INDIAN CLAIMS COMMISSION

ROSEAU RIVER ANISHINABE FIRST NATION
1903 SURRENDER INQUIRY

PANEL

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

COUNSEL

For the Roseau River Anishinabe First Nation
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For the Government of Canada
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To the Indian Claims Commission
John B. Edmond / Diana Kwan

September 2007

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SUMMARY

ROSEAU RIVER ANISHINABE FIRST NATION
1903 SURRENDER INQUIRY
Manitoba

The report may be cited as Indian Claims Commission, *Roseau River Anishinabe First Nation: 1903 Surrender Inquiry* (Ottawa, September 2007).

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

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

Treaties – Treaty 1 (1871); **Treaty Interpretation** – Outside Promises; **Reserve** – Surrender; **Fiduciary Duty** – Pre-surrender; **Indian Act** – Surrender; **Evidence** – Onus of Proof – Oral History – Admissibility; **Manitoba**

THE SPECIFIC CLAIM

In January 1903, the Roseau River Band surrendered for sale a portion of Indian Reserve (IR) 2. The Band submitted a specific claim in 1982 to the Department of Indian Affairs and Northern Development (DIAND) for compensation arising from the government's management of the sales of the surrendered land. The government rejected the mismanagement claim in 1986 and confirmed that decision the following year. In 1993, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim.

During the planning stages of the inquiry in December 1993, the First Nation brought forth a further claim based on the validity of the 1903 surrender. In July 2001, following the receipt of a research report jointly commissioned by the parties and written submissions by the First Nation, the government rejected the surrender claim. This claim was then incorporated into the ICC inquiry.

In 2002, the ICC conducted two community sessions to receive the Elders' testimony. The parties jointly retained experts to conduct research into land quality and related issues, but the research was delayed by changes in the First Nation's leadership and legal counsel. The First Nation requested a phased inquiry in November 2004, which the panel rejected in February 2005 (see Appendix B to the report). In February 2005, the First Nation decided to proceed only with the surrender claim, and in June the panel convened an expert session with the authors of the research report and the parties. After filing written submissions in late 2005 and early 2006, the parties presented their legal arguments on March 9, 2006.

BACKGROUND

Four Anishinabe Chiefs whose clans had settled along the Roseau River were among the signatories of Treaty 1 in 1871. Although there were four distinct groups, the Crown initially set aside only one reserve for the Roseau River Band, IR 2, comprising 13,350 acres, located at the confluence of the Red and Roseau Rivers. The Chiefs believed that Treaty 1 had promised them a reserve on both sides of the Roseau River, from its mouth to the Roseau Rapids located 20 miles upstream. In particular, one group of band members fought for years to have a reserve created at the Roseau Rapids. In 1888, the government allocated one and one-quarter sections, or 800 acres, as the Rapids reserve, IR 2A.

Between 1889 and 1903, the year of the surrender, the Roseau River Band came under increasing pressure from local settlers, municipalities, and politicians to surrender all of IR 2 for the purpose of settlement. The reserve was considered one of the best in Manitoba, containing prime agricultural land, as

well as water and timber. The Band was asked many times if it would consider a surrender of all or part of the reserve, but the Chiefs always declined. When Indian Commissioner David Laird met with band councillors in late December 1902, he proposed a surrender of the eastern portion of IR 2, but they responded that it was the only dry land on the reserve and would be needed for their cattle during the spring floods and, further, that they intended to cultivate that land in the future.

In January 1903, the Minister of the Interior, Clifford Sifton, instructed Inspector S.R. Marlatt to attempt to obtain a surrender of IR 2. Marlatt held a meeting on the reserve on January 20, at which time the Band refused a surrender. Ten days later, on January 30, 1903, the Band surrendered the eastern portion of the reserve, comprising 12 sections, or 7,698.6 acres, or 60 per cent of the reserve. Among the terms of the surrender was a condition that two sections of land at the Roseau Rapids be purchased for the Band from the proceeds of sale.

Issues

Did Canada breach Treaty 1 in relation to the 1903 surrender? Did Canada fail to abide by the statutory requirements of the 1886 *Indian Act* in the taking of the 1903 surrender? Did Canada breach any pre-surrender fiduciary duties in relation to the 1903 surrender, and, in particular, did Canada's conduct prior to the surrender give rise to a breach of fiduciary duty, and did the 1903 surrender result in an exploitative and unconscionable bargain?

Findings

Treaty 1, unlike most later numbered treaties, is silent on the question of surrender. Nevertheless, the Crown was not in breach of Treaty 1 by permitting the surrender of a portion of IR 2 in 1903. When Lieutenant Governor Archibald promised at the treaty talks to protect the reserve land forever using "rules," that oral promise became an enforceable term of the treaty, but both parties had a common intention that the Crown would protect the reserve land from trespass and other unauthorized uses, not that reserve land could never be surrendered. The Crown carried out this promise through the vehicle of the *Indian and Ordnance Lands Act*, in force in 1871, and through successive versions of the *Indian Act*, all of which contain prohibitions on trespass as well as the processes for the surrender of land.

In respect of the Crown's compliance with the *Indian Act* procedure for taking surrenders, the panel made findings regarding three evidentiary questions: first, the onus of proof remains with the claimant band on a balance of probabilities; second, the Affidavit of Surrender was properly sworn before a justice of the peace, and, further, provincial law governing the procedure for taking affidavits in the Manitoba courts has no application to affidavits under the federal *Indian Act*; and third, all the oral testimony of the Elders in 2002 and the record of Elder interviews in 1973 is admissible, and the panel has considered the weight of that evidence in accordance with the principles of necessity, reliability, and consistency.

On the question of whether a surrender meeting happened at all or whether alcohol was provided at the meeting, the panel accepts the Affidavit of Surrender and the post-surrender correspondence as establishing that a surrender meeting took place on January 30, 1903. Further, the available evidence does not show that the Crown breached any of the surrender provisions of the *Indian Act*, including the requirement for majority consent and the requirement that the surrender meeting be summoned for that purpose "according to the rules of the band." Although the official who arranged the surrender meeting, Inspector Marlatt, was inexperienced in taking surrenders and careless in not providing a reporting letter, there is no evidence that he committed fraud.

The Crown breached its fiduciary duty to the Band in several respects. The Crown failed to properly manage the Band's legal and other interests in its reserve when confronted with the objective of local settlers, municipalities, and some politicians to open up the land for settlement. When the Crown was faced with relentless lobbying by non-Aboriginal interests, officials, including Inspector Marlatt, rather than protect the

Band's position, tried to influence the Band to reverse its decision, to a degree that constitutes tainted dealings. Documented evidence that the Band rejected proposals for a surrender at least 10 times over a 14-year period up to a week before the surrender, coupled with statements by Inspector Marlatt that he had quiet influences at work, that the surrender was extremely difficult to get, and that it was the wish of the department, not the Indians, that the land be surrendered, establish that it would be unsafe to rely on the Band's intention when it voted in favour of the surrender.

The 1903 surrender was, above all, a foolish, improvident, and exploitative agreement. At a time when the Band was struggling to adapt to a livelihood of farming, in accordance with federal policy, the Crown permitted and actively encouraged the surrender of 60 per cent of the Band's main reserve. In 1903, the Crown knew or should have known that it would be foolhardy to cut the Band's relatively small total land base in half; to surrender the best-quality agricultural land on the reserve, land which the Band would soon need to cultivate and which it relied on to earn income; to surrender the highest and driest land, which the Band used for grazing cattle during floods; to leave the Band with a majority of reserve land at IR 2 that was low-lying and subject to annual floods; and to substitute two sections of land at the Rapids that was only good for pasture and wild hay. In 1903, the Crown had knowledge of these and other factors that would be prejudicial to the Band's future livelihood and would far outweigh the gains that accrued to the Band from the sale of the surrendered land and the addition of two sections at the Rapids. By not exercising its power under the *Indian Act* to disallow this surrender, the Crown was in breach of its fiduciary duty.

RECOMMENDATION

That the claim of the Roseau River Anishinabe First Nation regarding the 1903 surrender of a portion of Indian Reserve 2 be accepted for negotiation under Canada's Specific Claims Policy.

REFERENCES

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

Cases Referred To

St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 AC 46; *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Marshall*, [1999] 3 SCR 456; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 CNLR 169 (FCTD); *R. v. Sioui*, [1990] 1 SCR 1025; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Simon v. R.*, [1985] 2 SCR 387; *Xeni Gwet'in First Nations v. British Columbia*, [2004] 24 BCSC (4th) 296 (sub nom. *Tsilhqot'in Nation v. British Columbia*); *Mathias v. Canada et al.* (2000), 207 FTR 1 (sub nom. *Squamish Indian Band v. Canada*) (FCTD); *Cardinal et al. v. The Queen*, [1982] 1 SCR 508; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA); *Apsassin v. Canada*, [1993] 3 FC 28 (FCA).

ICC Reports Referred To

Peepeekisis First Nation: File Hills Colony Inquiry (Ottawa, March 2004); *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

Treaties and Statutes Referred To

Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions (Ottawa: Queen's Printer, 1957); *Treaty No. 3, between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods, with Adhesions* (Ottawa: Queen's Printer, 1966); *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); *Royal Proclamation of October 7, 1763*, RSC 1970, App. 2; *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* SC 1868 (31 Vict.); *Indian Act*, RSC 1886; *The Queen's Bench Act, 1895*, SM 1895; *Constitution Act, 1867* (UK), 30 & 31 Vict, reprinted in RSC 1985, App. II, No. 5; *Indian Advancement Act*, RSC 1886.

Other Sources Referred To

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

COUNSEL, PARTIES, INTERVENORS

S.M. Pillipow for the Roseau River Anishinabe First Nation; P. Robinson for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

In the summer of 1871, several Anishinabe and Swampy Cree bands negotiated Treaty 1 with the Crown at the Stone Fort (Lower Fort Garry) in Manitoba. Among the Anishinabe who signed the treaty were four Chiefs representing the Fort Garry and Pembina Band or Bands, with a combined population of 1,100 people. Although the Pembina Band, later called the Roseau River Band, was made up of clans or groups who had settled at different sites along the Roseau River, the Crown initially set aside only one reserve for the Band, Indian Reserve (IR) 2, at the confluence of the Red and Roseau Rivers. The size of the reserve, based on the formula of 160 acres for each family of five as specified in Treaty 1, measured approximately 13,350 acres. At the time of the treaty, the Roseau River band members were living along the Roseau River from its mouth to the vicinity of the Roseau Rapids, some 20 miles upstream.

The Chief and his followers at Roseau Rapids believed that Treaty 1 promised them a separate reserve, and petitioned for years to have their rights recognized. In 1888, the government set aside one and one-quarter sections, or approximately 800 acres, of reserve land at the Roseau Rapids (IR 2A) in return for an agreement signed by the Chief at the Rapids and six band members that extinguished all claims to land except IR 2 and the new IR 2A.

On January 30, 1903, the Roseau River Band surrendered for sale 12 sections, or 7,698.6 acres, on the east side of IR 2, comprising approximately 60 per cent of the reserve. One of the conditions of the surrender was the purchase from the proceeds of sale of two sections of land to be added to the Roseau Rapids reserve. The surrendered lands were offered for sale by public auction in Dominion City in May 1903. The total amount realized from the sale was $99,822.50, with the sale price per acre ranging from $10.00 to $15.25. One year later, two sections, comprising 1,280 acres, were purchased and added to the Roseau Rapids reserve. The historical background to this claim is set out in Appendix A of this report.

In 1982, the Roseau River Indian Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) for compensation arising from the government's management of the land sales resulting from the 1903 surrender. The mismanagement claim was first

rejected by the government in 1986, and the rejection was confirmed in 1987. In May 1993, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected mismanagement claim, which the ICC agreed to do.

At an initial planning conference in December 1993, the First Nation raised the issue of the validity of the 1903 surrender. As this issue was not part of the First Nation's original claim, the parties agreed to conduct a joint research project into the surrender, and Canada agreed to expedite its review. The report was completed in late 1997, and the First Nation provided legal submissions to Canada in 1999. This claim was rejected in July 2001.

Two community sessions were held in this inquiry, one in July 2002, and a follow-up session in September 2002. Concurrent discussions were held regarding further joint research on soil analysis. The terms of reference were originally finalized in January 2003; however, the election of a new Chief and council in March 2003 delayed the start of the project. The delay led to the original researcher withdrawing from the project and AFC Agra being retained in late 2003. AFC Agra completed a draft report in January 2004.

In spring 2004, legal counsel for the First Nation resigned, and the current legal counsel was hired. Following a period of review by new legal counsel, the parties met and spent the fall and early winter of 2005 discussing the report and the issues in the inquiry. The First Nation requested a phased inquiry in November 2004, which the panel rejected in February 2005 (Appendix B). At this time, the First Nation withdrew the mismanagement issues from the inquiry to focus on the surrender issues.

In March 2005, the research report was finalized, and the parties agreed that AFC Agra should present the report to the panel in a joint expert session. This expert session was held in June 2005. Following the expert session, details regarding the record were addressed. The record was formally closed on September 21, 2005, and dates for written and oral submissions were set.

The First Nation's written submission was received on October 28, 2005, and Canada's submission was received on January 20, 2006. The First Nation's reply submission was received on February 10, 2006, and the oral session was held on March 9, 2006. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is detailed in Appendix C.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal orders in council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[1] This Policy, outlined in DIAND's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[2] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[3]

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[4]

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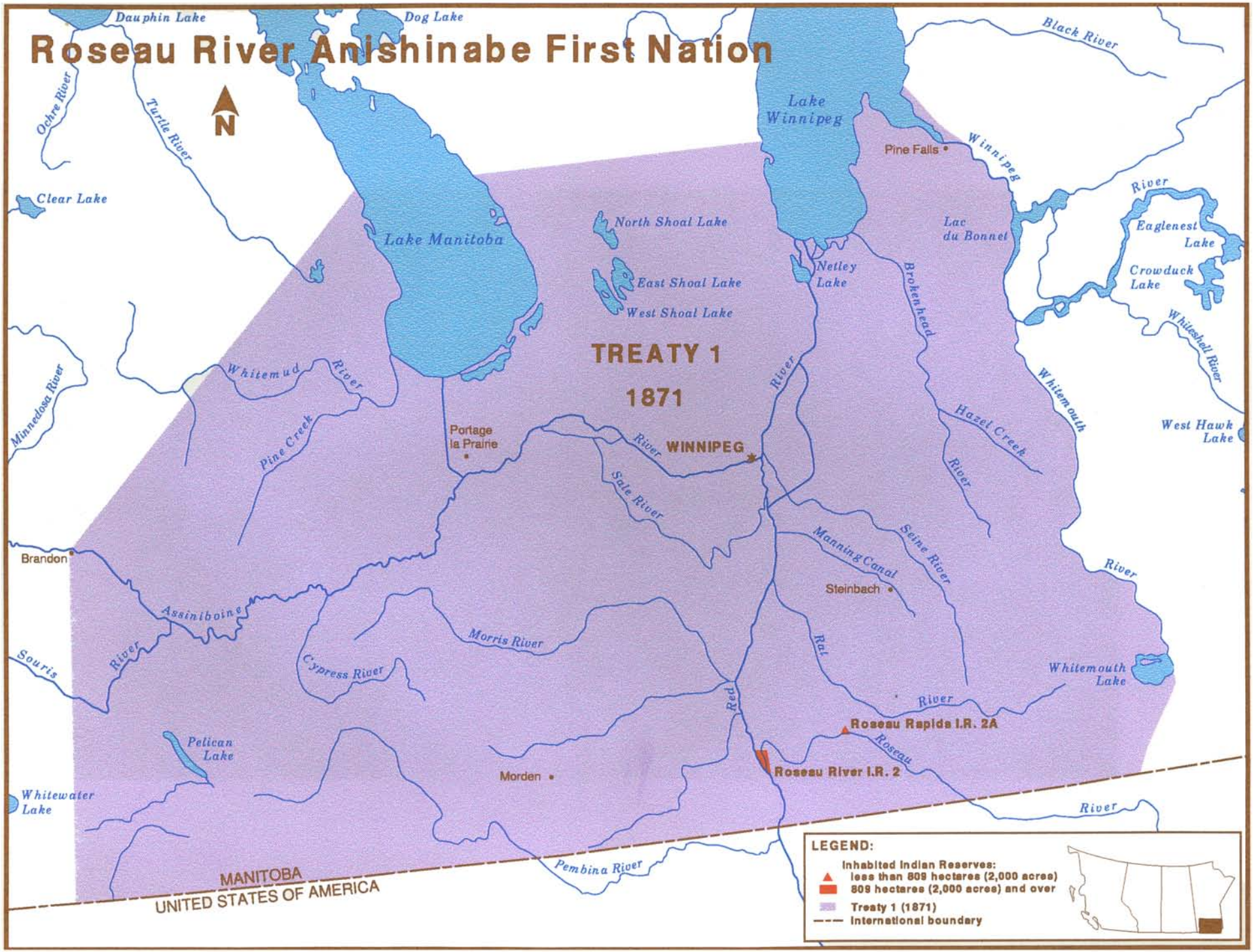
[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

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

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

[4] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 180.


Roseau River Anishinabe First Nation
N
Dauphin Lake
Dog Lake
Ochre River
Turtle River
Clear Lake
Lake Manitoba
North Shoal Lake
East Shoal Lake
West Shoal Lake
TREATY 1
1871
Lake Winnipeg
Black River
Pine Falls
Winnipeg River
Eaglenest Lake
Crowduck Lake
Lac du Bonnet
Netley Lake
Brokenhead River
Whiteshell River
West Hawk Lake
Whitemouth River
Hazel Creek
Whitemud River
Minnedosa River
Pine Creek
Portage la Prairie
Assiniboine River
WINNIPEG
Sale River
Seine River
Manning Canal
Steinbach
Brandon
Assiniboine River
Souris River
Morris River
Cypress River
Red River
Rat River
Whitemouth Lake
Roseau Rapids I.R. 2A
Roseau River I.R. 2
Roseau River
Pelican Lake
Morden
Whitewater Lake
Pembina River
MANITOBA
UNITED STATES OF AMERICA
LEGEND:
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Treaty 1 (1871)
International boundary

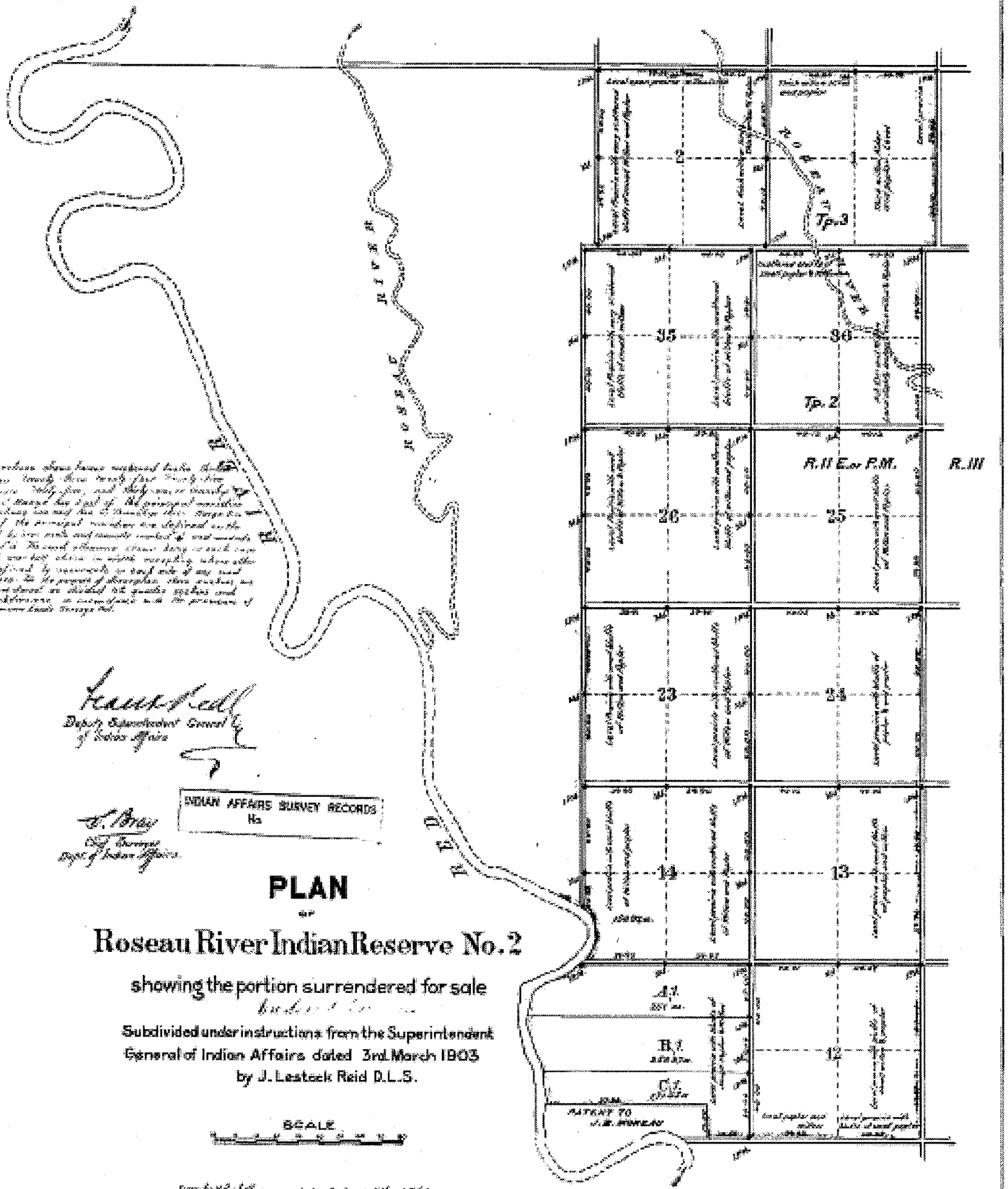
PART II

THE FACTS

In the summer of 1871, Lieutenant Governor A.G. Archibald and Indian Commissioner W. Simpson entered into treaty negotiations with several bands of Anishinabe and Swampy Cree at the Stone Fort (Lower Fort Garry). Treaty 1, the first of the numbered treaties across western Canada, was concluded on August 3, 1871. The Crown's objectives in signing the numbered treaties included promoting immigrant settlement in the west, encouraging Indian nations to adopt farming as a way of life, and creating peaceful coexistence among the Indian nations, settlers, and Métis. The Anishinabe were as interested in signing a treaty as the Crown, although for different reasons. They were becoming increasingly alarmed by encroachments on their traditional lands – the rate of non-Aboriginal settlement, pre-emption of land, and trespass to harvest timber – and wanted the Crown to protect their land and resources. In spite of the common desire to conclude a treaty, the negotiations were lengthy and difficult, primarily because of disagreements over the reserves to be set aside for the bands.

Treaty 1 did not specify the process to be used to surrender, sell, or alienate reserve land. When Lieutenant Governor Archibald spoke to the assembled bands at the opening of the treaty negotiations, however, he promised to lay aside reserves to be used by the Indians forever and to protect those reserves from intruders.

Four Chiefs – Chief Kewetayash and Chief Wakowush of the Pembina Band or Bands living in the area at the mouth of the Roseau River (later IR 2), Chief Nanawananaw of the Roseau Rapids group (later IR 2A), Chief Nashakepenais of the Fort Garry Band northeast of the river (assisted by their spokesperson, Wasuskookoon) – negotiated on behalf of the Bands. At the time of the treaty negotiations, Chiefs Kewetayash and Wakowush represented 600 people and Chief Nashakepenais 500 people. The population at the Rapids in 1871 is unknown but 13 years later it was reported to be 15 families. It soon became clear during the talks that, in return for extinguishing their rights to their traditional territories, the four Chiefs expected to receive reserve land of about 190 square miles throughout the Roseau River region. They finally, if reluctantly, agreed to a reserve acreage based on a formula of 160 acres per family of five in return for verbal promises of agricultural assistance, but it appears from later correspondence that the Chiefs had not understood that the Crown intended



Deputy Superintendent General of Indian Affairs

INDIAN AFFAIRS SURVEY RECORDS
No.

Surveyor General Dept. of Indian Affairs

PLAN

of

Roseau River Indian Reserve No. 2

showing the portion surrendered for sale

Subdivided under instructions from the Superintendent General of Indian Affairs dated 3rd March 1903 by J. Lestock Reid D.L.S.

SCALE

to set aside only one reserve for the four Chiefs and their followers, to be located at the mouth of the Roseau River. Although Treaty 1 spelled out the population formula and the starting point for the reserve land, being the mouth of the Roseau River, it did not set out any other landmarks or parameters.

This misunderstanding became important because a significant number of band members had little connection to the land at the mouth of the Roseau River, having settled prior to the treaty farther east along the river near Dominion City, at the Roseau Rapids, or northeast of the river. The Chiefs from these areas expected at the very least to have reserves set aside for them at those sites. One year after the treaty was signed, they indicated in a letter to Lieutenant Governor Archibald that, at the treaty talks, they had requested as a reserve all the land lying between the mouth of the Roseau River and Roseau Lake, at a width of about two miles on either side of the Roseau. This request was repeated at the treaty annuity payments in 1872 and conveyed to Crown officials several times in the following years. The Chiefs' message was clear and consistent, that the reserve allocation did not conform to the terms of the treaty.

For many years, officials in Ottawa ignored the Chiefs' demands for separate reserves. It appears that the Crown had not ascertained before the treaty talks in 1871 just where the various Chiefs of the Pembina Band and their followers lived. They did not appear to know, for example, that a group resided at the Roseau Rapids, even though Chief Nanawananaw was a signatory of the treaty. In the years following the treaty, the government was also slow to take a census of the Band's population to establish the acreage of its future reserve at the mouth of the Roseau River or to complete the first survey of the land.

In addition to misunderstandings about the location of reserves, immediately after the signing of Treaty 1 in 1871 the Anishinabe were faced with trying to enforce certain verbal promises made during the treaty talks regarding the amount of annuity payments and the provision of certain articles. In 1875, the Crown acknowledged these promises and agreed to amend the treaty to incorporate them, but the experience left the Pembina Band and other bands very suspicious of the government's word. The relationship of distrust that developed figured prominently in discussions years later when the Crown proposed a surrender of the Band's main reserve, IR 2, at the mouth of the Roseau River.

The 1903 surrender of part of IR 2 took place in a period of rapid settlement and railway construction across the Prairies, stimulated by then Prime Minister Sir John A. Macdonald's 1878 "National Policy," designed to foster immigration and natural resource development in the North-West Territories. As good agricultural land was taken up, settlers and municipalities began looking to Indian reserves as potential sources of land, especially where bands were taking many years to make the transition from traditional pursuits to a farming existence. The Roseau River Band, like many other Treaty 1 signatories, was slow to cultivate the land that the non-Indian community coveted for its agricultural value.

Although Crown officials worried about continuing encroachment on the Roseau River Band's land that was to be set aside as reserve IR 2, a final survey was not completed until 1887, when approximately 13,350 acres were surveyed at the confluence of the Red and Roseau Rivers for the bands of Wakowush, Kewetayash, and Nanawananaw, three of the four Roseau River Chiefs who signed Treaty 1. The fourth, Nashakepenais, from the Fort Garry Band northeast of the Roseau River area, opted to take his people to a reserve at Broken Head on the south shore of Lake Winnipeg when he realized that they would be put on a reserve at the mouth of the Roseau River.

The fact no Indian agent was responsible for the Roseau River Band in the 1870s was significant in that the Band's complaints about treaty implementation had to be sent directly to Ottawa. There were no local officials to deal with its questions until Indian Agent Francis Ogletree was given responsibility for the Band in 1882. When Ogletree took over, he soon reported to his superiors that the band members at the Rapids had suffered a great injustice by not having received a separate reserve. Ogletree became instrumental in bringing attention to the claim of the Rapids' group. He also noted in his reports that these were a peaceful people, loyal to the Crown, and not abusive.

Although the Crown acknowledged by the late 1870s that individual band members had made improvements at the Roseau Rapids before the treaty and should have some plots reserved for them, nothing was done until 1888 when, as a result of a dispute with a settler over land, the Crown set aside IR 2A at the Rapids, comprising one section of land plus a quarter section that had been promised earlier to the Indian Akeneus, also called Martin. In return, Chief Nashwasoop and six

band members living at the Rapids agreed in writing to relinquish all claims to land other than IR 2A at the Rapids and IR 2 at the mouth of the Roseau River.

In 1889, settlers and the communities near IR 2 began requesting that the government open up all of the reserve for purchase. The pressure intensified over the next 14 years and came from individuals, municipalities, and politicians alike. Conservative Alphonse LaRivière, the successful candidate in the 1889 by-election in Provencher, promised his constituents both before and after winning that the reserve would be thrown open for settlement. LaRivière became the driving force behind the political pressure on his own government to have the reserve surrendered. Initially, the Minister of the Interior, Edgar Dewdney, resisted the pressure, citing the excellent quality of land and wooded areas needed by the Indians. Indian Agent Ogletree also defended the Band's interests, reporting that with the wildlife declining, the Band was well situated, possessing a reserve with excellent agricultural land, hay lands, fishing, and timber. He noted in 1895 that band members were putting in crops on the land and that, when he asked the leaders about surrendering the reserve, they declared that they would never consent to give it up as it was the only thing that they and their children had to depend on for a livelihood. Inspector E. McColl also confirmed that it would not be in their interests to surrender the reserve, even if they were willing.

The Conservatives were in power from 1878 until 1896, when Wilfrid Laurier's Liberals won the federal election. Indian Agent Ogletree was replaced by an inspector, S.R. Marlatt, whose responsibility included the Roseau River reserves. When the Chiefs and councillors sent petitions in 1898 asking for more land at the Rapids owing to the flooding and depletion of timber on IR 2, Inspector Marlatt decided to visit the Band. During the visit, he clarified that the Chiefs had no intention of surrendering any of IR 2. Rather, they desired additional land extending six miles up the Roseau River from the Rapids, three miles wide on each side of the river. That, stated the Chiefs, would serve as the final settlement to their treaty claim for a reserve extending the whole distance of the Roseau River from the mouth of the river to the Rapids.

Marlatt, however, was more sympathetic to the idea of removing the Band altogether from IR 2 and relocating them on a larger reserve at the Rapids. So, too, was Indian Commissioner A.E. Forget, but he identified two important barriers to achieving this solution – the Band adamantly refused to give up any of IR 2, and most of the Rapids land had already been taken up by settlers.

In 1898, senior officials in the department became aware that the Roseau River Band's population was in decline, giving the appearance to some that the Band had more land than it was entitled to under the treaty. Thus, the idea of surrendering part of IR 2 without any exchange of land took hold on the basis that the Band was not entitled to and certainly did not need the entire reserve because of its smaller population.

By the turn of the century, the idea that all or part of IR 2 should be surrendered became the rallying cry of the surrounding municipalities, which forwarded resolutions and petitions to the department and politicians. Although Marlatt was convinced that the Band would not surrender any reserve land, he believed that it was not making the best use of the land and would be better off if removed a distance from non-Indian settlements. He also recommended that, even if a surrender were to proceed, the department ought to delay the sale of the land for five years to take advantage of the rapidly increasing value of the land. This option, Marlatt noted, would be acceptable to the Indians because they were not pressing for a surrender, and, as for the petitioners, they were simply being greedy and could wait.

During the winter of 1901, the Minister of the Interior, Clifford Sifton, in answer to opposition Member of Parliament Alphonse LaRivière's request in the House of Commons that IR 2 be opened up, answered that the Roseau River reserve was set aside for the Band under treaty and could only be surrendered with its consent. Meanwhile Inspector Marlatt visited the reserve at the request of Indian Commissioner David Laird to ask once again if the Band would be willing to surrender any of the reserve. This time he explained how the proceeds of sale would be applied to its accounts and told band members to take their time to decide. Within days, however, he received a message through the farm instructor, J.C. Ginn, that the Indians would not sell any part of IR 2. Interestingly, Mr Ginn reported that it was the Indians living at the Rapids, not those living at IR 2, who were most opposed to selling the reserve land, as they believed the government had cheated them in the past and would do so again.

In June of that year, John A. Howard of Winnipeg submitted a proposal for a colonization scheme on IR 2 if he were permitted to purchase the land, but, this time, Deputy Superintendent General of Indian Affairs J.A. Smart stepped in, telling the department's Secretary that the reserve was already small and it would be absurd to take any action towards a surrender. By this time, other

treaties had been concluded in the agricultural belt that quadrupled the reserve land formula from 160 acres to 640 acres per family of five. The Secretary replied to Smart that the Indians had already said "no" to a surrender and that the land, containing the best soil in Manitoba, was well suited to farming and stock-raising. Not to be deterred by the Band's opposition to selling its reserve, the Dominion City *Weekly Echo* newspaper entered the fray, repeatedly challenging politicians at all levels to lobby for a surrender, even recommending that a committee go directly to the Indians, induce them to sign a sales agreement, and present it to Ottawa.

At the provincial level, George Walton, a Liberal candidate for the 1903 provincial by-election, tried to enlist the support of federal Minister Sifton, whom he knew personally, to arrange the surrender of the Roseau River reserve, but was quickly rebuffed. Still, officials in Ottawa did not abandon the idea and resurrected the option of having the whole reserve surrendered in exchange for other land, which would result in the Band being removed to an isolated reserve. Again, Inspector Marlatt was dispatched to visit the Band in October 1902, but this meeting attracted few band members. He reported, however, that the young men were more interested in a land sale than the old men, but that he had some quiet influences at work among them that, he thought, would have a good effect.

