

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

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To the Indian Claims Commission
Michelle Brass

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SUMMARY

MUSKOWEKWAN FIRST NATION 1910 AND 1920 SURRENDERS INQUIRY Saskatchewan

The report may be cited as the Indian Claims Commission, *Muskowekwan First Nation: 1910 and 1920 Surrenders Inquiry* (Ottawa, November 2008)

*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 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 ICC held a community session in September 2005 and an oral hearing in May 2008.

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

Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990); Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85.

COUNSEL, PARTIES, INTERVENORS

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

Akan, Sam	Headman, Muskowekwan First Nation (c. 1915)
Atkinson, G.M.	Saskatchewan MLA (1909-1910)
Borden, Robert L.	Prime Minister of Canada (1911-1920)
Bray, S.	Chief Surveyor, Department of Indian Affairs (1904-1921)
Campbell, Glen	Chief Inspector of Indian Agencies (1912-1914)
Crawford, Frank W.	Secretary of the Village Council of Lestock, Sask. (c. 1918)
Desjarlais, Tom	Chief of the Muskowekwan First Nation (1918-1933)
Deville, E.	Surveyor General, Department of the Interior (1889-1920)
Edwards, W.F.L.	District Superintendent, Soldier Settlement Board of Canada (c. 1920)
Fairchild, H.W.	Surveyor, Department of Indian Affairs (c.1921-1931)
Graham, William M.	Indian Agent, Qu'Appelle Agency, 1896-1904); Inspector of Indian Agencies (1904-1913); Commissioner for Greater Production (1918-1919); Indian Commissioner (1918-1932)
Hardinge, J.B.	Acting Indian Agent, Touchwood Agency, (c.1920-1921); Indian Agent, Touchwood Agency (c.1922-1923)
Johnson, J. Fred	Member of Parliament (c. 1919)
Ka-kee-na-wup	Muskowekwan Chief or Headman at signing of Treaty 4
Maber, S.	Secretary, Soldier Settlement Board (c. 1920)
Martin, W.M.	Premier and Minister of Education for Saskatchewan (1916-1922)
McLean, J.D.	Secretary, Department of Indian Affairs (1897-1911)
McLean, J.K.	Surveyor, Department of Indian Affairs (1906-1912)

Meighen, Arthur	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)
Murison, William	Indian Agent for Muskowekwan Reserve, Touchwood Agency (1905-1920)
Muskowekwan	Chief of Muskowekwan First Nation
Nelson, John C.	Dominion Land Surveyor (1882-1892)
Orr, W.A.	Clerk in Charge of the Lands and Timber Branch of Indian Affairs (1905-1920)
Pedley, Frank	Deputy Superintendent General of Indian Affairs (1902-1913)
Reid, J. Lestock	Dominion Land Surveyor (1876-1910)
Robinson, F.J.	Deputy Minister, Saskatchewan Department of Public Works (c.1911); Chairman of the Board of Highway Commissioners (c. 1914)
Robertson, D.F.	Chief Surveyor, Department of Indian Affairs (c. 1924)
Ryley, G.U.	Land Commissioner, Grand Trunk Pacific Railway (c. 1908-1909)
Scott, Duncan Campbell	Deputy Superintendent of Indian Affairs (1913-1932)
Sifton, Clifford	Minister of the Interior & Superintendent General of Indian Affairs (1896-1905)
Stewart, S.	Assistant Secretary, Department of Indian Affairs (c. 1910)
Tate, D'Arcy	Solicitor, Grand Trunk Railroad Company (c. 1911)
White, W.R.	Dominion Land Surveyor, Department of Indian Affairs (c. 1913-1921)
Windigo (Old Windigo)	Headman, Muskowekwan First Nation (c. 1910-1915)

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

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).

surrender having been in order that the land covered thereby may be sold for the benefit of the band interested therein.”⁶

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

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).

⁸ “Pay-List of Surrender of Land,” Muscovequan’s Band, 14 October 1920 (ICC Exhibit 1a, pp. 462-467).

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 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

⁹ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy - Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 *Indian Claims Commission Proceedings* (ICCP) 171-85.

¹⁰ Commission issued September 1, 1992, pursuant to Order in Council P.C. 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

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:

