, vol. 7776, file 27128-1 (ICC Exhibit 1a, p. 784).
382 Fred Fischer, Indian Agent, to Secretary, Department of Indian Affairs, October 14, 1910, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 787).
Formal Survey of Additions to Shoal Lake IR 28A and Red Earth IR 29 (1911)

On May 6, 1911, J.D. McLean instructed Dominion Land Surveyor H.B. Proudfoot to survey a one-square-mile block of land north of the Carrot River as an addition to the Shoal Lake reserve. Proudfoot was asked to take special care not to include lands that had been set aside by the Department of the Interior as a timber berth, and to verify that this timber berth had not encroached on lands already belonging to the Shoal Lake Band. Instructions concerning the re-survey of the Red Earth reserve are not on the documentary record for this inquiry.

Proudfoot completed the survey of the Shoal Lake reserve in the fall of 1911. Writing to Secretary McLean on November 17, 1911, however, Proudfoot stated that it was difficult to set aside additional land that would adjoin the north end of the reserve while encompassing the hay lands desired by the Band. For that reason, the addition to the reserve took the form of an inverted letter “L,” which was illustrated in the margin of Proudfoot’s letter. An undated survey plan produced by Proudfoot circa 1911 illustrates in greater detail the addition to Shoal Lake IR 28A. Later plans show the addition to the reserve as containing an area of 651 acres, slightly more than the anticipated 640 acres.

In his official report, dated March 21, 1912, Surveyor Proudfoot noted that he conferred with “Albert Moore Chief” and “Councillor” Francis Bear regarding the lands to be surveyed. (This is the first reference in departmental correspondence to a Chief at Shoal Lake.) Both Proudfoot’s report and his diary reflect considerable difficulty with the survey, owing primarily to confusion amongst band members regarding the boundaries of their reserve and which lands were desired for the addition. He
commented in his diary that “These Indians have a very small idea of locality. There was no one on the Reserve that had ever seen any of the lines except at the S.W. corner ... so a good deal of hunting had to be done to locate the boundaries of the Reserve.”

Regarding the timber berth, Proudfoot reported that timber berth 920 covered the greater part of the existing Shoal Lake reserve (IR 28A). McLean immediately informed the Department of the Interior accordingly and requested that the owners of the berth be informed of its cancellation. In the fall of 1912, Secretary J.D. McLean of the Department of Indian Affairs wrote the Department of the Interior requesting that an Order in Council be drafted to confirm the addition of 651 acres to Shoal Lake IR 28A. Before this could be done, however, the Department of the Interior requested justification for the addition to the Shoal Lake reserve, and inquired whether there was not sufficient land on the existing reserve for the Band’s population. In his reply, McLean stated:

the population of Shoal Lake Band is eighty-nine souls. As these people are given land under the provisions of treaty No. 5, which allows one hundred and sixty acres for a family of five they are therefore entitled to two thousand eight hundred and forty-eight acres. The original reserve consisted of two thousand two hundred and thirty-seven acres. The addition requested is six hundred and fifty-one acres which would make a total of two thousand eight hundred and eighty-eight acres. It will also be remembered that most of the treaties allow six hundred and forty acres for each family of five. It is therefore considered that the lands asked for by this band are very reasonable.

It appears that McLean’s explanation was sufficient for the Department of the Interior to justify the addition to the reserve. Order in Council PC 2256 was approved on August 30, 1913, confirming the addition of 651 acres to Shoal Lake IR 28A.
In the fall of 1911, H.B. Proudfoot also completed the re-survey of Red Earth IR 29. He adjusted the boundaries of the reserve in order to incorporate the hay lands desired by the Band, and adjusted the orientation of the reserve so that the boundaries ran north-south and east-west rather than northeast to southwest. Proudfoot's report on this survey notes that he conferred with “Chief Jeremiah” regarding the reserve boundaries and the location of the desired hay lands. (This is the first reference in departmental correspondence to a Chief at Red Earth.) Proudfoot commented in his diary that “[t]he Chief knows nothing about the Reserve lines on either of the Reserves 29 or 29A, but is to bring a man in the morning, who was a former chief, and is said to know them all.” It appears that the hay lands desired by the Band north of the Carrot River were abandoned for more land added to the reconfigured IR 29.

As Proudfoot pointed out, the newly surveyed Red Earth IR 29 encroached on timber berth 1670. Attached to a letter written by Secretary McLean is a sketch of the newly defined reserve boundaries in relation to those of the old Red Earth IR 29. Survey Plan 1200, dated November 1, 1911, displays the position of the reconfigured Red Earth IR 29, containing an area of 3,595.95 acres. This represented an increase of 884.31 acres, as the original IR 29 contained 2,711.64 acres.

Proudfoot’s report notes that “the rest of the Indians of the Reserve” were equally unaware of where the reserve boundaries were located. See, H.B. Proudfoot, D.L. Surveyor, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 21, 1912, in, “Field Notes of Indian Reserve No. 29 Red Earth and Tie Line between I.R. No. 29 and the 14 Base,” surveyed by H.B. Proudfoot, D.L.S., October 9 - November 5, 1911, p. 25, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).

395 Order in Council PC 2256, August 30, 1913, DIAND, Indian Lands Registry, Instrument No. X11394 (ICC Exhibit 1a, pp. 838-839).
396 Field Notes, H.B. Proudfoot, October 9, 111 to November 5, 111, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).
398 Diary of H.B. Proudfoot, September 9, 1911 - January 24, 1912, LAC, RG 10, vol. 4055, file 385,392 (ICC Exhibit 1a, p. 817).
399 Field Notes, H.B. Proudfoot, October 9, 111 to November 5, 111, Office of the Treaty Commissioner (ICC Exhibit 1a, p. 793).
400 J.D. McLean, Assistant Deputy and Secretary, to H.B. Proudfoot, care of F. Fischer, Indian Agent, November 30, 1911, No file reference available (ICC Exhibit 1a, p. 804).
By Order in Council PC 2019, dated July 20, 1912, the addition to and reconfiguration of IR 29 was confirmed, and the reserved lands were withdrawn from the operation of the Dominion Lands Act. No adjustments were made to the boundaries of Carrot River IR 29A.

Chiefs and Councillors Identified on the Paylists of the Red Earth and Shoal Lake Bands (1913)

Chiefs of the Red Earth and Shoal Lake Bands were identified as such on the treaty annuity paylists for the first time in 1913. The Shoal Lake Band paylist for that year identifies Albert Moore as Chief, in addition to one Councillor. The Red Earth Band paylist similarly identifies Jeremiah Nawakayas as Chief, along with two Councillors.

Requests for Additions to the Red Earth and Shoal Lake Reserves (1914 - 1921)

Shortly after the additions and adjustment were made to Red Earth IR 29 and Shoal Lake IR 28A, the Bands put forth additional requests for land to the Department of Indian Affairs. At Red Earth, extensive flooding in 1913 led the Red Earth Band to consider relocating to drier lands. Inspector S.J. Jackson informed the department on November 29, 1913 that:

While at the Red Earth reserve during the treaty payments the band brought up the question of their upper reserve at Float River, and desired me to find out in what shape that part of the reserve is. Last Spring their present reserve was almost completely flooded and they may have to move. ... Do they own the upper reserve or not?

In reply, Assistant Deputy and Secretary J.D. McLean noted that the reserve at Flute Creek was surrendered in exchange for the Carrot River reserve (IR 29A Carrot River to 1st Base Line. The plan also shows the old position of the Indian Reserve No. 29, surveyed by H.B. Proudfoot, November 1, 1911 (ICC Exhibit 7q).)

401 DIAND, Indian Lands Registry, Plan 1200 (Microplan 1224 and 882), “Plan showing Indian Reserve No. 29, Red Earth, and the tie line connecting that Reserve with I.R. 29A Carrot River also tie line from Indian Reserve 29A Carrot River to 1st Base Line. The plan also shows the old position of the Indian Reserve No. 29,” surveyed by H.B. Proudfoot, November 1, 1911 (ICC Exhibit 7p); see also, DIAND, Indian Lands Registry, Plan T1200 (Microplan 1224 and 882), “Plan showing Indian Reserve No. 29, Red Earth, and the tie line connecting that Reserve with I.R. 29A Carrot River also tie line from Indian Reserve 29A Carrot River to 1st Base Line. The plan also shows the old position of the Indian Reserve No. 29,” surveyed by H.B. Proudfoot, November 1, 1911 (ICC Exhibit 7q).


405 S.J. Jackson, Inspector of Indian Agencies, Lake Manitoba Inspectorate, to Assistant Deputy and Secretary, Department of Indian Affairs, November 29, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 841).
29A) in 1894, “in accordance with their own request.”\textsuperscript{406} The principal reason advanced by the Band at that time for the exchange was that the Flute Creek reserve was too low and wet, an assertion supported by Inspector McColl.\textsuperscript{407} Subsequently, the Band requested an addition of a half-section (320 acres) of land to be added to the north end of Red Earth IR 29. On January 12, 1914, Secretary J.D. McLean directed Indian Agent W.R. Taylor to gather information and report on the details of the additional lands requested.\textsuperscript{408}

At about the same time, the Shoal Lake Band requested an addition to IR 28A that would encompass the Band’s burial grounds. This request was forwarded to the Department of the Interior by Assistant Deputy and Secretary of Indian Affairs J.D. McLean. McLean acknowledged that, under Treaty 5, the Band had received its full land entitlement (160 acres per family of five), but stated that, since nearly all the other treaties allowed 640 acres per family of five, he felt it reasonable that the small addition be granted.\textsuperscript{409} The subject land consisted of 200 acres located outside the southwest portion of Shoal Lake IR 28A.\textsuperscript{410} The parcel appears to encompass the “small separate reserve” surveyed by Samuel Bray in 1894, which was intended to enclose the burial ground and to form part of IR 28A.\textsuperscript{411} However, that small “reserve” does not appear on the plans of IR 28A produced after Bray’s 1894 survey. Controller N.O. Coté of the Land Patents Branch of the Department of the Interior stated that some haste was required to secure these lands before legislation established the Pasquia Hills Forest Reserve; if not, the land would be unavailable to the Band.\textsuperscript{412} On June 9, 1914, Order in Council PC 1492

\textsuperscript{406} J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 842).

\textsuperscript{407} J.D. McLean, Assistant Deputy and Secretary, to S.J. Jackson, Inspector of Indian Agencies, December 5, 1913, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 842).

\textsuperscript{408} J.D. McLean, Assistant Deputy and Secretary, to W.R. Taylor, Indian Agent, January 12, 1914, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 844).

\textsuperscript{409} J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, April 11, 1914, LAC, RG 10, vol. 723, file 387790 (ICC Exhibit 1a, p. 845).

\textsuperscript{410} N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister of the Interior, May 13, 1914, LAC, RG 15, vol. 723, file 387790 (ICC Exhibit 1a, p. 847); see also, DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), “Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace’s tie line,” surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 7a).

\textsuperscript{411} DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), “Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace’s tie line,” surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 7a); CLSR SK Plan 246; Treaty No. 5 Saskatchewan Shoal Lake Indian Reserve,” surveyed by S. Bray, November 50, 1894 (ICC Exhibit 7k, p. 2).

confirmed the addition of 200 acres to Shoal Lake IR 28A for the purpose of including the Band’s burial grounds within the reserve.\footnote{Order in Council PC 1492, June 9, 1914, DIAND, Indian Lands Registry, Instrument No. XI1395 (ICC Exhibit 1a, p. 851).}

On December 9, 1914, Indian Agent W.R. Taylor reported that the Red Earth Band was again requesting an addition of 320 acres to its reserve. The Band complained that there was little hay on its reserve and, in certain years of high water, none at all. The Indian Agent suggested that the Band’s request be granted without delay, as settlers were spreading along the Carrot River toward Red Earth and the area would soon be homesteaded.\footnote{W.R. Taylor, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, December 9, 1914, DIAND, file 578/30-47-27A, vol. 1 (ICC Exhibit 1a, p. 854).}

Three and a half years later, the department responded to this request. Secretary McLean wrote to Acting Indian Agent S.L. Macdonald on April 9, 1918, advising that IR 29 and 29A contained a greater area than the Band was entitled to under treaty and, therefore, applications for additional land would not be considered unless it could be shown that it was absolutely necessary.\footnote{J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Acting Indian Agent, April 9, 1918, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 860).} On January 8, 1919, Macdonald replied to McLean regarding the necessity of additional land at Red Earth. The Agent described the hay land given to the Band in 1911 as made up of mostly “alkali land” and “impassable swamp,” and stated that in the previous summer they cut all the hay available, which only yielded half their total requirement. He argued that it would be to the Band’s advantage to have an additional three or four hundred acres of hay land.\footnote{S.L. Macdonald, Indian Agent, to Assistant Deputy and Secretary, Department of Indian Affairs, January 8, 1919, No file reference available (ICC Exhibit 1a, p. 878).} McLean responded that the Band already had two reserves, amounting to a total area of 5,635.95 acres, exceeding its treaty land entitlement by almost 650 acres, and inquired whether the Band would be “willing to surrender some portion of their present reserve in exchange for another portion which may be considered more suitable for their purposes.”\footnote{J.D. McLean, Assistant Deputy and Secretary, to S.L. Macdonald, Indian Agent, January 14, 1919, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 879).}

The historical record contains no response to this proposal.

In the spring of 1921, the Red Earth community experienced a large flood. A resident from Shoal Lake reported to the Indian Agent that practically all the cattle and horses had drowned at Red Earth and the people were forced to retreat to the roofs of their houses. The Indian Agent requested that the department consider possible areas where the Red Earth people could relocate. Presumably referring to IR 29A, the Agent noted in this request that the Band was living “on the fringe of the river, a strip about 500 yards wide,
the balance being swamp.” 418 On May 27, 1921, Secretary McLean wrote that “[t]here must be some very unusual and special reasons for the cause of the flooding as the Indians have been at the Red Earth Reserve for a number of years without having such an unusual experience.” 419 He added that the Indian Agent should identify a tract of land for a new reserve, which the department would consider granting in exchange for the current reserve (Carrot River IR 29A). 420 On June 26, 1921, Indian Agent Waddy wrote a reply to the department in which he noted that, since the spring flood, the band members had “forgotten most of their troubles” 421 and had decided against relocating. The Chief informed Waddy that, in the future, they would move their cattle to higher ground (IR 29) in the spring and keep them there until the flood danger had passed. Still, the Band requested additional hay land on the “west side” of the Carrot River, containing approximately one section of land (640 acres). Waddy suggested to the Band that it exchange some of its current reserve for lands elsewhere, but the Band was reportedly not interested in that arrangement. Nevertheless, Waddy recommended that hay land should be procured for the Red Earth people. 422

On July 15, 1921, A.F. Mackenzie wrote to Indian Commissioner Graham on behalf of the Assistant Deputy and Secretary of Indian Affairs regarding the additional hay lands requested by the Red Earth Band. He noted that the Band had received an excess of reserve land according to its treaty land entitlement and added “[i]f the band desires to make an exchange, their request might be considered but there does not appear to be sufficient ground for making a request for additional land.” 423 This appears to be the final discussion on the matter, as no further adjustments were made to the reserve lands of the Red Earth people.

Additions and Adjustments to Shoal Lake IR 28A (1926 - 1927)
On March 15, 1926, Indian Agent Waddy informed the Department of Indian Affairs that the Shoal Lake Band had requested a surrender for exchange of

418 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 16, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 883).
419 J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).
420 J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, May 27, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 885).
421 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).
422 J.W. Waddy, Indian Agent, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, June 26, 1921, DIAND, 672/30-28, vol. 1 (ICC Exhibit 1a, p. 886).
423 A.F. Mackenzie, for Assistant Deputy and Secretary, to W.M. Graham, Indian Commissioner, Department of Indian Affairs, July 15, 1921, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, p. 887).
640 acres of its reserve. The area the Band wished to surrender was comprised of a shallow lake and swamp. In exchange, the Band wanted to acquire lands south of the Sipanok Channel (located northeast of IR 28A), which contained timber and hay resources. The Indian Agent noted that, while the land requested was better than the section to be surrendered, it was “not valuable,” as the “whole district up there floods at certain times.”

That same month, the request was forwarded by the Department of Indian Affairs to the Department of the Interior with a request that the latter determine whether the desired lands lying north of the reserve (south half of sections 5 and 6, township 53, range 4, W of 2nd meridian) were available for exchange. Controller N.O. Coté of the Department of the Interior replied that the lands requested appeared to be available with the exception of a portion of land that lay within timber berth 2946. Coté also wished to be provided with reasons why the exchange of land was desired.

Secretary McLean replied, on April 19, 1926, that the purpose of the exchange was to obtain “additional hay lands for the use of these Indians and also a small amount of timber.”

In December 1926, the Department of the Interior determined that the lands requested by the Department of Indian Affairs on behalf of the Shoal Lake Band had been recently withdrawn from timber berth 2946 and were therefore unencumbered. On that basis, it was recommended to the Deputy Minister of the Interior that the requested lands be made available to the Band.

On December 28, 1926, Indian Agent Waddy was informed by Secretary McLean that the surrender for exchange desired by the Shoal Lake Band had been approved. McLean provided Waddy with a description of the IR 28A land to be surrendered, along with a plan showing the subject area, namely, the northwest quarter of the block reserve surveyed by S. Bray in 1894. A clearer depiction of the portion of the reserve to be surrendered was sketched on a township plan prepared by E. Deville in 1919. McLean noted that, by surrendering the proposed area, IR 28A would be separated from the 651-
acre addition of 1911 and asked Waddy whether he considered that to be
detrimental to the reserve.431 Waddy replied in early 1927 that “[t]he piece of
land we are surrendering is practically all covered with water, and is no loss
and will do no harm to the reserve by being taken away from same.”432

On June 18, 1927, the Chief and Principal Men of the Shoal Lake Band
surrendered 640 acres of Shoal Lake IR 28A to be exchanged for an equal
amount of land comprised of the south half of sections 5 and 6, township 53,
range 4, W of 2nd meridian.433 An affidavit attesting to the validity of the
surrender was signed on the same day by Chief Albert Moore and Louis Young
of the Shoal Lake Band, as well as by Indian Agent J. Waddy.434 On August 11,
1927, the surrender for exchange was accepted by Order in Council PC
1534.435

With that acceptance, the Department of Indian Affairs requested that the
Department of the Interior proceed with the necessary actions to complete the
exchange.436 On October 31, 1927, Order in Council PC 2117 was approved,
withdrawing the new lands from the operation of the Dominion Lands Act
while applying the provisions of that statute to the land previously forming
part of the reserve.437 The new land set aside for the Shoal Lake Band was
named IR 28B and is shown on a survey plan attached to subsequent Order in
Council PC 1957-128.438 According to a notation on the same survey plan, IR
28B was surrendered ten years later in exchange for other lands adjoining IR
28A.439
Following the surrender of the 640-acre parcel from IR 28A in 1927 and its subsequent transfer to the Department of the Interior, the Surveyor General informed that department that:

An aerial photograph indicates that the tract is largely comprised within an extensive area of marsh land subject to flooding during high water in Carrot River. It does not appear therefore, that it will be desirable for settlement within a reasonable length of time and it is recommended that it be offered to be included in the [Pasquia] Forest Reserve.440

Red Earth and Shoal Lake Cree Nations Petition the Government for Better Land (1946)
On June 21, 1946, the Red Earth and Shoal Lake Cree Nations sent formal petitions to the Minister of Mines and Resources (which, at that time, was also responsible for what was then called the Indian Affairs Branch), requesting additional reserve land. The petitions from each First Nation were similar in wording and asserted that, in order to secure a future for their children, it was necessary to have farming land set aside for their use. The Red Earth petition outlined the Band’s arguments:

Indian Reserves 29 and 29A, situated as they are on the Carrot River, provide very little or no land suitable for farming or the production of hay. Our Band is becoming of considerable size and there are a great number of young people and children coming along who, in the course of a very short time, will have to look to the land for their living. When our Reserves were set apart for us we had no thought at that time of any change in our circumstances and were quite content to have a place set aside for us where we could live and continue our traditional method of living by hunting and trapping. With the approach of the settlers both from the East and from the West, the time will soon come when we will have to look to the land for our support. The settlers will cut down the trees and clear off the wooded land around us and what was formerly a very good trapping area will no longer be of much use for that purpose.441

The Red Earth Band requested two townships of land for farming and one township for hay land, pointing out that “there is only a portion of each quarter section which is suitable for all farming purposes.”442

---

Band’s petition is similar in content to that of the Red Earth Band, also requesting farming implements and instruction. The Shoal Lake Band asked for one and one-half townships adjacent to their reserve to provide for sufficient land for livestock and some land suitable for cultivation.443

Shoal Lake Elder Gerald Bear recalls that the 1946 petitions of the Red Earth and Shoal Lake Bands were made because “nothing was growing and that they needed more land.”444 Red Earth Elder John James Head recalls a meeting that took place around 1945 between Indian Superintendent Neil Wart and the Red Earth Councillors, asking for farming lands.445 Another Shoal Lake Elder, Edith Whitecap, understood that those petitions were made because of an attempt to take land away from the reserve.446

It appears that the department took the arguments outlined in the Bands’ petitions into consideration, requesting that Indian Agent Lovell investigate the matter. Agent Lovell, however, only reported back to the department on matters pertaining to Shoal Lake.447

“I would like to point out here that this reserve is at least seventy-five miles from any market, and in the fall and spring, it is practically impossible to get in or out of this reserve. I pointed this matter out to the Indians, and also the competition that they would have to meet in addition to the handicap of a seventy-five mile haul. They seemed to realize this, after discussing the problem for a length of time, and agreed to work on a more self-supporting basis; by this I mean, to break land, grow their own oats, start raising chickens, and grow all their own vegetables. At the present time, on this reserve, they grow most of their own vegetables, but they have been buying oats for their horses. I agreed to help them to break a small piece of land, with the understanding that, if they would show me that they were willing to co-operate and work, I would take it up with the Department to extend the breaking program, but I made it clearly understood that it was up to them to show me that they were willing to work.... In the spring, I intend to break from fifteen to twenty acres, and help them to seed this down in oats, and will watch their progress carefully, and give them all the assistance possible under the circumstances.448

443 Chief Robert McKay, Red Earth Band, to Hon. J.A. Glen, Minister of Mines and Resources, including Petition, Shoal Lake Band, June 21, 1946, DIAND, file 672/30-28, vol. 1 (ICC Exhibit 1a, pp. 937-938). It should be noted that one section of the Shoal Lake petition erroneously refers to its reserve land as IR 29 and 29A, which are the reserves belonging to the Red Earth First Nation.
444 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 40, Gerald Bear).
445 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 216-21).
446 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 74, Edith Whitecap).
There is no record of any further departmental response to the 1946 petitions.

Records of crops sown and harvested in the Pas Agency between 1936 and 1947 reflect a total of between 10 and 19 acres under cultivation at Red Earth, and between six and 17 acres under cultivation at Shoal Lake. The documentary record contains no further discussion of agricultural activity on the Shoal Lake or Red Earth reserves.

**Final Adjustments to the Shoal Lake Reserve (1957 - 1968)**

On January 31, 1957, Order in Council PC 1957-128 was approved, setting apart an additional 649.4 acres for the Shoal Lake Band, adjoining the north and west portions of IR 28A. Attached to the Order in Council is a copy of the survey plan originally produced by H.B. Proudfoot in 1911, with notations outlining the new addition to the reserve. This new addition adjoins the northern and western boundaries of IR 28A. This land had been set apart in exchange for IR 28B (640 acres), which was set apart for the Band in 1927. That exchange was performed to acquire land more suitable for farming.

In 1968, the Department of Indian Affairs realized that a 6.9 acre parcel of land had mistakenly been excluded from the addition to Shoal Lake IR 28A in 1957. To remedy this, Order in Council PC 1968-1496 was approved on July 31, 1968, setting apart that parcel as part of IR 28A.

In 1965, the final major addition was made to Shoal Lake IR 28A. Order in Council PC 1965-1924 confirmed the addition to IR 28A of 545.4 acres that had been purchased by the Shoal Lake Band, roughly the same amount of land and in the same location as the land surrendered in 1927, in exchange for IR 28B. Survey Plan 1225 illustrates the series of adjustments made to Shoal Lake IR 28A, resulting in the reserve's current configuration.


452 H.T. Vergette, Superintendent, Carlton Indian Agency, to Head, Land Surveys and Title Section, [DIAND], November 25, 1968, No file reference available (ICC Exhibit 1a, p. 954).


Oral Evidence Relating to the Quality of Red Earth and Shoal Lake Reserve Lands

At the Community Sessions, Elders of the Red Earth and Shoal Lake Cree Nations described how, in the past, band members made their living mainly from the traditional pursuits of hunting and trapping, supplemented by gardens and small numbers of livestock.456 The experience of Shoal Lake Elder Edith Whitecap’s family is fairly representative of the testimony from both First Nations. She explained that, although her family did some gardening and had a few livestock, “they couldn’t be the same as a farmer around here because the land was not sufficient enough to do any farming.”457 Instead, they made their living mainly through hunting and trapping, and kept gardens, cattle, and horses for their own use. “We didn’t sell anything, but they just helped the people out through that.”458 Elders recalled small-scale gardening and raising livestock for their own families’ use; no one spoke about successful larger-scale agricultural or livestock operations being carried out within the reserves.

A number of Elders noted that there was never a farming instructor sent to their reserves, 459 and the agricultural tools they received were inadequate.460

A number of Shoal Lake Elders also expressed the view that the land in their reserve is not good. Elder Lillian Lathlin stated that:

according to her ancestors, all the people before her, they always talked about this land, the promises that were given to them, that they did not receive adequate promises, the benefits of the land. The land is not a good place. The government did not give all that they promised to the people of this community ...

... We never got sufficient land, we only got land that was under muskeg, lots of water, a body of water. ... And our land today is still under muskeg, it’s still in the salty

---

455 DIAND, Indian Lands Registry, Plan 1225 (Microplan 1211), “Indian Reserve 28A Shoal Lake, Plan showing the addition to Indian Reserve 28A and the tie line between IR 28A and the 14th base line as surveyed by J.N. Wallace DLS, 1906, and the correction to be applied to Wallace’s tie line,” surveyed by H.B. Proudfoot, circa 1911 (ICC Exhibit 76).


457 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 81, Edith Whitecap).

458 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 71, Edith Whitecap).

459 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 16, Emil Flett; p. 59, Lillian Lathlin; p. 171, Hector Head; p. 177, Angelique McKay).

460 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 15-16, Emil Flett; pp. 27, 36-37, Gerald Bear; p. 57, Lillian Lathlin; p. 80, Edith Whitecap).
area. You can’t really plant anything in these areas. You can’t grow anything on a
salty area or a muskeg area. The land is not good for any agriculture.461

Shoal Lake Elder Gerald Bear says that “the land was good before, before the
water. Now it’s no good for gardening.”462 Gerald Bear remembers First
Nation members having gardens and livestock, such as horses, cattle and
chickens, but “they couldn’t really get anything from the land because it was –
there was too much water and there was too much – it was swamp, a swamp
area. And salt ... There was lots of those salt deposits that they mentioned.”465
Madeline Young remembers her husband’s family saying that “There wasn’t
enough good land.”464 Shoal Lake Elder Emil Flett stated that there is “no
land for agriculture” on the reserve, but there were some hay lands and “lots
of timber and lots of trees all over.”465 Several Shoal Lake Elders recalled
using hay lands both on and off reserve for their livestock.466

Similarly, many Red Earth Elders expressed the view that the land is not
good for farming because of flooding and excess water.467 Many also
remembered having to leave the reserve to find enough hay for their cattle.468
Red Earth Elder Hector Head says that there was not enough hay on the
reserve to raise cattle, explaining that his brother’s attempts to raise cattle had
been a failure for that reason.469

The oral evidence heard in this inquiry indicates that lands at Red Earth
and Shoal Lake have always been prone to seasonal flooding but that the
extent and severity of flooding has increased since the E.B. Campbell dam
was constructed in the 1960s. It should be noted, however, that no studies
were undertaken as part of this inquiry to corroborate the Elders’ accounts or
to determine the environmental impact of the dam.

Red Earth Elders recall seasonal flooding, as well as more catastrophic
floods, before the dams were built. Red Earth Elder Richard Nawakayas, born

461 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 57-58, Lillian Lathlin). See also: ICC Transcript,
October 16-17, 2007 (ICC Exhibit 5a, pp. 37-38, Gerald Bear; p. 43, Ella Bear; pp. 63-64, 67, Gilbert Flett; p.
73, Edith Whitecap).

462 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 34, Gerald Bear).

463 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 54, Gerald Bear). See also: ICC Transcript, October
16-17, 2007 (ICC Exhibit 5a, pp. 49-50, Madeline Young; pp. 71, 73, Edith Whitecap).

464 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 50, Madeline Young).

465 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 16, 19 Emil Flett).

466 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 30-31, Gerald Bear).


468 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, pp. 172-73, Hector Head; p. 187, Reta Nawakayas; p.
212, Arabella Nawakayas).

469 ICC Transcript, October 16-17, 2007 (ICC Exhibit 5a, p. 172-74, Hector Head).

470 The E.B. Campbell dam (which formed Tobin Lake) is located on the Saskatchewan River, upstream from the
Red Earth and Shoal Lake reserves.
in 1935, recalls flooding at Red Earth every year, noting that the floods subsided quickly some years, but took a long time to subside in other years. Elder Ellen Head, also born in 1935, recalls flooding when she was younger, and how they would stay on top of their barns when it flooded and use canoes to get around the reserve. Elder Reta Nawakayas recalls regular flooding of both IR 29 and 29A since she began living at Red Earth in the early 1950s. This evidence seems to concur with the documentary record, which records occasional catastrophic flood events at Red Earth (such as those in 1913 and 1921), as well as annual seasonal flooding.

The Shoal Lake reserve was also susceptible to seasonal flooding before the dams were built. Shoal Lake Elder Emil Flett, born in 1937, recalls that:

in the springtime there used to be lots of flooding and that was the only time that they had flooding from — according to the Elders before him. And the land, they were able to use that land for hay land, to get hay. And then when they built the dam ... that's when the waters came towards our area, and now there was water there all summer. And there was — like it used to be so shallow that we were able to walk into those areas and do our haying with the horses and all that, but as soon as the dam was built, they could no longer go there because there was too much water coming towards that area.

Aside from seasonal flooding, Shoal Lake Elder Gerald Bear recalls a big flood in 1949, when the graveyard at the southwest corner of IR 28A was covered with two feet of water.

At Shoal Lake, salt deposits and underwater streams flowing from the Pasquia Hills present additional obstacles to agriculture. The record shows that, from the time when the reserve was first surveyed, there have been two streams of salt water in the western part of the reserve. Many Elders mentioned that salt deposits within the reserve hindered their ability to grow anything successfully. Elder Madeline Young, who moved to the Shoal Lake...
reserve from Red Earth in 1946, recalls hearing her husband’s family talk about how they had “tried to plough out some land on different areas, but it was too salty an area, nothing grew there.”

There is some difficulty sorting out the impact that dam construction in the 1960s had on the reserve lands at Red Earth and Shoal Lake, as distinct from pre-existing conditions. However, there seems to be consensus among the Elders that the lands have changed to some extent since the dams were built.

Some Shoal Lake Elders noted that there used to be large gardens on the reserves, but an increase in water and salt in the soil has made it difficult to grow anything. Increased flooding has also forced some members to move from formerly habitable lands, and rendered some of the lands formerly used for gardening and hay lands unusable. Elder Edith Whitecap explained that although her family used to garden, “[w]e can’t really plant anything now because the land is – nothing is growing on the land now that much for garden stuff.” She remembered that near the place she used to have her house, “somebody came around there and ploughed the land, however, the land was never – never grew anything, it was just salty, too salty.”

She continued, explaining that the Shoal Lake reserve is mostly salt and swampy land, aside from a small area where the main community is located on solid ground, and that “we can’t really do anything with this land that we have.” Elder Gerald Bear explained that “we don’t have any land to really plant anything any more because of the flood, the water, and there’s lots of water all over.” He further noted that flooding now is more extensive and lasts much longer than it used to before the dams were built.

Some Red Earth Elders have noticed changes over time as well. Red Earth Elder Reta Nawakayas says that her family was successful in gardening until “the floods came in.” Elder Leona Head recalls that there were good hay lands and land good for gardening in earlier times, but the higher water table and flooding has changed the land.
APPENDIX B

RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY: INTERIM RULING ON REQUEST OF THE TREATY 8 FIRST NATIONS OF BRITISH COLUMBIA TO INTERVENE IN MANDATE CHALLENGE, DECEMBER 15, 2005

INDIAN CLAIMS COMMISSION

RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

INTERIM RULING
RULING ON REQUEST OF THE TREATY 8 FIRST NATIONS OF BRITISH COLUMBIA TO INTERVENE IN THE MANDATE CHALLENGE

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

COUNSEL
For the Red Earth and Shoal Lake Cree Nations
William A. Selnes

For the Treaty 8 First Nations of British Columbia
Christopher G. Devin

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
John B. Edmond / Julie McGregor

DECEMBER 2005
BACKGROUND

This ruling addresses the application of the seven Treaty 8 First Nations of British Columbia\(^1\) to intervene in the Government of Canada’s motion before the Indian Claims Commission (ICC), dated April 7, 2005, for a ruling to determine whether the Commission has jurisdiction to conduct an inquiry into the specific claim of the Red Earth and Shool Lake Cree Nations (hereinafter “Red Earth and Shool Lake”).

Red Earth and Shool Lake jointly submitted a specific claim to Canada in May 1996 on the question of the quality of their reserve lands. When the Minister of Indian Affairs and Northern Development had not made a decision by 2004 either to accept or reject the claim for negotiation, Red Earth and Shool Lake requested that the ICC conduct an inquiry. On June 2, 2004, the ICC agreed to conduct the inquiry on the basis that the claim was deemed to have been rejected by the Minister. A planning conference was held on February 24, 2005. Shortly thereafter, Canada notified the parties that it would challenge the jurisdiction of the ICC under the Specific Claims Policy, on the basis that the ICC lacked the jurisdiction to conduct an inquiry into a claim that had not been rejected by the Minister.

The applicants for intervener status in this motion, the Treaty 8 First Nations of British Columbia, are the Blueberry River, Doig River, Fort Nelson, Halfway River, Prophet River, Saulieu and West Moberly First Nations. In March 1993, the Treaty 8 Tribal Association, on behalf of the Treaty 8 First Nations of B.C., submitted a specific claim to Canada respecting annuity arrears. The claim asserted that Canada owed each respective First Nation outstanding annuity arrears under Treaty 8, from the date the Treaty was signed in 1899 to the date that each First Nation adhered to the Treaty.

In August 2003, the Treaty 8 Tribal Association requested that the ICC conduct an inquiry, on the basis that the Treaty 8 claim should be deemed to have been rejected because of the ten-year period in which it had been under review by Canada. In November 2003, the ICC agreed to conduct this inquiry. Since the Treaty 8 claim had been accepted on the basis of a “deemed rejection”, Treaty

\(^{1}\) In a letter of August 21, 2003, Deborah Smithson, Director, Treaty and Aboriginal Rights Research, Treaty 8 Tribal Association, Fort St. John, B.C., requested an inquiry on behalf of the First Nations new applicants on this motion, described them as “The Treaty 8 First Nations in B.C.” We therefore refer to the applicants for brevity as “the Treaty 8 First Nations of British Columbia”, “Treaty 8 First Nations”, or simply “Treaty 8”. 

---

546
8 did not receive funding from Canada to participate in the inquiry process. As a result, the inquiry has been delayed from August 2003 to the present.

On May 20, 2005, the ICC’s Commission Counsel advised counsel for Treaty 8 of Canada’s motion for a ruling on the ICC’s jurisdiction to accept a claim for inquiry on the basis of constructive or deemed rejection. Treaty 8’s counsel was also advised that Canada indicated that it would likely bring motions to challenge the ICC’s jurisdiction in other inquiries accepted by the ICC on the basis of a deemed rejection. On July 14, 2005, Treaty 8 made an application for intervenor status in the April 7, 2005 motion brought by Canada in the Red Earth and Shoal Lake Inquiry.

ISSUES

1. Should the ICC grant the Treaty 8 First Nations standing to intervene in Canada’s motion for a ruling on the ICC’s mandate to conduct an inquiry into the Red Earth and Shoal Lake Cree Nations’ specific claim?

2. If the Treaty 8 First Nations are granted standing to intervene in the motion, what should be the nature and extent of this intervention?

DECISION

For the reasons that follow, Treaty 8 will not be permitted to intervene in Canada’s motion challenging the mandate of the ICC in the Red Earth and Shoal Lake Cree Nations Inquiry.

POSITION OF THE TREATY 8 FIRST NATIONS

In Treaty 8’s submissions dated July 13, 2005, their legal counsel sets out the legal principles that apply to their application for intervenor status. Counsel for Treaty 8 argues that while judicial authorities have no direct application to the proceedings of the Commission, they are instructive respecting the question before the Commission. Accordingly, Rule 109 of the Federal Court Rules, 19982, provides guidance in determining when the Commission may grant leave to intervene. Rule 109 states in part:

2 Federal Courts Rules, r. 109.
Indian Claims Commission

Interior Ratling – Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry

109 (1) The Court may, on a motion, grant leave to any person to intervene in a proceeding.

(2) Notice of motion under subsection (1) shall

(a) ... 

(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.

Treaty 8 also points to the jurisprudence of the Federal Court which states that applications for leave to intervene often address the following factors:

(a) the nature of the proposed intervener’s interest in the proceeding
(b) the position the proposed intervener would take in the proceeding, and
(c) the timeliness of the intervention.

Based on these principles, the Treaty 8 First Nations ground their application in three propositions:

1. The Treaty 8 First Nations have a direct interest in the mandate challenge in the Red Earth and Shoal Lake Inquiry.

2. The Treaty 8 First Nations offer a different perspective from that of the Red Earth and Shoal Lake Cree Nations.

3. The Treaty 8 First Nations’ application to intervene is timely, given the circumstances and the proceedings in the Red Earth and Shoal Lake Inquiry.

Direct Interest

The Treaty 8 First Nations argue that if Canada is successful in challenging the ICC’s mandate to conduct the Red Earth and Shoal Lake Inquiry on the basis that it is a “deemed rejection,” such decision will have a direct impact on the Treaty 8 Inquiry. Given that Canada has already indicated an intention to bring individual motions challenging the ICC’s jurisdiction to conduct inquiries on

---

the basis of a “deemed rejection,” Treaty 8 argues that Canada will use a successful ruling against them. As such, counsel argues, Treaty 8 has a direct interest in the result of this mandate challenge.

In addition, counsel for Treaty 8 points out that it would be unreasonable to expect the Red Earth and Shoal Lake First Nations to take Treaty 8’s interests into consideration when making their submissions.

Different Perspective
The Treaty 8 First Nations argue that they bring a unique perspective to the mandate challenge because of their different geographical and historical circumstances, and their experience with the specific claims process.

Treaty 8 points to the fact that currently, they have approximately 15 claims that are in the specific claims process. These claims have not been accepted or rejected for negotiation by Canada. Treaty 8 further asserts that their particular experience with the specific claims process is indicative of the more general experience of British Columbia First Nations that have filed specific claims.

Treaty 8 points to the fact that 58% of the claims awaiting a legal opinion by Canada originate in British Columbia. The Red Earth and Shoal Lake Cree Nations, in comparison, have no claims in the process other than that which is the subject of Canada’s mandate challenge. According to Treaty 8, therefore, Red Earth and Shoal Lake are not in a position to speak to the detrimental effect a successful mandate challenge would have on the claims process in general.

In addition, Treaty 8 argues that allowing its intervention application would serve the broader public interest as well as judicial economy. In particular, states Treaty 8, the perspective that it brings “is that of the class of First Nations who are in similar circumstances but who have not yet had the opportunity of facing mandate challenges by Canada in their own inquiries.” Treaty 8 claims that it can effectively represent other First Nations requesting an inquiry on the basis of a deemed rejection.

Timeliness
Treaty 8 argues that their application to intervene was submitted in a timely manner, given that they were informed of Canada’s motion in the Red Earth and Shoal Lake Inquiry on May 16, 2005, and
that each of the Treaty 8 First Nations has its own counsel. Further, the intervention, they argue, would pose no prejudice to Canada since it has already indicated its intention to bring mandate challenges in the Treaty 8 claim if it proceeds before the ICC. A minor delay of a few weeks in the mandate challenge would be reasonable in the circumstances, they say, particularly in light of the position taken by Canada. Furthermore, Treaty 8 would accommodate whatever time requirements the Commission might impose.

**Position of Canada**

Canada opposes intervenor status for Treaty 8 on the basis that they have not fulfilled the legal requirements for an intervention application, as set out in the Commission's *Interim Ruling on the Long Plain First Nations Request to Intervene in the Sandy Bay Ojibway First Nation Inquiry*. In the *Long Plain First Nation Interim Ruling*, the Commission referred to *Pfizer Canada Inc. v. Canada (Attorney General)*, in which the Federal Court set out three criteria for intervenor status, as follows:

1. The applicant for intervention must have an interest in the outcome;
2. The rights of the applicant will be seriously affected by the outcome of the litigation; and
3. The applicant, as intervener, will bring a different perspective to the proceedings.

In determining whether the proposed intervener can bring a unique or different perspective to the proceedings, two other considerations should be included:

- Whether the position of the proposed intervener is adequately defended by one of the parties, and

---

Indian Claims Commission

Interior Ruling – Red Earth and Shoal Lake Cree Nations; Quality of Reserve Lands Inquiry

- Whether the court can hear and decide the case on its merits without the proposed intervenor.4

Canada submits that an applicant for intervenor status must have an interest that is more than “jurisprudential” in nature. Also, an intervenor must bring a unique or different perspective to the proceeding. Merely assisting in the interpretation of the jurisprudence surrounding the main issue - in this case the jurisdiction of a Commission established pursuant to the Inquiries Act - is not sufficient to be considered a “different perspective.” Canada argues that where a proposed intervenor will only restate what others will be arguing, intervenor status should be denied.

Canada’s counsel states that Treaty 8 and Red Earth and Shoal Lake have a similar legal position in regard to the Commission’s jurisdiction respecting “deemed rejections.” This position, states Canada, will be thoroughly presented by counsel for Red Earth and Shoal Lake. Furthermore, if the Commission were to allow the intervention of any party with similar issues before the Commission, then, once this precedent was established, the Commission would have no principled way of excluding applications to intervene in subsequent inquiries.

Canada submits that the introduction of evidence in an unrelated claim will not serve the interests of justice in deciding the merits of the Red Earth and Shoal Lake mandate challenge. It is important, states Canada, to ensure that the contribution of an intervenor is sufficient to counterbalance the disruption to the process. Canada’s motion has already been delayed by more than three months because of difficulties in scheduling. Canada notes that the Treaty 8 First Nations’ proposal to introduce further affidavits evidence would cause further delay.

Position of Red Earth and Shoal Lake Cree Nations

The Red Earth and Shoal Lake Cree Nations, which we understand are not being provided funding in this inquiry, have declined to make submissions in Treaty 8’s application to intervene. However, in a letter dated September 30, 2005, counsel for the First Nations stated,

---

... the Red Earth and Shoal Lake First Nations will consent to the Treaty 8 Bands becoming intervenors on the mandate challenge if the intervention is limited to presenting legal arguments. Red Earth and Shoal Lake will not consent to participation if the Treaty 8 Bands seek to file evidence on the mandate challenge.

ANALYSIS & RULING

ISSUE I

Should the ICC grant the Treaty 8 First Nations standing to intervene in Canada’s motion for a ruling on the ICC’s mandate to conduct an inquiry into the Red Earth and Shoal Lake Cree Nations’ specific claim?

We have carefully considered the application by Treaty 8 for leave to intervene in Canada’s mandate challenge motion in the Red Earth and Shoal Lake Inquiry. We conclude that Treaty 8 has failed to demonstrate a direct interest or unique perspective that would assist the Panel in making a determination on the jurisdiction of the Commission. The Panel notes that the criteria for intervener status in an administrative tribunal setting are similar to the criteria outlined in the jurisprudence of the Federal Court. However, the discretion of an administrative tribunal to grant intervener status is broader. As the Commission stated in the James Smith Cree Nation Inquiry:

... 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 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.

The Panel agrees that it has the authority to determine whether or not to grant intervener status in this motion.

At issue in Canada’s motion is whether or not the Commission has the jurisdiction to deem the Red Earth and Shoal Lake claim to have been rejected by the Minister. The issue of the
Commission’s jurisdiction is a question of law, which in our view will be adequately canvassed by the parties, Canada and Red Earth and Shoal Lake. Therefore, we are not convinced that the perspective of Treaty 8 would provide further insight or assistance to the Panel in determining the issues raised by the mandate challenge. Nor are we satisfied that the British Columbia Treaty 8 First Nations can act as a representative body for other First Nations.

In addition, while the Panel acknowledges that the claims of both Treaty 8 and Red Earth and Shoal Lake have been accepted for inquiry on the basis of a “deemed rejection,” these claims are not interrelated nor are they dependent on the resolution of shared facts, as was the case in Long Plain First Nation’s application to intervene in the Sandy Bay First Nation’s inquiry. Although a ruling on the ICC’s jurisdiction will affect any First Nation that wishes to have its specific claim reviewed by the Commission, where that claim has not yet been rejected, the outcome of Canada’s motion will not prejudice Treaty 8’s claims on the merits.

Therefore, the Panel directs that the application to intervene by the Treaty 8 First Nations be denied.

ISSUE 2

If the Treaty 8 First Nations are granted standing to intervene in the motion, what should be the nature and extent of this intervention?

As we have denied the application to intervene by the Treaty 8 First Nations, it is not necessary to consider this question.

FOR THE INDIAN CLAIMS COMMISSION

Jane Dickson-Gilmore (Chair)  
Commissioner

Alan C. Holman  
Commissioner

Sheila G. Purdy  
Commissioner

Dated this 15th day of December, 2005.
APPENDIX C

RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY: INTERIM RULING ON CANADA’S OBJECTION TO JURISDICTION, SEPTEMBER 26, 2006

INDIAN CLAIMS COMMISSION

INTERIM RULING: RED EARTH AND SHOAL LAKE CREE NATIONS QUALITY OF RESERVE LANDS INQUIRY

RULING ON CANADA’S OBJECTION TO JURISDICTION

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

COUNSEL
For the Red Earth and Shoal Lake Cree Nations
William A. Salnes

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
John B. Edmond / Julie McGregor

September 2006
INTRODUCTION

The Indian Claims Commission (the Commission or ICC) was created by the Government of Canada in 1991 as a neutral, independent body to facilitate the fair and expeditious resolution of specific claims. The Commission engages this function by conducting public inquiries into disputed claims and providing mediation services at any stage of the process. As one of four pillars of a policy intended to improve relations between Canada and the First Nations following the land conflict at Oka, Quebec, in 1990, the Commission was a direct response to the weaknesses of the Specific Claims Policy and the failed claim at Oka. Created under the authority of Part I of the Inquiries Act, the Commission was given a broad authority through Order in Council to “review the application by the Government of Canada of the specific claims policy to individual claims” and to interpret this mandate as it considers best to achieve that end.

Central to this mandate, and consistent with the government’s direction that the ICC provide an alternative to the courts for resolving disputed claims, the Commission established a process to inquire into and review government decisions not to accept a specific claim for negotiation. Where a First Nation and Canada disagree on the merits of a claim, the First Nation may request an inquiry.