On December 23, 1902, roughly five weeks before the surrender, Indian Commissioner Laird met with band Councillors Seenee (Cyril) and Sahawisgookesick (Martin Adam). An interpreter was present, and notes of the conversation were kept. The councillors confirmed that they spoke for the entire Band, that 28 band members including two of the three Chiefs had met two days previously, and that they had decided unanimously not to sell the reserve. When Laird put forward the option of selling only the eastern portion, they answered that it was the only dry land on the reserve and they needed it for their cattle during the floods. They also stated that they intended to cultivate that land in the future. Marlatt later blamed this latest response on infighting among rival factions in the Band, as well as the fact that the two councillors were from the "old school".

Provincial candidate George Walton had a second chance to influence Minister Sifton before the 1903 provincial by-election, this time when Sifton visited Winnipeg in January of that year and agreed to meet with a delegation headed by Walton. He again lobbied to have IR 2 opened up for settlement, and, although it is unclear whether Sifton made any promises in response, Sifton's

personal secretary sent two letters to Inspector Marlatt instructing him to go to the reserve and attempt to get a surrender within the week.

The *Weekly Echo* covered Marlatt's January 20 meeting with a large number of band members on the reserve, reporting that he offered proposals never before promised to the Indians, but the Band still refused and Marlatt came away disappointed. Marlatt did not provide a report of this meeting to his superiors. Nevertheless, Minister Sifton heard about the Band's latest refusal and advised MP LaRivière, who had just given him another petition from local residents, that a surrender was unlikely any time soon.

Between 1895 and 1903, 10 documents on the record indicate that the Band held a consistent position that it would not surrender any of IR 2. Yet, on January 30, 1903, 10 days after the Band's latest refusal to consider a surrender, three Chiefs and nine headmen signed a Surrender Document, using "X" marks; one day later, Chief Antoine and Inspector Marlatt swore an Affidavit of Surrender before Justice of the Peace O. Bellevance at Letellier. In the Surrender Document, the signatories – Chiefs Sheshebance, Nashwasoop, and Antoine – and nine headmen – Adam Martin, Sennee, Wapose, Alexander, Thomas, Pierre, Kahwakinniash, Jim, and John – surrendered 12 sections of land, or 7,698.6 acres, on the eastern side of IR 2. The terms of the surrender stipulated that the land would be sold as soon as possible; 10 per cent of the proceeds of sale would be expended on items needed by the Band; any advance to the Band prior to the receipt of the proceeds would be deducted from the 10 per cent; and two sections of land at Roseau Rapids would be purchased for the Band as soon as funds became available. In the affidavit, Chief Antoine and Inspector Marlatt swore that each of the surrender requirements of the *Indian Act*, set out in the document, had been complied with. The Order in Council approving the surrender was dated February 25, 1903.

Inspector Marlatt provided no report of the surrender meeting or any details describing the event, the participants, or details of the vote. He made a number of key statements, however, in the weeks and months that followed. Marlatt forwarded the signed Surrender Document to the Secretary on February 2, advising that he had experienced considerable difficulty getting the surrender, succeeding only after repeated promises that the Crown would carry out its terms. In June, Marlatt wrote again, this time to Indian Commissioner Laird, telling him that the surrender had been obtained not by the desire of the Indians but by the strong wish of the department. He went on to say

how difficult it was to secure the surrender, and that he got it only after making the Band understand that the 10 per cent would be available almost immediately after the sale. Marlatt viewed the Band as turbulent, unreasonable, non-progressive, and degenerate, quite the contrary to former Indian Agent Ogletree's opinion of the Band. Marlatt warned Laird to treat the Band fairly and generously in respect of this surrender because they needed to ensure its cooperation when a surrender of the rest of IR 2 was proposed in the near future.

The 12 sections of surrendered land were superior agricultural land. The surrendered portion was also the highest land on the reserve and farthest from the Roseau River, which flooded its banks every year and caused major floods periodically as a result of flooding on the Red River.

The land was sold by auction on May 15, 1903, at Dominion City. The sale was a great success, realizing $99,822.50, with an average price per acre of $12.96. The Roseau River Indians received a total of $8,588.60, either in cash distribution or goods purchased, in the year after the sale. By May 1904, 1,280 acres, or two sections, had been purchased and added to the Roseau Rapids reserve.

In the following years, however, a dispute arose concerning the interest payments to the band members. According to Minister of the Interior Frank Oliver, Sifton's successor, Marlatt had explained to the Band at the time of the surrender how the installment payments by the purchasers would garner interest, and promised that significant amounts of this interest would be distributed annually to the band members. In 1909, Indian Agent R. Logan went so far as to express the opinion that Marlatt had promised the Indians that they would be paid about $3,000.00 a year, which, according to Logan, the Indians understood to be every year, not only for three years.

In 1911, Roseau Chief Antoine joined a delegation of leaders of several bands travelling to Ottawa to complain to officials about the department's handling of surrenders and proceeds of sale. Chief Antoine demanded information on the sale of the reserve and the money that was to be paid out to the band members. He did not raise concerns about the surrender itself.

PART III

ISSUES

The Indian Claims Commission's inquiry concerns these three issues, as agreed to by the parties:

1 Did Canada breach any provision of Treaty 1 in relation to the 1903 surrender?

2 Did Canada fail to abide by the statutory requirements of the 1886 *Indian Act* in the taking of the 1903 surrender and, if so, what is the effect of the breach?

3 Did Canada breach any fiduciary duties in a pre-surrender context in relation to the 1903 surrender and, if so, what is the effect of the breach?

- i Did Canada's conduct prior to the surrender give rise to a breach of fiduciary duty, and, if so, what are the consequences?

- ii Did the 1903 surrender result in an exploitative and unconscionable bargain, and, if so, what are the consequences?

PART IV
ANALYSIS

ISSUE 1: VALIDITY OF THE SURRENDER IN RELATION TO TREATY 1

1 Did the Crown breach any provision of Treaty 1 in relation to the 1903 surrender?

We have been asked to consider whether the Crown was in breach of Treaty 1 by the very act of taking a surrender of reserve land in 1903. This question concerns oral promises made during the treaty talks in 1871 and the parties' intentions when they signed the treaty, in particular, whether they intended to prohibit for all time the surrender of reserve land.

Positions of the Parties

Treaty 1, signed in 1871, is silent on the question of possible surrender or alienation of reserve land. The First Nation claims that the absence of any reference to surrender or sale in the treaty document, combined with Lieutenant Governor A.G. Archibald's speech in which he promised that the Crown would protect the Bands' reserves forever, led the Pembina Band[5] to believe that its reserve land could never be sold, and that this belief induced the chiefs to sign the treaty. Many years later, when the Crown took a surrender of part of IR 2, it failed, states the First Nation, to protect the Band from encroachment by settlers. The consequences of the Crown's conduct, the First Nation maintains, is a breach of the treaty. The First Nation also argues that its interpretation of the oral promise to mean an undertaking that the original reserve lands had to be kept forever can be reconciled with the Band's right under the *Indian Act* to surrender its land.

The Government of Canada takes the position that Lieutenant Governor Archibald's statements to the assembled Chiefs and their followers during the treaty talks were merely rhetorical statements prior to the commencement of negotiations, but, if it is found that they were terms of the treaty, Canada argues that the Crown fulfilled that promise by enacting laws to protect Indian

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[5] The report uses the singular "Pembina Band" in most instances, but, from 1871 to approximately 1882, Crown officials referred to both the "Pembina Band" and "Pembina Bands," in recognition that several distinct groups of Indians lived in the vicinity of Pembina or Roseau River. After 1882, the word "Pembina" appears to have been dropped from Crown records and the name "Roseau Band," "Roseau Bands," "Roseau River Band," or "Roseau River Bands" substituted.

reserves against trespass and encroachment by settlers and others. Canada also points out that the First Nation is contradicting itself by arguing that the Band had a right under the statute to surrender reserve land but not under the treaty.

The question before us is whether Lieutenant Governor Archibald's oral promises to protect the Band's reserve land and to do so forever formed an enforceable term of Treaty 1. If the answer is yes, it is necessary to determine what rights those promises entailed and whether the parties had a common intention with respect to those promises. Did the parties intend that the land to be set aside as reserves had to be kept for all time and that all or part of the reserve could never be surrendered for any reason? Conversely, did the parties understand that the Crown's promise meant that it would protect reserve land from trespass by non-band members, such as settlers cutting timber, grazing cattle, or squatting on the land? Finally, if the parties had a common intention with respect to Lieutenant Governor Archibald's oral promises, did the Crown fulfill those promises?

The Facts

The written texts of Treaty 1 and Treaty 2, both concluded in August 1871, are silent on the question of whether reserve lands could be surrendered for sale or lease. In contrast, Treaty 3, signed two years later, contained the following language governing the disposition of reserve land:

> the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.[6]

Treaty 4, signed in 1874, employed almost identical language and added a clause: "but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves."[7] Treaty 5, signed in 1875, included language similar to Treaty 3 regarding the

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[6] Canada, *Treaty No. 3, between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods, with Adhesions* (Ottawa: Queen's Printer, 1966), 5.

[7] Canada, *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.

surrender of reserves. Later numbered treaties also adopted the surrender wording in Treaty 3 or Treaty 4, with the exception of Treaty 7, which was silent on surrender.

Although Treaty 1 (and Treaty 2) did not refer to the possible disposition of reserve land, Lieutenant Governor Archibald reported that he had made certain statements about reserves in his opening speech to the Chiefs during the treaty negotiations in the summer of 1871, including a promise to set aside and protect reserves:

> We told them that whether they wished it or not, immigrants would come in and fill up the country; that every year from this one twice as many in number as their whole people there assembled, would pour into the Province, and in a little while would spread all over it, and that now was the time for them to come to an arrangement that would secure homes and annuities for themselves and their children.[8]

Newspaper articles recording the treaty negotiations also reported on Lieutenant Governor Archibald's opening address to the Chiefs:

> Your great Mother, therefore will lay aside for you "lots" of land to be used by you and your children for ever. She will not allow the White man to intrude upon these lots. She will make rules to keep them for you so that as long as the Sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his Camp, or, if he chooses, build his house and till his land.[9]

Shortly after the signing of Treaties 1 and 2, the Chiefs began to petition the government on the grounds that certain verbal promises made by the Crown's representatives during the treaty negotiations had not been honoured. These particular "outside promises" did not concern the Bands' future reserve lands; rather, they were promises made during the treaty negotiations relating to the provision of clothing, articles, animals, and annuity payments. In 1875, the government finally recognized the existence of these "outside promises" and incorporated them into both treaties by way

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[8] Adams G. Archibald, Lieutenant Governor, Manitoba & NWT, to the Secretary of State for the Provinces, July 29, 1871, Canada, *Report of the Indian Branch of the Department of the Secretary of State for the Provinces, 1872*, 15 (ICC Exhibit 1a, p. 11).

[9] "The Chippewa Treaty: Second Day's Proceedings," *Manitoban*, August 5, 1871 (ICC Exhibit 1a, p. 19).

of a treaty amendment. Nevertheless, this experience illustrates that the Bands followed closely the spoken word of the treaty negotiators and expected them to live up to their undertakings.

This inquiry concerns the opening statements made by Lieutenant Governor Archibald that relate specifically to land. The First Nation characterizes them as oral promises:

> Promise #1. Your great mother, therefore, will lay aside for you lots to be used for you or your children **forever**.
>
> Promise #2. She will not allow the white man to intrude upon these lots.
>
> Promise #3. She will make rules to keep them for you, so that as long as the sun shall shine, there shall be no Indian who has not a place that he can call his home.[10]

In addition, the *Manitoban* newspaper reported a verbal exchange during the treaty negotiations that sheds some light on the parties' understanding of future surrenders of land. When Wasuskookoon, the spokesperson for the four Pembina Chiefs at the treaty talks, expressed concern about the limited size of the reserves should their population increase, Lieutenant Governor Archibald replied that, if the reserves were too small, the government would sell the land and give the Indians land elsewhere.[11] There is no evidence that the Indians disagreed with this approach.

The Law

Even though Treaty 1 was silent on the process for surrender or sale of reserve land, the principle was known in British law as far back as the *Royal Proclamation of 1763.* At that time, the British Crown recognized the serious harm that could be done to the Indians when land purchasers dealt directly with them:

> *And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians*, to the great Prejudice of our Interests, and to the great Dissatisfaction of

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[10] Reply Submission on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006, p. 2, para. 6. Emphasis in the original.

[11] "The Chippewa Treaty: Fifth Day's Proceedings," *Manitoban,* August 12, 1871 (ICC Exhibit 1a, p. 50).

> the said Indians: In order, therefore, to prevent such Irregularities for the future, and to that end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do ... strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that, *if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose* by the Governor or Commander in Chief of our Colony respectively within which they shall lie.[12]

After Confederation, the obligation on the Dominion of Canada to interpose itself as a safeguard between Indians and non-Indians wanting to purchase reserve land was affirmed by the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen*:

> The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867), by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose.[13]

This principle was continued and refined in the 1984 Supreme Court of Canada's discussion of the fiduciary relationship in *Guerin v. The Queen*:

> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act.* The surrender requirement, and the

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[12] *Royal Proclamation of October 7, 1763*, RSC 1970, App. 2, p. 6. Emphasis added.

[13] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 46 at 54.

> responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.[14]

The first federal statute after 1867 to deal with Indian reserve lands and the Crown's duty in respect of those lands was the 1868 *Indian and Ordnance Lands Act,* the precursor to the *Indian Act*:

> All lands reserved for Indians or for any tribe, band or body of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as before the passing of this Act, but subject to its provisions; and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown for the purposes of this Act.[15]

Not only did this Act contain the procedure to be followed when a surrender is taken,[16] it also provided an explicit prohibition on trespass:

> No persons other than Indians and those intermarried with Indians, shall settle, reside upon or occupy any land or road, or allowance for roads running through any lands belonging to or occupied by any tribe, band or body of Indians; ...[17]

The surrender and trespass provisions were further refined in the 1876 *Indian Act* and its successor legislation, including the 1886 *Indian Act* that governed the 1903 surrender.

Thus, starting with the *Royal Proclamation of 1763*, through the succession of Canadian laws related to Indians both before and after 1871, the date of Treaty 1, the Crown acknowledged the possibility of the alienation of reserve land and, by requiring reserve land to be surrendered first to

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[14] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, Dickson J.

[15] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* SC 1868 (31 Vict.), c. 42, s. 6.

[16] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* SC 1868 (31 Vict.), c. 42, s. 8. Section 9 of the Act contains a strict prohibition on the presence of alcohol at any meeting of Indians to discuss or assent to a surrender.

[17] *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands,* SC 1868 (31 Vict.), c. 42, s. 17. See also sections 18 and 19 dealing with the prosecution of squatters.

the Crown, assumed responsibility for protecting First Nations from the "great Frauds and Abuses" wrought by some prospective purchasers.

On the question of incorporating oral promises into the terms of a written treaty between the Crown and a First Nation, the law appears to be settled. The courts have held that oral promises at the time of treaty-making that were not reflected in the text of the document may form a part of that treaty. These decisions reflect the reality of the situation at the time: First Nations in Canada almost universally relied upon non-written ways of recording events, whereas Europeans brought with them detailed written systems of record-keeping in the English and French languages. Nowhere was this clash of knowledge systems more apparent than in the treaty-making process.

As Justice Binnie stated for the majority of the Supreme Court in *Marshall*, "where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms ..."[18] Binnie J also cited with approval the principle, espoused by Justice Dickson in *Guerin*, that "[t]he oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act."[19] Likewise, the Federal Court affirmed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* that "[o]ral promises made at the time the treaty was concluded give rise to rights under the treaty. The Courts must hold these promises in high regard if the honour of the Crown is to be upheld."[20]

In order for such oral terms to be enforceable under the treaty, however, there must be sufficient evidence of a common intention with respect to these terms. The Supreme Court of Canada stated in *R. v. Sioui* that even a generous interpretation of the treaty "must be realistic and reflect the

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[18] *R. v. Marshall*, [1999] 3 SCR 456 at 472, para. 12, Binnie J, citing Dickson J in *Guerin v. The Queen*, [1984] 2 SCR 335 at 338.

[19] *R. v. Marshall*, [1999] 3 SCR 456 at 472, para. 12, Binnie J, quoting *Guerin v. The Queen*, [1984] 2 SCR 335 at 338.

[20] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 CNLR 169 at 183 (FCTD).

intention of both parties, not just that of the [First Nation]."[21] The requirement for a common intention is also reflected in the principles of treaty interpretation in the common law, summarized by Justice McLachlin in the *Marshall* decision. The following two principles are particularly relevant to this claim:

> [t]he goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed ...[22]

and

> [w]hile construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic ...[23]

Panel's Reasons

Lieutenant Governor Archibald's oral promise to protect the Band's reserve land and to do so forever formed an enforceable term of Treaty 1. Even though he may have considered his opening remarks as a prelude to the treaty negotiations, the promises that he made regarding the establishment of reserves for the Indians' use forever and the protection of that land from intrusion by white people were sincere on his part and intended to influence the Indians to enter into the treaty. Because the Chiefs and their followers relied on the spoken word, they would have made little distinction between the value of the words spoken in an opening speech and those spoken later, which found their way into the written text. We find no evidence that the assembled bands rejected Archibald's offer of protection, nor is there evidence that the parties did not expect the Crown to follow through on these promises.

The next question is, did the parties have a common intention with respect to these promises? The Crown's intention in entering into Treaty 1 was primarily to promote the settlement of European immigrants in western Canada and to encourage the First Nations to abandon their traditional

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21 *R. v. Sioui*, [1990] 1 SCR 1025 at 1069, Lamer J.

22 *R. v. Marshall*, [1999] 3 SCR 456 at 512, para 78, McLachlin J.

23 *R. v. Marshall*, [1999] 3 SCR 456 at 512, para 78, McLachlin J.

economies in favour of agriculture on fixed plots of land. The Crown also wanted to negotiate treaties to promote security and peaceful coexistence with the Indians, particularly during the period when the followers of the Métis leader Louis Riel were themselves demanding a treaty to secure their land rights.[24]

The intent of the Anishinabe signatories is illustrated by the following passage from the Sprague Report, recounting events in 1869:

> When a new Lt. Gov. arrived ... in September 1870, [the Anishinabe] demanded a treaty as soon as he made his appearance ... In June 1871, all aboriginal people began to take direct action to safeguard lands that everyone feared were to be handed over to strangers. Anishinabe in the vicinity of Portage La Prairie posted a notice on the local church warning newcomers "not to intrude upon their lands until a Treaty" safeguard their own position in the new order.[25]

There is no question that the Anishinabe were alarmed at the ongoing and increasing encroachment of European settlers on their traditional lands; foremost in their minds was the need to protect as much of their land as possible from trespass and pre-emption by settlers and others. Just prior to promising the Chiefs that the Crown would protect their reserves forever, Lieutenant Governor Archibald told them that vast numbers of settlers were moving into the province. But this information only reflected what the Chiefs already knew, that unregulated settlement in Manitoba was having a serious impact on the livelihood of the Indians. The fear of losing their traditional lands weighed heavily on the assembly. Both parties to Treaty 1 appeared to share the objective of defining the Anishinabe's rights to land and securing acceptable living arrangements for them in relation to the settlers and the Métis.

Although it is impossible to know exactly what was in the minds of the Indian signatories to Treaty 1, it does not seem probable that the Chiefs would have wanted to be barred forever from dealing with their land. Nor is it realistic to interpret the absence of surrender references in the treaty

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[24] D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, pp. 6–8 (ICC Exhibit 2c, pp. 6–8).

[25] D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, pp. 6–8 (ICC Exhibit 2c, pp. 6–8).

as a complete ban on the alienation of reserve land. The factual evidence, detailed above, is minimal but does assist our understanding of how the Chiefs interpreted Lieutenant Governor Archibald's oral promises. When he told the Chiefs that, if the reserves became too small for the population, the government would sell them and provide other land elsewhere, Archibald was indicating that reserve land could be exchanged for other land. On balance, the Chiefs appeared to be aware that they could deal with their future reserve land.

For its part, the Crown, as represented by Lieutenant Governor Archibald, clearly intended that it would use the laws against trespass, already in existence in the 1868 *Indian and Ordnance Lands Act*, to protect the Bands from encroachment by non-band members and would continue that protection in future using similar laws. Given the Crown's obligation going back to the *Royal Proclamation* to interpose itself between potential buyers of reserve land and Indian bands, the Crown certainly would not have intended to prohibit surrender of reserve land for all time. Even though the treaty text was silent and Archibald's words could afford a different interpretation, such a result would not have been realistic and would not have reconciled the priorities and needs that both parties had in 1871.

We find that, when Lieutenant Governor Archibald promised that the Crown would set aside lots to be used by the Anishinabe "forever" and would protect them against the intrusion of white people using "rules," he was obligating the Crown to make and enforce laws prohibiting trespass and exploitation of resources on the reserves by third parties. This was the common intention that best reconciles the interests of the Anishinabe and the Crown at the time.

The First Nation also makes a somewhat curious argument that, even though the Band had no right under the treaty to surrender reserve land, it did have that right pursuant to the *Indian Act*. The First Nation acknowledges that, "if the Band wanted to consent to the sale of its lands [under the *Indian Act*,] then that intention would need to be respected."[26] By way of explanation, the First Nation points out that the right to alienate the land was created by legislation that the Band would

[26] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 142, para. 233.

not have known existed at the time.[27] This argument, however, creates an apparent contradiction between what the Band was able to do under the treaty and what it could do pursuant to the *Indian Act*. Unfortunately, the First Nation does not explain how that conflict could be reconciled in favour of the First Nation, in particular, whether any damages would flow from the Crown's breach of treaty if the surrender were valid in all other respects. In any event, our finding that the treaty did not create a prohibition on the surrender of reserve land makes it unnecessary to investigate this argument further.

Finally, the First Nation claims that the Crown also breached the treaty by its conduct during the 1903 surrender process. By raising the question of the Crown's conduct, the First Nation is introducing the issue of the Crown's fiduciary duty to the Band. The First Nation claims, for example, that the Band did not provide its consent to the surrender, but, even if it did, the consent was given under duress and under circumstances that were tainted by the Crown's conduct.[28] We have decided, however, that it is more appropriate in this inquiry to treat the question of the Crown's conduct under the separate issue of fiduciary duty. This approach is consistent with the *Guerin*[29] principle that the surrender requirements in the *Indian Act* and the responsibility they entail are the source of a distinct fiduciary duty owed by the Crown.

Conclusion

The panel concludes that the Crown did not breach Treaty 1 when it permitted a surrender of the Band's reserve land in 1903. The parties to the treaty had a common intention arising from the oral statements made by Lieutenant Governor Archibald in his opening speech at the treaty talks. They both intended that the Crown would protect the reserve land from trespass and other unauthorized use of the land by non-band members, not that the land could never be surrendered. These oral promises, which are enforceable terms of the treaty, specifically include a promise to protect the land

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[27] Reply Submission on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006, p. 3, para. 13

[28] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 142, para. 233.

[29] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, Dickson J.

using "rules." Absent any evidence to the contrary, however, we conclude that the Crown carried out this promise through the vehicle of the *Indian and Ordnance Lands Act*, in force in 1871, and through successive versions of the *Indian Act*, all of which contain prohibitions on trespass as well as the processes for the surrender of land.

The First Nation's arguments regarding the Crown's conduct in 1903 are best considered under Issue 3 in this report – the Crown's pre-surrender fiduciary duty.

ISSUE 2: VALIDITY OF THE SURRENDER IN RELATION TO THE *INDIAN ACT*

2 Did Canada fail to abide by the statutory requirements of the 1886 *Indian Act* in the taking of the 1903 surrender and, if so, what is the effect of the breach?

The *Indian Act* sets out a detailed process for taking a surrender of reserve land. The First Nation asks the panel to find that the Crown was in breach of the *Indian Act* surrender requirements when the surrender was taken in 1903. In accordance with the approach taken by the First Nation, we have considered the issue under two questions. First, was there a surrender meeting at all? Second, if there was, were the statutory requirements met, that is, was the surrender meeting conducted under the rules of the Band, was there a majority vote in favour of surrender, and was the Affidavit of Surrender[30] legally taken?

Positions of the Parties

The First Nation claims that no meeting took place on January 30, 1903, or, if it did, the meeting was not a surrender meeting, as required by the *Indian Act*. The First Nation relies heavily on the testimony of Elders in 2002 and recorded interviews with a different group of Elders in 1973 to support its case. In arguing whether a surrender meeting happened at all, the First Nation claims that alcohol was given to the Chiefs and other voters, and that Inspector Marlatt engaged in fraud by supplying alcohol, orchestrating a surrender without following the prescribed process, and presumably covering up his failure to hold a surrender meeting.

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[30] The terms "Affidavit of Surrender," "Certification Affidavit," and "Affidavit of Attestation" are all used to refer to the "Affidavit" required by the *Indian Act* surrender provisions.

Canada relies on the Surrender Document and Affidavit of Surrender as *prima facie* proof of the fact that the surrender meeting took place and that the Crown was in compliance with its legal requirements under the *Indian Act*. Canada argues that corroborating evidence confirming that a surrender meeting happened can be found in the pre-surrender and post-surrender correspondence. Moreover, states Canada, there was no practice in 1903 of recording the details of a surrender vote, guidelines for officials having been published only in 1913. Even then, says Canada, the guidelines were not legal requirements.

The parties also argue about the admissibility and weight to be given to the Elders' testimony on these questions.

The Facts

According to articles in the Dominion City *Weekly Echo*, Inspector Marlatt met with a large group of Indians on January 20, 1903, to discuss the possible surrender of part or all of IR 2. The article states that the Band refused to surrender any land and that Marlatt was very disappointed. Between January 20 and January 30, the date of the surrender, there is no evidence relating to the surrender, but there was a further petition from local residents similar to previous ones exhorting the government to sell IR 2. On January 30, 1903, 12 members of the Roseau River Band signed a Surrender Document, surrendering 12 square miles of IR 2 on behalf of the Band. Chief Antoine and Inspector Marlatt signed the required Affidavit of Surrender before a justice of the peace in Letellier on the following day. The signatories on the Surrender Document, using "X"s as their marks, were the three Chiefs – Sheshebance[31], Nashwasoop, and Antoine – and nine headmen or councillors, all of whom are identified in the document as the Chiefs and principal men of the Roseau River Band resident on IR 2 and 2A. Inspector Marlatt did not file a report of the surrender meeting, nor are there records setting out the attendance, voters list, or results of the vote. We do not know if any other officials attended the January 30 meeting or whether Marlatt used an interpreter. There is also no record of a report from Inspector Marlatt to senior officials describing the surrender meeting.

[31] Also referred to as "Seeseepance'.

The Law

The procedure for taking the 1903 surrender was governed by section 39 of the 1886 *Indian Act*, as amended, which provides that

> No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:
>
> (a.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;
>
> (b.) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men entitled to vote, before some judge of a superior, county or district court, or stipendiary magistrate or justice of the peace, or, in the case of reserves in Manitoba or the North-West Territories, before the Indian Commissioner for Manitoba and the North-West Territories, and in the case of reserves in British Columbia, before the Visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[32]

The origin of these surrender provisions can be traced to the *Royal Proclamation of 1763*, referred to in Issue 1 above, wherein the British Crown assumed the responsibility of interposing itself between Indians and the growing number of settlers seeking land in order to protect the Indians from the "Frauds and Abuses" they were experiencing in selling their land.

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[32] *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1891, c. 30, s. 2, and SC 1898, c. 34, s. 3.

Panel's Reasons

Evidentiary Considerations

Before discussing the First Nation's claim that no surrender meeting took place or if it did, the procedure used to obtain the surrender was illegal, we wish to respond to three evidentiary questions raised by the parties: onus of proof, the validity of the Affidavit of Surrender, and the oral history of the Elders.

Onus of Proof

Because of the dearth of evidence confirming the details of the surrender meeting, the First Nation argues that the onus of proof should be put on Canada to show that Inspector Marlatt called a surrender meeting, and, if he did so, that he conducted it in accordance with the *Indian Act*. The First Nation makes the point that this surrender was instigated solely by the Crown, and that the Affidavit of Surrender is the only evidence that a surrender meeting actually took place. Since the Crown was in the best position to know if the surrender requirements were followed, states the First Nation, Canada should bear the onus of proving compliance with the Act.

The panel observes, however, that the Indian Claims Commission is mandated to conduct inquiries on the basis of the Specific Claims Policy, which places the burden of proof on the claimant band to establish a breach of the Crown's lawful obligations.[33] We also point out that, at a practical level, the Commission inquires into historical events, some of which date back over 100 years and contain major evidentiary gaps owing to the practices of the day. Surrenders at the turn of the 20th century typically lacked the detailed records associated with later surrenders, such as those that were in evidence in the 1945 *Apsassin* surrender.[34] As a result of such gaps in the record, we expect both parties, not only the First Nation, to cooperate in identifying the issues and bringing forward the best available evidence to assist our understanding of the facts.

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[33] *Outstanding Business*, 31, reprinted in (1994) 1 ICCP 171 at 185. See also ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 202–3.

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

For these reasons, we conclude that the onus will remain with the First Nation to prove that no surrender meeting took place, or that, if it did, the procedure used was illegal. As the Commission has stated in past reports, that burden of proof is to be met on the balance of probabilities. In assessing whether the First Nation has discharged this burden, however, we take notice of the advice given by the Supreme Court of Canada in *Simon v. R.*, a case referred to us by the First Nation, to the effect that, where there is an absence of a written history on the part of the First Nation, the courts should not impose on it "an impossible burden of proof."[35] With that perspective in mind, the Commission has developed a longstanding practice of admitting and considering the evidence of Elders, whose oral testimony may be the only evidence originating with the First Nation.

Affidavit of Surrender

The Affidavit of Surrender is a crucial piece of evidence in this claim, in part because the government's practice in 1903 and for a decade thereafter was not to prepare lists of eligible voters, voters in attendance at the surrender meeting, or detailed results of the vote. The question before us is the extent to which the Affidavit of Surrender in this claim should be relied on as *prima facie* proof of the statements made within it.

The Affidavit of Surrender for the Roseau River Band's 1903 surrender was sworn on January 31 by Inspector Marlatt and Chief Antoine in Letellier, before Justice of the Peace O. Bellevance. Chief Antoine swore that the surrender was assented to and that it complied with the requirements of the *Indian Act* regarding the surrender, assent, and eligibility of the voters.

The First Nation challenges the procedural requirements for taking the Affidavit of Surrender on two fronts. First, the First Nation claims that it was required to be sworn before the Indian Commissioner, not a justice of the peace. Canada challenges this interpretation, arguing that the Act gave officials in Manitoba the additional option of having the Affidavit of Surrender sworn before the Indian Commissioner for Manitoba.

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[35] *Simon v. R.*, [1985] 2 SCR 387 at 408.

The requirement for proof of assent in the 1886 *Indian Act* was amended in 1891 and 1898 to incorporate specific references to surrenders in Manitoba, the North-West Territories, and British Columbia:

> (b.) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council;[36]

To interpret this section, as the First Nation has done, to mean that in a more remote region of Canada, the Affidavit of Surrender could be certified by only one person, the Indian Commissioner for Manitoba and the North-West Territories, would be illogical and impractical in our view. The intent of the amendment was to make it easier in less-populated regions, not more difficult, to locate one of the persons identified in the Act to take such statements under oath. We agree with Canada that the phrase "or, in the case of Manitoba"[37] offered an additional option in Manitoba, so that the Affidavit of Surrender could be legally sworn before a judge, stipendiary magistrate, justice of the peace, or the Indian Commissioner for Manitoba and the North-West Territories. We also observe that the amendment's final clause provides yet another option for Manitoba, the North-West Territories, and British Columbia, that of swearing the Affidavit before a person specially authorized by the Governor in Council. Accordingly, we find that the Affidavit was properly sworn before a justice of the peace.

The First Nation's second challenge to the validity of the Affidavit of Surrender is based on the argument that Chief Antoine must have been illiterate because he signed his name with an "X"

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[36] *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1891, c. 30, s. 2, and SC 1898, c. 34, s. 3.

[37] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 31, para. 74.

mark, others wrote letters for him, and officials provided interpreters at meetings with the Band. The First Nation contends that Chief Antoine's illiteracy required Inspector Marlatt to follow a Manitoba statute, *The Queen's Bench Act, 1895*,[38] which required the person taking an affidavit of an illiterate person to provide proof that the content of the affidavit was translated and read to him and that he appeared to understand it. Canada's answer is that the federal *Indian Act* did not require the signature of an interpreter or compliance with provincial legislation.

We note that the *Queen's Bench Act, 1895* sets out the rules of practice for proceedings before the Manitoba Court of Queen's Bench. In particular, the rules pertaining to affidavits are confined to causes of action in the Manitoba superior court. Further, section 92(14) of the Constitution of Canada gives the provinces exclusive jurisdiction to legislate in respect of the administration of justice "in the Province,"[39] including civil procedure in the provincial courts. It would appear, therefore, that the Manitoba *Queen's Bench Act, 1895*, establishing the rules of civil procedure in the province's superior court, applies only to that subject matter.

What is in question is not the procedure for taking affidavits within a provincial court action but the procedure required by the surrender provisions of a federal statute, the *Indian Act.* Section 91 of the *Constitution Act, 1867*, states that, for greater certainty, "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated,"[40] one of which is section 91(24), "Indians, and Lands reserved for Indians."[41] It would appear that the procedure for surrendering a reserve, including swearing affidavits, is one of those matters coming within the class of "Indians, and Lands reserved for Indians" and, therefore, within the exclusive jurisdiction of Parliament. The First Nation has provided no authority for the position that a law governing civil procedure in the courts of one province would have any application to a federal statute within the exclusive jurisdiction of Parliament.