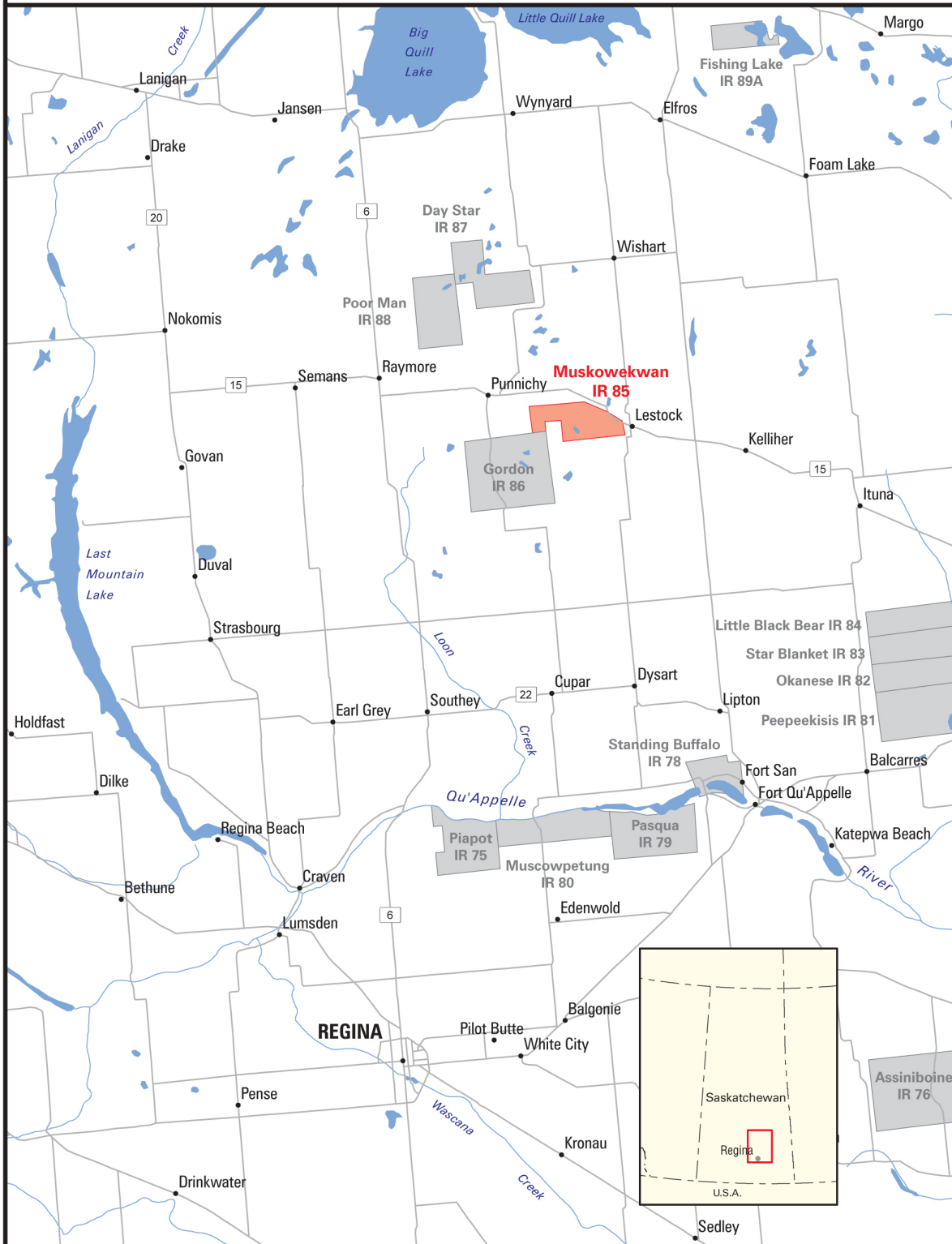
- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can 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.

¹² *Outstanding Business*: 20; reprinted in [1994] 1 ICCP 180.

Map 1

Claim Area Map



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.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”.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 Superintendent General of Indian Affairs explained to the Deputy Superintendent General of Indian Affairs, Frank Pedley, in a letter dated

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).

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 townsite 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 surrender of either the whole or part of that quarter section to the Band for its consideration. In February, 1908 the "Band in Council" agreed to surrender the whole of the NW quarter of section

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 accruing on the balance.

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 Muscovequan 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

¹⁵ The full text of these *Guidelines* appears in Appendix A.

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. 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. Bournet, 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.

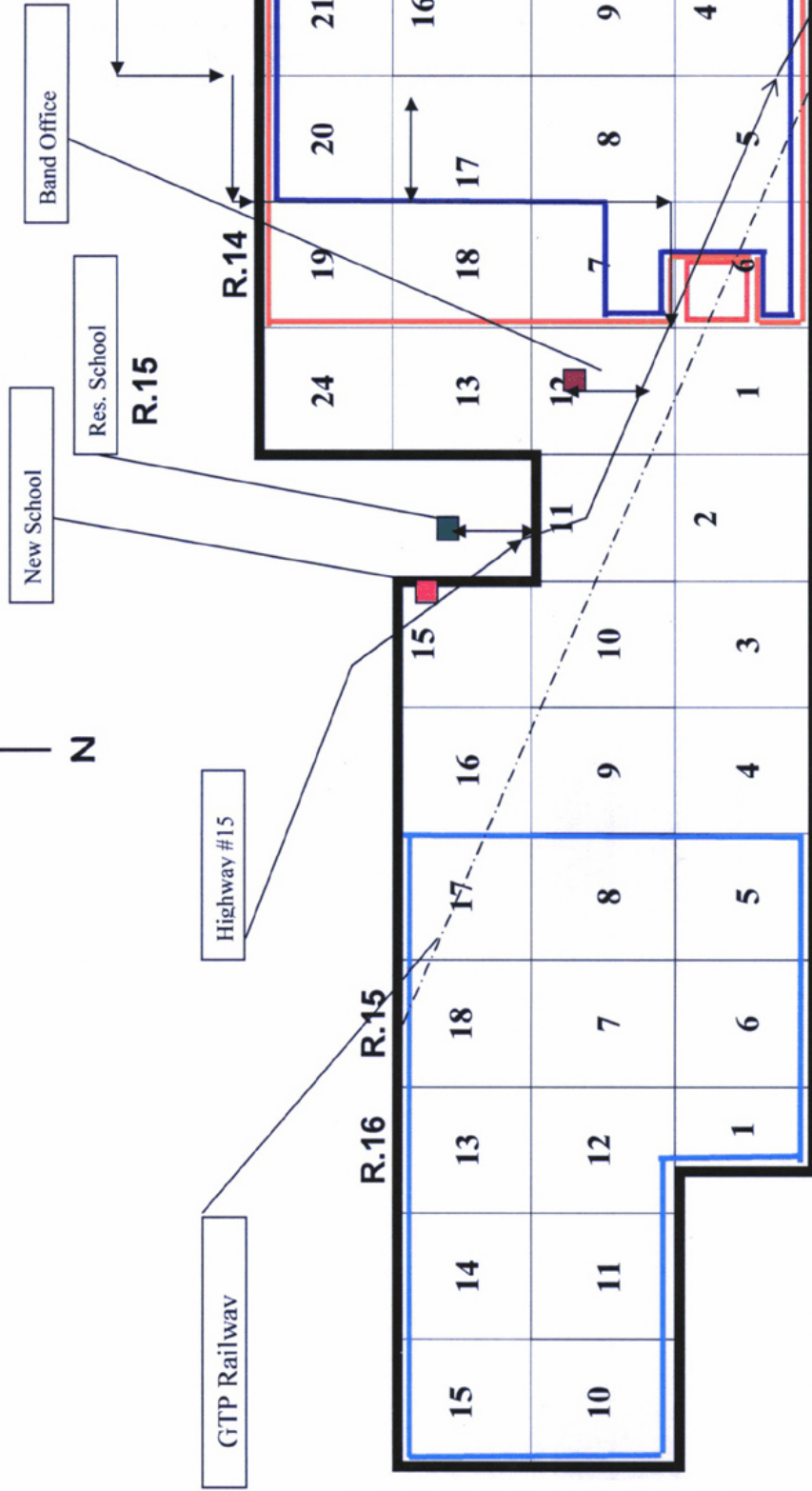
On October 21, 1920, Commissioner Graham wrote to Scott, advising him of the surrender of approximately 7,485 acres of land from the members of the Muskowekwan reserve No. 85, for sale by public auction. He advised that the Band had been given the regular legal notice of the meeting, that there was a 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.