---


2 Government policy divides land claims into two categories: specific claims arise from the breach or non-fulfilment of government obligations found in treaties, agreements, or statutes; comprehensive claims are based on unextinguished Aboriginal title.

3 Canada, House of Commons, Debates (September 25, 1980), 13220, “Government Orders, Indian Affairs, Statement at Oka and Chibougamau.” In this statement, then Prime Minister Brian Mulroney specified: “The agenda I believe we ought to be addressing will have four main pillars: land claims, the economic and social conditions on reserves, the relationship between aboriginal peoples and government, and concerns of Canada’s aboriginal peoples in contemporary Canadian life.”


6 The ICC also has the authority under Part III of its mandate to inquire into compensation criteria, where appropriate. This aspect of its work is not relevant to the present application.
If granted, the Commission brings Canada and the First Nation together in a structured and open process that inquires into the oral and documentary history of the claim and considers whether Canada owes a lawful obligation to the First Nation. The inquiry process produces a detailed history and legal analysis of the claim which, in turn, provides the foundation for the Commission’s recommendations to Canada either to reject or to accept a claim for negotiation. These recommendations are intended to assist the parties in resolving the dispute, and are not binding on either Canada or the First Nation.

Canada’s Position
Canada is seeking a ruling from the Panel that it is in excess of its jurisdiction in relation to the conduct of the inquiry concerning the specific claim of the Red Earth and Shoal Lake First Nations. Canada submits that the ICC’s authority to conduct inquiries is circumscribed by its enabling Order in Council which was enacted by the Governor in Council pursuant to the Inquiries Act, Part I, and which confines the Commission’s jurisdiction to inquire into and report on claims that have already been rejected by the Minister of Indian Affairs. The specific claim of the Red Earth and Shoal Lake First Nations has not already been rejected by the Minister. In Canada’s view, the term “rejection” carries a plain and ordinary meaning in the specific claims context, that is, a rejection requires some explicit or unequivocal act of refusal by the Minister to accept the claim. Rejection is thus a readily discernable event in the claims process and is manifested in a ministerial letter which sets out the fact that a claim has been rejected as well as the basis for that rejection. In the absence of an overt rejection by the Minister, the Commission has no authority to conduct an inquiry or investigate and report on claims. Had the Governor in Council intended the Commission to have jurisdiction to inquire into and report on claims that had not been rejected, the scope of such a mandate would have been clearly set out in the authorizing Order in Council.

Red Earth and Shoal Lake Cree Nations’s Position
The First Nations argue that the ICC has considered the Order in Council and found that it does not contain any direction on how a claim can be rejected. Moreover, the Commission has previously and consistently ruled that claims can be rejected by Canada through means other than a letter of
Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry

The First Nations take the position that Canada’s failure to act has had significant negative consequences and has hampered their ability to assemble evidence for their claims. Over a decade has passed since the claim was submitted to DIAND, and there is no indication from the department when a determination will be made on the Red Earth and Shoal Lake claim. During this time, six elders who possessed evidence relevant to the claim have died, and the oral history they maintained is no longer available to assist in establishing the First Nations’ claim. This loss of evidence is that much more important, argues the First Nations, given the resource constraints placed upon them by DIAND, which refuses to provide funding to any First Nation before the Commission whose claim has not been expressly rejected. The First Nations are experiencing ongoing frustration, loss of hope and loss of confidence in the commitment of Canada to the fair and expeditious resolution of specific claims.

Nature of the Motion

On June 2, 2004, the Indian Claims Commission considered the request of the Red Earth and Shoal Lake Cree Nations to inquire into their claim regarding the quality of the reserve lands set apart for them under Treaty 5. This claim had been submitted to the Minister of Indian Affairs and Northern Development (the Minister) in May 1996, but had not yet been accepted or definitively rejected by way of a letter to the First Nations. Notwithstanding the absence of an express act of rejection, the Commission accepted the First Nations’ request for an inquiry. The Government of Canada objected to this exercise of the Commission’s jurisdiction, asserting that express rejection by the Minister is required before the Commission’s jurisdiction can be engaged and, as such, the Commission had no mandate to inquire into the claim. The Minister, his officials, and counsel declined to participate in the inquiry or to provide funding to the First Nations to enable them to participate in the inquiry process. Counsel for the Commission thereupon advised the Minister’s counsel that, unless the
Minister brought a motion before the panel to determine the jurisdictional issue, the panel would exercise the subpoena powers available to it under the Inquiries Act to obtain the documents in the possession of the Minister necessary for the inquiry to proceed. The Minister chose to challenge, by way of motion, the jurisdiction of the Commission to hold the inquiry. The Minister’s motion, served April 7, 2005, was heard on February 9, 2006, by way of written and oral submissions on behalf of the parties. For the reasons that follow, we have concluded that the Commission possesses the jurisdiction to hold this inquiry.

THE ISSUES

This motion raises the following issues:

1. Is it within the Commission’s jurisdiction to accept a claim for inquiry where there has not been an express written rejection of that claim by the Minister?

2. If yes, on the facts of the Red Earth and Shoal Lake Cree Nations’ claim, was Canada’s conduct tantamount to a rejection of that claim, thereby engaging the Commission’s authority to review the claim?

ISSUE 1: THE COMMISSION’S JURISDICTION

The decision to create the Indian Claims Commission was informed by the government’s belief that “no issue is as urgent as the land claims” and by the need to “accelerate the settlement of specific claims … that result from past government non-performance or malfeasance with respect to existing treaties and to the Indian Act.” The Commission was central to this new approach, as was the Prime Minister’s commitment of increased resources dedicated to the claims process.\(^7\)

The Commission’s Order in Council

The central role of the Commission in accelerating the resolution of claims is evident in Order in Council PC 1992-1730, made under Part I of the federal Inquiries Act, which defines the terms of

\(^7\) Canada, House of Commons, Debates (September 25, 1990), 13320, “Government Orders, Indian Affairs, Situation at Oka and Châteauguay.”

\(^8\) Canada, House of Commons, Debates (September 25, 1990), 13320, “Government Orders, Indian Affairs, Situation at Oka and Châteauguay.”
its existence. In the preamble to the Order, which section 13 of the Interpretation Act provides must be "read as part of the enactment intended to assist in explaining its purport and object," the Commission is tasked with a strong supervisory role over the specific claims policy:

WHEREAS the Government of Canada and the First Nations agree that an interim process to review the application by the Government of Canada of the Specific Claims Policy to individual claims is desirable...

These powers of review are detailed further in the Order in Council as follows:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commissioner, inquire into and report on:

a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and

b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.

The Panel understands the operating provisions of the mandate as provided in paragraphs (a) and (b), quoted above, to be broad and remedial in nature, and it has consistently reinforced this

---

8 Interpretation Act, RSC 1985, c. 1-21.
position in executing that mandate.\textsuperscript{12} This understanding is consistent with the direction contained in section 12 of the \textit{Interpretation Act}, which provides:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best enables the attainment of its objectives.\textsuperscript{13}

The Panel takes the position that its inquiry function must be read in conjunction with the objective defined in the preamble to the Order in Council, whereby the Commission is directed to review the government’s application of the specific claims policy. Thus the Commission is not only required to provide elucidation of individual claims through the inquiry process but must also oversee the ongoing application of the specific claims policy by the government. Insofar as this policy is an important element of the Crown’s dealings with First Nations, the Panel believes that its mandate requires it to be vigilant in ensuring that the goal of the specific claims policy – namely, the fair and expeditious resolution of claims – is pursued in a manner consistent with the preservation of the honour of the Crown.

\textbf{Canada’s Specific Claims Policy}

Canada’s Specific Claim Policy, commenced in 1973, was set out in 1982 \textit{Outstanding Business: A Native Claims Policy – Specific Claims}.\textsuperscript{14} This policy was the culmination of the government’s efforts to address First Nations’ concerns over their limited ability to have their specific claims resolved in a fair and equitable manner. As such, it sets out the process for the government’s review of claims and establishes criteria for determining whether a lawful obligation to a First Nation exists.


\textsuperscript{13} \textit{Interpretation Act, RSC 1985, c. I-21.}

\textsuperscript{14} Department of Indian Affairs and Northern Development (DIAND), \textit{Outstanding Business: A Native Claims Policy – Specific Claims} (Ottawa: Ministry of Supply and Services, 1982), reprinted in (1994) 1 ICCP 171 85 (hereafter \textit{Outstanding Business}).
In presenting the views of First Nations, the policy states: “They [First Nations] believe that claims should be based on moral and equitable grounds as well as lawful obligation and these should be clearly set out.” With regard to the assessment of claims, the policy provides that negotiation rather than litigation is the preferred means for the resolution of claims. In fact, the policy purports to adopt a more liberal approach than the court process by eliminating some of the existing barriers to negotiation and by stressing that the resolution of specific claims must be characterized by “mutual respect and cooperation” and achieved “without further delay.”

Regrettably, since its inception in 1973, the specific claims process has been marked by persistent delays and backlog which have become endemic to the process and a significant barrier to the goal of “justice, equity and prosperity” which were intended to characterize the process. The Department of Indian and Northern Affairs finds itself in a constant state of overload as it faces continuing and mounting backlogs. In the period from 1973 to 2005, approximately 1,305 claims were filed with the Specific Claims Branch of Indian and Northern Affairs; of these, 67 claims have been rejected, 635 are “in review,” 113 are in negotiation, 268 have been settled, 35 have been resolved through administrative remedy, 84 have been closed, 68 are in litigation, and 36 are currently within the Indian Claims Commission process. Given that approximately 70 new claims

35 Outstanding Business, 15.

36 Outstanding Business, 19; see also ICC, Kleena First Nation: Kleena Game Sanctuary and Kleena National Park Reserve Creation Inquiry Interim Ruling (Ottawa, December 2000), reported (2003) 16 ICCP 75 at 96 and 101.

37 Outstanding Business states at 21: “With respect to Canadian Indians, however, the government has decided to negotiate each claim on the basis of the issues involved. Bands with longstanding grievances will not have their claims rejected before they are even heard because of the technicalities provided under the statutes of limitation or under the doctrine of laches. In other words, the government is not going to refrain from negotiating specific claims with native people on the basis of these statutes or this doctrine. However, the government does reserve the right to use these statutes or this doctrine in a court case.”

38 Outstanding Business, 3.

39 Outstanding Business, 3.

40 ICC Transcript, cross-examination of Veola Wenslake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 21 22.
enter the specific claims process yearly, at a rate of five or six claims per month, any diminution in the current number of claims or in the delays characterizing their review and resolution is unlikely.\textsuperscript{21}

Upon filing, each claim must be assessed by the department for the thoroughness of the historical record submitted with the claim as well as for clarification of the issues relevant to the claim. Waiting times for this review range from three to six years, and it is not clear what might distinguish the amount of waiting time characterizing different claims. The sole statements of the department on the issue of process are that claims are reviewed on a “first in, first reviewed” basis and that review “may be time-consuming if the claim issues are numerous, or complex, or involve areas that require further consultation with experts.”\textsuperscript{22} Evidence filed by the department in relation to this application does not reveal the presence of any objective mechanism within the specific claims review process which can track the progress of individual claims through the process or ensure equity across the rates at which those claims are reviewed.\textsuperscript{23}

Upon completion of this preliminary assessment, the claim is sent to the Department of Justice (DOJ) for legal review. Canada observes that, “due to the large volume of claims currently with DOJ, it sometimes takes considerable time to obtain DOJ’s analysis of a claim.”\textsuperscript{24} Current estimates indicate that the Department of Justice completes approximately 15 reviews per year, each of which requires an average of 12 to 18 months to complete. This record constitutes an improvement over the estimate of 30 months given by Canada in the Alexis First Nation Inquiry interim ruling in April 2000.\textsuperscript{25} Nevertheless, the current rate of review implies that the Specific

\textsuperscript{21} ICC Transcript, cross-examination of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatchewan, Saskatchewan, August 19, 2005, p. 20.

\textsuperscript{22} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras. 7 and 10.

\textsuperscript{23} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005.

\textsuperscript{24} Letter from Robert Nault, Minister of Indian Affairs, to Chief Nauvay, September 16, 2002, Exhibit 23, Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005; see also Weselake Affidavit, para. 40.

Claims Branch continues to fall behind on claims review at a rate of 55 claims per year. When this backlog is juxtaposed with the average of 13.5 claims that reach the Minister for decision each year, it is difficult to be optimistic about possible reductions in the claims backlog. It is also important to remember that, for many First Nations, acceptance of their claim is merely the beginning of yet another long, complex, and expensive process of negotiations over the terms of settlement of the claim, a process that can add many more years onto the claims resolution process.

It is difficult to recognize within the processes outlined above the “accelerated,” fair, or expeditious resolution of claims that is the central goal of Canada’s specific claims policy. Nor is the honour of the Crown apparent in a claims process characterized by the magnitude of delay seen here and by the failure of the government to provide sufficient resources to ensure that those charged with administration of its policy are able to do so in a timely and efficient manner. First Nations bring their claims to Canada and insert them into Canada’s process in good faith, believing that their claims will be processed in a manner commensurate with the importance of the claim to their people. This expectation on the part of First Nations is not unreasonable. Yet, when their claims languish within the process for more than a decade, and in the absence of any apparent structure within that process which monitors the progress of individual claims and may provide firm and accurate estimates for completion of the review and decision, it is not surprising that some claimants experience a loss of faith in Canada’s commitment to the resolution of claims.

First Nations in this position are often loath to pursue vindication of their claims in the courts, as this action brings the review of their claim in the specific claims process to an immediate and full halt by DIAND, consistent with its policy that resources do not permit staff to both review a single claim and argue it in court. Faced with this reality, and reluctant to step away from a process in which they have often been invested for more than a generation, First Nations are at the

---

26 ICC Transcript, cross-examination of Yveta Wesselke, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatoon, Saskatchewan, August 19, 2005, pp. 20 and 26.

mercy of the department, its limited resources, and an absolute absence of any legal or bureaucratic imperative that might require it to process claims and reach a decision in a reasonable time period.

Given this dilemma, some First Nations have turned to the Indian Claims Commission for review of their apparently stalled claims. Since 1996, the Commission has entertained 21 applications for inquiry of claims that have not yet been expressly rejected by the Minister. Of these applications, the Commission has refused 11 applications for inquiries and agreed to 10 such requests. Canada disputes the Commission's jurisdiction to conduct these inquiries. However, as will be seen, the Commission is both guardian of its own process and empowered to interpret its own mandate. This mandate provides strong legal and moral grounds supporting the exercise of this jurisdiction.

The Commission's Interpretation of Its Mandate
The essence of Canada's objection to this exercise of the Commission's jurisdiction resides in its emphasis on the ICC's authority to inquire into claims "already rejected" by the Minister. Canada takes the position that in the absence of an express act of rejection, defined by Canada as the letter of rejection of a claim which passes from the Minister to the claimant First Nation, the Commission has no jurisdiction to conduct an inquiry. The Panel does not accept this argument or the very narrow view of its mandate that it implies. It has been the stated position of the Commission since its ruling in the 1993 Athabascan Denesuline Inquiry\(^2\) that there is nothing in the terms of reference defined by the Order in Council which confines the Commission to claims rejected in a particular manner. In addition, the empowering Order in Council defines a mandate that is both broad and remedial; one that requires the Commission to oversee the application of the specific claims process to ensure that it proceeds in a manner which respects the importance of claims, the rights of First Nations, and the honour of the Crown — a factor that must infuse all its dealings with Aboriginal people. The preamble to this Order, which must be read as an important and interpretive aspect of that Order, endows the particular functions of both inquiry and report. Insofar as the Commission is charged with

facilitating the resolution of specific claims and ensuring that this process advances fairly and expeditiously, it is impossible and inappropriate to sever the obligation to review the application of the specific claims policy from the individual claims to which that policy applies.

In executing this aspect of the Commission's mandate, the Panel has taken the view that, in the absence of any jurisprudence defining what constitutes rejection and without any federal policy statement that might clarify the term, rejection should not be confined to express communication, either written or verbal, but can be the result of certain action, inaction, or "other conduct" by the Crown in its management of its claims review process.29 Where such conduct has been found to characterize Canada's review of a claim, the Commission may find that the claim has, in effect, been "constructively rejected". The essential question is thus what constitutes rejection and, in the particular case, whether the actions or inactions of the Crown are such that they may give rise to a reasonable apprehension on the part of the claimant First Nation that its claim is rejected.

Over the decade in which the Commission has been receiving and considering applications for inquiries into such claims, a determination of constructive rejection has been guided by consideration of three factors, any or all of which may lead to a reasonable apprehension on the part of the First Nation that its claim is rejected:

1. delay without reasonable explanation;
2. lapsed undertakings to the First Nation by Canada; and/or
3. proportionality between complexity of the claim and apparent time in review.

In the Commission's experience, delay is the single most common issue raised by claimant First Nations seeking an inquiry. However, in considering this issue, the Panel distinguishes between those delays that are unavoidable and those that can, and should, be overcome by the parties. Here, the Panel is mindful of resource constraints that characterize both parties' participation in the process, and it requires some evidence that these constraints have been managed as effectively and

efficiently as possible to limit the degree to which they contribute to delays. The issue is not whether delays might be reasonable in some circumstances, but whether delay is reasonable in the immediate case—a matter that must be determined on a case by case basis having regard not only to the duration of the delay but also to its justification and its impact on the process and the parties.

As acknowledged by the Supreme Court of Canada, and as evidenced in the Commission’s inquiry processes, most First Nations must rely on oral history to vindicate their claims; as such, extensive delays may permanently damage a First Nation’s case as elders in possession of evidence pass on and the evidence is lost. The Court has confirmed the importance of “com[ing] to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past,” and cautioned that “the failure to [keep written records] would ‘impose an impossible burden of proof’ on aboriginal peoples, and ‘render nugatory’ any rights that they have.” Insofar as such evidence is almost certainly critical to the success of the First Nation’s claim, the harm caused by the loss of oral evidence in a specific claim is irreparable.

By the same measure, if a claim takes a decade or more to obtain a ministerial determination of rejection, the loss of elders constitutes a serious blow to the case to be made should Canada reject the claim and the First Nation pursue an inquiry before the Commission. As the Panel observed in the Peepeekisis First Nation: File Hills Colony Inquiry—Interim Ruling:

In our view, the nature of the harm caused to the First Nation by Canada’s delay in addressing this claim, namely by the loss of Elders and other people with a depth of knowledge and developed expertise regarding the claim, impairs the kind of prejudice which today prevents the First Nation from presenting its best case had the claim been responded to in a timely manner.33

RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

These consequences of delay must be added to the impact on communities of compiling and filing a claim which may not see resolution for a generation or more, leading to a loss of faith in the Crown’s perceived commitment to the resolution of claims. As well, in some cases, the likelihood of increased activism by some First Nations, convinced that this is the only way to generate attention to their claim, is enhanced when claims languish in the process with no resolution in sight. In short, then, what matters about delay is not the simple magnitude of the delay as defined by the passage of time, but rather the impact of that delay on the process and those who must place their faith in that process. Insofar as the fair and expeditious resolution of claims is in the interest of all Canadians, the consequences of delay have importance far beyond the parameters of the specific claims process.

Although it is rare for the Panel to find a claim to have been constructively rejected on the basis of delay alone, the most compelling instances of delay have ranged up to 15 years. However, even in such cases, delay has never been the sole factor impelling a finding that the claim had been rejected. For example, in the Peepeskasis First Nation: File Hills Colony Inquiry, delay was accompanied by ongoing undertakings by the Crown to the First Nation that a determination of the claim was imminent, only to have the promised date of determination specified by the Crown pass without any comment or fulfilment of that undertaking. There was also no explanation at any point in the 15-year review of the claim by the Crown of the reasons for the amount of time taken to complete the process. This oversight is especially important insofar as the department confirms that review may take more time where the claim is, as noted above, characterized by issues “[which] are numerous, or complex, or involve areas that require further consultation with experts” — factors that were not present in the Peepeskasis claim.

Significant lapsed undertakings by the Crown in reviewing claims exacerbate delays and may also constitute compelling evidence of constructive rejection. In the Alexis First Nation: TransAlta Utilities Rights of Way Inquiry, Canada repeatedly informed the First Nation that a “preliminary
position was forthcoming” on its claim and yet consistently failed to follow through on that undertaking; in addition, research into this modest and straightforward right-of-way claim was promised to the First Nation, but was never in fact shared with it. When, three years after filing its claim, the First Nation had received no research and no indication from the Crown when or whether it might obtain a determination on the claim, it informed the department that it would be commencing litigation on the claim. The First Nation further specified that it would be prepared to suspend the court action on receiving notification that the claim was validated. After waiting nearly a full year to respond to this communication by the Band, the department informed the First Nation that it would not continue to process a claim that was being actively litigated, but, if the Band would suspend its court action, the department could promise a prompt response to the claim. There is no evidence that any response to the claim was expedited, and, after nearly a year had passed following the First Nation’s suspension of its litigation and the promise of rapid response by the Crown, with no determination on the claim in sight, the Alexis First Nation successfully requested an inquiry from the Commission into its claim.

The Commission’s attention to the Alexis claim demonstrates the value of public inquiries in such contexts and, in particular, the freedom of commissions of inquiry to interpret their mandates in a broad and remedial fashion. The claim of the Alexis First Nation had not been “rejected” in a manner consistent with Canada’s interpretation of that term, and yet, had the Indian Claims Commission not accepted the claim as constructively rejected, important information about the specific claims process and potential unfairness within it would have gone unnoticed by the Canadian public. Thus, while there were clear benefits to the parties in obtaining the insights of an independent investigation of the claim, the inquiry also revealed two important points. First, that Canada was inserting into the Specific Claims Policy aspects not seen anywhere in Outstanding Business - namely, the requirement that claims may not proceed in the specific claims process if they are concurrently in litigation. Although this practice may be reasonable in some cases, the fact that it was neither publicly known nor part of the policy creates a profound unfairness for First Nations and a significant deviation from the policy adopted by government. Second, the admission within the inquiry process by Canada’s counsel that review of a claim by the Department of Justice required
an average of 30 months shed important light on the location of delay within an already intractably lengthy process.

There can be little question that the ability to intervene in circumstances in which a First Nation has been subjected to myriad delays and failed undertakings is consistent with the remedial nature of the ICC's mandate. The Commission has this obligation as a body charged with making public inquiry into specific claims as matters that are of significance to the Canadian people. Canada objects to the Commission's decade-old policy of constructive rejection both on practical grounds as well as for reasons attached to Canada's interpretation of the Commission's mandate. The Government of Canada argues that the willingness of the Commission to accept claims not yet formally rejected by the Minister creates a manifest unfairness in the system by permitting “queue-jumping” by those First Nations that are able to access the Commission. In addition, Canada argues that in applying the designation of constructive rejection, the Commission is usurping Canada's powers of review and determination of claims.

With respect, neither of these arguments is sound. In order for concerns over queue-jumping to be sustained, there must be some clear evidence of a queue, and some reasonably objective criteria that are consistently applied to claims and that thus define a clear and relatively systematic queue. Canada has not been able to establish that there is any objective standard by which claims may be ranked in a consistent fashion, thereby ensuring some systematic movement through the specific claims process. Rather, it appears that the queue is arbitrary and that the “first in, first-reviewed” approach may be undermined by a wide range of factors, including the complexity of the claim, the state of the research filed, the nature of the issues in the claim, and the amount of time the First Nation takes to review Canada's research report confirming the information submitted by the First Nation. By Canada's own admission, the “amount of time [a review requires] will vary depending

\[37\] ICC Transcript, cross-examination of Veda Weslake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatchewan, Saskatchewan, August 19, 2005, pp. 118-21.

\[38\] Affidavit of Veda Weslake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras. 5 12; see also ICC Transcript, cross-examination of Veda Weslake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Saskatchewan, Saskatchewan, August 19, 2005, pp. 21-23.
on the circumstances. It is difficult to understand Canada’s concerns about a First Nation attempting to shift its unknown location in an unsystematic or unverified queue, when Canada itself is apparently unable either to elucidate that queue or to monitor the progress of claims through it. In the absence of any evidence by Canada documenting the queue and indicating some means of tracking the various claims’ movements through it (thereby enabling some determination of whether, in fact, the queue has been jumped), arguments of queue-jumping ring decidedly hollow.

Canada asserts that when the Commission reaches a determination that a claim has been constructively rejected, the Commission has effectively usurped the power of the Minister to reach his or her own determination on a claim. However, in reaching such a conclusion and accepting a constructively rejected claim for inquiry, the Commission is not presuming to usurp the Crown’s right to administer its own policy. When a First Nation approaches the Commission and requests an inquiry based on a finding that its claim has been constructively rejected, the Commission is not stating an opinion on whether the claim should be rejected or accepted. Rather, the Commission is making a determination, based on a systematic analysis guided by the three-point criteria that underlies the Commission’s constructive rejection policy, of the claim’s experience in the system and whether the conduct of the Crown in processing that claim is such that the First Nation may reasonably perceive its claim to have been rejected. In short, the Commission is asked whether the Crown has acted in a manner that is tantamount to a rejection of the claim. Such an analysis has no impact on the power of the Minister to reach his or her own determination on the merits of the claim and on whether that claim is actually rejected. The latter remains a separate and distinct question that is outside the province of the Commission.

Analysis

In our view, a claim may be construed as rejected based on a record of sufficiently unreasonable conduct by the Minister’s officials, which may manifest in any or all of the following ways: delay without reasonable explanation; lapsed undertakings by Canada to the First Nation; or lack of proportionality between complexity of the claim and apparent time in review. Canada rejects this
construction of the Commission’s mandate. Consistent with its position that the sole legitimate articulation of “rejection” resides within a ministerial letter following a determination on the claim, Canada asserts that any alternative understanding of that term, such as the expression of rejection contained within the Commission’s constructive rejection policy, is inconsistent with the intention of the Minister as expressed in *Outstanding Business*. Had the Minister intended to impose time constraints on the making of a determination on a claim, Canada argues, this would have been clearly articulated within the policy. Canada similarly argues that, had the Governor in Council intended to grant the Commission the authority to inquire into and report on delay in the specific claims process, such a role would have been explicitly stated in the Order in Council creating the Commission. What is absent from these arguments, however, is recognition not only of the remedial nature of the Commission’s mandate but also of the intended role of the Commission in facilitating the fair and expeditious resolution of claims - a role which is consistent with the goals of the specific claims policy it is mandated to review.

Insofar as the Commission has been charged with such tasks, it is difficult to see how the Crown can succeed with an argument that this work would not include ensuring an absence of unreasonableness in the process, whether it resides in delays that are unreasonable and/or unexplained by the Crown or in lapsed undertakings. Canada replies that the Commission should not take questions of reasonableness or justice into consideration in interpreting its mandate. Yet, as is clear from the principles expressed by the Minister in *Outstanding Business*, it is precisely justice that the specific claims policy of 1982 promised to provide to First Nations. If there is, in fact, patent unreasonableness in the administration of a specific claims review process that allows relatively simple claims to wait more than 15 years without any decision, that is an absence of justice that must be remedied. The Commission was given the responsibility to review the specific claims process and that responsibility will be discharged mindful of the imperatives of “mutual respect and cooperation” which were intended to characterize the resolution of specific claims “without further delay.”10

There is no legal or bureaucratic force compelling the Minister to reach a decision on a claim, and the prerogative remedy of mandamus is not available to a claimant seeking a decision on a claim

---

10 *Outstanding Business*, 3.
that may, in the claimant’s view, be unreasonably delayed. However, the present issue is not whether
the Minister may be required to reach a decision on a claim, but, rather, whether, having not done
so in a reasonable fashion, the decision may be assumed to be unfavourable to the claimant so as to
engage the Commission’s jurisdiction. If the Commission is found to lack the power to deem the
Minister’s actions to have been tantamount to a rejection of the claim, there are limited options
available to a First Nation that reasonably perceives its claim to be stalled in the specific claims
process. First, there will be the option of continuing to await a determination by the Minister on the
validity of its claim, in the absence of any firm estimate, or ability to estimate, when a determination
might be reasonably expected. In such a case, the First Nation will also be mindful of the possibility
that the delays may stretch out indefinitely and result in the loss of elders and evidence germane to
the claim, as well as the negative implications for the hopes and morale of a community awaiting
resolution of its claim. Confronted by these realities, the option of continuing to occupy some
unknown place in an unsystematic queue in a process lacking in transparency may not be attractive
to the First Nation. This realization takes the First Nation to its second alternative, the courts, where
it will face excessive costs, possible additional delays, and the risk of winner-take-all outcomes, all
of which the 1982 specific claims policy was designed to avoid. The limited attractiveness of both
these options constitutes a further unfairness to the First Nation, which, as noted above, files its
claims and enters the specific claims process in good faith and anticipating a fair and expeditious
resolution of its claim, as promised by Outstanding Business.

Although there is nothing in the current specific claims policy and process that requires the
Minister to reach a decision within a reasonable time period, the courts have not been slow to place
an obligation upon decision makers to reach a decision even where a mandatory time-frame for
decision making is absent within the relevant legislation. In Austin v. Canada (Minister of Consumer
and Corporate Affairs), Dubé J, denying mandamus on the grounds that the delay in question was
not unreasonable, noted that delay even in the absence of a time limit may be unreasonable:

Subsection 20(4) of the Competition Act imposes no time limit for the Minister to
act. Obviously, he cannot procrastinate ad infinitum. In the absence of any time
RED EARTH AND SHOAL LAKE CREE NATIONS: QUALITY OF RESERVE LANDS INQUIRY

Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry  Interim Ruling  19

... limitation he must exercise his discretion and make it known to the applicant within a reasonable time. 61

In Bhatnager v. Canada (Minister of Employment and Immigration), Strayer J (as he then was) equated unreasonable delay in reaching a decision to a refusal to make a decision:

The decision to be taken by a visa officer pursuant to section 6 of the Regulations with respect to issuing an immigrant visa to a sponsored member of the family class is an administrative one and the Court cannot direct what that decision should be. But mandamus can issue to require that some decision be made. Normally this would arise where there has been a specific refusal to make a decision, but it may also happen where there has been a long delay in the making of a decision without adequate explanation. 62

Strayer J reached a similar conclusion in Ermineskin Band Council v. Canada (Registrar, Indian and Northern Affairs):

While there has been no express rejection of this demand [for a decision respecting the Council’s protest against the registration of certain persons as band members], more than enough time has passed for a response and none has been forthcoming. This is tantamount to a refusal to decide. 63

Although the submissions on behalf of the Minister fall short of asserting that the Minister need never reach a decision on a specific claim, that is the clear implication of the government’s position if, indeed, a claimant has no recourse to the Commission should the Minister choose never to make a decision.

Conclusion
Commissions of inquiry have a wide discretion in interpreting their Terms of Reference. The Indian Claims Commission has consistently interpreted its mandate broadly and liberally, having regard to

61 Bhatnager v. Canada (Minister of Employment and Immigration), [1985] 2 FC 315.
the purposes for which it was established and the fact that it does not determine rights but, instead, provides a considered evaluation with recommendation to the Minister of Indian Affairs and the claimant First Nation. The Commission's terms of reference do not define when or how a claim has been rejected. Thus, the Panel considers this issue to be a question of fact based on the record in a particular claim. Indeed, in the vast majority of cases, a claim will have been expressly rejected by the Minister; however, if no formal rejection has been communicated and the First Nation requests an inquiry, the Commission will examine the conduct of the Crown in the specific claims process, as well as any other relevant facts, to determine whether to hold an inquiry on the basis of a constructive rejection.

Conduct by Canada, whether of delay without reasonable explanation, lapsed undertakings by Canada to the First Nation, or lack of proportionality between complexity of the claim and apparent time in review, any of which may give rise to a reasonable apprehension of rejection of the claim on the part of the claimant First Nation, may be regarded as equivalent to a rejection of the claim. In essence, what the Panel is asserting is not a determination of rejection based on the merits of the claim, but, rather, the determination of rejection based on a systematic assessment of the conduct of the Crown in administering its specific claims policy with regard to that claim. The equation is one in which the failure to decide, or to give any reasonable indication that a decision is in progress, is deemed to be equivalent to a refusal to decide. In such a situation, the First Nation must be provided with a fair and accessible remedy to the Crown’s refusal to reach a determination of its claim.

Lacking recourse to a legal remedy such as mandamus to compel a timely review of their claims, and without any other avenue such as the Commission, claimant First Nations must abandon their claim, turn to the courts, or simply accept that their claim will remain undecided. Such a situation is antithetical to the spirit and content of the ICC’s constituting Order in Council, and it cannot have been the promise of the specific claims policy in 1982 or of the creation of the Commission in 1991. This review of the statements and recitals set out above, made by government in the spirit of reconciliation, compels the Panel to this conclusion. As we see it, a promise of reasonably expeditious review of First Nations’ specific claims was made, and the Commission was given charge of its mandate to inquire into and comment on the mechanism by which that promise
is to be kept. Consistent with the views of the Supreme Court in *Badger* and in *Halida*, the
Commission has “always assumed that the Crown intends to fulfill its promises.”\(^{46}\) The current
specific claims process does not always function in a manner that meets this expectation and, as
such, it falls to the Commission, consistent with the obligations contained in its Order in Council,
to assist the parties to adhere to the principles of the policy.

To maintain the honour of the Crown and the integrity of the claims process, the promise of
the policy outlined in *Outstanding Business* must be kept. That can be achieved only if, once the
delays and lapsed undertakings in question become unreasonable, the First Nation can take another
path to facilitate the resolution of its claim. In determining whether the Commission has jurisdiction
to inquire into a claim that has not been expressly rejected by the Minister, we find that the
Commission does indeed have, in certain circumstances, the jurisdiction to hold an inquiry in the
absence of express ministerial rejection.

We now address whether the circumstances of the review by the Minister and his officials
of the claim of the Red Earth and Shoal Lake Cree Nations is such as to engage the jurisdiction of
the Commission.

**ISSUE 2: JURISDICTION TO INQUIRE INTO THE CLAIM OF THE RED EARTH AND SHOAL
LAKE CREE NATIONS**

Where there has been no formal communication of a rejection of the claim, as in this case, we must
consider whether the action, lack of action, or other conduct on the part of Canada is sufficient to
conclude that the claim has been rejected. As stated, a finding of constructive rejection by the
Commission is a question of fact based on the record in a particular claim, in this case the combined
claim of the Red Earth and Shoal Lake Cree Nations. The Commission determines whether the facts
amount to a reasonable apprehension of rejection by considering three factors which may
characterize Canada’s review of a claim: delay without reasonable explanation; lapsed undertakings
by Canada to the First Nation; and the proportionality between the claim and the apparent time in
review.

Background to the Claim and the Request for Inquiry

The claim of the Red Earth and Shoal Lake Cree Nations pertains to questions of the quality and location of lands reserved for these Saskatchewan First Nations under the terms of Treaty 5. The claims were jointly submitted to the Minister of Indian Affairs and Northern Development on May 3, 1996. On August 29, 1996, the Research Manager of the Specific Claims Branch of the Department of Indian Affairs and Northern Development contacted the First Nations to acknowledge receipt of the claim, and the preliminary analysis of the claim was initiated on March 17, 1997. The First Nations were informed on May 26, 1997, that the initial analysis was complete and that Canada’s historical research was scheduled to commence the following November. Additional information on the claim was requested from the First Nations by Specific Claims.

Chief Roy Head of the Red Earth First Nation contacted the Specific Claims Branch on May 1, 1997, to request a copy of the confirming research report, and again on August 15, 1997, requesting an update on the status of the claim and confirming research. Canada’s reply to this letter does not address the request for a copy of the research. On September 17, 1997, the Chief again contacted Specific Claims, on this occasion to request a copy of the preliminary analysis and the name of the researcher assigned to the claim. On July 10, 1998, Specific Claims informed Chief Head that a researcher had been contracted to conduct the historical research and that the department expected this work to be completed in “early October.” The researcher’s contract was later extended to November 27, 1998, and the report was completed and reviewed by the Specific Claims Branch in January 1999.

On March 29, 1999, Specific Claims found that the research report failed to comply with the standards of the Specific Claims Branch, and on May 13 a new researcher was contracted to complete a second confirmation research report. The First Nations were contacted regarding this development, albeit without elucidation of the grounds for rejection of the initial report, and provided with the terms of reference under which the new research was to be conducted. An estimated completion date for the report was given as August 9, 1999. This second report also failed to meet with Specific Claims Branch standards when first received, and on October 18, 1999, the

---

45 Affidavit of Veda Wenselo, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 12.
First Nations were informed by the Specific Claims Branch that the second researcher's contract had been extended, but that no date of completion for the requested revisions had been finalized.

On February 15, 2000, the Specific Claims Branch completed its review of the confirmation research report and forwarded the report to the First Nations for their review. On December 7, 2000, the Federation of Saskatchewan Indian Nations (FSIN), an organization of representatives from Saskatchewan Treaty First Nations, contacted the Specific Claims Branch on behalf of the Red Earth and Shoal Lake First Nations and communicated that the First Nations' review was complete. Citing the "several years" that had passed since the claim's initial submission to the Specific Claims Branch, the Federation's Vice Chief requested that Specific Claims appoint a lawyer from the Department of Justice immediately to prepare a legal opinion on the claim. At the same time, the First Nations submitted Band Council Resolutions to Canada echoing that request.

The Specific Claims Branch advised the First Nations that their claim had been referred to the Department of Justice for review on March 16, 2001. On July 15, 2002, having had no contact from the Specific Claims Branch regarding their claim, the First Nations contacted the Minister of Indian and Northern Affairs Canada, Robert Nault, to express their frustration with the delay and to request that a decision be reached on their claim in the near future. The Minister replied on September 16, 2002:

The situation has been brought to the attention of the Director of Policy and Research, SCB, and I have asked that the SCB and DOJ work together to expedite this claim as soon as possible.97

It was not until April 3, 2003, that the First Nations received confirmation that a Department of Justice lawyer had, in fact, been appointed to review their claim and provide a legal opinion. The appointment of a lawyer for this purpose took from March 16, 2001, until April 3, 2003—a span of just over two years. On November 13, 2003, the Acting Senior Advisor, Specific Claims Branch, informed the First Nations that the review of their claim was under way and that the claim was being

---

96 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, 2005, Exhibit 20.

97 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, 2005, Exhibit 23.
processed as quickly and expeditiously as possible.\textsuperscript{48} No estimated date for completion of this review was given. Six days later, on November 19, 2003, Chief Miller Nawakayas of the Red Earth Cree Nation and Chief Marcel Head of the Shoal Lake Cree Nation contacted Minister Nault, expressing concerns about the six-year delay in the processing of their claim:

... it was only recently that the claim has even been assigned to a Justice Department lawyer. Your officials plead ‘limited resources’. They are unable to provide us with any time frame for the legal review, not to mention the review which the Department [of Indian Affairs] must make afterwards... We consider this situation to be the equivalent of a rejection of the claim.\textsuperscript{49}

There is no record of any reply to this letter from the Minister's office. On November 19, 2003, citing approximately seven years in the processing of their claim, the Red Earth and Shoal Lake First Nations requested that the Indian Claims Commission conduct an inquiry into their claim, which they perceived as effectively rejected by the department.\textsuperscript{50}

On February 3, 2004, the Specific Claims Branch contacted the First Nations and asserted, “The claim has been identified as a priority for 2004.”\textsuperscript{51} One week later, on February 10, 2004, Andy Mitchell, Minister of Indian and Northern Affairs Canada, advised the First Nations that their claim was still under review by the Department of Justice.\textsuperscript{52}

On June 2, 2004, following careful contemplation of the situation of the Red Earth and Shoal Lake First Nations' claim, the Indian Claims Commission accepted the claim for inquiry based on

\textsuperscript{48} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 25.

\textsuperscript{49} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 26.

\textsuperscript{50} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 27.

\textsuperscript{51} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 28.

\textsuperscript{52} Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 29.
its constructive rejection policy.54 Informed of the Commission’s acceptance of the request for inquiry, Minister of Indian and Northern Affairs Canada Andy Scott contacted the First Nations and informed them that a “decision has not yet been made on whether this claim should be accepted or rejected.”55 Given the department’s position that funding to participate in the Indian Claims Commission’s processes is provided “when an Indian Band disagrees with my rejection of a claim ... and has an Indian specific claim in that situation,” the implication is that no funding would be provided to the Red Earth and Shoal Lake Bands to permit them to participate in the inquiry.56 The Minister chose to challenge, by way of motion, the jurisdiction of the Commission to hold the inquiry. The Minister’s motion, served April 7, 2005, was heard on February 9, 2006, by way of written and oral submissions on behalf of the parties.

As of the date of the hearing of this application, February 9, 2006, the Department of Justice lawyer appointed on April 3, 2003, to review the claim of the Red Earth and Shoal Lake First Nations had not yet to complete that review, and there is no evidence of any estimated time frame for its completion. It is the Panel’s understanding that once the legal opinion is completed by the Department of Justice, it will be returned to the Specific Claims Branch of the Department of Indian and Northern Affairs for a further internal review. Following completion of this phase of review, the file, complete with legal opinion, will be sent to the Department of Indian Affairs’ Claims Advisory Committee. This Committee will conduct its own review and make a recommendation to the Minister of Indian and Northern Affairs whether to accept the claim for negotiation of a settlement.

Analysis

Delay

Over 10 years have passed since the Red Earth and Shoal Lake Cree Nations submitted their claim to the Specific Claims Branch. To date, the Department of Justice has yet to render its legal opinion

54 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 30.

55 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 31.

56 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 31.
on the validity of the claim. The evidence given by Ms Veda Weselake, Director of the Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, confirms that it has taken the Specific Claims Branch three and half years to conduct a preliminary analysis and to produce a satisfactory historical report. It has taken a further two and a half years for the Department of Justice to assign a lawyer to the claim and, after three years, that lawyer has yet to complete a legal opinion on this claim – a span well outside the 12-18 months cited by the Department of Justice as constituting the average time taken to complete such reviews. The delay continues notwithstanding the direction of the Minister, given in 2002, to the Department of Indian and Northern Affairs and the Department of Justice work together to expedite the review of this claim.

It has been acknowledged by both parties that Canada has provided updates on the processing of the claim by correspondence and by telephone. In fact, over the five years punctuating the claim’s submission to the Specific Claims Branch on May 3, 1996, and the transfer of the claim to the Department of Justice on March 16, 2001, the claim appeared to be progressing toward a timely decision, given what is known about the processing of claims submitted to the Specific Claims Branch. It is also evident that one year of that initial processing period was taken up by the First Nations’ review of Canada’s research confirmation report. However, on reaching the Department of Justice, the processing of the claim decelerated to the point of apparent inactivity, and five years on there is no indication that any progress has been made on completing the legal opinion or on whether or when that opinion will be completed. It is also at this point that communication by the Specific Claims Branch with the First Nations regarding the progress of the claim apparently broke down, as the Specific Claims Branch is unable to establish clearly that its representatives communicated with the First Nations regarding the progress of their claim or the reasons for the delays. Such delay and the absence of any apparent effort to keep the First Nations informed about

56 Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, paras 13 and 35.

57 According to Ms Weselake’s evidence, in March 2001 Canada advised the First Nations that their claim had been referred to the Department of Justice for a review: Affidavit of Veda Weselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, para 37. A Department of Justice lawyer was not assigned to the claim until April 2003. The only correspondence from Canada on record during this time frame is the Minister’s letter of September 2002.
their claim’s review are hardly reminiscent of the “mutual respect and cooperation” in the resolution of specific claims anticipated in *Outstanding Business*.[56] It is the view of the Panel that the totality of time taken to date by the Specific Claims Branch to complete its review of the claim has been characterized by an unreasonable measure of delay for which, especially over the past five years, no reasonable explanation has been either forthcoming or communicated to the claimants.

In considering delay, however, the issue is not solely one of the magnitude of time taken to review a claim. As noted in the analysis of Issue 1 of this ruling, what is equally important is the impact the delay has had on the First Nation and its ability to present a full and cogent case for validation of its claim. In the present case, the claimants have waited a decade for the Crown to complete the review of their claim and to determine either to reject or to accept the claim for negotiation. For half of this period of delay, the waiting has not been eased by the Crown’s failure to provide any justification for these delays or any hint of when their claim might be decided by the Crown. More significantly, while they wait for the Crown, the First Nations have watched the evidentiary record of their claim be diminished and disadvantaged by the deaths of six elders whose historical evidence is no longer available to assist in establishing the validity of the claim. The First Nations adduced evidence that the Red Earth First Nation has witnessed the passing of Elders Abel Head, John McKay, and Ralph Head, while the Shoal Lake First Nation has lost Elders Jeremiah Whitecap, Joe Bear, and Horace Kitchener.[57] As was stressed in the elucidation of the Commission’s mandate earlier in this ruling, as societies whose historical records were, until relatively recently, retained orally in the memories of elders and others who were present at treaty signing or told of the event by their ancestors, such oral evidence is often a First Nation’s primary, if not sole, source of evidence. Canada’s delay in addressing this claim has prejudiced the Red Earth and Shoal Lake Cree Nations’ ability to effectively present their claim and, in the words of the First Nations’ counsel[58], has led to feelings of “frustration, anger, disappointment, depression, loss of hope, and loss of

---

[56] *Outstanding Business*, 3.

[57] Affidavit of Ian McKay, Red Earth First Nation, Melfort, Saskatchewan, July 6, 2005, para. 9.

[58] Reply Submissions on Behalf of the Red Earth and Shoal Lake Cree Nations, para. 75.
confidence" on the part of the First Nations in the commitment of Canada to the fair and expeditious resolution of specific claims.

In summary, the Panel finds that the conduct of the Crown in its review of the claim of the Red Earth and Shoal Lake First Nations over the period of May 3, 1996, through to the present, but most notably since 2001, has created an unacceptable situation of delay for which no reasonable explanation has been provided to the First Nations. Furthermore, Canada has not provided evidence to this Panel which might justify either the delay or the Specific Claims Branch's failure to communicate with the First Nations to explain the delay. Conversely, the First Nations have provided compelling evidence not only of the delay but also of the deleterious consequences the passage of time has created for the First Nations through the death of elders and the resulting erosion of the historical record of the claim.

Lapsed Undertakings

In addition to delay, the Panel considers, as relevant to a determination of constructive rejection, evidence of lapsed undertakings regarding such matters as the rate of progress in the processing of the claim and the estimated time frames for a decision on a claim. In the present case, and as detailed above, there are three instances of statements by the Crown which may be reasonably seen as creating an expectation on the part of the First Nations that review of their claim would be expedited when, in fact, there is no evidence to indicate that this undertaking initiated any shift in the approach of the Specific Claims Branch towards the claim. It is significant that the first of these statements originated with the Minister of Indian and Northern Affairs. As previously stated, in September 2002, the Minister communicated by letter to the First Nations that their claim had been brought to the attention of the Director of Policy and Research and that the Specific Claims Branch and the Department of Justice would work together to expedite review of the claim. One year later, in November 2003, in reply to a query from the First Nations concerning the ongoing lack of progress on their claim, an official from the Specific Claims Branch assured the First Nations that their claim

---

61 Affidavit of Veda Wenselake, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 23.
was being processed “as quickly and expeditiously as possible.” Then, in 2004, the claim was identified as a “priority” by the Specific Claims Branch. Although Canada continues to suggest that a decision is forthcoming, it has not provided a certain date within which it will make a decision.