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38 *The Queen's Bench Act, 1895*, SM 1895, c. 6, s. 502.

39 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 92 (14), reprinted in RSC 1985, App. II, No. 5.

40 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, reprinted in RSC 1985, App. II, No. 5.

41 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91(24), reprinted in RSC 1985, App. II, No. 5.

Even if Chief Antoine had been illiterate, the important question for the panel is whether he knew and understood what he was attesting to under oath. If he understood English but was unable to read or write, the document would have to be read to him before he signed. If he did not understand English, it would be necessary to translate the document for him. Although there is no documentary proof that a translator was present at the January 30 meeting or the meeting with the justice of the peace on January 31, Elder Oliver Nelson testified in 2002 that an interpreter was at the January 20 meeting and that, at "all of the meetings that Roseau had at that time with the Government or outside communities, there was always an interpreter present."[42] The 1973 interview with Elder Lawrence Larocque is also useful, as he was able to give the name of an interpreter used at meetings. When asked if he recalled the name of the interpreter at the surrender meeting, Mr Laroque replied, "I imagine it was old Napoleon Hagen (Hayden)."[43] Moreover, both parties appear to agree that the use of interpreters was common practice when officials met with the Roseau River leadership or in a general meeting with band members. Although the record is incomplete, there is simply no evidence that at the time of the surrender or afterward Chief Antoine did not understand what he was signing when he executed the Affidavit of Surrender.

We, therefore, find that the Affidavit of Surrender of Chief Antoine was properly sworn pursuant to the 1886 *Indian Act* and that the provincial *Queen's Bench Act, 1895*, had no application to the procedure for swearing an affidavit under the federal Act. Moreover, we note that the Supreme Court of Canada has determined that the procedure for executing the Affidavit of Surrender in section 39(b) is directory, not mandatory.[44] As such, non-compliance with the technical requirements would not defeat a surrender that is otherwise valid.

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42 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, p. 155, Oliver Nelson).

43 Roy Felix Antoine, "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973, p. 20 (ICC Exhibit 12, p. 20).

44 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 373–75, paras. 41–43 (sub nom. *Apsassin*), McLachlin J.

Oral History

The parties strongly disagree on the admissibility and weight to be given to the Elders' testimony in this inquiry.

In principle, ICC panels admit the evidence of Elders barring exceptional circumstances. Unless the First Nation decides otherwise, the panel will attend a session in the community to hear directly from the Elders. The Commission also advises the parties in its "Information Guide" that the transcript from the community session is "an important source of information used to supplement the historical documents and promote a broader understanding of the claim from the First Nation's perspective."[45] We find no reason in this inquiry not to admit the oral testimony of any of the Elders.

The only question before us is the weight to be given to such evidence. As the panel stated in the *Peepeekisis First Nation* inquiry report, the "oral evidence submitted in [the inquiry is] ... weighed and considered along with all the other evidence in the determination of the issues at hand."[46] The First Nation correctly points out that the most important factors in assessing the weight of the testimony are necessity, reliability, and consistency. The necessity of considering oral history evidence when the witnesses to the event in question are no longer alive was addressed in *Tsilhqot'in Nation v. British Columbia*, which confirmed that, when it is impossible to call a witness, "a case may be made that hearsay evidence of the particular event ... is necessary. Death of all who saw the event will more than likely make the case for necessity."[47] The ICC typically inquires into events from the 19th and early 20th centuries, necessitating the consideration of oral history evidence in order to complete the record.

Second, the question of reliability is highly relevant to ICC inquiries, not for the purpose of deciding admissibility, but to assess the weight of the Elders' evidence. The court in *Tsilhqot'in* set out certain information that, in our view, is useful for testing the reliability of the Elders' testimony:

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45 ICC, "Information Guide: Fairness in Claims Negotiations" (revised April 2005), p. 7.

46 ICC, *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004), 9–10.

47 *Xeni Gwet'in First Nations v. British Columbia*, [2004] 24 BCSC (4th) 296 at 302, para. 18 (sub nom. *Tsilhqot'in Nation v. British Columbia*).

1) some personal information concerning the witnesses circumstances and ability to recount what others have told him or her;
2) who it was that told the witness about the event or story;
3) the relationship of the witness to the person from whom he or she learned of the event or story;
4) the general reputation of the person from whom the witness learned of the event or story;
5) whether that person witnessed the event or was simply told of it; and,
6) any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.[48]

Third, the degree of consistency in the Elders' testimony is of particular importance in this inquiry because two different groups of Elders gave information on the specific claim, one in a series of interviews with Chief Felix Antoine in 1973, and the other in the 2002 community session.

Having admitted all of the oral testimony from the 2002 community session and the summary of the 1973 interviews with Elders, the panel has considered the weight of that evidence based on necessity, reliability, and consistency.

Did a Surrender Meeting Happen?

We now come to the First Nation's claim that no surrender meeting took place. The First Nation relies on the 2002 testimony of some of the Elders who declared that no one could remember a meeting being held, or, if it was, alcohol was supplied to the band members. Other Elders testified they were told that some band leaders were taken to Ottawa where they were given alcohol and signed a surrender, while others believed it was Winnipeg or overseas.

Canada submits that the Elders' testimony is fraught with inconsistencies, both among the group of Elders testifying in 2002 and between this group and the Elders interviewed in 1973. In particular, states Canada, no one in 1973 mentioned alcohol as a factor in the surrender. The First Nation explains this discrepancy by observing that in 1973 the Elders were not asked about alcohol and, in any event, they would have been reluctant to talk about it. Although Elder Sam Hayden confirmed in 1973 that a meeting had taken place where the old church used to be, the First Nation

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[48] *Xeni Gwet'in First Nations v. British Columbia*, [2004] 24 BCSC (4th) 296 at 302, para. 19 (sub nom. *Tsilhqot'in Nation v. British Columbia*).

suggests that he must have been confused by the question and was actually thinking of the time band members received their treaty payment and rations.

We, too, are struck by the inconsistencies between the 1973 interviews and the 2002 community session evidence. The court in *Squamish Indian Band v. Canada* dealt with a similar challenge – ascertaining historical truths at a given place on a given date – and had this to say:

> the historical truths sought in this case are narrow, specific questions. It is one thing, in cases like *Delgamuukw*, *Marshall*, and *Badger* to rely on information which may not be historically precise to prove patterns of behaviour over a long period of time. It is quite another to rely on undated, and sometimes confused, evidence to show who was resident at the False Creek Site in 1869 and at the Reserve in 1877.[49]

We find that, regarding the existence of a surrender meeting and the provision of alcohol, the oral evidence cannot be given a great deal of weight because of the inconsistencies between the 1973 interviews and the 2002 testimony.

Turning to the documentary evidence, we find only the Surrender Document, Affidavit of Surrender, and some correspondence before and after the date of the surrender. The correspondence in the weeks before January 30 includes letters directing Inspector Marlatt to endeavour to secure a surrender and advising that blank forms of surrender were being sent for that purpose. Following the surrender, numerous letters from officials, third parties, and the Band itself refer to the surrender having been taken, but it is the Band's correspondence that is particularly noteworthy. As the panel in *The Key First Nation: 1909 Surrender Inquiry* report explained, the post-surrender conduct of the Band "assumes greater importance in circumstances where the evidence surrounding the surrender itself is scarce or equivocal."[50] In July 1903, the Band wrote to Minister Sifton requesting a sufficient advance of money to purchase the sections at the Rapids: "[t]his is in accordance with the arrangement entered into when we surrendered a portion of our Reserve at the Roseau last

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[49] *Mathias v. Canada et al.* (2000), 207 FTR 1 at 31–32, para. 39.

[50] ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 87.

January."[51] Five months later, the Band executed a Band Council Resolution that also referred to the agreement dated January 30, 1903, to surrender a portion of IR 2.[52]

The correspondence prior to and following the surrender does not prove that a surrender meeting under the *Indian Act* actually took place, but it does corroborate the sworn statements made by Chief Antoine and Inspector Marlatt. On balance, the oral testimony put forward by the First Nation does not persuade us that no surrender meeting happened. We also reject the First Nation's position that alcohol was made available at the meeting, either by Marlatt or anyone else, including band members. Not only is the oral testimony inconsistent on this question, nothing else suggests that alcohol was supplied at the meeting or that the band members were under the influence of alcohol when they voted.

Similarly, we are unable to agree with the First Nation's contention that Inspector Marlatt was guilty of fraudulent behaviour by supplying alcohol to procure the surrender, or, presumably, representing to the government that a surrender meeting had taken place when it had not. The source of the First Nation's position appears to be the conviction that Marlatt must have been using unethical conduct at the January 30 meeting because of the Band's sudden reversal of its long-standing position against surrendering the reserve. An allegation of fraud, however, must be founded on compelling evidence, none of which is present in this inquiry. As Canada notes, the "allegation of fraud is very serious and the band will be held strictly to this burden of proof."[53] Moreover, the Specific Claims Policy requires that a claim based on fraud in connection with the acquisition or disposition of Indian reserve land must be clearly demonstrated in order to succeed.[54] Although the record does not reveal an obvious explanation for the Band's reversal, suspicion alone is not a substitute for clear proof when alleging fraud.

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[51] Chief and Councillors, Roseau River Band, to Clifford Sifton, Minister of the Interior, July 24, 1903, Library and Archives Canada (LAC), RG 10, vol. 3830, file 26306-1 (ICC Exhibit 1a, p. 808).

[52] Roseau River Band, Band Council Resolution, January 8, 1904, Indian Lands Registry, Instrument no. R6247 (ICC Exhibit 1a, p. 849).

[53] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 34, para. 87.

[54] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 180.

The panel finds that a surrender meeting under the *Indian Act* took place, that it happened on January 30, 1903, at IR 2, that alcohol was not a factor, and that Inspector Marlatt was not guilty of fraud in the conduct of the surrender meeting. He was inexperienced in taking surrenders and careless in not providing a reporting letter to his superiors, but such behaviour is not tantamount to deceit.

Did the Surrender Meeting Comply with the Indian Act?

Having found that a surrender meeting took place, we now address the First Nation's alternative claim that if the surrender meeting happened, it did not meet the requirements of the *Indian Act* on three grounds: the meeting was not conducted under the rules of the Band; there was no majority vote; and the Affidavit of Surrender sworn by Chief Antoine and Inspector Marlatt was invalid.

Rules of the Band

The 1886 *Indian Act* requires that a vote to surrender reserve land be held "at a meeting or council thereof summoned for that purpose, according to the rules of the band."[55] The First Nation argues that "the surrender requirements of the 1886 *Indian Act* were in direct conflict with the rules of the Band. Total consensus of the Band meant total consensus of all, including women."[56] The First Nation relies on the evidence of Elders who described their clan system of consensus decision-making. In addition, Melvin Pierre, who researched the history of the Roseau River Anishinabe and who supplemented the testimony of his older brother Gordon Pierre, wondered how the surrender meeting could have happened so quickly when such an important meeting would require great preparation, including the making of a ceremonial pipe.[57] The First Nation urges the panel to interpret the phrase "rules of the band" in the surrender provisions broadly enough to include traditional methods of decision-making.

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

56 Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 29, 2005, p. 157, para. 284.

57 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, p. 77, Melvin Pierre).

Canada, on the contrary, interprets the phrase "rules of the band" to mean explicit rules made by the Chief or council. In the alternative, Canada argues that the Band supplied no evidence of its traditional methods of calling or conducting meetings and that, in the absence of evidence to the contrary, the Affidavit of Surrender remains the basis for finding that the surrender meeting was held in accordance with the Act.

We find it impossible to reconcile the First Nation's interpretation – that "rules of the band" may include consensus decision-making – with the wording in the same section that requires a majority of eligible voters to vote on the surrender. The First Nation referred us to the ICC's *Duncan's First Nation* inquiry report, which reviewed the case law dealing with the phrase "rules of the band";[58] however, the issue in *Duncan's* centred on the Band's normal practice for summoning a meeting, not the method of decision-making. In that respect, the *Duncan's* report is not helpful to the First Nation.

We also do not agree with one of Canada's arguments that, based on the use of the word "rules" in the 1886 *Indian Act* and 1886 *Indian Advancement Act*,[59] a band would be required to have in place explicit rules or bylaws made by the Chief and council and approved by the Crown. This strikes us as an unreasonably narrow interpretation, especially in the case of bands at the turn of the century who did not write down or formally adopt rules for summoning band members or conducting meetings.

We interpret "rules of the band" in the following way: the statutory requirement for a majority vote was mandatory and could not be replaced by other forms of decision-making, but, if there were well-established written or customary rules, known to the Crown, regarding the calling and conduct of important meetings, these rules should have been followed to the extent possible in summoning voters for the surrender meeting. As a practical matter, the official organizing a surrender meeting would want to employ the most effective way of calling a meeting so that a majority of eligible voters would attend. For its part, the band would want the meeting to be

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[58] ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 150–54.The case law referred to on this issue is *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1CNLR 54 (Ont. Ct (Gen. Div.)) and *Apsassin v. The Queen*, [1988] 1 CNLR 73 (FCTD).

[59] *Indian* Act, RSC 1886, c. 43, s. 44; *Indian Advancement Act*, RSC 1886, c. 44, s. 10.

organized fairly and its eligible voters notified. It is primarily for these reasons, we think, that the Act requires the Crown to observe the "rules of the band." That being said, we do not think a failure to follow the rules of the band to the letter would in itself result in an invalid surrender.

Based on our interpretation that "rules of the band" means rules relating to calling or conducting a meeting and not the method of decision-making, we observe that the First Nation has not brought forward any evidence that special rules or practices known to the Crown at the time were in place. The only evidence that the "rules of the band" were followed is the Affidavit of Surrender, in which both Chief Antoine and Inspector Marlatt attested to the fact that "assent [to the surrender] was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules."[60] We, therefore, find no basis for concluding that the 1903 surrender meeting breached the Band's rules.

Majority Assent to Surrender

One of the mandatory requirements for a valid surrender under the 1886 *Indian Act* is approval by a majority of the male members of the band, of the full age of 21 years, at a meeting or council summoned for that purpose. In the case of the Roseau River Band's surrender of a portion of IR 2, there is little documentation proving that the requirement for a majority vote was met, save for the Affidavit of Surrender and, to a lesser extent, the Surrender Document. The Affidavit of Surrender, sworn by Chief Antoine and Inspector Marlatt, states in part:

> That the annexed Release or Surrender was assented to by a majority of the male members of the said Band of Indians of the Roseau Indian Reserve of the full age of twenty-one years then present.[61]

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[60] Affidavit of Surrender, January 31, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 681–82).

[61] Affidavit of Surrender, January 31, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 681–82).

The Surrender Document, signed with an "X" mark by 12 Chiefs and principal men of the Roseau River Band of Indians,[62] states that, on behalf of all the band members, the signatories surrendered to the Crown the portion of IR 2 described in the document, subject to certain terms and conditions. The 12 names include three Chiefs and nine councillors or headmen. A 13th name is listed but there is no mark beside it.

The First Nation takes the position that the surrender did not achieve a majority vote of male band members over the age of 21. It relies primarily on the report of Public History Inc. (PHI) to conclude that, based on the paylists for 1902 and 1903, a majority vote would have required 15 eligible voters to assent to the surrender, whereas the Surrender Document lists only 12. Canada acknowledges that, prior to 1913, the year that explicit guidelines were issued, surrenders produced minimal documentation regarding the vote. Canada's primary argument, however, is based on the limitations of paylists in establishing whether the voters constituted a majority under the Act.

Both parties refer to the 1982 *Cardinal* case on the interpretation of the word "majority" in the surrender provisions of the *Indian Act*. The Court in *Cardinal* concluded that a relative double majority is required:

> the section is construed as meaning that an assent, to be valid, must be given by a majority of a majority of eligible band members in attendance at a meeting called for the purpose of giving or withholding assent.[63]

In other words, the Court found that, for a surrender to be valid, a majority of male band members age 21 or over had to be in attendance at the surrender meeting and a majority of those in attendance had to vote in favour.

The PHI historical report into the Roseau River 1903 surrender states that, in July 1902, the Band consisted of 196 members, 55 of whom were males over the age of 21. In 1903, the Band's

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[62] Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 678–80).

[63] *Cardinal et al. v. The Queen*, [1982] 1 SCR 508 at 517.

membership increased to 202, with 57 members being males over the age of 21.[64] The basis for these numbers are the treaty annuity paylists for the years 1902 and 1903.[65] Using the lower number of 55, the First Nation finds that the required number in attendance would have been 28, and a majority voting in favour of surrender would have been 15. Yet, says the First Nation, the Surrender Document lists only 12 names.

There are, however, significant difficulties in using paylists to show the precise majority needed for a valid surrender. Paylists were designed to record the annual treaty payments to band members by listing the head of each household by name, ticket number, spouse if any, and number of male and female children. The paylists do not record the ages of band members. Most male band members ceased being listed under the name of their father, not when they turned a certain age, but when they established their own family. At that time their names would be entered separately with their own ticket number. These men could have been older or younger than 21.

Even if we were satisfied that, on a balance of probabilities, the paylists of 1902 and 1903 indicate 15 as the number needed to achieve a majority vote in favour of surrender, we are faced with the fact that the Surrender Document was never intended to serve as a tally of the votes in favour. The First Nation argues that the "[surrender] document lists 12 names of male members 21 years of age or older, who purportedly voted in favour of the surrender. Thus, a majority was not reached."[66] With respect, the Surrender Document does not establish any of those facts. The Surrender Document begins with these words,

> We, the undersigned Chiefs and Principal men of the Roseau River Band of Indians resident on our Reserves no. 2 and 2a. In the Province of Manitoba and Dominion of

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[64] Public History Inc., "Roseau River Indian Reserve No. 2, 1903 Surrender Claim Historical Report," revised October 28, 1997 (ICC Exhibit 3c, pp. 26–27).

[65] Treaty annuity paylist, Roseau River Band, July 10 and 11, 1902, LAC, RG 10, vol. 9377, pp. 67–96 (ICC Exhibit 1j, pp. 1–15); Treaty annuity paylist, Roseau River Band, July 8, 1903, LAC, RG 10, vol. 9378, pp. 54–74 (ICC Exhibit 1j, pp. 16–27).

[66] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 158, para. 287.

> Canada, for and acting on behalf of the whole people of our said Band in Council assembled, do hereby release, remise, surrender ....[67]

The Surrender Document is not a list of the voters and does not verify the age of the signatories, whether they voted, or how they voted, although we can probably assume that most of the names on the list, being Chiefs and councillors or headmen, did vote. As Canada points out, "the number of band members signing the surrender document is legally irrelevant as there is no statutory or other legal requirement for any band member to sign the surrender document."[68] Although the document suggests that the Chief and principal men were expected to sign, each surrender is different. If, for example, a Chief opposed the surrender, he could choose not to sign the Surrender Document. Moreover, one or more voters could leave the meeting before the document was signed, or some of the signatories could vote against the surrender but sign the document anyway. In short, the 12 signatures of Chiefs and councillors or headmen on the Surrender Document do not necessarily represent the exact number who voted in favour of the surrender.

Canada also points out in its written submission that paylists do not confirm that certain additional criteria in the *Indian Act* entitling a band member to vote at a surrender meeting – that of being habitually resident on or near and interested in the reserve in question – was met. In its written reply, the First Nation responds by asserting that, in the years up to and including 1903, the government recognized the Roseau River Band as three separate Bands, one of whom, the Rapids Band led by Nashwasoop (Nashwaskoope)[69] and his followers, lived on IR 2A at all times and only travelled to IR 2 for treaty annuity payments. Thus, states the First Nation, the people at the Rapids had no interest in or connection to IR 2, with the exception of entitlement to a share of the proceeds, and therefore should have been excluded from the surrender vote. When the panel asked for

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[67] Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 678–80).

[68] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 43, para. 119. See also the discussion regarding the Surrender Document in ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 81–82.

[69] For the sake of consistency, we have chosen to use the spelling "Nashwasoop" for this Chief throughout the report; this form is commonly found in the documentary record, but the name is also found as "Nashwaskoope" and "Nashwashoope."

clarification of the First Nation's position on the number of bands existing in 1903, counsel for the First Nation confirmed that he was not asking the panel to make a finding that three separate bands existed, only that the Crown recognized them as such.[70] This is not a case, however, in which alternative scenarios are possible. Either there was one band with two reserves, or there were three bands, two of which had reserves. Since we are not being asked to find that three bands existed, we consider that, with respect to all the issues before us, the Roseau River Band was one Band at the time of the surrender.

First Nation's counsel then acknowledged that "there certainly would be an interest [by the Rapids' group] in the outcome of the surrender and what they could get out of it. But was their interest sufficient enough that they should be allowed to vote on taking land from Reserve 2?"[71]

The simple answer to that question is an unequivocal yes. We refer to the Commission's report in the *Duncan's First Nation* inquiry, in which the panel conducted a detailed analysis of the *Indian Act* wording that prohibits an otherwise eligible voter from voting on the surrender unless he "habitually resides on or near and is interested in the reserve in question."[72] In the *Duncan's* inquiry, none of the listed voters resided on or geographically near any of the seven parcels of reserve land that were surrendered. The panel in *Duncan's*, however, agreed with the government that, "as long as an otherwise eligible band member habitually resides on or near, and is interested in *any portion* of the reserve in question, he should not be disqualified from voting with regard to the surrender of that portion or any other part of the reserve."[73] The panel found that the words "interested in the reserve" were included in the Act "to ensure the participation of those band members who have a *reasonable connection – whether residential, economic, or spiritual* – with the reserve."[74] The panel also noted that in general it would err on the side of inclusion. As for the question of whether the

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[70] ICC Transcript, March 9, 2006, p. 119 (Stephen Pillipow).

[71] ICC Transcript, March 9, p. 118 (Stephen Pillipow).

[72] *Indian Act*, RSC 1886, c. 43, s. 39.

[73] ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 162–63. Emphasis in the original.

[74] ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 166. Emphasis added.

voters' habitual residence was sufficiently "near" the reserve in question, the panel in *Duncan's* concluded that it is a question of fact to be answered on a case-by-case basis.[75]

The band members from the Rapids had a sufficient interest in IR 2 to be eligible to vote. In the first place, being geographically proximate to the reserve in question does not define nearness. The Rapids' group lived at IR 2A along the Roseau River and were an integral part of the Roseau River Anishinabe. Long before the 1903 surrender, the reserve allocation for the Roseau River Anishinabe was expanded to include a small parcel at the Rapids that became reserve 2A. Reserves 2 and 2A were separate parcels set aside for all members of the Roseau Band. There is no question that the Rapids' Indians had an interest in IR 2: not only were they entitled to a share of the proceeds, the surrender contained a condition that two sections of reserve land would be added to the Rapids' reserve. Consequently, they had a direct economic interest in IR 2, in that they had an equal right to share in the proceeds of surrender, and the reserve on which they were resident would be enlarged, if only minimally, as a result of the surrender.

In conclusion, we would be reluctant to find that a surrender was a nullity by comparing a number deduced from paylist information with the number of signatories on the Surrender Document in order to arrive at the required majority. The only evidence before us is the Affidavit of Surrender, in which Chief Antoine attests to the truth of the following:

> That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.
> ...
> That no Indian was present or voted at such council or meeting meeting [sic] who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.[76]

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[75] ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 177.

[76] Surrender Affidavit, January 31, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 681–82).

The First Nation has not brought forward sufficient evidence to rebut the contents of Chief Antoine's affidavit. We therefore find that a valid majority assented to the 1903 surrender and, as a result, do not need to consider the legal effect of a breach of the *Indian Act* surrender provisions.

Conclusion

With respect to the three evidentiary questions put before the panel, we confirm that the onus of proof in this inquiry rests with the claimant Band on a balance of probabilities. The panel finds that the Affidavit of Surrender was properly sworn before a justice of the peace and that the provincial law governing the procedure for taking affidavits in the Manitoba courts has no application to affidavits under the federal *Indian Act.* Finally, the panel admits all of the oral testimony of the Elders in 2002 and the record of Elder interviews in 1973, and has considered the weight of that evidence in accordance with the principles of necessity, reliability, and consistency.

The panel concludes that a surrender meeting did take place and that the surrender taken at the January 30, 1903, meeting complied with the procedural requirements of the *Indian Act.* The lack of knowledge by some Elders that a surrender meeting happened or, in the alternative, their testimony that alcohol was provided to the voters, is inconsistent with other Elder evidence and insufficient to rebut the evidence of the sworn Affidavit of Surrender and the post-surrender correspondence from the Band acknowledging the surrender. Further, no reliable evidence exists that Inspector Marlatt, although inexperienced and careless, was guilty of fraudulent behaviour.

The panel interprets "rules of the band" in the *Indian Act* to mean a well-established practice of the band, formal or informal, and known to the Crown, for summoning a surrender meeting, not for decision-making. We find that insufficient evidence exists to prove that less than a majority of eligible voters assented to the surrender, given that the paylists and the Surrender Document do not identify who was an eligible voter or who voted in support of the surrender.

ISSUE 3: PRE-SURRENDER FIDUCIARY DUTY

3 Did Canada breach any fiduciary duties in a pre-surrender context in relation to the 1903 surrender and, if so, what is the effect of the breach?

- i Did Canada's conduct prior to the surrender give rise to a breach of fiduciary duty, and, if so, what are the consequences?
- ii Did the 1903 surrender result in an exploitative and unconscionable bargain, and, if so, what are the consequences?

The panel has concluded that the 1903 surrender was valid, having been taken in conformity with the *Indian Act* surrender provisions. When the Crown took the surrender, however, it was also subject to a fiduciary duty in favour of the Roseau River Band. We now review the Crown's actions throughout the surrender process to determine if its conduct met the standard of a responsible fiduciary in relation to the Band's legal and other interests.

The question of the Crown's pre-surrender fiduciary duty is divided into two parts: first, did the Crown's conduct leading up to the surrender vote give rise to a breach of fiduciary duty; and second, was the surrender so foolish and improvident that it amounted to an exploitative bargain?

First Nation's Position

It is the First Nation's position that the Band's understanding of the terms of surrender was inadequate and that the Band ceded its decision-making authority to the Crown. Elders from the community testified in 2002 that alcohol may have been used to obtain the 1903 surrender from the Chief and councillors, and also that the leadership did not understand that they were surrendering the land, only that they were leasing or renting it. The First Nation also claims that the Band's leaders believed they were entitled under Treaty 1 to have sufficient reserve land at both the mouth of the Roseau River (IR 2) and the Rapids (IR 2A) because of their historic connection to these and other areas along the river. At the same time, according to the First Nation, the Band expressly rejected the option of surrendering any of IR 2 in order to obtain more land at IR 2A. The First Nation also alleges that there were tainted dealings on behalf of the Crown in that the Crown procured the surrender forcefully and for the benefit of the settlers and local politicians, not the Band. Finally, it contends that, even if the surrender was obtained in accordance with the *Indian Act*, the surrender

was so foolish and improvident that it amounted to exploitation of the Band. As such, the Crown should have withheld its consent to the surrender. This allegation rests in part on the assertion that Crown officials of the day knew about the superior agricultural quality of the land that was surrendered and were fully aware of the flooding that occurred regularly on the remaining portion of the reserve.

Canada's Position

Canada denies the allegation that alcohol was used to procure the surrender, and states that there is absolutely no evidence that the Crown engaged in tainted dealings in favour of the settlers' interests. Canada argues that the Elders' evidence which gives rise to these arguments is unreliable and inconsistent with the 1973 interviews with Elders of the community. Further, Canada maintains, there is evidence that the Band had a long-standing interest in acquiring more land at the Rapids, so the surrender made sense to the Band at the time, and was neither foolish nor improvident. Canada relies on post-surrender correspondence between the Band and the department for proof that the Band understood that it was surrendering its land, as well as proof that the Band did not cede its decision-making authority to the Crown.

The Law on Pre-surrender Fiduciary Duty

Determining whether the Crown met its pre-surrender fiduciary duty to a band involves examining the period leading up to and including the surrender vote and the period after the vote, when the Crown had a fiduciary duty to examine the surrender and refuse to accept it if the surrender was an exploitative arrangement. The source of the Crown's fiduciary duty to prevent exploitation of the band is found in the surrender provisions of the 1886 *Indian Act*:

> when such assent [to the surrender] has been so certified, ... such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[77]

[77] *Indian Act*, RSC 1886, s. 39(b), as amended in other respects by SC 1898, c. 34, s. 3.

The leading court judgment on pre-surrender fiduciary duty remains the Supreme Court of Canada's 1995 decision in *Blueberry River Indian Band*,[78] which is known as the *Apsassin* case. The two judges writing the decision took different but complementary approaches to the question of the Crown's fiduciary duty in taking a surrender.

Madam Justice McLachlin described the surrender requirements of the *Indian Act* as striking "a balance between the two extremes of autonomy and protection."[79] She compared the band's autonomy to decide on a surrender with the Crown's fiduciary duty to protect the band. The Crown's final approval of a surrender already consented to by the band, stated McLachlin J, is not intended "to substitute the Crown's decision for that of the band, but to prevent exploitation."[80] She explained 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.[81]

On the facts in *Apsassin*, Madam Justice McLachlin did not find an exploitative bargain; on the contrary, she concluded that the surrender made good sense from the Band's perspective.

Although McLachlin J stressed the importance of the fiduciary duty at the time of the Crown's approval of a band's decision to surrender reserve land, she also asked the question whether a fiduciary duty should be superimposed on the whole *Indian Act* regime for taking surrenders. Her conclusion, based on the facts in *Apsassin*, was in the negative, but she did recognize the possibility

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

[79] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370, para. 35 (sub nom. *Apsassin*), McLachlin J.

[80] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370, para. 35 (sub nom. *Apsassin*), McLachlin J. On this question, McLachlin J followed the majority judgment in *Guerin v. The Queen*, [1984] 2 SCR 335 at 383, Dickson J.

[81] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371, para. 36 (sub nom. *Apsassin*), McLachlin J.

that in different circumstances a band might give its decision-making authority to the Crown, thereby creating a fiduciary obligation on the Crown "to exercise that power solely for the benefit of the vulnerable party."[82]

Mr Justice Gonthier agreed with Madam Justice McLachlin's approach to the Crown's fiduciary duty under the statute to prevent an exploitative bargain, but Gonthier J preferred an approach that examines the understanding and intention of band members at the time, as well as the Crown's conduct. Mr Justice Gonthier acknowledged that in the eyes of the law, Aboriginal peoples are autonomous actors regarding a decision to surrender their reserve land, and that such decisions should be respected. That is why, he stated, it is "preferable to rely on the understanding and intention of the Band members"[83] in order to determine the true purpose of the surrender from the band's perspective. Nevertheless, Gonthier J stressed:

> I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.[84]

Gonthier J did not provide examples of what he would consider to be tainted dealings, nor was there any evidence of tainted dealings in the *Apsassin* case.

The 2002 decision of the Supreme Court of Canada in *Wewaykum Indian Band*[85] provides a further elucidation of the factors that the courts may examine in deciding whether the Crown has breached its fiduciary duty to a band in relation to reserve land. *Wewaykum* did not concern a surrender; nevertheless, the Court set out some general propositions concerning the Crown's fiduciary duty when dealing with Indian land that becomes a reserve, including a brief reference to

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[82] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72, paras. 37–39 (sub nom. *Apsassin*), McLachlin J.

[83] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 358, para. 7 (sub nom. *Apsassin*), Gonthier J.

[84] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362, para. 14 (sub nom. *Apsassin*), Gonthier J.

[85] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

the situation of "reserve disposition."[86] Mr Justice Binnie, writing for a unanimous Court, cited with approval McLachlin J's approach in *Apsassin* to the effect that the band's decision was to be respected unless that decision constituted exploitation.[87] He also interpreted Madam Justice Wilson's approach in *Guerin* as signifying that

> *ordinary diligence* must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties, or, indeed, exploitation by the Crown itself.[88]

Both parties in this specific claim rely on the *Apsassin* judgment, each emphasizing the particular approaches most conducive to their arguments. The First Nation also relies on the 1997 Federal Court of Appeal decision in *Semiahmoo Indian Band*[89] in support of its position that the surrender was an exploitative deal; however, this judgment is not particularly helpful, as the surrender provisions were used to bring about what was, in effect, an expropriation. In contrast to a surrender, *Semiahmoo* appropriately describes the parameters of the Crown's fiduciary duty in the context of an expropriation, when a band has lost all decision-making power. Still, we agree that the view expressed in *Semiahmoo*, that "the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain,"[90] applies equally to surrenders.

The Test to Be Applied

By combining the factors identified by Justices McLachlin and Gonthier in *Apsassin,* this Commission has set out in several inquiries four essential questions to determine if the Crown met its fiduciary duty to a band when taking a surrender. The parties in this inquiry have followed a similar approach in their submissions.

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86 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295, para. 99.

87 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295, para. 99.

88 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 296, para. 100. Emphasis added.

89 *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA).

90 *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 at 25, para. 45 (CA).

These, then, are the questions:

1 Was the Roseau River Band's understanding of the proposed surrender adequate;
2 Did the Band cede its decision-making power to the Crown;
3 Did the Crown's conduct taint the dealings in a manner that makes it unsafe to rely on the Band's understanding and intention; and
4 Was the Band's decision to surrender the reserve land so foolish or improvident that it constituted exploitation?

Although we deal with these questions separately, the facts relevant to the issues of tainted dealings and exploitation frequently overlap because of the central role played by the Crown in advancing the surrender.