- 1884 Reserve Boundary as Surveyed by J.C. Nelson March 1884
- - - 1908 Grand Trunk Pacific Railway (GTPR) Constructed
- 1910 Surrender for Sale 160 Acres, Townsite of Lestock
- 1918 Surrender for Lease for Pasture 5920 acres for 5 years
- 1919 Surrender for Lease for Pasture 8000 acres for 5 years
- 1920 Surrender for Sale 7485 acres.

**TREATY No. 4 N.W.T.
INDIAN RESERVE**

No. 85

MUSKOWEKWAN INDIAN BAND



For illustrative purposes only

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*.¹⁶ 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:

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

¹⁶ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

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.*¹⁷

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.¹⁸

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;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;

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.

¹⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 7 (sub nom. *Apsassin*). Emphasis added.

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

¹⁹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*).

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 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

²⁰ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 14 (sub nom. *Apsassin*).

²¹ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 41 (sub nom. *Apsassin*).

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 *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

²² *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 43 (sub nom. *Apsassin*).

²³ *Guerin v. The Queen*, [1984] 2 SCR 335.

²⁴ *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.

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 *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.”²⁵

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.²⁶ 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.²⁷

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

²⁵ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 40 (sub nom. *Apsassin*).

²⁶ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, at para. 37 (sub nom. *Apsassin*).

²⁷ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, at para. 38 (sub nom. *Apsassin*). Original emphasis.

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.²⁸

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.²⁹ The First Nation argues that non-compliance with these requirements is fatal to a surrender.³⁰ The First Nation acknowledges, however, that it bears the onus of proving that the *Indian Act* requirements were not met.³¹

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.³² 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

²⁸ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, at paras. 39-40 (sub nom. *Apsassin*).

²⁹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 392.

³⁰ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 395-396.

³¹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 402.

³² Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 406-407.

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.³³

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.³⁴ 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.³⁵

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.³⁶ 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.³⁷

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.³⁸

³³ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 410, 412.

³⁴ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 420, 424.

³⁵ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 423.

³⁶ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 98.

³⁷ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 99.

³⁸ 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 *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.³⁹ It maintains that, in any event, there is no evidence that the Band did not understand the terms of the surrender.⁴⁰

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.⁴¹

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,

³⁹ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 102, citing ICC, *Roseau River Anishnabe First Nation: 1903 Surrender Inquiry* (Ottawa, September 2007) at 34-35.

⁴⁰ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 137.

⁴¹ Written Reply on Behalf of the Muskowekwan First Nation, May 8, 2008, paras. 20-21.

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.”⁴²

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 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?

⁴² ICC, *Roseau River Anishinabe First Nation: 1903 Surrender Inquiry* (Ottawa, September 2007) at 34.

- 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 respected.⁴⁵ 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.⁴⁶

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

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.

⁴⁵ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 119.

⁴⁶ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 130.

the interests of the Grand Trunk Pacific Railway Company and the settlers.⁴⁷ It alleges that the Crown failed to fully inform the First Nation of its options or the foreseeable consequences of that particular surrender.⁴⁸

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.⁴⁹ 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.⁵⁰

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.⁵¹ 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 the interests of local settlers.⁵² Furthermore, it alleges that the Crown did not inform the First Nation that it was against Crown policy to have a townsite within a reserve, or inform them of the negative consequences of similar surrenders.⁵³

⁴⁷ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 506.

⁴⁸ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 521-522.

⁴⁹ Written Submission on Behalf of the Government of Canada, April 23, 2008, paras. 145-146.

⁵⁰ Written Submission on Behalf of the Government of Canada, April 23, 2008, para 175.

⁵¹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 576.

⁵² Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 582.

⁵³ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 585.

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.⁵⁴ 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 townsite" policy.⁵⁵

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.⁵⁶ 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.⁵⁷ Canada responds that, viewed from the First Nation's perspective at the time, the 1910 surrender was not foolish, improvident, or exploitative.⁵⁸

The First Nation submits that some Crown representatives thought the establishment of a townsite 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.⁵⁹

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

⁵⁴ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 141.

⁵⁵ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 139.

⁵⁶ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 635.

⁵⁷ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 642, 648, 679.

⁵⁸ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 144.

⁵⁹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 641, 647.

bad company, intemperance, and immorality.⁶⁰ 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.⁶¹

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

⁶⁰ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 143.

⁶¹ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 144.

⁶² *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

⁶³ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 38 (sub nom. *Apsassin*). Emphasis in the original.

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.

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 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

⁶⁵ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*).

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).

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 townsite 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 “Muskowequan’s Reserve” and proposed having a town 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.”⁷⁰

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.

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).

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).