It may reasonably be suggested that any of the above statements could have created a sense of false encouragement on the part of the First Nations regarding the commitment of the Crown to the resolution of their claim. That these undertakings to expedite review of the claim transpired in the apparent absence of any such accelerated review is problematic in itself; that such unfounded undertakings may have influenced the claimants’ willingness to remain in the Specific Claims Branch queue as elders passed away and evidence was lost, rather than pursuing litigation or earlier intervention by the Commission, is an unacceptable but quite possible consequence of the Crown’s lapsed undertakings.

The Panel finds that the Minister of Indian and Northern Affairs and officials of the Specific Claims Branch made undertakings to the Red Earth and Shoal Lake First Nations to expedite review of the claim, but that no evidence exists to indicate that these undertakings were fulfilled.

Proportionality between the Delay and the Complexity of the Claim
The Red Earth and Shoal Lake Cree Nations’ claim involves a determination of Canada’s obligation, according to the terms of Treaty 5, to provide lands of adequate quality and quantity to support the farming economy encouraged by the department and adopted by the claimants. Although Canada has significant experience on the matter of land quantum under the numbered Treaties, it asserts that the issue of the quality of farming land is a novel treaty interpretation issue which may have broad legal significance for other Treaty 5 First Nations. As such, Canada alleges that this aspect of the claim has contributed significantly to the delay in processing the claim. Canada argues that, while the processing of historical claims is by its very nature complex and time consuming, responding to

---

62 Affidavit of Veda Wenesiuk, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 25.

63 Affidavit of Veda Wenesiuk, Director of Research and Policy Directorate, Specific Claims Branch, Indian and Northern Affairs Canada, Gatineau, Quebec, May 2005, Exhibit 28.
novel treaty interpretations in a Specific Claims Branch characterized by inadequate and highly strained human and financial resources requires considerably more time and effort.

While the Panel is all too familiar with the challenges implicit in resolving historical claims, it is not able to agree with Canada’s arguments linking the land quality question in this claim with the delays that have characterized its review. Canada has not brought any evidence before the Panel which links the land quality question with the pace of review, and thus it is impossible to make any conclusions about the implications of the question in the absence of such evidence.

At least in part, Canada’s concerns that the claim presents questions of “novel treaty interpretation” appear to have less to do with the complexity of the issue of land quality than with the possible precedential effect of any determination of that issue by the Specific Claims Branch. While it is reasonable that officials would wish to take special care in reviewing a claim where some aspects may be expected to have “broad legal significance,” the main issue in this claim – and, indeed, in many other claims submitted to the Specific Claims Branch – is whether there are unfulfilled treaty obligations within the meaning of the specific claims policy. Questions of precedential effect should not bear any relationship to the legal question in this or any other claim. As was stated by Commission Counsel on behalf of the Panel stated in the Mikisew Cree First Nation Inquiry:

Even if the Commission were to conclude that it is justifiable for Canada to consider the broader policy implication of accepting the claim, the apparent lack of clarity in the [Specific Claims] policy (which was developed 14 years ago) cannot provide a justifiable reason for the patent delay in this case.\(^a\)

Canada maintains that it is subject to limited resources, both human and financial, and that these limitations become especially confounding when claimants raise new and unexpected treaty interpretations. While there are abundant statements in the evidence by various officials of the Specific Claims Branch lamenting the limitation in resources, these limitations cannot become an excuse by the Crown to avoid its obligations to manage claims in a fair and expeditious fashion. Delays due to resource constraints are reasonable in some contexts. However, when those delays lead

---

to permanent harm to the evidence in a claim – as in the deaths of six elders over 10 years in the present case – the challenges characterizing the process are shifted onto the claimant party and result in significant unfairness.

Because Canada has failed to present evidence to support a link between the complexity of the claim of the Red Earth and Shoal Lake First Nations and the delays, it is impossible to accept its assertion that the complexity of the claim explains the delay in completing the review. To the degree that precedential effect goes to the question of complexity, concerns regarding the possible precedential impacts arising from the management of the land quality issue should not bear any relationship to the legal questions in this claim. As regards the impact of resources, or lack thereof, within the Specific Claims process, the Commission has long held the view that it is the responsibility of the parties to manage their resource constraints as effectively as possible and in a manner that will not have any impact on the fairness of the claims review process. If, in fact, resource constraints are responsible for some portion of the considerable delay characterizing Canada’s Specific Claims process in the present case, this fact would go to the question of Canada’s ability to effectively manage those resources to ensure that they impair the integrity of the claims process as little as possible.

With regard to the Red Earth and Shoal Lake First Nations, the delays experienced indicate an absence of effective resource management by Canada which has had a direct and deleterious impact on the fairness of the specific claims review process and the ability of the First Nations to establish their claim.

CONCLUSION

The Panel finds in the affirmative on both issues in this motion. First, it is within the Commission’s jurisdiction to accept constructively rejected claims for inquiry. Second, on the facts of the Red Earth and Shoal Lakes First Nations’ claim, the conduct of Canada was tantamount to a rejection of that claim. The Commission therefore possesses the jurisdiction to conduct an inquiry into this claim.

Canada’s motion is hereby dismissed.
FOR THE INDIAN CLAIMS COMMISSION

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

Dated this 26th day of September, 2006.
APPENDIX D

NOTICE OF APPLICATION, FEDERAL COURT OF CANADA, OCTOBER 25, 2006

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

and

RED EARTH INDIAN BAND and
SHOAL LAKE CREE NATION

Applicant

Respondents

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Court Rules, 1994, and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Court Rules, 1994, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.
October 25, 2006

TO: Kapoor, Selnes & Klimm
417 Main St.
P.O. Box 2200
Melfort, SK  S0E 1A0
Tel: (306) 752-5777
Fax: (306) 752-2712

William A. Selnes
Solicitor for the Respondents,
Red Earth Indian Band and Shoal Lake Cree Nation
APPLICATION

This is an application for judicial review in respect of the Indian Specific Claims Commission (the "Commission") established by Order in Council P.C. 1991-1329; as amended (the "Order in Council"). The Applicant seeks judicial review of the decision of the Commission dated September 26, 2006, entitled "Ruling on Canada’s Objection to Jurisdiction", whereby the Commission purported to take jurisdiction over the Respondents' request for an inquiry into their claim. The decision was communicated to counsel for the Department of Indian and Northern Affairs on the same date.

The Applicant makes application for an Order of the Court:

(a) quashing or setting aside the said decision of the Commission;

(b) declaring that the Commission erred in its interpretation of its constituting Order in Council;

(c) prohibiting the Commission for continuing with the said inquiry;

(d) costs; and

(e) such further and other relief as counsel may advise or this Honourable Court permit.

The grounds for the application are:

(a) the Commission’s constituting Order in Council provides that the Commission shall inquire into and report on “whether a claimant has a valid claim ... where that claim has already been rejected by the Minister”;

(b) at the time of the decision, the Minister had not rejected the claim of the Respondents;
(c) the Commission erred in law in its interpretation of the said Order in Council by finding that the Commission nonetheless has jurisdiction to carry out an inquiry into the claim;

(d) the Commission exceeded its jurisdiction in deciding to proceed with the said inquiry; and

(e) such further or other grounds as counsel may advise and this Honourable Court may permit.

The application will be supported by the following material:

(a) the decision of the Commission dated September 26, 2006;

(b) the affidavit of Jillian Russell, not yet sworn; and

(c) such other material as counsel may advise and this Honourable Court may permit.

October 25, 2006

John H. Stenza
Deputy Attorney General of Canada
For: John S. Tyhurst
Department of Justice
234 Wellington Street
East Tower, Room 1251
Ottawa, ON K1A 0H8
Tel: (613) 997-4860
Fax: (613) 994-1920
Solicitor for the Applicant
RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

APPENDIX E

RED EARTH AND SHOAL LAKE CREE NATIONS: INTERIM RULING ON
CANADA’S OBJECTION TO PROPOSED TESTIMONY OF TWO NON-ELDER
WITNESSES, OCTOBER 11, 2007

October 11, 2007

William Selnes
Kapoor, Selnes, Klein & Brown
417 Main Street
Melfort, SK
S0J 1M0

Vivian Russell
DIAND, Legal Services
319-400 Cooper Street
Ottawa, ON
K1A 0H4

RE: Red Earth and Shoal Lake Cree Nations: Quality of Reserve Land Inquiry
ICC File: 2107-54-01

Dear Counsel:

This letter is in response to Canada’s objection to the proposed testimony of the non-elder witnesses Ian McKey and Charles Whitecap.

The Panel has considered the submissions of the parties and has ruled as follows, pursuant to paragraph 42 of the Commission’s “Guidelines for Parties.”

Mr. McKey and Mr. Whitecap will be permitted to testify. Their testimony will be given in an open hearing, following the conclusion of the Elders’ testimony in the respective sessions at each First Nation community. The order of examination will be as follows:

- Mr. Selnes for the First Nation: Examination in chief;
- Ms Brass, counsel to the Commission: Questions;
- Panel: Questions;
- Mr. Russell, counsel for Canada: Cross-examination;
- Mr. Selnes: Re-examination, restricted to matters raised by the Commission or in cross-examination.
Please do not hesitate to contact me should you have any questions or comments.

Sincerely,

Michelle Brass
Associate Counsel

cc. Chief Miller Nawakayas and Ian McKay, Red Earth First Nation
    Chief Marcel Hend and Charles Whitecap, Shoal Lake Cree Nation
    Richard Yen, IDAMP, Specific Claims Branch
    Rarihokwats, Researcher, Red Earth/Shoal Lake Cree Nations
APPENDIX F

C H R O N O L O G Y

RED EARTH AND SHOAL LAKE CREE NATIONS:
QUALITY OF RESERVE LANDS INQUIRY

1 Planning conference Regina, February 24, 2005

2 Community session and site visit Red Earth and Shoal Lake, October 16-17, 2007


3 Written legal submissions

- Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, March 6, 2008
- Submission on Behalf the Government of Canada, April 17, 2008
- Reply Submission on Behalf of the Red Earth and Shoal Lake Cree Nations, May 1, 2008

4 Oral legal submissions Saskatoon, May 15, 2008

5 Interim rulings

Mandate Challenge:
- Submission on Behalf of the Government of Canada, May 20, 2005
- Submission on Behalf of Red Earth and Shoal Lake Cree Nations, October, 2005
6 Content of formal record

The formal record of the Red Earth and Shoal Lake Cree Nations: Quality of Reserve Lands Inquiry consists of the following materials:

- Exhibits 1 - 9 tendered during the inquiry, including transcript of community session
- Transcript of oral legal submissions on inquiry
- Transcript of oral legal submissions on mandate challenge

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

MUSKOWEKWAN FIRST NATION
1910 AND 1920 SURRENDERS INQUIRY

PANEL
Chief Commissioner Renée Dupuis, C.M., Ad.E. (Chair)
Commissioner Sheila G. Purdy
Commissioner Alan C. Holman

COUNSEL
For the Muskowekwan First Nation
Stephen Pillipow/Murray Hinds

For the Government of Canada
Susan Ayala/Douglas Faulkner

To the Indian Claims Commission
Michelle Brass

NOVEMBER 2008
CONTENTS

SUMMARY 599
KEY HISTORICAL NAMES CITED 605

PART I INTRODUCTION 609
Background to the Inquiry 609

PART II THE FACTS 614

PART III ISSUES 627

PART IV ANALYSIS 628
THE 1910 SURRENDER 634
   Issue 1: Compliance With Provisions of the Indian Act 634
   Issue 2: Was A Pre-surrender Fiduciary Duty Breached? 637
THE 1920 SURRENDER 646
   Issue 1: Compliance With Provisions Of The Indian Act 646
   Issue 2: Was a Pre-surrender Fiduciary Duty Breached? 650
OUTSTANDING ISSUES 660

PART V CONCLUSIONS AND RECOMMENDATION 662

APPENDICES
A Historical Background 665
B Issues 704
C Interim Decisions 706
D Chronology 709
SUMMARY

MUSKOWEKWAN FIRST NATION
1910 AND 1920 SURRENDERS INQUIRY
Saskatchewan


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 S.G. Purdy,
Commissioner A.C. Holman

Treaties – Treaty 4 (1874); Reserve – Surrender; Indian Act – Surrender;
Fiduciary Duty – Pre-surrender; Right of Way – Railway; Saskatchewan

THE SPECIFIC CLAIM
On September 17, 1992, the Muskowekwan First Nation submitted a specific claim to the Department of Indian Affairs, alleging the invalidity of two surrenders, one taken in 1910 and the other in 1920. The First Nation made a number of supplementary legal submissions in August 1994, July 1996, July and August 1997, and September 1999, raising a lengthy number of issues concerning these surrenders, including pre- and post-surrender fiduciary duties of the Crown, and rights to mines and minerals, among others.

The First Nation claim was rejected in what has been referred to in this inquiry as a “preliminary” letter from the Specific Claims Branch, dated May 13, 1997, and in a confirming letter from the Minister of Indian Affairs dated November 26, 1997.

The issues in this inquiry are whether the provisions of the applicable *Indian Act* were breached with respect to the two surrenders, and whether the Crown breached its pre-surrender fiduciary obligations with respect to each surrender.

**BACKGROUND**

On September 15, 1874, the Government of Canada signed Treaty 4 with “the Cree, Saulteaux and other Indians,” including Chief Ka-kee-na-wup on behalf of the Muskowekwan (or Muscowequan) First Nation.

The Muskowekwan First Nation occupies Indian Reserve No. 85 (IR 85) in southern Saskatchewan. In late 1905, the Grand Trunk Pacific Railway Company (GTP) applied to the Indian Affairs department to construct its railway line through the Muskowekwan Reserve. By Order in Council dated May 12, 1906, 164.8 acres of the reserve were granted to the GTP for a right of way and station grounds (known as Mostyn).

Some months after its request and before it was granted the right of way, the GTP had also applied to the Department of Indian Affairs to purchase 640 acres on IR 85 for a townsite next to its station grounds. On March 7, 1910, the Muskowekwan First Nation surrendered for sale approximately 160 acres of its reserve lands for a townsite. The surrender was accepted by Order in Council on April 1, 1910.

Over the following years, the Crown received several petitions from residents of the Village of Lestock (formerly the Mostyn station grounds) and their elected representatives, as well as from band members themselves, asking that additional lands from the eastern end of the Muskowekwan reserve, adjacent to the new townsite, be surrendered. On October 14, 1920, Commissioner W.M. Graham obtained a second surrender for sale of approximately 7,485 acres from the Muskowekwan First Nation, consisting of the eastern three rows of sections.

**ISSUES**

Eight issues were initially presented for our consideration. However, because the Indian Claims Commission was required to complete all inquiries by December 31, 2008, only two have been addressed in this inquiry on consent of both parties. These are: 1) whether the Crown breached the relevant provisions of the 1906 *Indian Act* and its related policy guidelines with respect to each of the 1910 and 1920 surrenders; and 2) whether the Crown breached its pre-surrender fiduciary obligations with respect to either, or both, of the two surrenders.
FINDINGS
The panel finds that the Muskowekwan First Nation has failed to establish that there were violations of the applicable Indian Act concerning the 1910 surrender. The surrender document and supporting surrender affidavit are prima facie proof of their contents and there is no evidence before us to contradict their presumed reliability.

The panel finds, however, that the Crown breached its pre-surrender fiduciary obligations to the Muskowekwan First Nation concerning the 1910 surrender for several reasons.

The Crown failed to advise and discuss with the Band the consequences that would result from the GTP’s request for additional lands for a townsite in addition to its request for a right of way, until months after the Crown had already granted the right of way to the GTP. The First Nation was not informed of the likely consequences of having both a right of way and a townsite located on its reserve lands.

Furthermore, the Crown did not follow its own clear policies against permitting townsites to be located on reserve lands. The failure to apply departmental policy in this instance was not a mere technicality, but negatively impacted the core of the First Nation’s land base, culture, and way of life. Overall, the Crown favoured the railway's and settlers' interests over those of the First Nation. The Crown ignored a request by the First Nation that the township be located elsewhere on the reserve so as to not to cut up the reserve quite so badly. Contrary to the requirements of Apsassin, the implications of a townsite and a right of way on reserve lands were not fully discussed with the Indians by departmental representatives prior to the actual surrender. Instead, the First Nation was provided with only some of the information relevant to the exercise of its free and informed consent when making its decision. Had band members been fully informed, the panel cannot say that their decision would have been the same.

With respect to the 1920 surrender, the panel finds that, while there were some violations of 1914 federal Guidelines governing the conduct of the surrender process, particularly with respect to notice provisions, these violations were mere technicalities that did not affect the Band’s majority vote in favour of the surrender. The Band had long intended to surrender a portion of its reserve lands and had discussed doing so over a period of years. The true purpose of the Indian Act and the 1914 Guidelines in question was fulfilled. However, the panel finds that the Crown failed to live up to its pre-
surrender fiduciary obligation, as outlined in the *Apsassin* case, to prevent exploitative and improvident surrenders.

The Crown failed to inform the Band, which needed money for farming equipment, of its various options, other than surrender. It encouraged the Band to surrender some of its best farming land in order to get the money it needed, despite the fact that there were considerable funds in the Band’s capital and interest accounts that could have been used for this purpose. Furthermore, some of the land included in the surrender was already generating income from grazing leases that could have been applied to this purpose. Finally, the Crown could also have pursued purchasers of previously surrendered lands who had defaulted in their payments.

The First Nation was left with the erroneous impression by Crown representatives that it had only one option, a surrender, when a surrender was the most extreme of the alternatives available. A surrender of some of the First Nation’s best farming lands in order to get monies for farming equipment made little sense in these circumstances. If the Crown had provided full information to the First Nation concerning its options, it cannot be said that band members would have reached the same conclusion.

The panel thus finds that the Crown favoured settler interests over those of the Muskowekwan First Nation in the 1920 surrender. The Crown responded to political pressures from the Town of Lestock and its elected representatives by obtaining an improvident and exploitative surrender of reserve lands for use by the town, instead of properly managing the interests of the First Nation with these competing interests, thus breaching the duties set out in *Apsassin*.

**RECOMMENDATION**

That the claim of the Muskowekwan First Nation regarding the 1910 and 1920 surrenders 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 photograph, that is fully referenced in the report.

**Cases Referred To**

*Guerin v. The Queen*, [1984] 2 SCR 335; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).
ICC Reports Referred To
ICC, Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007).

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

Counsel, Parties, Intervenors
S.M. Pillipow and M. Hinds, for the Muskowekwan First Nation; S. Ayala and D. Faulkner for the Government of Canada; M. Brass to the Indian Claims Commission.
**KEY HISTORICAL NAMES CITED**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akan, Sam</td>
<td>Headman, Muskowekwan First Nation (c. 1915)</td>
</tr>
<tr>
<td>Atkinson, G.M.</td>
<td>Saskatchewan MLA (1909-1910)</td>
</tr>
<tr>
<td>Borden, Robert L.</td>
<td>Prime Minister of Canada (1911-1920)</td>
</tr>
<tr>
<td>Bray, S.</td>
<td>Chief Surveyor, Department of Indian Affairs (1904-1921)</td>
</tr>
<tr>
<td>Campbell, Glen</td>
<td>Chief Inspector of Indian Agencies (1912-1914)</td>
</tr>
<tr>
<td>Crawford, Frank W.</td>
<td>Secretary of the Village Council of Lestock, Sask. (c. 1918)</td>
</tr>
<tr>
<td>Desjarlais, Tom</td>
<td>Chief of the Muskowekwan First Nation (1918-1933)</td>
</tr>
<tr>
<td>Deville, E.</td>
<td>Surveyor General, Department of the Interior (1889-1920)</td>
</tr>
<tr>
<td>Edwards, W.F.L.</td>
<td>District Superintendent, Soldier Settlement Board of Canada (c. 1920)</td>
</tr>
<tr>
<td>Fairchild, H.W.</td>
<td>Surveyor, Department of Indian Affairs (c.1921-1931)</td>
</tr>
<tr>
<td>Graham, William M.</td>
<td>Indian Agent, Qu'Appelle Agency, 1896-1904); Inspector of Indian Agencies (1904-1913); Commissioner for Greater Production (1918-1919); Indian Commissioner (1918-1932)</td>
</tr>
<tr>
<td>Hardinge, J.B.</td>
<td>Acting Indian Agent, Touchwood Agency, (c.1920-1921); Indian Agent, Touchwood Agency (c.1922-1923)</td>
</tr>
<tr>
<td>Johnson, J. Fred</td>
<td>Member of Parliament (c. 1919)</td>
</tr>
<tr>
<td>Name</td>
<td>Title and Notes</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Ka-kee-na-wup</td>
<td>Muskowekwan Chief or Headman at signing of Treaty 4</td>
</tr>
<tr>
<td>Maber, S.</td>
<td>Secretary, Soldier Settlement Board (c. 1920)</td>
</tr>
<tr>
<td>Martin, W.M.</td>
<td>Premier and Minister of Education for Saskatchewan (1916-1922)</td>
</tr>
<tr>
<td>McLean, J.D.</td>
<td>Secretary, Department of Indian Affairs (1897-1911)</td>
</tr>
<tr>
<td>McLean, J.K.</td>
<td>Surveyor, Department of Indian Affairs (1906-1912)</td>
</tr>
<tr>
<td>Meighen, Arthur</td>
<td>Minister of the Interior, Minister of Indian Affairs and Superintendent General of Indian Affairs (c. 1917-1920); Prime Minister (July 10, 1920 - December 29, 1921 and June 29, 1926 - September 25, 1926)</td>
</tr>
<tr>
<td>Murison, William</td>
<td>Indian Agent for Muskowekwan Reserve, Touchwood Agency (1905-1920)</td>
</tr>
<tr>
<td>Muskowekwan</td>
<td>Chief of Muskowekwan First Nation</td>
</tr>
<tr>
<td>Nelson, John C.</td>
<td>Dominion Land Surveyor (1882-1892)</td>
</tr>
<tr>
<td>Orr, W.A.</td>
<td>Clerk in Charge of the Lands and Timber Branch of Indian Affairs (1905-1920)</td>
</tr>
<tr>
<td>Pedley, Frank</td>
<td>Deputy Superintendent General of Indian Affairs (1902-1913)</td>
</tr>
<tr>
<td>Reid, J. Lestock</td>
<td>Dominion Land Surveyor (1876-1910)</td>
</tr>
<tr>
<td>Robinson, FJ.</td>
<td>Deputy Minister, Saskatchewan Department of Public Works (c.1911); Chairman of the Board of Highway Commissioners (c. 1914)</td>
</tr>
<tr>
<td>Name</td>
<td>Position and Affiliation</td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Robertson, D.F.</td>
<td>Chief Surveyor, Department of Indian Affairs (c. 1924)</td>
</tr>
<tr>
<td>Ryley, G.U.</td>
<td>Land Commissioner, Grand Trunk Pacific Railway (c. 1908-1909)</td>
</tr>
<tr>
<td>Scott, Duncan Campbell</td>
<td>Deputy Superintendent of Indian Affairs (1913-1932)</td>
</tr>
<tr>
<td>Sifton, Clifford</td>
<td>Minister of the Interior &amp; Superintendent General of Indian Affairs (1896-1905)</td>
</tr>
<tr>
<td>Stewart, S.</td>
<td>Assistant Secretary, Department of Indian Affairs (c. 1910)</td>
</tr>
<tr>
<td>Tate, D’Arcy</td>
<td>Solicitor, Grand Trunk Railroad Company (c. 1911)</td>
</tr>
<tr>
<td>White, W.R.</td>
<td>Dominion Land Surveyor, Department of Indian Affairs (c. 1913-1921)</td>
</tr>
<tr>
<td>Windigo (Old Windigo)</td>
<td>Headman, Muskowekwan First Nation (c. 1910-1915)</td>
</tr>
</tbody>
</table>
MUSKOWEKwan INQUIRY: 1910 AND 1920 SURRENDERS

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

On September 15, 1874, the Government of Canada signed Treaty 4 with “the Cree, Saulteaux and other Indians” living in what now comprises southern Saskatchewan, small portions of southeastern Alberta, and west-central Manitoba. The signatories included Chief Ka-kee-na-wup on behalf of the Muskowekwan (or Muscowequan) First Nation. 1 The Muskowekwan First Nation occupies Indian Reserve No. 85 (IR 85), located in the Little Touchwood Hills region of southern Saskatchewan.

In late 1905, the Grand Trunk Pacific Railway Company (GTP) applied to Indian Affairs to construct its railway line through the Muskowekwan Reserve.2 By Order in Council dated May 12, 1906, 164.8 acres of the reserve were granted to the GTP for a right of way and station grounds.3 This transaction is not an issue in this inquiry, but forms the backdrop to the two surrenders that are at issue, one taken in 1910 and the other in 1920.

Some months after its request, and before it was granted a right of way, the GTP had also applied to the Department of Indian Affairs to purchase 640 acres on IR 85 for a townsite next to its station grounds (Mostyn).4 On March 7, 1910, Indian Agent William Murison obtained a surrender for sale from the Muskowekwan First Nation of approximately 160 acres of their reserve lands for a townsite, namely, the Northwest (NW) quarter of section 6, township 27, range 14, West (W) of the 2nd meridian.5 The surrender was accepted by Order in Council on April 1, 1910, “the said surrender having been in order that the land covered thereby may be sold for the benefit of the band interested therein.”6

---

1 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), 8 (ICC Exhibit 1a, p. 6).
2 Indian Commissioner to Indian Agent, Touchwood Agency, 21 November 2005 (ICC Exhibit 1a, p. 32).
3 Order in Council, 12 May 1906 (ICC Exhibit 1a, p. 45).
4 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to Secretary, Department of Indian Affairs, 2 February 1906 (ICC Exhibit 1a, p. 35).
5 Surrender for Sale, 7 March 1910 (ICC Exhibit 1a, pp. 107-112).
Beginning in 1912, the Indian Affairs department received several petitions and requests for the surrender of additional lands from the eastern end of the Muskowekwan reserve, adjacent to the new townsite, both from the Band itself, and from residents of the Village of Lestock (formerly the Mostyn station). On October 14, 1920, Commissioner W.M. Graham obtained a second surrender for sale from the Muskowekwan First Nation of the eastern three rows of sections of the reserve, some 7,485 acres.\(^7\)

Each of the 170 Muskowekwan members received a payment of $100 at the time the surrender was signed.\(^8\) The full historical background to this claim is set out in Appendix A of this report.

On September 17, 1992, the Muskowekwan First Nation submitted a specific claim alleging the invalidity of the 1910 and the 1920 surrenders to the Department of Indian Affairs. The First Nation made a number of supplementary legal submissions in August 1994, July 1996, July and August 1997, and September 1999, raising a lengthy number of issues, pertaining to the pre- and post-surrender fiduciary duties of the Crown, and title to mines and minerals, among others. The claim was rejected in a letter from the Specific Claims Branch dated May 13, 1997, and in a confirming letter from the Minister of Indian Affairs dated November 26, 1997. The First Nation requested an inquiry on November 21, 2003 and the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim on December 18, 2003.

The parties at first agreed to eight issues, which are attached to this report as Appendix B. However, the Commission was subject to an Order in Council, dated November 22, 2007, which ordered that all inquiries before the Commission be completed, including reports, by December 31, 2008. Because of the impending closure of the Claims Commission, the First Nation was only able to address two of these eight issues. Canada agreed that the Commission would deal with only the first two issues. We wish to emphasize that the remaining six issues are still outstanding and should be dealt with under the Department of Indian and Northern Affairs’ expedited process. Our findings will in no way preclude those issues from being raised in that process or before the newly-created Specific Claims Tribunal.

Because of the special nature of this inquiry, which left a number of issues undecided, we have referred to a number of interim decisions that we

---

6. Order in Council, PC 572, 1 April 1910 (ICC Exhibit 1a, pp. 119-120).
7. Surrender for Sale, 14 October 1920 (ICC Exhibit 1a, pp. 453-458).
made throughout the hearing, most related to research issues, to assist the Tribunal. These rulings are summarized in Appendix C.

A chronology of the written submissions, documentary evidence, transcripts and the balance of the record in this inquiry is detailed in Appendix D.

MANDATE OF THE COMMISSION
The Indian Claims Commission (ICC) was established through Order in Council on July 15, 1991 as an interim measure in the federal specific claims process. The 1973 Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy - Specific Claims*.9

The Commission’s mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1st, 1992. The Order in Council directs:

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 upon:

i) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and

ii) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister’s determination of the applicable criteria.10

In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

---


The government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation”, i.e., an obligation derived from the law on the part of the federal government. A lawful obligation may arise in any of the following circumstances:

i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
ii) A breach of 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.11

In addition to the foregoing, the government is prepared to acknowledge claims which are 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.12

11 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 at 179.

PART II

THE FACTS

On September 15, 1874, the Government of Canada signed Treaty 4 with “the Cree, Saulteaux and other Indians” living in parts of Saskatchewan, Alberta, and Manitoba.\(^\text{13}\) In Treaty 4, the Crown promised to set apart reserves for each of the signatory First Nations and stated that those reserves “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”.\(^\text{14}\) Chief Ka-kee-na-wup signed the treaty on behalf of the Muskowekwan (or Muscowequan) First Nation, which now occupies the Muskowekwan Indian Reserve No. 85, (IR 85), in southern Saskatchewan, first surveyed in March of 1884. The final boundaries of IR 85 included lands within township 27, ranges 14-16, West (W) of 2nd meridian.

In October 1905, Indian Agent William Murison informed the Department of Indian Affairs that the Grand Trunk Pacific Railway Company (GTP) was planning to construct its railway line through the Muskowekwan reserve. He was told not to allow any railway construction on the Muskowekwan Indian reserve until he was informed that the right of way had been duly arranged.

The GTP applied a few months later to the Department of Indian Affairs to purchase an additional 640 acres for a townsite within IR 85, adjacent to its station grounds (referred to as Mostyn). Indian Agent Murison was instructed to take a surrender of 640 acres for the proposed townsite if the First Nation were willing; however, his instructions were retracted only two days later and the First Nation was not consulted. On May 12, 1906, 164.8 acres of the Muskowekwan Reserve were granted to the GTP for a railway right of way and station grounds by Order in Council.

At that time, Indian Affairs policy did not generally permit townsites to be situated within the boundaries of Indian reserves. As Clifford Sifton, the

\(^{13}\) A full description of the historical background to the First Nation’s claim is found at Appendix A to this report.

\(^{14}\) Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians of Fort Qu’Appelle and Fort Ellice (Ottawa: Queen’s Printer, 1966), 8 (ICC Exhibit 1a, p. 4).
Superintendent General of Indian Affairs explained to the Deputy Superintendent General of Indian Affairs, Frank Pedley, in a letter dated December 5, 1904, there were serious objections to allowing townsites to be located on Indian reserves, or even in the immediate neighbourhood of a reserve, as complications could arise.

On July 31, 1906, Indian Affairs Secretary J.D. McLean informed the GTP that any land surrendered for a townsitie must be adjacent to the outside boundaries of the reserve. The company eventually amended its application to include the IR 85 land lying between its proposed townsite and the southern boundary of the reserve, an area of 960 acres.

On November 6, 1906, the Acting Deputy Superintendent General of Indian Affairs instructed Indian Agent Murison to call a meeting with the Muskowekwan First Nation to see if the Band was willing to surrender the lands needed for a townsite. Agent Murison indicated that he personally opposed such a surrender, saying he did not think that it was in the best interests of the Indians to have a town located on the reserve. As instructed, however, he held a meeting with the Band on November 28, 1906 to discuss the proposed surrender.

Murison later reported that the First Nation would agree to the surrender on certain conditions: they wanted to receive $25 per acre for the land; they wanted one-tenth of the purchase money to be distributed at the time of signing, and they wanted the interest on the balance of the purchase money to be distributed annually. They also requested permission to use part of their capital funds for fencing, farm machinery, or such work or material for the benefit of the Band as might be authorized by the Indian Affairs department. Finally, the First Nation also requested that the location of the proposed townsite be moved one and a half miles to the west, as this would not cut up their reserve so badly and it would allow settlers to approach the town from the north and the south.

The GTP responded to this last request by saying it could not move the townsite because of unsuitable grades in the location suggested by the First Nation. It also indicated that for $25 per acre, it would prefer to purchase a smaller parcel of land lying wholly within the reserve boundaries. In response, Indian Affairs again informed the GTP that it would be objectionable to have a townsite altogether within an Indian reserve.

The GTP finally acquiesced in January, 1907, asking for either all of the Northwest (NW) quarter of section 6 in range 14 or only that part of the quarter section lying north of the right of way, for its townsite. On January 30, J.D. McLean instructed Indian Agent Murison to submit a proposal for a
McLean informed the GTP of the proposed terms of surrender on March 8, 1907, but the company did not respond until April 1, 1908. At that time, GTP Land Commissioner G.U. Ryley requested that the department allow the offer to “stand open” until he could visit the site and decide whether a townsite would be advisable or not.

On September 14, 1908, Indian Agent Murison reported that the Muskowekwan First Nation had again offered to surrender the NW quarter of section 6, range 14, provided that they were paid the purchase money in cash, and commented that they expected to be paid approximately $10 per acre.

That December, the Inspector of Indian Agencies, W.M. Graham, reminded Deputy Superintendent Frank Pedley that “Muscowequan’s Band” had been talking of surrendering a part of their land for some time. Graham, however, instead proposed that the First Nation be induced to surrender the whole of their reserve and amalgamate with Poorman’s First Nation, stating that the Muskowekwan Band had not done well in the past, and that he thought little could be accomplished by them as long as they remained where they were. Graham was authorized to pursue this action, but did nothing for several more months.

On August 30, 1909, a Member of the Saskatchewan Legislative Assembly, G.M. Atkinson, wrote to Frank Oliver, the Superintendent General of Indian Affairs (Oliver was also the Minister of the Interior), regarding the GTP station grounds on the Muskowekwan Reserve. MLA Atkinson indicated that the settlers adjacent to Mostyn were extremely anxious that a town should be started or at least that some arrangements should be made so that grain could be shipped from there that fall. He urged that, in the interests of the settlers, it was very desirable that the matter be settled without delay.

Pedley told Graham to take the matter up with the two Bands, but directed that if Graham were unable to secure the surrender and the proposed amalgamation, he should advise the Indians to surrender a tract at Mostyn, either for sale to the Grand Trunk Pacific, or to be laid out and sold as a townsite.

Graham asked for a cheque for $25,000 so that he could make an immediate cash payment to the Muskowekwan and Poorman’s First Nations’ members if they agreed. However, he advised against placing a high valuation
on the lands for the proposed townsite, noting there was no guarantee it would ever be anything more than a siding, if it were surrounded by the reserve. The Indian Affairs department declined to provide him a cash advance, asking Graham to first report the exact terms and conditions requested by the two Bands after he had met with them.

Graham met separately with the Muskowekwan and Poorman’s First Nations on October 16, 1909, but was unable to secure their consent to his plan for the surrender and amalgamation.

At Graham’s meeting with Muskowekwan First Nation, he raised the proposed surrender of a portion of the Muskowekwan reserve for use as a townsite. Graham later reported that the Band was agreeable to selling part of its reserve for that purpose for $15 per acre, but he recommended that the department wait, expressing his “great hopes” that the surrender of the whole reserve would be obtained soon, and commenting that a surrender of the townsite would delay this.

In January of 1910, the GTP again contacted the Indian Affairs department concerning its proposed townsite. The company indicated that it required only the NW quarter of section 6 but that since only a few lots could be sold, the Company did not feel that it could afford to pay more than $15 per acre for the quarter section. Assistant Secretary S. Stewart responded that the land in question had not been surrendered by the Indians and was not available.

MLA Atkinson wrote Pedley on February 14, 1910, pressing him to obtain a surrender of the land at Mostyn siding as it was in the interests of all the parties. On February 24, 1910, Pedley authorized Indian Agent Murison to take a surrender of the quarter section, and informed Atkinson of the department’s actions. Just over 10 days later, the 1910 surrender, which is in dispute in these proceedings, was taken.

On March 7, 1910, Agent Murison obtained a surrender for sale from the Muskowekwan First Nation of the NW quarter of section 6, township 27, range 14, W of 2nd meridian, containing 160 acres. The conditions of the surrender required that the monies received from the sale (after deducting the usual proportion for expenses of management), as well as the cash payments received, were to be placed to the Band’s credit, with interest paid in the usual way. According to the surrender document, the Band was to receive 10 per cent of the sale price of the land, valued at $25.00 per acre, with a further amount to be paid to them yearly as monies were realized from the sale, in payments of not less than ten per cent. The lands were to be offered for sale to the public by public auction, once subdivision occurred.
Chief Muscowequan and six other band members, including Windigo, a headman, signed the surrender, which was witnessed by Indian Agent William Murison as well as Justice of the Peace G. Lindsburgh. An affidavit of execution was sworn by Indian Agent Murison and Chief Muskowekwan before Lindsburgh as well.

Agent Murison returned the surrender papers to the department on March 8, 1910, reporting that they were duly signed by the Chief, Headmen, and leaders of the Band, at a regular meeting of the Band summoned for the purpose. The surrender was accepted by Order in Council PC 572 on April 1, 1910 so that the lands could be sold for the benefit of the First Nation. An auction sale was held several months later, in November 1910, at which time 117 of the available lots were sold for a total of $6,135.60; however, there were problems with many of the sales, as many of the purchasers fell into arrears and others refused to take the necessary steps to patent their lands.

In 1912, Indian Agent Murison was asked by band members to find out if the department would consider accepting a surrender of an additional part of their reserve, namely two rows comprising eight sections from the east side of their reserve adjacent to the new townsite, which had been renamed Lestock. The band members also stated their willingness to surrender the balance of Section 6 on which the Village of Lestock was situated. The First Nation requested that these eight and three-quarter sections of land, comprising approximately 5,565 acres, be sold for a minimum of $8 per acre and that a payment of $100 per person be distributed to band members at the time of surrender. In a memorandum dated May 17, 1912, however, Pedley directed that no action be taken on their request.

On September 3, 1912, a petition signed by 66 owners of property in the Village of Lestock and the surrounding district, requested that the Indian Affairs department sell the east side of the Muskowekwan reserve, in which the Village was situated. The Village’s Secretary-Treasurer, Charles Robb, forwarded the petition to the department with a covering letter, complaining that the Village could never make any headway until that part of the reserve was sold. J.D. McLean, the Indian Affairs Secretary, responded on October 7, 1912 that the department had not yet made a decision. On October 19, Pedley confirmed that no action would be taken at that time.

On January 21, 1913, Glen Campbell, the Chief Inspector of Indian Agencies, wrote to Indian Affairs Secretary J.D. McLean, advising him that a letter had been received from the Muskowekwan’s reserve Indians to the effect that they had sent a petition through their Agent asking permission to surrender some of their land. He indicated that the band members were
anxious to have a reply. On January 29, 1913, McLean informed Campbell, however, that it had been decided to let the matter stand.

In March, 1913, the Secretary-Treasurer of the Lestock Village Council forwarded yet another petition signed by 118 citizens of Lestock to the Minister of the Interior, again requesting that the Department of Indian Affairs sell the eastern part of the reserve, on the basis that the town was being held back. Once again, no action was taken by Indian Affairs.

On May 15, 1914, Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs, issued Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves, commonly referred to as the 1914 Guidelines. Among other things, the Guidelines required that the meeting to consider a surrender be summoned according to the rules of the band, and that unless otherwise provided, there were to be printed notices giving the date and place of the meeting posted on the reserve one week before the meeting, and written or verbal notice to each Indian on the voters list not less than three days before the meeting. The Guidelines also required that an affidavit of execution of the surrender be made by the duly authorized officer and either the Chief of the band and a principal man, or two principal men, before a person both authorized to take affidavits and with jurisdiction in the place where the oath was to be taken. A further requirement was that the number of voting members of the band be recorded in a voters list, as well as the number present at the meeting and the number voting for/against the surrender, in a report prepared by the officer taking the surrender.\(^{15}\)

On February 8, 1915, Indian Agent Murison informed the Secretary of the Department of Indian Affairs that the Chief of the Muskowekwan First Nation had again brought up the question of surrendering two rows of sections from the east side of that reserve. He further noted that the villagers of Lestock were anxious to see the surrender taken as they had difficulty in financing their school owing to the small amount of property that was assessable for tax purposes.

On the same day, February 8, 21 members of the Muskowekwan First Nation addressed a second petition, this time to Duncan Campbell Scott, stating they wished to sell nine sections of their reserve because they needed funds to improve their reserve and band, that they had plenty of other lands exclusive of that lot, and that all their farming land was outside the part they wished to dispose of. They noted that the Town of Lestock wanted to purchase that block of land, and required it in order to increase their taxable land.

\(^{15}\) The full text of these Guidelines appears in Appendix A.
Their petition, signed by Sam Akan and “Old Windigo,” among others, included a request for a 50 per cent cash payment at the time of surrender and annual payments of interest on the balance thereafter.

On March 6, 1915, Indian Agent Murison held a meeting with the voting members of the Muskowekwan First Nation to discuss the proposed surrender. He reported to his superiors that the First Nation had agreed to surrender the land, but wanted $10 per acre as the upset price and a payment of 10 per cent of the purchase price at the time of surrender, not 50 per cent as previously requested.

Secretary McLean replied that the department was not in a position at that time to meet their wishes, as it was not possible to tell when the lands could be sold. McLean suggested to Murison, however, that he should continue his discussions, stating that the department would give the proposed surrender due consideration if the First Nation would agree to receive the 10 per cent cash payment after the land was sold, rather than at the time of the surrender.

In the meantime, the Village of Lestock was experiencing serious financial problems. Some 30 purchasers who had bought lands in 1910 had refused to patent the lands or pay their taxes, while others had fallen into arrears in paying the purchase price. Surrendered lands that had been sold but not yet patented remained federal Crown lands under federal laws. Under the Saskatchewan Arrears of Tax Act, however, lands vested in the federal Crown by virtue of the Indian Act could not be taxed. The Secretary for the Lestock School District informed the Indian Affairs department that, as a result, it was very hard to collect the taxes to keep the school open. He explained that very few people had got patents for the lots they owned, and were defiant, saying that they could not be forced to pay their taxes.

On March 27, 1918, a third petition from 42 village residents as well as nearby farmers was sent to Arthur Meighen, the Minister of the Interior, asking that all of those reserve lands lying within range 14 (the easternmost 11 and three-quarter sections of the reserve) be advertised and sold by public auction. J.D. McLean acknowledged receipt of their petition, and informed the petitioners that the matter had been placed in the hands of Commissioner W.M. Graham, who would endeavour to meet their wishes, paying due regard to the interests of the Indians.

The March 1918 petition from the Village of Lestock coincided with a new government initiative on Indian reserves, linked to a need to increase food production during the First World War. The plan had been developed by W.M. Graham himself. In 1918, Graham envisioned what became known as the “Greater Production” scheme, a means of increasing food supply by bringing
unused Indian land under cultivation by Indians or by leases to others. His proposal was favourably received by the government. On February 16, 1918, Graham was appointed Commissioner for Greater Production for Manitoba, Saskatchewan, and Alberta.

Commissioner Graham identified the Muskowekwan Indian Reserve as one of the reserves suitable for the new program. Agent Murison reported that while there were no large areas on the reserve suitable for cultivation, there were eight and one-quarter sections at the east end of the reserve that were suitable, and 10 sections at the western end of the reserve that could be used for raising cattle.

In furtherance of the “Greater Production” scheme, the members of the Muskowekwan First Nation were asked to sign surrenders for lease, so that their lands could be used for grazing. On April 30, 1918, the “Chief and Principal Men” of the Muskowekwan First Nation signed a surrender for lease of 5,920 acres from the eastern end of the reserve for a term of five years. The surrender was signed by Chief Tom Desjarlais, Sam Akan, and Windigo, and was again witnessed by Agent Murison. An accompanying affidavit of execution was sworn the same day by Tom Desjarlais, Sam Akan, Windigo, and Indian Agent Murison, before a justice of the peace. This surrender is not an issue in this inquiry.

The town’s demands for the surrender of reserve lands adjacent to the townsite, however, continued even though the lands were leased. On May 3, 1918, Saskatchewan Premier W.M. Martin wrote to Duncan Campbell Scott, urging that, if at all possible, some effort should be made to dispose of a portion of the Indian lands adjoining the Village, so that the lands could be taxed. Scott replied that such lands could only be sold after a surrender, but advised the Premier that Commissioner Graham had been instructed to take the matter up with the Indians.

On May 23, 1918, 29 village residents petitioned Prime Minister R.L. Borden to sell the 12 eastern sections of the Muskowekwan Reserve, arguing that the land was too valuable to be leased for grazing, and should be sold to farmers.

In August, Frank W. Crawford, the Village Council Secretary, wrote to Indian Affairs, wanting to know what was being done with the Muskowekwan reserve land, which the Village had asked to have surrendered in order to extend the boundaries of its school district. He stated that the First Nation itself supported a surrender, and that a petition had circulated among the Indians of the Band, and had been signed by them, strongly in favor of surrendering that portion of the reserve, lands his council believed would sell
well. In a subsequent letter to the department, Crawford added that Mr. Bourret, the Overseer of the Village of Lestock, had been present and had seen a large majority of the Indians sign the petition. However, W.A. Orr, of the Department of Indian Affairs, replied to Crawford, pointing out that despite these representations, Canada had received no recent petition from the First Nation for the sale of part of its reserve, and that the land in question was under a five year grazing lease.

On February 8, 1919, Saskatchewan Premier Martin again wrote to Duncan Campbell Scott, requesting that serious consideration be given to placing the IR 85 lands surrounding Lestock on the market to afford a measure of relief for the school district, given its financial difficulties due to a lack of taxable land. Scott assured Martin that the Indian department viewed the position of the people of Lestock sympathetically but that the scope of its action was necessarily restricted, because there had been no surrender. He suggested, however, that some arrangement could be made to use the lands for the settlement of returning soldiers.

On August 4, 1919, the Muskowekwan First Nation signed another surrender for lease of 12 and one-half sections (8,000 acres) at the western end of its reserve for a term of five years, for grazing purposes. This surrender is not an issue in this inquiry.

Duncan Campbell Scott met personally with a delegation of villagers from Lestock. He wrote to Commissioner W.M. Graham on August 8, 1919, telling him that the town’s situation was a serious one and that the department wanted to relieve some of its problems. He asked Graham to consider the possibility of obtaining a surrender of a portion of the Muskowekwan reserve either for soldiers settlement or for sale in the usual way. He stated that he had promised the delegation that the department would give this matter the consideration that it deserved and make a decision quickly. Graham replied that the land was not suitable for soldier settlement purposes, and furthermore, that he did not believe that it could be readily disposed of, even if it were surrendered. However, he said that he would give the Soldier Settlement Board an opportunity to state whether they wanted the land for settlement purposes or not.

Scott responded that, if the Soldier Settlement Board did not find the land suitable, he wanted the land surrendered in any event, as the situation at Lestock appeared to be very serious and the department had to try to relieve it if at all possible.

On September 29, 1919, J. Fred Johnston, the local Member of Parliament, wrote to Scott, asking when the people of this District could
expect some action in the matter. That November, Duncan Campbell Scott informed the Superintendent General of Indian Affairs, Arthur Meighen, that he would take up the matter personally with Graham. Although his statements were inconsistent with past government policy against situating townsites on or near reserves, Scott informed the Minister that the Indian Affairs department, in addition to acting as the guardian of the Indians, had also acted as a pioneer in developing and extending civilization in western Canada, and that it had been departmental policy to do everything in its power to facilitate the growth and advancement of small non aboriginal communities in the vicinity of Indian reserves.