Panel's Reasons

Was the Band's Understanding of the Surrender Adequate?

The First Nation claims that, even if a surrender meeting actually took place, the band members' understanding of the surrender was inadequate because, according to the testimony of some Elders at the community session in 2002, Crown officials provided the Band with alcohol at the surrender meeting, thereby impairing its members' capacity. The First Nation also points to oral evidence from the 2002 community session that the Band believed it was merely leasing or renting out the land, not surrendering it for sale. However, we find this evidence problematic in that these subjects were not mentioned by any of the Elders interviewed for this claim in 1973. The First Nation explains that some of the Elders at that time expressed reluctance to talk about the circumstances surrounding the 1903 surrender and were not asked directly about the presence of alcohol.[91] Although it would be reasonable to believe that the voters had been tricked with alcohol into voting for the surrender because of the sudden reversal of their long-standing opposition to surrender, there is simply no other evidence, as we have already stated, that alcohol played a role in the surrender meeting. If alcohol had been a factor, it probably would have been mentioned prior to the 2002 community session and likely would have been raised by at least one Elder in 1973.

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[91] Reply Submisssion on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006, p. 20, para. 58.

We are also not convinced that the band members thought they were leasing or renting the land for three reasons: first, as the Commission concluded in the *Duncan's First Nation* inquiry report, the government did not consider leasing of surrendered land to be an option before 1918; indeed, "the primary policy appeared to remain the surrender for sale until at least the late 1920s and perhaps the mid-30s."[92] Second, the First Nation was unable to point to any documentary evidence to suggest that anyone in 1903, either officials or the Band, even considered the option of leasing or renting. Third, had the leadership believed that the land would only be rented out, they would have protested at the time of the auction or when it became apparent that the Crown was taking in far greater amounts of money than would accrue from rental or leasing agreements.

Our examination of the record illustrates that the Band had a basic understanding that it was surrendering 12 sections of IR 2 for sale and that it understood the consequences of that surrender. For instance, the post-surrender correspondence includes a petition from Chief and council on July 24, 1903, requesting moneys from the surrender "in accordance with the arrangement entered into when we surrendered a portion of our Reserve at the Roseau last January."[93] In a similar vein, Chief and council signed a Band Council Resolution on January 4, 1904, confirming the acceptance of the additional land to be set aside as reserve land at the Rapids,

> as part of an agreement made by us with the said Department for the surrender of a portion of Indian Reserve Number 2, the said surrender made, and dated the thirtieth day of January A.D. 1903.[94]

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[92] ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 261.

[93] Chief and Councillors, Roseau River Band, to Clifford Sifton, Minister of the Interior, July 24, 1903, LAC, RG 10, vol. 3630, file 26306-1 (ICC Exhibit 1a, p. 808).

[94] Roseau River Band, Band Council Resolution, January 8, 1904, Indian Lands Registry, Instrument no. R6247 (ICC Exhibit 1a, p. 849).

What the Band did object to was the Crown's failure over the first seven years to pay annual interest to the band members, which, according to statements by Minister Frank Oliver in 1906[95] and Indian Agent R. Logan in 1909,[96] had been verbally promised to them at the time of the surrender.

The panel concludes that the Band understood that it was surrendering the 12 eastern sections of IR 2 for sale and that part of the proceeds would be used to purchase more land at the Rapids. In that respect, its understanding of the surrender and its consequences was adequate.

Did the Band Cede Its Decision-making Power to the Crown?

In the circumstances of a surrender, it is possible to find that, even though the band decided to surrender reserve land through a majority vote, in reality the band did not have true decision-making power. Madam Justice McLachlin in *Apsassin* defined the legal relationship that is created *if* a beneficiary cedes its decision-making power to the fiduciary:

> 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.[97]

If a band has ceded its power to the Crown, or if the circumstances reveal that the Crown has effectively prevented the band from giving free and informed consent to the surrender, the Crown will become a fiduciary of the highest order, requiring it to act solely for the benefit of the band.

Certain circumstances could create a situation in which the Crown becomes the decision-maker on the surrender. Examples might include a band without knowledge of its options or the foreseeable consequences of the surrender; an absence of band leadership or capability of making important decisions; Crown officials who actively undermine the leadership; a band struggling to

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[95] Frank Oliver, Superintendent General of Indian Affairs (SGIA), to the Governor General in Council, February 21, 1906, LAC, RG 10, vol. 3731, file 26306-2 (ICC Exhibit 1a, p. 947).

[96] R. Logan, Indian Agent, to the Secretary, Department of Indian Affairs (DIA), May 8, 1909, LAC, RG 10, vol. 3731, file 26306-A (ICC Exhibit 1a, p. 1045).

[97] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372, para. 38 (sub nom. *Apsassin*), McLachlin J.

survive; or the Crown bringing undue pressure on the band to make a particular decision. The possibility of such a situation arising becomes more likely when several of these facts exist concurrently.

The problem faced by the panel in this claim is that, on the important question of what happened between January 20, 1903, the date of the meeting at which Inspector Marlatt was told that the Band would not surrender any land, and January 30, 1903, the date of the surrender vote, there is no direct evidence connecting Marlatt's actions with the reversal of the Band's position. We know from Marlatt's letter to Laird in October 1902, following a meeting with certain band leaders, that he claimed to have "some quiet influences at work among them,"[98] a statement that, given the tone of the rest of the letter, indicates that Marlatt was making efforts to influence the Band to support a surrender. We also know that within days of the surrender, for which there is no detailed reporting letter, Marlatt commented in a letter to the Secretary of Indian Affairs:

> I trust that the terms of surrender will be closely observed, I had very considerable difficulty in getting it, and only after repeated promises that the Department would carry out the terms of the agreement to the letter.[99]

This statement was followed by an even more transparent declaration in June 1903 of the government's intentions for the surrender and for the future of the Band's reserve:

> *The surrender was obtained not by the desire of the Indians but by the strong wish of the Department*. It was with great difficulty secured and only after a clear understanding that the 10% would be available almost immediately after the sale. ... They are a very turbulent, unreasonable, non-progressive, degenerate band, and I fear that little can be done for them while they remain where they are, they are fully posted as to the value of their lands, and *last but most important it will be but a short time until they are again asked to surrender the balance of the reserve*, and unless

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[98] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, October 25, 1902, LAC, RG 10, vol. 3565, file 82, pt. 29 (ICC Exhibit 1a, pp. 642–43).

[99] S.R. Marlatt, Inspector of Indian Agencies, to the Secretary, DIA, February 2, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 685).

> they are generously and fairly treated according to their own ideas at this time they will be very slow to sign another surrender.[100]

According to this letter, the promise of a quick payment of 10 per cent of the sale proceeds clinched the deal, but that alone does not prove that the Band gave up its decision-making power. The inclusion of a condition that a band will receive a maximum of 10 per cent of the proceeds of sale was sanctioned by the *Indian Act* of the day and was a common feature of surrender agreements.[101] In the case of the Roseau River Band, the surrender agreement provided for 10 per cent of the amount realized after the sale of the land, to be paid out for items that the band members needed.

We have already concluded that insufficient evidence exists to prove that Marlatt supplied alcohol to the voters at the surrender meeting. Similarly, we have insufficient evidence to show conclusively that the Band ceded its decision-making authority to the Crown such that the Crown dictated the results of the surrender vote. This conclusion does not mean, however, that undue influence on the Band was not a factor. We shall now address the question of undue influence to determine whether the Crown conduct tainted the dealings.

Did the Crown's Conduct Taint the Dealings?

According to Mr Justice Gonthier in *Apsassin*, "if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention,"[102] he would be reluctant to give effect to a surrender. Thus, if tainted dealings are proven, it remains necessary to show that they had a direct effect on the Band's understanding and intention when it made the decision to surrender reserve land.

"Tainted dealings" as a source of a breach of the Crown's fiduciary duty is best defined, in our view, by example, not by strict definition or an exhaustive list of factors. At one end of the spectrum we may find fraud or forgery by the Crown; bribery, especially if a band is experiencing

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[100] Inspector of Indian Agencies to the Commissioner of Indian Affairs, June 19, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 789–91). Emphasis added.

[101] *Indian Act,* RSC 1886, c. 43, s. 70.

[102] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362, para. 14 (sub nom. *Apsassin*), Gonthier J.

hunger or illness; or Crown officials or politicians motivated by monetary gain. At the other end of the spectrum, but no less significant, would be the Crown's failure to properly manage a band's legal and other interests in the face of third parties interested in having reserve land opened up for sale.

The ICC panel in the 1998 *Moosomin First Nation Surrender Inquiry* report relied on the approach to analyzing conflicting interests used in *Apsassin* at the Federal Court of Appeal. The majority addressed the scope of the Crown's duty when advising the Blueberry Band on a possible surrender of its reserve, as well as the post-war pressure on the Crown to make land available for returning war veterans.[103] The panel in *Moosomin* concluded that the Crown is required to properly manage competing interests when dealing with a surrender. The failure to do so and the Crown's

> use of its position of authority to apply undue influence on a band to effect a particular result can contribute to a finding of "tainted dealings" involving the Crown. Such a finding may cast doubt on the surrender as the true expression of a band's intention.[104]

Similarly, in the *Kahkewistahaw First Nation* surrender inquiry report, also published in 1998, the panel recognized that

> the Crown was and is constantly faced with conflicting interests since it has the dual and concurrent responsibilities of representing the interests of both the general public and Indians. However, the *fact* that the Crown has conflicting duties in a given case does not necessarily mean that the Crown has breached its fiduciary obligations to the First Nation involved. *Rather it is the manner in which the Crown manages that conflict that determines whether the Crown has fulfilled its fiduciary obligations.*[105]

The Crown's conflict in the claim before us could hardly have been more extreme. The Roseau River Band in 1903 had a legal interest in IR 2 that the Crown had a duty to protect. The Band had been resolute in its communications to the Crown throughout the years and in the weeks

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[103] *Apsassin v. Canada*, [1993] 3 FC 28 (FCA).

[104] *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 184.

[105] *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 82–83. Emphasis added.

leading up to the surrender that it intended to keep the entire reserve. Further, the Band understood that it had a right under Treaty 1 to have an adequate land base at the Rapids without having to surrender any existing reserve land. Lined up against these interests were settlers, politicians, municipalities, and other third parties intent on opening up as much of IR 2 as possible.

Interests of the Band

The Indians' interest in land that has been set aside as a reserve for their use and benefit is an independent legal interest. Although the Crown holds the fee simple title to reserve land, the band holds a unique or *sui generis* interest in the land that includes a personal, usufructuary right and a beneficial interest. Although a band has no right to transfer this land except upon surrender to the Crown, its legal interest gives rise to a fiduciary duty in the Crown to protect the band's interest from invasion, destruction, or exploitation.[106] Otherwise stated, the Roseau River Band had the legal right to be protected by the Crown from invasion or destruction of its land by non-band members and the right to be protected from exploitative deals with third parties or even the Crown itself.

In addition to its legal interest in the reserve, the Roseau River Band was intent on having the treaty implemented in accordance with its understanding of the treaty promise to set aside reserve land. The Band held a persistent belief that the reserve land promised under Treaty 1 would extend from the mouth of the Roseau River on either side of the river to and including the area known as the Rapids. The Chiefs of the Pembina Band understood that the group who lived at the Rapids, headed by Chief Nanawananaw, himself a signatory of Treaty 1, would obtain adequate reserve land at the Rapids and that the other members of the Pembina Band would be entitled to reserves at the mouth of the Roseau River and at other locations along the river. This understanding is an important thread that is woven through the history of the Band from the time of the treaty in 1871 to the 1903 surrender.

The treaty document itself, as we have discussed earlier, states the reserve entitlement of the four chiefs and their followers to be

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[106] *Guerin v. The Queen*, [1984] 2 SCR 335 at 349–50, Wilson J; at 382, Dickson J. See also *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370, para. 33 (sub nom. *Apsassin*), McLachlin J; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295.

> so much land on the Roseau River as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, beginning from the mouth of the river ...[107]

The Band's future reserve land was defined in the treaty as being on the Roseau River and commencing at the mouth of the river, but the distance up the river was defined only in terms of a population formula, a measurement that would not have been particularly useful to a Band made up of several groups moving and living along the Roseau River. The treaty did not confirm how far up the river the reserve would go. From the government's perspective, it would depend on the population; from the Band's perspective, it would extend to the Roseau Rapids. Yet, the government was slow to survey the boundaries of the reserve and take a census of the population. When the Band became aware of the parameters of IR 2 following a preliminary survey in 1872, its members strongly objected, according to Indian Commissioner Provencher:

> Their Reserve, as surveyed from the outlet of Rivière aux Rousseau, going up the Red River, comprises 13,554 acres. The Pembina Indians contend that this reserve is not located in conformity to the conventions of the Treaty, and they claim the grant of the land on both sides of the Rousseau River, running east.[108]

A final survey was not completed until 1887. The documentary evidence is clear that the Band had an honest belief that it was entitled to receive a reserve at the Rapids, and fought for years after the treaty to obtain sufficient land at that location. Yet, there is no evidence that the Crown was even aware of the Rapids group of Indians in 1871, even though Chief Nanawananaw and his followers came from the Rapids area.

The Band was unable to make progress with the government in asserting its claim to a reserve at the Rapids, and, without an Indian Agent responsible for the Roseau River Band, its lines of communication with the department were limited. When in 1882 Indian Agent Frances Ogletree was

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[107] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1a, p. 14).

[108] J.A.N. Provencher, Indian Commissioner, to the SGIA, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 40 (ICC Exhibit 1a, p. 144).

given responsibility for the Roseau River Indians, he quickly became aware of the Band's struggle, noting that "there is a very strong feeling among the Indians at the Rapids that the Government is not carrying out the terms of the Treaty with them in not giving them the Reserve at the Rapids."[109] In January 1886, Indian Agent Ogletree reported again to Inspector McColl on the situation at IR 2, this time commenting:

> I cannot close this letter without bringing to your notice the feeling existing amongst the Indians at the Rapids in reference to their claims there. I feel sorry for them from my heart. They are not abusive ... I believe a gross injustice has been done them by someone. They claim that they never gave up the Rapids as their Reserve and some of them were certainly entitled to their holding as well as others in different parts of the Province.[110]

With the growing awareness of officials such as Ogletree, McColl, and Provencher that a serious misunderstanding had arisen regarding the right to reserves at both IR 2 and the Rapids, it was open to the government to create a reserve at the Rapids that would meet the Band's needs. Instead, it set aside a mere one and one-quarter sections in 1888.[111] In return, Chief Nashwasoop[112] and other signatories to the agreement relinquished all claims to land except for IR 2 and the small Rapids' reserve (IR 2A).[113]

Ten years later, in 1898, Inspector Marlatt wrote a letter to Indian Commissioner Forget in which he explains the Band's treaty interest:

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[109] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, May 21, 1885, LAC, RG 10, vol. 3713, file 20888 (ICC Exhibit 1a, pp. 222–23).

[110] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 20, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 247–48).

[111] The quarter-section was specifically set aside for the band member, Akeneus, who was also known as Martin.

[112] For the sake of consistency, we have chosen to use the spelling "Nashwasoop" for this Chief throughout the report; this form is commonly found in the documentary record, but the name is also found as "Nashwaskoope" and "Nashwashoope."

[113] Articles of Agreement, August 29, 1888, DIAND, Indian Lands Registry, Instrument no. R 6245 (ICC Exhibit 1a, pp. 373–75).

> The Indians claim that they were promised at the time of their Treaty all lands on both sides of the Roseau River from its mouth to the small Reserve at the Rapids, they could not give me the distance each side of the River they were to have; they claim the Government broke faith with them when they were only allowed the land known as their Reserves that they have *from time of the Treaty to the present never ceased to press their claims for what they consider their just rights.*[114]

Yet, officials paid little attention to the Band's demands for a much larger reserve base until the pressure on the government to open up IR 2 to settlement became intense.

When the Band was faced with proposals to surrender either all or part of its reserve at IR 2, it was adamant that surrender of its land was not an option. Among the 10 or more documents between 1895 and 1903 that set out the Band's consistent position on surrender, it is the 1898 letter from Inspector Marlatt that reveals the limits of what the Band was prepared to concede in order to keep IR 2 intact and still obtain an adequate reserve at the Rapids:

> They are willing to abandon their claim to the land between the two Reserves and accept a tract of land in place of it extending for six miles up the Roseau River from the Rapids Reserve, with a depth of three miles on each side of the River, *they do not propose to abandon any of the land in the present Reserves, but want the new location in addition, and a final settlement to their old claim.*[115]

In summary, the Roseau River Band had two important interests that the Crown was fully aware of: first, the Band had a legal interest in having the Crown protect IR 2 in its entirety, because the Band had repeatedly informed the Crown over many years that it did not wish to surrender the reserve; and second, the Band had a genuine belief that it was entitled under Treaty 1 to have a reserve at the Rapids. This interest, we note, meant a significant land base, not merely the protection of small, individual plots of land that had been improved prior to the treaty.

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[114] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 555). Emphasis added.

[115] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 556). Emphasis added. Commissioner Forget's marginal note on the letter reminds the department that the 1888 agreement whereby the Roseau Band received one and one-quarter sections of reserve land at the Rapids extinguished any further claim by the Band.

Interests of Settlers, Politicians, and Municipalities

The interests of the non-Indian population to obtain all or part of IR 2 stand in sharp relief to the Band's legal interest in IR 2 and its stated position not to surrender any of it. The pressure brought to bear on the department by settlers, politicians, and municipalities to arrange the surrender of IR 2 for the benefit of the non-Indian population was relentless from 1889 until the surrender in 1903. The First Nation points to at least six occasions between 1889 and 1901 when the settlers formally lobbied the department for a surrender of IR 2.[116] In particular, the residents of Dominion City and Emerson actively campaigned to have the reserve thrown open for settlement, sending three petitions in one year alone. The municipality of Franklin also took up the cause of getting a surrender in order to increase its tax base and reduce its debts.

At the same time, the federal Conservative candidate for Provencher, Alphonse LaRivière, was lobbying the government and promising, if elected, to throw open the reserve for settlement. He only intensified his lobbying efforts after being elected in 1889. Meanwhile, the Liberal Member of Parliament from 1896 to 1900, J.A. Macdonnell, actively supported the municipalities in their efforts. Finally, there was the prominent local leader and unsuccessful Liberal candidate in the 1903 provincial by-election, George Walton, who brought considerable pressure on federal Minister of the Interior Clifford Sifton. Politicians of all stripes were the recipients, of ongoing pressure from individual settlers, business people, and municipalities, all of which was fuelled by newspaper articles during the two years leading to the surrender.

The federal government's interest derived in part from former Prime Minister Sir John A. Macdonald's "National Policy" of settlement and natural resource development in the west. Its objectives for the Indian population included encouraging First Nations on the Prairies to settle and take up farming. The Historical Background to this report gives a detailed account of this and related Crown policies during the late 1800s and early 1900s.[117]

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[116] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. ii, para. 8.

[117] See Appendix A: Historical Background, "Indian, Dominion and Settler Lands: A National Policy Challenge, 1870s–1930s."

Chief among the settlers' arguments for opening up IR 2 was the observation that the land was prime farming land that the Band was not exploiting. Inspector Marlatt agreed, and he also appeared to endorse the general opinion of the townspeople when he wrote one year before the surrender that there might be hope for the Band, "if they were removed to some isolated locality, away from the settlements."[118]

Did the Crown Properly Manage the Conflicting Interests?

The Band's legal interest in having its reserve land protected by the Crown was under threat from settlers and the settlement policies of the government. The question before us is whether the Crown acted as a responsible fiduciary in managing those interests. The Crown had a fiduciary duty to protect the Band's interests in IR 2 but, as guardian of the public trust, was also required to consider the requests of citizens pressing for more agricultural land. In addition, the Crown was seized with implementing public policy on non-Aboriginal settlement in the Prairies that at times directly conflicted with its policy, reflected in the treaties, of encouraging First Nations to take up farming.

Canada takes the position that, unlike the Kahkewistahaw First Nation's 1907 surrender, Crown officials here did not employ predatory practices or premeditation in obtaining the Roseau River Band's surrender. Nor, argues Canada, does the documentary record indicate that the government was acting for the settler population or that it pressured the Band. Canada interprets the Crown's role as a neutral mediator between the Band and the settlers:

> the Crown, through Marlatt, was acting as an intermediary between the settler and Indian communities, in other words properly managing the interests at issue. Essentially Marlatt conveyed the potential market offers or specific land purchase offers from the local settler community to the Band.[119]

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[118] Extract from Inspector S.R. Marlatt's annual report, June 30, 1902, LAC, RG 10, vol 3730, file 26306-1 (ICC Exhibit 1a, p. 629).

[119] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 101, para. 308.

The First Nation, however, presents a more compelling argument that, even though the Band had never sought other land, including the Rapids, at the expense of its land at IR 2, the government refused to listen:

> The Band did not have a goal to get land closer to any particular place, including the Rapids. Certainly the Band wanted more land, as was promised them under the Treaty, but they were clear that they wanted to retain this land for their future benefit.[120]

We agree with the First Nation that government officials, having been subjected to a continual barrage of lobbying from all fronts over a period of 14 years leading up to the surrender in early 1903, chose to ignore the Band's repeated wish not to surrender any land and instead "shared the attitude of local settlers and politicians that this was but an obstacle to overcome."[121]

Although the record provides examples of politicians and officials occasionally deflecting the pressure, it tells a more convincing story of a Crown that would not listen to a Band that had made its intentions clear to no fewer than five senior departmental officials – Inspector Marlatt, Indian Agent Ogletree, Inspector McColl, Farm Instructor Ginn, and Indian Commissioner Laird. Indirectly, the message that under no circumstances would the Band surrender any of IR 2 also reached Commissioner Forget, Deputy Superintendent General Smart, Minister Sifton, the House of Commons, and at least two newspapers, the *Weekly Echo* and the *Manitoba Free Press*. Yet, the Crown refused to accept the Band's position.

Minister Sifton's actions during a visit to Winnipeg a few weeks before the surrender illustrate clearly the Crown's intentions. Shortly after Sifton received a deputation in Winnipeg headed by George Walton, Sifton's personal secretary sent two letters to Inspector Marlatt, the first directing him to "endeavor to secure a surrender of the [Roseau Indian reserve] within a week if

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[120] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 164, para. 308, quoting from Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, pp. 645–50).

[121] Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 165, para. 311.

possible,"[122] and the second repeating these instructions and advising Marlatt to meet with George Walton on the matter.[123] These directions take on added importance because they came directly from a Minister to one of his officials in the region. Marlatt had shown that he was completely sympathetic to the settler cause but, regardless, he would have felt under enormous pressure to get the surrender after receiving Sifton's instructions. When Marlatt failed on January 20, 1903, to persuade the Band to surrender any of IR 2, even though he had offered new terms, the *Manitoba Free Press* reported that he was extremely disappointed.[124] When the rural municipality of Montcalm immediately sent a petition via MP Alphonse LaRivière urging Sifton to recommend a surrender, he responded that "Indian reserves are secured by treaty with the Indians, and cannot be thrown open to colonization, except with their consent."[125] Yet, Sifton took no steps to reverse his instructions to Marlatt, thereby resulting in Marlatt's return to the Band for one last attempt to secure the surrender.

Further, in the weeks leading up to the surrender, Inspector Marlatt confirmed that he had "some quiet influences at work among them" and, following the surrender, he stated quite openly that it had not been the desire of the Band to surrender its land but rather "the strong wish of the Department." The Crown showed itself to be firmly on the side of those who wanted the land opened up for sale.

It was the Crown, not the Band, that initiated the surrender discussions. That fact alone would not lead to a finding that the Crown exerted undue influence on the Band, but, in this case, the Band had consistently refused every request from the Crown to consider a surrender of IR 2 land until the surrender meeting of January 30, 1903. No one knows what Inspector Marlatt told the leadership that changed their minds between their January 20 refusal to grant a surrender and the January 30

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[122] A. Collier, Private Secretary, Winnipeg, to S.R. Marlatt, Inspector of Indian Agencies, January 13, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 454 (ICC Exhibit 1a, p. 659).

[123] A. Collier, Private Secretary, Winnipeg, to S.R. Marlatt, Inspector of Indian Agencies, January 13, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 53 (ICC Exhibit 1a, p. 660).

[124] Dominion City *Weekly Echo*, as quoted in "Indians Refuse to Give up Land: Inspector Marlatt Addresses the Tribes on Dominion City Reserve," *Manitoba Free Press*, Winnipeg, January 24, 1903 (ICC Exhibit 1a, p. 669).

[125] Clifford Sifton, Minister of the Interior, to A. LaRivière, MP, January 28, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 270 (ICC Exhibit 1a, p. 676).

surrender vote. It is possible, however, that Marlatt was able to use the prospect of even a little more land at the Rapids to influence the band members to change their position. Given the Crown's lack of concern for the Band in almost every aspect of this surrender, it is possible that Marlatt took advantage of the fact that the Rapids group had a long-standing claim for a larger reserve by putting the acquisition of two sections of land at the Rapids on the table at the last minute. Although the only evidence of the Band's sudden reversal is the Surrender Document and Affidavit of Surrender, we find that they are open to challenge on the question of the Band's true intention because of the Crown's own conduct. Even Inspector Marlatt, who took the surrender, admitted afterward that it was not the desire of the Band to grant the surrender.

To argue, as Canada does, that the settlers did not get everything they wanted – that they did not succeed in opening up the remaining 40 per cent of the reserve and in removing the Band to a more remote location – is no answer. Nor is the fact that the municipality of Franklin only derived a net benefit financially from 10 sections instead of 12, owing to the removal of two sections at the Rapids from the municipality to become reserve land at IR 2A under the terms of the surrender.

Although each specific claim must be assessed on its own facts, we find striking similarities between this claim and the Kahkewistahaw First Nation surrender claim. The panel in the Kahkewistahaw inquiry made these observations in finding tainted dealings:

> To suggest that the Band would, after 22 years of adamant opposition, reverse itself and adopt a position so clearly detrimental to its best interests over the course of five days ... in the absence of "tainted dealings" by the Government of Canada, is absurd.
>
> This is not a case where a band had no interest in putting reserve land to the use for which it was best suited, as was the situation in *Apsassin*. Rather, this is a situation where the Band's efforts at developing agricultural self-sufficiency, although impeded by various policies and circumstances, had gained a foothold and the Band was becoming increasingly able to put the land to good use.[126]

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[126] ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 3 ICCP 3 at 84. See also ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 184–85.

We are unable to agree with Canada's assertion that the motivation and methods of the Crown in the 1903 Roseau surrender were materially different from the "premeditation and predatory practices"[127] of the Crown when it took the Kahkewistahaw surrender. The Crown had only one objective in mind when it proposed the surrender to the Roseau River Band – to serve the interests of the non-Indian population – and it used its position of authority to exert influence on the Band until the surrender was achieved. There were precious few instances of the Crown protecting the Band's interests in the years leading to the surrender. On the contrary, the Crown acted primarily as the advocate for third parties.

We find that the Crown failed to properly manage the conflicting interests in IR 2. The Crown was obligated as a fiduciary to protect the Band's legal interest in its land. The Band did not want to surrender any of IR 2 and, prior to the surrender meeting, had repeatedly refused all overtures from the Crown, including the option of surrendering part of IR 2 in order to obtain more land at the Rapids.

This failure becomes a breach of the Crown's fiduciary duty if, as a result, it would be unsafe to rely on the Band's understanding and intention. As we have discussed, the Band appeared to understand the terms of the surrender and its consequences. Yet, had the Crown conducted itself as a responsible fiduciary, it would not have proceeded in 1903, or possibly ever, to drive the Band towards a surrender of those 12 sections of land. By positioning itself as the lead actor in pressing the Band to change its mind, the Crown eventually succeeded in obtaining the result that it, the Crown, clearly wanted for political or policy reasons. Given the combination of pressures on the Band from all quarters, coupled with the desire of the Crown to get the deal, it was only a matter of time, as the First Nation points out, before the Band gave in.

Unfortunately, little in the historical documents sheds light on the nature of the discussions between Inspector Marlatt and the Band between the January 20 and January 30 meetings. Yet, it is the consistency of the Band's position over the years never to surrender its land, all of which is clearly documented, that persuades us that right up to the vote the Band was resolute in its intention to keep IR 2 intact for the future.

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[127] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 99, paras. 300, 301.

Was it instead a situation, as Canada suggests, in which factions within the Band disagreed over the location and size of reserve land, with the result that the surrender vote reflected nothing more than a majority with historical ties to the Rapids outvoting the minority who had settled at the mouth of the Roseau River? Inspector Marlatt certainly believed in 1902 that the Roseau River Band was made up of rival factions:

> I am sorry indeed to hear of their decision not to surrender, I presume nothing further can be done at present, I think inter-tribal strife and jealousy is the real reason of their refusal.[128]

As we point out in the Historical Background, however, the Anishinabe operated under a clan system.[129] At the time of signing Treaty 1, the Roseau River Band was in essence four bands under four Chiefs, located at various settlements along the Roseau River. Apart from Inspector Marlatt's opinion on the matter, there is no indication that this was a Band driven by internecine conflict. Nor was this a Band, as Canada suggests, that simply wished to acquire more land at the Rapids and was content to exchange most of its main reserve to accomplish that end. The better interpretation is that the clans' different needs and priorities for reserve land ought to have been recognized by the Crown at the time of treaty-making in 1871. It was the Crown's apparent ignorance of the Rapids group in 1871 and its later unwillingness to act quickly to protect the Rapids from trespass by settlers that created the dilemma faced by the Band.

In conclusion, the Crown breached its fiduciary duty to the Roseau River Band when it acted primarily in the interest of settlers and municipalities, giving little or no heed to the Band's legal interests and its belief that under treaty it had a right to receive an adequate land base at the Rapids without having to give up IR 2. In the end, the persistence of officials and their political masters in their efforts to obtain the surrender amounted to undue influence on the Band. Had that influence not been exerted, we are confident that the Band would have opted to keep all of IR 2 and to continue pressing the government to set aside a much larger reserve at the Rapids. The evidence satisfies us

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[128] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, LAC, RG 10, vol. 3565, file 82, pt. 29 (ICC Exhibit 1a, pp. 652–53).

[129] See Appendix A: Historical Background, "Roseau River Band and the Signing of Treaty 1, 1871."

beyond a doubt that the Crown's conduct tainted the surrender dealings such that it would be unsafe to rely on the Band's intentions when it voted for the surrender.

Did the Crown Fail to Prevent an Exploitative Bargain?

The Crown knew of the circumstances of this Band in 1903 and the likely consequences of surrendering 60 per cent of its main reserve. Had the Governor in Council directed the most cursory examination of the circumstances of the surrender, it would have concluded that this surrender was an exploitative bargain that should not go forward.

Earlier we discussed the complementary approaches that the judges in *Apsassin* took to the question of the pre-surrender fiduciary duty. McLachlin J described it as striking "a balance between the two extremes of autonomy and protection."[130] Regardless of a band's power to make the surrender decision, in scrutinizing that decision, the Crown must decide if it was so foolish or improvident that it constituted exploitation by a third party or even by the Crown itself. According to McLachlin J, it is the prevention of exploitation that is the essence of the Crown's fiduciary duty within the statutory scheme for surrendering land. If an exploitative bargain is found, the Crown can override the band's decision and refuse the surrender. Mr Justice Gonthier incorporated other possible sources of a breach of fiduciary, as we have discussed, but agreed with McLachlin J's analysis that the *Indian Act*'s provision for Crown consent to a surrender creates a separate fiduciary duty.

Further, Mr Justice Binnie in *Wewaykum* stated that once land becomes a reserve, the Crown's fiduciary duty "expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation."[131] When a surrender of that reserve land is contemplated, according to Binnie J, the Crown must use ordinary diligence to prevent an exploitative bargain with third parties or by the Crown itself.[132]

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130 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370, para. 35 (sub nom. *Apsassin*), McLachlin J.

131 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295, para. 97.

132 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295, para. 97.

In deciding whether the Crown should have used its power in the *Indian Act* to override a band's decision to surrender reserve land, we must assess what the Crown knew or should have known about the consequences of that surrender, given the capabilities of the band at the time. A progressive band that has made the transition from a hunting and gathering society to one of experienced farmers, settled on a reserve, cultivating the land and raising stock, may be quite capable of resisting the pressure to surrender land coming from the settler community or the Crown. The Roseau Band in 1903 was not in that category. It was in transition. Canada argues that the Band had strong leaders who knew how to handle themselves over the previous 30 years of interaction with the Crown and who held out for the most favourable terms in the surrender discussions. Yet, we observe that, for those same 30 years, the Chiefs had made little progress in convincing the government of their right under treaty to obtain a sufficient land base at the Rapids.

Against the backdrop of a community struggling to become an agricultural society stand four important aspects of Crown knowledge relevant to the question of exploitation: awareness of the small size of the Roseau reserve prior to the surrender; knowledge of the quality of the surrendered land compared to the residual reserve;[133] knowledge of the Band's use of the reserve prior to 1903 and its future needs; and knowledge of recurring flooding on the residual reserve at IR 2. A review of each of these elements leads us to the overwhelming conclusion that the Crown was acting against the best interests of the Roseau River Band and had a duty to refuse its consent to the surrender.

Size of the Land Base

The Roseau River Band received a relatively small land base under Treaty 1. A few years later, the Crown was settling other treaties in Manitoba and Saskatchewan that quadrupled the land base of reserves from 160 acres to 640 acres for a family of five. The Crown must have known in 1903 that the future success of First Nations in the agricultural belt depended on a viable land base on which to develop farming operations.