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.”⁷¹

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 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

⁷¹ W. Murison, Indian Agent, to Indian Commissioner, December 4, 1905 (ICC Exhibit 1a, pp. 33-34).

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.⁷²

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."⁷³ 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 section..."⁷⁴ 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

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).

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).

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.⁷⁵

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.⁷⁶

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.

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).

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).

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

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).

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).

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

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 13, 2008, paras. 443, 447.

⁸² Written Reply to Canada's Submission on Behalf of the Muskowekwan First Nation, May 8, 2008, para. 27.

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

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.⁸⁵ 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.⁸⁶

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 1986.⁸⁷

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.⁸⁸

⁸³ Written Reply to Canada's Submission on Behalf of the Muskowekwan First Nation, May 8, 2008, para. 24.

⁸⁴ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 447.

⁸⁵ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 108.

⁸⁶ Written Submission on Behalf of the Government of Canada, April 23, 2008, paras. 111-112.

⁸⁷ Citing *Mitchell v. Canada (M.N.R.)*, [2001] 1 S.C.R. 911, at para. 39, Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 116.

⁸⁸ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 382.

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."⁸⁹ 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

⁸⁹ Public History Inc., *Muskowekwan 'Rules of the Band' Project – Research Findings*, prepared for the First Nation and Canada, September 2006 (ICC Exhibit 10a, p. 4).

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' 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

⁹⁰ Affidavit of Peter Windago, dated September 11, 1986 (ICC Exhibit 1a, pp. 1011-1015).

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.

“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 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?

2 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?

⁹² *Blueberry River Indian Band v. Canada* (Department of Indian Affairs and Northern Development), [1995] 4 SCR 344, at para. 7 (sub nom. *Apsassin*).

- 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 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

⁹³ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 466.

⁹⁴ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 468.

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.

⁹⁷ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 477.

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

⁹⁸ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 147.

⁹⁹ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 155.

¹⁰⁰ Written Submission on Behalf of the Government of Canada, April 23, 2008 para. 158.

¹⁰¹ Written Submission on Behalf of the Government of Canada, April 23, 2008 para. 157.

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.

¹⁰⁴ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 555.

that 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.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ It argues further that the Department of Indian Affairs allowed

¹⁰⁵ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 567, 569.

¹⁰⁶ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 175.

¹⁰⁷ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 164.

¹⁰⁸ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 592.

¹⁰⁹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 614.

¹¹⁰ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 616.

band members to think that the surrender was necessary in order to obtain agricultural assistance.¹¹¹

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*.¹¹²

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.¹¹³ 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.¹¹⁴

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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷

¹¹¹ Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, para. 626.

¹¹² Written Submission on Behalf of the Muskowekwan First Nation, March 13, 2008, paras. 587-588.

¹¹³ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 161.

¹¹⁴ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 162.

¹¹⁵ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 166.

¹¹⁶ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 163.

¹¹⁷ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 165.

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.¹¹⁸ 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.¹¹⁹

Canada responds that very little of the surrendered lands was being farmed,¹²⁰ 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.¹²¹ It maintains 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.

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.

¹²⁰ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 169.

¹²¹ Written Submission on Behalf of the Government of Canada, April 23, 2008, para. 171.

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 William Morris Graham, Thomas Desjarlais, Sam Fred Akan, and Windigo.¹²⁶ 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

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).

¹²⁶ Surrender Affidavit, October 14, 1920 (ICC Exhibit 1a, p. 459).

¹²⁷ W.M. Graham, Indian Commissioner, Voters List, October 14, 1920 (ICC Exhibit 1a, pp. 460-461).

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 \$1,000.¹²⁹

¹²⁸ R.A. Schoney, "An Economic Assessment of the Muskowekwan 1920 Cash Inducement," prepared for the Muskowekwan First Nation, November 13, 2006 (ICC Exhibit 10b, pp. 13, 15).

¹²⁹ Bank of Canada Inflation Calculator, December 21, 2007, included as part of Exhibit 10; and R.A. Schoney, "An Economic Assessment of the Muskowekwan 1920 Cash Inducement," prepared for the Muskowekwan First Nation, November 13, 2006 (ICC Exhibit 10b, p. 15).

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 ...”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.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.

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

¹³⁰ Petition, Members of the Muscovequan Band, Muskovequan Reserve, to Duncan C. Scott, Deputy Superintendent General, Dept. of Indian Affairs, February 8, 1915 (ICC Exhibit 1a, pp. 223-224).

¹³¹ Petition, Muscovequan Band of Indians to D.C. Scott, Deputy Minister, Dept. of Indian Affairs, March 5, 1920 (ICC Exhibit 1a, 402-403).

respectively,¹³² 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 \$144,343.95.¹³³

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

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).

to the First 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 Commission 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

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).

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 Provinces and are finely adapted for agriculture and stockraising.”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.

¹³⁸ Governor General in Council, Order in Council, O.C.P.C. 393, dated February 16, 1918 (ICC Exhibit 1a, pp. 250-252).

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

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.

¹³⁹ Stephen Pillipow, Barrister & Solicitor, to Indian Claims Commission, March 11, 2008 (ICC File 2107-34-1, p. 109543).

¹⁴⁰ Email, Michelle Brass, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, March 12, 2008 (ICC File 2107-34-1, p. 109507).

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

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INTRODUCTION

The Muskowekwan First Nation¹⁴¹ 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.¹⁴² 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 4.¹⁴³

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,

¹⁴¹ The historical documentation contains various spellings of “Muskowekwan,” including Muscowequan, Muscowequan, 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. Dickieson 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*, xxxiii (ICC Exhibit 1a, p. 14). See also: treaty annuity paylist for “Mus cow we quon, Hard Quill’s Band”, [1874], no file reference available (ICC Exhibit 1m. p. 1).

with the consent of the Indians entitled thereto first had and obtained.”¹⁴⁴ 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.”¹⁴⁵

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 1884.¹⁴⁶ The original plan and field notes prepared by Surveyor Nelson in 1884 indicated IR 85 contained an area of 30 square miles.¹⁴⁷ 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.¹⁴⁸ 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*.¹⁴⁹

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).