In December, Scott indicated that he had met with Graham, and that if the Soldier Settlement Board decided that it did not want the land, an attempt would be made to obtain its surrender from the Indians.

On March 5, 1920, the Muskowekwan First Nation submitted yet another petition to the department. It contained 26 signatures, again including those of Chief Tom Desjarlais, Windigo, and Sam Akan. This time, the petition requested the sale of the eastern two rows of sections of IR 85, containing eight and three-quarter sections. The petition referred to the Band’s express need for farming equipment as the reason why it wanted to surrender land, stating that Band members wanted the money to buy farm equipment such as horses, harness, and plows. The petition stated that very few Band members had the “power” to farm without equipment and that a majority had nothing to farm with. It added that the land being offered for sale was good for growing grain of any kind.

Concurrently, Scott informed MP Johnston that he was satisfied that Graham understood that it was necessary and desirable that a surrender be secured from the Indians in order to dispose of the lands properly, and that a satisfactory settlement of the question would be arrived at in the near future.

Shortly thereafter, a lawyer in Lestock informed the Soldier Settlement Board that the Muskowekwan First Nation had petitioned to sell nine sections of IR 85, near the town. W.A. Orr confirmed to the Soldier Settlement Board that the petition had been received, and that it was receiving due consideration.

On April 13, 1920, J.D. McLean informed Graham of the many urgent representations received by the Indian Affairs department relating to the proposed surrender of reserve lands near Lestock. McLean instructed Graham to make arrangements for a surrender at an early date. Graham agreed that it was desirable that something should be done, and that the Indians should be approached with a view to obtaining an early surrender.
Duncan Campbell Scott reminded Graham of the insistent pressure for the department to do something to relieve the situation at Lestock, and asked Graham to attend to the surrender personally.

On August 20, 1920, Commissioner Graham requested instructions concerning the surrender, and asked that he be provided with sufficient funds to make an advance payment at the time of surrender. On September 8, 1920, $17,000 in cash was forwarded to him for this purpose. Meanwhile, the Soldier Settlement Board advised that due to changes in its own policies, it did not intend to purchase any of the Muskowekwan lands.

Two weeks later, Graham arrived at the Touchwood Agency to take the surrender. By that time, only 159 of the 245 town lots surrendered in 1910 had been sold, and even more purchasers had fallen into arrears with their payments.

On October 14, 1920, the Muskowekwan First Nation surrendered for sale the eastern three rows of sections of the reserve, including all the lands they had leased for five year terms only two years earlier. The amount of land surrendered included three and three-quarter sections more than the First Nation had said it wanted to surrender in its March petition.

The surrender document contains nine signatures, including those of Chief Tom Desjarlais, Sam Akan, and Windigo, and signatures of five witnesses, including Commissioner W.M. Graham and former Indian Agent W. Murison. The conditions of surrender included, among others, that all moneys received from the sale were to be placed to the credit of the First Nation with interest paid to them in the usual way. The affidavit of execution accompanying the surrender was sworn by W.M. Graham, Thomas Desjarlais, Sam Fred Akan, and Windigo, before Acting Indian Agent J. B. Hardinge, acting as a justice of the peace.

Commissioner Graham prepared a voters list, also dated October 14, 1920, which records the names of 29 band members who had voted in favour of the surrender and six voters who were marked as absent. The names of the Chief, Sam Akan, and Windigo, are included among those present and voting in favour of the surrender. The voters list does not indicate any votes against the surrender. A “Pay-List of Surrender of Land” for the Muskowekwan First Nation records a payment of $100 to each of 170 Muskowekwan members, paid on that same date.

On October 21, 1920, Commissioner Graham wrote to Scott, advising him of the surrender of approximately 7,485 acres of land from the members of the Muskowekwan reserve No. 85, for sale by public auction. He advised that the Band had been given the regular legal notice of the meeting, that there was
a representative number of the members present, and that of the 29 eligible members present, all had voted in favour of the surrender. He also confirmed that 170 band members had been paid $100 each, for a total of $17,000.
PART III

ISSUES

In this report, the Indian Claims Commission is inquiring into only the first two issues raised by the First Nation. Each issue is raised with respect to both the 1910 and 1920 surrenders:

1. Were the provisions of the applicable Indian Act complied with when the surrenders were obtained?

2. Did the Crown breach any pre-surrender fiduciary duty owed to the Muskowekwan First Nation?

As noted earlier, there were in total eight issues agreed to by the parties. However, on consent, the other six issues were abandoned for purposes of this inquiry due to the need to complete the inquiries of the Indian Claims Commission by December 31, 2008. The remaining six issues that we have not addressed, however, are still outstanding, and may be dealt with by the new claims tribunal or through other processes. The original eight issues appear as Appendix B to this report.
PART IV

ANALYSIS

The panel was asked both to consider whether the Crown breached the requirements of s. 49 of the Indian Act, R.S.C. 1906, in effect at the time that both disputed surrenders were taken from the Muskowekwan First Nation, and also whether the Crown breached its pre-surrender fiduciary obligations. We will address these two issues by considering the 1910 and the 1920 surrenders separately. However, we will first outline the relevant law concerning compliance with the Indian Act and the pre-surrender fiduciary duties of the Crown, before we apply it to the issues raised about each of the two surrenders.

The Law

The leading case concerning the requirements of a surrender under the Indian Act is Blueberry River Indian Band v. Canada, commonly referred to as Apsassin. While the Supreme Court of Canada was divided in that case on the issue of whether mineral rights were or were not surrendered as part of a surrender, the court agreed in general on the approach to be taken to issues concerning Indian Act requirements involving surrenders, and with regard to the pre-surrender fiduciary duties owed by the Crown during surrenders. Separate reasons were issued by Mr. Justice Gonthier and Madam Justice McLachlin on these issues.

In Apsassin, Mr. Justice Gonthier held that the juridical nature of the 1940 surrender at issue in this case was “academic” in circumstances where the “Band gave its full and informed consent, the Crown fulfilled its fiduciary duty in relation to the surrender, and the parties complied with the statutory surrender procedures.” As he stated, it is important to give legal effect to the intention of the band members rather than rely on technicalities:

16 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 (sub nom. Apsassin).
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 (which, as noted above, is not the case here), then the Band members’ intention should be given legal effect.*

Mr. Justice Gonthier suggested that an “intention-based approach” was preferable to a technical one, unless a statutory bar existed preventing that approach, in order to “give effect to the true purpose” of the transaction:

An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. *It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples.* However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

In *Apsassin*, the trial judge had made eight findings of fact referred to by both Mr. Justice Gonthier and Madam Justice McLachlin. Because of their importance, and because of the fact that the circumstances of *Apsassin* differ to a certain extent from the facts of this inquiry, we have reproduced them fully below:

1. That the plaintiffs had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;

---

17 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para. 6 (sub nom. Apsassin). Emphasis added.
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;

3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;

4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;

5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;

6. That Mr. Grew [the local Indian Agent] fully explained to the Indians the consequences of a surrender;

7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternate sites had already been chosen by them, after mature consideration.19

To Mr. Justice Gonthier, points 1, 6, and 7, were the most important, namely that the Band had known for some time that an “absolute surrender” was contemplated, the consequences had been fully explained to them by the Indian Agent, and the Band understood that they were giving up all their rights to the lands in question, forever. Mr. Justice Gonthier also noted that in terms of technical surrender requirements of the Indian Act, “[t]here was also substantial compliance with the technical surrender requirements embodied in [the Indian Act] and as McLachlin J. concludes, the evidence amply demonstrates the valid assent of the Band members ...” 20

An issue was raised as to whether the surrender was invalid because of non-compliance with the 1927 Indian Act. Provisions of that Indian Act indicated that no surrender was valid unless it was assented to by the majority of male members of the band at a meeting summoned for the purpose. The Act also required that once a release or surrender has been assented to by the band at such a council or meeting, it was to be certified on oath by the Superintendent General or by the officer authorized by him to attend the council or meeting, as well as by some of the chiefs or principal men who had been present and entitled to vote. This certification was required to be done by someone with the authority to take affidavits, and with jurisdiction within the place where the oath was administered.

In Apsassin, these Indian Act provisions were not complied with in obtaining the 1945 surrender from the Band. This raised the question of whether such provisions were mandatory (required) or only directory (recommended). Madam Justice McLachlin observed that the “non-compliance was technical. The chiefs should have personally certified the surrender on oath. Instead, they told the commissioner that they wished to surrender, which the commissioner certified on oath.” 21

After reviewing the cases, Madam Justice McLachlin held that the decision required the court to examine the “true object” of the provisions. Having done so, she held that failure to comply with the Act did not defeat the surrender:

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

21 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344 at para. 41 (sub nom. Apsassin).
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.22

Madam Justice McLachlin therefore concluded that the surrender was valid.

In Apsassin, Madam Justice McLachlin also addressed the issue of
whether fiduciary duties were owed by the Crown in the pre-surrender stage,
and whether the Indian Act imposed a duty on the Crown to prevent a
surrender where such a surrender might be exploitative. She determined that
the answer to that question was to be found in in Guerin,23 where the
Supreme Court had held that the duty on the Crown with respect to surrender
of Indian lands was founded on preventing exploitative bargains:

My view is that the Indian Act’s provisions for surrender of band reserves strikes a
balance between the two extremes of autonomy and protection. The band’s
consent was required to surrender its reserve. Without that consent the reserve
could not be sold. But the Crown, through the Governor in Council, was also
required to consent to the surrender. The purpose of the requirement of Crown
consent was not to substitute the Crown’s decision for that of the band, but to
prevent exploitation. As Dickson J. characterized it in Guerin (at p. 383):

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

It follows that under the Indian Act, the Band had the right to decide whether to
surrender the reserve, and its decision was to be respected. At the same time, if
the Band’s decision was foolish or improvident – a decision that constituted
exploitation – the Crown could refuse to consent. In short, the Crown’s
obligation was limited to preventing exploitative bargains.24

Based on the facts in Apsassin, Madam Justice McLachlin did not find that the
evidence supported a conclusion that the surrender of the reserve was
foolish, improvident or amounted to exploitation. In fact, she found that,
viewed from the perspective of the Band at the time, it made good sense. Furthermore, she held that the measure of control which that particular

22 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),
23 Guerin v. The Queen, [1984] 2 SCR 335.
24 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),
The Indian Act permitted the Band to exercise over the surrender of the reserve negated the contention that absent exploitation, the Act imposed a fiduciary obligation on the Crown prior to the surrender of the reserve. As such, she concluded that “the evidence does not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band.”

If the Indian Act did not impose a duty on the Crown to block the surrender of the reserve, on the particular facts, Madam Justice McLachlin then considered whether a fiduciary relationship was superimposed on the Indian Act regime for the alienation of Indian lands. She explained first that fiduciary obligations arose where one person possessed unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person:

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

Madam Justice McLachlin found that the evidence supported the view that the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender of their reserve. However, she concluded that the eight factual findings made by the trial judge, which we have referred to earlier, did not support the contention that the Band had either abnegated or entrusted its power of decision over the surrender of the reserve to the Crown and thus that this evidence did not support the existence of a fiduciary duty on the Crown prior to the surrender.

THE 1910 SURRENDER

Issue 1: Compliance With Provisions of the Indian Act

1 Were the provisions of the applicable Indian Act complied with when the surrenders were obtained?

Positions of the Parties

Section 49(1) of the 1906 Indian Act requires that a majority of male members eligible to vote be present at a meeting called for the purposes of voting on the surrender, and that a majority of those present vote in favour of the surrender, for the surrender to be valid. The First Nation argues that non-compliance with these requirements is fatal to a surrender. The First Nation acknowledges, however, that it bears the onus of proving that the Indian Act requirements were not met.

The Muskowekwan First Nation argues that the 1910 surrender is not valid or binding because there is no evidence that express notice of the surrender meeting was provided to the First Nation, and further, that the surrender was taken at a “regular” meeting rather than at a meeting summoned for the specific purposes of a surrender. It takes the position that the 1910 surrender affidavit should not be relied on as prima facie proof that the requirements of the Indian Act were satisfied, where there is no other evidence that a majority of the male members of the First Nation of the full age of 21 attended the meeting or that a majority of those who did attend in turn assented to the surrender.

The First Nation argues that the surrender document failed to conform to provincial legislative requirements for the taking of affidavits at that time and thus, should not be relied on. It suggests, in particular, that the 1910 Affidavit does not certify that the contents of the Affidavit were read and translated to Chief Muskowekwan, or that he understood it, or even that he had marked his “x” in the presence of the justice of the peace who commissioned the Affidavit.
For its part, Canada maintains that the 1910 surrender complied with the provisions of the relevant Indian Act, in that it was assented to by a majority of the male members of the Band 21 years of age or older, who were habitually resident on or near the reserve, and further, that a meeting was summoned for the purpose of considering the surrender.\footnote{Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 98.} Canada submits that, despite the use of the word “regular” in his reporting letter, Indian Agent Murison made it clear that the meeting was summoned for that reason.\footnote{Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 99.}

Canada argues as well that the surrender affidavit clearly states that the meeting was summoned according to the rules of the Band. It relies on the contents of the surrender affidavit as proof of its contents, in the absence of evidence to the contrary. Canada further submits that the surrender affidavit itself confirms that a majority of male band members of the full age of 21 attended the meeting and that a majority of those who attended then assented to the surrender.\footnote{Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 98.}

Canada points out, concerning the issue of provincial legislation governing the commissioning of affidavits, that the Indian Claims Commission has previously, in its \textit{Roseau River Anishnabe First Nation Report: 1903 Surrender Inquiry}, dismissed an argument that provincial civil procedure rules pertaining to affidavits should be applied to affidavits sworn pursuant to Indian Act requirements.\footnote{Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 102, citing ICC, \textit{Roseau River Anishinabe First Nation: 1903 Surrender Inquiry} (Ottawa, September 2007) at 54-55.} It maintains that, in any event, there is no evidence that the Band did not understand the terms of the surrender.\footnote{Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 137.}

In reply, the First Nation submits that the surrender affidavit does not prove that “express” notice was given of the meeting or that it was summoned for that purpose, as Agent Murison simply reported that the surrender affidavit was “signed” at the regular meeting of the Band.\footnote{Written Reply on Behalf of the Muskowekwan First Nation, May 8, 2008, paras. 20-21.}
Panel’s Reasons

We find that the evidence put before us by the First Nation has failed to establish that there was a breach of the Indian Act with respect to the 1910 surrender.

Contrary to the First Nation’s argument, it is clear that the surrender document and surrender affidavit are prima facie evidence of their contents. It falls to the First Nation to provide evidence to the contrary to displace that presumption on a balance of probabilities. We have no evidence in the record to contradict the content of these documents according to that test, and cannot simply presume that the documents are incorrect, as this would effectively place the onus of proving the documents reliable on the Crown, despite the fact that reliability is presumed.

We do not accept the argument that the procedure for taking affidavits according to provincial laws has any applicability to an Indian Act surrender. Provincial laws did not apply on reserves at that time. As the panel stated in Roseau River, “the procedure for surrendering a reserve, including swearing affidavits, is one of those matters coming within the class of ‘Indians, and Lands reserved for [the] Indians,’ and, therefore, within the exclusive jurisdiction of Parliament.”

It is clear to us, on all of the evidence, including that put forward by the Muskowekwan First Nation, that a meeting was summoned by Agent Murison for the purposes of considering a surrender, as was required under s. 49 of the Indian Act. While Agent Murison’s report refers to a “regular” meeting, it also refers to the meeting being summoned for the purpose of taking the surrender. We are satisfied that the meeting was summoned for the purpose of taking a surrender, and that a surrender was in fact proposed and taken at that meeting. Relying on the law set out in Apsassin, which requires that we take an intention-based approach rather than a technical one, we are satisfied that the 1910 surrender was given voluntarily, and was intended to be given by the First Nation involved, and thus, should not be invalidated because of mere semantic issues raised by the Indian Agent’s correspondence.

The fact that Agent Murison used wording that does not conform precisely to s. 49 of the Indian Act itself does not, in our view, invalidate the meeting itself. Conformity with the provisions of section 49 of the Indian Act should not be decided based on technicalities, but rather on the true object of those provisions. The object of section 49 is that there must be a meeting both summoned and held for the purposes of considering a surrender. We are

---

42 ICC, Roseau River Anishinabe First Nation: 1903 Surrender Inquiry (Ottawa, September 2007) at 34.
satisfied, on the evidence before us, that such a meeting was summoned by the Indian Agent and actually held for that purpose, thus complying with the provisions of s. 49.

**Issue 2: Was A Pre-surrender Fiduciary Duty Breached?**

2 Did the Crown breach any pre-surrender fiduciary duty owed to the Muskowekwan First Nation?

The panel was asked to make findings with respect to four arguments raised by the parties concerning this issue as it applies to the 1910 surrender:

   a) Was the First Nation’s understanding of the proposed surrenders adequate?
   b) Did the First Nation cede its decision-making authority to the Crown?
   c) Did the Crown’s conduct taint the dealings in a manner that makes it unsafe to rely on the First Nation’s understanding and intention?
   d) Was the First Nation’s decision to surrender the reserve land so foolish or improvident that it constitutes exploitation?

We will outline the positions of the parties with respect to each of these arguments in turn. However, since many of their submissions and arguments overlap, our findings will concern only the broader question of whether the Crown breached any pre-surrender fiduciary duties.

**Positions of the Parties**

**a) Was the First Nation’s understanding of the proposed surrender adequate?**

The First Nation advances the position that the Crown owes the First Nation pre-surrender fiduciary duties.\(^43\) The First Nation suggests that the available record does not show what the First Nation’s understanding was at the time of the 1910 surrender.\(^44\)

Canada does not dispute that pre-surrender fiduciary duties are owed by the Crown, but argues that no pre-surrender breach of fiduciary duty occurred with respect to either surrender. The Crown takes the position that the First Nation’s intention to surrender its reserve lands should be

---

\(^{43}\) Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 456.

\(^{44}\) Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 462.
India claims commission proceedings

respected. Canada further maintains that the historical evidence demonstrates that the First Nation did understand the terms of the surrender, and that it was presented to the First Nation and discussed on several occasions over the course of more than three years.

b) Did the First Nation cede its decision-making authority to the Crown?
The First Nation claims that it ceded its decision-making power to Canada in the 1910 surrender. The First Nation argues that the Crown was in a conflict of interest, at least politically, in that it acted in the interests of the Grand Trunk Pacific Railway Company and the settlers. It alleges that the Crown failed to fully inform the First Nation of its options or the foreseeable consequences of that particular surrender.

Canada responds by stating that there is no evidence that the First Nation either ceded or abnegated its decision making power to the Crown, noting that both the Indian Agent and Indian Commissioner David Laird were personally opposed to the creation of a townsite on the reserve. Furthermore, the Crown states that the First Nation rejected the Crown’s proposal to surrender the entire reserve and instead made a counter-proposal leading up to the March 7 surrender, thus, evidencing that the surrender was an autonomous decision of the First Nation.

c) Did the Crown’s conduct taint the dealings in a manner that makes it unsafe to rely on the First Nation’s understanding and intention?
The First Nation argues that the Crown’s conduct during the 1910 surrender so tainted its dealings that it is unsafe to rely on the First Nation’s understanding and intention with respect to the surrender. It maintains that the Crown failed to manage competing interests, and placed the interests of the local non-Indian settlers and railway ahead of those of the First Nation. The First Nation argues that the department had been warned internally that the townsite might never develop, and knew that the railway lacked interest in proceeding, but nonetheless proceeded with the townsite in order to satisfy

50 Written Submission on Behalf of the Government of Canada, April 23, 2008, para 175.
the interests of local settlers. Furthermore, it alleges that the Crown did not inform the First Nation that it was against Crown policy to have a townsites within a reserve, or inform them of the negative consequences of similar surrenders.

Canada responds by pointing out that the evidence demonstrates that the First Nation was capable of ignoring and did ignore suggestions of the Crown and third parties with respect to the disposition of reserve lands. It adds that the First Nation has presented no evidence to demonstrate that the First Nation’s decision would have been any different had they been aware of the Crown’s “no townsites” policy.

**d) Was the First Nation’s decision to surrender the reserve land so foolish or improvident that it constitutes exploitation?**

The First Nation argues that the 1910 surrender was so foolish and improvident as to be considered exploitative, such that the Governor-in-Council ought to have refused to provide its consent to it. The Muskowekwan First Nation maintains that the Crown failed to scrutinize the surrender to ensure that it was not an exploitative transaction, and failed to use ordinary diligence to avoid the destruction or invasion of the First Nation’s property interest under an exploitative bargain. Canada responds that, viewed from the First Nation’s perspective at the time, the 1910 surrender was not foolish, improvident, or exploitative.

The First Nation submits that some Crown representatives thought the establishment of a townsites on the reserve was not in the best interests of the First Nation, and that the establishment of the Town of Lestock was against the Crown’s own policy to not allow townsites on Indian reserves.

In response, Canada argues that the First Nation’s submissions adopt a paternalism that would have had the Governor-in-Council protect First Nations members against loitering, being in bad company, intemperance, and immorality. Instead, Canada maintains that the Crown respected the First Nation’s autonomy and its decision to benefit financially from the rail line that already existed on the reserve.

---

52 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 582.
56 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 635.
Panel’s Reasons

In *Guerin v. the Queen*, the Supreme Court of Canada stated that when Parliament conferred discretion upon the Crown to decide for itself where the best interests of Indians “really lie,” Parliament transformed the Crown’s obligations into fiduciary ones.62 In writing about the fiduciary relationship in the context of a surrender, in the *Apsassin* case, Madam Justice McLachlin commented that “[t]he 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.”63 As we noted earlier, in *Apsassin*, the Supreme Court also dealt with the specific issue of pre-surrender fiduciary duties. In her analysis, Madam Justice McLachlin dealt both with the surrender requirements of the *Indian Act* and the fiduciary duty imposed on the Crown, pointing out that the *Indian Act*’s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. She wrote:

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.64

In the panel’s view, even where a band’s consent to a surrender is freely given, informed and voluntary, the Crown still has a duty to evaluate the results of a surrender for the purposes of determining whether it is exploitative or not.

In *Apsassin*, Madam Justice McLachlin decided there was no need to superimpose a fiduciary obligation on the Crown leading up to the disputed surrender because, although the Band “trusted the Crown to provide it with information as to its options and their foreseeable consequences,” in relation to the surrender, the evidence did “not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.”65

In the claim before us, the facts are considerably different. When we compare the facts found by the trial judge and accepted by the Supreme Court

---

64 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 35 (sub nom. *Apsassin*). Emphasis added.
65 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*).
in *Apsassin*, to those in this case, we conclude that there was a breach of the Crown’s pre-surrender fiduciary duties in the 1910 surrender for the following reasons.

First, we find that the facts establish that the Crown did not respect its own clear policies against having townsites within the limits of, or close to, a reserve. As early as January, 1904, J.A.J. McKenna, the Assistant Indian Commissioner for the Department of Indian Affairs stated that the Superintendent General had refused to approve of the establishing of a town on a reserve, and “has laid down the rule that no town is to be established upon any reserve or within three miles thereof.”66 The following month, McKenna explained that the “whole question was carefully considered by the Minister, and he made up his mind definitely not to allow the establishment of towns upon any Indian reserves. He went further and directed that in so far as Dominion lands were concerned, no such lands should be given for townsites within three miles of a reserve …”67 In April, 1904, McKenna again referred to the rule “laid down” by the Minister but McKenna concluded it should not be “absolute,” and recommended that a town be created on the particular reserve (Cote’s) under discussion at that time.68

Clifford Sifton, the Minister of Indian Affairs and of the Interior, however, confirmed the departmental policy against allowing townsites on reserves in a memorandum dated December 5, 1904, stating that “[t]here are serious objections to allowing town sites to be located upon Indian reserves. Not only should the Department resist the location of town sites upon the reserves but if possible the location in the immediate neighbourhood of a reserve should be discouraged. A variety of complications will arise from the proximity of a town site.” Sifton turned down the application for a townsites by the Canadian Northern Railway for those reasons, directing that the Saskatchewan Valley and Manitoba Land Company be advised that “so far as possible it is the policy of the Department to avoid Indian reserves.”69

In 1906, David Laird, the Indian Commissioner, responded to comments contained in Murison’s monthly report for the Touchwood Agency, by making a note in the marginalia. Murison had noted that the GTP had located its station grounds on “Muskowegan’s Reserve” and proposed having a town

---

66 J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to H.A. Carruthers, Indian Agent, Cote, Alberta, January 14, 1904 (ICC Exhibit 1a, p. 1074).
67 J.A. McKenna, Asst. Indian Commissioner, Department of Indian Affairs to H.A. Carruthers, Indian Agent, Cote, Alberta, February 1, 1904 (ICC Exhibit 1a, pp. 1075-1076).
68 J.A. McKenna, Asst. Indian Commissioner for Manitoba and the Northwest Territories, to Secretary, Department of Indian Affairs, April 13, 1904 (ICC Exhibit 1a, pp. 1085-1088).
69 Clifford Sifton, Department of the Interior, to Frank Pedley, December 5, 1904 (ICC Exhibit 1a, pp. 29-30).
there. Laird wrote, “[t]his is the first I have heard of the G.T.P. having located station grounds on this reserve. Has the Department been consulted in this matter? I concur with Mr. Murison that a town-site on a reserve is most objectionable.”

As such, it cannot be said that the Indian Affairs representatives dealt with the matter in a most conscientious manner. They proceeded to take a surrender of reserve lands for a townsite, despite the longstanding departmental policy against doing so, and even though the land affected by the surrender was among the best farming land on the reserve. No explanation was provided by Canada as to why the Crown proceeded in this manner. Instead, the evidence we have suggests this action was taken to favour the third parties who wanted reserve lands for their own purposes, rather than taken in the interests of the First Nation.

The evidence establishes that the Crown was well aware of the fact that some of the lands involved were the best farming lands on the reserve. For example, in December, 1905, commenting on a request for a right of way made by the Grand Trunk Pacific Railway, Agent Murison informed the Indian Commissioner that the proposed railway “runs through the best farming land on the Reserve, the land is of good quality.”

We note further that it was only a few months later, in February, 1906, that the Grand Trunk Pacific put forward a second request for a townsite. Only two days after that request, and despite the departmental policy against such townsites that we have referred to, Indian Agent Murison was instructed to take a surrender of a tract of land for a townsite.

Thus, even while it was considering the GTP’s request for a right of way, which did not require the Band’s consent, the Crown was aware of a potential second encroachment on the reserve, but did nothing to inform the First Nation. We believe that the Crown should have advised the First Nation of the second request as soon as it was received, and before the Crown granted the GTP a right of way. Instead, Canada issued the right of way to the GTP in May 1906 without any advance disclosure to the First Nation that another request for more land for a townsite had already been made by the company. This failure to disclose the proposal to establish a townsite on the reserve and the breach of departmental policy against locating townsites on reserve lands were not mere technicalities, but involved actions that directly affected the

70 Marginalia, D.L. [David Laird], Indian Commissioner, on extract of monthly report from W. Murison, Indian Agent, to David Laird, November 10, 1906 (ICC Exhibit 1a, p. 59).
71 W. Murison, Indian Agent, to Indian Commissioner, December 4, 1905 (ICC Exhibit 1a, pp. 33-34).
integrity of the Muskowekwan First Nation’s land base, way of life, and culture.

Rather than informing the First Nation of these requests, there is no evidence on the record to indicate that Canada provided any information to advise the First Nation that it had already granted the GTP a right of way until November 28, 1906, some six months later. This fact is confirmed in Agent Murison’s report about the meeting he had held with the First Nation to discuss the surrender of a portion of the reserve so that the GTP could establish a townsite. According to the evidence, that was the first discussion held by the department with the First Nation about the GTP’s requests. It took place some thirteen months after the GTP had first requested a right of way on the reserve, and some nine months after the GTP had asked for more reserve lands, this time for a townsite.

Given these facts, we find that Canada did not adequately take the First Nation’s interests into account. In fact, we find that Canada did not properly manage the First Nation’s interests with those of the Crown, but consistently favoured third party interests instead. At the time of the 1910 surrender, for example, Canada already knew that the lands, once surrendered, could not be easily sold.  

Therefore, it was certainly not in the interests of the Band to surrender lands for which they might not be paid for years. However, band members were not informed at the time of the surrender that their lands might languish, unsold, for some time, even though the department was well aware of this issue, and had discussed it internally before the surrender. For example, W.M. Graham, the Inspector of Indian Agencies, had advised Frank Pedley, the Deputy Superintendent of the Department of Indian Affairs that he did not favor “putting a high value on the proposed townsite. The Department [has] no guarantee that it will ever be anything more than a proposed siding, especially if it is to be surrounded by the reserve.”

This information was in fact confirmed by the GTP itself which expressed its own concern that the lands might not sell quickly. G.U. Ryley, the Land Commissioner with the GTP advised Pedley on January 20, 1910 that “[a]s it is considered that only a few lots could be sold, the Company does not feel that it could afford to pay more than $15.00 per acre for the quarter

72 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, Deputy Superintendent General, Indian Affairs, 17 September 1909 (ICC Exhibit 1a, pp. 93-94).

73 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate to Frank Pedley, Deputy Superintendent General, Indian Affairs, September 17, 1909 (ICC Exhibit 1a, pp. 93-94).
None of this information, from the evidence we have, was presented to the First Nation.

We find that, not only did the Crown not act in the interests of the First Nation, instead favouring the settlers and railway, but that there were additional times when the Crown acted according to its own convenience as well. For example, in December, 1908, when the First Nation asked to surrender a part of their lands, Graham deliberately ignored their request. He explained:

For some time the Indians of Muscowequan’s Band, Touchwood Hills Agency, have been talking of surrendering a part of their land but I have not taken much notice of their talk, as I thought it would be better to let matters develop a little further before taking action ... I would suggest that the Indians of this Band be induced to surrender the whole of their reserve, which contains about 24,000 acres, and amalgamate with Poorman’s Band of Indians, who own a reserve containing about 27,000 acres ... The Indians of Muscowequan’s have not done well in the past, and I think little will be accomplished as long as they remain where they are. The main line of the G.T.P. angles across their reserve and towns are springing up close by, and if we can bring about the amalgamation it will be a good thing.

Canada also ignored an earlier request presented by the First Nation through Agent Murison asking that the location of the proposed townsite be moved west, so as to not cut up their reserve quite so badly. As Agent Murison had reported to Pedley on November 28, 1906, the First Nation had asked for something that was best for them, but which was also fair to the interests of the settlers. He wrote that the Band had asked,

If the Railway will move their Townsite one and a half miles west. This would not cut up their reserve so badly and there would be an approach to the Town from both the north and south side for Settlers. This would avoid the necessity of making a road through the reserve from the north and no doubt would save trouble in the future.

---

74 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Town and Development Company Ltd. to Frank Pedley, Deputy Superintendent General, Indian Affairs, January 20, 1910 (ICC Exhibit 1a, p. 98).
75 W.M. Graham, Inspector of Indian Agencies, Qu’Appelle Inspectorate, to Frank Pedley, Deputy Superintendent General, Indian Affairs, December 8, 1908 (ICC Exhibit 1a, pp. 82-83).
76 W. Murison, Indian Agent, to Deputy Superintendent General, Department of Indian Affairs, November 28, 1906 (ICC Exhibit 1a, pp. 62-63).
As soon as the railway responded that the site could not be moved due to “unsuitable grades,” however, Indian Affairs dropped the matter.77 Once again, the interests of the First Nation were ignored in favour of third parties.

Thus, we find that the department repeatedly failed to advance the best interests of the Band. The Crown not only favoured the interests of the GTP over the First Nation by first granting the railway a right of way across reserve lands, it then favoured the interests of settlers over those of the First Nation, by refusing to move the location of the townsite to accommodate the First Nation’s specific request.

This on-going and deliberate preference by the Crown for the interests of the settlers, in particular, over those of the First Nation, is further evidenced by the government’s response to the various pressures exerted on it by the settlers and their elected representatives. For example, the Crown was urged to move quickly to take a surrender of reserve lands by G.M. Atkinson, the Member of Legislative Assembly for Wynot, Saskatchewan, who wrote to the Minister of the Interior, Frank Oliver, to the effect that:

Mostyn on the G.T.P. is situated on the Muscowequan Indian Reserve belonging to the Touchwood Agency. Settlers adjacent to Mostyn are extremely anxious that a town should be started at this point or at least that some arrangements should be made that grain can be shipped from there this fall. … It appears that the Indians themselves are willing to sell for $2000.00 but the Indian Department are insisting on obtaining $4000.00. In the interests of the settlers it is very desirable that this matter should be settled without delay.

I would be pleased if you could personally look into this matter and find out where the deadlock is, and if possible use such pressure as will bring about shipping facilities at Mostyn this fall.

I am writing entirely in the interests of the settlers.78

The following year, Atkinson complained to Pedley that the “[s]ettlers adjacent to this siding have waited patiently for a long time to have the Railway Co. take over the land, and open up the place so business can be done at that point. I think it would be in the interests of all parties concerned if Indian Agent Wm. Murison were instructed to take a surrender of the land from the Indians ….”79

77 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, to Secretary, Dept. of Indian Affairs, December 26, 1906 (ICC Exhibit 1a, p. 65).
78 G.M. Atkinson, M.L.A., Wishart, Saskatchewan, to Frank Oliver, Minister, Dept. of Interior, August 30, 1909 (ICC Exhibit 1a, pp. 88-89).
We are particularly concerned that there was no discussion with the First Nation as to the foreseeable consequences of the Crown’s grant of a right of way to the railway, despite the Crown’s knowledge that the construction of a townsite had also been requested.

Contrary to the requirements of Apsassin, the matter of the proposed townsite was not fully discussed with the Indians by departmental representatives prior to the actual surrender. Instead, the First Nation was provided with only some of the information relevant to the exercise of their free and informed consent when making its decision. Had they been fully informed, we cannot say that their decision would have been the same.

THE 1920 SURRENDER

Issue 1: Compliance With Provisions Of The Indian Act

1 Were the provisions of the applicable Indian Act complied with when the surrenders were obtained?

Positions of the Parties

The Muskowekwan First Nation argues that the 1920 surrender is invalid because there is no evidence to indicate that express notice of the proposed surrender was provided, and because the 1986 affidavit of Peter Windago attests that no notice was given.80

The First Nation alleges that the meeting was not called or conducted according to the rules of the First Nation, which customarily did not decide such matters until members had taken the time to consider the matter, and then, with decisions being made by a secret ballot rather than by a show of hands.81 The First Nation also relies on 1911 census documents in determining the ages of the members in question,82 and asserts that the surrender affidavit does not explicitly state or prove that a majority of male members over the age of 21 were present, and is therefore of little assistance to Canada.83 Finally, the First Nation submits that there is uncertainty as to whether the 1920 surrender was assented to by the majority of the male members of the First Nation eligible to vote.84

79 G.M. Atkinson, M.L.A., Wynot, Saskatchewan, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, February 14, 1910 (ICC Exhibit 1a, p. 100).
80 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 440.
81 Written Submission on Behalf of the Muskowekwan First Nation, March 15, 2008, paras. 443, 447.
82 Written Reply to Canada’s Submission on Behalf of the Muskowekwan First Nation, May 8, 2008, para. 27.
Canada’s position is that the evidence confirms that the surrender was assented to by a majority of the male members of the Band who were 21 years of age or older, who were habitually resident on or near the reserve, and were at a meeting called for the purpose of considering the surrender. Canada states that the meeting was summoned according to the rules of the Band, and was held in the presence of the authorized officer, Indian Agent Murison. Canada submits further that these facts were certified under oath at the time by Commissioner Graham, Chief Tom Desjarlais, and Councillors Sam Akan and Windigo, in the surrender affidavit, and thus asserts that the evidence put forward by the First Nation does not establish that the notice requirements of the Indian Act or guidelines were contravened.

Finally, Canada maintains that there are “concerns” with the oral history evidence, and argues that contemporary documentary evidence should be given more weight than affidavits sworn in 1986.

In reply, the First Nation submits that there was no discrepancy between the information contained in the 1986 affidavits and the information given by the Muskowekwan Elders in the community session held in 2005, and that the oral evidence of the Elders is therefore entitled to be given weight.

Panel’s Reasons
As we discussed earlier, section 49 of the Indian Act requires that a meeting must be summoned for purposes of taking a surrender. Since a meeting was summoned for that purpose, we find that s. 49 requirements were met at the time of the 1920 surrender. Contrary to the First Nation’s argument, as we noted earlier, surrender and surrender affidavit documents are prima facie evidence of their contents. We find there is a lack of evidence to contradict the contents of those documents.

There were no specific rules of the Band identified on the record regarding how meetings were summoned for the purpose of taking surrenders, despite joint research by Public History Inc. to determine if such rules existed. This research, commissioned during the course of the inquiry, concluded that “no information was found about traditional or internal rules of the Muskowekwan Band for decision-making or councils, or any other
rules of the band." This point was acknowledged by counsel for the First Nation at the oral session conducted on May 29, 2008.

We note that there is no documentary evidence as to the formalities of the notice given for the meeting that took place to discuss the surrender, other than an 1986 affidavit sworn by Peter Windago, who was present at the surrender meeting, and attested that no notice was given. However, although Canada has challenged this affidavit evidence as meriting less weight than other documentary evidence, we have no reason not to believe Peter Windago's sworn evidence.

Windago attested that he was 24 years old at the time of the surrender and was threshing grain off reserve when he was told he was to return home for a meeting the next afternoon. He stated: “We did not know what the meeting was about because no one told us and there were no notices of any kind either posted or given to us.” Windago had attended the Muskowekwan residential school and knew how to read and write, and so he felt that in 1920, “I was well-qualified to read any notices or information regarding our Band matters. There were no notices of any kind telling us about a meeting to sell land and there was no information give to us in writing about the meeting or sale of land or any other information, except what Mr. Graham told us at the meeting.” According to his evidence, then, there was no posted notice of the meeting; insufficient advance notice of the meeting, and no advance notice of the purpose of the meeting.90

Peter Windago’s affidavit suggests that the Department of Indian Affairs’ 1914 Guidelines outlining the formalities for the taking of a surrender were also not followed. The relevant portions of the new Guidelines, for purposes of this inquiry, are as follows:

3. The meeting or council for consideration of surrender shall be summoned according to the rules of the band, which, unless otherwise provided, shall be as follows: Printed or written notices giving the date and place of the meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter who is to be present and interpret at the meeting or council must deliver, if practicable, written or verbal notice to each Indian on the voters’

---

90 Affidavit of Peter Windago, dated September 11, 1986 (ICC Exhibit 1a, pp. 1011-1015).
list, not less than three days before the date of the meeting, or must give sufficient reasons for non-delivery of such notices.

...  

7. The surrender should be signed by a number of Indians and witnessed by the authorized officer, and the affidavit of execution of the surrender should be made by the duly authorized officer and the Chief of the Band and a Principal man or two Principal men before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

8. The officer taking the surrender should report the number of voting members of the band as recorded in the voters' list, the number present at the meeting, the number voting for and the number voting against the surrender.91

However, having reviewed Apsassin carefully, we are obliged to find that these are technical requirements only.

Although we accept that these requirements had not been complied with in the taking of the surrender, we conclude that the surrender is not void, given that we are required to apply an “intention-based approach,” rather than a technical one, and ensure that the “understanding and intention of the Band members” is analyzed to “give effect to the true purpose of the dealings.”92

Once an intention-based approach is applied, the facts establish that the First Nation knew that a surrender was being contemplated, as its members had clearly discussed it amongst themselves several times, given their discussions with their Indian Agent and the numerous petitions they filed. We find that they intended to surrender their lands. While the 1914 Guidelines were not complied with, we find that these requirements were superfluous to the purpose of the meeting, which was clearly understood, in light of the Band's oft-stated intention to surrender its lands. Moreover, there is nothing in the Guidelines that specifies the method of voting that is to be used, for example, a secret ballot versus a show of hands.

Finally, we have no reason to doubt John Pambrun's evidence in his 1986 affidavit to the effect that he had been present, and had also voted, but was not named on the voters list. Even if his name was not recorded in the voters list, however, Pambrun did not attest that he had voted against the surrender, and

91 Circular to Indian Agents, Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, Department of Indian Affairs, Ottawa, Ont., May 15, 1914 (ICC Exhibit 1a, p. 218). Emphasis added.
92 Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, at para. 7 (sub nom. Apsassin).
even if he had voted against the surrender, his vote would not have changed the result.

While the voters list may have been inaccurate, it is clear that a majority of those present and eligible to vote voted in favour of the surrender. Not even the First Nation argues to the contrary. Therefore, there is no persuasive evidence to contradict the contents of the surrender document and surrender affidavit, or to reverse the presumption of reliability.

**Issue 2: Was a Pre-surrender Fiduciary Duty Breached?**

1. Did the Crown breach any pre-surrender fiduciary duty owed to the Muskowekwan First Nation?

As with the 1910 surrender, we were asked to make our findings regarding the 1920 surrender with respect to four arguments raised by the parties relating to this issue, namely:

   a) Was the First Nation’s understanding of the proposed surrender adequate?
   b) Did the First Nation cede its decision-making authority to the Crown?
   c) Did the Crown’s conduct taint the dealings in a manner that makes it unsafe to rely on the First Nation’s understanding and intention?
   d) Was the First Nation’s decision to surrender the reserve land so foolish or improvident that it constitutes exploitation?

**Positions of the Parties**

a) Was the First Nation’s understanding of the proposed surrender adequate?

The First Nation takes the position that the First Nation’s understanding of the 1920 surrender was inadequate, as there was insufficient information provided to the First Nation prior to and at the October 14, 1920 meeting, and no notices about it posted in advance.93

Furthermore, contrary to the Band’s usual custom of allowing for contemplation and discussion between the members, the First Nation argues that its members were given insufficient time to consider the 1920 surrender and only 15 minutes to reach a decision.94 At the meeting, the First Nation was

---

93 Written Submission on Behalf of the Muskowekwan First Nation, March 15, 2008, para. 466.
not provided with details regarding the exact number of acres being surrendered or the amount of money to be paid per acre.95

The First Nation asserts that its members were told that the surrender was for the department, and not that the land would be sold by auction.96 Finally, the First Nation argues that band members understood that they would immediately receive $100 per person and an annual payment of interest every year thereafter, if they agreed to the 1920 surrender.97

For its part, Canada submits that the historical evidence demonstrates that the First Nation was an active participant in the eight years of surrender negotiations.98 It points out that the negotiations leading to the 1920 surrender began as early as 1912, when the First Nation asked for a minimum value for their land and that a distribution of $100 per capita be made upon the surrender. On three other occasions, the First Nation petitioned the Department of Indian Affairs to sell some of their land, and therefore had considerable time to discuss and consider the surrender.99

Canada suggests that both the documentary and oral evidence establish that the surrender for sale was intended, and that the First Nation understood that, following the initial payment at the time of the surrender, members would be paid interest on sale proceeds. Canada maintains that language in the March, 1920 petition indicates that the First Nation knew that the land would be sold by auction.100 Canada further suggests that the difference between evidence of the Elders and the documentary record can be reconciled by understanding the disappointment felt by community members when the lands were not readily sold, thereby delaying interest payments to them.101

b) Did the First Nation cede its decision-making authority to the Crown?
The First Nation submits that the settlers placed undue pressure on the First Nation to agree to the surrender.102 They allege that the Crown was the First Nation’s only advisor,103 at a time when the First Nation was struggling to survive as a result of disease and starvation.104 The First Nation argues that

95 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 473.
96 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 476; see also First Nation reply submissions, May 8, 2008, para. 84.
100 Written Submission on Behalf of the Government of Canada, April 23, 2008 para. 158.
102 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 507, 530.
103 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 552.
band members believed that the surrender was inevitable and that they were powerless to prevent it, believing that they would be removed or imprisoned if they failed to agree to the surrender.  

In response, Canada argues that the weight of evidence does not support the First Nation’s claim that it ceded its decision-making power to the Crown as a result of the Crown’s conflict of interest, undue influence, failure to inform, or the Band’s weakness at the time. Canada asserts that the claim that the Crown set itself up as the First Nation’s advisor is not supported by the evidence. Instead, Canada takes the position that the First Nation acted autonomously, and had petitioned the Crown over a period of eight years to surrender some of its land, adding that the fact that the First Nation had refused a previous Crown request to surrender all of its reserve lands again demonstrates its autonomy. Canada argues that there is no evidence that First Nation members feared imprisonment or removal if they voted against the 1920 surrender, pointing out that they had opposed a surrender in 1909 without any apparent fear of repercussions.

c) Did the Crown’s conduct taint the dealings in a manner that makes it unsafe to rely on the First Nation’s understanding and intention?

The First Nation asserts that the Crown failed to manage competing interests, and instead placed the interests of the settlers before those of the First Nation. It argues that the Crown failed to fully inform the First Nation of the terms of the surrender; failed to provide the First Nation with independent advice; and failed to tell the First Nation that it did not have to agree to the surrender. It insists that the Crown made an unconscionable use of money to influence the First Nation’s decision to surrender its lands at a time when band members were struggling to survive and were weakened by starvation and disease. It argues further that the Department of Indian Affairs allowed band members to think that the surrender was necessary in order to obtain agricultural assistance. Finally, by arranging for an immediate cash payment, paid immediately thereafter, it submits that the Crown tainted the dealings in a manner that distinguishes these facts from those in Apsassin.

---

110 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 616.
111 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 626.
For its part, Canada maintains that the Crown did consider other interests than those of the Town of Lestock, such as investigating whether the Soldier Settlement Board might need the land. Furthermore, Canada argues that in 1921, the Crown refused a petition from the Lestock Board of Trade requesting a further surrender, basing its refusal on the fact that the surrender would deprive the First Nation of needed farmland, thereby demonstrating that the Crown would dismiss a request for surrenders that were not in the best interests of the First Nation.

As for the argument that the First Nation was weak, diseased, and starving, Canada states that the First Nation requests for a surrender had been maintained over an eight year period, with its last petition pre-dating the influenza epidemic.

With regard to the $100 per capita payment, Canada submits that the First Nation had requested such a payment be made at the time of a surrender as early as 1912, and that since it was the First Nation that had requested the payment, the fact that the payment was made cannot be construed as undue influence on the part of the Crown. Finally, Canada states that there is no evidence to support the contention that the Crown failed to advise the First Nation of alternate means of obtaining farming equipment.

d) Was the First Nation’s decision to surrender the reserve land so foolish or improvident that it constitutes exploitation?

The First Nation argues that the 1920 surrender was not in the best interests of the First Nation because the First Nation was using the land for agriculture, hunting, fishing, and gathering, and was deriving revenues from leases of it. The First Nation submits that its land base was small to begin with, and that the 1920 surrender was almost one-third of its lands, representing over 55% of its best agricultural lands, such that the First Nation members had surrendered their best farming lands in order to obtain farming equipment.

Canada responds that very little of the surrendered lands was being farmed, and that in its 1915 petition, the First Nation had stated that all of its farming land was outside the area it wished to surrender. It maintains

118 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 662.
119 Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 671-672, 678.
that the perspective of the First Nation at the time must be considered in determining whether there was a pre-surrender breach of fiduciary duties.

**Panel's Reasons**

We find that the Crown breached its pre-surrender fiduciary duties with respect to the 1920 surrender. However, in doing so, we do not accept all the arguments put forward by the First Nation. For example, we do not accept the submission that the First Nation did not understand the consequences of the surrender.