Departmental officials knew of the problems associated with the small reserve allocated to the Roseau River Band. In response to a 1901 letter from a Winnipeg man interested in buying IR 2,

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[133] The terms "residual," "remaining," and "unsurrendered" are used interchangeably to describe the portion of IR 2 that was reserve land after the 1903 surrender.

Deputy Superintendent General Smart asked Secretary McLean for a report on the reserve, noting, "I am of the opinion that the reserve is not a very large one and it would be absurd to take any action towards getting a surrender from the Indians and disposing of it."[134] McLean assured Smart, however, that the Indians had recently communicated to Inspector Marlatt their decision not to sell any part of their reserve. McLean also commented in the same memo that the 13,000-acre reserve was "well adapted for farming and stock-raising and there is an abundance of hay. The soil cannot be surpassed in any part of Manitoba."[135]

Although the Crown was worried about the future difficulties faced by the Roseau Band in possessing a small land base, officials justified their support for the 1903 surrender by arguing that the population had recently decreased. The population declined "from 258 in 1896 to 209 this year,"[136] according to Inspector Marlatt in his 1902 annual report.

Quality of the Surrendered and Residual Land

The Crown was fully aware that the land to be surrendered in 1903 was superior to the low-lying land at the mouth of the Roseau River. All 12 sections of surrendered land ran north-south, east of the low land, and occupied the only high ground on the reserve. The fact that the Crown did not consider preserving even a small part of the higher and best farmland for the Band when it proposed the surrender is an indication that the priority of officials was to get as much quality land as possible for the settlers.

The First Nation points to several examples of the Crown's knowledge of the superior value of the entire reserve, starting with Indian Agent Ogletree's 1889 letter to Inspector McColl, in which he wrote that, even if the Band agreed to a surrender,

> the government should exercise great caution before agreeing to any changes as the time is at hand when Indians must undertake agriculture for their support as there is

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134 J.A. Smart, Deputy Superintendent General of Indian Affairs (DSGIA), to J.D. McLean, June 14, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 611).

135 J.D. McLean to DSGIA, June 15, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 612).

136 Extract from Inspector S.R. Marlatt's annual report, June 30, 1902, LAC, RG 10, vol 3730, file 26306-1 (ICC Exhibit 1a, p. 629).

> very little game to depend on hereafter and no better location can be had for agricultural purposes and stock raising as well as fishing than the Rosseau River Reserve."[137]

Six years later, Agent Ogletree had not changed his mind, explaining to Inspector McColl that the Band would never consent to surrender its reserve and move to an isolated place with no agricultural operations because, in the Band's view, the reserve land was the only thing its members and their children could depend on for their livelihood.[138]

Canada's takes the position that the Band placed little value on the surrendered land. Instead, argues Canada, the primary catalyst for the 1903 surrender was the ongoing interest by some band members in obtaining more land at the Rapids. In support, Canada cites Agent Ogletree's 1886 statement that, in order to get land at the Rapids, a sub-group of the Band was willing to give up part of its share of IR 2.[139] In the 1880s, however, the Rapids group was extremely worried about the possibility that they would lose all of their land as settlers obtained patents and the government neglected to protect it from trespass and timber extraction. As Canada itself points out,[140] when Inspector Marlatt in 1898 sought clarification of the Band's wishes as expressed in two petitions from Chief Seeseepance and councillors requesting more land at the Rapids, Marlatt was told that, although they would abandon their claim to land between IR 2 and the Rapids, "they do not propose to abandon any of the land in the present Reserves, but want the new location *in addition*, and a final settlement to their old claim."[141]

In the same 1898 letter, Inspector Marlatt suggested that it would be desirable if the Indians could "be induced to abandon the large Reserve at the mouth of the River and have a new Reserve

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[137] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 25, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 413–16).

[138] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, May 31, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 511–14).

[139] Written Submission on Behalf of the Government of Canada, January 20, 2006, pp. 65–66, paras. 200, 201.

[140] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 67, para. 205.

[141] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 555–57). Emphasis added.

formed East of the Rapids ... The land in the large Reserve is valuable and the Indians are making but little use of it, all would like to live at the Rapids, from choice, if there was room for them."[142] This letter indicates three things: as early as 1898, Marlatt saw an opportunity to persuade the Band to leave IR 2 for a reserve near the Rapids; Marlatt knew the value of IR 2; and Marlatt refused to accept what the Band had just told him, that they did not propose to abandon any of IR 2 in order to obtain more land at the Rapids. In his 1902 annual report, Marlatt repeated the view that the Band was living on valuable land, stating that "they have the most valuable reserve in the province, but this is no incentive to them."[143]

The Band, too, was well aware of the value of the eastern part of the reserve as prime farmland. The Band's knowledge of the quality of its land is evidenced by the transcript of an interview between Indian Commissioner Laird and Seenee (Cyril) from IR 2 and Sahawisgookesick (Martin Adam) from the Rapids reserve on December 23, 1902, approximately five weeks before the surrender. After ascertaining that Seenee and Shawisgookesick spoke for both parts of the Band, Laird asked them about the meeting they had held on December 21 to discuss the proposed surrender. The councillors told Laird through an interpreter that they did not want to sell the reserve, not one of them. The reason was

> *because there is only one high place there* and that is the place they are asked to sell and they dont [sic] want to sell that. They have 50 head more of cattle now and they have to take care of them, and *in the Spring the water will take the whole business.*[144]

When Laird pointed to the eastern sections of the reserve on a map and asked them to reconsider their decision – at the same time assuring them that the government would not force a surrender –

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[142] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 555–57).

[143] Extract from Inspector S.R. Marlatt's annual report, June 30, 1902, LAC, RG 10, vol 3730, file 26306-1 (ICC Exhibit 1a, p. 629).

[144] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 646). Emphasis added.

the councillors replied, "[t]hat is the best land."[145] Laird responded that he hoped they would change their minds the next year. Even though the Band was making more use of the western portion of the reserve prior to 1903 for living, cutting timber, and some limited farming, it depended on the high land during spring floods. The councillors also showed that they understood the agricultural value of the eastern portion when they told Indian Commissioner Laird in the same interview that they planned to plough and crop it in the future.

The historical evidence of qualitative differences in the surrendered and residual reserve and Crown knowledge of those differences is reinforced by the AFC Agra report jointly commissioned by the parties for this inquiry. Following AFC Agra's preparation of a research report on the historical valuation and land quality of Roseau River IR 2, the panel conducted a special hearing with the parties and the authors of the report to review their findings on the questions of land quality, land use in 1903, flooding, and land values circa 1903.[146] The panel was particularly interested in what Crown officials would or should have known in 1903 about two subjects: first, the quality of land on the surrendered portion, the remaining reserve, and the two sections of replacement lands at the Rapids; and second, the impact of flooding on IR 2.

The AFC Agra report concludes that it would have been known in 1903 that the surrendered land at IR 2 was high quality farmland; that the remaining land at IR 2 and the original land at IR 2A was a mixture of high quality farmland, pasture, and marshes; that the remaining land at IR 2 and the replacement land at IR 2A were superior in forestry and wildlife to the surrendered land; and that the replacement land at IR 2A "was not capable of sustained cultivation but could be used for pasture and wild hay."[147] The authors express the opinion that

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[145] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 648).

[146] The AFC Agra report is a valuable addition to the panel's understanding of the land at the time. For that assistance, the panel is grateful to the parties and the authors of the report (ICC Exhibit 16c).

[147] AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. i (ICC Exhibit 16a, p. 7). See also AFC Agra PowerPoint Presentation, "Summary of Land Quality Research" (Table 1), in ICC Transcript, June 13, 2005 (ICC Exhibit 16c, p. 231).

> in 1903, the surrendered land was superior to the remaining reserve land and the replacement land with regard to agricultural capability but inferior with regard to suitability for forestry and wildlife.[148]

Canada disagrees with the authors' conclusion that the agricultural quality of the surrendered lands was superior to that of the residual reserve, pointing to the AFC Agra report's finding that the soils in the two areas were similar except for the Riverdale soils and a small area of clay soil on the residual reserve.[149] Canada points to the report's finding that 100 per cent of the *unsurrendered* land at IR 2 was arable[150] as further evidence that the lands were of similar quality. Canada also challenges the report's finding that 100 per cent of the *surrendered* land was arable because those results were based on the effects of a drainage project built many years later that had improved the quality and the ability to cultivate this land.[151]

The First Nation relies instead on the experts' conclusion that the surrendered land was superior land from an agricultural perspective, and on the historical record that we have canvassed showing that both key officials and the Band were aware that the eastern portion of IR 2 contained the best land for farming. The First Nation answers Canada's argument that the quality of land on both sides of the reserve was similar by differentiating land that was "arable" from land that was "able to be cultivated" in 1903. Although the soils may have been similar, says the First Nation, "far less of the land on the remaining reserve was able to be cultivated."[152]

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[148] AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. i (ICC Exhibit 16a, p. 7).

[149] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 146, para. 386, citing AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 14 (ICC Exhibit 16a, p. 29).

[150] Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 147, para. 397.

[151] Written Submission on Behalf of the Government of Canada, January 20, 2006, pp. 148–49, paras. 401–3.

[152] Reply Submission on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006, p. 59, paras. 202, 203.

In our view, the First Nation has taken the preferred approach by addressing the reality of farming practices in 1903, compared to decades later when modern farming techniques and machinery enabled farmers to turn arable but primarily slough- and stone-filled land into cultivable farmland. In describing parts of the residual reserve at the mouth of the Roseau River, agrologist Stanley Lore confirmed that in 1903 the land between the Roseau and the Red Rivers was of agricultural use only for cutting hay.[153]

The First Nation concludes its argument on land quality with an observation that is both an expression of common sense and a reflection of the evidence: "the surrendered lands were of superior agricultural quality, which was the reason why the local settlers and politicians so desired these lands."[154]

The Band's Use of the Reserve

Canada states that, from the Band's perspective, its best interests were served by remaining on the part of the reserve near the river where the band members lived, carried on traditional activities, and had started to cultivate the land. Agrologist Fred de Mille agreed that it would be natural for the people to live near a source of water, wood, and, if possible, hay meadows, as well as along a river for transportation.[155] Mr de Mille also added that "any agriculture at that point really was in its infancy."[156] Even so, counters the First Nation, at the very time that the Roseau River Band was in transition from a traditional life of hunting, fishing, and trapping to one of farming where it was starting to make some gains, the Crown took a surrender of the Band's best agricultural land.

The panel accepts Canada's argument that band members in 1903 relied to a greater extent for their survival on the residual land than the surrendered land. At the same time, we are cognizant of the evidence that the Band also used the surrendered portions to keep livestock, at least during

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153 ICC Transcript, June 13, 2005 (ICC Exhibit 16c, p. 150, Stanley Lore).

154 Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 182, para. 344.

155 ICC Transcript, June 13, 2005 (ICC Exhibit 16c, p. 142, Fred de Mille).

156 ICC Transcript, June 13, 2005 (ICC Exhibit 16c, p. 142, Fred de Mille).

Band's perspective, it used the land it needed to survive and, without a history of farming, could not be expected to abandon its means of survival overnight to take up farming. This transition would take decades in the case of the Roseau River Band. From the perspective of the Crown and settlers, however, the Roseau Band had not cultivated the eastern portion at all or to the extent deemed appropriate.

If Crown officials did not know about the Band's uses of the surrendered land, they should have informed themselves before advancing the surrender, but it is more likely the case that they placed no value on the use of the land for traditional pursuits or to gain income from gathering and selling plants. Either way, there is no evidence that any officials took the time to ascertain the current or future needs of the Band.

Flooding on the Red and Roseau Rivers

One of the most egregious aspects of this inquiry is the Crown's conclusion that it was in the best interests of this Band to give up 60 per cent of IR 2, most of it on higher ground, in return for two sections of land at the Rapids plus the sale proceeds, when most of the Band's residual reserve lay in a flood plain. The record is clear that Crown officials knew about the regular flooding. As early as June 1882, Indian Agent Ogletree reported on the high water that forced band members to evacuate the area.[161] The 1898 petition for more land at the Rapids from Roseau Chiefs and councillors sent a clear message to the Crown about annual flooding:

> And in regard to the old reserve near the mouth of this river its [sic] over flooded every Spring and no timber now in that said land and so we cannot make our living out of that place.[162]

Agent Ogletree and other officials also acknowledged the problem of high water in several annual reports prior to the surrender. As recently as December 1902, when the two councillors met with

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[161] Francis Ogletree, Indian Agent, to James Graham, Indian Superintendent, Winnipeg, June 17, 1882, LAC, RG 10, vol. 3768, file 35579 (ICC Exhibit 1a, pp. 208–9).

[162] Chief Nayshowsoupe and four councillors, Roseau River Rapids, to the Minister of the Interior, January 13, 1898 (ICC Exhibit 1a, p. 538).

Indian Commissioner Laird, they told him explicitly that they needed the high ground in spring because of the flooding.[163] As the First Nation points out, Farm Inspector Ginn must have also known about the flooding, because evidence exists that he was already cultivating some of the land that was later surrendered.[164] More recently, some Elders who were interviewed in 1973 or who testified at the 2002 community session spoke briefly about the flooding[165] and how they needed a place to go during the floods.

Finally, the AFC Agra report confirms that two types of flooding occur along the Roseau River. First, small areas of the reserve along the river, known as "Riverdale" soils, flood each spring; second, approximately 80 per cent of the remaining reserve but only 20 per cent of the surrendered land is affected by the "Lake Roseau" phenomenon.[166] "Lake Roseau," according to the report, is an area of 30 square miles (77.7 square kilometres) at the lower end of the Roseau River basin (in southern Manitoba and northern Minnesota) and is intermittently flooded almost every year.[167]

The data obtained by AFC Agra shows that five of the 12 greatest floods recorded on the Red River at Winnipeg took place in 1826, 1852, 1861, 1882, and 1897.[168] As the authors explain, because the flows of the Red River are 15 to 20 times the flows of the Roseau River during flood

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163 David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 646).

164 Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 195, para. 375.

165 Roy Felix Antoine, "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973, p. 1 (ICC Exhibit 12, p. 1–2); ICC Transcript, July 31, 2002 (ICC Exhibit 5a, pp. 167–68, Oliver Nelson).

166 AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 37 (ICC Exhibit 16a, p. 52).

167 AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, pp. 36, 39 (ICC Exhibit 16a, pp. 51, 54).

168 AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 26 (ICC Exhibit 16a, p. 41).

events, "it is the Red River that dictates whether or not flooding will occur on the Reserve or surrendered land – not the Roseau River."[169] The authors conclude that, in their belief,

> the floods of 1882 and 1897 would have provided knowledge specific to Roseau River Reserve #2 regarding the relative impact of flooding on the different parts of the reserve.
>
> ...
>
> Negative impacts [of flooding] include siltation, delayed seeding, and the requirement for extra drainage.
>
> These negative impacts are felt most severely on the remaining land at IR#2, followed by the surrendered land. There is very little flooding impact on the original lands at IR 2A or the purchased replacement lands.[170]

Canada responds to the AFC Agra report on flooding with a number of criticisms, including the unreliability of the data relating to knowledge of flooding and its impact circa 1903. We acknowledge that reliable data on the frequency, extent, and duration of flooding in the period around 1903 is absent from the report, but assume, like Canada, that precise data is likely impossible to obtain. Still, we can conclude from the combination of accounts by officials and band members at the time, as well as the available data and the Elders' testimony, that yearly spring floods and the occasional major flood would have had an impact on the Band's ability to progress in farming on the western portion of IR 2. Officials knew of the recurring floods on the low lands and would not have needed to do long-term forecasting in order to make a responsible decision in the interests of the Band. What the Crown chose to do instead was support the surrender of the highest and driest land on the reserve, leaving the Band with the low-lying portion most susceptible to flooding.

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[169] AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 36 (ICC Exhibit 16a, p. 51).

[170] AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 51 (ICC Exhibit 16a, p. 66).

spring flooding, for gathering seneca root,[157] for hunting and trapping, and possibly for some modest farming.[158] The evidence of Indian farming on the surrendered portion of the reserve, according to the AFC Agra report, is inconclusive but suggests that by 1903 the Band had started cultivating land and grazing cattle there. The other reality, as evidenced by excerpts from the annual reports of the Department of Indian Affairs from 1872 to 1904,[159] is that the Roseau Band was having considerable difficulty adapting to agricultural life, and was sustaining itself at times by selling seneca root, hunting, and working for cash wages.

We are struck by the Crown's seeming indifference to a Band that, although reputably excellent hunters, needed considerable help and time to adapt to a farming existence. Instead of ensuring that the Band had high-quality farmland for future development, the Crown influenced and, in the end, permitted the Band to give up its future means of self-sufficiency. The First Nation puts it best:

> The Band was living along the Roseau River and there was some good quality agricultural land next to where they resided. It was this land that was being developed first. Had the Band been allowed to develop in the ordinary course, it would have been just a matter of time before they developed the surrendered land.[160]

Further, Canada's corollary argument that the Band was not actively using the surrendered land at the time rings hollow in this case. Officials favouring the surrender believed that the Band was not using the surrendered portion at all, but this belief was coloured by the Crown's and the settlers' perspective of looking at land use on the Prairies for one purpose only – farmland. There is no question that the Band was actively using the land to harvest food and earn income. From the

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157 Seneca root is also called snakeroot.

158 AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, pp. 52–54, 56–57 (ICC Exhibit 16a, pp. 68–69, 71–72).

159 Written Submission on Behalf of the Government of Canada, January 20, 2006, Appendix B, pp. 1–48, "Roseau River 1903 Surrender Claim: Excerpts from Annual Reports of 1871 to 1904."

160 Written Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005, p. 187, para. 355.

Best Interests from the Band's Perspective

The Crown knew that, after the surrender, the Band would be left with 40 per cent of its main reserve; that the reserve was already very small compared to other prairie reserves owing to the formula in effect for Treaty 1; that there was significantly less prime agricultural land on the residual reserve than the surrendered portion; and that the residual reserve was prone to serious flooding. Nevertheless, Canada argues that, from the Band's perspective, it was in its best interests to surrender 12 sections on the eastern portion of IR 2 in return for two sections at the Rapids and the proceeds of sale.

The 1903 Surrender Document contains, in addition to an advance of 10 per cent of the proceeds after sale, a condition that

> the Department shall purchase for the Indians herein interested, from the capital funds of the Bands two sections of land adjacent to the Reserve known as Reserve NO. 2a., or Roseau Rapids, said lands to be purchased as funds are available.[171]

The panel is not aware of any documentation in the months before and after the surrender explaining how the addition of two sections of reserve land at the Rapids became a condition of the surrender. Nevertheless, a significant number of band members had their residence at the Rapids when IR 2 was established at the mouth of the Roseau River. The question then is whether, in the final analysis, it was in the Band's best interests to purchase two sections of land at the Rapids, plus gain income from the proceeds of sale, in return for its surrender of 12 sections of IR 2.

Canada asserts that the Band was made up of subgroups "that had different interests *vis-a-vis* the land at the rapids and the retention of the 'old reserve' at IR No. 2."[172] In support, Canada points to Indian Agent Ogletree's 1886 letter in which he described the fear experienced by the Indians at the Rapids that they would lose their land to settlers:

> They proposed giving up their share of the Reserve at the Mouth of the river if they were only allowed to remain where they are it was only a few days before I was there

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171 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

172 Written Submission on Behalf of the Government of Canada, January 20, 2006, p. 66, para. 201.

> that 240 acres of land were sold to a party and it seems some of them had improvements on this very place as the party who purchased had forbidden them trespassing on it and they feel quite alarmed about it.[173]

Canada also relies on the various petitions from Chiefs and their followers in 1887, one year before the creation of IR 2A in 1888, as well as in 1898, when two groups requested more land at the Rapids. It is important to note, however, that, after considerable discussion among officials about the real intentions of the Band, Inspector Marlatt concluded that the Indians were not interested in giving up any of IR 2 in order to obtain a larger reserve at the Rapids.

From the Band's perspective, we find that the surrender was not in its best interests, either in 1903 or for the foreseeable future. Band members already had first-hand experience of the flooding and depletion of timber on the unsurrendered portion and they knew how valuable the surrendered land was, as high ground during floods, for gaining income, and as future farmland for them and their children. In spite of its claim to more land at the Rapids, this Band knew what was in its best interests, which is why it resisted the surrender right up to the week of the vote.

The panel concludes that the Crown was acting against the Band's best interests when it took and approved the 1903 surrender. Prior to the 1903 surrender, the Band possessed 13,349.84 acres at IR 2 and 800 acres at IR 2A. In 1903 the Band surrendered 7,698.6 acres, close to 60 per cent, of IR 2 and was left with flood-prone land whose agricultural quality was inferior to the surrendered land. The Band still relied on the mixed uses of its residual reserve in 1903, but both it and the Crown recognized that the surrendered land was essential to the Band's future. The Band obtained 1,280 acres, or two sections, of primarily pasture-quality, rocky land, unsuitable for agriculture, at the Rapids.[174] Although the prospect of receiving income from the sale of the surrendered land was no doubt a factor in the surrender, this Band had proven over the years that its first priority was land, not money. It wanted to keep all of IR 2 and it believed that, in addition, it had a right to a sufficient

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[173] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 20, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 248).

[174] AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, pp. 14, 17 (ICC Exhibit 16a, pp. 29, 32).

land base at the Rapids. By all objective standards, the surrender was a foolish and improvident bargain that amounted to exploitation of the Band.

The Crown itself was the author of this exploitative bargain. Instead of recognizing the Band's reasonable belief that it should have viable reserves at both the mouth of the Roseau River and the Rapids, the Crown sought to amalgamate the groups on one reserve (IR 2), ignore the Rapids group, and even try to remove the Band altogether at one point. By failing to pay attention to the Band's understanding of its treaty rights, the Crown set off a chain of events that 32 years later meant the Band was still fighting for land at the Rapids. In such circumstances, the Crown was able to manipulate the Band and did so. The Crown failed to exercise ordinary or any diligence in order to prevent this surrender.

When Madam Justice McLachlin spoke of the balance between autonomy and protection in the reserve surrender process, she must have envisaged occasions when the Crown, acting as a responsible fiduciary, would use its power in the *Indian Act* to reject a surrender in order to protect a band from an extremely foolish and improvident surrender. In 1903, the Roseau River Band was deserving of the Crown's protection from the relentless pressure to open up the reserve contrary to the Band's wishes. The Crown was obligated to use ordinary diligence in scrutinizing the surrender agreement to ensure that it was not exploitative but, in the rush to satisfy other constituencies, failed to do so and so breached its fiduciary duty to the Band.

Conclusion

The Roseau River Band's understanding of reserve surrender and its consequences was adequate in 1903; the evidence does not prove that the Band ceded its decision-making power. Nevertheless, the Crown's conduct in applying undue influence on the Band to obtain the surrender and its failure to properly manage the conflicting interests in the land, when it knew that the Band was consistently opposed to a surrender, tainted the dealings such that it would be unsafe to rely on the Band's intention.

In 1903, the Crown knew or should have known that it would be foolhardy to cut the Band's relatively small land base in half; to surrender the best-quality agricultural land on the reserve, which the Band would soon need to cultivate and which it relied on in 1903 to earn income; to surrender

the highest and driest land, which the Band used for grazing cattle during floods; to leave the Band with a majority of reserve land that was low-lying and subject to annual floods; and to substitute two sections of land at the Rapids that was good only for pasture and wild hay.

From the Band's perspective, the evidence shows that it understood the value of keeping all of IR 2, recognizing that band members would soon be cultivating the eastern portion. Band members also knew how valuable the surrendered area was for their cattle and families during the floods and for gaining income throughout the year. All the evidence points to a Band whose intention over the years until the very date of the surrender meeting was not to give up any of its reserve land.

By exerting undue influence on the Band in order to obtain the surrender and in failing to withhold its consent to an exploitative arrangement, the Crown breached its fiduciary duty to the Band.

PART V

CONCLUSIONS AND RECOMMENDATION

The written text of Treaty 1 and the oral promises made to the Roseau River Band at the time of the treaty negotiations in 1871 do not prohibit the surrender of reserve land. The Crown was, therefore, not in breach of Treaty 1 when it permitted a surrender of a portion of reserve IR 2 in 1903.

The record in this inquiry suffers from a lack of documentary evidence establishing that the Crown complied with the surrender requirements of the *Indian Act*; however, in the absence of persuasive evidence to the contrary, the panel concludes that the surrender was taken in accordance with the requirements of the statute.

Although the surrender itself was valid, sufficient and compelling evidence exists to prove that the Crown did not act as a responsible fiduciary. The Crown failed in its duty to protect the Band's legal interest from the intense lobbying of the non-Indian community to open up the land for settlement. In particular, the Crown chose to ignore the Band's steadfast position, conveyed to Crown officials over many years, that it would never surrender any of IR 2, even if it meant not obtaining more reserve land at the Rapids reserve, IR 2A. Further, the Crown's own documents reveal that officials exercised undue influence to achieve the surrender. One of many examples is found in the words of Inspector Marlatt, who admitted that it was the strong desire of the department, not the wishes of the Band, that produced the surrender. The Crown's conduct throughout the surrender process reveals a flagrant disregard for the Band's interests and is sufficient proof of tainted dealings.

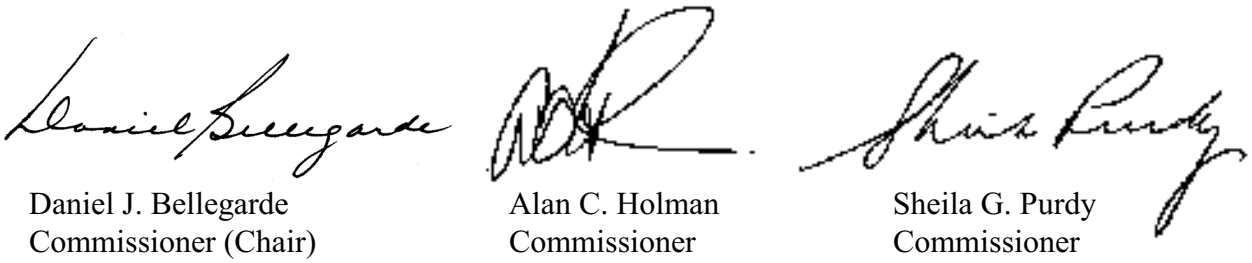
The 1903 surrender was, above all, a foolish, improvident, and exploitative agreement. At a time when the Band was struggling to adapt to a livelihood of farming, in accordance with federal policy, the Crown permitted and actively encouraged the surrender of 60 per cent of the Band's main reserve at the mouth of the Roseau River, land that was the highest, driest, and best agricultural land on the reserve. The surrender cut the Band's relatively small land base in half. The remaining 40 per cent at IR 2 lay in a flood zone and was less valuable as farmland. In 1903, the Crown had knowledge of these and other factors that would be prejudicial to the Band's future livelihood and would far outweigh the gains that accrued to the Band from the sale of the surrendered land and the

addition of two sections at the Rapids. When the Crown declined to exercise its power under the *Indian Act* to disallow the surrender, it was in breach of its fiduciary duty to the Band.

We therefore recommend to the parties:

That the claim of the Roseau River Anishinabe First Nation regarding the 1903 surrender of a portion of Indian Reserve 2 be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



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

Dated this 18th day of September, 2007

APPENDIX A

HISTORICAL BACKGROUND

ROSEAU RIVER ANISHINABE FIRST NATION

1903 SURRENDER INQUIRY

Indian Claims Commission

CONTENTS

INTRODUCTION

In 1903, the Roseau River Band surrendered for sale 12 square miles of land included in Indian Reserve (IR) 2, which had been surveyed pursuant to Treaty 1. The First Nation has since asserted that this surrender was not properly obtained by the Department of Indian Affairs and was not in the Band's best interest. The Government of Canada, however, affirms that the surrender was properly obtained and not contrary to the First Nation's interests at the time.

ROSEAU RIVER BAND AND THE SIGNING OF TREATY 1, 1871

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

Addresses of the Canadian House of Commons and Senate, dated December 16 and 17, 1867, respectively, requested the Queen to unite "Rupert's Land and the North-Western Territory with this Dominion, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government."[1] Furthermore, those addresses stated,

> upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[2]

In response, the British government passed the *Rupert's Land Act, 1868*, which enabled the surrender by the Hudson's Bay Company, (then the owner of Rupert's Land), "of all or any of the Lands, Territories, Rights, Privileges, Liberties, Franchises, Powers, and Authorities whatsoever granted or purported to be granted ..to the said Governor and Company within Rupert's Land" to the Queen.[3]

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[1] Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, December 17 & 16, 1867, attached as Schedule (A) to *Rupert's Land and North-Western Territory Order,* June 23, 1870, reprinted in RSC 1985, Appendix II, No. 9.

[2] Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, December 17 & 16, 1867, attached as Schedule (A) to *Rupert's Land and North-Western Territory Order*, June 23, 1870, reprinted in RSC 1985, Appendix II, No. 9.

[3] *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), s. 3, reprinted in RSC 1985, Appendix II, No. 6.

That surrender, dated November 19, 1869[4] was subsequently accepted by the Queen.[5] On June 23, 1870, the *Rupert's Land and North-Western Territory Order* was signed, providing for the admission of the two territories into Canada, effective July 15, 1870.[6] The Province of Manitoba was immediately created out of these territories by the *Manitoba Act, 1870*.[7] The remainder was known thereafter as the Northwest Territories. The lands in question in this inquiry are within the original Province of Manitoba.

The young dominion was required to fulfill the promise contained in its 1867 address to the Queen by protecting the Aboriginal interest under treaty while advancing those of the settlers.[8] From the end of July until early August 1871, several Indian bands composed of Anishinabe and Swampy Cree met at the "Stone Fort" (Lower Fort Garry) to negotiate a treaty with Canada, represented by Adams G. Archibald, Lieutenant Governor of Manitoba and the North-West Territories since 1870, and newly appointed Indian Commissioner Wemyss Simpson.[9]

One of these bands was the Roseau River Band (known then as the Pembina and Fort Garry Bands). Following the Selkirk settlers' arrival at Red River in 1812, the members of this Band had moved from a general location at the confluence of the Red River and Joe Creek to the Roseau River valley and settled in three locations that – as hunters, harvesters, and traders – they already knew very well:

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[4] Deed of Surrender by the Governor and Company of Adventurers of England trading into Hudson's Bay to Her Majesty Queen Victoria, November 19, 1869,attached as Schedule (C) to *Rupert's Land and North-Western Territory Order*, June 23, 1870, reprinted in RSC 1985, Appendix II, No. 9.

[5] As noted in the preamble to the *Rupert's Land and North-Western Territory Order*, June 23, 1870, reprinted in RSC 1985, Appendix II, No. 9.

[6] *Rupert's Land and North-Western Territory Order* , June 23, 1870, reprinted in RSC 1985, Appendix II, No. 9.

[7] *Manitoba Act, 1870*, 33 Victoria, c. 3 (Canada), reprinted in RSC 1985, Appendix II, No. 8.

[8] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 324 (ICC Exhibit 11, p. 4).

[9] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 325–328 (ICC Exhibit 11, pp. 5–8).

> Most of the tribe settled at the Rapids or See-Boss-Qui-tan, but the odd family lived on the south side of the Jordan, close to where it empties into the Roseau. This campsite was sort of a half-way stop between the Rapids Reserve and the Roseau Reserve, where the rest of the tribe settled. The smaller creeks and coulees running into both the Red and Roseau Rivers provided excellent fishing for the Saulteaux [Anishinabe] as well for most years these streams were high and the abundance of clean, fresh, water resulted in these waterways teeming with fish.[10]

The organization of these bands, including Roseau River, was based on the clan system in which specific roles and responsibilities were entrusted to each clan, represented by a symbolic totem.[11] Although some leadership responsibilities might be clan-specific, key decisions affecting the community were consensus-based. As Elder Lawrence Henry explained at a 2002 community session:

> [T]hat whole system is based on consensus, total consensus. It doesn't mean partial, it means total. If we, as a gathering here, if one of us in this gathering here disagreed with an issue, we would have to sit down again and go through it again until we convince that individual or that individual convinced the rest of us. That's how it worked.[12]

At the treaty negotiations, the government officials requested that the Indian bands appoint Chiefs or other representatives to speak on their behalf.[13] The leaders selected to represent the Roseau River Band were Nashakepenais, Nanawananaw, Kewetayash, and Wakowush.[14] Although the Canadian government thereafter recognized these leaders and their successors as Chiefs and

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[10] James McKercher Waddell, *Dominion City: Facts, Fiction and Hyperbole* (Steinbach, MB: Derksen Printers, 1970), 13 (ICC Exhibit 10, p. 13). See also Roy Felix Antoine, "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973, p. 1 (ICC Exhibit 12, p. 4).

[11] ICC Transcript, July 31, 2002 (ICC Exhibit 5a, pp. 127–31, Lawrence Henry).

[12] ICC Transcript, July 31, 2002 (ICC Exhibit 5a, pp. 130–31, Lawrence Henry).

[13] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 325 (ICC Exhibit 11, p. 5).