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, 40, DIAND, Indian Lands Registry, Instrument B4000 (ICC Exhibit 1b, pp. 67-68).

¹⁴⁷ Natural Resources Canada, Plan 197 CLSR 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 CLSR 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-ekwun,” March 1884 (ICC Exhibit 7b, p. 4).

¹⁴⁸ Order in Council PC 1151, May 17, 1889, p. 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).

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, 1927.¹⁵⁰

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.¹⁵¹ In November and December 1905, Indian Agent Murison was instructed "not allow any work of railway construction on the Muscovequan Indian Reserve ... until you have been informed that the right of way has been duly arranged for."¹⁵² However, Indian Agent Murison was further instructed to prepare sketches and land valuations for the proposed GTP right of way.¹⁵³

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.¹⁵⁴ On February 2, 1906, G.U. Ryley, Land Commissioner for the GTP Railway applied

¹⁵⁰ Order in Council PC 71, January 14, 1927, LAC, RG 2, vol. 1778 (ICC Exhibit 1a, pp. 698-701).

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).

¹⁵³ Indian Commissioner to Indian Agent, Touchwood Agency, November [21], 1905, LAC, RG 10, vol. 3560, file 81, part 8 (ICC Exhibit 1a, p. 32); W. Murison, Indian Agent, Touchwood Agency to Indian Commissioner, December 4, 1905, LAC, RG 10, vol. 3560, file 81, pt. 8 (ICC Exhibit 1a, pp. 33-34).

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).

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.¹⁵⁵

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 Muskowekun Indian Reserve No. 85 the total acreage required being 164.8."¹⁵⁶ Two days later, on February 10, 1906, Indian Agent Murison was instructed:

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 Muskowekun reserve were granted to the Company for a railway right of way and station grounds.¹⁵⁸

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 283,808-1 (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).

¹⁵⁷ Frank Pedley, Deputy Superintendent General of Indian Affairs to W. Murison, Indian Agent, February 10, 1906, LAC, RG 10, vol. 4022, file 283808, 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.

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,

[t]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 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

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).

¹⁶⁰ Clifford Sifton, Minister of the Interior, to [Frank] Pedley, December 5, 1904, PARC, file 675/31-2-17-89, CN vol. 1 (ICC Exhibit 1a, p. 29). See: Peggy Martin-Maguire, *First Nation Land Surrenders on the Prairies, 1896-1911*, prepared for the Indian Claims Commission (Ottawa: September 1998), 207-208, 281-285 and 375-378 for further information.

¹⁶¹ Clifford Sifton, Minister of the Interior, to Mr. Pedley, December 5, 1904, PARC, file 675/31-2-17-89 (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).

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 increasing. It is a difficult matter to keep Indians out of a town located on a Reserve.¹⁶⁷

This is a reference to the establishment of the town of Kamsack, by the Canadian Northern Railway, on the Cote IR 64 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

¹⁶⁴ J.D. McLean, Secretary, Department of Indian Affairs, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, July 31, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 51).

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).

¹⁶⁷ W. Murison, Indian Agent, Touchwood Agency, to DSGIA, November 21, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 60).

reviewing the company's offer and the situation of the Cote First Nation, Sifton approved the proposed development.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."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.¹⁷⁰ 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

¹⁶⁸ Peggy Martin-Maguire, *First Nation Land Surrenders on the Prairies, 1896-1911*, prepared for the Indian Claims Commission (Ottawa: September 1998), 261- 262.

¹⁶⁹ W. Murison, Indian Agent, Touchwood Agency, to DSGIA, November 28, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 62).

¹⁷⁰ G.U. Ryley to Secretary, Department of Indian Affairs, December 26, 1906, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 65).

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).

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

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).

him that the *Indian Act* only allowed a maximum cash payment of 50 per cent of the purchase price.¹⁷⁸

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.”¹⁷⁹ On December 30, 1908, Graham was authorized to pursue the proposal, although it appears that no action was taken for several months.¹⁸⁰

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.”¹⁸¹

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

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).

¹⁷⁹ W.M. Graham, Inspector of Indian Agencies, Qu’Appelle Inspectorate, to Frank Pedley, DSGIA, December 8, 1908, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 82).

¹⁸⁰ J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Inspector of Indian Agencies and Reserves, December 30, 1908, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 87).

¹⁸¹ G.M. Atkinson, MLA, to Frank Oliver, Minister of the Interior, August 30, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 88-89).

to the Grand Trunk Pacific ... or to be laid out and sold as a townsite.”¹⁸² 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.¹⁸³

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.”¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

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

¹⁸² F. Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, September 10, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 90).

¹⁸³ Frank Pedley, DSGIA, to G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway Company, September 11, 1909, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 91).

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).

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.”¹⁸⁷

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.¹⁸⁸

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

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).

¹⁸⁹ G.U. Ryley, Land Commissioner, Grand Trunk Pacific Town and Development Company Ltd., to DSGIA, January 20, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 98).

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).

¹⁹¹ G.M. Atkinson, M.L.A., to Frank Pedley, DSGIA, February 14, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 100).

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:

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

¹⁹² J.K. McLean to Deputy Minister, February 19, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 101-102).

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).

¹⁹⁴ Frank Pedley, DSGIA, to G.M. Atkinson, M.L.A., February 24, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 106).

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).

¹⁹⁶ Surrender for Sale, March 7, 1910, DIAND, Indian Lands Registry, Instrument X10074 (ICC Exhibit 1a, pp. 107-12).

Chief Muscovequan 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 Muskowekwun 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

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).