The documentary record reveals that many of the same First Nations leaders were involved in surrender discussions that had taken place over a ten year period, from the first discussions resulting in the 1910 surrender to those resulting in the 1920 surrender. These same knowledgeable leaders were also involved in making a number of decisions concerning surrenders for leases, and others for sale, after the 1910 surrender and before the 1920 one.

For example, Tom Desjarlais, Sam Akan, and Windigo, were signatories not only to the 1910 surrender, but also to a 1918 surrender for lease of lands for grazing.\(^{122}\) Tom Desjarlais and “Sam Fred Akan” (although not Windigo) were signatories to a 1919 surrender for lease for grazing purposes as well.\(^{123}\) Their participation in these prior surrenders, as well as in the various petitions asking for reserve lands to be taken in surrender, is an indication, in our view, of their understanding of such transactions. As in *Apsassin*, we find that band members understood the consequences of a surrender, and understood that monies would be deposited to their credit once the lands were sold.

We accept that the 1920 surrender decision was controversial. The 1986 affidavit of John Pambrun, a member of the Muskowekwan Band at the relevant time, indicates that while the Chief, Tom Desjarlais, wanted to “sell” the land, “‘Old Man’ Windigo, a councillor, was very much against selling any land and was fighting hard not to sell the land.”\(^{124}\) The surrender itself, however, shows Windigo as a signatory to the 1920 surrender, as well as Sam Akan and Chief Tom Desjarlais,\(^{125}\) and the surrender affidavit was sworn by

---

\(^{121}\) Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 171.

\(^{122}\) Surrender for Lease, Chief and Principal Men, Muscowequan's Band of Indians, April 30, 1918 (ICC Exhibit 1a, pp. 284-289).

\(^{123}\) Surrender for Lease, Chief and Principal Men, Muscowequan's Band of Indians, August 4, 1919 (ICC Exhibit 1a, pp. 367-372).

\(^{124}\) Affidavit of John Pambrun, September 30, 1986 (ICC Exhibit 1a, pp. 1019-1021).

\(^{125}\) Surrender by Chief and Principal Men of the Muscowequan Band of Indians, October 14, 1920 (ICC Exhibit 1a, pp. 453–458).
Similarly, Commissioner Graham’s report of October 14, 1920, which sets out the “voters list” for the surrender, indicates that the 29 voters in favour of the surrender included Windigo as well as “Thos. Dejarlais, Chief” and “Sam Akan,” and states there were no votes recorded against it.127

That the surrender vote was ultimately unanimous does not necessarily negate the evidence presented by the First Nation. It is quite possible that Windigo opposed the surrender during community discussions, but went along with the final vote. We view the fact that there is oral and affidavit evidence of internal divisions within the Band as reflecting the fact that, while there may not have been consensus, there were certainly community discussions, some of them quite animated, concerning the surrender.

As for the question of autonomy, we cannot ignore the fact that the Band had earlier rejected Commissioner Graham’s proposal to surrender the whole reserve and amalgamate with Poorman’s Band. All of these factors lead us to conclude that the Band understood very well the consequences of the 1920 surrender, and had not ceded or relinquished its decision-making authority to the Crown.

This, however, does not change the fact that the surrender was improvident.

While oral history testimony before us discussed the effect of disease and economic factors for the Band at that time, it is clear to us that the Band was primarily interested in obtaining a surrender so that it could obtain funds for agricultural equipment, and thus meet the needs of the community. It makes no sense, in those circumstances, that the Band would surrender some of its finest farming lands; however, the Band was left with the erroneous impression that a surrender was its only option.

We note that three petitions were received from the First Nation after 1910 requesting a surrender. The third, dated March 5, 1920, was conditional upon a first payment of $100. This was a considerable sum of money, according to an expert report by R.A. Schoney commissioned by the First Nation. It was equal to almost a full year of wages for an adult male and could buy a significant amount of household goods, including 1,307 lbs of beef and 115 sacks of flour. More particularly, the report indicates that a “starter kit” of agricultural implements, sufficient to allow a family of five to take up farming, would have cost approximately $564.48 at the time.128
Evidence presented by both Canada and the First Nation indicate that the value of $100 in 1920, when converted into 2007 dollars, would have been close to $1,000.\textsuperscript{129}

Even though the First Nation had considerable funds in its capital and interest accounts at the time, the First Nation, on several occasions in the record, referred to their lack of funds as the main reason for needing to surrender their land. On February 8, 1915, for example, the members of the Muskowekwan Band petitioned Duncan Campbell Scott, the Deputy Superintendent General of the Department of Indian Affairs, to surrender part of their reserve, saying, “we are in need of Finances to improve our reserve and Band and we consider, that we have plenty of land exclusive of this said lot and all our farming land lies outside of this part we are wishing to dispose of …”.\textsuperscript{130}

In a letter dated March 5, 1920, again to Scott, 26 members of the Muskowekwan Band, including Chief Tom Desjarlais, “H.M. Windigo” and Sam F. Akan, again petitioned the Crown to surrender lands they had previously leased. The petition stated that:

We have leased this land two years ago for grazing purposes, expecting that we would git [sic] some money by leasing it but it seems impossible for us to get any money by leasing the land. So we have made up our minds to sell the land to the government … We want the money to buy farm equipment such as horses, harness and plows. Very few have power to farm and a big majority have nothing to farm with atal [sic]. Therefore we want $100.00 individually in first payment. … We would like to have the money in the first week of April. Because by having money in that time we would be able to purchase any thing that we want for the farm.\textsuperscript{131}

There is no evidence on the record, and nothing presented by Canada, to indicate that the federal government explored or discussed with the First Nation any other alternatives by which the First Nation could access funding for agriculture, other than a surrender. However, the evidentiary record, establishes that other options existed, including monies from the First Nation’s own accounts.

\textsuperscript{130} Petition, Members of the Muscowequan Band, Muscowequan Reserve, to Duncan C. Scott, Deputy Superintendent General, Dept. of Indian Affairs, February 8, 1915 (ICC Exhibit 1a, pp. 223-224).
\textsuperscript{131} Petition, Muscowequan Band of Indians to D.C. Scott, Deputy Minister, Dept. of Indian Affairs, March 5, 1920 (ICC Exhibit 1a, 402-403).
For example, for the years 1919-1920, the First Nation had $6,621.67 in its capital account and $3,068.69 in its interest account. In 1920-1921, these amounts were $8,012.22 and $3,861.51 respectively, enough to easily purchase whatever supplemental farming equipment Band members required, given that the Schoney Report indicated that a family of five could purchase a starter kit of agricultural equipment for $564.48. The purchase of farming and agricultural implements could have been funded by monies from the Band's capital account with the approval of the Minister of Indian Affairs, while monies spent from the interest account would have required the approval of the Superintendent General of Indian Affairs. These were dual positions occupied by the same person at the relevant times.

A surrender was the most extreme of the available options to provide funds to the Band, and in our view, was an unnecessary transaction when other alternatives were available. Furthermore, many of the purchasers of lands surrendered in 1910 were in arrears of their payments. Instead of extending them more time to pay, Canada could have instead put pressure on those purchasers to pay up, or could have taken steps to foreclose those properties.

According to Canada, rental monies were being received from the grazing leases the Band had entered into as well. As Duncan Campbell Scott reported to the Indian Affairs Minister, Arthur Meighen:

Mr. Graham has been particularly energetic in exercising the powers thus conferred upon him, and a large number of leases were granted and the result was a very valuable increase in the national food supply ... The department has leased to white settlers for grazing purposes 297,024 acres of Indian lands. This, together with the lands leased for farming purposes, has realized to date the sum of $144,343.95.

These funds, too, could have been used to purchase farming equipment for those Bands who required it, instead of a surrender being taken that included these leased lands themselves.

Instead, we find that the Crown responded to the relentless pressure from the settlers to free up lands for their uses, and in doing so, placed the best interests of the settlers above those of the First Nation. The pressures may have been politically difficult to deal with, but the Crown had a duty to the First

132 Trust Account Ledgerbooks – Statements of Muskowekwan Capital and Interest/Revenue Trust Accounts No. 231 for the years 1909/1910 through 1956/1957 (ICC Exhibit 1h).
133 Duncan C. Scott, Deputy Superintendent General, Dept. of Indian Affairs, to Arthur Meighen, Superintendent General, Dept. of Indian Affairs, December 1, 1919 (ICC Exhibit 1a, pp. 393-398).
Nation to act in the best interests of the First Nation, and to resist external pressures to the contrary, if the actions proposed were not also in the First Nation’s best interests.

There is no doubt that such pressures were applied. On August 8, 1918, for example, the Secretary for the Village of Lestock wrote to the Department of Indian Affairs, urging the Crown to take a surrender and erroneously claiming that a “petition” had been circulated among the Indians of the Band and was “signed by them. Strongly in favour of surrendering that Portion of Reserve (at Treaty time on or about June 4th/18). We believe that at the present time this land would sell well.”134 Duncan Campbell Scott wrote to Commissioner Graham on June 21, 1920 in which he stated that, “regarding the question of obtaining from the Indians a surrender of certain lands in the Muscowequan reserve, for which application has been made by the village of Lestock. I have to say that they are pressing us in this matter, and it seems desirable that, if possible, the Indians should be approached at an early date, with a view to surrender.”135 Graham was reminded on June 29 that “there is such insistent pressure that we should do something to relieve the situation at Lestock in the interest of these people who want a school section, &c, &c. I really wish you could manage, in the midst of all your other duties, to look in that matter yourself.”136

By then, the federal government had already accepted Commissioner Graham’s proposal for a “Greater Production” scheme, which once again placed settler interests ahead of those of First Nations. As Graham advised Arthur Meighen, the Minister of Indian Affairs, on January 7, 1918, there were “large areas of pasture lands are lying close to the railroads and, so far as this Inspectorate is concerned, are surrounded, in most cases, by White settlements, and in this time of need, it does not seem right to see this opportunity of raising food, neglected.”137 In February, 1918, an Order in Council adopted Meighen’s recommendation that, among other things, Graham be appointed a Commissioner with authority to make proper arrangements to lease reserve lands to this end, given that “only a small portion of the land on Indian reserves is under cultivation and that these reserves are for the most part situated in the productive area of the three

134 F.W. Crawford, Secretary, Village of Lestock, Lestock, Saskatchewan, to Dept. of Indian Affairs, 8 August 1918 (ICC Exhibit 1a, p. 306).
135 D.C. Scott, Deputy Superintendent General, Dept. of Indian Affairs, to W.M. Graham, Commissioner, Regina, Saskatchewan, June 21, 1920 (ICC Exhibit 1a, p. 426).
136 Author not identified, to W.M. Graham, Commissioner, Regina, Saskatchewan, June 29, 1920 (ICC Exhibit 1a, p. 428).
137 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Arthur Meighen, Minister of Indian Affairs, January 7, 1918 (ICC Exhibit 1a, pp. 246-248).
Provinces and are finely adapted for agriculture and stockraising.\textsuperscript{138} Clearly, the government priority in this instance was that agriculture and food production be increased, even if it resulted in the permanent loss of reserve lands at IR 85.

We find that the 1920 surrender was, overall, an improvident transaction because it deprived the First Nation of land that was considered not just good agricultural land, but was in fact a portion of the Band’s best agricultural land. The result of the transaction left the First Nation with a significantly smaller amount of good and arable land, a fact the above correspondence indicates the Crown was again well aware of at the time of the surrender.

The Crown also knew, as a result of Agent Murison’s 1905 report concerning the GTP right of way, that some of the land on the reserve, and particularly in the centre and eastern parts where the railway ran, was very good agricultural land, compared to lands of lesser quality in the western part of the reserve.

As a result of the surrender, the First Nation lost a significant portion of its best land. The actual amount of land lost to farming by the First Nation because of the 1920 surrender has been confirmed by David Hoffman in a research report commissioned by the parties in the course of the present inquiry. Among other things, Hoffman was asked to document and describe the use of IR 85 lands by the First Nation, to determine the quality of the lands, and to compare the quality of the lands taken in the 1910 and 1920 surrenders with what was left as reserve lands.

According to the Hoffman report, prior to the 1920 surrender, 63 per cent of the Band’s total land base was arable lands, and 60 per cent of those were of class 2 quality, meaning of the best quality for that use. Of the lands surrendered in 1920, 75 per cent were arable lands, and 100 per cent of these were of class 2. After the 1920 surrender, only 57 per cent of the Band’s remaining land base were arable lands, and only 40 per cent were class 2, leaving them with considerably less of their best quality arable lands.

In our view, the Hoffman report supports some of the First Nation’s allegations. The First Nation had argued, in particular, that the 1920 surrender covered almost one-third of their arable lands; that the lands remaining were inferior for agricultural purposes; and that the surrender deprived the Band of 55 per cent of its best quality, class 2 lands. We agree that the surrender deprived the Band of some of its best quality farm lands;
however, we would have found that the Crown breached its fiduciary duties, for the other reasons we have expressed, even if this had not been the case.

Even if the members of the Band were in need of money, and wished to get money through the means of a surrender, we find that Canada should have refused the surrender because it was an improvident decision.

Finally, there is no evidence before us to explain why the Band surrendered the extra three sections that were included in the surrender itself. The Band’s last petition, dated March 5, 1920, had requested only the surrender of nine sections (eight in the east of the reserve and one section in the south side of Lestock). No evidence has been produced by the Crown to explain why these additional sections of land were included. There is nothing on the record of any discussion with the Band at the time of the surrender concerning these additional lands. We are therefore unable to determine whether the Band knowingly “consented” to a transaction that surrendered more land than its members had previously expressed a willingness to surrender. We accept Peter Windago’s affidavit evidence, however, that the amount of land Graham referred to at the meeting as the subject of the surrender was not adequately explained.

It makes no sense that the Band would surrender some of its best farming land in order to buy farming equipment, or that it would surrender more land than it had previously considered expendable. Thus, we find that the surrender, given the circumstances around it, amounted to an exploitative bargain that resulted in the Band being deprived of the very land it needed in order for its members to survive the difficult conditions they were experiencing. We conclude that Canada breached its pre-surrender fiduciary duties, as set out in Guerin and Apsassin, to prevent exploitative bargains.

OUTSTANDING ISSUES
Originally, as set out in Appendix B, the First Nation had advanced eight issues. Some of these were withdrawn, leaving three issues for our consideration. On March 11, 2008, counsel for the First Nation informed the Commission that the First Nation had decided not to make any submissions on the third issue of the inquiry, thus removing it from our scope of review.139

Canada advised that it did not object to this decision, and the panel was informed accordingly.140

140 Email, Michelle Brass, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, March 12, 2008 (ICC File 2107-34-1, p. 109507).
As a result, we have limited our comments to only two issues, namely the Indian Act requirements and the pre-surrender fiduciary duties. We make no findings on any of the remaining issues raised in the course of this inquiry. These were withdrawn by the First Nation with Canada’s consent, following an Order in Council, dated November 27, 2007, which ordered that all inquiries before the Commission be completed, including reports, by December 31, 2008. The remaining issues are therefore outstanding issues under Canada’s specific claims policy, and constitute a basis for an action before the new Specific Claims Tribunal, should the First Nation wish to proceed in that venue.
PART V

CONCLUSIONS AND RECOMMENDATION

We find that there is a lack of evidence of violations of the applicable Indian Act concerning the 1910 surrender. The surrender documents and supporting surrender affidavit are prima facie proof of the reliability of their contents and we have been presented with no evidence to contradict them.

We find, however, that the Crown breached its pre-surrender fiduciary obligations to the Muskowekwan First Nation concerning the 1910 surrender, and thereby breached its lawful obligations to the Band.

The Crown did not follow its own departmental policy against permitting townsites to be located on reserve lands. The failure to apply departmental policy in this instance was not a mere technicality, but negatively impacted the core of the First Nation’s land base. The Crown further failed to inform and discuss with the Band the consequences that would result from the GTP’s request for additional lands for a townsite in addition to its request for a right of way, until months after the Crown had already granted the right of way to the GTP.

With respect to the 1920 surrender, we find that there is a lack of evidence of violations of the applicable Indian Act. The surrender documents and supporting surrender affidavit are prima facie proof of the reliability of their contents and we have been presented with insufficient evidence to contradict them. We find that, while there were some violations of 1914 federal Guidelines governing the conduct of the surrender process, particularly with respect to notice provisions, these were mere technicalities that did not affect the Band’s majority vote in favour of the surrender. The Band had long intended to surrender its reserve lands and had discussed doing so over a period of years. Moreover, some of the Muskowekwan First Nation signatories to the surrender and surrender affidavit had been involved in a number of other surrenders over the years. We find that they were knowledgeable about surrenders, and that the First Nation intended to surrender its lands. According to the Apsassin decision of the Supreme Court
of Canada, we must consider the true purpose of the provisions of the Indian Act and the 1914 Guidelines rather than technicalities. Having done so, we are satisfied that the Band intended to surrender some of its lands, and that any non-compliance was based on semantic issues, rather than substantive ones.

We find, however, that the Crown failed to live up to its pre-surrender fiduciary obligations in the 1920 surrender to prevent exploitative and improvident surrenders, required under both Guerin and Apsassin, for the following reasons.

The Crown failed to inform the Muskowekwan First Nation, which desperately needed money for farming equipment, of its other options. Instead, Canada encouraged the Band to surrender some of its best farming land in order to get the money it needed, despite the fact that there were considerable funds in band accounts that could have been used for this purpose, and even though some of the land included in the surrender was already generating income from grazing leases that could have been applied to this purpose. The Crown could also have pursued purchasers of previously surrendered lands who had defaulted in their payments.

The First Nation was left with the erroneous impression by Crown representatives that it had only one available option, to surrender some of its best farming lands, when a surrender was the most extreme of the various possibilities. We conclude that if the Crown had provided full information to the First Nation concerning the options available to it, it is unlikely that band members would have reached the same conclusion.

The panel thus finds that the Crown favoured settlers’ interests over those of the Muskowekwan First Nation in the 1920 surrender. The Crown responded to political pressures from the Town of Lestock and other elected representatives by obtaining an improvident and exploitative surrender of reserve lands for use by the town, instead of properly managing the interests of the First Nation with these other and competing interests. By approving the surrender, Canada failed to meet its pre-surrender fiduciary obligations.

In conclusion, we find that there are outstanding lawful obligations owed by Canada to the Muskowekwan First Nation concerning the Crown’s pre-surrender fiduciary obligations regarding the surrenders taken by the Crown in 1910 and 1920 of parts of IR 85.
We therefore recommend to the parties:

That the claim of the Muskowekwan First Nation regarding the 1910 and 1920 surrenders be accepted for negotiation.

FOR THE INDIAN CLAIMS COMMISSION

Renée Dupuis
Chief Commissioner

Sheila G. Purdy
Commissioner

Alan C. Holman
Commissioner

Dated this 5th day of November, 2008.
APPENDIX A

HISTORICAL BACKGROUND

MUSKOWEKWAN FIRST NATION:
1910 AND 1920 SURRENDERS INQUIRY

INDIAN CLAIMS COMMISSION
CONTENTS

Introduction 669
Background 669
Survey and Confirmation of IR 85 670
Grand Trunk Pacific Railway Applications for Right of Way and Townsite on IR 85 671
Surrenders of IR 85 Lands 672
Surrender of NW 6, March 7, 1910 (Lestock Townsite) 678
Subdivision & Sale of NW 6 (Lestock Townsite), 1910 680
Other Uses of Townsite Lots in NW 6, 1911-1912 681
   GTP Pipeline, 1911-1912 681
   Establishment of School Site, 1911-1912 681
Requests for Surrender of Additional IR 85 Lands, 1912-1920 681
Greater Production & Surrenders for Lease, 1918-1919 687
Continuing Pressure On the Crown for Surrender For Sale, 1919-1920 691
   Sale of Remaining Town Lots Surrendered in 1910 695
   Surrender of 7,485 Acres from IR 85, October 14, 1920 695
Sale of Lands Surrendered in 1920 702
MUSKOWEKWAN INQUIRY: 1910 AND 1920 SURRENDERS

INTRODUCTION
The Muskowekwan First Nation occupies the Muskowekwan Indian Reserve No. 85, (hereafter referred to as IR 85), located in the Little Touchwood Hills region of southern Saskatchewan. Historically, the lands and affairs of the Muskowekwan First Nation were administered under the Touchwood Agency of the Department of Indian Affairs.

On September 17, 1992, the Muskowekwan First Nation submitted a Specific Claim to the Department of Indian Affairs, alleging the invalidity of two surrenders of portions of IR 85 taken in 1910 and 1920. The claim was rejected in a letter from the Specific Claims Branch dated May 13, 1997, and in a confirming letter from the Minister of Indian Affairs dated November 26, 1997. The First Nation requested an inquiry on November 21, 2003, and the ICC agreed to conduct an inquiry into the rejected claim on December 18, 2003.

BACKGROUND
On September 15, 1874, the Government of Canada, represented by Treaty Commissioners Alexander Morris, David Laird, and William J. Christie, signed Treaty 4 with “the Cree, Saulteaux and other Indians” living in what now comprises southern Saskatchewan and small portions of southeastern Alberta and west central Manitoba. Chief Ka-kee-na-wup signed the treaty on behalf of what came to be known as the Muskowekwan (or Muscowequan) First Nation. Muskowekwan was a son of Ka-kee-na-wup, and succeeded him as Chief of the First Nation after his father’s death, which occurred shortly after the signing of Treaty 4.

Treaty 4 promised to set apart reserves for each of the signatory First Nations of sufficient area to provide one square mile for each family of five, and stated that those reserves “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.”

141 The historical documentation contains various spellings of “Muskowekwan,” including Muscowequant, Muscowequon, and other variations. The spelling “Muskowekwan” will be used throughout this paper, except in direct quotes from the historical documentation.
142 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), 8 (ICC Exhibit 1a, p. 6).
143 M.G. Dickason to the Minister of the Interior, October 7, 1876, Canada, Annual Report of the Department of the Interior for the Year Ended June 30, 1876, xxxii (ICC Exhibit 1a, p. 14). See also treaty annuity paylist for “Mus cowe quon, Hard Quill’s Band”, [1874], no file reference available (ICC Exhibit 1m, p. 1).
144 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. 4).
The treaty also provided for the appropriation of reserve lands for public purposes, “due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.”

SURVEY AND CONFIRMATION OF IR 85

Dominion Land Surveyor John C. Nelson surveyed IR 85 for the 45 families under Chief “Nuskow-ekwun” (also referred to as “Muskowekwun”), in March of 1884. The original plan and field notes prepared by Surveyor Nelson in 1884 indicated IR 85 contained an area of 30 square miles. However, the reserve was apparently enlarged after the initial survey. The description of the reserve contained in the confirming Order in Council PC 1151, dated May 17, 1889, indicates the reserve contained 36 square miles and the accompanying plan shows an additional six and one-half sections at the western end of the reserve when compared to Nelson’s survey. The final boundaries of IR 85 included lands within township 27, ranges 14-16, West (W) of 2nd meridian. By Order in Council PC 1694, dated June 12, 1893, the lands comprising IR 85 were withdrawn from the operation of the Dominion Lands Act.

The Hudson’s Bay Company claimed two sections within the reserve: section 8, township 27, range 14, and section 8, township 27, range 15, both W of 2nd meridian. Although claimed by the HBC, section 8, township 27, range 14, W of 2nd meridian was included in the description of lands surrendered in 1920 and was also initially advertised for sale in 1921, but was taken off the market before the sale took place. The company’s claims were eventually relinquished by an agreement with the Crown, confirmed by Order in Council PC 71, dated January 14, 1927.

---

145 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), 7 (ICC Exhibit 1a, p. 5).
146 Order in Council PC 1151, May 17, 1889, 46, DIAND, Indian Lands Registry, Instrument B4000 (ICC Exhibit 1b, pp. 67-68).
147 Natural Resources Canada, Plan 197 CSLR SK, “Plan of Indian Reserve (Treaty No. 4) at Little Touchwood Hills,” showing “Muskow-ekwun’s Reserve No. 85,” surveyed March 1884 by John C. Nelson (Exhibit 7a); Natural Resources Canada, Field Book FB 120 CSLR SK, John C. Nelson, “Field Notes of the Survey of the Boundaries of an Indian Reserve at Little Touchwood Hills for the Band of Chief Muskow-equn,” March 1884 (ICC Exhibit 7b, p. 4).
148 Order in Council PC 1151, May 17, 1889, 40, DIAND, Indian Lands Registry, Instrument B4000 (ICC Exhibit 1b, pp. 67-68). [Later plans show 36 and one-half sections, and a reserve acreage of 37.9 square miles - see Plan 223 and T562.]
149 Order in Council PC 1694, June 12, 1893, no file reference available (ICC Exhibit 1a, pp. 25-27).
**GRAND TRUNK PACIFIC RAILWAY APPLICATIONS FOR RIGHT OF WAY AND TOWNSITE ON IR 85**

In October 1905, Indian Agent William Murison informed the Department of Indian Affairs that the Grand Trunk Pacific Railway Company (GTP) was planning to construct its railway line through the Muskowekwan reserve.  

In November and December 1905, Indian Agent Murison was instructed “not allow any work of railway construction on the Muscowequan Indian Reserve … until you have been informed that the right of way has been duly arranged for.” However, Indian Agent Murison was further instructed to prepare sketches and land valuations for the proposed GTP right of way.

When the GTP requested and prepared for the right of way, it also applied a few months later, in February 1906, to the Department of Indian Affairs to purchase 640 acres for a townsite within IR 85, adjacent to its station grounds. On February 2, 1906, G.U. Ryley, Land Commissioner for the GTP Railway applied on behalf of the Grand Trunk Pacific Railway Company, to purchase for a townsite an area of 640 acres in the Muskowekun Indian Reserve, as shown on the accompanying blueprint, and comprising, if surveyed according to the Dominion Land system of survey, portions of Sections 6 and 7, Township 27, Range 14, and portions of Sections 1 and 12, Township 27, Range 15, West of 2nd Meridian.

Official application for the right of way came on February 8, 1906, when D’Arcy Tate of the GTP railway wrote to the department in an effort “to acquire for our right of way a portion of the Muskowekwun Indian Reserve No. 85 the total acreage required being 164.8.” Two days later, on February 10, 1906, Indian Agent Murison was instructed:

---

151 Indian Commissioner to Indian Agent, Touchwood Agency, November [21], 1905, LAC, RG 10, vol. 3560, file 81, part 8 (ICC Exhibit 1a, p. 32).

152 Indian Commissioner to Indian Agent, Touchwood Agency, November [21], 1905, LAC, RG 10, vol. 3560, file 81, part 8 (ICC Exhibit 1a, p. 32).


154 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to Secretary, Department of Indian Affairs, February 2, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 35).

155 G.U. Ryley, Land Commissioner, for the Grand Trunk Pacific Railway to Secretary, Dept. of Indian Affairs, February 2, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 35).

156 D’Arcy Tate, Assistant Solicitor, Grand Trunk Pacific Railway, Montreal, Que. to Frank Pedley, Deputy Superintendent General of Indian Affairs, February 8, 1906, LAC, RG 10, vol. 4022, file 283808, part 1 (ICC Exhibit 1a, p. 1102).
to submit the matter to the Indian [illegible] and to take a surrender from them, if they are willing to give the same on such reasonable terms as they, with your assistance, may [illegible] upon.

Please exercise your best judgment in placing a value on the said tract. You are hereby authorized to take the surrender, in accordance with the provisions of the Indian Act.157

Following negotiations concerning the value of the required right of way lands, an agreement was reached between the company and the Department of Indian Affairs for transfer of the right of way. By Order in Council dated May 12, 1906, 164.8 acres of the Muskowekwan reserve were granted to the Company for a railway right of way and station grounds.158

**SURRENDERS OF IR 85 LANDS**

The matter of the townsite application was not as speedily resolved as the GTP right of way. The department had previously objected to allowing townsites within the boundaries of Indian reserves, specifically in the case of an earlier application to establish a railway townsite within the Fishing Lake IR 89, (originally part of the Yellow Quill Reserve), in late 1904.159 In that case, a request by the Saskatchewan Valley and Manitoba Land Company to establish a townsite on IR 89 was declined by Superintendent General of Indian Affairs (SGIA) Clifford Sifton, (who also held the combined portfolios of Minister of the Interior and Minister of Indian Affairs), noting that “it is the policy of the Department to avoid Indian Reserves.”160 In a letter to Deputy Superintendent General of Indian Affairs (hereafter DSGIA) Frank Pedley, dated December 5, 1904, Sifton explained,

Here are serious objections to allowing townsites to be located upon Indian Reserves. Not only should the Department resist the location of townsites upon the reserves but if possible the location in the immediate neighbourhood of a reserve

157 Frank Pedley, Deputy Superintendent General of Indian Affairs to W. Murison, Indian Agent, February 10, 1906, LAC, RG 10, vol. 4022, file 283806, part 1 (ICC Exhibit 1a, p. 38).

158 Order in Council, May 12, 1906, DIAND, Indian Lands Registry, Instrument X10073 (ICC Exhibit 1a, p. 45). It should be noted that the railway right of way transaction is not at issue in this inquiry.

159 Frank Pedley, [Deputy Superintendent General], Department of Indian Affairs, to Mr. Sifton, December 3, 1904, PARC, file 675/31-2-17-89, CN vol. 1 (ICC Exhibit 1a, p. 28).

should be discouraged. A variety of complications will arise from the proximity of a
townsite. 161

Nevertheless, within eight days of the GTP’s application for a townsite
within the Muskowekwan IR 85, the department prepared a description for
surrender and, on February 10, 1906, DSGIA Frank Pedley authorized Indian
Agent Murison to take a surrender from the First Nation. 162 He retracted those
instructions, however, two days later. 163

On July 31, 1906, Secretary J.D. McLean informed the company that any
land surrendered for a townsite must adjoin the outside boundaries of the
reserve; therefore, the townsite would have to comprise more than the
original 640 acres applied for. 164 The company resisted the suggestion to
move the location of the proposed townsite, but eventually agreed to amend
its application to include the IR 85 land lying between their proposed townsite
and the southern boundary of the reserve, which comprised an area of 960
acres. 165

On November 6, 1906, the Acting DSGIA instructed Indian Agent Murison
to call a meeting with the Muskowekwan First Nation to discuss the proposed
surrender of 960 acres for a townsite and authorized him to take a surrender
if their consent was secured. 166 On November 21, 1906, Agent Murison
informed the department that he had not yet called a meeting to discuss the
surrender, and offered his opinion with respect to the proposed townsite.
Agent Murison wrote:

I do not think that it is in the best interests of the Indians to have a Town located on
the Reserve.

During my recent visit to the Pelly Agency where they have a railway town
located on one of the reserves, I found that the Indians at that point were
constantly loafing in the town and that intemperance and immorality was

161 Clifford Sifton, Minister of the Interior, to Mr. Pedley, December 5, 1904, PARC, file 675/31-2-17-98 (ICC
Exhibit 1a, p. 29).
162 Frank Pedley, DSGIA, to W. Murison, Indian Agent, February 10, 1906, LAC, RG 10, vol. 4022, file 283808-1
(ICC Exhibit 1a, p. 38).
163 Frank Pedley, DSGIA, to W. Murison, Indian Agent, February 12, 1906, LAC, RG 10, vol. 4022, file 283808-1
(ICC Exhibit 1a, p. 39).
164 J.D. McLean, Secretary, Department of Indian Affairs, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific
165 G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, to Secretary, Department of Indian
Affairs, October 23, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 56); see also, G.U. Ryley,
Land Commissioner, Grand Trunk Pacific Railway Company, to J.D. McLean, Secretary, Department of Indian
Affairs, August 28, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 52).
166 S. Stewart, Acting DSGIA, to W. Murison, Indian Agent, November 6, 1906, LAC, RG 10, vol. 4022, file 283808-1
(ICC Exhibit 1a, p. 58).
increasing. It is a difficult matter to keep Indians out of a town located on a Reserve.\textsuperscript{167}

This is a reference to the establishment of the town of Kamsack, by the Canadian Northern Railway, on the Cote IR 6-4 in 1904. Initially, SGIA Clifford Sifton adhered to the policy that it was inadvisable to establish townsites within Indian reserves. However, upon the receipt of a report reviewing the company’s offer and the situation of the Cote First Nation, Sifton approved the proposed development.\textsuperscript{168}

On November 28, 1906, Indian Agent Murison reported on a meeting held with the Muskowekwan First Nation to discuss the proposed surrender. Murison stated that they agreed to the surrender on a number of conditions:

1. that they receive $25 per acre for the land;

2. that one-tenth of the purchase money be distributed at the time of signing and that the interest accruing on the balance of the purchase money be distributed annually; and

3. that they be given permission to use part of their capital funds for fencing, farm machinery, or “such work or material for the benefit of the Band” as might be authorized by the department.

The First Nation also requested that the location of the proposed townsite be moved one and a half miles to the west, preferring section 11 and the west half of section 2, both in township 27, range 15, W of 2nd meridian, as this “would not cut up their reserve so badly and there would be an approach to the Town from both the north and south side for Settlers.”\textsuperscript{169}

The company replied that it could not entertain the suggestion to move the townsite to section 11 on account of unsuitable grades in that location and suggested that, for $25 per acre, it preferred to purchase a smaller parcel of land (rather than 960 acres) lying wholly within the reserve boundaries.\textsuperscript{170}

\textsuperscript{167} W. Murison, Indian Agent, Touchwood Agency, to DSGIA, November 21, 1906, LAC, RG 10, vol. 4022, file 283808-1 (IC: Exhibit 1a, p. 60).


\textsuperscript{169} W. Murison, Indian Agent, Touchwood Agency, to DSGIA, November 28, 1906, LAC, RG 10, vol. 4022, file 283808-1 (IC: Exhibit 1a, p. 62).

\textsuperscript{170} G.U. Ryley to Secretary, Department of Indian Affairs, December 26, 1906, LAC, RG 10, vol. 4022, file 283808-1 (IC: Exhibit 1a, p. 65).
Although the department informed the GTP that “it is objectionable to have a townsite altogether within an Indian reserve,”¹⁷¹ the company finally applied on January 24, 1907 for only the NW quarter of section 6 in range 14 or, alternatively, only that part of the quarter section lying north of the right of way, for its townsite.¹⁷²

On January 30, 1907, J.D. McLean instructed Indian Agent Murison to submit the proposal for a surrender of either the whole or part of that quarter section.¹⁷³ On February 16, 1907, Murison met with the “Band in Council” who, “after considerable discussion,” agreed to surrender the whole of NW 6 for $25 per acre conditionally upon an immediate cash payment of 10 per cent of the purchase price and an annual distribution of the interest money accruing on the balance.¹⁷⁴ McLean informed the GTP of the terms on March 8, 1907,¹⁷⁵ but the railway company did not respond until almost a year later, on April 1, 1908, when GTP Land Commissioner G.U. Ryley requested that the department allow the offer to “stand open until I have an opportunity of visiting the ground and deciding whether it would be advisable to have a townsite at this point.”¹⁷⁶

On September 14, 1908, Indian Agent Murison reported that the Muskowekwan First Nation again offered to surrender the NW quarter of section 6, range 14, “provided that they are paid the purchase money in cash.” He noted that they expected to receive not less than $1500 for the parcel (approximately $10 per acre).¹⁷⁷

The department replied to Murison on September 22, 1908, advising him that the Indian Act only allowed a maximum cash payment of 50 per cent of the purchase price.¹⁷⁸

¹⁷¹ J.D. McLean, Secretary, Department of Indian Affairs, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, December 31, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 66).
¹⁷² G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, to Frank Pedley, Deputy Minister, Department of Indian Affairs, January 24, 1907, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 67). See ICC Exhibit 7d (Plan of Muskowekwan IR 85) for an illustration of the numbered section referenced.
¹⁷³ J.D. McLean, Secretary, Department of Indian Affairs, to W. Murison, Indian Agent, Touchwood Agency, January 30, 1907, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 68).
¹⁷⁴ W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, February 21, 1907, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 71).
¹⁷⁵ J.D. McLean, Secretary, Department of Indian Affairs, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, March 8, 1907, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 72).
¹⁷⁶ G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, to Frank Pedley, Deputy Minister, Department of Indian Affairs, April 1, 1908, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 77).
¹⁷⁷ W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, September 14, 1908, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 80).
¹⁷⁸ J.D. McLean, Secretary, Department of Indian Affairs, to W. Murison, Indian Agent, September 22, 1908, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 81).
The matter of surrender arose again in a letter dated December 8, 1908, from Inspector of Indian Agencies W.M. Graham to the DSGIA. Graham noted that “[f]or some time the Indians of Muscowequan’s Band ... have been talking of surrendering a part of their land” and that “the time has arrived when something can be done if the Department sees fit.” He proposed that the First Nation be “induced to surrender the whole of their reserve” and amalgamate with Poorman’s (now known as Kawacatoose) First Nation. Graham explained that “[t]he Indians of Muscowequan’s have not done well in the past, and I think little will be accomplished as long as they remain where they are.”

On December 30, 1908, Graham was authorized to pursue the proposal, although it appears that no action was taken for several months.

On August 30, 1909, Saskatchewan MLA G.M. Atkinson wrote to the SGIA and Minister of the Interior, Frank Oliver, regarding the GTP station grounds on the Muskowekwan Reserve, known as Mostyn station. Atkinson stated that “settlers adjacent to Mostyn are extremely anxious that a town should be started at this point or at least that some arrangements should be made that grain can be shipped from there this fall.” He noted that “the Indians themselves are willing to sell for $2000.00,” and that “in the interests of the settlers it is very desirable that this matter should be settled without delay.”

DSGIA Pedley forwarded Atkinson’s letter to Graham and asked him to take up the matter. Pedley noted that, if Graham was unable to secure the surrender of the entire reserve and amalgamation as previously proposed, which the department considered “especially desirable,” then he should “advise the Indians in the direction of having a tract at Mostyn surrendered either for sale to the Grand Trunk Pacific ... or to be laid out and sold as a townsite.”

Simultaneously, Pedley informed the GTP that “all previous offers or proposed action are ... cancelled, at least for the present,” pending the possible surrender of the entire reserve.

Graham replied on September 17, 1909, stating that he hoped to take up the matter soon and requesting a cheque for $25,000 to enable him to make a
cash payment to the Muskowekwan and Poorman’s First Nations upon their agreement to the proposed surrender and amalgamation. Graham explained his need to have cash on hand at the time of the meeting: “[d]elay waiting for papers and money after they have verbally agreed to surrender is very apt to lead to disagreement among themselves, and those in favor of the Surrender are apt to be influenced by those Indians who are against it, and by a certain element of the outside public.” With regard to the proposal for a townsite at Mostyn, Graham commented that “[t]he Department [has] no guarantee that it will ever be anything more than a siding, especially if it is to be surrounded by the reserve,” and advised against placing a high valuation on the lands for the proposed townsite. The department declined to provide a cash advance to Graham, instead asking that he report the exact terms and conditions requested by the bands before dealing with the matter further.

Graham met with the Muskowekwan and Poorman’s First Nations separately on October 16, 1909, but was unable to secure either the surrender of the entire Muskowekwan reserve or the proposed amalgamation. He reported that the Muskowekwan First Nation was “almost unanimous for not surrendering,” but said that, after the meeting, “I was not surprised to hear a number of the Indians say that they would have voted for the Surrender had their leaders not persuaded them to oppose it.” Graham proposed that, if another meeting was held to discuss the surrender, “I would be glad to have the funds before I go up, as this means much in the getting of a Surrender and also saves time and a long journey.”

The proposed surrender of a portion of IR 85 for a townsite was also discussed at the meeting. Graham reported that the Muskowekwan First Nation was agreeable to sell part of its reserve for that purpose at $15 per acre, but advised the department to defer any action on the proposal, saying,

I have great hopes that the Surrender of the whole reserve will be obtained sometime soon, and the surrendering of the townsite would have a tendency to delay ... the surrender of the whole reserve.

184 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, September 17, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 93-94).
185 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Frank Pedley, DSGIA, September 17, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 94).
186 Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, September 25, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 95).
187 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Secretary, Department of Indian Affairs, October 25, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 96-97).
188 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Secretary, Department of Indian Affairs, October 25, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 96-97).
In January of 1910, the GTP contacted the department to further discuss the proposed townsite. The company insisted that only the NW quarter of section 6 was required and stated its position that “[a]s it is considered that only a few lots could be sold the Company does not feel that it could afford to pay more than $15.00 per acre for the quarter section.”\(^{189}\) Assistant Secretary S. Stewart briefly replied on January 26, 1910, stating that “the land in question, not having been surrendered by the Indians, it [sic] is not in the market.”\(^{190}\)

MLA G.M. Atkinson wrote to DSGIA Pedley once again on February 14, 1910, requesting “in the interests of all parties concerned” that a surrender be taken of the land at the Mostyn siding “so business can be done at that point.”\(^{191}\) In response to Atkinson’s request, Surveyor J.K. McLean opposed the GTP proposal, recommending to the Deputy Minister that the department take a surrender of the whole quarter section and subdivide 40-80 acres of it into town lots to be sold at public auction, as this would bring in more money than selling the entire quarter section at $15 per acre.\(^{192}\) On February 24, 1910, DSGIA Frank Pedley authorized Indian Agent Murison to take a surrender of the quarter section\(^{193}\) and simultaneously notified MLA Atkinson of the department’s actions.\(^{194}\) It should be noted that George Maitland Atkinson is listed in the land sales books as having purchased five lots in Lestock.\(^{195}\) This purchase is not at issue in this claim.

**SURRENDER OF NW 6, MARCH 7, 1910 (LESTOCK TOWNSITE)**

On March 7, 1910, the Muskowekwan First Nation signed a surrender for sale of the NW quarter of section 6, township 27, range 14, W of 2nd meridian, containing 160 acres “more or less.” The conditions of the surrender were as follows:

---


190 S. Stewart, Assistant Secretary, Department of Indian Affairs, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific, [January] 26, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 99).


193 Frank Pedley, DSGIA, to W. Murison, Indian Agent, February 24, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 105).


195 DIAND, Indian Lands Registry, Land Sales Book (bound volume entitled “Lestock”): particulars of sales for Lestock townsite lots (ICC Exhibit 1c, pp. 1-5).
that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, and the cash payments hereinafter provided for, be placed to our credit and interest thereon paid to us, in the usual way.

... Provided that we shall receive at the time of surrender ten per cent. of the sale price of the land based at a valuation of $25.00 per acre, the balance of the moiety of fifty per cent. to be paid to us yearly as moneys are realized from the sale, in payments of not less than ten per cent.

The land to be offered for sale at public auction in lots after subdivision thereof.196

Chief Muskowekwan and six others, including Headman Windigo, signed the surrender document. Four of them signed with their marks. The surrender document was witnessed by Indian Agent William Murison and Justice of the Peace G. Lindsburgh.197 The affidavit of execution, also dated March 7, 1910, was sworn by Indian Agent Murison and Chief Muskowekwan before the same justice of the peace.198

Agent Murison promptly returned the surrender papers to the department on March 8, 1910, reporting that the papers were “duly signed by the Chief, Headmen and leaders of the Band at a regular meeting of the Band summoned for the purpose.”199 No other account of the surrender meeting has been located.

On March 16, 1910, the department forwarded a cheque in the amount of $400 to Agent Murison to be distributed to the members of the First Nation in accordance with the conditions of surrender.200 Murison made a cash payment of $2.80 to each of the 138 individual Muskowekwan members on April 25, 1910.201

The surrender was subsequently accepted by Order in Council PC 572, dated April 1, 1910, “the said surrender having been made in order that the land covered thereby may be sold for the benefit of the band interested therein.”202

196 Surrender for Sale, March 7, 1910, DIAND, Indian Lands Registry, Instrument X10074 (ICC Exhibit 1a, pp. 107-12).
197 Surrender for Sale, March 7, 1910, DIAND, Indian Lands Registry, Instrument X10074 (ICC Exhibit 1a, pp. 107-12).
198 Affidavit, March 7, 1910, DIAND, Indian Lands Registry, Instrument X10074 (ICC Exhibit 1a, p. 113).
199 W. Murison, Indian Agent to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 8, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 114).
200 Secretary, Department of Indian Affairs, to W. Murison, Indian Agent, March 16, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 116).
On April 11, 1910, Dominion Land Surveyor J. Lestock Reid was instructed by the Secretary of the Department of Indian Affairs to survey the surrendered NW 6 lands. The Secretary noted that, although the First Nation had surrendered the whole quarter section, “it has however been decided that for the present only about forty acres shall be subdivided into town lots.” The instructions suggested that the northwest corner should be subdivided, but left the decision on exactly which lands to subdivide to Reid’s judgment.203

On August 10, 1910, Surveyor Reid forwarded his plan and field notes of the townsite survey, as well as valuations for each lot to the Department of Indian Affairs. Reid’s plan shows all the land in the quarter section lying north of the GTP right of way subdivided into 15 blocks, with most blocks further subdivided into various numbers and sizes of town lots, the majority of which contained less than one-tenth of an acre of land. A notation on the townsite plan indicates that the total area of town lots was 31.48 acres.204 Reid placed a valuation on each lot ranging from $15 - $120 and suggested that Block 15, containing 2.73 acres (undivided), be reserved for a public park.205

Secretary J.D. McLean prepared a draft sale notice on October 11, 1910, advising that 245 lots would be sold by public auction on November 23, 1910. The terms of sale were one-quarter cash, with the balance to be paid in three equal annual instalments at an interest rate of five per cent.206 McLean instructed the King’s Printer to place six insertions of the advertisement in each of five newspapers: The Phoenix (Saskatoon); The Leader (Regina); The Manitoba Free Press (Winnipeg); The Dauphin Press (Dauphin, Manitoba); and The Globe (Toronto).207 On November 15, 1910, McLean also notified Inspector Graham that 10 lots would be “reserved from sale for the present,” as the GTP pipeline from the right of way to Lake Justine (at the northeast corner of the townsite) crossed those lots.208

The auction sale was held on November 23, 1910, at which time 117 of the available lots were sold for a total of $6,135.60.209

---

202 Order in Council PC 572, April 1, 1910, DIAND, Indian Lands Registry, Instrument 40396 (ICC Exhibit 1a, pp. 119-20).
203 Secretary, Department of Indian Affairs, to J. Lestock Reid, Dominion Land Surveyor, Department of Indian Affairs, April 11, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 121-22).
205 J. Lestock Reid, [D.L.S.], to J.D. McLean, Assistant DSGIA, August 10, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 144-54).
207 J.D. McLean, Secretary, to King’s Printer, October 11, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 160).
208 J.D. McLean, Secretary, to W.M. Graham, Inspector of Indian Agencies, November 15, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 162).
OTHER USES OF TOWNSITE LOTS IN NW 6, 1911-1912

GTP Pipeline, 1911-1912

Following discussions during 1911 and 1912, the department transferred Lot 9, Block 12, to the GTP for $20 in return for the company moving its pump house (associated with the pipeline mentioned above) off of one of the newly surveyed road allowances and onto that lot.210 The price paid by the GTP was equivalent to the value placed on the lot by Surveyor Reid.211

Establishment of School Site, 1911-1912

In August of 1911, the Province of Saskatchewan informed the department of provincial regulations which required the reservation of a school site of at least one acre in all townsites, to be acquired for a price of not more than $50 “in accordance with the provisions of Section seven of the Regulations of Subdivision Plans of the Province of Saskatchewan.”212 In December of 1911, the department agreed to sell lots 7-12 (six lots comprising 1.08 acres) for school purposes, for a total price of $50 as dictated by provincial legislation. Surveyor Reid’s 1910 valuations had valued each lot at $30 with a total of $180 for all six lots.213

REQUESTS FOR SURRENDER OF ADDITIONAL IR 85 LANDS, 1912-1920

Beginning in 1912, the department received requests for the surrender of additional lands from the eastern end of the Muskowekwan reserve, adjacent to the new townsite. Indian Agent Murison brought the first request to the attention of the department on March 20, 1912, as follows “I have been asked

209 W.M. Graham, Inspector of Indian Agencies, South Saskatchewan Inspectorate, to Secretary, Department of Indian Affairs, November 26, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 174).
210 D’Arcy Tate, Solicitor, Grand Trunk Pacific Railway Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 1, 1911, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 180); J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to D’Arcy Tate, Solicitor, Grand Trunk Pacific Railway Company, April 5, 1911, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 181); H.H. Hansard, Solicitor, Grand Trunk Pacific Railway Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 23, 1912, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 195-197).
211 J. Lestock Reid, to J.D. McLean, Assistant Deputy Superintendent General, Department of Indian Affairs, August 10, 1910, LAC, RG 10, vol. 4022, file 283,808-1 (ICC Exhibit 1a, p. 154).
212 F.J. Robinson, Deputy Minister, Department of Public Works [Province of Saskatchewan], to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 24, 1911, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 182-83); Assistant Deputy and Secretary, Department of Indian Affairs, to F.J. Robinson, Deputy Minister, Department of Public Works [Province of Saskatchewan], December 20, 1911, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 185).
213 J. Lestock Reid to J.D. McLean, Assistant IRSIA, August 10, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 144-54); Assistant Deputy and Secretary, Department of Indian Affairs, to F.J. Robinson, Deputy Minister, Department of Public Works [Province of Saskatchewan], December 20, 1911, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 185).
by the members of the Muscowequon Band to find out if the Department would consider taking a Surrender of two rows of Sections from off the east side of their reserve and the balance of Section (6) on which the Village of Lestock (Mostyn) is situated.\textsuperscript{214} The First Nation requested that these eight and three-quarter sections of land (sections 4, 5, 8, 9, 16, 17, 20, 21 and part of 6, in township 27, range 14, W of 2nd meridian), comprising 5,565 acres, be sold for a minimum value of $8 per acre and that a payment of $100 per person be distributed at the time of surrender.\textsuperscript{215} In a memorandum dated May 17, 1912, DSGIA Pedley directed that “no action is to be taken on this at the present time.”\textsuperscript{216} Although Agent Murison was informed of this decision, it is not known whether he passed on this information to the First Nation.