[14] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1a, p. 14). These were the four Chiefs referred to in the treaty document. Others also played a leadership role.

headmen,[15] it never officially recognized the clan system which, nonetheless, remained in place long afterwards. In fact, it was still in place, according to Elder Ed Smith, at the time of the 1903 surrender.[16]

The treaty negotiations lasted several days and almost broke down completely due to disagreement over the reserve area each band was to receive.[17] Wasuskookoon, speaking on behalf of the Roseau River Chiefs, indicated that they wished to keep for themselves an area of about 190 square miles "from the mouth of Rat Creek up the Red River to the International line; from Red River going along the boundary line East to Roseaux Lake, south end; from Roseaux Lake down to a line parallel with the boundary line from Rat Creek."[18] Commissioner Simpson, however, insisted that the reserves would be based on a formula of 160 acres for each family of five.[19] The next day, Wasuskookoon voiced the following concern: "I understand thoroughly that every 20 people get a mile square; but if an Indian with a family of five settles down, he may have more children. Where is their land?" It was Lieutenant Governor Archibald who replied: "Whenever his [the Indian's] children get more numerous than they are now, they will be provided for further West. Whenever the reserves are found too small the Government will sell the land, and give the Indians land elsewhere."[20]

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[15] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 3 (ICC Exhibit 1a, p. 13).

[16] Since that time the clan system has been replaced by a custom council made up of 21 family representatives who are appointed in family meetings and who are mandated to draft laws. There is also a Chief and council (of four councillors) elected every two years under band custom. ICC Transcript, July 31, 2002 (ICC Exhibit 5a, pp. 19, 23, Ed Smith).

[17] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 327 (ICC Exhibit 11, p. 7).

[18] "The Chippewa Treaty: Fourth Day's Proceedings," *Manitoban,* August 12, 1871 (ICC Exhibit 1a, p. 47).

[19] "The Chippewa Treaty: Fourth Day's Proceedings," *Manitoban,* August 12, 1871 (ICC Exhibit 1a, p. 48).

[20] "The Chippewa Treaty: Fifth Day's Proceedings," *Manitoban,* August 12, 1871 (ICC Exhibit 1a, p. 50).

Eventually, the bands agreed to reserves of 160 acres per family of five, but only after securing other concessions from the government. The bands were able to obtain verbal promises of government assistance in adopting an agricultural way of life – much better terms than the government had planned to concede.[21] In 1869, S.J. Dawson had cautioned the government on this point:

> [T]hey are shrewd and sufficiently awake to their own interests, and, if the matter should be one of importance, affecting the general interests of the tribe, they neither reply to a proposition, nor make one themselves, until it is fully discussed and deliberated upon in Council by all the Chiefs ... .
>
> At these gatherings it is necessary to observe extreme caution in what is said, as, though they have no means of writing, there are always those present who are charged to keep every word in mind. As an instance of the manner in which the records are in this way kept, without writing, I may mention that, on one occasion, at Fort Frances, the principal Chief of the tribe commenced an oration, by repeating, almost verbatim, what I had said to him two years previously ... .
>
> For my own part, I would have the fullest reliance as to these Indians observing a treaty and adhering most strictly to all its provisions, if, in the first place it were concluded after *full discussion and after all its provisions were thoroughly understood by the Indians*, and if, in the next, it were never infringed upon by the whites, who are generally the first to break through Indian treaties.[22]

Although the verbal promises were not included in the original treaty document, reports by Archibald and others confirmed that they had been made. By 1875, complaints by the signatories about "broken promises" led to a revision of the treaty document.[23]

In the end, Canada acquired rights to a territory slightly larger than the Province of Manitoba (as it was at the time) in exchange for a number of specific treaty obligations. In addition to establishing reserves of 160 acres per family of five, Treaty 1 committed the government to providing an annuity of $15 for every such family (both the reserve allocation and the annuity to be

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[21] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 326–31 (ICC Exhibit 11, pp. 6–11).

[22] S.J. Dawson, 1869, as cited in D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 323–24 (ICC Exhibit 11, pp. 3–4). Emphasis in the original.

[23] D.J. Hall, "'A Serene Atmosphere'? Treaty 1 Revisited" (1984) 4:2 *The Canadian Journal of Native Studies* 321 at 331 (ICC Exhibit 11, p. 11).

pro-rated for larger or smaller families), maintaining a school on each reserve, and prohibiting the sale of liquor on reserves.[24] The 1875 addendum to the treaty document confirmed government promises of agricultural implements and assistance, and increased the annuity to $5 per person with an additional $20 for each chief.[25]

Despite being unplanned, the government's promises of agricultural assistance were nevertheless consistent with its general policy of encouraging agricultural settlement of the treaty signatories. This is evident in the instructions sent in May 1871 to the Treaty Commissioners regarding the selection of reserves:

> One part of your duty, and by no means the least important, will be to select desirable reserves for the use of the Indians themselves, with a view to the gradual introduction of those agencies which in Canada have operated so beneficially in promoting settlement and civilization among the Indians.[26]

In his opening address at the treaty negotiations, Lieutenant Governor Archibald clearly spelled out what these "agencies" of "settlement and civilization" were, as well as the extent and purpose of the reserves the government promised for the Indian bands:

> Your Great Mother wishes the good of all races under her sway. She wishes her Red Children, as well as her White people, to be happy and contented. She wishes them to live in comfort. She would like them to adopt the habits of the whites – to till land and raise food, and store it up against a time of want ... But the Queen, though she may think it good for you to adopt civilized habits, has no idea of compelling you to do so. This she leaves to your own choice, and you need not live like the white man unless you can be persuaded to do so with your own free will. Many of you, however, are already doing this ... you could live and be surrounded with comforts by what you

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[24] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1a, p. 14).

[25] "Memorandum of things outside of the Treaty which were promised at the Treaty at the Lower Fort, signed the third day of August, A.D. 1871," Order in Council, April 30, 1875, and treaty adhesion, September 8, 1875, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 5–6 (ICC Exhibit 1a, pp. 15–16).

[26] Joseph Howe, Secretary of State for the Provinces, to W.M. Simpson, S.J. Dawson, and Robert Pether, May 6, 1871, Canada, *Report of the Indian Branch of the Department of the Secretary of State for the Provinces* (Ottawa, 1872), 7 (ICC Exhibit 1a, p. 5).

> can raise from the soil. Your Great Mother, therefore, will lay aside for you lots of land, to be used by you and your children forever. She will not allow the white man to intrude upon these lots. She will make rules to keep them for you, so that as long as the Sun shall shine, there shall be no Indian who has not a place that he can call his home, where he can go and pitch his camp, or, if he chooses, build his house and till his land. These reserves will be large enough, but you must not expect them to be larger than will be enough to give a farm to each family when farms shall be required. They will enable you to earn a living should the chase fail, and should you choose to get your living by the soil. You must not expect to have included in your reserve more of hay land than will be reasonably sufficient for your purposes, in case you adopt the habits of farmers.[27]

INDIAN, DOMINION, AND SETTLER LANDS: A NATIONAL POLICY CHALLENGE, 1870S–1930S

In 1871, just prior to negotiating Treaty 1, the government passed an order in council which provided for recognition of pre-survey homestead and pre-emption rights, conditional on their registration with the land officer and based on the planned quadrilateral township survey system. The objective was to bring order to the settlement that was rapidly expanding through the new Province of Manitoba, which had not yet been officially surveyed.[28] The extinguishment of Aboriginal title and the development of arable lands were the key objectives of government policy in the northwest well into the 20th century. The goal, embodied in John A. Macdonald's "National Policy" that brought the Conservatives back to federal power from 1878 until 1896, was the settlement and natural resource development of the northwest.

When the Department of the Interior was created and charged with this broad task in 1873, it took over the administration and development of the dominion land survey system that had been established in 1871. By means of railway land grants, the government provided incentives for railway construction; homestead and pre-emption regulations allowed settlers to secure an initial grant of land as well as the right, once they were settled, to purchase adjacent land; access to mineral and timber resources was provided for; sales of certain sections within townships designated as

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[27] "The Chippewa Treaty: Second Day's Proceedings," *Manitoban*, August 5, 1871 (ICC Exhibit 1a, p. 19).

[28] Order in Council PC (unknown), May 26, 1871, no file reference available (ICC Exhibit 1a, p. 6).

"school lands" provided funds for education; and land was also set aside for town sites and public utilities.[29]

The policy and regulations governing dominion lands were consolidated in the first *Dominion Lands Act* in 1872. "None of the provisions of this Act," it stipulated, "respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."[30] The exemption of Indian lands from the operation of the *Dominion Lands Act* remained constant throughout subsequent years.

Most settlers of the west were either eastern Canadians or recent immigrants to Canada selected on the strength of their agricultural experience, but very few of them had prior knowledge of Aboriginal peoples. Some of these settlers developed good relations with some of the Indian bands and supported them in their rights and possessions.[31] In 1875, Indian Commissioner J.A.N. Provencher commented on this in a report to the Superintendent General of Indian Affairs:

> The Indians, as may be expected, claim the exclusive right of property to lands: they deny to the Government the right to possess without their consent; and, as a natural conclusion, reserve to themselves the right of stating their terms and of selecting their Reserves. On all questions which might arise in future in reference to these rights, it follows that their opinions, their demands, and their interests ever ought to predominate.
>
> There are many, who, for several reasons, and in all good faith, do everything in their power to keep the Indians in that belief ... .[32]

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[29] See ICC Exhibits 6b (*Dominion Lands Acts*) and 6d (Regulations and Orders in Council containing or modifying Regulations).

[30] *Dominion Lands Act*, SC 1872, c. 23, s. 42 (ICC Exhibit 6b, p. 14).

[31] James McKircher Waddell, *Dominion City: Facts, Fiction and Hyperbole* (Steinbach, MB: Derksen Printers, 1970), 16 (ICC Exhibit 10, p. 16).

[32] J.A.N. Provencher, Indian Commissioner, to the Superintendent General of Indian Affairs (hereafter SGIA), October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 34 (ICC Exhibit 1a, p. 138).

As settlement increased and good agricultural lands were taken up, however, Indian reserves attracted the attention of settlers even before they were officially surveyed and confirmed. The Indian Commissioner also warned of this in his 1875 report to the Superintendent General:

> [O]ther parties, under the widespread belief that the Indians are useless to the country, and especially to their neighbors, maintain that they ought to be, at most, only tolerated; and that every restriction to their rights, claims, and actions should be held as of advantage and benefit to the public.
>
> Should the Indians ever come to the knowledge that such is the system to be followed regarding them, they would fall into a state of discouragement to be deplored as much in regard to themselves as to the Government.[33]

Most Aboriginal Treaty 1 signatories, having little or no prior experience with agriculture, were slow to develop their reserves' agricultural potential, which led to calls by settlers to have reserves opened up for settlement.[34] In addition, reserves drew attention from settlers on account of their legal status; exempt from municipal taxation, they were often seen as stunting municipalities' growth potential. The government soon recognized the need for refined policy, not only for the creation of reserves, but also for the protection of Indians' interest in them.

On its creation in 1873, the Department of the Interior inherited responsibility for Indian Affairs from the Secretary of State for the Provinces. The Department of the Interior was responsible for developing much of the policy underlying the first consolidated *Indian Act* in 1876. Even after a separate Department of Indian Affairs was created in 1880, the Minister of the Interior, by virtue of his office, remained the Superintendent General of Indian Affairs. For example, from 1878 to 1883, John A. Macdonald was Prime Minister, self-appointed Minister of the Interior and *ex officio* Superintendent General of Indian Affairs. Except for a short period between 1883 and 1887, when the portfolio was assigned to the Privy Council, these two latter responsibilities remained with the Minister of the Interior until the 1930s.

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[33] J.A.N. Provencher, Indian Commissioner, to the SGIA, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 34 (ICC Exhibit 1a, p. 138).

[34] Deputy Superintendent General of Indian Affairs (hereafter DSGIA) to E. McColl, Inspector of Indian Agencies, May 16, 1895, and E. McColl, Inspector of Indian Agencies, to DSGIA, June 3, 1895, Library and Archives Canada (hereafter LAC), RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 510, 515–20).

For much of the period in question, therefore, one Minister had the challenging responsibility of reconciling the government's policy on dominion land settlement and development with the creation of reserves and the protection of Indians' interests in them – whether they decided to lease, sell, replace, or maintain them.

ESTABLISHMENT OF ROSEAU RIVER INDIAN RESERVES (IR) 2 AND 2A

The general location of the reserve for the Roseau River Band was recorded in the original text of Treaty 1:

> for the use of the Indians of whom Na-sha-ke-penais, Nan-na-wa-nanaw, Ke-we-tayash and Wa-ko-wush are the Chiefs, so much land on the Roseau River as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, beginning from the mouth of the river.[35]

The exact location and size of the reserve was to be determined and the reserve surveyed after an accurate census was taken. As previously mentioned, the government considered the setting aside of reserves to be an important duty of the Treaty Commissioners.[36]

The land occupied by the Roseau River Anishinabe was one of the few places in the new province with timber suitable for building, and some settlers were soon cutting timber there, despite the fact that it had been identified as potential reserve land.[37]

Responding to complaints of the Roseau River Anishinabe, Lieutenant Governor Archibald wrote to the Secretary of State for the Provinces in February 1872, saying:

> It is in vain for me to disclaim to these poor sons of the soil any responsibility for, or power to deal with Indian affairs – they are not politicians enough to

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[35] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1a, p. 14).

[36] Joseph Howe, Secretary of State for the Provinces, to W.M. Simpson, S.J. Dawson, and Robert Pether, May 6, 1871, Canada, *Report of the Indian Branch of the Department of the Secretary of State for the Provinces, 1871*, 7 (ICC Exhibit 1a, p. 5).

[37] F.J. Bradley, Deputy Collector, North Pembina, to A.G. Archibald, Lieutenant Governor of Manitoba, March 16, 1872, Archives of Manitoba (hereafter AM), MG 12, B1, Archibald Papers, item 621 (ICC, Exhibit 1a, p. 70).

> distinguish between the representative of Her Majesty in one capacity and Her representative in another. They say they made the Treaty with the Queen, and they feel they have a right to look to me, as Her Representative, to see that the stipulations contained in the treaties are kept. They say that I was present and took part in the negotiations. They consider a reference to a Commissioner wholly inacessible [*sic*] to them as really a refusal to fulfil the Treaty.
>
> What can I do under these circumstances? To refuse interviews would be to involve serious danger. To grant them, involves serious trouble and embarrassment. If I were free, after hearing the Indians, to act upon my own judgment, I should consider the trouble a matter of small moment, but to be obliged to listen to all they have to say, without power to deal with their complaints & talking to them at the risk of contravening the policy of the Commissioner of the Govt is excedingly [*sic*] disagreeable – It is a position in which I think I ought not to be placed.
>
> Mr. Simpson has a memo: signed by him and attested by myself and Mr. McKay, containing all the stipulations made with the Indians, that were not formally embodied in the Treaty. The Indians expect these promises to be rigidly kept, and it will be most unsafe to disappoint them.
>
> Of course, I assume the Commissioner is preparing to discharge the obligations he contracted; but I do not know that he is – and I cannot assure the Indians that he is – while the spring is now at hand and there is not a moment to lose, if the promises are to be fulfilled.
>
> May I therefore ask you as the head of the Department to see that there should be somebody here, if Mr. Simpson is unable to come himself, who may, under the instructions of Mr. Simpson, deal with the Indians and explain to them what is doing [*sic*] and what they may count upon.
>
> It will be a matter of profound regret, if by neglect or indifference, we should forfeit the advantages of the Treaties and pave the way for a condition of things such as has arisen in the United States, much of which is due to indifference to or neglect of the Indians and to failure to fulfil strictly the obligations incurred in the Treaties made with them.[38]

Several days later, Archibald reiterated his concern about Commissioner Simpson's neglect of his duties in stronger words: "Mr. Simpson is mistaken if he imagines that his absence prevents these people from making continual applications about matters which interest them, or has any other effect than to shift over to me or to Mr. McKay, work which he should do himself."[39]

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[38] A.G. Archibald to the Secretary of State for the Provinces, February 17, 1872, AM, MG 12, B1, Archibald Papers, Despatch Book 3, no. 26 (ICC Exhibit 1a, pp. 68–69).

[39] A.G. Archibald to the Secretary of State for the Provinces, February 23, 1872, AM, MG 12, B1, Archibald Papers, Despatch Book 3, no. 35 (ICC Exhibit 19a, p. 2).

At the beginning of March 1872, the Lieutenant Governor issued a public proclamation intended to protect lands designated by treaty as Indian reserves. In a report to Ottawa, however, he expressed doubt regarding its anticipated effectiveness and suggested stronger measures were needed from the government.[40] The Lieutenant Governor, however, did not stop there. At Archibald's request, the Inspector of Surveys in Winnipeg instructed Surveyor Moses McFadden to survey the part of the reserve at the mouth of the Roseau River. This was not intended to be a final survey because the census to determine the Band's population had not yet been completed. Instead, it focussed on the area of the most serious timber trespasses.[41]

McFadden reported on April 8, 1872, that he had completed the survey as instructed, with some amendments to take into account the course of the river.[42] Two years later, in March 1874, a "Plan of Township No. 3, Range 2 East of First Meridian" was published by the Dominion Lands Office of the Department of the Interior, showing an Indian reserve at the confluence of the Red and Roseau Rivers.[43]

A complete survey of the Roseau River reserve, however, was not undertaken until October of 1887. By order of the Deputy Superintendent General,[44] Surveyor A.W. Ponton surveyed

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[40] A.G. Archibald to the Secretary of State for the Provinces, April 6, 1872, AM, MG 12, B1, Archibald Papers, Despatch Book 3, no. 55 (ICC Exhibit 1a, p. 93); D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, pp. 20–22 (ICC Exhibit 2c, pp. 20–22).

[41] Lindsay Russell, Inspector of Surveys, to Moses McFadden, Deputy Surveyor, March 22, 1872, AM, MG 12, B1, Archibald Papers, item 632 (ICC Exhibit 1a, pp. 83–87).

[42] M. McFadden, Deputy Surveyor, to Lindsay Russell, Inspector of Surveys, April 8, 1872, LAC, RG 10, vol. 3558, file 43 (ICC Exhibit 1a, p. 94).

[43] "Plan of Township No. 3, Range 2, East of First Meridian," surveyed by A.F. Martin, September–October 1873, published by the Dominion Lands Office, March 1, 1874, Indian Affairs Survey Records, Instrument 30 (ICC Exhibit 7b).

[44] DSGIA, "Instructions for the Re-Survey of the Roseau River Indian Reserve, Man.," July 6, 1887, LAC, RG 10, vol. 3777, file 38307 (ICC Exhibit 1a, pp. 280–82).

20.86 square miles (approximately 13,350 acres) as "Indian Reserve No. 2 on Roseau River for the bands of Wakowush, Keweetoyash & Nanawanan."[45] Ponton described the reserve as follows:

> This reserve is generally a gently rolling prairie of rich heavy clay soil. The grass is long and luxuriant, and there is considerable timber on the reserve. Oak, elm and poplar can be found along the banks of the Red River and the Roseau River.
>
> I observed some small potato patches along the Red River and two large grain fields, one some ten acres in extent, situated in the central portion of the reserve and another of some thirty acres, at the north boundary. Both these fields are enclosed with neat wire fences, and the grain in stack will yield a large crop.[46]

Another long delay occurred before Roseau River IR 2 was confirmed by Order in Council on January 20, 1917, when 13,349.84 acres in townships 2 and 3, range 2, east of the principal meridian, were "withdrawn from the operation of the Dominion Lands Act and set apart for the Indians."[47] Before that happened, however, much of the IR 2 land had already been surrendered, and a second reserve, IR 2A, had been established at the Roseau Rapids.

Complaints Regarding Reserve Establishment and Treaty Fulfillment, 1872–75

In April 1872, the Roseau River Chiefs and councillors again wrote to Lieutenant Governor Archibald, asking that the lands and homes occupied by two families be included in their reserve. The families were located about two miles from the mouth of the Roseau River, between the Roseau and the northeasterly branch of the Red River. The letter also addressed the issue of the reserve as a whole:

> We further desire to say to your Excellency that at the meeting of the Great Council, held at the Stone Fort last summer, we asked to be allowed to hold, as an Indian

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[45] "Treaty No. 1 Manitoba, Survey of Indian Reserve No. 2, on Roseau River for the bands of Wakowush, Keweetoyash & Nanawanan," surveyed by A.W. Ponton, DLS, September–October 1887, Natural Resources Canada, Legal Surveys Division, Plan T-109 CLSR MB (ICC Exhibit 7d).

[46] A.W. Ponton, Surveyor, to the SGIA, December 6, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, 168 (ICC Exhibit 1a, p. 335).

[47] Order in Council PC 165, January 20, 1917, Department of Indian Affairs and Northern Development (DIAND), Indian Lands Registry, Instrument no. R5296 (ICC Exhibit 1a, pp. 1240–42). The reserve was listed and treated as a reserve in the intervening years.

> Reserve, all that portion of land lying between the mouth of the Roseau River and Roseau Lake, and being in width about two miles on either side of the Roseau. And now to ask your Excellency was such granted us.[48]

In closing, the Chiefs and councillors requested agricultural assistance for two families who intended to settle and commence farming, as had been promised at the treaty negotiations.[49]

In a reply written on his behalf, Lieutenant Governor Archibald emphasized that the extent of the reserve to which the Roseau River Band would be entitled depended on its population and that, as "soon as this is found out, the reserve will be run off & marked, so that every Indian may see the boundaries of the lands assigned to the tribe." He also noted that he had no doubt that the Indian Commissioner, in laying out the reserve, would include the land and homes of the two families, "if this can be done without inconvenience." Archibald said nothing, however, regarding the request for agricultural assistance.[50]

At the treaty annuity payments in June 1872, it appears that Commissioner Simpson attempted to resolve the dispute regarding the location and dimensions of the reserve by pressuring the Band, without success, to leave the Roseau River valley for Broken Head River.[51] According to the Dominion Lands Agent, Gilbert McMicken, "this arrangement would save from reserve six

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[48] Che-we-ti-as, Wa-ko-wash, and [Ma-ma-tah-com-trip] to the Lieutenant Governor of Manitoba and NWT, April 1872, AM, MG 12, B 1, Archibald Papers, item 651 (ICC Exhibit 1a, pp. 90–91).

[49] Che-we-ti-as, Wa-ko-wash, and [Ma-ma-tah-com-trip] to the Lieutenant Governor of Manitoba and NWT, April 1872, AM, MG 12, B 1, Archibald Papers, item 651 (ICC Exhibit 1a, p. 91).

[50] F.J. Bradley , Deputy Collector , to Kewetyash, Wa-ko-wash, and Mama-tah-com-trip, Chiefs of the Indians of Roseau River, April 13, 1872, AM, MG 12, B 1, Archibald Papers, item 651 (ICC Exhibit 1a, pp. 101–2). After they came to see him, the Roseau River band members had been instructed by Lieutenant Governor Archibald that, in future, they should contact Mr Bradley, the Customs Officer at Pembina. See Adams George Archibald to the Secretary of State for the Provinces, February 23, 1872, AM, MG 12, B1, Archibald Papers, Despatch Book 3, no. 35 (ICC Exhibit 19a, pp. 2, 5).

[51] D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, p. 28 (ICC Exhibit 2c, p. 28); J.A.N. Provencher, Indian Commissioner, to the SGIA, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 40 (ICC Exhibit 1a, p. 144).

thousand five hundred acres of good land [at Roseau River]."[52] There is no evidence that anything further was done that year with regard to laying out the reserve or fulfilling other treaty obligations.

Similar problems were also arising elsewhere. In July 1872, Archibald complained about Commissioner Simpson: "[N]early a year has elapsed and not a step has been taken towards ascertaining the number of Indians or laying off the Reserves."[53] Simpson defended himself by saying that the surveyors were very busy and the Indians themselves were changing their minds about where they wanted their reserves.[54]

By the end of the year, Archibald was replaced by Alexander Morris. The new Lieutenant Governor promptly recommended reforms that led to Indian Commissioner Simpson's replacement, in June 1873, by a resident Indian Commissioner, Joseph A. Provencher.

Amendment to Treaty 1 in Recognition of Unfulfilled Verbal Promises, 1875

By April 1875, protests by the Roseau River Chiefs and other signatories of Treaties 1 and 2 about unfulfilled verbal promises prompted action on the part of the dominion government. On April 30 of that year, an Order in Council was passed confirming the verbal "outside promises" as part of Treaties 1 and 2.[55] On September 8, 15 Roseau River band members (three Chiefs, seven councillors, and five braves) signed the treaty amendment at the Roseau River reserve.[56]

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[52] McMicken, telegram to Aikins, July 31, 1872, LAC, RG 10, vol. 3579, file 609, cited in D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, p. 31 (ICC Exhibit 2c, p. 31).

[53] A.G. Archibald, Lieutenant Governor, to Joseph Howe, Secretary of State for the Provinces, July 6, 1872, LAC, RG 10, vol. 3555, file 11, cited in D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, p. 30 (ICC Exhibit 2c, p. 30).

[54] D.N. Sprague, "Pretended Accommodation, Intended Removal: Canada's Response to Anishinabe Occupation of Land on the Roseau River," January 1995, p. 32 (ICC Exhibit 2c, p. 32).

[55] Order in Council, April 30, 1875, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 6 (ICC Exhibit 1a, p. 130).

[56] Treaty 1 amendment and adhesion, September 8, 1875, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 5–7, 9–10 (ICC Exhibit 1a, pp. 129–31, 133–34).

The 1875 amendment of Treaty 1 did not affect the treaty's provision that the Roseau River Band was to receive 160 acres of land per family of five, "beginning from the mouth of the river."[57] This wording confirmed the Band's understanding that its reserve would extend up the Roseau River, but its size depended on the Band's population at the time of survey.

As some of the earliest settlers in the region acknowledged, the Anishinabe were settled at Roseau Rapids before adhering to Treaty 1; moreover, they continued to live and farm there even after the first reserve was established at the mouth of the Roseau River.[58] In the words of Elder Robert James, his father had told him that "that land belonged to us ... from here to Dominion City and all along the river to the Rapids."[59]

In July 1875, a few months after the "outside promises" of the treaty were confirmed by Order in Council, the Superintendent General promised to protect the rights of the Aboriginal people who had settled down on specific lands prior to treaty.[60] With regard to the Anishinabe at Roseau Rapids, instructions had been given in April of that year to survey a reserve of one quarter section – the southeast quarter of section 10 – of township 3, range 4, east of the principal meridian, and to allot the rest of the township as Métis grants. Apparently, the Métis had protested against any of this township being reserved for the Anishinabe.[61] In October 1875, an inspection found additional improvements on the northeast quarter of sections 11 and 12, and the northwest quarter of

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[57] Treaty 1, August 3, 1871, in Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957), 4 (ICC Exhibit 1a, p. 14).

[58] James McKercher Waddell, *Dominion City: Facts, Fiction and Hyperbole* (Steinbach, MB: Derksen Printers, 1970), 13, 26, 38 (ICC Exhibit 10, pp. 13, 26, 38); E. McColl, Inspector of Indian Agencies, to the SGIA, May 23, 1885, LAC, RG 10, vol. 3713, file 20888 (ICC Exhibit 1a, pp. 225–26).

[59] ICC Transcript, September 10, 2002 (ICC Exhibit 5b, p. 34, Robert James).

[60] E.A. Meredith, Deputy Minister of the Interior, to James T. Graham, Acting Indian Superintendent, Winnipeg, December 7, 1877, LAC, RG 10, vol. 3558, file 29 (Exhibit 1a, p. 153). This letter refers to a previous letter dated July 16, 1875.

[61] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306–1 (ICC Exhibit 1a, p. 259).

section 3.[62] It appears, however, that the southeast quarter of section 10 was never marked off as a reserve at the time.

At the end of October, Indian Commissioner Provencher informed the Superintendent General of Indian Affairs that the Pembina (Roseau River) Bands were not satisfied with their reserve because it did not encompass certain homes established further up the Roseau River:

> The Pembina Bands, under the three chiefs who were party to Treaty No. 1, number 480 souls. This number has decreased since 1871, some having gone back to the United States where they always had resided.
>
> Their Reserve, as surveyed from the outlet of Rivière aux Rousseau, going up the Red River, comprises 13,554 acres. The Pembina Indians contend that this reserve is not located in conformity to the conventions of the Treaty, and they claim the grant of the land on both sides of the Rousseau [*sic*] River, running east. These lands having been set aside for Half-breed claims, or for settlers who had already taken possession, it does not seem possible that their request could be granted. They gave as a reason for the necessity of a change that they already had commenced large settlements at the places which they claimed, but it is now in evidence that the number of houses built does not come up to one-half dozen.
>
> There are altogether eleven houses belonging to these Indians. They are very docile and well conducted and are anxious to put to good profit the advantages they derive from the Government. They have expressed the desire of having a school established amongst them next spring.[63]

Another inspection in October 1877 revealed further improvements along the Roseau River near the Rapids. A month later, the Surveyor General again recommended to the Superintendent General of Indian Affairs that the southeast quarter of section 10 be reserved,[64] although that section was supposed to have been surveyed in 1875. He also recommended that the other Anishinabe settled at the Rapids, who reportedly settled after the treaty, be told that they

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[62] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 259–60).

[63] J.A.N. Provencher, Indian Commissioner, to the SGIA, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 40 (ICC Exhibit 1a, p. 144).

[64] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 260–61).

> would not be permitted to continue to occupy these lands, and that they would lose any further improvements made by them, but that the improvements as they were found to exist by Messrs Goulet and Newcomb would be valued and the owners would respectively receive such value before patents would be issued for such lands to the half breeds to whom they might be allotted.[65]

Instructions to this effect were sent to the Acting Indian Superintendent in Winnipeg,[66] but there is no indication that the message reached the Anishinabe at the Rapids. No compensation was paid nor reservation made of the quarter section, which the government acknowledged had been occupied prior to treaty.[67]

In 1879, the Roseau River Band held a meeting at a schoolhouse on its reserve[68] "for the purpose of considering what could be done towards securing certain lands which they claim, at what is commonly known as the Rapids, on the Rouseau [*sic*] River."[69] The meeting was also attended by a number of non-Anishinabe settlers and was reported in a local newspaper. The Anishinabe at the mouth of the Roseau did not want to relinquish their lands there but were keen on obtaining reserved lands at the Rapids – lands which, in their view, they had never relinquished. A man named Goldie argued that they were better off moving to the Rapids and getting their reserve there. In his view, "[t]he land which had been given to them [at the mouth of the Roseau] was not fit for cultivation."[70] The schoolteacher, A. McPherson, thought that it would be unlikely that they would be able to

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[65] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 261–62).

[66] E.A. Meredith, Deputy Minister of the Interior, to James T. Graham, Acting Indian Superintendent, Winnipeg, December 7, 1877, LAC, RG 10, vol. 3558, file 29 (Exhibit 1a, pp. 152–54).

[67] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 260–63).

[68] The Band had requested its treaty right to a school in 1875, but had not yet received one. This school was run by non-Anishinabe neighbours independently from the government. J.A.N. Provencher, Indian Commissioner, to the SGIA, October 30, 1875, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June, 1875*, Part 1, "Report of the Superintendent General of Indian Affairs," 40 (ICC Exhibit 1a, p. 144); Newspaper article [1879], LAC, RG 10, vol. 3678, file 11729 (ICC Exhibit 1a, p. 156). The article is undated, but the outside date on the RG 10 file is 1879.

[69] Newspaper article [1879], LAC, RG 10, vol. 3678, file 11729 (ICC Exhibit 1a, pp. 155).

[70] Newspaper article [1879], LAC, RG 10, vol. 3678, file 11729 (ICC Exhibit 1a, pp. 155).

accomplish this.[71] There is no evidence of further meetings on the matter at the time, or of any communications with the government officials.

This apparent communication problem may be attributable to the absence of an Indian agent responsible for the Roseau River Band. That situation changed in April 1882, when the duties of the Indian Agent resident at Portage la Prairie, Francis Ogletree, were increased to include responsibility for the Roseau River Band due to concerns that the Band was "specially exposed to temptation owing to their proximity to the Towns of Emerson and Pembina."[72] The temptation appears to have been reciprocal, because by June of that year, Ogletree was instructed to visit the reserve and take precautions "to prevent the timber and wood from being pillaged."[73] Ogletree's report reveals that, initially, his primary source of information about the band members at the Roseau Rapids was local settlers and not the department. He reported that there was insufficient proof to make a case about timber trespass and added:

> The Indians of Chief Nanawananaw are living some eighteen or twenty miles up the Roseau River. I did not visit them, as I cannot find from the wording of the Treaty, that they are entitled to any land up there, and the settlers say they have no claim, consequently there would be no use in looking after the timber.[74]

It does not appear that the issue of the Roseau Rapids reserve was raised again until the beginning of the 1885 Métis uprising, when Agent Ogletree was informed that "emissaries from the insurgents in the North West Territories" were visiting the different bands under his charge. On visiting the Roseau River Anishinabe, however, he found them "very peaceably inclined and ... determined to remain loyal to the Queen under all circumstances." Nevertheless, he noted that there was "a very strong feeling among the Indians at the Rapids that the Government is not carrying out the terms of the Treaty with them in not giving them the Reserve at the Rapids." He concluded with

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[71] Newspaper article [1879], LAC, RG 10, vol. 3678, file 11729 (ICC Exhibit 1a, pp. 155–56).

[72] Order in Council PC 781-1882, April 24, 1882, LAC, RG 2, vol. 227 (ICC Exhibit 1a, pp. 206–7).

[73] Francis Ogletree, Indian Agent, to James Graham, Indian Superintendent, Winnipeg, June 17, 1882, LAC, RG 10, vol. 3768, file 35579 (ICC Exhibit 1a, p. 208).