²⁰¹ Paylist, Muscovequan’s Band, April 25, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, pp. 123-34).

²⁰² Order in Council PC 572, April 1, 1910, DIAND, Indian Lands Registry, Instrument 40396 (ICC Exhibit 1a, pp. 119-20).

SUBDIVISION & SALE OF NW 6 (LESTOCK TOWNSITE), 1910

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

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).

²⁰⁴ Natural Resources Canada, Plan T1052 CLSR SK, “Plan of part of the Town-plot of Lestock in the Muscowequan I.R. No. 85,” surveyed by J. Lestock Reid, D.L.S., 1910 (ICC Exhibit 7e).

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).

²⁰⁶ Draft sale notice, October 11, 1910, LAC, RG 10, vol. 4022, file 283808-1 (ICC Exhibit 1a, p. 161).

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).

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

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

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).

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).

of Sub-division 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 by the members of the Muscovequon 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.”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.²¹⁵ In a memorandum dated May 17, 1912, DSGIA Pedley directed that “no action is to be taken on this at

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 DSGIA, 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).

²¹⁴ Unidentified author, Touchwood Agency, to unidentified recipient, March 30, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 187).

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.

the present time.”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.”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.”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”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.”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,”

²¹⁶ DSGIA to Lands Branch, May 17, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 189).

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).

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).

²¹⁹ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Charles S. Roat [sic], October 7, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 202).

²²⁰ DSGIA to Lands Branch, October 19, 1912, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 203).

and that they were “anxious to have a reply.”²²¹ On January 29, 1913, Assistant Deputy and Secretary J.D. McLean informed Campbell that “it has been decided to allow this matter to stand.”²²²

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 85,²²³ “as this town is being held back on this account.”²²⁴ 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.²²⁵ 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.²²⁶ 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.²²⁷ 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.

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, pp. 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).

²²⁵ Description for Surrender, W.R. White, May 23, 1913, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 212); see also, Draft Surrender for Sale, undated, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 213-16).

²²⁶ Draft Surrender for Sale, undated, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 213-16).

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).

Roche.”²²⁸ 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:

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 than 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.

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).

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.²²⁹

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."²³⁰ He further noted that "[t]he people in the 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.

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 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).

²³² Members of the Muscowequan Band, to D.C. Scott, DSGIA, February 8, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 223-24).

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

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

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).

²³⁴ Members of the Muscowequan Band to D.C. Scott, DSGIA, February 8, 1915, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 223-24).

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).

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

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

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.

²⁴⁰ Petition from “residents of the Village of Lestock and farmers adjacent thereto,” to Arthur Mehan [*sic*], Minister of the Interior, March 27, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 264-65).

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 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:

²⁴¹ Petition from “residents of the Village of Lestock and farmers adjacent thereto,” to Arthur Mehan [*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).

²⁴³ Brian E. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: University of British Columbia Press, 1986), 39 (ICC Exhibit 8f, p.5).

²⁴⁴ 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); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990), 249-250 (ICC Exhibit 8a, pp.8-9).

- 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

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. 255).

become property of the First Nation when the lease expired.²⁴⁸ The surrender 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.²⁴⁹ 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.²⁵⁰ 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.²⁵¹ A bank receipt indicates the money was deposited into the Muscowequan Trust Fund Account #231.²⁵² 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, 1918.²⁵³

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

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.

²⁴⁹ Affidavit, April 30, 1918, DIAND, Indian Lands Registry, Instrument X10077 (ICC Exhibit 1a, pp. 290-91).

²⁵⁰ Report by unidentified author, ca. 1919, LAC, RG 10, vol. 4069, file 427063 (ICC Exhibit 1a, pp. 313-54).

²⁵¹ W.M. Graham, Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, May 2, 1918, DIAND file 675/32-1, vol. 2 (ICC Exhibit 1a, pp. 292-93).

²⁵² Bank Receipt, May 6, 1918, attached to document dated May 2, 1918, DIAND, FRC file 675/32-1, vol. 2 (ICC Exhibit 1a, p. 293).

²⁵³ Trust Fund Account 231, LAC, RG 10, vol. 5949, Acct. 231 (ICC Exhibit 1h, p. 12).

Indian lands adjoining the village,” in order to make them available for taxation.²⁵⁴ 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.”²⁵⁵

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.”²⁵⁶ 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.”²⁵⁷ Crawford stated,

[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.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.”²⁵⁹ W.A. Orr, the Clerk in Charge of the Lands and Timber Branch of the Department

²⁵⁴ W.M. Martin, Premier’s Office, Province of Saskatchewan, to Duncan Campbell Scott, DSGIA, May 3, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 294-95).

²⁵⁵ Duncan C. Scott to W.M. Martin, Premier and Minister of Education, May 7, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 296).

²⁵⁶ Petition from Frank W. Crawford and others to R.L. Borden, May 23, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 298-99).

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).

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).

²⁵⁹ F.W. 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).

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.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.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.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.²⁶³

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.²⁶⁴ The surrender document contains 20 signatures,

²⁶⁰ W.A. Orr, In Charge, Lands and Timber Branch, to F.W. Crawford, Secretary, Village of Lestock, August 28, 1918, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 309).

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).

²⁶² 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).

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).

²⁶⁴ Surrender for Lease, August 4, 1919, DIAND, Indian Lands Registry, Instrument X10078 (ICC Exhibit 1a, pp. 367-72); see also, Affidavit, August 9, 1919, DIAND, Indian Lands Registry, Instrument X10078 (ICC Exhibit 1a, p. 377).

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.²⁶⁵

The surrender of August 4, 1919 was accepted by Order in Council PC 1943, dated September 18, 1919.²⁶⁶ 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,

[t]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 Muscowequan Reserve either for Soldiers Settlement or for sale in the usual way.²⁶⁷

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.”²⁶⁸

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.