During this same period, there were two petitions from the residents of Lestock and the surrounding area for a surrender of the “east side” of the reserve. On September 3, 1912, a petition signed by 66 “owners of property in the Village of Lestock, Sask. or the surrounding district,” requested that the Department of Indian Affairs “have the East side of the Muscowequan Reserve (in which the above mentioned village is situated) sold.”\textsuperscript{217} The Secretary-Treasurer of the Village, Charles Robb, forwarded the petition to the department with a covering letter, commenting that “it is plain that this Village ... will never make any headway until this part of the Reserve is sold.”\textsuperscript{218} Assistant Deputy and Secretary J.D. McLean responded to Robb on October 7, 1912, saying “the Department has not decided to proceed with the question of surrender and sale.”\textsuperscript{219} and, on October 19, 1912, DSGIA Frank Pedley issued instructions to the Lands Branch of the Department of Indian Affairs that “no action is to be taken on this at the present time.”\textsuperscript{220}

On January 21, 1913, Chief Inspector of Indian Agencies Glen Campbell wrote to the Secretary, stating “I have a letter from Muscowequan’s Reserve Indians to the effect that through their Agent they sent a petition to the department asking permission to surrender some of their land,” and that they were “anxious to have a reply.”\textsuperscript{221}

\textsuperscript{215} W.A. Orr, In Charge, Lands and Timber Branch, to Deputy Minister, April 17, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 188). See ICC Exhibit 7d (Plan of Muskowekwan IR 85) for an illustration of the numbered sections referenced.
\textsuperscript{216} DSGIA to Lands Branch, May 17, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 189).
\textsuperscript{217} Petition to the Department of Indian Affairs, September 3, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 198-99).
\textsuperscript{218} Chas. S. Robb, Secretary Treasurer, Village Council of Lestock, to Department of Indian Affairs, September 25, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 200).
\textsuperscript{219} J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Charles S. Robb [sic], October 7, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 202).
\textsuperscript{220} DSGIA to Lands Branch, October 19, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 203).
On January 29, 1913, Assistant Deputy and Secretary J.D. McLean informed Campbell that “it has been decided to allow this matter to stand.”

On March 11, 1913, the Secretary-Treasurer of the Lestock Village Council forwarded another petition signed by 118 “citizens of Lestock” to the Minister of the Interior, requesting that the Department of Indian Affairs sell the “Eastern part” of IR 85, “as this town is being held back on this account.” Following this request, the department prepared a legal description and draft surrender papers identifying the eastern two rows of sections within the reserve, plus the balance of section 6 (comprising a total of 5,565 acres), as the land to be surrendered. The proposed conditions for surrender required a minimum sale price of $8 per acre and a cash payment of $100 per person at the time of surrender. The description and terms appearing in the draft surrender forms are the same as those contained in the First Nation’s 1912 proposal for surrender.

On May 23, 1913, the Acting DSGIA prepared a draft letter which would accompany the draft surrender papers, authorizing Indian Agent Murison to take the surrender. Marginalia on the draft letter, apparently written by J.D. McLean, states “[t]he acting Minister before acting on this desires to know whether authority for obtaining this surrender has been obtained from the Hon. Wm. Roche.” There is nothing further in the historical record of this inquiry regarding this surrender proposal.

On May 15, 1914, Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs, issued “Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves” (commonly referred to as ‘the 1914 Guidelines’). These instructions were in place at the time of the 1920 surrender. The new instructions were as follows:

---

221 Glen Campbell, Chief Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, January 21, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 204).
222 J.D. McLean, Assistant Deputy and Secretary, to Glen Campbell, Chief Inspector of Indian Agencies, January 29, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 205).
223 Petition to the Department of Indian Affairs, undated, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 208-10).
224 Chas. S. Robb, Secretary Treasurer, Village Council of Lestock, to the Minister, Department of the Interior, March 11, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 208-10).
227 Acting DSGIA to W. Murison, Indian Agent, May 23, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 212).
228 See marginalia on letter from Acting DSGIA to W. Murison, Indian Agent, May 23, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 213).
1. A proposal to submit to the Indians the question of surrender of an Indian reserve or any portion thereof must be submitted by an officer of the Department for approval by the Superintendent General or his deputy upon a memo setting forth the terms of the proposed surrender and the reasons therefor.

2. An Officer duly authorized by the Superintendent General or his deputy to submit a surrender to the Indians shall for the purpose of taking such surrender make a voters’ list of all the male members of the band of the full age of twenty-one years who habitually reside on or near and are interested in the reserve in question.

3. The meeting or council for consideration of surrender shall be summoned according to the rules of the band, which, unless otherwise provided, shall be as follows: Printed or written notices giving the date and place of the meeting are to be conspicuously posted on the reserve, and one week must elapse between the issue or posting of the notices and the date for meeting or council. The interpreter who is to be present and interpret at the meeting or council must deliver, if practicable, written or verbal notice to each Indian on the voters’ list, not less then three days before the date of the meeting, or must give sufficient reasons for non-delivery of such notices.

4. The terms of the surrender must be interpreted to the Indians, and if necessary or advisable, to individual Indians present at the meeting or council, by an interpreter qualified to interpret from the English language into the language or languages spoken by the Indians.

5. The surrender must be assented to by a majority of the Indians whose names appear upon the voters’ list, who must be present at the meeting or council summoned for the purpose as hereinbefore provided.

6. The officer duly authorized shall keep a poll-book and shall record the vote of each Indian who was present at the meeting or council and voted.

7. The surrender should be signed by a number of Indians and witnessed by the authorized officer; and the affidavit of execution of the surrender should be made by the duly authorized officer and the Chief of the Band and a Principal man or two Principal men before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.

8. The officer taking the surrender should report the number of voting members of the band as recorded in the voters’ list, the number present at the meeting, the number voting for and the number voting against the surrender.

Two years later in 1915, the matter of a possible surrender surfaced again. On February 8, 1915, Indian Agent Murison informed the Secretary of the Department of Indian Affairs that “the Chief on Muscowequons Reserve has again brought up the question of surrendering two rows of sections from the east side of that reserve.” He further noted that “[t]he people in the

229 Circular to Indian Agents. Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs, Department of Indian Affairs, Ottawa, Ont., May 15, 1914, [LAC, RG 10, vol. 12,649, file 701/34-1] (ICC Exhibit 1a, p. 218).

230
Village of Lestock are anxious to see the Surrender taken as they have difficulty in financing their school owing to the small amount of property assessable.\(^{231}\) On the same date, 21 members of the Muskowekwan First Nation signed a petition addressed to DSGIA Duncan Campbell Scott, stating,

[w]e the undersigned members of Muscowequans Band hereby beg to notify you that we desire to sell nine sections of this Muscowequans Reserve to -

The parcel of land consisting of Sections 4, 5, 6, 8, 9, 16, 17, 20, 21. As we are in need of Finances to improve our Reserve and band and we consider, we have plenty of land exclusive of this said lot and all our farming land lays outside of this part we are wishing to dispose of. The town of Lestock is desirous of purchasing this block of land and require it in order to increase their taxable land as the present Town of Lestock comprises only a quarter of Section.

We consider that the land should be worth at least from $9 nine dollars to twelve dollars per acre according to class or more if you could procure it for us.\(^{232}\)

The petition included a request for a 50 per cent cash payment at the time of surrender and annual payments of interest on the balance thereafter.

Headmen Sam Akan and Old Windigo were among those who signed the petition.

On March 6, 1915, Indian Agent Murison held a meeting with “the voting members” of the Muskowekwan First Nation to discuss the proposed surrender. On March 10, 1915, Murison reported that the First Nation had “agreed to surrender the land,” on the conditions of a $10 per acre upset price and a payment of 10 per cent of the purchase price at the time of surrender.\(^{233}\) The agent forwarded the petition, dated February 8, 1915, with his report. That petition contains a postscript, dated March 6, 1915 (the same date as the meeting) and signed by Indian Agent Murison alone, which noted that it had been unanimously agreed at the meeting to revise the proposed conditions for surrender to require a 10 per cent advance payment at the time of surrender and an upset valuation of $10 per acre.\(^{234}\)

---

\(^{230}\) W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, February 8, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 222).

\(^{231}\) W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, February 8, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 222).


\(^{233}\) W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, March 10, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 226).

On March 23, 1915, Assistant Deputy and Secretary J.D. McLean informed Agent Murison that “the Department is not in a position at present to meet their wishes, as it is not possible to tell when the lands could be sold.” He noted, however, that the department would give the proposed surrender “due consideration” if the First Nation would agree to receive the 10 per cent cash payment upon sale of the land, rather than at the time of the surrender.235 There is no further correspondence on record regarding this proposal.

Beginning in June of 1915 and continuing for many years, there was ongoing correspondence between the Village of Lestock and the Department of Indian Affairs relating to the Village's difficult financial situation. On June 17, 1915, the Secretary for the Lestock School District informed the department that “we find it very hard to collect the taxes to keep our school open,” because a number of town lot purchasers were either in arrears with respect to payment for their lots or refused to apply for the Land Patent for their parcels once payments were completed.236 As a result, legal title to the lots remained vested in the Crown and the Village had difficulty collecting taxes on those lands. The department informed the Village on numerous occasions that the Indian Act allowed for unpatented lots to be taxed but this conflicted with the provincial “Arrears of Taxes Act in Sask. … [which] provides that no Land shall be sold the Title of which is vested in the Crown by virtue of the Indian Act Dominion.”237 In addition, the department only issued a Land Patent upon application by the purchaser. Despite numerous requests from the Village council, the department did not modify that practice to assist the Village in collecting taxes, although information was frequently provided to the Village regarding the status of various sales; it later cancelled some sales in which purchasers were in arrears.238

Adding to the Village’s financial difficulties were the numerous townsite lots which remained unsold.239

235 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W. Murison, Indian Agent, March 23, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 227).
236 Frank W. Crawford, Secretary, Lestock S.D. [School District], to Department of Indian Affairs, June 17, 1915, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 230).
237 F.W. Crawford, Secretary Treasurer, Village of Lestock, to Department of Indian Affairs, August 11, 1916, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 236-37).
238 See for example, [W.A. Orr], In Charge, Lands and Timber Branch, to R.G. Steele, Secretary Treasurer, Lestock, Saskatchewan, July 2, 1915, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 231); F.W. Crawford, Secretary Treasurer, Village of Lestock, to Department of Indian Affairs, May [18], 1917, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 242-43); S. Stewart for Assistant Deputy and Secretary, Department of Indian Affairs, to F.W. Crawford, Secretary Treasurer, Lestock, Saskatchewan, May 28, 1917, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 245).
239 See preceding section entitled “Disposition of other Townsite Lots, 1911-1927” for further information.
On March 27, 1918, a third petition from 42 village residents and nearby farmers was sent to the Minister of the Interior, Arthur Meighen, stating,

your petitioners are seriously handicapped in the conduct of their public affairs, in as much as they have no accessible [sic] property in the said Village save the few lots sold. They are unable to organize a Public School district under the Provincial School law; neither can they issue debentures to raise money for public improvements in the said Village. 240

The petitioners requested that all of IR 85 lying within range 14 (the easternmost 11 and three-quarter sections of the Reserve) be advertised and sold at public auction. 241 Assistant Deputy and Secretary J.D. McLean acknowledged the petition on April 24, 1918, and informed the residents that the matter had been placed in the hands of Commissioner W.M. Graham, “who will no doubt endeavour to meet as far as possible the wish of the petitioners, due regard being had to the interests of the Indians.” 242

GREATER PRODUCTION & SURRENDERS FOR LEASE, 1918-1919

This March 1918 petition from the Village of Lestock coincides with a new government initiative toward Indian reserves. During the First World War, DSGIA Duncan Campbell Scott felt that increased food production represented a key component to ensuring an Allied victory. Scott considered uncultivated or ‘unused’ Indian reserve land in the prairie provinces to be an ideal agricultural resource to aid the war effort. 243 In 1918, W.M. Graham, Inspector of Indian Agencies for South Saskatchewan, conceptualized the “Greater Production” scheme, intended to generate a marked increase in food production by bringing unused Indian land under cultivation. 244 Graham’s plan was favourably received by the government and, effective February 16, 1918, Graham was appointed Commissioner for Greater

---

240 Petition from “residents of the Village of Lestock and farmers adjacent thereto,” to Arthur Meighen [sic], Minister of the Interior, March 27, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 264-65).
241 Petition from “residents of the Village of Lestock and farmers adjacent thereto,” to Arthur Meighen [sic], Minister of the Interior, March 27, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 264-65).
242 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to H. Wall, Lestock, Saskatchewan, April 24, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 282).
Production for Manitoba, Saskatchewan, and Alberta. Funded by a war appropriation grant of $362,000, Commissioner Graham’s Greater Production scheme contained three distinct components:

- to encourage individual Indians to increase crop production;
- to lease reserve lands to non-Indian farmers (which resulted in the lease of 16,374 acres for cultivation and 297,024 acres for grazing); and
- to establish and operate ‘Greater Production’ farms on Indian land.245

The Muskowekwan IR 85 was one of the reserves identified by Graham for the Greater Production scheme. On March 8, 1918, Indian Agent Murison reported to the department regarding “the question of throwing open for the purposes of production that portion of the several reserves which are not being used by the Indians” in the Touchwood Agency.246 Regarding the Muskowekwan IR 85, Murison reported that there were “no large areas suitable for cultivation”, but that there were eight and one-quarter sections at the east end of the Reserve and 10 sections at the western end of the Reserve suitable for raising cattle, which “the Indians have consented to release for leasing purposes for a term of years.”247

On April 30, 1918, the “Chief and Principal Men” of the Muskowekwan First Nation signed a surrender for lease of 5,920 acres from the eastern end of IR 85 (comprising the two eastern rows of sections, plus the balance of section 6 and half of section 7.) The surrender was for a term of five years, “and [was conditional] upon such terms as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people,” as well as upon two $500 payments “to the credit of our Band,” one in 1918 and one upon expiration of the lease. The surrender also required that “the Government of Canada” build a fence around the leased land, which would become property of the First Nation when the lease expired.248

245 Brian E. Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: University of British Columbia Press, 1986), 40 (ICC Exhibit 8f, p.6). On February 16, 1918, Order in Council PC 393 was approved appointing Graham as the Commissioner of Greater Production; see Order in Council PC 393, February 16, 1918, LAC, RG 2, vol. 1189 (ICC Exhibit 1a, pp. 250-52).

246 W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, March 8, 1918, DIAND file 675/36-2, vol. 1 (ICC Exhibit 1a, p. 254).

247 W. Murison, Indian Agent, Touchwood Agency, to Secretary, Department of Indian Affairs, March 8, 1918, DIAND file 675/36-2, vol. 1 (ICC Exhibit 1a, p. 253).

248 Surrender for Lease, April 30, 1918, DIAND, Indian Lands Registry, Instrument X10077 (ICC Exhibit 1a, pp. 284-89). It is unclear from the available documents which half of section 7 was surrendered for lease; it could have been the eastern half (adjacent to section 8), the southern half (adjacent to section 6 and the town of Lestock), or the north half of section 7.
document was signed by Chief Tom Desjarlais, and Headmen Sam Akan and Windigo (using his mark), and was witnessed by Indian Agent William Murison. The accompanying affidavit of execution was sworn on the same date by Tom Desjarlais, Sam Akan, Windigo and Indian Agent Murison before a Justice of the Peace in Punnichy, Saskatchewan. The Department of Indian Affairs issued a lease to W.T. White for 6,080 acres of land on the eastern side of IR 85 for five years, beginning April 1, 1918, for an annual rent of $1,200, on condition that the lessee fence the land. This surrender for lease is not an issue in this inquiry.

On May 2, 1918, Commissioner W.M. Graham forwarded the surrender papers to the department along with the first $500 payment called for in the surrender. A bank receipt indicates the money was deposited into the Muscowequan Trust Fund Account #231. The trust account ledgers show a further $500.00 deposit for grazing leases was made to the First Nation’s interest account by Commissioner W.M. Graham on May 31, 1918.

On May 3, 1918, W.M. Martin, the Premier and Minister of Education for Saskatchewan, wrote to DSGIA Duncan C. Scott regarding the financial difficulties of the Lestock school district, and Martin urged that “if at all possible some effort should be made to dispose of a portion of the Indian lands adjoining the village,” in order to make them available for taxation. Scott replied that lands could only be sold after a surrender and informed Martin that Commissioner Graham had been instructed “to take the matter up with the Indians.”

On May 23, 1918, 29 village residents petitioned Prime Minister R.L. Borden to sell the 12 eastern sections of the Muskowekwan reserve instead of leasing out the land. They argued that the land was too valuable for grazing and could instead “be sold to Farmers that would bring it under cultivation, which would give us more accessible [sic] property.” There is no record of a departmental reply to the petitioners.
Frank W. Crawford, Secretary of the Village Council, wrote again on August 8, 1918 to ask “what is being done” with the Muskowekwan reserve land “which we asked to have surrendered in order that we could extend the boundaries of our School District.”\textsuperscript{257} Crawford stated,

\[\text{[w]e understand that a petition [sic] was circulated [sic] among the Indians of the Band, and signed by them, strongly in favor of surrendering that Portion of Reserve (at Treaty time on or about June 4th/18). We believe that at the present time this land would sell well.}\textsuperscript{258}

In a subsequent letter to the department, Crawford elaborated further, saying, “Mr. [Bournet] the Overseer of the Village of Lestock, was present and did see the Petition signed by a large majority of the Indians.”\textsuperscript{259} W.A. Orr, the Clerk in Charge of the Lands and Timber Branch of the Department of Indian Affairs, replied to Crawford on August 28, 1918, stating that no recent petition had been received from the First Nation for the sale of part of its Reserve and that the land in question had been leased for five years.\textsuperscript{260}

Six months later, on February 8, 1919, Saskatchewan Premier Martin wrote to DSGIA Scott again, requesting that “serious consideration” be given to placing the IR 85 lands surrounding Lestock on the market, “as a means of affording a measure of relief” for the school district’s financial difficulties due to a lack of taxable land.\textsuperscript{261} Scott assured Martin that “we view with sympathy the position of the people of Lestock,” but noted that “the scope of our action is necessarily restricted” because no surrender had been made.\textsuperscript{262} He suggested, however, that “some arrangement could be made” to use the lands for the settlement of returning soldiers and in a letter dated February 26, 1919, instructed Commissioner Graham to contact Martin and report to the department.\textsuperscript{263}

\begin{itemize}
\item \textsuperscript{257} Frank W. Crawford, Secretary, Village of Lestock, to Department of Indian Affairs, August 8, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 306).
\item \textsuperscript{258} Frank W. Crawford, Secretary, Village of Lestock, to Department of Indian Affairs, August 8, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 306).
\item \textsuperscript{259} W.F. Crawford, Secretary, Village of Lestock, to Department of Indian Affairs, August 21, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 308).
\item \textsuperscript{260} W.A. Orr, In Charge, Lands and Timber Branch, to W.F. Crawford, Secretary, Village of Lestock, August 28, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 309).
\item \textsuperscript{261} W.M. Martin, Minister of Education, to D.C. Scott, DSGIA, February 8, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 355-56).
\item \textsuperscript{262} Duncan C. Scott, DSGIA, to W.M. Martin, Premier and Minster of Education, Province of Saskatchewan, February 26, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 359).
\item \textsuperscript{263} Duncan C. Scott, DSGIA, to W.M. Martin, Premier and Minister of Education, Province of Saskatchewan, February 26, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 359); Duncan C. Scott, DSGIA, to W.M. Graham, Commissioner, February 26, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 358).
\end{itemize}
On August 4, 1919, the Muskowekwan First Nation signed another surrender for lease of 12 and one-half sections (8,000 acres) at the western end of its reserve for a term of five years. The conditions of that surrender included a requirement that 50 per cent of the annual rental be distributed among the individual members of the First Nation (except in the first year), and the balance placed in the First Nation’s trust account. The surrender document contains 20 signatures, and an accompanying voters list notes that 20 out of 22 members present at the meeting voted in favour of the surrender. A further 12 members were reportedly absent.

The surrender of August 4, 1919 was accepted by Order in Council PC 1943, dated September 18, 1919. This surrender for lease is not an issue in this inquiry.

CONTINUING PRESSURE ON THE CROWN FOR SURRENDER FOR SALE, 1919-1920

In August of 1919, a delegation from Lestock met with DSGIA D.C. Scott to press their concerns. In a letter to Commissioner W.M. Graham, dated August 8, 1919, Scott commented,

[...]he present situation in which the town finds itself is certainly a serious one and we are desirous of relieving conditions, if at all possible. I would like you, therefore, to consider the possibility of obtaining a surrender of a portion of the Muskowequan Reserve either for Soldiers Settlement or for sale in the usual way.

He concluded the letter by noting that “I promised the delegation that we would give this matter the consideration that it deserves and give a speedy decision.”

Graham replied to Scott on August 12, 1919, stating,
In my opinion this land will not be acceptable to the Soldier Settlement Board for Soldier Settlement purposes, and even if a surrender was got for sale in the usual way, I do not think that the land could be readily disposed of.

However, I shall take steps to have the land examined and give the Soldier Settlement Board an opportunity of stating if they desire this land for settlement purposes.269

Scott replied on September 2, 1919, saying, even if the land were not suitable for soldier settlement,

it would be well to have the surrender taken in any event. The situation there appears to be a very serious one and we must try to relieve it if at all possible. ...

From my interview with the delegation, ... I was led to believe that if this land was placed on the market it could be disposed of. I am sure that they in their own interests would make a determined effort to have it sold.270

Graham did not reply to this letter, but pressure for departmental action continued. Local Member of Parliament J. Fred Johnston wrote to D.C. Scott on September 29, 1919, asking whether any report had been received from Commissioner Graham and “when the people of this District may expect some action in the matter.”271 In November of 1919, Scott requested SGIA Arthur Meighen take up the matter personally with Graham. Scott explained:

Our Department, in addition to acting as the guardian of the Indians, has also acted as a pioneer in the development and extension of the civilization in western Canada, and it has been our policy to do all in our power to facilitate the growth and advancement of small white communities in the vicinity of Indian reserves.272

Scott’s statement indicated a departure from the department’s policy not to create townsites near reserves.

It is uncertain whether Meighen discussed the matter with Graham, but subsequent correspondence indicates some confusion existed between Graham and his superiors regarding what action was expected. When this uncertainty became apparent, MP Johnston asked Scott in December 1919 to

269 W.M. Graham, Commissioner, to Duncan C. Scott, Department of Indian Affairs, August 12, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 378-79).
“make it plain to the Commissioner just what is wanted,” and that “prompt action is looked for.” On December 5, 1919, Scott informed Johnston that:

Commissioner Graham is at present in Ottawa, and I have had a conference with him in regard to this matter. His idea is that this land should be offered to the Soldier Settlement Board, and a valuation placed upon it at as early a date as possible, which will probably be next spring, and, if the Board does not wish to acquire the land, an endeavour will be made to obtain surrender of it from the Indians. If this were done, disposition would have to be made by public competition.

On March 5, 1920, the Muskowekwan First Nation submitted a final petition to the department, again requesting the sale of the eastern two rows of sections of IR 85 (containing eight and three-quarter sections):

We the undersigned Indians of Muscowequans Band, Muscowequans Indian Reserve No. 85, Do hereby petition that we want to surrender a [sic] sale a part of our land on the East end of our reserve containing eight sections and a section on the South side of Lestock. We have leased this land two years ago for grazing purposes, expecting that we would git [sic] some money by leasing it but it seems impossible for us to get any money by leasing the land. So we have made up our minds to sell the land to the government at $15.00 per acre and $15.00 to be the upset price.

We want the money to buy farm equipment such as horses, harness and plows. Very few have power to farm and a big majority have nothing to farm with atal [sic].

Therefore we want $100.00 individually in first payment. The balance annually. The land we are offering for sale is good for growing grain of any kind.

We would like to have the money in the first week of April. Because by having money in that time we would be able to purchase anything that we want for the farm.

The petition contained 26 signatures, including those of Chief Tom Desjarlais and two Headmen, Windigo and Sam Akan.

Concurrently, on March 6, 1920, Scott replied again to MP Johnston, informing him that he had discussed the proposed surrender with Commissioner Graham again. He commented that “I am satisfied that Mr. Graham now understands that it is necessary and desirable that a surrender should be secured from the Indians in order that a proper disposal may be

---

274 Duncan C. Scott, DSGIA, to J.F. Johnston, Member of Parliament, December 5, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 400–401).
275 Chief Tom Desjarlais and others, to Duncan C. Scott, Deputy Minister, Department of Indian Affairs, March 5, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 402–403).
made of these lands,” and that “a satisfactory settlement of the question will be arrived at in the near future.”

Shortly thereafter, the District Superintendent for the Soldier Settlement Board wrote to his superiors in Ottawa, informing them of a communication received from a Solicitor in Lestock, who stated that the Muskowekwan First Nation had recently signed a petition “in which they intimate their willingness to surrender for settlement purposes” nine sections of their IR 85 near the town. In response, W.A. Orr, the Clerk in Charge of the Lands and Timber Branch of the Department of Indian Affairs informed the Soldier Settlement Board on March 24, 1920 that the petition was “receiving due consideration.”

On April 13, 1920, J.D. McLean informed Graham of the “many urgent representations” received by the department relating to the proposed surrender near Lestock and instructed him to make arrangements for the surrender “at an early date.” As Graham was unable to deal with the matter immediately, Scott inquired on June 21, 1920, if Inspector Markle should be instructed to take the surrender instead, as the Village was “pressing us in this matter.” Graham agreed that “it is desirable that something should be done, and the Indians approached with a view to obtaining an early surrender,” but suggested that Markle was “the last man in the service” who should be asked to take up the matter, given his recent failure in obtaining a surrender at Pigeon Lake. Scott concurred, but reminded Graham of the “insistent pressure” for the department to “do something to relieve the situation at Lestock in the interest of these people who want a school section,” and asked Graham to attend to the Muskowekwan surrender personally.

On August 20, 1920, Commissioner Graham requested instructions from the department to take a surrender from the Muskowekwan First Nation as

276 Duncan C. Scott, DSGIA, to J. Fred Johnston, Member of Parliament, March 6, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 404).
279 J.D. McLean, Assistant Deputy and Secretary, to W.M. Graham, Commissioner, April 13, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 416).
280 W.M. Graham, Commissioner, Department of Indian Affairs, to Duncan C. Scott, DSGIA, April 20, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 417).
well as “sufficient funds to make an advance payment” at the time of surrender. On August 28, 1920, Acting DSGIA J.D. McLean authorized Graham to take the surrender and, on September 8, 1920, $17,000 for a cash payment was forwarded to Commissioner Graham.

On September 17, 1920, Graham requested that the department confirm with the Soldier Settlement Board whether it wished to purchase the land for soldier settlement but again noted that, “speaking of it as a whole”, the land was unsuitable for that purpose. The Soldier Settlement Board informed the Department of Indian Affairs on October 1, 1920 that “the Board is not anticipating at present the acquirement of further tracts of Indian Lands,” and that it therefore did not intend to purchase any of the Muskowekwan lands.

### Sale of Remaining Town Lots Surrendered in 1910

During these eight years of correspondence regarding a proposed second surrender for sale, the department and village representatives continued to correspond regarding the past and proposed sales of the Lestock town lots surrendered in 1910. By October 1920, 159 of the 245 town lots were sold. A number of these sales were incomplete since many purchasers fell into arrears with their payments which resulted in the department cancelling 25 sales of Lestock town lots in 1920.

### Surrender of 7,485 Acres from IR 85, October 14, 1920

A month after the cash payment was forwarded to the Indian Commissioner, Graham arrived at the “Touchwood Agency” on October 14, 1920 prepared to take the surrender.

At the Community Session held in Muskowekwan in 2005, as part of this inquiry, the panel heard evidence from Elders of the community. Some Elders recalled a meeting being held to discuss the request for surrender. Elders
Peter Windago and John Pambrun stated that they attended the meeting held at the residential school on the reserve on the afternoon of October 14, 1920. That same day, the Muskowekwan First Nation signed a surrender for sale of sections 4-9 and 16-21 inclusive, township 21, range 14, W of 2nd meridian, “together with the road allowances surrounding the said sections,” but excluding the already surrendered NW quarter of section 6 and the GTP right of way and associated road allowance, containing 7,485 acres “more or less.” This tract of surrendered land covered the eastern three rows of sections from the Reserve, including all the lands leased in 1918, which amounted to three and three-quarter sections more than the First Nation had petitioned to surrender. The conditions of surrender were as follows:

TO HAVE AND TO HOLD the same unto His said Majesty THE KING, his Heirs and Successors forever, in trust to sell by Public Auction 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 be placed to our credit and interest thereon paid to us, in the usual way.

AND WE, the said Chief and Principal men of the said the Muscowequan 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 land and the disposition of the moneys derived therefrom.291

The surrender document contains nine signatures (three of which were marks),292 those of Chief Tom Desjarlais and Headmen Sam Akan and Windigo (who signed with his mark). The document bears the signatures of five witnesses, including Commissioner W.M. Graham and former Indian Agent W. Murison.293 Affidavits of Elders John Pambrun and Peter Windago taken under oath by solicitor William Pillipow, in the presence of the Saskatchewan Commissioner of Oaths, at the Muskowekwan reserve in July and September 1986,294 state that Graham did not bring the surrender forms with him to the meeting, but that he assured the First Nation that “he would put it into writing later when he returned home.”295

292 The use of the word “mark” in this paper refers to the use of a cross or other symbol in a document in place of a signature.
293 Surrender for Sale, October 14, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, pp. 453-58). By October of 1920, Murison had been succeeded by Acting Indian Agent J.B. Hardinge.
In their affidavits, both Elders stated that some Muskowekwan members were against the sale, including the two Headmen, Sam Akan and Windigo, while the Chief was in favour of selling the land if First Nation members received the money right away and were paid $50 every year. Peter Windago recalled that the members were given 15 minutes to discuss the sale before voting. He noted that they discussed the proposal, “but the money on the table looked very good to all of us and we really wanted it and we needed it right away.” He explained that, when Graham called the meeting to order 15 minutes later,

“[he] told us that if we wanted the money right away then we would have to vote for the sale. Mr. Graham then asked those who wanted the money and agreed to sell the lands to put their hands up. This was very bad because if one did not put his hand up he would be stopping someone else from getting the money. Slowly, one after another, the members put their hands up and Mr. Graham did the counting and said that the vote was to sell the land and he started paying out the money. There were some that voted against the sale.”

Although some members were opposed to selling the land, John Pambrun recalled that everyone except Headman Windago was intimidated by Graham. Pambrun felt that “even though it was not good to sell the land they might as well vote for it because Commissioner Graham would get the land anyway.” The intimidation factor was reiterated by Elder Philip Manitopyes. Elder Mervyn Wolfe recalled his uncle telling him that Philip Manitopyes had told him “in those days I guess white people were more supreme, so they either were going to be displaced or moved away from here, so they went ahead, I guess, and they signed.” This fear of forcible dispossession was discussed further at the Community Session:

Commissioner Holman: You also mentioned that they were afraid of being moved from their homes, were there actual threats made by anybody to say that if you didn’t sign this, you could end up being moved?

---

297 Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015).
298 Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015).
300 ICC Transcript, September 21-22, 2005 (Exhibit 5a, p. 21, Mervyn Wolfe).
[Elder] Mervyn Wolfe: I think where I was coming from there, because we had a Métis settlement up here, and they moved the Métis settlement, and I think the people thought, well, if we don’t cooperate here, the same thing will happen to us because it was in Lestock.301

Muskowekwan First Nation members also feared being sent to jail for disagreeing with white people. Elder Mervyn Wolfe explained:

Well, what my uncles were told they did, and it was just -- you couldn’t get away from it, and if you did, if you did argue or anything, then you would go to court, more than likely go to court or be put in jail for anything that you said that was wrong to them in their eyes.

... Well, I guess the thought would be, that they had at that time, would be either to go to jail or be moved.302

This fear of incarceration was reiterated by Elder Albert Oochoo who explained “they fooled the people and they were -- they were scared to go to jail. The people were scared to go to jail.”303

At the Community Session, Elders Mervyn Wolfe, Joe Desjarlais and Donald Severight also recalled being told that Muskowekwan members had a difficult life at the time the 1920 surrender was taken. Joe Desjarlais remembered his grandfather, The Fox, told him: “since we’re having a hard time, he said, I don’t like the idea of selling part of my reserve, he said, but since we’re having such a hard time, I guess I’ll have to go along with it, he said.”304 Elder Donald Severight recalled being told by Muskowekwan Elders that:

[t]here wasn’t very many people at that time. Through sickness has put a lot of people under. There was a big epidemic in that time and era, so .. and the living was scarcely a hand-to-mouth existence through what they could get a hold of.

And that when deals came on for these land sales, according to the Elders it wasn’t .. it wasn’t sold, but then it was forcibly committed through the .. through the Indian agent and the farming instructor, and also a priest was involved. So they

301 ICC Transcript, September 21-22, 2005 (Exhibit 5a, pp. 23-24, Mervyn Wolfe).
302 ICC Transcript, September 21-22, 2005 (Exhibit 5a, pp. 24-25, Mervyn Wolfe).
304 ICC Transcript, September 21-22, 2005 (Exhibit 5a, p. 48, Joe Desjarlais).
had no choice, but they were weakened through starvation and sickness, and they had to submit through not ... not selling, but to lease the land...305

The affidavit of execution accompanying the surrender was sworn on the same date by W.M. Graham, Thomas Desjarlais, Sam Fred Akan and Windigo before Acting Indian Agent J.B. Hardinge, acting as a justice of the peace, in the Village of Punnichy, Saskatchewan.306

Commissioner Graham also prepared a voters list, dated October 14, 1920, which records the names of 29 voters “in favour of surrender” and six voters as “absentees.” The voters list does not indicate there were any votes against the surrender. The names of the Chief and both Headmen are included among those present and voting in favour of the surrender.307 It should be noted that, in June of 1920, the Muskowekwan First Nation had consented to the membership transfer from Gordon’s First Nation of David Severight (spelled “Severite” on the voters list), who was recorded as having voted in favour of the surrender, but that transfer was not approved by the department until December of 1920.308

Elder John Pambrun stated in his affidavit that he voted at the meeting,309 but his name does not appear on the record of the vote prepared by Graham. There is also conflicting oral evidence around the reason that John Pambrun was at the meeting. At the September 2005 Community Session, Elder Roland Desjarlais recounted that his maternal grandfather, John Pambrun, told him “that he was at the door of a surrender’s meeting and his job was to keep people out, to keep the underage people out, to control the underage people, not to have children or the younger people come in.”310 Mr. Desjarlais continued,

I don’t believe he did tell me he did vote, but I thought he did. But he said he was — at the time he was 20 years old and that he wasn’t old enough to vote, but he was actually at the door for the purpose of keeping people out of the meeting.311

Elder John Pambrun Jr. recalled his father being about 21 years of age at the time of the 1920 surrender and explained “[n]o, he never told me nothing about that he had to stand by the door and guard it or anything like that. He

305 ICC Transcript, September 21-22, 2005 (Exhibit 5a, pp. 162-63, Donald Severight).
307 Voters List, October 14, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, pp. 460-61).
308 Consent of Band to Transfer (David Severight), June 1, 1920, LAC, RG 10, vol. 3989, file 17378-3F (ICC Exhibit 1a, pp. 420); J.D. McLean, Assistant Deputy and Secretary, to J.B. Hardinge, Indian Agent, December 8, 1920, LAC, RG 10, vol. 3989, file 17378-3F (ICC Exhibit 1a, p. 480).
310 ICC Transcript, September 21-22, 2005 (ICC Exhibit 5a, p. 74, Roland Desjarlais).
311 ICC Transcript, September 21-22, 2005 (ICC Exhibit 5a, p. 74-75, Roland Desjarlais).
just said he was in the room at the time they had the meeting at the mission school in the classroom, that’s what he said.”

There is also conflicting evidence about the presence of another member, Lawrence Desjarlais. Elder Joe Desjarlais recalled that his father, Lawrence Desjarlais, attended the meeting with Joe Desjarlais’ grandfather (Gregory Desjarlais - The Fox). The voters list, however, indicates that both Lawrence and Gregory Desjarlais were absent.

In their 1986 affidavits, both John Pambrun and Peter Windago recalled the presence of Commissioner Graham, the Indian Agent, a clerk and RCMP officers at the meeting, but both indicated they saw no notices posted in advance regarding the meeting or its purpose. Peter Windago recalled that “there was no information given to us in writing about the meeting or sale of land or any other information, except what Mr. Graham told us at the meeting.” He remembered that, on the day before the meeting, he and a number of other men were summoned back to the reserve for a meeting, but did not know what the meeting was about. According to Mr. Windago and Mr. Pambrun, Graham said he had come to buy 12 sections of land from the east side of the reserve, but there was no discussion of exactly which land was being sold, or for what price.

Both men remembered that Commissioner Graham brought a suitcase filled with money, and said he would pay each person $100. Peter Windago recalled:

Mr. Graham brought with him a suitcase from which he took out very much money in bundles and put the money on the table. I had never seen so much money in my life. It was rolled up in bundles and there was rubber bands put around it. Mr. Graham placed many bundles of money on the table. ...

... Mr. Graham started the meeting and said that he had come to buy the twelve (12) sections of land on the other side of the reserve. He told us that we did not need the land and that it would be best if we sold it. He further stated that with the money on the table he could pay every Indian $100.00 and that was a lot of money.
Also dated October 14, 1920 is a “Pay-List of Surrender of Land” for the Muskowekwan First Nation. The surrender paylists recorded a payment of $100 to each of 170 Muskowekwan members, including 36 men.\(^{319}\) Elder Margaret Pelletier was not at the meeting, but was told by others that Graham “brought a lot of money” to the meeting.\(^{320}\) Graham also promised that additional money would be placed to the First Nation’s credit, either with a bank or the department, and that each member would receive an interest payment every year. Peter Windago and Philip Manitopyes understood that the payment would be $50 per year, and John Pambrun understood that the payment would be $100 per year.\(^{321}\) Any payments made to the First Nation resulting from any surrender, are not at issue in this inquiry.

As mentioned previously, David Severight and another man, David Gordon, both received the initial payments made at the time of the surrender in October of 1920. The Muskowekwan First Nation had consented to the transfer of David Gordon on August 3, 1920, and to the transfer of David Severight on June 1, 1920\(^{322}\) (both of whom were previously members of Gordon First Nation), but those transfers were not approved by the department until December of that year.\(^{323}\) Commissioner Graham explained that he paid these men because the First Nation had already consented to their transfer and “there did not appear to me to be any good reason why the Department should withhold their approval.”\(^{324}\)

However, David Gordon’s name does not appear on the voters list as either a voter or an absentee.

On October 21, 1920, Commissioner Graham wrote to DSGIA Duncan Campbell Scott regarding the recent surrender, saying,

I beg to inform you that I proceeded to the Touchwood Agency on the 14th inst. and secured a surrender for sale by public auction of approximately seven


\(^{320}\) Affidavit of Margaret Pelletier, 1986, no file reference available (ICC Exhibit 1a, p. 1025).

\(^{321}\) Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, p. 1013); Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, p. 1021); Affidavit of Philip Manitopyes, September 30, 1986 (ICC Exhibit 1a pp. 1022-1023).

\(^{322}\) Chief and Councillors, Muscowequan Band of Indians, Consent to Transfer, June 1, 1920, LAC RG 10, vol. 3989, file 173738-3F (ICC Exhibit 1a pp. 422); Chief and Councillors, Muscowequan Band of Indians, Consent to Transfer, August 3, 1920, LAC RG 10, vol. 3989, file 173738-3F (ICC Exhibit 1a p. 430).

\(^{323}\) J.D. McLean, Assistant Deputy and Secretary, to J.B. Hardinge, Indian Agent, December 8, 1920, LAC RG 10, vol. 3989, file 173738-3F (ICC Exhibit 1a, p. 479); J.D. McLean, Assistant Deputy and Secretary, to J.B. Hardinge, Indian Agent, December 8, 1920, LAC RG 10, vol. 3989, file 173738-3F (ICC Exhibit 1a, p. 480).

\(^{324}\) W.M. Graham, Indian Commissioner, Department of Indian Affairs, to D.C. Scott, DSGIA, October 21, 1920, LAC, RG 10, vol. 6706, file 121A-S-41-1 (ICC Exhibit 1a, p. 471).
thousand four hundred and eighty-five (7485) acres of land from the members of the Muscowequan Reserve No. 85.

This Band were given the regular legal notice of the meeting and there was a representative number of the members present. There are thirty-five members eligible to vote; twenty nine were present and all voted in favor of the surrender. There were six absentees. One hundred and seventy (170) members were paid $100.00 each, making the total payment $17000.00.325

On November 4, 1920, Order in Council PC 2680 accepted the surrender of 7,485 acres, “the said surrender having been given in order that the area covered thereby may be sold for the benefit of the band.”326

The following March, when Muskowekwan members requested the promised interest payment, they discovered “that there was no agreement and there was no interest as Mr. Graham had promised the day of the vote.”327 In his 1986 affidavit, Elder Philip Manitopyes stated that Lucian Bruce and others, including himself, formed a committee to hire a lawyer and take action against the government for “stealing” their land. They were unable to pursue legal action, however, because the members could not raise the money required to retain a lawyer.328

Elder Margaret Pelletier said that, after the meeting, there was “much discussion” among Muskowekwan members about what had taken place at the meeting and why so much land had been sold for $100 each.329 Peter Windago also said that “the people talked about this a long time after and felt that they had been cheated by Mr. Graham because he did not tell the truth.”330

SALE OF LANDS SURRENDERED IN 1920

Beginning with an auction in November of 1921, the Department of Indian Affairs experienced disappointing results in its efforts to sell the IR 85 lands surrendered in 1920, with the last three quarter sections being sold by tender in 1956.331

325 W.M. Graham, Indian Commissioner, Department of Indian Affairs, to D.C. Scott, DSGIA, October 21, 1920, LAC, Br. 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 471).
326 Order in Council PC 2680, November 4, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, p. 475).
327 Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015).
328 Affidavit of Philip Manitopyes, September 30, 1986 (ICC Exhibit 1a, p. 1023).
329 Affidavit of Margaret Pelletier, 1986, no file reference available (ICC Exhibit 1a, p. 1025).
It should be noted, however, that the administration and sales of the IR 85 lands surrendered in 1920 are not at issue in this inquiry.
APPENDIX B

 ISSUES

1 Were the provisions of the applicable Indian Act complied with when the surrenders were obtained?

2 Did the Crown breach any pre-surrender fiduciary duty owed to the Muskowekwan First Nation?

3 Was either surrender obtained by the Crown as a result of undue influence, unconscionable circumstances or negligent misrepresentation by the Crown?

4 Did the Crown breach any post-surrender fiduciary obligations owed to the Muskowekwan First Nation following either or both surrenders?

5 Was the 1920 surrender for the sale of reserve lands invalidated because of the fact a 1918 surrender for lease of a portion of the same lands was not revoked?

6 If a valid surrender was taken, did it include the mines and minerals associated with the lands, and if so, did the Crown breach any fiduciary or trust obligations when it failed to reserve the mines and minerals for the benefit of the Muskowekwan First Nation?

7 Did the Crown breach a post-surrender fiduciary duty to the Muskowekwan First Nation:

   a) By failing to obtain adequate compensation for 702.5 acres of surface water surrendered in 1920?

   b) By taking title to 281,000 acres more than approved by the First Nation surrender and the Order in Council dated 4 November 1920?