[74] Francis Ogletree, Indian Agent, to James Graham, Indian Superintendent, Winnipeg, June 17, 1882, LAC, RG 10, vol. 3768, file 35579 (ICC Exhibit 1a, p. 210).

a strong recommendation to Inspector McColl that "some person of influence be sent among them to settle these disputes about Reserves for all time to come. Otherwise there will be dissatisfaction all the time."[75]

McColl forwarded Ogletree's recommendation to the office of the Superintendent General in Ottawa, where instructions were given that a "correct description of the lands claimed at the Rapids of the Rosseau [sic] should be obtained" as well as more complete information on the basis of the Roseau Rapids Anishinabe claim.[76] There is no indication that anything further was done at the time.

In January 1886, Agent Ogletree again reported on the situation:

> I cannot close this letter without bringing to your notice the feeling existing amongst the Indians at the Rapids in reference to their claims there. I feel sorry for them from my heart. They are not abusive ... I believe a gross injustice has been done them by someone. They claim that they never gave up the Rapids as their Reserve and some of them were certainly entitled to their holding as well as others in different parts of the Province. Many of them had improvements previous to the Treaty being made and before the survey took place. There is one of them by the name of Martin who is a fine worker with good log house and out buildings and had them when the survey was made and it seems a pity he should loose [sic] them all. The Chief too and several others have very good buildings, far better than any on the Reserve ... . Their improvements being on school sections and if anything can be done to settle this matter it would be [very] desirable to do so. They have never expressed a harsh word in talking about their [claim] but it can be easily seen that they would sooner do anything in preference to giving up the Rapids as a place of residence. They proposed giving up their share of the Reserve at the Mouth of the river if they were only allowed to remain where they are. It was only a few days before I was there that 240 acres of land were sold to a party and it seems some of them have improvements on this very place as the party who purchased had forbidden them trespassing on it and they feel quite alarmed about it. I trust the Department will do something to have this matter settled as I cannot encourage the Indians to make any extensive improvements

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[75] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, May 21, 1885, LAC, RG 10, vol. 3713, file 20888 (ICC Exhibit 1a, pp. 222–23).

[76] E. McColl, Inspector of Indian Agencies, to the SGIA, May 23, 1885, with marginalia, LAC, RG 10, vol. 3713, file 20888 (ICC Exhibit 1a, pp. 224–26).

> on their holdings there in case it may lead to trouble and the matter of giving them seed there and cattle will in their judgement confirm their title to their claims.[77]

Once again, Ogletree's report was forwarded to Ottawa,[78] but this time he was promptly instructed to provide the exact locations of the improvements made by the Roseau Rapids Anishinabe.[79]

On February 27, Ogletree provided a list of the individual Anishinabe settled at the Rapids and the location of their improvements in parts of sections 3, 10, 11, and 12 in township 3, range 4, west of the principal meridian.[80] Inspector McColl forwarded this list to the Superintendent General of Indian Affairs on March 1, 1886.[81]

On March 18, Indian Affairs headquarters sent a long explanatory letter to the Deputy Minister of the Interior. (At that time, 1883–87, responsibility for Indian Affairs fell under the auspices of the Privy Council instead of the Department or the Minister of the Interior.) The letter concluded with a strong recommendation in favour of the Roseau Rapids Anishinabe: "It is highly desirable that these lands should be secured to the Indian occupants and in this connection I beg to refer you to section 8, subsection (a) of the Act 43 Vic. Cap. 28. I shall be glad to hear from you in this matter."[82]

In his response, dated almost seven months later, the Acting Deputy Minister of the Interior, John Hall, reviewed the facts of the case as far back as 1874. He pointed out that the Department of Indian Affairs had been party to an arrangement whereby only the southeast quarter of section 10

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[77] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, January 20, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 247–48).

[78] E. McColl, Inspector of Indian Agencies, to the SGIA, January 22, 1886, with marginalia, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 249).

[79] [Author not identified] to E. McColl, Inspector of Indian Agencies, February 5, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 250).

[80] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 27, 1886, LAC, RG 10, 3730, file 26306-1 (ICC Exhibit 1a, p. 251).

[81] E. McColl, Inspector of Indian Agencies, to the SGIA, March 1, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 252).

[82] Department of Indian Affairs (hereafter DIA) to A.M. Burgess, Deputy Minister of the Interior, March 18, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 256).

would be reserved for the Band, with compensation for any other improvements at the Rapids not contained within this quarter section. Hall acknowledged, however, that patents for the remaining improved lands had been given to others without compensation being paid to the Indians and asked for suggestions "how and from whom the value of the improvements can now be collected to pay the Indians entitled thereto."[83]

The Deputy Superintendent General of Indian Affairs replied on October 11 that "the Indians owning the improvements on the land in question should be paid for the same out of the proceeds of the lands sold."[84] On the same day, Indian Affairs headquarters sent a copy of Hall's letter to Inspector McColl in Winnipeg, informed him that the "SE ¼ of Sec 10 has been reserved for the Indian Akeneus" and asked what steps had been taken with regard to compensation for the improvements.[85]

On April 29, 1887, the "Chief and Councillors of the Rapids Indian Reserve on the Roseau River" addressed a petition to Prime Minister John A. Macdonald (who, at the time, was responsible for Indian Affairs). They asked that "your government order an immediate survey of our Reserve at the Rapids, measuring six miles along the Roseau River by two miles on each side of it, so that our families may find satisfaction and comfort."[86] A copy of this petition, implicitly refusing the proposal of compensation, was forwarded to the Deputy Minister of the Interior, A.M. Burgess.[87] Burgess, in turn, replied by reiterating his previously stated position, modified, however, by one key error; he stated that the southeast quarter of section 10 (previously reserved for the Indian Akeneus), would

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[83] John Hall, Acting Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, October 4, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 258–63).

[84] DIA to A.M. Burgess, Deputy Minister of the Interior, October 11, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 265).

[85] DIA to E. McColl, Inspector of Indian Agencies, October 11, 1886, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 264).

[86] Chief and Councillors of the Rapids Indian Reserve on the Roseau River to John A. Macdonald, SGIA, April 29, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 267).

[87] DIA to A.M. Burgess, Deputy Minister of the Interior, May 6, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 270).

be sold and the proceeds used to pay for improvements on other sections.[88] The Department of Indian Affairs promptly pointed out this error and requested that the land not be sold.[89]

The issue finally came to a head in July 1887, when Kakuakooniash (alias "Big Indian"), a councillor for the Roseau Rapids Anishinabe, refused to move from his home on the northwest quarter and the north half of the southwest quarter of section 3, township 3, range 4, east of the principal meridian.[90] Kakuakooniash had been living on this land since before 1870, but now a settler named B. Brewster was attempting to settle there. Brewster had purchased the land from Solicitor B.E. Chaffey, who had purchased it from Anny L.C. Genthon, a Métis who had been granted the land by patent from the government but had never occupied it.[91] A lengthy exchange of correspondence ensued between Brewster, Chaffey, the Department of Indian Affairs, and the Department of the Interior. Negotiations were also undertaken with Kakuakooniash, who, in October 1887, stated his willingness to leave the land on the condition that he be paid $218 in compensation and be allowed to settle permanently on section 11, township 3, range 4.[92]

Finally, in July 1888, the Deputy Minister of the Interior offered to recommend to the Minister of the Interior that section 11 and the southeast quarter of section 10 (about 800 acres in total) be transferred to the Department of Indian Affairs for the use of the Roseau Rapids Anishinabe, but only on the "understanding and condition that the Department of Indian Affairs will agree to remove any of these Indians who may be located upon any other lands in this Township."[93]

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[88] A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, May 16, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 271–74).

[89] DIA to A.M. Burgess, Deputy Minister of the Interior, June 1, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 277–79).

[90] John Allison, Homestead Inspector, claim report, October 27, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 321).

[91] B.E. Chaffey, Solicitor, to L. Vankoughnet, DSGIA, July 11, 1887, no file reference available (ICC Exhibit 1a, p. 287).

[92] John Allison, Homestead Inspector, claim report, October 27, 1887, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 321–23).

[93] A.M. Burgess, Deputy Minister of the Interior, to the DSGIA, July 11, 1888, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 360).

On August 29, 1888, Chief Nashwasoop[94] and six other Roseau River band members marked their "X" on Articles of Agreement drawn up by Indian Agent Ogletree. They consented to relinquish their claim to "Any and all lands in the Province of Manitoba" except for the reserve at the mouth of the Roseau River and the land identified at the Roseau Rapids, i.e., section 11 and the southeast quarter of section 10, township 3, range 4, east of the principal meridian.[95] According to Ogletree's report, dated September 5, 1888, he had great difficulty getting the signature of Kakuakooniash, who wanted to be "assured payment for his improvements." Things only changed after Ogletree suggested that "the Government would not again make them the offer," promised some provisions, and agreed to request compensation for Kakuakooniash. Ogletree explained:

> The Document I drew up my self is merely to show that they were willing to give up all other claims in Township Three range four providing the Government gives them a title to section 11 and South East quarter of section 10 Township three range four, it will be necessary to give them some written Document to satisfy them. [*sic*] as soon as I got all those who came to Dominion City to sign among whom were four councillors I took the interpreter with me and we drove up to the Rapids and got the Chief's Signature. I gave them eleven sacks flour, one hundred pounds of bacon, and eleven pounds of tea. The odd [sack] of flour and pound of Tea, I gave to the Big Indian. They certainly required some provisions while they would be working at their hay and I was so anxious to get them to agree to a settlement. I trust the Department will not find fault with me for taking it upon my self to give these provisions. I saw at the time that they were pretty hard up and would do a great deal for the sake of getting a little provisions. At another time they might be more difficult to deal with and I thought it better to settle the matter when I had a chance. I certainly would recommend the department if they could see their way through it, to recompense the Big Indian to a small amount of his improvements say to the amount of fifty or seventy five dollars that would make everything Satisfactory.[96]

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[94] For the sake of consistency, we have chosen to use the spelling "Nashwasoop" for this Chief throughout the report; this form is commonly found in the documentary record, but the name is also found as "Nashwaskoope" and "Nashwashoope."

[95] Articles of Agreement, August 29, 1888, DIAND, Indian Lands Registry, Instrument no. R 6245 (ICC Exhibit 1a, pp. 373–75).

[96] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, September 5, 1888, LAC, RG 10, 3730, file 26306-1 (ICC Exhibit 1a, pp. 379–82).

On October 24, 1888, the Department of the Interior confirmed that section 11 and the southeast quarter of section 10 were at the disposal of the Department of Indian Affairs.[97] The Department of Indian Affairs then registered the agreement with the Secretary of State.[98] Kakuakooniash eventually received a wagon and mower, together valued at $125.00, as compensation for his improvements, in March 1894.[99] No survey, however, appears to have been conducted of this reserve until 1904 at the earliest, when additional lands were purchased and added at the Rapids following the 1903 surrender of more than half of the main reserve, IR 2.[100]

BAND RESISTANCE TO PRESSURE FOR THE SURRENDER OF IR 2, 1889–1903

In February 1889, Indian Agent Ogletree reported that "the resident population in and around Dominion City ... [had] been urging on their representatives at Ottawa to have the Rosseau [*sic*] Reserve thrown open for settlement."[101] In the run-up to the federal by-election in the riding of Provencher on January 24, 1889, the Conservative candidate, Alphonse LaRivière, had reportedly promised the electorate that, if elected, "he would have the [Roseau River] Reserve thrown open for settlement in a short time."[102] Indian Agent Ogletree reported that such statements were causing "considerable alarm among the Indians."[103]

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97 P.B. Douglas, Assistant Secretary, Department of the Interior, to the DSGIA, October 24, 1888, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 395).

98 G. Powell, Undersecretary of State, to the DSGIA, November 12, 1888, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 398).

99 E. McColl, Inspector of Indian Agencies, voucher to A. Macdonald & Co., March 20, 1894, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 499).

100 DIA, "TR. 1 Roseau Rapids I.R. No. 2-A, TP. 3, R. 4, E. 1st Meridian, Manitoba" [1904], Plan T-1305 CLSR MB (ICC Exhibit 7h).

101 Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 25, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 414).

102 Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 25, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 413).

103 Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 25, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 414).

Ogletree's response to this situation was to urge the government to act in the best interests of the Anishinabe, saying:

> [I]t always causes uneasiness in the minds of the Indians and should be at once and for all time to come set at rest, unless the Indians themselves are agreeable to a change and even then the Government should exercise great caution before agreeing to any change as the time is at hand when Indians must undertake Agriculture for their support as there is very little game to depend on hereafter, and no better location can be had for Agricultural purposes and stock-raising as well as fishing than the Rosseau [*sic*] River Reserve. There is quite a sufficiency of hay for a large stock and a large range for pasturage besides a sufficient quantity of the best of land for wheat and barley raising.[104]

Once elected, Mr LaRivière stood in the House of Commons on February 27, 1889, and asked if the government intended to negotiate, "at as early a date as possible," a surrender for exchange with the Roseau River Indians in order that their reserve might be opened for settlement. The Minister of the Interior, Edgar Dewdney, replied: "The land in the above reserve is of most excellent quality. It is also well wooded, and altogether a most suitable location for the Indians. It would not be in their interests to remove them."[105] One week later, Indian Agent Ogletree received confirmation from Ottawa that there was "no intention of bringing the Roseau River Reserve into the market."[106]

Responding to requests from "authorities of the town of Emerson and Dominion city" to have the Roseau River reserve made available for settlement, the Deputy Superintendent General of Indian Affairs asked Inspector McColl, in May 1895, to report on "particulars which will be of use in giving the question intelligent consideration, as well as your opinion thereon."[107] The request was relayed

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[104] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, February 25, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 414).

[105] Canada, House of Commons, *Debates* (February 27, 1889), 347 (ICC Exhibit 1a, p. 418). It should be emphasized that both LaRivière and Dewdney belonged to the same federal party – the Conservatives.

[106] DIA to F. Ogletree, Indian Agent, March 5, 1889, LAC, RG 10, vol. 3810, file 54499 (ICC Exhibit 1a, p. 420).

[107] DSGIA to E. McColl, Inspector of Indian Agencies, May 16, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 510).

to Agent Ogletree, who reported that there were about 35 families on the Roseau River reserve who farmed (they and others also engaged in hunting, fishing, gathering snakeroot, and working for local farmers), but that game was getting scarcer and band members who had never farmed before were expressing an interest in breaking land.[108] Based on previous discussions with band members, Ogletree was convinced they would never surrender:

> As for them being induced to surrender or sell their Reserve I feel quite certain that they will never agree to do so. They are not in the dark about the steps that have been more than once taken to deprive them of their land and get them removed. People round Letellier and other places express themselves openly that it is a shame to keep such a fine tract of land for the good for nothing Indians. At the time that the matter was brought up in the House of Commons a few years ago, I spoke to the Indians about it and asked them if they would be willing to surrender their land for sale and at other times and very lately when they were putting in their crop this spring I spoke to some of their leading men and at all times they invariably declared that they would never consent to give it up that eventually it was the only thing that they and their children had to depend on for a livelihood. So I feel quite certain that there will be no Surrender of the Reserve. I do not think it worth while speaking of where the Indians could be put in case of a surrender as it would never do to place them in an isolated place where there would be no agricultural opperations [*sic*] carried on and where many of them especially the old People could not mix among the white People where they often make their living by doing chores for the Farmers and Towns People.[109]

Upon receipt of the Agent's report, Inspector McColl visited the reserve himself and, after speaking with the Chief and leading men, came to the same conclusion as Agent Ogletree: "[T]hey were absolutely opposed to surrendering their Reserve for any consideration."[110] The Inspector found that band members were progressing in agriculture, and he was "fully persuaded that it is not in their

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[108] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, May 31, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 511–14).

[109] Francis Ogletree, Indian Agent, to E. McColl, Inspector of Indian Agencies, May 31, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 513–14).

[110] E. McColl, Inspector of Indian Agencies, to the DSGIA, June 3, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 517).

interest that their reserve be sold even were they willing that such be done, which they are not."[111] McColl also pointed out that there was considerable unused land surrounding the reserve which the settlers could use:

> I consider that the proposal of the authorities of Emerson and of Dominion City should not be entertained. It is time enough to seriously consider the recommendation of the authorities of Emerson and Dominion City when the vast and unbroken fields in proximity to this reserve are cultivated. It would be as reasonable for the Indians to petition the Government to dispose of the settlers lands in the vicinity of the reserve because they do not cultivate them more extensively as it is for the settlers to ask that the reserve be thrown upon the market because the Indians do not cultivate more of it.[112]

In July 1896, Wilfrid Laurier's Liberal party won the federal election and, within a year, there was a major reorganization of the Department of Indian Affairs. Several Indian agents, including Francis Ogletree, were dismissed and the administration of the reserves placed under the direct management of local inspectors. S.R. Marlatt of Portage la Prairie was appointed Inspector in charge of the Lake Manitoba Inspectorate, which included the Roseau River reserves.[113] Marlatt, originally from Oakville, Ontario, had been in Manitoba since 1871 and seems to have been politically well-connected, submitting as bondsmen the names of Robert Watson, the Minister of Public Works for the Province of Manitoba, and J.S. Rutherford, MP.[114]

In January 1898, the Roseau Chiefs and councillors sent two petitions to the Indian Commissioner, to be forwarded to the Minister of the Interior, requesting additional land at Roseau Rapids. They explained that the "old reserve near the mouth of this river its [*sic*] over flooded every Spring and no timber now in that said land and so we cannot make our living out of that said

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[111] E. McColl, Inspector of Indian Agencies, to the DSGIA, June 3, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 519).

[112] E. McColl, Inspector of Indian Agencies, to the DSGIA, June 3, 1895, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 519–20).

[113] Order in Council, PC 1501, July 27, 1897, LAC, RG 2, vol. 741 (ICC Exhibit 1a, p. 532).

[114] S.R. Marlatt to the Secretary, DIA, October 9, 1897, LAC, RG 10, vol. 3878, file 91839-28 (ICC Exhibit 1a, p. 537).

place."[115] When commenting on these petitions, Marlatt first reported "that most of the Roseau Indians would like to live at the Rapids, if there was room for them."[116] After visiting the Band, however, he informed the Indian Commissioner that "they do not propose to abandon any of the land in the present Reserves but want the new location in addition."[117] The "new location" would include land "extending for six miles up the Roseau River from the Rapids Reserve, with a depth of three miles on each side of the River." They promised to accept this as "final settlement to their old claim" to land on both sides of the river for the whole distance between the two reserves which they asserted had been promised them at the Treaty 1 negotiations.[118]

Nevertheless, Marlatt expressed the view that,

> could the Indians be induced to abandon the large Reserve at the mouth of the River and have a new Reserve formed East of the Rapids, it would be very desirable.
>
> The land in the large Reserve is valuable and the Indians are making but little use of it, all would like to live at the Rapids, from choice, if there was room for them.[119]

In a marginal note on the Inspector's report, Indian Commissioner Forget expressed agreement with Marlatt, saying that "it would be well if the Band at the mouth of Roseau could be induced to move

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[115] Chief Nayshowsoupe and four councillors, Roseau River Rapids, to the Minister of the Interior, January 13, 1898 (ICC Exhibit 1a, p. 538); see also Chief Seeseepance and four councillors, Roseau River Rapids, to the Minister of the Interior, January 15, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 539). These petitions were not forwarded to Ottawa until March 29, 1898. See Indian Commissioner to the Secretary, DIA, March 29, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 552–53). On the Roseau River IR 2's proneness to flood in relation to the surrounding area, see AFC Agra, "Final Report on Roseau River Indian Reserve #2: Historical Valuation & Land Quality Estimate," prepared for Roseau River Anishinabe First Nation and the Government of Canada, May 2005, p. 51 (ICC Exhibit 16a, p. 66).

[116] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, February 1, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 546).

[117] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 556).

[118] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 555–56).

[119] S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 556).

up to the Rapids reserve."[120] However, because most of the land which might be given in exchange was already taken up by settlers and the Band did not want to give up the Roseau River reserve, Forget thought that Marlatt should look further into the matter before taking any action.[121]

In June 1898, the Secretary of the Department of Indian Affairs informed the Commissioner that current population figures indicated the Roseau River Band had more land than it was entitled to under treaty, and, although it was

> not desirable to make any exchanges of Reserves, when the same may be avoided, but under the circumstances that you mention, it may be advisable to induce the Indians to surrender a large portion of their Reserve at the mouth of the River, that is, if a more suitable locality cannot be found for a Reserve to be given to them in exchange. The proceeds of the Sale of the lands, if surrendered, would be, as usual applied for the benefit of the Indians.[122]

It appears that there was no further follow up on this matter until April 1900, when the municipality of Franklin passed a resolution recommending

> that the Government take the necessary steps, compatible with honor, to arrange with the Indians and secure an abandonment of the said lands [Roseau River IR 2], and in the event of this being attained, to open the said land for settlement in lots of 160 acres each to be disposed of under the usual homestead regulations.[123]

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[120] A.E. Forget, Indian Commissioner, marginal notes on a letter from S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 556).

[121] A.E. Forget, Indian Commissioner, marginal notes on a letter from S.R. Marlatt, Inspector of Indian Agencies, to A.E. Forget, Indian Commissioner, April 21, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 556).

[122] J.D. McLean, Secretary, DIA, to A.E. Forget, Indian Commissioner, June 2, 1898, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 562).

[123] Municipality of Franklin, Manitoba, "Resolution re. Indian Reservation," April 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 582).

The next month, Alphonse LaRivière, MP, brought this resolution to the government's attention in the House of Commons. The government replied that, although the resolution had not been received, it would be considered once it arrived.[124]

In June, an Emerson real estate agent forwarded to J.A. Macdonnell, Member of Parliament for the riding of Selkirk, petitions from the ratepayers of Emerson and Franklin asking the federal government to take the necessary steps to have the Roseau River reserve surrendered and opened up for settlement. They stated that

> the Indian population connected with said Reservation has become so depleted that there are now only a few families residing on the Reserve and the land is almost deserted:
> AND WHEREAS the settlement of the said reservation by an agricultural population would greatly enhance the prosperity of the Municipality aforesaid and would afford a place of settlement for the large number seeking farms ...[125]

According to Michael Scott, the real estate agent who forwarded the petitions to Macdonnell, "if even half of it were opened for settlement, great benefit would result."[126]

Macdonnell, in turn, forwarded these petitions to James Smart, Deputy Superintendent General of Indian Affairs, who promised to refer the matter to the Indian Commissioner, but noted there might be some financial obstacles in the way of a purchase of the reserve land:

> I wish to present the difficulty which the petitioners possibly have not thoroughly considered, and that is that the Government of Canada will be obliged to pay a reasonable value for the land to the Indians to whom it belongs, and as long as there appears to be land fit for settlement in the Province it would seem difficult to justify an expenditure of this kind out of the general funds of the country.[127]

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[124] Canada, House of Commons, *Debates* (May 10, 1900), 5023 (ICC Exhibit 1a, p. 586).

[125] Petition from the ratepayers of Franklin Municipality, Manitoba, c. April 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 576). See also the petition from the ratepayers of the town of Emerson, c. April 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 573–74).

[126] Michael Scott, Real Estate and General Agent, Emerson, to J.A. Macdonnell, MP, June 16, 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 587).

[127] Jas. A. Smart, DIA, to J.A. Macdonnell, MP, June 23, 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 589).

In July, Indian Commissioner David Laird was asked to "ascertain upon what terms the Indians would surrender [their reserve] ..., reporting fully as to the number of Indians on the Reserve, with a statement from them as to their condition."[128] Laird promised, in reply, to have Inspector Marlatt "visit the Reserve to discuss the matter with the Indians."[129]

Marlatt did not comment on the question of surrender of the Roseau River reserve until December 1900, saying he would submit the matter to the Indians when they gathered for the next annuity payments. Although he thought a surrender would be in the Band's best interest, he also considered it unlikely that it would consent to one:

> My opinion is that they will not consent to surrender any part, or all of their reserve, in their own interest I think it would be to their advantage, as they are not making the best use of the reserve, and would do much better if assimilated with other bands which are removed from white settlements. But it will be hard to persuade them as they are very strongly wedded to the locality.[130]

Marlatt also suggested that, even if the Band did surrender the reserve, it would be in the best interest of the Indians to delay the sale because land prices were increasing:

> Should they surrender it should be clearly understood that the lands would not be sold until good prices can be realized, I believe in the next five years they will double in value.
>
> The reserve is situated between two railways, with stations on each line within three miles of it, and no doubt would be in great demand if opened for settlement, for this reason I cannot see that any undue haste is necessary in placing the lands on the market, the Indians are not pressing the matter and they are the ones most interested, I cannot see that the Department should consider the petitioners of the Municipality of Franklin, as their motive, as shewn by the resolution of their

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[128] J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, July 7, 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 592).

[129] David Laird, Indian Commissioner, to the Secretary, DIA, July 14, 1900, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 594).

[130] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 21, 1900, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 596–97).

> Council, is a purly [*sic*] selfish one in which the interests of the Indians is [*sic*] not taken into consideration.[131]

Soon afterwards, in February 1901, MP Alphonse LaRivière again asked in the House of Commons whether the Roseau River reserve would be opened for settlement. The Minister of the Interior and Superintendent General of Indian Affairs, Clifford Sifton, replied that "the Indians referred to cannot be removed, nor can the land be opened for settlement without their consent, the land having been reserved for the use of the Indians by treaty."[132]

At the end of February, Inspector Marlatt met, as planned, with the Roseau River Band and fully explained its options. He later reported that the band members at the main reserve were willing to consider selling, but those at the Rapids had refused because they did not trust the government. Marlatt stated:

> At the time of my visit to these Indians on the 26th ultimo, I submitted several propositions to them for their consideration, I did not advise them to sell, but went into full explinations [*sic*] as to capital and interest funds etc, I told them to take plenty of time to think the matter over and let me have their decision in due course.
>
> This morning I am in receipt of a letter from Mr, J,C, [sic] Ginn, our business manager at the reserve which in part reads as follows:–
>
> I have been instructed by the Indians of both reserves to inform you that they have decided not to sell any part of their reserve as spoken about when you were here last time, the Indians of the lower reserve were willing to sell but the Rapids Indians were opposed to the selling, they gave for their reason that the Government, they thought, had cheated them some years ago, and were afraid they would do so again.[133]

The results of this meeting were communicated by the Indian Commissioner to department headquarters in Ottawa.[134]

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131 S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 21, 1900, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 597).

132 Canada, House of Commons, *Debates* (February 12, 1901), 82–83 (ICC Exhibit 1a, pp. 601–2).

133 S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, March 26, 1901, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 603).

134 David Laird, Indian Commissioner, to the Secretary, DIA, April 4, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 604).

In June 1901, John A. Howard of Winnipeg submitted a proposal for a colonization scheme to David Laird, for which Howard claimed to have associates ready to assist him. Howard had heard of the petitions sent to the government by settlers in the vicinity of the reserve and, anticipating that the land would be thrown open for settlement, he wished "to be considered the first applicant." "The consummation of this," he added, "will mean a fair profit to me which you are aware will be very acceptable."[135]

In his memo to the Secretary asking for a report, Deputy Superintendent General Smart stated: "I am of the opinion that the reserve is not a very large one and it would be absurd to take any action towards getting a surrender from the Indians and disposing of it."[136] The Secretary replied that the Indians had recently considered and rejected a surrender; he also added that the reserve was "well adapted for farming and stock-raising and there is an abundance of hay. The soil cannot be surpassed in any part of Manitoba."[137] No further action appears to have been taken with regard to Howard's proposal.

In the early 1900s, the Dominion City *Weekly Echo* reported that, for several years, it had been "using its best efforts to bring before the public the importance of opening up for settlement that valuable tract of land lying just west of Dominion City and known as the Roseau Indian Reserve."[138] According to an article written in the *Echo* on January 23, 1902, entitled "Waste Land in the Roseau Reserve," the excellent agricultural land in the Roseau River reserve was under-utilized by the Band and it would be advantageous to both the Indians and the surrounding community if the lands were sold.

> Here then is this large area of good land being occupied by a few indolent Indians; only 236 on 14,150 acres [on both IR 2 and IR 2A]. How much better would it be for the district surrounding this reserve and for the Indians themselves, if the

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[135] John A. Howard, Winnipeg, to David Laird, Indian Commissioner, June 6, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 608). See also John A. Howard, Winnipeg, to Clifford Sifton, Minister of the Interior, June 6, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 609–10).

[136] J.A. Smart, DSGIA, to J.D. McLean, June 14, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 611).

[137] J.D. McLean to DSGIA, June 15, 1901, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 612).

[138] Dominion City *Weekly Echo*, February 19, 1903 (ICC Exhibit 1a, p. 694).

> land were put up for sale and the money kept for them as a reserve fund. The interest on this money would easily keep the Indians and then their children would reap the benefit; while under existing circumstances the land is little more than a desert, so far as raising any profitable produce is concerned, and will never be a source of revenue either to the government or any towns in proximity to it, so long as it is occupied by the Indians.[139]

Three weeks later, the *Weekly Echo* urged the local Liberal association – which was preparing for a provincial by-election – to pass a resolution calling on the government to take action on this front:

> The quill is again taken up for the purpose of urging some action in regard to the Indian reservation lying to the west of Dominion City. Why is it that the Dominion government has taken no steps in this matter? Here lies a large acreage of good tillable land, which, under existing circumstances, cannot become of any use to anyone. The Indians on the reserve only number 236 persons, including squaws and papooses and it is a deplorable state of affairs when these few redskins occupy 14,150 acres of first class land upon which should be located good settlers, who would be a source of revenue to the municipality and the government, as well as a medium of advancement and improvement to the district.
>
> The Liberal association is soon to meet; why not pass a resolution recommending the government to take some steps in this matter? A petition, asking for our dues in regard to the reserve, should also be circulated and unanimously signed.
>
> The government should send an interpreter down and give him instructions to convince them of the advisability of selling the larger portion of the reserve. This would be advantageous both to the Indians themselves and to the district at large.[140]

In April 1902, the newspaper urged the municipal council to be more aggressive in influencing the government to get the reserve lands opened up, and suggested that a committee approach the Indians directly and "induce" them to sign a sales agreement:

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[139] "Waste Land in the Roseau Reserve," Dominion City *Weekly Echo*, January 23, 1902 (ICC Exhibit 1a, p. 615).

[140] "That Roseau Reserve Question," Dominion City *Weekly Echo*, February 13, 1902 (ICC Exhibit 1a, p. 618).

> Does the council intend to take any steps in the matter of the Indian Reserve? If so it is time they were at it. They can do quite a good deal towards influencing the government to take action in this matter if they go the right way about it.
>
> One good way of getting around the difficulty, would be to get the Indians to sign an agreement to sell the land, and present this to the government at Ottawa. If the council would instruct their attorney to draw up an agreement, which a committee could present to the Indians and induce as many of them as possible to sign it, then send this in together with a petition from the voters, some action would probably be taken.[141]

According to the same editorial, the majority of the Roseau River band members were willing to sell most of the reserve:

> It is the general belief that the great majority of the Indians are willing to sell the whole reserve with the exception of a small corner large enough for them to live on. If this be so, there is no reason why the council should not take the matter up and investigate it thoroughly. They are usually ready to do anything in their power to advance the interests of the Municipality and surely they will endeavor to have the reserve opened up for settlers; it means money for them in the shape of taxes as well as increased business to merchants.[142]

In June, the newspaper reported that Alphonse LaRivière, MP, was also advocating a direct appeal to the Indians.[143]

The *Weekly Echo*'s efforts to have the reserve opened for settlement also drew the support of the *Manitoba Free Press*; the "progress of the town and district is unquestionably hampered to a great degree," it stated, "by the presence of an Indian reserve."[144]

In July 1902, the Liberals nominated George Walton as candidate for the provincial by-election. His opponent was the incumbent D.H. McFadden,[145] who was in cabinet as Provincial

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[141] "The Council and the Reserve," Dominion City *Weekly Echo*, April 24, 1902 (ICC Exhibit 1a, p. 625).

[142] "The Council and the Reserve," Dominion City *Weekly Echo*, April 24, 1902 (ICC Exhibit 1a, p. 625).

[143] "Mr. LaRiviere Speaks of the Indian Reserve," Dominion City *Weekly Echo*, June 26, 1902 (ICC Exhibit 1a, p. 628).

[144] *Manitoba Free Press*, as quoted in "Our Prosperity Hampered," Dominion City *Weekly Echo*, October 2, 1902 (ICC Exhibit 1a, p. 640).

[145] "Liberal Convention,"*Emerson Journal*, July 11, 1902 (ICC Exhibit 1a, p. 631).

Secretary.[146] Walton had been an active member of the local Liberals for some 23 years and, when he was first approached to run, he had written to Clifford Sifton, Minister of the Interior, asking him – "as a friend" – to advise him on whether to proceed.[147] When Walton later informed Sifton about his nomination, he stated that he thought "the chances for carrying this particular constituency were never better" and then asked if there was any chance that the Roseau River reserve would be opened for settlement, saying "it would be a great boon to the town of Dominion City."[148] Sifton's private secretary replied that, "[i]n reference to the Indian Reserve near Dominion City, I am advised that it is not the intention to open it for settlement at the present time."[149] This was not, however, the last exchange between Walton and Sifton on this matter.

In his annual report for the 1901–1902 fiscal year, Inspector Marlatt stated that the Roseau River band members were "fast passing away, and unless some radical step is taken in their behalf, they will soon be extinct." He suggested, however, that, "if they were removed to some isolated locality, away from the settlements, there might be some hope for them."[150] (It should be noted that these remarks were not included in the published version of Marlatt's report.)