²⁶⁵ Surrender for Lease, August 4, 1919, DIAND, Indian Lands Registry, Instrument X10078 (ICC Exhibit 1a, pp. 367-72); Voters List, August 4, 1919, DIAND, Indian Lands Registry, Instrument X10078 (ICC Exhibit 1a, pp. 373-74).

²⁶⁶ Order in Council PC 1943, September 18, 1919, DIAND, Indian Lands Registry, Instrument X10078 (ICC Exhibit 1a, pp. 385-86).

²⁶⁷ Duncan C. Scott, DSGIA, to W.M. Graham, Commissioner, August 8, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 375-76).

²⁶⁸ Duncan C. Scott, DSGIA, to W.M. Graham, Commissioner, August 8, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 375-76).

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

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).

²⁷⁰ Duncan C. Scott, DSGIA, to W.M. Graham, Commissioner, September 2, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 382-83).

²⁷¹ J. Fred Johnston, House of Commons, to D.C. Scott, DSGIA, September 29, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 387).

²⁷² [Duncan C. Scott], DSGIA, to Hon. Arthur Meighen, [SGIA], November 4, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 390-91).

action was expected. When this uncertainty became apparent, MP Johnston asked Scott in December 1919 to “make it plain to the Commissioner just what is wanted,” and that “prompt action is looked for.”²⁷³ 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.²⁷⁴

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 Muscovequans Band, Muscovequans 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 any thing that we want for the farm.²⁷⁵

²⁷³ J. Fred Johnston, to D.C. Scott, DSGIA, December 1, 1919, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 399).

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).

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 made of these lands,” and that “a satisfactory settlement of the question will be arrived at in the near future.”²⁷⁶

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.²⁷⁷ 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.”²⁷⁸

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.”²⁷⁹ As Graham was unable to deal with the matter immediately,²⁸⁰ Scott inquired on June 21, 1920, if Inspector Markle should be instructed to

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).

²⁷⁷ W.F.L. Edwards, District Superintendent, Soldier Settlement Board of Canada, to Secretary, Soldier Settlement Board of Canada, March 17, 1920, LAC, RG 10, vol. 7535, file 26121-5 (ICC Exhibit 1a, p. 407).

²⁷⁸ W.A. Orr, In Charge, Lands and Timber Branch, to Captain Leslie Chance, Soldier Settlement Board, March 24, 1920, LAC, RG 10, vol. 7535, file 26121-5 (ICC Exhibit 1a, p. 410).

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).

take the surrender instead, as the Village was “pressing us in this matter.”²⁸¹ 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.²⁸² 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.²⁸³

On August 20, 1920, Commissioner Graham requested instructions from the department to take a surrender from the Muskowekwan First Nation as well as “sufficient funds to make an advance payment” at the time of surrender.²⁸⁴ 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.²⁸⁵

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.²⁸⁶ The Soldier Settlement Board informed the Department of Indian Affairs on October 1, 1920 that “the Board is not anticipating at

²⁸¹ D.C. Scott, DSGIA, to W.M. Graham, Commissioner, June 21, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 426).

²⁸² Extract from letter from W.M. Graham, Commissioner, to unidentified recipient, June 25, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 427).

²⁸³ Extract from letter from unidentified author to W.M. Graham, Commissioner, June 29, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 428).

²⁸⁴ W.M. Graham, Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, August 20, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 436).

²⁸⁵ J.D. McLean, Acting DSGIA, to W.M. Graham, Indian Commissioner, August 28, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 439-42); see marginal note written on letter from W.M. Graham, Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, September 2, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 443).

²⁸⁶ W.M. Graham, Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, September 17, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 446).

present the acquirement of further tracts of Indian Lands,” and that it therefore did not intend to purchase any of the Muskowekwan lands.²⁸⁷

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.²⁸⁸ 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 1920.²⁸⁹

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.²⁹⁰

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,

²⁸⁷ S. Maber, Secretary, Soldier Settlement Board, to W.A. Orr, DSGIA [*sic*], October 1, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 450).

²⁸⁸ DIAND, Indian Lands Registry, Land Sales Book (Bound volume entitled “Lestock”), 1910- 1923 (ICC Exhibit 1c).

²⁸⁹ Memorandum signed by D.C. Scott, DSGIA, May 26, 1920, LAC, RG 10, vol. 4023, file 283808-1B (ICC Exhibit 1a, pp. 420-21).

²⁹⁰ W.M. Graham, Indian Commissioner, Department of Indian Affairs, to D.C. Scott, DSGIA, October 21, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, p. 471).

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 including 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 Phillipow, 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

²⁹¹ Surrender for Sale, October 14, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, p. 453-58).

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.

²⁹⁴ William Phillipow, to Karen Webb, Associate Commission Council, Indian Claims Commission, July 20, 2005, no file reference available (ICC Exhibit 1a, pp.1069-1070).

²⁹⁵ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015); Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, pp. 1019-1021).

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.²⁹⁶ 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.”²⁹⁷ 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.”²⁹⁸

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.”²⁹⁹ 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

²⁹⁶ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015); Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, pp. 1019-1021).

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).

²⁹⁹ Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, pp. 1019-1021).

from here, so they went ahead, I guess, and they signed.”³⁰⁰ 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?
- [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

³⁰⁰ ICC Transcript, September 21-22, 2005 (Exhibit 5a, p. 21, Mervyn Wolfe).

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).

³⁰³ ICC Transcript, September 21-22, 2005 (Exhibit 5a, p. 153, Albert Oochoo).

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 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

³⁰⁴ ICC Transcript, September 21-22, 2005 (Exhibit 5a, p. 48, Joe Desjarlais).

³⁰⁵ ICC Transcript, September 21-22, 2005 (Exhibit 5a, pp. 162-63, Donald Severight).

³⁰⁶ Affidavit, October 14, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, p. 459).