8 Did the Crown breach a post-surrender fiduciary duty to the Muskowekwan First Nation:
a) By failing to subdivide for sale 117.76 acres of lands surrendered in 1910 and failing to survey 78.96 acres of the lands for 26 years?

b) By failing to sell at public auction, pursuant to the terms of the surrender, the lands surrendered in 1910?

c) By giving to the Province of Saskatchewan 2.73 acres of land for parkland for no consideration, contrary to the terms of the 1910 surrender? By selling lands to the Lestock School District for prices well below the assessed value and by failing to pay the sale proceeds to the First Nation for 19 years?

d) By permitting an exploitative bargain through the sale of many of the lots at prices as much as 31% below the appraised value?

e) By withholding from sale more than 71 acres of land surrendered in 1910 for more than 10 years?

f) By failing to complete the sales prior to the coming into force of the Farm Creditors Arrangement Act (FCAA) in 1934, and by giving priority to the FCAA over the 1927 Indian Act?

g) By leasing, rather than selling, portions of the lands surrendered in 1920 contrary to the terms of the surrender?
APPENDIX C

INTERIM DECISIONS

The panel made a number of interim decisions during the course of this inquiry. For example, on August 22, 2005, the panel decided it did not want to categorize issues into “provisional” issues and other issues, as had been suggested, since the First Nation had raised certain issues with Canada after the rejection of its claim. Instead, the panel directed that the Community Session should proceed on the basis of all the issues, but that some issues, raised after Canada’s rejection of the claim, would be identified as being contained within the First Nation’s 1999 supplemental submissions.332

On November 10, 2005, the panel also indicated it needed research done into the sale of lands in the area bordering on IR 85 in order to address the post-surrender fiduciary duties of the Crown raised in Issue # 4).333

On November 17, 2005, counsel for the First Nation made submissions as to the need to have three research projects completed. The first was research into the value of $100 in 1920, to be conducted by Dr. Richard Schoney. The second was research into comparative soil analysis of lands on IR 85, proposed to be completed by Dave Hoffman. The third was to be a report by Public History Inc. on the rules of the Muskowekwan First Nation in 1910 and 1920 concerning the calling of a meeting of the Band.334 The request was resubmitted on November 23, 2005 asking that the panel make a determination concerning relevancy of the proposed expert evidence as well.335 Canada responded that the proposed report by Dr. Schoney would add little to the quality or weight of the First Nation’s arguments, but raised a larger concern that, if the Band were alleging that Canada had induced it to surrender its “best” lands, this was a new allegation that required a new claim to be submitted to Canada. 336

The panel decided on December 20, 2005 that it was important that Dr. Schoney determine the cost of farming equipment in 1920, given the First Nation’s petition in 1920 indicating that band members wanted to surrender some of their reserve lands in order to purchase such equipment. The panel asked that the parties explore the possibility of joint research in this regard. Canada later advised that it would not participate in joint research, and the First Nation proceeded with Dr. Schoney’s research on its own. At the same time, the panel approved the research project by Public History Inc. concerning “rules of the Band.”

The panel also indicated that it would like more information on the request for soil analysis research to be done by David Hoffman in light of the fact that the argument raised could amount to a new claim.

In March, 2006, the First Nation made submissions to the panel to the effect that the Hoffman Report was needed for the ICC to determine whether the surrender was an “exploitative bargain” under the Apsassin test. It asserted that this was not raising a new claim, as the First Nation had raised the issue of a “pre-surrender fiduciary duty of the Crown to prevent an exploitative bargain” in its July 31, 1996 submissions to Canada. It argued that similar soil research had been referenced in the Kahkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry report, and that similar expert evidence had been considered in the Roseau River Anishinabe First Nation: 1903 Surrender Inquiry report as well.

Canada responded that the First Nation had never before raised the “quality of lands” issue either with the Specific Claims Branch or with the ICC and therefore Canada had not had an opportunity to research and consider the issue. Canada took the position that this was a new claim, and that since it had not been rejected by the Minister of Indian Affairs, the ICC had no authority to inquire into it, regardless of its validity. In its reply, the First Nation repeated its arguments that the claim was not new, and that the Canada’s 1997 rejection of the claim had referred specifically to Canada’s position that the Crown’s duty was limited to preventing an exploitative bargain, and that Canada had done so.

337 Email, Douglas Faulkner, Legal Counsel, DIAND, to Murray Hinds, January 19, 2006 (ICC File 2107-34-1, 105743).
On July 18, 2006, Canada advised that it was prepared to agree that the “quality of lands” issue could be considered within the current inquiry without the First Nation being required to file a new claim. 342 The terms of reference for the Hoffman report were approved by the panel on October 19, 2006, and the report was commissioned as joint research. 343

342 Email, Douglas Faulkner, Legal Counsel, DIAND, to Stephen Pillipow, July 18, 2006 (ICC File 2107-34-1, 106925).
## APPENDIX D

### CHRONOLOGY

1. **Planning conference**
   - Location: Saskatoon
   - Date: February 15, 2005

2. **Community session**
   - Location: Muskowekwan First Nation
   - Date: September 21-22, 2005
   - The Commission heard from Mervyn Wolfe, Delores Windigo, Joe Desjarlais, Harvey Desjarlais, Roland Desjarlais, John Pambrun, Jr., Tom Pambrun, Rosalie Pambrun, Nora Pambrun, Albert Oochoo, Donald Severight, Katherine Windigo, Beatrice Bruce, Myrtle Crane, Raymond Arcand, Alfred Bigsky.

3. **Interim decisions**
   - Description: Interim decision concerning provisional issues, August 22, 2005
   - Description: Interim decision concerning research projects, November 10, 2005 and November 17, 2005

   **Submissions with respect to comparative soil analysis research**
   - Letter, Murray Hinds, Muskowekwan First Nation, March 3, 2006
   - Letter, Douglas Faulkner, Legal Counsel, DIAND, March 17, 2006
   - Letter, Murray Hinds, Muskowekwan First Nation, March 31, 2006

   Interim decision concerning terms of reference for joint research, October 19, 2006

4. **Written legal submissions**
   - **Submissions to oral session**
     - Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008
     - Written Submission on Behalf of Canada, April 24, 2008
     - Reply Submission on Behalf of the Muskowekwan First Nation, May 8, 2008

5. **Oral legal submissions**
   - **Oral session**
     - Location: Saskatoon, Saskatchewan
     - Date: May 29, 2008
6 Content of formal record
The formal record of the Muskowekwan First Nation 1910 and 1920 Surrenders Inquiry consists of the following materials:

- written submissions relating to the research issue
- the document collection (1 volume of documents with an annotated index, Exhibit 1a, together with Exhibits 1b-1L)
- Exhibits 2-9 tendered during the inquiry
- transcripts of community session (one volume) (Exhibit 5a)
- Transcript of oral session (one volume)

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

SUMMARY 715

PART I  INTRODUCTION 718
The Commission’s Mandate and Mediation Process 719

PART II  THE PILOT PROJECT 721
Michipicoten Pilot Project 721
  Protocol Agreement 723
  The Pilot Project Process 724
The Community Session 725
  Communications – Newsletters 726

PART III  HISTORICAL BACKGROUND 729
Surrender 75, April 10, 1855 731
Surrender 423, July 19, 1899 733
Surrender 438, September 10, 1900 735
Expropriation of Railway Right of Way, 1927 735
The Michipicoten People Seek a Place to Settle 736

PART IV  THE CLAIMS – RESEARCH, NEGOTIATIONS, AND RESOLUTION 740
Grievances Researched – No Claim 740
  Timber Claim 740
    Great Lakes Power Transmission Right of Way 741
    Ontario Hydro Transmission Right of Way 741
  Relocation Claim 742
Resolved through Administrative Referral 743
  Chapleau IR 61 and Missinabie IR 62 743
  1927 Right of Way 744
Claims Settled 744
  Two Survey Claims (1898 and 1899) – Settled May 2000 ($120,000) 744
  Three Algoma Surrenders (1855, 1899, and 1900) – Settled April 2004 ($11.7 million) 746
CONTENTS

1899 and 1900 Algoma Surrenders  746
1855 Surrender Claim  746
Negotiations of the Algoma Surrender Claims  747
Boundary Claim – Settled January 2008 ($52.3 million plus 3,000 acres of Ontario Crown land)  747
Province of Ontario  750
Canada’s Settlement Offer  751
Ratification  751

PART V  CONCLUSION  752

APPENDICES
A  Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs and Northern Development, October 29, 1996  755
B  Chief John S. Peterson, Michipicoten First Nation, to W. Austin, Assistant Deputy Minister, Indian and Northern Affairs, May 7, 2001  768
MICHIPICOTEN FIRST NATION — PILOT PROJECT MEDIATION

SUMMARY

MICHIPICOTEN FIRST NATION
PILOT PROJECT MEDIATION
Ontario

The report may be cited as Indian Claims Commission, Michipicoten First Nation: Pilot Project Mediation (Ottawa, October 2008), reported (2009) 24 ICCP 711.

This summary is intended for research purposes only. For greater detail, the reader should refer to the published report.

Treaties — Robinson-Superior Treaty (1850); Indian Act — Surrender — Expropriation; Band — Trust Fund; Rights of Way — Hydro Line — Railway; Mandate of Indian Claims Commission — Mediation; Ontario

THE PILOT PROJECT AND THE SPECIFIC CLAIMS

On October 29, 1996, the Chief of the Michipicoten First Nation wrote to the Minister of Indian Affairs to propose that Canada and the First Nation work together to develop a common research and review process to resolve the First Nation’s specific claims. Two claims, both relating to transmission rights of way, had been submitted to the Specific Claims Branch (SCB) of the Department of Indian Affairs and Northern Development (DIAND), and were under review. The First Nation had identified 11 other possible claims which it wanted to research and develop jointly with SCB and Department of Justice personnel to test whether this proposed collaboration could make the claims process less cumbersome. Both Canada and the First Nation requested that the Indian Claims Commission (ICC) facilitate the process.

BACKGROUND

The ICC’s involvement in this claim related only to its mediation mandate. As mediator, the ICC did not receive historical records or legal submissions from the parties.

On September 7, 1850, Chief Totomenai signed the Robinson-Superior Treaty on behalf of his followers living on the shores of Lake Superior near the Michipicoten and Doré Rivers. The treaty specified that the First Nation would receive a reserve “four miles square” at Gros Cap, where they were located. Because of interference by the local Hudson’s Bay Company officials, the reserve was not surveyed in July 1853.
when the surveyor and Indian Affairs official met with the Chief. Instead, the surveyor produced a "coast sketch" of a reserve that was smaller than stipulated in the treaty and in a location other than that requested by the Chief. When the reserve was finally surveyed in about 1899, it was identical to this sketch. This formed the basis for the boundary claim.

There were three major surrenders of land from the Michipicoten Reserve. In the first, on April 10, 1855, one square mile was surrendered for sale to a mining developer. Only Chief Totomenai signed the surrender, and there is no evidence that a meeting was held or a vote taken. On July 19, 1899, 1,000 acres were surrendered to be sold to the Algoma Central Railway Company to provide a transportation corridor from the harbour to Wawa, a new townsite which had been established as a result of a short-lived gold rush in the area. Shortly after construction of the railway began, it became apparent that the line trespassed onto non-surrendered reserve land. To correct this, an additional 481.5 acres was surrendered for sale. The Chief and several band members signed these two surrenders, but there was no voters list and no evidence of a meeting as required by the Indian Act. These three surrenders were referred to during the pilot project as the Algoma surrenders.

When the surveyors for the railway company were defining the surrendered property, it became apparent that the reserve had never been surveyed. The Department of Indian Affairs authorized the surveyors to define the boundaries of the reserve in two separate surveys in 1898 and 1899 and paid for the work with money held in trust for the band, without authorization from the Chief and Council. These are the survey claims.

In subsequent years, there were additional losses of land and assets. In 1925, the merchantable timber on the reserve was surrendered. In 1927, 13.9 acres of land was expropriated to provide the Algoma Central Railway additional land for its right of way. In 1939, the Great Lakes Power Company built a transmission line through the reserve without the approval of the Chief and Council. In 1965, Ontario Hydro built a transmission line across the reserve without the approval of the First Nation.

On account of these various land transactions, the Michipicoten people had to move their houses, schools, and churches several times. Some of these moves found them located on land that was unsuitable for a settlement, and their health and welfare suffered. Many band members chose to leave the reserve and settle in communities as far away as Sault Ste Marie and Sudbury. Some of the descendants of those people came to the Michipicoten reserve for the first time when the pilot project held a community session to gather evidence from the band members.
MATTERS FACILITATED
The Commission’s role was to chair the pilot project sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

OUTCOME
In January 2008, 11 years after the pilot project began, 13 potential grievances had been researched, reviewed, and settled. Six claims were submitted and settled for a total monetary compensation of $64 million plus the addition of 3,000 acres of Ontario Crown land to the reserve and the authorization to acquire an additional 5,400 acres which could be given reserve status. The breakdown is as follows:

- two survey claims, 1898 and 1899 – settled May 2000 ($120,000)
- three Algoma surrender claims, 1855, 1898, and 1899 – settled April 2004 ($11.7 million)
- one boundary claim – settled January 2008 ($52.3 million plus 3,000 acres from Ontario Crown land)

Three other claims were resolved, to the satisfaction of the First Nation, through administrative referral (the two claims relating to Chapleau Indian Reserve (IR) 61 and Missinabie IR 62, and the 1927 railway right of way claim).

There were four additional claims where the parties agreed that there was no breach of lawful obligation and the files were closed (the timber claim, the two transmission rights of way, and the relocation claim).

REFERENCES
The ICC does no independent research during mediation and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.
PART I

INTRODUCTION

The Anishinabe people of Michipicoten have occupied the territory near the mouth of the Michipicoten River on the northeast shore of Lake Superior for over 700 years. Their reserve at this location, Gros Cap Indian Reserve (IR) 49, about 24 kilometres south of Wawa, Ontario, was identified in the schedule attached to the Robinson-Superior Treaty of 1850. As originally surveyed, it was a mountainous 4,458 hectares of rock, bush, forest, lakes, and rivers on Lake Superior; subsequent surrenders and expropriations took away almost all the frontage on the lake and left the First Nation with only about 3,500 hectares of the original reserve. The Michipicoten First Nation also has approximately 182 hectares of reserve land at three other locations: Missinabie IR 62 and Chapleau IR 61 (both of which were purchased by band members and set aside as reserves in 1905), and Gros Cap IR 49A, part of the original reserve which was surrendered in 1900 but returned and set aside as reserve land in 1955. As of December 2007, the First Nation had a registered population of 751, of whom only 56 reside on the reserves. Other band members live in communities in the region and in the cities of Sault Ste Marie and Thunder Bay.

On October 29, 1996, Sam Stone, Chief of the Michipicoten First Nation, wrote to the Minister of Indian Affairs to suggest that they work together to develop a common research and review process to resolve the First Nation’s 13 specific claims in a "coherent, cooperative and timely fashion." The Minister agreed. Canada and the First Nation, with the assistance of the Indian Claims Commission, entered into a pilot project whereby the resolution of claims would be based on "joint historical research, joint identification of issues, coordinated legal research and joint presentations to Department of

2 Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs, October 29, 1996, ICC file 2105-30-1-1, vol. 1.
Justice lawyers, if necessary.3 In January 2008, 11 years and two months after sending that letter, the process was complete. All the land issues of the Michipicoten First Nation were researched. Six claims were submitted, accepted for negotiations, and settled, with the First Nation receiving compensation packages totalling over $64 million plus the addition of 3,000 acres to its reserve; three other issues were resolved, to the complete satisfaction of the First Nation, through administrative referral; and four files were closed after the grievances were found not to be in breach of a lawful obligation by Canada.

This report outlines the process and success of the Michipicoten Pilot Project. It will not provide a full history of the Michipicoten First Nation or its various land claims, but will summarize material produced during the pilot project to provide the historical background to the claims. Although the Commission is not at liberty, based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, this report will summarize the events leading up to the resolution of the claims and illustrate the Commission’s role in the process.

THE COMMISSION’S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian claims in Canada might be improved. Following the Commission’s establishment by Order in Council4 on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into its specific claim; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process. An inquiry may take place when a claim has been rejected or when the Minister

---

3 Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs, October 29, 1996, ICC file 2105-30-1-1, vol. 1.
4 The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, among other things, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.
has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

The Commission provides broad mediation, facilitation, and other administrative services at the request of both the First Nation and the Government of Canada. These services are available at any stage of the specific claims process, including research, submission, review, acceptance, and negotiation. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The mediation process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.
PART II

THE PILOT PROJECT

MICHIPICOTEN PILOT PROJECT

On October 29, 1996, Michipicoten Chief Sam Stone wrote to the then Minister of Indian Affairs, Ron Irwin, suggesting an alternative method to resolve land claim issues. In his letter, he summarized the history of the land transactions involving his reserve which they had been unable to bring to the government’s attention:

For many years now Michipicoten has attempted to have these historic grievances addressed through the Specific Claims process, without success. Requests for information and help regarding claims issues, made to both the Union of Ontario Indians and to INAC [Indian and Northern Affairs Canada], date back to the early 1970’s. Our requests for assistance fell on deaf ears.5

INAC provided funding to the Union of Ontario Indians to research land claims for the First Nations under its umbrella, including Michipicoten. In the 1990s, the Union did not have a central research office, opting instead to divide the funding among its member bands. Michipicoten’s share was approximately $9,000 for the entire year.6 This was not an adequate amount to cover the costs for historical research and legal advice for even one of its claims.

In 1993, the Michipicoten First Nation discovered the benefits of joint research as part of Ontario Hydro’s Past Grievance Process. When Hydro approached First Nations in Northern Ontario in the late 1980s and early 1990s to seek permission to run transmission lines over reserve land, the bands indicated that they wanted to discuss outstanding grievances relating to previous Hydro land deals before agreeing to any new ones. Hydro listened and developed a non-adversarial, joint problem-solving process based loosely

5 Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs, October 29, 1996, ICC file 2105-30-1-1, vol. 1.
on the Harvard model. Lawyers were excluded from the process – instead representatives from Hydro sat down with representatives from the First Nations to try to come to a reasonable settlement of the issues. To get a good clear statement of facts, the parties hired one researcher, paid for by Hydro, to work for both sides to collect the documents needed in the negotiations. This was a very successful process for the Michipicoten First Nation, but it was not enough to satisfy all its needs:

Through that process adequate funds were made available to research the full history regarding Ontario Hydro’s acquisition of a right-of-way across the reserve in the 1960’s. A fair and honourable Agreement was reached with Ontario Hydro and this was celebrated with a feast in our community earlier this summer.

As a result of the process with Ontario Hydro, we were able to research enough of our history to submit two specific claims, one regarding the right-of-way for Ontario Hydro and another regarding a right-of-way granted to Great Lakes Power. However, we have no funds available to us to research and submit any further specific claims.7

Settling land claims was an urgent matter for this Band. Some of the reserve land previously surrendered and taken up for railway purposes was for sale on the open market, but the Band could not afford to buy it. Several economic initiatives were also in progress, and the First Nation needed funds to continue. Chief Stone proposed joint Indian Affairs / First Nation research and legal review of claims, with a Department of Justice lawyer and Specific Claims Branch negotiator involved early in the process and with the First Nation and its legal counsel involved in decisions at every stage:

We want to build on our strengths and develop the real potential of these lands and of our people, but in order to do so we need to clear up our historic grievances with Canada and regain control of as much of our land as possible.

To that end we make the following proposal: we would like to meet with you to discuss a work plan and budget for a special project designed to identify, research and resolve all of Michipicoten’s specific claims in a coherent, cooperative and timely fashion. We would be prepared to consider joint historical research, joint identification of issues, coordinated legal research and joint presentations to Department of Justice lawyers, if necessary. We would be pleased to involve Ontario at any stage of these proceedings.

The large number of claims issues that are serious, yet relatively untouched, represents a unique opportunity for Canada and Michipicoten to design and implement a special process. These claims are of the utmost importance to my

7 Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs, October 29, 1996, ICC file 2105-30-1-1, vol. 1.
First Nation and we are prepared to devote the necessary time and energy to make this special project work. All that we lack is adequate resources to make it happen.8

This letter to Minister Irwin arrived at the Department of Indian Affairs and Northern Development (DIAND) at a time when the department was open to new ideas in the resolution of specific land claims. Several other joint research initiatives with First Nations in Quebec and New Brunswick were just beginning, and the staff at Specific Claims saw merit in the Michipicoten proposal.

The original proposal did not mention participation by the Indian Claims Commission (ICC). However, in November 1996, just after Chief Stone wrote to the Minister, Concorde Inc. completed a "Review of the Indian Specific Claims Commission" for the Assembly of First Nations. Among its many recommendations, one in particular was that the mandate of the ICC be expanded to allow it to be involved with claims from the beginning of the process:

2. a) that expansion of the Commission’s mandate include provisions for the Commission to receive a “statement of grievance” from a Band at the beginning of the claim settlement process and have authority to convene Canada and the Band in a joint "Claim Process Review Session" where cost-effective options for determining the nature of the grievance and the dispute resolution process to follow will be determined. Either party may choose after the session to proceed with the claim process as it currently exists, including appeal of the Commission when, through the existing process, a claim is not accepted by Canada.9

The parties thought this recommendation might be tested in the proposed Michipicoten Pilot Project and so asked the ICC to facilitate the process.10 The ICC agreed and became involved with the pilot project from its inception.

Protocol Agreement
The first order of business for the pilot project participants was to develop the protocol to be followed and to define the role of the Indian Claims Commission in the project. In the Protocol Agreement, signed on March 25, 1997, the parties agreed to participate in a good faith, interest-based process,

8 Chief Sam Stone, Michipicoten First Nation, to Ron Irwin, Minister of Indian Affairs, October 29, 1996, ICC file 2105-30-1-1, vol. 1.
and Canada agreed to provide the level of funding necessary to allow the First Nation to fully participate in all aspects of the pilot project. The process was divided into two phases: (1) claim identification and assessment, and (2) negotiations. It was agreed that, whenever possible, the same people would be involved in both phases. In Phase 1, the parties would work together to choose a researcher and to develop terms of reference. When initial findings were presented to the table, the parties would jointly assess the information, identify issues or allegations of any potential claim, and direct further research if needed, always on a "without prejudice" basis. The table would then prepare the claim to submit to the Department of Justice for a legal opinion.

For the most part, the role of the Indian Claims Commission as impartial facilitator focused on matters relating to process throughout the various stages of the pilot project. With the agreement of the parties, the Commission chaired meetings, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for meetings. The Commission acted as research coordinator for the various studies required during the negotiations and was also available to mediate disputes when requested to do so by the parties or to assist them in arranging for further mediation.

**The Pilot Project Process**

By the time the Protocol Agreement was signed in March 1997, most of the members of the pilot project team were in place. The Michipicoten First Nation was represented by its Chief, as well as its legal counsel and negotiation advisor. For Canada, the Specific Claims Branch assigned an analyst with over 20 years' experience in research and analysis, with particular expertise in claims from the Robinson-Superior area. The Department of Justice assigned a lawyer to join the team from the outset to ensure familiarity with the factual and legal issues as they were developed. A federal negotiator joined the table after the first claims were accepted. Together, these parties agreed to hire one researcher, a person who had experience both with specific claims and as the joint researcher on the Michipicoten / Ontario Hydro Past Grievance Process.

The participants decided that, in the beginning at least, full table meetings would be convened monthly, with various sub-groups meeting as required. Budgets were prepared to apply for funding through DIAND to cover the expenses of the joint researcher, the First Nation’s legal counsel, its negotiator, and the participation of the Chief at meetings. Most importantly,
the parties chose the focus of the initial research and established the terms of reference for that work.

THE COMMUNITY SESSION
In the existing specific claims process, there is no formal method of incorporating Elders’ oral testimony into a claim submission. On the other hand, the Indian Claims Commission’s inquiry process includes a community session at which First Nation Elders tell the Commissioners what they know, either from eyewitness account or from the community’s oral tradition (information passed from generation to generation). The pilot project team decided to use the ICC model, altering it slightly to adapt to its needs.

ICC Commissioner Roger Augustine chaired the meeting, held on the Michipicoten Reserve on September 9 and 10, 1997, and Olive Dickason moderated the proceedings. Dr Dickason, a member of the Order of Canada and an Elder for the Women of the Metis Nation of Canada, is a leading Canadian historian known for her research and documentation of Aboriginal history. She agreed to pose the questions to the Elders. Although the parties worked together to develop a list of pre-approved questions relating to various land transactions, they also allowed Dr Dickason to change their order and wording, and to ask any other questions that she thought appropriate.

At the request of the First Nation’s negotiating team, Elders were asked to swear an oath, using either a Bible or a sacred Eagle Feather, before giving their oral testimony. The ICC made all the necessary arrangements to preserve the evidence for the record, including arranging for court reporters as well as audio and video taping of the proceedings. Every effort was made to avoid the appearance of formality – the technical people were as unobtrusive as possible, the distance between Dr Dickason and the Elder was minimized, and the lawyers were seated to the side of the room.

Sixteen Elders came forward at the community session to share their oral history and to make that history part of the historical record. For the Chief, a particular benefit of the community session was that it served to bring the community together. About 90 per cent of the Michipicoten First Nation live off reserve, as far away as Chapleau, Sault Ste Marie, and Thunder Bay, and many who came to the community session were on the reserve for the first time. "The community session was a success from our point of view," said Michipicoten Chief Sam Stone, after the session. "Some people told me this was the first time they’d actually been to the reserve. Now, as a result of just
holding the session, people are thinking about themselves as a community.”

Ms. Dickason also commented on this benefit:

Getting the people together at Michipicot en to talk about their personal memories as well as their history provided an opportunity to strengthen community ties. Because the people are scattered over a large area, such an event was unprecedented. They lost no time renewing old ties and making new acquaintances. They also profited from the occasion to expand their perceptions of their history as they compared versions with each other.

This newly fostered community spirit remained to such a degree that, when decisions were later made on how to use settlement money, the First Nation advocated setting funds aside for an annual community feast to bring together the on- and off-reserve members.

Communications – Newsletters

The pilot project also went beyond the usual specific claims research and assessment process in that the parties worked on a communication strategy from the beginning. In the process that was in place in the mid 1990s, the band membership and surrounding communities were often unaware that claims had been submitted until a settlement offer was made. The Michipicoten table wanted to make sure that, throughout all stages of the research, analysis, and negotiations, all band members were aware of the progress being made. They also wanted to keep any third-party interests informed to avoid future confusion. Finally, they wanted anyone interested in specific claims generally to be aware of the pilot project and its goals. All participants worked together to produce a "Special Newsletter on the Michipicoten Pilot Project," published by the Indian Claims Commission in the summer of 1997. With historical pictures of the reserve, recent photographs of some of the team members, and a map showing the reserve and claim areas, this newsletter explained the rationale for the pilot project, summarized the history and potential claims and provided answers to questions which readers might have.

Because the Chief and his advisors wanted this newsletter to go to all band members, staff on the reserve began to update the band list and determine the current addresses for off-reserve members. This work continued while the claims were researched and assessed, so that by the time a ratification vote

was needed, an up-to-date mailing list was immediately available. The newsletter was also sent to various umbrella native organizations, native media, federal and provincial elected officials, the towns of Michipicoten and Wawa, Algoma Mines, and officials in the Ontario government’s Native Affairs Secretariat. Local land owners were assured that title to any land under discussion would not be affected by the claims, and band members were told how they could be involved.¹⁴

Subsequent newsletters were written and distributed by the Chief and his advisors, and their primary function was to keep the band membership informed and involved. These newsletters outlined the progress of the pilot project, gave explanations of the allegations in the claims and the rationale for acceptance and settlement. They also provided explanations of policy and procedure and addressed the concerns of the band membership. In addition, the Chief and his advisors held several information meetings on the reserve and in communities where off-reserve band members lived (Sault Ste Marie, Sudbury, Hawk Junction, and Chapleau). All this work served to raise awareness of the claims with the band membership and to build trust with the team working on the claims. The result was that all the settled claims were ratified by nearly all the eligible voters.

PART III

HISTORICAL BACKGROUND

The Michipicoten area was an excellent location to support a hunter/gatherer economy and has been inhabited by native peoples for hundreds of years. The maple trees, migratory birds, and fish of the coastal area provided summer sustenance, while Lake Superior and the various rivers provided transportation to winter hunting grounds in the interior. It was a natural location for fur traders because of the geographic link from Lake Superior to James Bay via the Michipicoten, Missinabie, and Moose River systems, and from the early 1700s through to the early 1900s, there was a trading post at the confluence of the Michipicoten and Magpie Rivers, variously operated by the French, the Free Traders, and the Hudson’s Bay Company (HBC).

At some point between 1780 and 1821, there were two competing trading posts on the Michipicoten River: the North West Company post on the southwest side and the HBC post on the northeast. After the merger of the two companies in 1821, the principal post of the HBC was established on the southwest side. Other industries were established at the post — commercial fishing, tinware manufacturing, York boat construction, and some agriculture — to supply inland posts and other markets. This location was part of the seasonal round for the Michipicoten Ojibway, a place to fish and make maple sugar in the spring and summer and to trade their furs. For the rest of the year, they were engaged in hunting and trapping throughout a larger area in the inland forests.

"In consequence of the discovery of minerals, on the shores of Lakes Huron and Superior, the Government of the late Province of Canada, deemed

15 The Commission acted as facilitator in the pilot project. It did no research and made no findings. The following summaries of the histories of the claims is drawn from reports and documents produced by the pilot project. The information in the General Historical Overview is summarized from two reports produced by the pilot project team: Christine Dernoi, ‘Report on the Surrender of 1,481.5 acres on Gros Cap IR #49 & the Expropriation of a Railway RoW (The Algoma Central Railway Surrernders),’ December 1997, ICC file 2105-30-8-2, and Christine Dernoi, ‘A Specific Claim Report on the First Nation’s Relocation from Michipicoten River Village to Little Gros Cap, Halfway and Green Acres,’ December 1998, ICC file 2105-30-10-2.

it desirable, to extinguish the Indian title" and, in 1849, Deputy Provincial Land Surveyor Alexander Vidal and Indian Superintendent T.G. Anderson were sent to investigate the possibility of negotiating treaties with the Indians at those two locations. At that time, they met with Chiefs Totomenai and Chick-a-nass at Michipicoten and noted that there was a settlement at Michipicoten River of 160 people. The Chiefs told these government emissaries that the Michipicoten Band wished to reserve a specific tract around the bay on Lake Superior, from the Michipicoten River to the Doré River.

A year later, on September 7, 1850, the Michipicoten First Nation entered into a treaty (commonly referred to as the Robinson-Superior Treaty) with the Crown at Sault Ste Marie, Chief Totomenai signing the document on behalf of his people. In the schedule of reserves included in that treaty is a general description of the land to be set aside for the Michipicoten First Nation:

"Four miles square at Gros Cap, being a valley near the Honourable Hudson’s Bay Company's post of Michipicoten, for Totominai and Tribe." 

Surveyor James Bridgland and J.W. Keating, acting for the Department of Indian Affairs as interpreter and arbiter, were appointed to survey the reserves mentioned in the Robinson-Superior Treaty. In July 1853, both men met with Chief Totomenai, who pointed out the limits of his reserve. At the same time, the HBC factor at the Michipicoten post told Keating and Bridgland that the company wished to occupy one and a half miles on either side of the Michipicoten River, part of which overlapped with Chief Totomenai's request. Keating mistakenly thought that the treaty specified that reserves were not to interfere with HBC lands (this was, in fact, a provision included only in the description of the reserve to be surveyed at Fort William). Surveyor Bridgland produced a "Coast Sketch" map which showed the eastern boundary of the reserve one and a half miles west of the mouth of the Michipicoten River and the western boundary some distance east of the Doré River, the two natural boundaries the Chiefs had identified in 1849. Although subsequent correspondence indicated that there was a survey post at the southwest corner of the reserve, it is apparent that Bridgland did not continue to define the

18 Report, A. Vidal and T.G. Alexander, Commissioners, to Governor General in Council, December 5, 1849, Appendix B and Appendix D, transcribed copies in DIAND, Treaties and Historical Research Centre.
19 Copy of the Robinson Treaty made in the year 1850 with the Ojibwa Indians of Lake Superior [Ottawa: Queen’s Printer, no date], 4 (see also, Canada, Indian Treaties and Surrenders [Ottawa, Queen’s Printer, 1912; facsim. ed., Toronto: Coles Publishing, 1971], 1: 148).
boundaries of the reserve.\textsuperscript{20} No lines were drawn, no technical descriptions were recorded, and no field notes were produced.

Several weeks later, in September 1853, Keating returned to Michipicoten, without Bridgland, and, "at the urgent request of the Chief," persuaded the HBC "to give up the right bank [of the Michipicoten River] as far as the tributary which rushes down a broken fall some hundred feet high immediately opposite to the [HBC] establishment and affords a most valuable water-power."\textsuperscript{21} In effect, the east boundary of the reserve was to be located on the right bank of the Michipicoten River, commencing at its mouth, and extending as far inland as the Magpie River. Although Keating included a statement of this agreement in his report, the reserve was not surveyed and Bridgland's "coast sketch" was not altered to reflect the change. As a result, the coast sketch made in July 1853, was submitted to the department, and was the only demarcation of the reserve on file for the next half century.

In fact, it was not until a survey of surrendered land was conducted in 1899 that it became apparent that the Gros Cap Indian Reserve had never been surveyed. On July 26, 1899, Surveyor Thomas Byrne wrote to the department regarding the lack of survey lines:

\begin{quote}
Although the part at the south west angle of the Indian reserve is still standing in a fairly good state of preservation the Indians say that the boundaries of the reserve were never run and there is certainly no traces of lines to be found. I think it would be desirable to have it surveyed this season as there are a large number of prospectors working in this vicinity and they cannot tell whether they are on the reserve or not.\textsuperscript{22}
\end{quote}

On August 12, 1889, the Department of Indian Affairs (DIA) authorized Byrne to survey the reserve boundaries, and it was completed by the beginning of October 1899. The survey plan, recorded as Canada Lands Surveys Records (CLSR) 1114, is based on Bridgland's coast sketch and not on the area as reported by Keating in 1853.

\textbf{SURRENDER 75, APRIL 10, 1855}

As stated above, it was mineral exploration that led to the government's interest in negotiating the Robinson-Superior Treaty, and prospectors were

\begin{flushright}
\textsuperscript{20} Thomas O. Byrne, Ontario Land Surveyor (OLS), Report of Survey in Field Notes, September 29, 1899, DIAND, Indian Lands Registry, Book no. 281.
\textsuperscript{22} Thomas O. Byrne, OLS, to J.D. McLean, Secretary, Department of Indian Affairs (DIA), July 26, 1899, DIAND file 493/50–5–49, vol. 1.
\end{flushright}
soon in the Michipicoten area. In July 1851, 10 months after the Gros Cap reserve was identified in the treaty, George K. Smith, a geologist, applied to Indian Affairs to purchase one square mile of that land for mining purposes, a proposal which he said the Chief of the Band favoured.

Having discovered veins of metal at Gros Cap & learning that it is an Indian reservation, which Mr. Swanston, Ag't the agent for the Hon'ble Hudson Bay Co. at this place [Michipicoten], informs me the Chief Tetomonee (in whose favor the reservation was made) has no objection to my purchasing, I humbly beg leave to request that you will grant your consent (that being necessary by the treaty) to the said Chief Tetomonee to sell me one square mile of the said reservation on the same terms on which land could be purchased form the Government of the Province.23

There is no reply to this request on the record, and it was not until May 1853 that Smith again wrote to the Superintendent General of Indian Affairs asking the department to expedite the survey of the reserve, as well as the portion that he wanted to buy. In May 1854, after Bridgland had submitted his report and sketch plan of the Gros Cap reserve and Indian Affairs had made inquiries at the Crown Lands Office about terms and conditions for the sale of mining locations, Superintendent General of Indian Affairs Robert Bruce informed Smith that, if the Band was willing to give a written surrender, the department would sell the land requested, excepting an area on the shore required for harbour purposes, for seven shillings and six pence per acre.24

The department authorized Smith himself to take the surrender. His first attempt produced a document dated August 10, 1854, that was for more land for less money, and stated that the land was surrendered to the Department of Indian Affairs rather than to the Queen. In September, the Superintendent General sent Smith a "formal draft of Surrender to the Crown prepared for Chief Totumanaie's signature."25 Surrender 75 dated April 10, 1855, ceded the whole of the Gros Cap peninsula, with the northern boundary extended inland to produce one square mile. Only Chief Totomenai signed the surrender and there is no evidence that a meeting was held or a vote taken.26

23 George K. Smith, Lake Superior, Michipicoten, to Col. Bruce, Superintendent General of Indian Affairs, July 26, 1851, Library and Archives Canada (LAC), RG 10, vol. 190, p. 111089, reel C-11513.
This surrender was accepted by Order in Council dated September 10, 1855. After payment in full was received, the patent was issued to Smith in 1856.

**SURRENDER 423, JULY 19, 1899**

In 1897, gold was discovered on the south shore of Wawa Lake, a short distance northeast of Gros Cap IR 49. Although the "rush" that brought hundreds of prospectors to the area was short-lived (essentially over by 1906), it caused a great deal of economic activity in the area. One by-product of the gold rush was the construction of a railroad from Michipicoten Harbour to the new townsite of Wawa.

In the summer of 1899, the Lake Superior Power Company applied to purchase 1,000 acres of land on Gros Cap IR 49, between Smith’s mining site and the eastern boundary of the reserve. Subsequent correspondence showed that Lake Superior Power was making the application on behalf of the Algoma Central Railway (ACR) Company which was at the time applying for its charter. Even though Indian Agent William Van Abbott indicated that he did not think the surrender of this land would be desirable because it took in most of the reserve’s frontage on Lake Superior, officials at headquarters authorized the taking of the surrender without further investigation. Van Abbott was instructed to take the surrender when he made his annual visit to pay annuities in August.

Indian Agent Van Abbott alerted headquarters to a problem in taking this surrender from the Indians "resident on our reserve at Gros Cap" as indicated on the forms sent to him. From the time of treaty at least, the membership of the Michipicoten First Nation had been divided, with some living near Lake Superior and others living at various inland locations. Research conducted for the pilot project demonstrated that in 1899, 153 Michipicoten people (including 41 men) were paid their annuity at Michipicoten in mid August 1899, while 181 (42 were men) were paid in early July at Chapleau, Missanabie, Biscotasing, and Brunswick House. According to Van Abbott, no one actually lived on the reserve and only "about 14" of the eligible male voters lived nearby, so the instructions "would exclude the Chapleau, Missanabie and other branches of the Michipicoten Indians from having a

voice in the surrender." To this headquarters replied with telegrams instructing Van Abbott to change the wording in the surrender forms and to "summon Indians residing near and interested in Reserve." The Indian Agent was also told that he should go to Michipicoten immediately to take the surrender and not wait until treaty payments which were scheduled to take place approximately four weeks later.

The surrender for sale of 1,000 acres of the Gros Cap reserve was taken on July 19, 1899, signed by Chief Sanson Legarde and 12 others – "the Chief and principal men of the Michipicoten Band of Indians resident in the neighbourhood of our Reserve at Gros Cap," in the presence of William Van Abbott and W.J. Pine, interpreter. The Governor General in Council accepted the surrender by Order in Council PC 1862 dated August 16, 1899. The details of the surrender meeting were not reported and no voters list was produced.

Immediately after the surrender – before the Order in Council, before payment was made, before letters patent were issued, indeed before the Algoma Central Railway (ACR) company was incorporated – ACR began work to build a rail line on the land. Surveyor Byrne wrote on July 26, 1899, that he was "at present engaged in surveying 1000 acres recently surrendered by the Indians here to the Algoma Central Railway Co.," and this work continued despite notice from the Department of Indian Affairs that "no survey can be made of the piece of land unless under the instructions from the Department." By September 6, 1899, ACR's work was well under way:

The company, acting on the assumption that there was no question that the land required for the railway would be granted to the company, has proceeded to construct, besides letting in contract for the building of twelve miles of its line of railway from the dock property on this land. Some 600 men are now employed on this railway construction.

---

33 Thomas O. Byrne, OLA, to J.D. McLean, Secretary, DIA, July 26, 1899, DIAND file 493/30-5-49, vol. 1.
In August 1899, the Indian Agent had valued the surrendered land at $5.00 per acre and in November, after ACR protested that the price was too high, he justified his appraisal on the grounds that the adjoining 640 acres (that is, the Smith land discussed above) had recently sold for $10,000 and "there is very good reason to suppose that the lode or vein of iron contained in that location may extend to the other land which adjoins it" and also that the 1000 acres "contains the entire lake frontage and would in a great measure reduce the value of the remainder of the reserve." In fact, Chief Sanson Legarde had already commented on how the inability to access the shore would adversely affect his people:

I write you to complain of the manner in which the government is taking the thousand acres of our Gros Cap reserve. I see that by the way it is being surveyed that they are taking all the shore line and we will have no entrance to Lake Superior left. If the government takes the 1000 acres there where it is being surveyed, they might as well take all of the balance of the reserve too, as no Indian is going to carry provisions up onto those rocks to eat it there, there will not be a spot left where he can plant a few potatoes or build a wigwam, and what use we getting for it. Maybe we will only get 25¢ each year. I ask you to see that we get what is right for what the government asks as they are spoiling our reserve so it will no longer be any use to us.

DIA headquarters agreed with Van Abbott’s assessment and on May 22, 1900, asked ACR for payment of the 1,000 acres at $5.00 per acre. Before this matter could be settled, however, it was discovered that ACR was laying part of its track outside the area of the 1,000 acres surrendered and, therefore, trespassing on the reserve.

SURRENDER 438, SEPTEMBER 10, 1900

Indian Agent Van Abbott heard about the trespass from band members at the annual annuity payments in August 1900. ACR officials explained that the rail bed corridor was impeded by a mountain and it was necessary to go around it. On August 16, 1900, ACR made a formal request for the additional lands, and on September 10, 1900, Chief James Cass and 11 men, "the Chief and Principal men of The Michipicoten And of Indians resident in the neighbourhood of our Reserve at Gros Cap." signed a surrender for the sale of

481.5 acres north of the 1,000 acres previously surrendered.\textsuperscript{38} No voters list was supplied but Van Abbott’s covering letter stated that only the 12 who signed the surrender were present.\textsuperscript{39} The surrender was accepted by Order in Council PC 2345 dated October 9, 1900.

Van Abbott also appraised this land at $5.00 per acre, the same as the 1,000 acres for which no money had yet been paid. DIA asked ACR to remit $7,407.50 (1481.5 × $5.00) but again the railway company protested the valuation. The matter was sent to arbitration with ACR and DIA each appointing one person to meet and agree on a fair price for the land. On October 26, 1901, the committee reported back that the 80 acres fronting on the harbour were worth $10.00 per acre but the rest of the land was only worth $2.00 per acre. The total value of the land, therefore, was $3,603.00.\textsuperscript{40} The money was paid shortly after, and, after a delay of some years while DIA waited for the appropriate survey plans, patents were issued in 1909 and 1911.

**EXPROPRIATION OF RAILWAY RIGHT OF WAY, 1927**

Reference to the map of the Gros Cap IR indicates that even with these two surrenders, a railway line could not run from the harbour to Wawa without crossing unsurrendered reserve land. In a telegram sent on September 6, 1900, Indian Agent Van Abbott informed DIA headquarters that a right of way was not included in the description of the surrender he was about to take, and asked for instructions. Without any explanation, DIA telegraphed the message: "No surrender for right of way."\textsuperscript{41} In 1926, ACR applied to purchase the right of way containing 13.9 acres and which two internal DIA memorandums concluded had been used by ACR since 1900. ACR agreed to pay for the land at the rate of $10.00 per acre and the land was expropriated by Order in Council dated June 15, 1927.

**THE MICHIPICOTEN PEOPLE SEEK A PLACE TO SETTLE**

At the time of treaty and for many years after, the Band did not live on IR 49. Some of its members lived at inland posts (primarily Chapleau and


\textsuperscript{39} William Van Abbott, Indian Agent, Sault Ste Marie, to J.D. McLean, Secretary, DIA, September 13, 1900, LAC, RG 10, vol. 7539, file 29013-4, pt. 1, reel C-14809.

\textsuperscript{40} Department of Indian Affairs, Agreement with Lake Superior Power & Algoma Central Railway, October 26, 1901, LAC, RG 10, vol. 7539, file 29013-4, pt. 1, reel C-14809.

\textsuperscript{41} Telegram, J.D. McLean, Secretary, DIA, to William Van Abbott, Indian Agent, Sault Ste Marie, September 6, 1900, LAC, RG 10, vol. 7539, file 29013-4, pt. 1, reel C-14809.
Missanabie) while a portion continued to maintain a summer settlement in and around the HBC post at the confluence of the Michipicoten and Magpie Rivers. The Chief’s request during the treaty negotiations that this settlement area be included in the reserve was ignored, and it was not until 1885 that surveyors were sent to set aside a reserve at the settlement site. The HBC, recognizing the value of the falls on the Magpie River, persuaded the Indians to move their settlement to the high bank on the east side of the Michipicoten River, and it was at this location that Department of Indian Affairs surveyors laid out a 197-acre block in 1885, which the department identified as IR 48. The Province of Ontario, however, did not respond to requests to have the area set aside as a reserve. When gold was discovered near Wawa in 1897, followed quickly by an influx of prospectors and tradespeople, this land was sold by Crown Ontario to speculators who proposed to build a town at the location. Ontario officials defended this action because of the presence of IR 49 nearby, but did agree to protect the rights of any band members living on the property:

1 [I]t has been found that the land thus laid out by your Department [IR 48] was valuable for a Town site, and considering the fact that your Department has an Indian Reserve of four square miles close by laid out for your Department by P.L.S. James W Bridgland and granted under treaty for said Indians, it would appear not to be in the interest of the public weal to shut up from settlement a valuable Town Site on the banks of the Michipicoten River. A portion of it has been laid out and granted to the Lands Corporation of Michipicoten (Limited), but the Director of Mines has stated "that the rights of the Indians will be protected."

On the sub-division into the Town site, a number of houses were shown on the plan and there will be no difficulty, as the Company is re-transferring back to the Crown certain lots in the Town site, to make grants of certain lots to the half breeds or Indians occupying said lots, but as said before, it is not in the interest of the public to set apart this land wholly as an Indian Reservation.42

The 1897 gold rush in the area was short-lived because there were insufficient gold deposits to sustain it, but the discovery of a major iron ore deposit at about the same time was of more importance. Helen Mine was opened near present-day Wawa in about 1898, and soon the U.S.–funded conglomerate that owned the mine applied to purchase land on IR 49 to develop the rail and shipping links required to bring supplies in and transport ore out. As discussed above, 1,481.5 acres were surrendered in 1899 and 1900 to the

42 Assistant Commissioner, Crown Lands Ontario, to J.D. McLean, Secretary, Department of Indian Affairs, May 3, 1898, Document #140 in Christine Dernoi,, "Report on the Surrender of 1,481.5 acres on Gros Cap IR #49 & the Expropriation of a Railway RoW," ICC file 2105-30-8-2.
Algoma Central Railway or its subsidiary companies (who by this time had also acquired the land at the harbour surrendered in 1855). An additional 13.9 acres was expropriated for this purpose in 1927.

After their village site near the HBC was surveyed into town plots in 1898, Michipicoten band members gradually moved to a new settlement (variously called "Little Gros Cap" or "Halfway"), which they established at a site they thought was on unsurrendered land in IR 49. A survey in 1931, however, determined that a large part of this settlement was actually located on the northwest corner of the land surrendered in 1855, which by this time was owned by the Algoma Central Railway. In 1935, after negotiations with the company, the Band authorized payment from its trust fund to purchase the 55.6-acre parcel at $1.00 per acre. DIA, however, made no effort to reconstitute the parcel as reserve land.

From the beginning, the Halfway village was difficult to access. For many years there was just a trail through non-reserve lands for the two miles from the settlement to Michipicoten Harbour, and even in 1925 the trail needed work just to make it "passable for foot travel." Band money was spent over the years to maintain and improve the road, but by 1954 development in the area made access so difficult and dangerous that government officials recommended that the village be moved to a more advantageous location:

The reserve is split by the Algoma Central Railway right of way and loading docks at Michipicoten Harbour.

In the past the Indians have been able to cross these lines and under trestles, etc. At times a truck or wagon could get through. Due to extension of the Company’s activities changes have been made that render it unsafe for any other than foot passage. As all supplies now have to be carried for distances of up to a mile, this makes it almost impossible for the Indians to continue living at the present location.