Marlatt's suggestion that a surrender for exchange would be in the Band's interest prompted a request from department headquarters for more information. Laird thought the suggestion of a surrender for exchange "might be worth considering could a suitable isolated locality be found, and were it possible to induce them to remove from their present reserve." However, because the Band had "far more land than they will ever require," Laird did not rule out asking for a surrender for sale. He stated that he had "advised Marlatt to have a talk with ... [the Roseau River band members] in

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146 "Election Result – Hon. D.H. McFadden Re-Elected," Dominion City *Weekly Echo*, July 23, 1903 (ICC Exhibit 1a, p. 807).

147 George Walton, Winnipeg, to Clifford Sifton, April 12, 1902, LAC, MG 27, Series II-D-15, vol. 135, pp. 108003–5 (ICC Exhibit 1a, pp. 622–23).

148 George Walton, Plain Coulee, Manitoba, to Clifford Sifton, July 12, 1902, LAC, MG 27, Series II-D-15, vol. 47, pp. 108006–8 (ICC Exhibit 1a, pp. 632–33).

149 A.P. Collier, Private Secretary to the Minister of the Interior, to George Walton, July 19, 1902, LAC, MG 27, Series II-D-15, vol. 135, p. 853 (ICC Exhibit 1a, p. 635).

150 Extract from Inspector S.R. Marlatt's annual report, June 30, 1902, LAC, RG 10, vol 3730, file 26306-1 (ICC Exhibit 1a, p. 629).

a general way and ascertain whether they would be willing to surrender say the half or a considerable portion of their reserve."[151]

On October 25, 1902, Marlatt reported to Commissioner Laird on his meeting with the Roseau River Anishinabe to discuss the sale of all, or part, of Roseau River reserve. Unable to hire the interpreter he had wanted, he had "put up with what I could get at the reserve which was not very good."[152] Few band members had been able to attend, but three Chiefs and four councillors had nonetheless promised to hold another meeting:

> I am inclined to think that they are favorably disposed to selling a portion of the reserve, they were not prepared to give me an answer at present, and were careful not to commit themselves in any way. They have promised to hold a meeting of the three bands interested between Christmas and New Years, and let me know the result of the deliberations.
>
> I gather that some of the old men are opposed to selling, the young men and workers are favorably disposed and their influence will predominate.
>
> I have some quiet influences at work among them that I think will have a good effect.
>
> There is a great demand for land in that locality at present, I had a straight offer of $10,00 per acre for the twelve eastern sections if sold at auction just now it would bring from $8,00 to $18,00 per acre.
>
> I do not think that any more can be done at present, we wil [sic] have to wait their pleasure at New Years.[153]

Laird relayed the essence of Inspector Marlatt's report in a letter to the Secretary of the Department of Indian Affairs, dated October 28, 1902.[154]

On December 23, 1902, two councillors of the Roseau River Band, Seenee (Cyril) and Sahawisgookesick (Martin Adam), met with Commissioner Laird. Notes were kept of the

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[151] David Laird, Indian Commissioner, to the Secretary, DIA, October 28, 1902, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 644).

[152] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, October 25, 1902, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 642).

[153] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, October 25, 1902, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 642–43).

[154] David Laird, Indian Commissioner, to the Secretary, DIA, October 28, 1902, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 644).

conversation, which took place through an interpreter. In response to Laird's questions, Seenee and Sahawisgookesick affirmed that they spoke for the band members living both at the mouth of the Roseau River and at the Roseau Rapids. They explained that 28 band members, including two of the three Chiefs, had met on December 21 to discuss the surrender proposal and those present had unanimously decided not to sell the reserve. It was for this precise reason – because they did not want to sell the reserve – that they had come to see Laird.[155]

Laird, however, appeared surprised when they asserted that not one band member had expressed a willingness to sell the reserve. Moreover, he then attempted to convince them of the advantages of selling at least part of the reserve:

> Com. [Commissioner] What is the reason? It would be better for them to sell some for they have far more land than they can use. I do not ask them to sell it all but if they would sell a piece they would have money that would help them to get horses and outfits so they could work the other land better. They would have something to help them to get food and put in better crops. Do they understand that?[156]

In reply, the councillors pointed out that the Band was increasing its herd of cattle and the land wanted for surrender was among the only dry land available:

> Int. [Interpreter] He says they dont [sic] want to sell because there is only one high place there and that is the place they are asked to sell and they dont [sic] want to sell that. They have 50 head more of cattle now and they have to take care of them, and in the Spring the water will take the whole business.[157]

Referring to the land in question, the councillors also explained that the Band planned to "plough it and crop it by and by."[158]

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[155] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, pp. 645–47).

[156] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, pp. 645–46).

[157] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 646).

[158] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 647).

The interview continued in the same vein, with Laird advocating surrender and the councillors repeating that the Band did not want to sell. Although he assured them that the government would not force them to sell if they did not want to, Laird urged them to talk it over for another year "and see if the advice I have given them is not the best."[159]

During the course of the interview, the councillors also mentioned that "the Farmer" (farm instructor) was not giving out rations to those that needed them; moreover, under the influence of the Farmer, the doctor hired by the department to provide health care was not responding to requests for help. They were silent, however, when Laird asked them if the Farmer was preventing the doctor from attending to the band members because of a quarrel.[160] Although no further information came to light in the interview, Laird later asked Marlatt to look into these matters.[161]

After reading Laird's notes of the interview, Inspector Marlatt expressed regret that the Band had decided not to surrender and questioned the unanimity of the Band's refusal:

> I am sorry indeed to hear of their decision not to surrender, I presume nothing further can be done at present, I think inter-tribal strife and jealousy is the real reason of their refusal.
>
> ...
>
> I may say that the two men who waited upon you are of the old school, and nothing that the Department can do will satisfy them, I take it that they are largely responsible for the way things have gone re the surrender.[162]

Marlatt also rejected, with a detailed explanation, the complaints regarding rations and medical assistance.[163]

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[159] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 648).

[160] David Laird, Notes of an interview with Seenee (Cyril) and Sahawisgookesick (Martin Adam), December 23, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, pp. 648–49).

[161] David Laird, Indian Commissioner, to S.R. Marlatt, Inspector of Indian Agencies, December 24, 1902, LAC, RG 10, vol. 3656, file 82, part 29 (ICC Exhibit 1a, p. 651).

[162] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 652–53).

[163] S.R. Marlatt, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 26, 1902, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, pp. 652–53).

In January 1903, Clifford Sifton completed his tour of immigration offices in the United States and stopped in Winnipeg to speak at the Young Men's Liberal Club.[164] According to a subsequent newspaper account, "a deputation composed of Mr. George Walton and others, waited upon the above gentleman [Sifton] and after some discussion obtained permission to allow Agent Marlatt to offer the [Roseau] Indians tempting inducements to sell their right to the land."[165]

On the same day that Sifton made his speech, January 13, 1903, his private secretary (who was also in Winnipeg) sent two letters to Inspector Marlatt in Portage la Prairie instructing him to go to Roseau River "within the next week" to try to obtain a surrender.[166] One of the letters – marked "Personal" – gave him additional instructions:

> Mr Sifton wants you to go at once to the Rosseau [*sic*] Reserve and endeavour to secure a surrender. You should see Mr. George Walton of this City, who is at Dominion City just now, regarding the matter. Try and secure the surrender within the next week.[167]

Marlatt expected to be in Dominion City on Monday, January 19, and asked the Indian Commissioner to send him the surrender forms there.[168] The Commissioner immediately sent two blank forms of surrender, plus one copy for the office. He filled in "for your guidance what is required except the description of the land and the terms of surrender." He also instructed Marlatt that "[t]he surrender should be signed in duplicate and assented to as required by Section 39 of the Indian Act as amended."[169]

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[164] "To Speak Tomorrow: Hon. Mr. Sifton at the Young Liberal Club Rooms," *Manitoba Free Press*, January 12, 1903 (ICC Exhibit 1a, p. 658).

[165] Dominion City *Weekly Echo*, February 19, 1903 (ICC Exhibit 1a, p. 694).

[166] A. Collier, Private Secretary, Winnipeg, to S.R. Marlatt, Inspector of Indian Agencies, January 13, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 454 and p. 53 (ICC Exhibit 1a, pp. 659 and 660).

[167] A. Collier, Private Secretary, Winnipeg, to S.R. Marlatt, Inspector of Indian Agencies, January 13, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 53 (ICC Exhibit 1a, p. 660).

[168] Indian Commissioner's Office, Winnipeg, note to file: "Telephone message from Agent Swinford, Portage la Prairie," January 16, 1903, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 664).

[169] David Laird, Indian Commissioner, to S.R. Marlatt, Inspector of Indian Agencies, January 16, 1903, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 665).

On the afternoon of January 19, 1903, George Walton spoke at the annual meeting of the Liberal Association of the Emerson Electoral District, held in Dominion City, and announced that "negotiations were now in progress for the opening of the Indian Reserve near Dominion City for settlement, and he hoped the desired object would be obtained."[170]

The next day, however, when Marlatt met with a large gathering of Indians on their reserve, they again absolutely refused to surrender their land. There is no report in the record from Marlatt or any other government official, but the Dominion City *Weekly Echo* did cover the meeting:

> Mr. S.R. Marlatt, inspector of Indian agents, addressed a large gathering of the three tribes of Indians on their reserve last Tuesday [January 20], for the purpose of requesting them to give up part or the whole of their land. Although Mr. Marlatt made proposals that had never before been offered to Indians they absolutely refused to have anything to do with his offers. The impression prevails that some person has been inducing them to ask absurd figures for such land, thinking the government would pay it. Mr. Marlatt was very disappointed in not being able to persuade them to open their reserves, as such a thing would be of great advantage to the district. Let us hope they will come to their senses soon.[171]

On January 28, 1903, in response to yet another petition from local residents – forwarded by MP Alphonse LaRivière – Clifford Sifton expressed the view that a surrender of the Roseau River reserve was unlikely:

> You are no doubt also aware that the removal of Indians from an Indian reserve does not depend upon my recommendation, nor upon the wishes of the Government, but upon the willingness of the Indians to remove. A short time ago instructions were given to the Inspector of the District to if possible procure a surrender of this territory, but although his formal report is not at hand I believe the Indians declined to accede to the suggestion which was made to them. Under these circumstances

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[170] "Emerson Liberals," *Emerson Journal*, January 22, 1903 (ICC Exhibit 1a, p. 666). In July 1903, Walton lost the by-election by just 19 votes. See "Election Result – Hon. D.H. McFadden Re-Elected," Dominion City *Weekly Echo*, July 23, 1903 (ICC Exhibit 1a, p. 807).

[171] Dominion City *Weekly Echo*, as quoted in "Indians Refuse to Give up Land: Inspector Marlatt Addresses the Tribes on Dominion City Reserve," *Manitoba Free Press*, Winnipeg, January 24, 1903 (ICC Exhibit 1a, p. 669).

> there does not seem to be much probability that the reserve will be thrown open to settlement at an early date.[172]

SURRENDER OF ROSEAU RIVER IR 2, JANUARY 30, 1903

Two days later, on Friday, January 30, 1903, three Chiefs and nine headmen signed a surrender of approximately 12 square miles of Roseau River IR 2, using "X"s to mark their signatures. Chief Antoine and Marlatt signed the required affidavit before a Justice of the Peace in Letellier on the following day.[173]

The surrender document on file with the Department of Indian Affairs (which appears to be an original and not a copy) has various typed additions, including the name of the Band, the description of the area surrendered, and the terms agreed upon. The only handwriting on the document are the day and month of the date and the various signatures.[174]

The three Chiefs – Sheshebance, Nashwasoop, and Antoine – and nine headmen – Adam Martin, Sennee, Wapose, Alexander, Thomas, Pierre, Kahwakinniash, Jim, and John – are identified as the "Chiefs and Principal men of the Roseau River Band of Indians resident on our Reserves No. 2 and 2a." The document states that they agreed to surrender 12 square miles of IR 2, described as:

> all that portion of the Indian Reserve No. 2 (two) on the Roseau River, as shown by a map or plan of the said Reserve made by A.W. Ponton, D.L.S. in September and October 1887 described as follows: –
>
> Commencing at the North East corner of the said Reserve, thence Westerly along the North boundary of the said Reserve a distance of two miles, thence Southerly along a line drawn parallel to the Eastern boundary of the said Reserve to a point where the said line touches the Eastern bank of the Red River, thence along the said Eastern bank of the Red River, to the Southern Boundary of the said Reserve thence Easterly along the said Southern boundary to the South East corner of the said

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[172] Clifford Sifton, Minister of the Interior, to A. LaRivière, MP, January 28, 1903, LAC, MG 27, Series II-D-15, vol. 250, p. 270 (ICC Exhibit 1a, p. 676).

[173] Surrender, January 30, 1903, and Surrender Affidavit, January 31, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 677–80, 681–83).

[174] Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 678–80).

> Reserve thence Northerly along the said Eastern boundary of said Reserve six miles more or less to the place of beginning.[175]

The surrender contained two standard terms or conditions: first, that the government would sell the land upon such terms as it deemed most conducive to the welfare of the Band, and; second, that part of the sale revenue, minus an amount to be deducted for administrative purposes, would be placed to the credit of the Band.[176]

The Chiefs and principal men agreed to "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 capital and interest that may accrue from said capital secured from the sale of lands herein surrendered."[177] In addition, the surrender stipulated the following conditions:

- the surrendered lands would be surveyed and sold "at the earliest possible date";[178]
- "one tenth of the amount realized from said sale shall be expended soon as available for such articles or commodities as the Indians may desire and the Department approves of. Any advances made at this time, or at any time subsequent to the sale of the said lands to be repaid from the 10% before mentioned";[179] and
- "the Department shall purchase for the Indians herein interested, from the capital funds of the Bands two sections of land adjacent to the Reserve known as Reserve NO. [*sic*] 2a., or Roseau Rapids, said lands to be purchased as soon as funds are available."[180]

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175 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 678).

176 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

177 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

178 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

179 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

180 Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

The affidavit signed by Chief Antoine and Marlatt attested that the surrender had been taken in conformity with the *Indian Act*:

> And the said Chief Antoine says:
>
> That the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present.
>
> That such assent was given at a meeting or council of the said Band of Indians summoned for that purpose, according to their Rules, and held in the presence of the said Chief Antoine.
>
> That no Indian was present or voted at such council or meeting who was not an habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.[181]

The surrender was accepted by an Order in Council dated February 25, 1903, which also authorized the Superintendent General to sell the reserve lands "in the best interest of the Indians concerned without reference to the Land Regulations of the Department of Indian affairs, as established by Order in Council of the 15th September, 1888, governing the disposal of Indian lands."[182]

In submitting the surrender documents to department headquarters, Inspector Marlatt provided no details of who or how many of the band members he met with or who voted for and against the proposal. Marlatt forwarded the signed surrender to Ottawa on February 2, 1903, reporting that he had convinced the Band with great difficulty and only after repeated promises that the terms of the surrender would be carried out to the letter:

> I secured the surrender on the authority of the Sup'd [sic] General of Indian Affairs.
>
> I trust that the terms of surrender will be closely observed, I had very considerable difficulty in getting it, and only after repeated promises that the Department would carry out the terms of the agreement to the letter.

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[181] Surrender Affidavit, January 31, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, pp. 681–82).

[182] Order in Council PC 241, February 25, 1903, DIAND, Indian Lands Registry, Instrument no. R5295 (ICC Exhibit 1a, pp. 702–3).

> The survey should be made at once, and the lands placed on the market before the first of April, it is important that the sale should be made before the spring freshets, the land will bring high prices if placed on the market soon as excitement runs high over them.[183]

Four months later, however, in June 1903, Marlatt gave further insight into how he had obtained the surrender:

> The surrender was obtained not by the desire of the Indians but by the strong wish of the Department. It was with great difficulty secured and only after a clear understanding that the 10% would be available almost immediately after the sale. The money is theirs and it will be very hard to convince them that the Department have any control in the matter ... They are a very turbulent, unreasonable, non-progressive, degenerate band, and I fear that little can be done for them while they remain where they are, they are fully posted as to the value of their lands, and last but most important it will be but a short time until they are again asked to surrender the balance of the reserve, and unless they are generously and fairly treated according to their own ideas at this time they will be very slow to sign another surrender.[184]

Although Marlatt's reports on the surrender negotiations were scant, other important sources of evidence are available. According to Elder Tom Henry, who was interviewed by Roy Antoine in 1973, there was no general assembly or vote held. Antoine reported as follows in August 1973:

> I received quite an upset reaction from Mr. Henry and he stated that the Department was miserable that time. He mentioned that at that time the inspector's name was Marlette [*sic*]. He also informed me that they didn't have a referendum before the surrender took place. The people weren't informed on what was taking place and he also states that the Agent forced them to sell the land. They were promised $15.00 every year for so many years.
>
> ... He [Henry] also informed the chief and council at that time that they shouldn't sell the land but was told that he didn't know anything. The chief also said that they were going to be rich at that time.[185]

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[183] S.R. Marlatt, Inspector of Indian Agencies, to the Secretary, DIA, February 2, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, p. 685).

[184] Inspector of Indian Agencies to the Commissioner of Indian Affairs, June 19, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 790–91).

[185] Roy Felix Antoine, "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973, p. 5 (ICC Exhibit 12, p. 8).

Attached to Antoine's report are the notes of the actual interview. According to Henry, "[t]he old people were crazy (not to hold a general assembly). They were promised that they would be rich."[186]

Lawrence Laroque (born in 1906), another Elder interviewed by Antoine, said that it was the Roseau Rapids people that were in favour of the surrender. He also affirmed that "[t]hey held general meetings for other surrenders, but not this time (when they surrendered the 12 sections)."[187]

In September 2002, at a community session convened by the Indian Claims Commission, Elder Rose Nelson also stated that there was no consensus with regard to the surrender. Moreover, she stated that her father had told her that alcohol had been passed around before the surrender was obtained.[188] At a previous community session, in July 2002, Elder Ed Smith mentioned that his grandfather had told him of the lack of consensus.[189] Another Elder, Elsie Patrick, alleged in July 2002 that those who signed the document thought it was "just like a lease or something, they were renting the land."[190] This was also the understanding of Gordon Pierre, whose grandfather Joseph Pierre was married with children at the time of the surrender.[191]

At the July 2002 community session, Elder Oliver Nelson provided a possible explanation for this apparent inconsistency. He alleged that the surrender document had been forged, but, when the Chiefs and councillors found out, they did nothing because they were embarrassed, having

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186 Roy Felix Antoine, notes attached to "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973 (ICC Exhibit 12, p. 17).

187 Roy Felix Antoine, notes attached to "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973 (ICC Exhibit 12, pp. 19–20).

188 ICC Transcript, September 10, 2002 (ICC Exhibit 5b, pp. 8, 12, Rose Nelson).

189 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, pp. 18–19, 23, Ed Smith).

190 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, p. 29, Elsie Patrick). She also stated that four men on the reserve were taken to Ottawa to sign the document, a statement that does not correspond with the rest of the evidence on record; however, it may be that she was confusing it with a trip to Ottawa in 1911, in which delegates from Roseau River raised questions regarding the 1903 surrender. See DIA, "Notes of representations made by delegation of Indians from the West," January 24, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 1a, pp. 1142–79).

191 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, p. 85, Gordon Pierre). Joseph Pierre is listed under band number 233 in the Roseau River Band treaty annuity paylist, dated July 8, 1903, LAC, RG 10, vol. 9378, p. 70 (ICC Exhibit 1j, p. 24).

"abuse[d] some liquor and they didn't want to come back to the community and say what happened."[192]

In 1904, when LaRivière raised the question of another surrender of more of the reserve in the House of Commons, Minister Sifton's reply revealed something of the government's policy and approach to surrenders. LaRivière stated:

> I understand the government have adopted a policy whereby all these little patches of land known as reserves may be thrown open in the more settled parts of the Province of Manitoba and the Territories and an equivalent found elsewhere. They are an impediment to colonization, and are not in the best interests of the Indians themselves ... But a step in the right direction has been taken with respect to the Indian reserve at Roseau River. A portion of the reserve has been thrown open for settlement ... It is valuable land for settlers, but useless for the Indians because they do not cultivate it. If the balance of the Indians at Roseau River were removed and the rest of the reservation thrown open for settlement, it would be in the best interest of the country and of the Indians themselves.[193]

Sifton then replied:

> Whatever may be deemed desirable or otherwise, the fact of the matter is that the Indians own these lands just as much as my hon. friend (Mr. LaRivière) owns any piece of land for which he has a title in fee simple. The faith of the government of Canada is pledged to the maintenance of the title of these Indians in that land. Under the arrangement that we have made with them, our faith is pledged that we will not disturb them in the occupation of the land which has been reserved for them, except upon their own consent being given in a specified form. We follow the policy of getting the consent wherever we can when we think it will not interfere with the means of the livelihood of the Indians; for we realize, as my hon. friend does, that it would be to the interest of the Indians that the land should be thrown open for settlement and sold, and that they should be paid the interest on the proceeds rather than keep the land while putting it to no use. But my hon. friend recognizes the fact that we have to proceed in a diplomatic way and get the Indians to surrender their lands when they are willing to do so. The officers of the department, having constant dealings with the Indians, know how far it is safe to go in each particular case. In the case to which my hon. friend refers, that of the Roseau reserve, after urgent requests had been made by the settlers, with some difficulty the Inspector, Mr. Marlatt, I think

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192 ICC Transcript, July 31, 2002 (ICC Exhibit 5a, p. 159, Oliver Nelson).

193 Canada, House of Commons, *Debates* (July 18, 1904), 6952 (ICC Exhibit 1a, p. 904).

> it was, secured the consent of the Indians to sell a portion of that reserve. Under the law, the Indians are entitled to be paid in cash ten per cent of the proceeds of the land sold for distribution among themselves. I presume that the original intention of putting that in the statute was to offer a sort of inducement to the Indians to sell, for the Indian, like some whitemen, has a fairly good appreciation of cash in hand, and the fact that they were going to secure something might be an inducement to them to surrender, when possibly they would not surrender if they were not going to get something immediately.[194]

In 1906, Sifton's successor as Minister of the Interior (and Superintendent General), Frank Oliver, gave further insights into the promises made in order to obtain the 1903 surrender:

> During the negotiations for this surrender it was necessary for the officer representing the Department on this occasion to go very fully into the financial position which would be set up by the sale of these lands and the funding of the money for the Rosseau [*sic*] River Band. It was explained that, as the land was to be paid for in instalments by purchasers, and that, as further instalments would bear interest at the rate of 5%, there would be a considerable amount of interest available for distribution when the second payment (with interest) had been made. His assertion of these facts was in the nature of a promise that such interest would be forthcoming and would be distributed annually in the future.[195]

In May 1909, Indian Agent R. Logan commented that he was "of the opinion that Mr. Marlatt promised the Indians, that they would be paid about $3000.00 a year, and the Indians certainly understood it was to be every year, and not for only three years."[196]

In 1911, Roseau Chief Antoine and others went to Ottawa demanding details "about selling the reserve and about ... money from the surrender. Inspr. Marlatt made the arrangements about the sale and said that in ten years all the land sold would be paid for. ... Being a good piece of land, we asked $15.00 an acre for it."[197]

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194 Canada, House of Commons, *Debates* (July 18, 1904), 6952–53 (ICC Exhibit 1a, pp. 904–5).

195 Frank Oliver, SGIA, to the Governor General in Council, February 21, 1906, LAC, RG 10, vol. 3731, file 26306-2 (ICC Exhibit 1a, p. 947).

196 R. Logan, Indian Agent, to the Secretary, DIA, May 8, 1909, LAC, RG 10, vol. 3731, file 26306-A (ICC Exhibit 1a, p. 1045).

197 DIA, "Notes of representations made by delegation of Indians from the West," January 24, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 1a, pp. 1148–50).

SUBDIVISION AND SALE OF THE SURRENDERED IR 2 LANDS

In March and April 1903, Surveyor J. Lestock Reid prepared and submitted a survey and valuation of the surrendered lands.[198] At about the same time, the department placed advertisements in local newspapers[199] and informed parties who had previously expressed interest in the lands.[200] The advertisements stipulated that the terms of the sale were "One-tenth cash at time of sale, the balance in nine equal annual instalments with interest at the rate of 5 per cent."[201]

The lands were offered for sale by public auction in Dominion City on Friday, May 15, 1903.[202] Before the sale, it was announced that any band member who had planted on the surrendered land could take up the crop when it matured, subject to rent to be decided by the department. Also, "the Indians owning fences on any of the lands in question will be allowed to remove the wire, rails and posts next autumn."[203]

According to the account in the newspapers, the sale was a great success, with many local farmers and bona fide settlers (not speculators, as feared) bidding on the land:

> Nothing in real estate circles has for a considerable time created as much interest as the sale of a portion of the Indian Reserve. Interest was at fever heat when the train from Winnipeg arrived. Rigs were drawn up in large numbers in front of the livery stables, and in addition to the great crowd of strangers there were many Indians, some of whom had gone in for donning the brightest garbs they could obtain. The sale was held in Morkill's Hall and fully 300 must have been present. Mr. James

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198 J. Lestock Reid to the DSGIA, April 7, 1903, with attached valuation, LAC, RG 10, vol. 3730, file 26306-2 (ICC Exhibit 1a, pp. 749, 750).

199 "Public Auction of Indian Lands," Dominion City *Weekly Echo*, March 26, 1903 (ICC Exhibit 1a, p. 743); "Public Auction of Indian Lands," *Emerson Journal*, April 4, 1903 (ICC Exhibit 1a, p. 748).

200 J.D. McLean, Secretary, DIA, to Laird Brothers, Dresden, ON, March 23, 1903, LAC, RG 10, vol. 5021, p. 676 (ICC Exhibit 1a, p. 737); J.D. McLean to W.J.L. McKay, Orangeville, ON, March 25, 1903, LAC, RG 10, vol. 5023 [page number illegible] (ICC Exhibit 1a, p. 739).

201 "Public Auction of Indian Lands," Dominion City *Weekly Echo*, March 26, 1903 (ICC Exhibit 1a, p. 743).

202 Frank Pedley, DSGIA, memorandum to J.D. McLean, with marginalia by McLean, March 19, 1903, LAC, RG 10, vol. 3730, file 26306-2 (ICC Exhibit 1a, p. 731); J.B. Lash, Clerk of Sale, to D. Laird, Indian Commissioner, May 22, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 770–71).

203 J.B. Lash, Clerk of Sale, to D. Laird, Indian Commissioner, May 22, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 770–71).

> Dowswell, of Emerson, was the auctioneer and did his work well and quickly considering the delay occasioned by payments being made during the sale and by twenty minutes to four the whole 47 parcels had been sold ... From start to finish it was never a speculator's sale. There were a large number of local farmers bidding, together with a few from Ontario and the N.W.T. The Americans were present in strong numbers.[204]

J.B. Lash, the department's clerk in charge of the sale, confirmed its success.[205]

George Walton and his friends were also pleased and later expressed their gratitude to Minister Sifton and his private secretary for their assistance:

> I am pleased to say that the sale passed off most satisfactory and the lands brought fair prices and every person present congratulated the Department on the fair manner in which it was conducted. I desire to thank Hon Mr. Sifton and yourself for the assistance rendered me in connection with this matter.[206]

The total amount realized from the sale was $99,822.50, and the sale price per acre ranged from $10.00 to $15.25, with the average price per acre being $12.96.[207] On account of two errors that were later fixed, the down payments totalled $9,978.25 – four dollars short of one-tenth of the total purchase price of the surrendered lands.[208] The Roseau River Indians received a total of $8,588.60, either in cash distribution or goods purchased, all paid out in the year after the sale. The difference consisted of the 10 per cent of the purchasers' down payments ($997.82) which was deducted for the Indian Land Management Fund and the $391.83 that remained in the Band's capital account.[209]

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[204] Dominion City *Weekly Echo*, May 21, 1903 (ICC Exhibit 1a, p. 767).

[205] J.B. Lash, Clerk of Sale, to D. Laird, Indian Commissioner, May 22, 1903, LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 771–72).

[206] George Walton, to A.P. Collier, Department of the Interior, June 3, 1903, LAC, MG 27, Series II-D-15, vol. 152, p. 121663 (ICC Exhibit 1a, p. 782).

[207] Public History Inc, "Roseau River Indian Reserve No. 2, 1903 Surrender Claim Historical Report," revised October 28, 1997, p. 38 and Appendix B, table 4 (ICC Exhibit 3c, pp. 38, 55–57).

[208] J.B. Lash, "Return of Auction Sale of Indian Lands in Roseau River Reserve," [May 22, 1903], LAC, RG 10, vol. 3730, file 26306-1 (ICC Exhibit 1a, pp. 775–76).

[209] Public History Inc, "Roseau River Indian Reserve No. 2, 1903 Surrender Claim Historical Report," revised October 28, 1997, p. 38, and Appendix B, table 4 (ICC Exhibit 3c, pp. 36–38, 58).

The final term of the surrender stipulated "that the Department shall purchase for the Indians herein interested, from the capital funds of the Bands two sections [640 acres x 2 = 1,280 acres] of land adjacent to the Reserve known as Reserve NO. [*sic*] 2a., or Roseau Rapids, said lands to be purchased as soon as funds are available."[210] At the time of the surrender, the reserve at the Roseau Rapids consisted of the 800 acres in section 11 and the southeast quarter of section 10, both in township 3, range 4, east of the principal meridian. By May 21, 1904, 1,280 acres in sections 13, 14, and 24 of the same township were purchased and added to this reserve, which was later confirmed as Roseau River IR 2A.[211]

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[210] Surrender, January 30, 1903, DIAND, Indian Lands Registry, Instrument no. R5294 (ICC Exhibit 1a, p. 679).

[211] David Laird, Indian Commissioner, to Thomas G. Mathers, Barrister, Winnipeg, May 13, 1904, LAC, RG 10, vol. 3565, file 82, part 29 (ICC Exhibit 1a, p. 894); Certificate of Title No. 51845, May 21, 1904, in DIAND, Indian Lands Registry, Instrument no. R6246 (ICC Exhibit 1a, p. 895); DIA, "TR. 1 Roseau Rapids I.R. No. 2-A, TP. 3, R. 4, E. 1st. Meridian, Manitoba" [1904], Plan T-1305 CLSR MB (ICC Exhibit 7h).

APPENDIX B

INTERIM RULING, FEBRUARY 17, 2007

February 17, 2005

Stephen M. Pillipow
Woloshyn & Company
200 Scotiabank Building
111 - 2nd Avenue South
Saskatoon, SK S7K 1K6

-and-

Perry Robinson
DIAND Legal Services
10 Wellington Street, 10th Floor
Gatineau, QC K1A 0H4

RE: Roseau River Anishinabe First Nation - 1903 Surrender
ICC File: 2106-03-01
Panel Decision on two Phases to Inquiry

Dear Counsel:

This letter is further to Roseau River First Nation's request for a decision from the ICC Panel to convert the inquiry into two phases as provided in Mr. Pillipow's letters to the ICC dated November 2, 2004 and November 22, 2004. Mr. Pilipow made a request to the Panel that the "issues that deal with the Post-Surrender breaches of fiduciary obligations be held in abeyance". This request was reaffirmed by Mr. Pillipow in a letter sent to the ICC dated February 7, 2005 following the near completion of the parties recent joint research. Counsel for Canada, Mr. Robinson, set out Canada's concerns in a letter dated December 6, 2004.

The Panel considered the positions advanced by both parties. The Panel members concluded that they cannot justify re-framing the inquiry into two distinct phases at this stage. It was observed that this inquiry has a rather lengthy procedural history. The Panel ask that the parties work within the present structure and the agreed-upon issues. Further, the Panel recommends that should the First Nation decide that it does not wish to proceed with the post-surrender issues, the First Nation may request to have it severed from the Agreed Statement of Issues and withdrawn from the ICC inquiry, rather than held in abeyance.

The Panel members wish to convey to the parties their commitment to the resolution of this inquiry. They strongly encourage the parties to deal with any outstanding research matters in a timely manner so that the parties can progress to the next stage of the inquiry.

Yours truly,

[signed]

Marcelle M. Marion
Associate Legal Counsel

c.c. Chief Terrence Nelson, Roseau River Anishinabe First Nation
Dal McCloy, Roseau River Anishinabe First Nation
Richard Yen, DIAND, Specific Claims Branch
Brad Morrison, DIAND, Specific Claims Branch, Winnipeg

APPENDIX C

CHRONOLOGY

ROSEAU RIVER ANISHINABE FIRST NATION: 1903 SURRENDER INQUIRY

1 Planning conference — Ottawa, December 17, 1993; Ottawa, October 23, 1997; Ottawa, April 29, 2002

2 Community session — Roseau River, July 31, 2002

The Commission heard from Ed Smith, Elsie Patrick, Marjorie Nelson, Lawrence Antoine, Chief Felix Antoine, Gordon Pierre, John Alexander, Martha Larocque, Lawrence Henry, Robert Johnson, and Oliver Nelson.

Roseau River, September 10, 2002

The Commission heard from Rose Nelson, Ed Smith, and Robert James.

3 Interim Ruling

Roseau River Anishinabe First Nation: 1903 Surrender – Interim Ruling, February 17, 2005

4 Expert session — Winnipeg, June 13, 2005

The Commission heard from Stan Lore and Fred de Mille, AFC Agra Services.

5 Written legal submissions

- Submission on Behalf of the Roseau River Anishinabe First Nation, October 28, 2005
- Submission on Behalf the Government of Canada, January 20, 2006
- Reply Submission on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006

6 Oral legal submissions — Winnipeg, March 9, 2006

7 Content of formal record

The formal record of the Roseau River Anishinabe First Nation: 1903 Surrender Inquiry consists of the following materials:

- Exhibits 1 – 22 tendered during the inquiry, including transcripts of community and expert sessions
- transcript of oral session

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