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 173738-3F (ICC Exhibit 1a, pp. 422); 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).

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 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.”³¹² 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).³¹³ The voters list, however, indicates that both Lawrence and Gregory Desjarlais were absent.³¹⁴

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

³⁰⁹ Affidavit of John Pambrun, September 30, 1986, no file reference available (Exhibit 1a, pp. 1019-1021).

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).

³¹² ICC Transcript, September 21-22, 2005 (ICC Exhibit 5a, p. 108, John Pambrun Jr).

³¹³ ICC Transcript, September 21-22, 2005 (ICC Exhibit 5a, p. 56, Joe Desjarlais).

³¹⁴ Voters List, October 14, 1920, DIAND, Indian Lands Registry, Instrument X10096 (ICC Exhibit 1a, pp. 460-461).

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.”³¹⁵ 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.³¹⁶ 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.³¹⁷

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.³¹⁸

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

³¹⁵ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015); Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, pp. 1019-1021).

³¹⁶ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015).

³¹⁷ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015); Affidavit of John Pambrun, September 30, 1986, no file reference available (ICC Exhibit 1a, pp. 1019-1021).

³¹⁸ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1012-1013).

³¹⁹ “Pay-List of Surrender of Land,” Muscovequan’s Band, October 14, 1920, LAC, RG 10, vol. 6706, file 121A-5-41-1 (ICC Exhibit 1a, pp. 462-67).

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, 1920³²² (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-5-41-1 (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

³²⁵ W.M. Graham, Indian Commissioner, Department of Indian Affairs, to D.C. Scott, DSGIA, October 21, 1920, LAC, RG 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).

³³⁰ Affidavit of Peter Windago, September 11, 1986, no file reference available (ICC Exhibit 1a, pp. 1011-1015).

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 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.

³³¹ Sale notice, September 12, 1956, DIAND, file 675/34-21C-27-14, vol. 1 (ICC Exhibit 1a, p. 1001); W.C. Bethune, Superintendent, Reserves and Trusts, to W.J.D. Kerley, Superintendent, Indian Agency, September 17, 1956, DIAND, file 675/34-21C-27-14, vol. 1 (ICC Exhibit 1a, p. 1002); W.C. Bethune, Superintendent of Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, to Director, October 25, 1956, DIAND, file 675/34-21C-27-14, vol. 1 (ICC Exhibit 1a, p. 1003).

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

³³² Letter, Karen L. Webb, Associate Counsel, ICC, to Murray Hinds, Woloshyn and Co., Barristers and Solicitors, Saskatoon, August 22, 2005 (ICC File 2107-34-1, 105092).

³³³ Letter, Karen L. Webb, Associate Counsel, ICC, to Murray Hinds, Woloshyn and Co., Barristers and Solicitors, Saskatoon, August 22, 2005 (ICC File 2107-34-1, 105494).

³³⁴ Letter, Murray Hinds, Woloshyn and Co., Barristers & Solicitors, Saskatoon, November 17, 2005 (ICC File 2107-34-1, 105527).

³³⁵ Letter, Murray Hinds, Woloshyn and Co., Barristers & Solicitors, Saskatoon, to Karen Webb, Associate Counsel, ICC, November 23, 2005 (ICC File 2107-34-1, 105555).

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,³³⁷ 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.³³⁸

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 *Kahkewistahaw 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.³³⁹

³³⁶ Letter, Douglas Faulkner, DIAND, to Karen Webb, Associate Counsel, ICC, and Murray Hinds, Woloshyn and Co., Barristers and Solicitors, December 8, 2005 (ICC File 2107-34-1, 105619).

³³⁷ Email, Douglas Faulkner, Legal Counsel, DIAND, to Murray Hinds, January 19, 2006 (ICC File 2107-34-1, 105743).

³³⁸ Letter, Karen Webb, Associate Counsel, ICC, Saskatoon, to Murray Hinds, Barrister and Solicitor, Woloshyn and Co., Barristers and Solicitors, December 20, 2005 (ICC File 2107-34-1, 105650).

³³⁹ ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; and *Roseau River Anishinabe First Nation: 1903 Surrender Inquiry* (Ottawa, September 2007), referred to in letter, Murray Hinds, Woloshyn and Co., Barristers and Solicitors, Saskatoon, to Karen Webb, Associate Counsel, ICC, March 3, 2006 (ICC File 2107-34-1, 105982).

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.³⁴⁰ 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 exploitive bargain, and that Canada had done so.³⁴¹

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

³⁴⁰ Letter, Douglas Faulkner, Legal Counsel, DIAND, to Karen Webb, Associate Counsel, ICC,, March 14, 2006 (ICC File 2107-34-1, 106032).

³⁴¹ Letter, Murray Hinds, Woloshyn an Co., Barristers and Solicitors, Saskatoon, to Karen Webb, Associate Counsel, ICC,, March 20, 2006 (ICC File 2107-34-1, 106058).

³⁴² Email, Douglas Faulkner, Legal Counsel, DIAND, to Stephen Pillipow, July 18, 2006 (ICC File 2107-34-1, 106925).

³⁴³ Letter, Karen Webb Johnston to Stephen Pillipow, Woloshyn and Co., Barristers and Solicitors, Saskatoon, and Douglas Faulkner, Legal Counsel, DIAND, October 19, 2006 (ICC File 2107-34-1, 107145).

APPENDIX D
CHRONOLOGY

- 1 Planning conference** Saskatoon, February 15, 2005
- 2 Community session** Muskowekwan First Nation, 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 Ochoo, Donald Severight, Katherine Windigo, Beatrice Bruce, Myrtle Crane, Raymond Arcand, Alfred Bigsky.
- 3 Interim decisions**
Interim decision concerning provisional issues, August 22, 2005
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 Saskatoon, Saskatchewan, 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.