... It will be necessary to move the Indians from their present location. Here they are isolated from work and supplies. Another location should be chosen by Superintendent Laurence in consultation with the Chief, where they will be able to move in safety.44


By 1956, the department and the Algoma Central Railway company negotiated an agreement to relocate the Michipicoten Indians. Algoma agreed to purchase the Halfway site for $1.00 per acre in exchange for a new 13.6 acre site at Briant, in the area covered by the 1,000-acre surrender, to build houses, roads, and sewers and to help defer moving expenses. This new site became known locally as "Green Acres" and was set aside as IR 49A by Order in Council dated September 25, 1958.

Unfortunately, the Green Acres site turned out to be completely inappropriate for a village site. The houses and septic systems were built on clay which shifted with winter freezing and spring thawing, causing foundations to crack and septic tanks to break. After complaints by band members about conditions on the reserve, the Algoma Health Unit visited Green Acres in 1970 and 1971. The Health Unit report is full of references to substandard housing conditions and contaminated water ("all nine of the existing [septic] tank systems were causing raw sewage to pond or to find its way to the creek to the east of the village."[45]) The entire village site was condemned, and the Department of Indian Affairs began to look for a more suitable location for a village. In 1973, a new subdivision on IR 49 was started at the present site of the Michipicoten village – a beach site to the west of the Gros Cap Mining location along the shores of Lake Superior.

PART IV

THE CLAIMS – RESEARCH, NEGOTIATIONS, AND RESOLUTION

A total of 13 potential claims were researched and reviewed in the Michipicoten Pilot Project. For four of the 13, the First Nation decided, after the research was complete, that there was no breach of lawful obligation and the files were closed:

- timber claim
- Great Lakes Power transmission right of way
- Ontario Hydro transmission right of way
- relocation claim

Three issues were resolved through administrative referral:

- Chapleau IR 61
- Missinabie IR 62
- 1927 railway right of way

Six claims were submitted and settled for a total monetary compensation of approximately $64 million, the addition of 3,000 acres of Ontario Crown land to the reserve, and the authorization to acquire an additional 5,400 acres which can be given reserve status:

- two survey claims, 1898 and 1899 – settled May 2000 ($120,000)
- three Algoma surrender claims, 1855, 1898, and 1899 – settled April 2004 ($11.7 million)
- boundary claim – settled January 2008 ($52.3 million plus 3,000 acres from Crown Ontario)

GRIEVANCES RESEARCHED – NO CLAIM

Timber Claim

In June 1925, the Michipicoten First Nation surrendered the merchantable timber on Gros Cap IR 49. At the beginning of the pilot project, the First
Nation thought there might be a specific claim based on inadequate compensation. Research conducted in the course of the pilot project found no evidence of a breach of Canada's fiduciary obligation, and in April 2001, the First Nation reported that it would not proceed with a claim. The file was closed.

**Great Lakes Power Transmission Right of Way**

The history of this claim was summarized in a paper presented by the First Nation's legal counsel to the Canadian Bar Association in January 2004:

In 1939, Great Lakes Power Company built a transmission line through the reserve to provide electricity to the harbour area. This was done without any consultation with the people of Michipicoten First Nation, nor was there any prior discussion with DIAND. The local Indian Agent found out about the line in 1940, and DIAND subsequently granted a right of way in perpetuity upon payment of $100.00. Even though the federal Department of Justice stated at the time that the transaction required approval by the Chief and Council, no such approval was ever sought or obtained.

This claim was submitted to Specific Claims Branch early in 1996 and by the time the pilot project started, it was being reviewed by the Department of Justice. In August 1998, however, the First Nation asked that Justice set it aside while other claims were under review. In April 2001, the First Nation indicated that it would not proceed with the claim. The file was closed.

**Ontario Hydro Transmission Right of Way**

In a sense, this was the claim that started the whole pilot project process, for this was the right of way that was the subject of the Michipicoten First Nation's negotiations through the Ontario Hydro past-grievance process. According to the First Nation's legal counsel:

In 1965, Ontario Hydro wrote to DIAND to request a right of way across the reserve. Hydro's letter pointed out that crossing the reserve would result in

---

significant cost savings. DIAND proceeded on the basis of providing the right of way (totalling about 70 acres) for $300.00 per year.

This amount and other conditions of the potential agreement between Hydro and DIAND were unsatisfactory to MFN. After negotiations broke down, DIAND sanctioned the construction and operation of the line without the required approval of the Chief & Council. There was no legal authority for the transmission line to cross the reserve for many years.49

Like the Great Lakes Power claim, the Ontario Hydro claim was submitted to Specific Claims Branch early in 1996 and was being reviewed by the Department of Justice when the pilot project started. It, too, was put in abeyance in August 1998 while other claims were under review and was not mentioned again until April 2001, when the First Nation indicated that it would not proceed with the claim. In the eyes of the First Nation's legal counsel, "although once again the Department's behaviour was less than exemplary, the grievance has been resolved directly with Ontario Hydro."50

**Relocation Claim**

This claim has its roots in the many moves the Michipicoten people had to make to secure a location for their houses, schools, and community, as summarized above in the brief history of the claims. Research was concentrated on IR 48, which was surveyed but not confirmed as a reserve, and the various exchanges of land within the area surrendered to the Algoma Central Railway between 1935 and 1957. When the research was complete, however, the First Nation was unable to identify a breach of lawful obligation by Canada, and no claim was submitted.51

The First Nation proposed that there was a way to address the "grievance" which the community felt because of the devastating effects of the various village relocations. Roman Catholic churches were built in each settlement, and, until the last move, whenever the community was relocated, the steeple bell was removed and established in a new church. The Whitesands Bell was donated to the First Nation by the owner of the Algoma Railway in 1901, and in the early 1900s was located in the basement of a church in Wawa. The pilot


project team helped the First Nation in its efforts to have the bell returned to the community. In the summer of 2003, a bell tower was constructed in front of the cemetery on the reserve where the Whitesands Church once stood.52

RESOLVED THROUGH ADMINISTRATIVE REFERRAL

Chapleau IR 61 and Missinabie IR 6253

When the Robinson-Superior Treaty was signed, the treaty commissioners identified two groups of Indians trading at Michipicoten, a coastal group under Chief Totomenai and an inland group for whom no separate chief was named at the time of treaty. The reserve at Gros Cap was established in 1853 for the coastal group but no land was set aside for the Michipicoten band members who lived at Chapleau, Missinabie, and other inland sites. Various requests for land for these people was ignored until 1905 when two reserves were established – IR 61 at Chapleau and IR 62 (Dog Lake) at Missinabie. These lands were purchased by the members of the Michipicoten First Nation for whom the reserves were set aside, the costs paid out of their annuity money.

In 1906, Treaty 9 was negotiated with the Indians living in "90,000 square miles of provincial lands drained by the Albany and Moose river systems."54 Among those signing that treaty were the Missinabie Cree First Nations and the Chapleau Ojibway First Nation. The Missinabie Cree were mistakenly denied a reserve on the grounds that they already owned IR 62 at Dog Lake, an error that was entered into DIAND’s Indian Lands Register. The reserve for the Chapleau Ojibway, IR 74, was surveyed immediately adjacent to IR 61, and the Indian Lands Register entered both reserves as belonging to the Chapleau Ojibway. In 1965, an employee in Indian Affairs’ Lands and Trusts section discovered these errors, but his recommendation to update the Lands Registry records to reflect the true ownership of the reserves was not acted on.

In his October 29, 1996, letter to the Minister, Chief Stone listed IR 61 and IR 62 among the grievances to be researched. Beginning in October 1998, the joint researcher, the Justice lawyer, and the Specific Claims Branch analyst worked together to prepare a package of material from documents already

53 The history is summarized from Christine Derouin, "History of Indian Reserve No. 61 and 62 at Chapleau and Missinabie and Members of the Michipicoten First Nation," executive summary, November 2000. Please note that two spellings, Missanabie and Missinabie, are found in the documentation. In this paper, only the latter spelling will be used.
54 The James Bay Treaty, Treaty No. 9 (Made in 1905 and 1906), and Adhesions made in 1929 and 1930 (Ottawa: Queen’s Printer, 1964), 3.
collected. This was submitted to the Indian Lands Registry on December 8, 1998, with a request that the records be amended. On December 10, 1998, a registrar’s order was issued amending the record to show that Chapleau IR 61 and Missinabie IR 62 were established for the use and benefit of the Michipicoten Band of Indians.

1927 Right of Way
This claim involves the 1927 expropriation of 13.9 acres of land for a right of way across the Gros Cap Reserve, for which the Algoma Central Railway received letters patent. The First Nation alleged that it had not been consulted about this transaction, that the compensation was inadequate, that the transfer was excessive (the railway needed only a right of way, not outright ownership), and that the agreement should have included a reversionary clause. There was also an allegation of trespass since preliminary research indicated that the company had been using this land for some 25 years before the expropriation. Research on this claim was conducted through the pilot project and was nearing completion in July 2000, when the Algoma Central Railway informed the Michipicoten First Nation of its intention to abandon this line. At the request of the negotiating table, Canada declared an interest in the lands so that the First Nation could use the rail bed as a road from the village site to Highway 17. The railway company agreed to return the land for a nominal fee, and the Band decided that it would not submit a claim for compensation but would instead concentrate on having the land returned to reserve status through administrative referral. On January 31, 2007, the land was deeded to the Michipicoten First Nation.

CLAIMS SETTLED
Two Survey Claims (1898 and 1899) – Settled May 2000 ($120,000)
These two claims, which concern the use of Michipicoten trust money to pay for surveys in 1898 and 1899, were not included in the list of possible claims at the outset of the pilot project but were identified early in the research of the other claims.

The 1898 survey claim had its origin with the 1855 surrender, which was conditional upon the land being surveyed at the buyer’s expense. The land was sold to the mining interest in 1855, but Canada did not enforce the condition, and no survey was conducted at that time. It was not until 1898,
when a dispute arose about whether a wharf was located on the surrendered lands or on the Gros Cap reserve, that the area was finally marked out. On the basis that the Band was the complainant in the dispute, the Department of Indian Affairs paid $133.00 for the survey out of band funds. In its specific claim, the Michipicoten First Nation alleged that Canada had breached its fiduciary obligation by failing to enforce the terms of the 1855 sale agreement; had Canada done so, the 1898 survey would have been unnecessary and so the costs of that survey should not have been paid by the Band.

The 1899 survey claim relates to both the 1899 surrender and the boundary claim. When the First Nation surrendered the 1,000 acres from the Gros Cap Reserve in 1899, the surveyor at the time noted that he could not locate the initial survey of the reserve boundaries. An Order in Council was passed authorizing the use of band funds to pay for the boundary survey, and the $601.59 bill was paid from the band’s capital account. In the specific claim, the Michipicoten First Nation took the position that Canada would have paid all survey costs if the boundaries had been delineated in 1853 when the reserve was established, and the passage of time did not remove this obligation.

These two claims were submitted together to the Department of Justice on August 13, 1997, and Canada accepted the claim for negotiations on October 7, 1998. In the spirit of the pilot project, the negotiations of the settlement proceeded very quickly:

> Considering that the *Michipicoten Pilot Project* is intended to expedite the normal Specific Claims process, the Michipicoten Negotiating Team pressed Canada’s representative to make an offer to settle the two Survey Claims as soon as reasonably possible after they were accepted for negotiation.

> There were two reasons for this. First, unlike most of Michipicoten’s other Specific Claims, the Survey Claims are relatively small and straightforward because there is no uncertainty about the amounts of money illegally taken from the Michipicoten’s account, and there is no dispute about when the funds were taken.

> Second, the Negotiating Team believed that it would be in Michipicoten’s best interest to move quickly and decisively in a way that demonstrates the business-like approach being taken by the Chief and Council to resolve our Specific Claims in a “reasonable” period of time through the *Michipicoten Pilot Project*.57

---

56 Paul Cuillerier, Director General, Specific Claims Branch, to Chief Sam Stone, September 3, 1998; and Jane Stewart, Minister of Indian Affairs, to Chief Sam Stone, October 7, 1998, in ICC file 2105-30-7-1.

On December 11, 1998, Canada offered $120,000 to settle ($70,000 as compensation for the improper use of band funds and $50,000 for negotiation costs), which was accepted by the Chief and council on January 28, 1999, and again on March 27, 1999, following a band council election. The parties immediately began the process of drafting a settlement agreement which was initialled by the Chief and Canada’s negotiator. On May 13, 2000, the First Nation held a ratification vote, at which time a majority of the voters accepted the settlement.

**Three Algoma Surrenders (1855, 1899, and 1900) — Settled April 2004 ($11.7 million)**

These three separate claims relate to land transactions involving the Algoma Central Railway. Because they had elements in common and, in keeping with the goals of the pilot project, they were bundled together whenever possible to save time and money in the research, review, and negotiations stages.

**1899 and 1900 Algoma Surrenders**

In its statement of claim, submitted to Canada on January 14, 1998, the First Nation alleged that both of these surrenders were invalid because a quorum of voting members was not present in either instance; thus, the surrenders did not conform with the voting requirements of the *Indian Act*. On December 7, 1998, the Acting Deputy Minister of Indian Affairs informed Chief Stone that Canada was accepting the 1899 and 1900 claims for negotiation. The parties elected to begin the preliminary work on these claims (establish a negotiations protocol agreement, identify heads of damages, and identify and begin the studies needed) but to delay negotiations until the legal opinion on the 1855 surrender was complete so that, if it was accepted, the three claims could be negotiated together.

**1855 Surrender Claim**

This claim relates to the alleged surrender and sale of 640 acres on Gros Cap IR 49 to the mining entrepreneur, George K. Smith, in 1855 (land that later eventually became part of the holdings of the Algoma group of companies). In its specific claim, the First Nation alleged that, because there was no public meeting or assembly of the Michipicoten people and no representative of the Crown present when Smith met with Chief Totomenai, the surrender was taken contrary to the provisions of the *Royal Proclamation of 1763* and

---

58 Warren Johnson, Acting Assistant Deputy Minister, Indian and Northern Affairs Canada, to Chief Sam Stone, December 7, 1998.
therefore was invalid. This claim was submitted to Canada on June 26, 1998. The legal review of the 1855 claim, because it was a pre-Confederation claim and there were few precedents to rely on, took longer than usual, but it was finally accepted for negotiation on October 3, 2000.59

**Negotiations of the Algoma Surrender Claims**

The parties agreed that four studies would be conducted to determine the economic loss suffered by the First Nation as a result of these improper land transactions: two land appraisals, a forestry loss-of-use study and a loss-of-rent study. The methodology agreed upon for this last study came about through cooperative problem solving by the team:

> In keeping with the spirit of the Pilot Project, Canada and Michipicoten utilized an innovative "loss of rent" approach to value the loss of use. This was done by creating a hypothetical lease to Algoma for the time period that the illegally surrendered lands were occupied.60

Work began on these reports in December 2000 with the assistance of the ICC study coordinator, and all were completed by July 2002.

In March 2003, Canada made a settlement offer which included $11.7 million in cash and a recommendation to return 2,111 acres to reserve status. An agreement in principle was in place by August 2003, and a ratification vote was held on November 1, 2003, with an overwhelming majority of First Nations members voted to accept the offer. The settlement agreement was signed by the Minister of Indian Affairs on March 16, 2004. Settlement money was transferred to the First Nation in April 2004, and a signing ceremony took place in the community on May 26, 2004.

**Boundary Claim**61 — *Settled January 2008 ($52.3 million plus 3,000 acres of Ontario Crown land)*

The research and legal review of the historical report and document collection was completed in February 2000, and the First Nation submitted its specific claim to both the governments of Canada and Ontario in March 2000,

---

59 Robert D. Nault, Minister of Indian Affairs, to Chief John Peterson, Michipicoten First Nation, October 3, 2000.


alleging that the eastern and western boundaries of Gros Cap IR 49 as surveyed in 1899 did not reflect the First Nation’s understanding of the location and size of the reserve to be set aside pursuant to the Robinson-Superior Treaty of 1850 and the 1853 agreement with J.W. Keating regarding the boundary of the reserve. Canada accepted the claim for negotiations on January 30, 2003.62 Ontario did not enter into the discussions until the beginning of 2006.

Canada and the Michipicoten First Nation began negotiations on the boundary claim in May 2003 and the Indian Claims Commission continued to facilitate these bilateral meetings as it had done since the beginning of the pilot project. Elements of the negotiation included a negotiation protocol, participation of Ontario, land quantum and location, replacement lands, additions to reserve, alternative to standard study approach, communication strategy, per capita distribution of settlement money.

As a first step, the parties agreed to rely on the protocol agreement already in place for the pilot project and signed on June 9, 1999. For the purpose of any land appraisals or loss-of-use studies that would be required during the negotiations, both parties agreed that the larger reserve to which the First Nation was entitled would have included approximately 6,300 acres of land in two areas adjacent to the east and west boundaries of the Gros Cap IR 49 as originally surveyed.

In keeping with the pilot project’s overall objective of considering innovative processes to save both time and money, Canada suggested that the table consider an alternative study approach. Rather than engaging in fresh land appraisals and loss-of-use studies for the boundary claim lands, the table could investigate whether it could extrapolate the data available through the recent studies carried out for the Algoma surrender claims and bring those values forward from 2001 to the current date. This approach could be considered in this case because (a) the Algoma studies were recent, (b) they covered land that adjoined the boundary claim lands, and (c) the time periods covered by the Algoma claims and the boundary claim were comparable. In June 2004, an expert hired by the parties confirmed that the extrapolation of the previous data was a reasonable approach and, on that basis, the parties worked together to update the figures for the land appraisals as well as the loss-of-rent and loss-of-timber studies from the Algoma surrender negotiations.

At the same time, the parties agreed to conduct joint research on a number of issues that were not addressed in the Algoma studies. This included an overview of the historical use of claim lands to identify any economic uses not considered in the previous studies; a spot marking of theoretical eastern boundary; an evaluation of historical hydraulic generation development, and a current unimproved fair market value of two hydro sites on the Magpie River in the southeast corner of the additional lands. The ICC acted as study coordinator for all of this work. All of these studies were completed by January 2007.

Province of Ontario

According to the federal specific claims policy for pre-Confederation claims involving land issues, the involvement of the Province of Ontario in the negotiation process is required. At the beginning of 2006, the Ontario Secretariat for Aboriginal Affairs completed its research and legal review of the Michipicoten boundary claim and agreed to negotiate a settlement. Under its current policy, the Province of Ontario will not agree to ICC-facilitated negotiations. Canada and the First Nation, however, were very pleased with the role the ICC had played in the pilot project and wished to continue that relationship on all matters that did not involve Ontario. As a result, the negotiations split into two tables: Michipicoten meeting with Ontario, without the ICC, to discuss the provincial Crown land component, and Michipicoten meeting with Canada, facilitated by the ICC, regarding the financial compensation.

In August 1991, the Michipicoten First Nation had signed a Land and Larger Land Base (LLLB) Framework Agreement with Canada and Ontario.

That agreement committed the parties to use their best efforts to negotiate and conclude agreements to provide either a reserve land base for landless signatory First Nations, or to expand the size of existing reserves of signature First Nations whose existing reserves were too small to accommodate their communities’ housing, economic development and other needs.

The negotiations for the lands to be added to reserve under the LLLB process were suspended when Ontario agreed to negotiate the boundary claim, but the

---


LLL lands already identified would be included in the boundary claim settlement. A sketch produced by DIAND in September 2006 shows the 3,000 acres of provincial Crown lands both to the east and west of IR 49 to be added to the Michipicoten First Nation’s reserve as part of the boundary claim settlement.

Canada’s Settlement Offer
Canada made an offer to settle on June 14, 2007, which the First Nation accepted by Band Council Resolution dated June 28, 2007. The negotiated settlement included cash compensation of $52.3 million and the authorization to acquire a maximum of 3,335 acres to be added to the First Nation’s reserve lands.

Ratification
The settlement agreement was presented to the Michipicoten First Nation for ratification on January 12, 2008. As a direct result of the regular and thorough communication with band members on all matters relating to the negotiations, the voter turnout was exceptionally high. Over 80 per cent of the electorate voted and 97 per cent of them accepted the compensation package.

PART V

CONCLUSION

The Michipicoten Pilot Project was an extraordinary success. It met or exceeded its goals to save time and money, and it had a positive affect on the community, bringing together a far-flung membership to learn more about the history and traditions of their ancestors. The Indian Claims Commission congratulates all members of the Michipicoten Pilot Project team, whose members came to the table and stayed to form a cooperative unit, dedicated to bringing final resolution to these long-standing grievances.

Three Michipicoten Chiefs were involved in the negotiations over the course of the 11 years of the pilot project – Sam Stone, John Peterson, and Joe Buckell – and whether they were at the table or meeting community members, they demonstrated a commitment to resolving the grievances and moving forward. The First Nation’s legal counsel, Kim Alexander Fullerton, and its negotiations advisor, Trevor Falk, were present throughout the process. Christine Dernoi conducted all of the historical research jointly for the First Nation and Canada. Linda Rychel acted as Canada’s legal counsel and Liane Luton was the claims analyst throughout the entire research phase. Wayne Wallace and Douglas Patterson negotiated on behalf of Canada. The Michipicoten Pilot Project succeeded, in large degree, because these people committed themselves to stay involved in the pilot project until a fair and just settlement of the claims and grievances was reached.

Meetings were chaired by the Indian Claims Commission. The administrative functions performed by ICC staff, such as organizing meetings and preparing meeting summaries, allowed the parties to focus all their time and resources on the resolution of the claims.

The specific claims process has changed a great deal since the pilot project was initiated, and some of the changes were as a direct result of the success at Michipicoten. There are still many constructive elements of this pilot project that could be adapted and incorporated into the claims
submission and review process and settlement negotiations to make procedures more efficient and more relevant to the First Nation communities:

- Ensure that funding for claim development is sufficient to ensure that all First Nations have access to qualified researchers and lawyers.

- Circulate up-to-date guidelines and criteria required to establish the various types of specific claims and develop a mechanism to allow First Nation researchers and lawyers to ask for clarification and assistance as they develop a claim. This should also include some mechanism to share public-domain documents in the government’s possession as a result of research on similar claims.

- Consider “bundling” claims that have historical elements in common. By considering the three Algoma surrender claims at the same time, the Michipicoten Pilot Project was able to save considerable time and money in both the research and negotiation phases.

- Provide neutral, third-party facilitation, such as provided by the ICC, for all meetings. The administrative functions that the ICC performs allow the parties to concentrate on the substantive work on the claims and in the negotiations. The mediation background and continuing attendance of the chairperson ensures a well-run meeting and the opportunity to deal with small problems as they arise, so that they do not grow to require formal mediation or a breakdown in talks.

FOR THE INDIAN CLAIMS COMMISSION

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

Dated this 20th day of October, 2008.
APPENDIX A

CHIEF SAM STONE, MICHIPICOTEN FIRST NATION, TO RON IRWIN, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, OCTOBER 29, 1996

REPORT ON THE PILOT PROJECT OF THE MICHIPICOTEN FIRST NATION

INDIAN CLAIMS COMMISSION
October 29, 1996

The Honourable Ron Irwin
Minister of Indian Affairs and
Northern Development
House of Commons
Rm. 583, Confederation Building
OTTAWA, ON K1A 0H4

Dear Minister Irwin:

RE: PROPOSAL FOR SPECIAL PROJECT WITH MICHIPICOTEN FIRST NATION

Michipicoten First Nation, located near Wawa, Ontario, is a signatory to the 1850 Robinson-Superior Treaty. Our reserve should have been laid out using the French unit of measurement, the League. Instead, the British mile was used and were were cheated out of most of our land before we even got our reserve. The first surrender of our land took place only five years later in 1855, when one square mile was taken away from us on the basis of only the Chief’s signature. Then, in 1898, one thousand acres was surrendered, followed the year later by another surrender of 481.5 acres. Again, both surrenders were taken under very questionable circumstances. These surrenders were made to benefit the Algoma Central Railway and the subsequent development of iron ore mines in the area.

In 1927, the Algoma Central Railway requested a right-of-way across our reserve, but instead Canada sold our land outright to the railway. Our First Nation was left with no decent land to live on and most of our people ended up living off what was left of the reserve. In 1935, we were forced to purchase 55.6 acres of land from the railway in order to have a place to live. This land was never added on to our reserve. Even it was eventually taken away in 1956, through a highly unusual "Agreement for Exchange", and we were moved once again.

In the early 1900's the people of Michipicoten paid for two reserves north of Michipicoten. They are Chapleau Reserve #61 and Missinabie Reserve #62. In a truly bizarre set of transactions Canada transferred Chapleau Reserve #61 to the Chapleau Ojibway First Nation in 1950, and treated Missinabie Reserve #62 as though it belonged to the Missinabie Cree First Nation. All of this was done without consent or
The Honourable Ron Irwin
October 28, 1996
Page 2

compensation. For many years now Michipicoten has attempted to have these historic grievances addressed through the Specific Claims process, without success. Requests for information and help regarding claims issues, made to both the Union of Ontario Indians and to INAC, date back to the early 1970's. Our requests for assistance fell on deaf ears.

Nothing of any substance was accomplished until Michipicoten entered into the Ontario Hydro Past Grievance Process in 1993. Through that process adequate funds were made available to research the full history regarding Ontario Hydro's acquisition of a right-of-way across the reserve in the 1960's. A fair and honourable Agreement was reached with Ontario Hydro and this was celebrated with a feast at our community earlier this summer.

As a result of the process with Ontario Hydro, we were able to research enough of our history to submit two specific claims, one regarding the right-of-way for Ontario Hydro and another regarding a right-of-way granted to Great Lakes Power. However, we have no funds available to us to research and submit any further specific claims.

Michipicoten is participating in the Land and Larger Land Base Negotiations, through the Indian Commission of Ontario. In that process we have been told that we cannot get our land back because we have not submitted specific claims! Much of our land that was taken by the railway is now up for sale. We cannot afford to buy it, and we are afraid that the chance to regain some of our historic reserve land will be lost.

Attached is a "Preliminary Plan", dated December 4, 1995, prepared by Waters Edge Consulting Inc., which outlines some of the questionable land dealings and surrenders with respect to Michipicoten and sets out a proposed work plan. Also attached is a letter from F.J. Singleton, Director Lands Directorate Reserves and Trusts, to E.G. Morton, Director Reserves and Trust Ontario Region, dated October 25, 1983, setting out the numerous surrenders of land from Gros Cap Indian Reserve No. 49 (Michipicoten).

Our First Nation is involved in a number of economic development initiatives, including a small hydro site on our current reserve. We want to build on our strengths and develop the real potential of these lands and of our people, but in order to do so we need to clear up our historic grievances with Canada and regain control of as much of our land as possible.

To that end we make the following proposal: we would like to meet with you to discuss a work plan and budget for a special project designed to identify, research and resolve all of Michipicoten's specific claims in a coherent, cooperative and timely fashion. We would be prepared to consider joint historical research, joint identification of issues, coordinated legal research and joint presentations to Department of Justice lawyers, if necessary. We would be pleased to involve Ontario at any stage of these proceedings.
The Honourable Ron Irwin  
October 29, 1996  
Page 3

The large number of claims issues that are serious, yet relatively untouched,  
represents a unique opportunity for Canada and Michipicoten to design and implement  
a special process. These claims are of the utmost importance to my First Nation and  
we are prepared to devote the necessary time and energy to make this special project  
work. All that we lack is adequate resources to make it happen.

These matters are now extremely urgent and we cannot afford to wait, as some of our  
lands currently in the possession of Algoma Ore Company may be sold to third parties  
and lost forever. Even if the current fast track claims could be accepted and settled  
quickly, we could then re-invest any financial compensation received into our other  
outstanding claims. We have requested assistance from the Union of Ontario Indians,  
but they tell us that they have no additional funds to apply to claims research and  
development. Our share of the funding that DIAND provides to the Union of Ontario  
Indians for Treaty research is totally inadequate to fund this type of ambitious project.  
The 1850 Ojibway Treaty Council has no resources available to assist us in these  
matters.

Please indicate at your earliest convenience when you will be able to meet with us. If  
possible we would like for you to be able to see our land and to hold these discussions  
in our community. If this is not possible, we would be prepared to meet with you in  
Ottawa. I have asked our legal counsel, Kim Fullerton, to follow up with your staff on  
these matters.

Meegwetch,

[Signature]

Chief Sam Stone

Attachments
Michipicoten First Nation has prepared the following plan to systematically research the various surrenders and expropriations of our Reserve lands. Using the documentation obtained through this research, it is intended that specific Claim Reports be developed for submission to Canada and eventual negotiation and resolution.

Standards for Document Research

The document researcher(s) will be required to do her/his work in a manner that meets or exceeds standards and criteria established by Indian Affairs (Specific Claims Directorate).

In order to ensure that "startup" costs are as low as possible, the initial document research will be focussed and may not be absolutely comprehensive. Providing that the research indicates sufficient evidence to warrant the preparation of a Specific Claim Report, and providing that legal counsel agrees, some possible sources of information may not be checked at this stage.

As more document research is done into Specific Claims relating to the lands of Michipicoten First Nation, a Master Index will be created (on paper and in electronic format), consistent with the needs of self-government. Particular care will be taken to ensure that all documents are properly catalogued and stored for future reference.
MICHIPICOTEN FIRST NATION Preliminary Plan for Specific Claims

Specific Claim Reports

For each surrender or expropriation, a Specific Claim Report will be prepared which summarizes the historic facts as revealed by document research, but within the context indicated by Elders interviews and other such sources of information. Each draft Specific Claim Report will indicate clearly the basis of any Specific Claim, and will be reviewed by legal counsel to ensure that the Claim is properly described in legal terms. However, the Specific Claim Reports will not be overly “legalistic” in tone or content.

The priority of work on Specific Claim Reports will be established by the Chief and Council of Michipicoten First Nation. Each Specific Claim Report will come to Chief and Council for final approval before being submitted to Canada.

Priorities (General)

The Specific Claims that seem to be most straightforward or smallest will be given high priority, in order to get them “into the pipe” in the near future (in recognition of relatively long time delays between the date of submission and the decision by Canada about whether or not to negotiate a resolution). Preparatory work on these claims is not likely to be very costly, and will contribute to broader knowledge about some of the other larger surrenders and expropriations. The possibility of a Boundary Claim ( leagues vs. Miles) will be left until most other Specific Claims have been researched and submitted.

Work Plan (Preliminary)

The following Specific Claims are listed in priority order, but this is based on minimal information at this time. The actual priority of work on a Specific Claim will be subject to approval by Chief and Council. There is a relatively low degree of certainty for the others.

With regard to estimated costs, the figures provided below are based on a limited amount of information for bringing each Specific Claim to the point of initial submission to Canada. Where provided, the estimates for the document research are thought to be quite good, but better estimates of subsequent work cannot be made until the document research is completed.

This list is not comprehensive. It is expected that, as more information becomes available other Specific Claims will become apparent.
MICHIPICOTEN FIRST NATION  —  PILOT PROJECT MEDIATION

1. **Great Lakes Power Line** The research for this Specific Claim has already been done in relation to the Hydro negotiations, and a draft report prepared. There was trespass involved (the line was built before any discussions with Indian Affairs or the Chief and Council), there was never any permission from Chief and Council, and the compensation was inadequate.

   This Specific Claim could be submitted early in January, 1996. The total cost would be less than $3,000.00 (this figure is so low because it does not include the cost of the research which was paid out of the Hydro budget and because the claim is so straightforward). This would be a “Fast Track” claim (for compensation less than half a million dollars).

2. **Ontario Hydro Power Line** The compensation obtained from Hydro in 1984 and additional compensation from Hydro from the present negotiations do not address any of Canada’s failures to protect the interests of Michipicoten. Again, the research for this Specific Claim has already been done, and it would also likely be the “Fast Track” claim.

   Using the research and the work that has already been done, it would be possible to bring this Specific Claim to the point of submission for around $7,000.00. Since all the documents are available, it could be ready for submission in February, 1996.

3. **Railway Right-of-Way (1927)** Section 46 of the Indian Act permits expropriation for public purposes, but no more or no less than is actually needed may be expropriated. In this case, the railway needed a right-of-way, not ownership, so that all Canada should have granted. The reasons for the relatively high priority of this Specific Claim is that it is thought to be very strong and quite straightforward. The recent (February, 1995) Sumas Report of the Indian Specific Claims Commission is relevant.

   The cost should be less than $12,000.00, of which document research would be about $3,000.00. Depending on the availability of records, it is likely that this Specific Claim could be ready for submission by Spring, 1996.

4. **1000 Acre Surrender (1999) and 481.5 Acre Surrender (1999)** These are understood to have been surrendered to facilitate mining and development of Michipicoten Harbour. Some research work as apparently done by the Union regarding this situation in the mid-1980’s, but the set of documents does not appear to be complete and there does not appear to be a document Index or record of files searched.
MICHIPICOTEN FIRST NATION Preliminary Plan for Specific Claims

The necessary document research could be completed by mid-1996, at a cost of about $5,000.00, after which an assessment can be made about the amount of work required to bring the Specific Claim to the point of submission.

It is not clear at this time whether it would be in the best interest of Michipicoten First Nation for these two surrenders to be treated separately, or whether they should be combined.

5. Chapleau Reserve #61 and Missinabie Reserve #62 in the early 1900's, the people of Michipicoten First Nation paid for these reserves. In 1950, Canada transferred the Chapleau Reserve #61 to the Chapleau Ojibway First Nation, who were Adherents to Treaty #9. For many years, Canada considered the Missinabie Reserve #62 as belonging to the Missinabie Cree (also Adherents to Treaty #9).

A detailed estimate for the necessary document research has been made ($10,000.00), but, no estimates can be made for other costs at this time. The research could be done by the middle of 1996.

6. Timber (1925) This Specific Claim might revolve around whether the amount of money received bore any resemblance to the value of the timber removed. Initial research costs would probably be quite modest, perhaps as low as $2,500.00. If this work leads to the conclusion that a valid claim could be made, additional research will be required around issues relating to the sale of the timber such as ensuring that there was a proper cruise, tendering, following of regulations, scaling returns and the like.

7. Exchange of Lands (1956-59) There is no provision in the Indian Act for "exchanges" of land, which might be the basis of a Specific Claim in the instance. In addition, there are several aspects of this transaction which seem odd. First, the rationale that appears to have been provided for the exchange (safety) somehow doesn't ring true. Second, it seems strange that the survey of the 55.6 acre parcel (subject of an Agreement between Canada and Algoma Steel in 1935) was described in a "clockwise" direction in 1935 but was described from a different starting point and in a "counter-clockwise" direction in this transaction. [Although the two descriptions are very different, it may be that the same piece of land is being described, in which case questions arise about whether this might have been an attempt to conceal the nature and content of the 1935 transaction or legitimize something that was thought to be improper in respect of the 1935 Agreement.] Third, this may be the same parcel of 55.6 acres that has recently been returned, which also raises questions.

The document research for this Specific Claim might cost about $5,000.00.

December 4, 1995
8. **First Surrender of One Square Mile (1855)** The records seem to indicate that this surrender was made by the Chief alone, which may be the basis of a Specific Claim. The state of the records going this far back is not known at this time, so no estimates can be made for research or other costs at this time. The facts that this surrender pre-dated the Indian Act and also pre-dated Confederation is likely to introduce complications.

9. **Leagues vs. Miles** The Gros Cap Reserve was one of the three Reserves mentioned in the Robinson-Superior Treaty. At that time, the First Nations around Lake Superior were more familiar with the French measure of distance (league) than the British (mile). One league is about four miles. In the discussion leading to the signing of the 1850 Treaty, the Chiefs and Principal men thought about distance being measured in leagues rather than miles. Therefore, they had in mind that the Gros Cap Reserve would be about sixteen miles by sixteen miles, instead of four miles by four miles.

Canada and Ontario have accepted that the Reserve of Fort William First Nation should have been much bigger on account of the leagues vs. miles “misunderstanding”. The same rationale that applied to Fort William out to apply to Michipicoten. However, it is not possible at this time to estimate the costs for filing a Specific Claim in this regard. The cost should not be too large if the research by Fort William First Nation can be made available. It is suggested that work on this Specific Claim await most of the preceding Claims.

**Funding**

Michipicoten First Nation will apply the “usual” funding from the Union of Ontario Indians to this work, but this amounts to only about $4,000.00 per year. Therefore, funds will need to be obtained from other sources. However, it has been demonstrated that a great deal of progress can be made with relatively small amounts of money, and careful management will permit this situation to continue.

For Michipicoten First Nation, funding is especially critical for the initial document research and preparatory work, to get some Specific Claims “into the pipe”.

After a Specific Claim is accepted by Canada, an advance against the eventual settlement is provided to meet negotiation costs. This will relieve the pressure somewhat, although careful management will still be required in order to keep costs as low as possible and preserve as much as possible of the eventual settlement amounts for the benefit of the present and future members of Michipicoten First Nation.
MICHIPICOTEN FIRST NATION Preliminary Plan for Specific Claims

Efficiencies

To the greatest extend possible, the document research will be conducted in a manner so as to avoid duplication of effort. Some research will cover several claims — for example, pay list collection and genealogy for the Missinabi and Chapleau work will also cover the 1889-1900 last surrenders. Similarly, Trust Fund research will cover the surrenders, the possible timber claim and expropriations.

Consideration will be given to combining claims if that is thought to be in the overall best interest of Michipicoten. For example, the 1889 and 1900 surrenders may be covered by the same research, report and legal work.

Outside Technical and Negotiation Support

Michipicoten First Nation has engaged Water’s Edge Consulting Inc. (Trevor Falk) to provide necessary technical and negotiation support. Christine Dernol and Associates have already done some document research for Michipicoten, and it is expected that this will continue.

Summary

Approaching the surrenders and expropriations of Gros Cap Reserve lands in this systematic manner should result in most of the necessary document research being completed by mid-1997. Specific Claims based on the document research will be prepared and submitted as indicated by the document research and as funds permit.

Although there will be delays by Canada in processing some or all of those Specific Claims, it is hoped that the first one (Great Lakes Power) can be well into the negotiation process by the end of 1996. Others will require more time, and some may involve prolonged negotiations. However, there is no reason that the research, preparation, submission and negotiation of Specific Claims cannot proceed in an orderly manner such as outlined in this Preliminary Plan.

December 4, 1995
Surrender on Gros Cap
Indian Reserve No. 49

I refer to your memorandum of September 12, 1983.

Surrender 75 - April 10, 1855. A search of our records revealed no information regarding a referendum, or the number of eligible voters for this surrender.

Surrender 243 - July 24, 1899. William Van Abbott, Indian Lands Agent, Sault Ste. Marie, in a July 24, 1899 letter to James A. Smart, Deputy Superintendent General of Indian Affairs (enclosed) states that there are about 66 male voters in the Band "only about 16 of which reside near the Reserve Gros Cap" Section 39 of the 1866 Indian Act R.S.C. 1867-1868 c. 43 (enclosed) prescribes that

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.

Van Abbott's July 24, 1899 letter to Smart (enclosed) states

I have the honor to forward you herewith surrender of 1000 acres of the Gros Cap Michipicoten Indian Reserve signed by the Chief and 12 members of the Band residing in the neighborhood of the Gros Cap Reserve, that is to say Michipicoten River.
We were unable to locate a copy of any referendum for Surrender 423.

Surrender 423 – September 10, 1900. A search of departmental records failed to uncover a copy of the referendum, or the number of eligible voters for this surrender.

William Van Abbott wrote to J.D. McLean, Secretary, Department of Indian Affairs, Ottawa, on September 13, 1900 (enclosed) stating that there were only twelve present and they all agreed, and signed the document.

Surrender 920 – June 29, 1925. A.D. McNeill, Indian Agent, Sault Ste. Marie, in a July 14, 1925 letter to A.F. MacKenzie, Acting Assistant, Deputy and Secretary, Department of Indian Affairs (enclosed) reports on the surrender of Gros Cap Indian Reserve Timber.

McNeill’s letter indicates that a meeting called to consider the surrender took place on, or about, June 29, 1925. He states that there are a total of 37 Indians over the age of 21 living at Michigan, and that 26 were present to vote. The voting list is enclosed for your information.

CCCR 1149 – June 15, 1927. A.F. MacKenzie, Acting Assistant, Deputy and Secretary, Department of Indian Affairs in a January 11, 1928 letter to Chief James Kataasen (enclosed) states that the sale of a Right-of-Way across the Gros Cap Reserve to the Algoma Central Railway “was made under the provisions of Section No. 46 of the Indian Act and authorized by Order in Council No. 1149 dated June 15th 1927.” Section 46 of R.C.C. 1141, C.14, is enclosed for your information.

No referendum by the Band is required in this instance as 6.46. Compensation for lands taken for public purposes, necessitates only the consent of the Governor in Council.


The attached Resolution has the signatures of Councillors Moses Stone and Thomas Andre only, and as this represents a majority of the Council, I would recommend that action be taken without the necessity of having the Chief’s signature.

H.M. Jones, Director, Indian Affairs, in an August 21, 1956 memorandum to the Deputy Minister (enclosed) stated...
The 55.6 acres were purchased from the Railway Company in 1935 at $1.00 an acre and have never been officially added to the Reserve. It is, therefore, possible to make this land available without a formal surrender.

I trust the foregoing will be of assistance.

[Signature]

P.J. Singleton
Directing
Land Directorate
Reserves and Trusts

Encl.
APPENDIX B

CHIEF JOHN S. PETERSON, MICHIPICOTEN FIRST NATION, TO W. AUSTIN,
ASSISTANT DEPUTY MINISTER, INDIAN AND NORTHERN AFFAIRS, MAY 7,
2001

REPORT ON THE PILOT PROJECT OF THE
MICHIPICOTEN FIRST NATION
Michipicoten First Nation
PO. Box 1, Suite 8, RR#1, Wawa, ON P0S 1K0
Phone: 705-856-1999 • Fax: 705-856-1648

May 7, 2001

Mr. W. Austin, Assistant Deputy Minister
Indian and Northern Affairs
Claims And Indian Government
10 Wellington Street, North Tower
16th Floor
Hull, Quebec
K1A 0H4

Via Fax: (819) 953-3246

Dear Mr Austin:

Re: Michipicoten Specific Claims Pilot Project; First Phase Completed

I am writing to you on behalf of Michipicoten First Nation to express our thanks and gratitude to Canada on the occasion of the successful completion of the research and submission phase of our joint Specific Claims Pilot Project. At a meeting on our reserve on April 24, 2001, we informed Canada that in our opinion there are no more claims to be submitted to Canada and that completes the first phase of the Pilot Project. The second phase, negotiation of accepted claims, is already well underway; we have already settled two claims and are in negotiations with three others.

Just over four years ago then Chief Sam Stone wrote to then Minister Irwin and suggested a novel way to approach specific claims, one based on cooperation, joint research, non-positional bargaining and working together as allies, not adversaries. Minister Irwin, to his credit, took up the challenge and in March 1997 the Pilot Project began with the full support of the then Research Manager at SCB, Ms. Pamela Keating. We are writing to you because you have been there since the beginning and have been very supportive of this Pilot Project.

The concept was simple, yet effective: a mediated team-based approach to settling claims. The Indian Claims Commission provides the mediation and also chairs all of our meetings. Michipicoten and Canada both retained one researcher who researched all our historic grievances. Michipicoten’s lawyer and Canada’s lawyer met as part of the team to define and narrow the legal issues. Additional research was performed as required to fully flesh out the allegations. Tight focussed legal submissions were then given to the Department of Justice for a legal opinion, which took on average about six months to complete, compared to the two years plus in the normal claims process.

Website: www.michipicoten.org • E-mail: mfn@adss.on.ca
In the four years since the start of the Pilot Project thirteen claims were identified by the parties. Six Specific Claims have been submitted to date, five of which have been accepted for negotiation (Canada has told us we will have an answer on the last one this summer). This co-operative process has resulted in the conclusion that four of the transactions identified at the outset of the Pilot Project as claims, are in fact not claims and will not be submitted. Three other claims have been resolved to our complete satisfaction by way of administrative referrals. Each and every claim submitted through the Pilot Project has been accepted for negotiations. We were able to “separate the wheat from the chaff” through our mediated team-based approach resulting in large time, and cost, savings. Robert F. Reid, Q.C., from the Indian Claims Commission, has been extraordinarily effective in this regard; his contribution to the success of this Pilot Project should not be underestimated.

The seven claims that were not submitted eliminated the need for a legal review by Canada. Through the normal process, without this cooperation most, or all, of those claims would have been submitted to Canada. With respect to costs, on average, we have dealt with over three claims per year (or one claim every four months) with an average cost of less than $50,000 per claim for joint research, First Nation participation (including a 2 day community session in 1997) and First Nation legal submissions. With these modest costs Canada and Michipicoten First Nation have achieved both a sense of closure and satisfaction regarding our historic past grievances. Negotiations on our accepted claims are already benefitting from this established trust relationship.

What I want to convey to you most of all is the sense of well being that this Pilot Project has brought to our community. First, we were treated like equals and given the necessary funding and resources to come to the table as equals. The funding also allowed us to meet with our members, both on and off the reserve, and explain our history and our claims to them. This in turn made our members feel much more involved. We see that retaining positive results on claim settlement votes has also been greatly enhanced. This Pilot Project has done more to bring together all the members of this First Nation, both on and off reserve, than you could imagine.

The Pilot Project has also allowed us to reach out to our non-native neighbours and forge new relationships and partnerships. The town of Wawa is now a big supporter of what we are doing and our Council and their Council meet regularly to ensure open and effective communication. There will be no surprises.
Mr. W. Austin, Assistant Deputy Minister

May 7, 2001

For some time now the team members have discussed the idea of a presentation about the Pilot Project to senior officials in DIAND, DOJ and the Indian Claims Commission. Michipicoten First Nation would be delighted to participate in such a presentation where we could discuss our lessons learned, what worked, what did not, and to have an open dialogue and exchange of ideas. It is my understanding that Jeffrey Ross, Ontario Senior Claims Analyst SCB, is organizing the presentation. We would very much like to help.

We now have a sense that our historic grievances will be rectified and that our First Nation will be able to successfully move into the future. This would not have been possible without the frank and above-board support that we have received from Specific Claims Branch, Research Funding Division and the Department of Justice. Thank you for your support.

Meeewetch,

Kathryn Campbell

cc: The Honourable R. D. Nault P.C., M.P. Via FAX: (819) 953-4941
    Audrey Stewart, Via Fax: (819) 954-4123
    Veda Wesolake, Via Fax: (819) 953-4224
    Robert F. Reid, Q.C. Via Fax (819) 943-0157
RESPONSE

Response of the Minister of Indian Affairs and Northern Development to the Chief Commissioner on the Paul First Nation - Kapasiwin Townsite Inquiry Report
774
MAR 3 2009

Ms. Renée Dupuis
Chief Commissioner
Indian Specific Claims Commission
400 – 427 Laurier Avenue West
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Chief Commissioner:

I am writing to you with respect to the Indian Specific Claims Commission’s report entitled Paul First Nation – Kapaswcin Townsite Inquiry that was released on June 7, 2007. As you know, the Commission recommended that the claim not be accepted for negotiations in that report.

I would like to inform you that the Government of Canada has decided not to accept the portions of the Paul First Nation’s claim that were the subject of the Commission’s inquiry. I appreciate the Commission’s consideration of the issues relating to the First Nation’s claim, and I wish to thank you for the Commission’s work.

Sincerely,

Chuck Strahl

cc:
Chief Daniel Paul
Mr. Daniel Bellegarde
Mr. Alan Holman
Ms. Sheila Purdy
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.
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.
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.