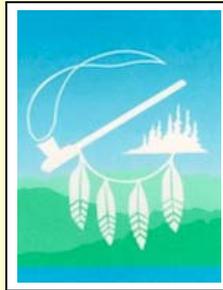


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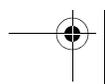
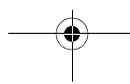
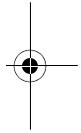
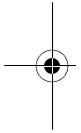
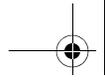
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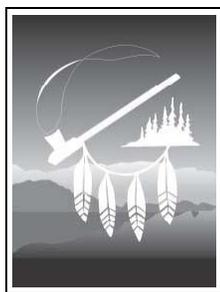
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INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION



(2009) 23 ICCP

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RENÉE DUPUIS, C.M., *Ad.E.*

COMMISSIONERS

DANIEL J. BELLEGARDE

JANE DICKSON-GILMORE

ALAN C. HOLMAN

SHEILA G. PURDY

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FROM THE CHIEF COMMISSIONER

This is the 23rd volume of the *Indian Claims Commission Proceedings* to be published. I am pleased to present it on behalf of the Commissioners of the Indian Claims Commission. This volume includes four inquiry reports, five mediation reports, and one letter of response to the Commission's recommendations in completed inquiries.

The first report, on the Roseau River Anishinabe First Nation 1903 Surrender Inquiry, dated September 2007, relates the history, analysis, and findings of the inquiry. The panel recommended that the claim regarding the 1903 surrender of a portion of Indian Reserve 2 be accepted for negotiation under Canada's Specific Claims Policy.

The second report, on the Lower Similkameen Indian Band Victoria, Vancouver, and Eastern Railway Right of Way Inquiry, dated February 2008, covers five issues and recommends that the Band's claim for compensation be accepted for negotiation under Canada's Specific Claims Policy.

The third report, on the Lucky Man Cree Nation Treaty Land Entitlement - Phase II Inquiry, dated February 2008, recommends that the treaty land entitlement claim be accepted for negotiation under Canada's Specific Claims Policy.

The fourth report, on the Esketemc Wright's Meadow Pre-emption Inquiry, dated June 2008, sets out the history, analysis, and findings. The panel found that the Band had an interest in Wright's Meadow land but the majority of the panel recommends that the claim be accepted for negotiation under Canada's Specific Claims Policy.

The five mediation reports relate to the successful negotiation, with the assistance of the Commission, in the claims of the Fort Pelly Agency Pelly Haylands Claim (March 2008), the Muskoday First Nation Treaty Land Entitlement Negotiations (April 2008), the Metepenagiag Mi'kmaq Nation Hosford Lot and Red Bank Indian Reserve 7 Negotiations (May 2008), the George Gordon First Nation Treaty Land Entitlement Negotiations (May 2008), and the Sturgeon Lake First Nation Treaty Land Entitlement Negotiations (May 2008).

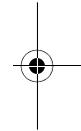
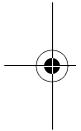
Finally, included in this volume is one letter of response from the Minister of Indian Affairs and Northern Development pertaining to the Roseau River



FROM THE CHIEF COMMISSIONER

Anishinabe First Nation 1903 Surrender Inquiry. The Minister accepted the Commission's recommendation to accept the claim for negotiation.

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



ABBREVIATIONS

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

ABBREVIATIONS

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

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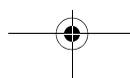
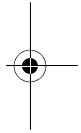
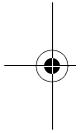
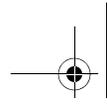
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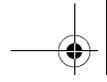
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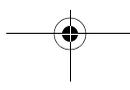
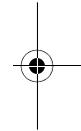
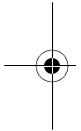
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INDIAN CLAIMS COMMISSION

ROSEAU RIVER ANISHINABE FIRST NATION 1903 SURRENDER INQUIRY

PANEL

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

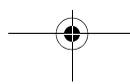
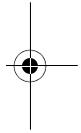
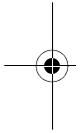
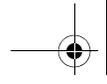
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SEPTEMBER 2007



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ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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), reported (2009) 23 ICCP 3.

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

Panel: Commissioner 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

INDIAN CLAIMS COMMISSION PROCEEDINGS

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

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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

INDIAN CLAIMS COMMISSION PROCEEDINGS

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.

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ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

(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; *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA); *Apsassin v. Canada*, [1993] 3 FC 28 (FCA).

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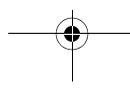
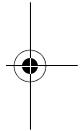
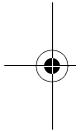
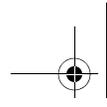
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ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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

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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,

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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

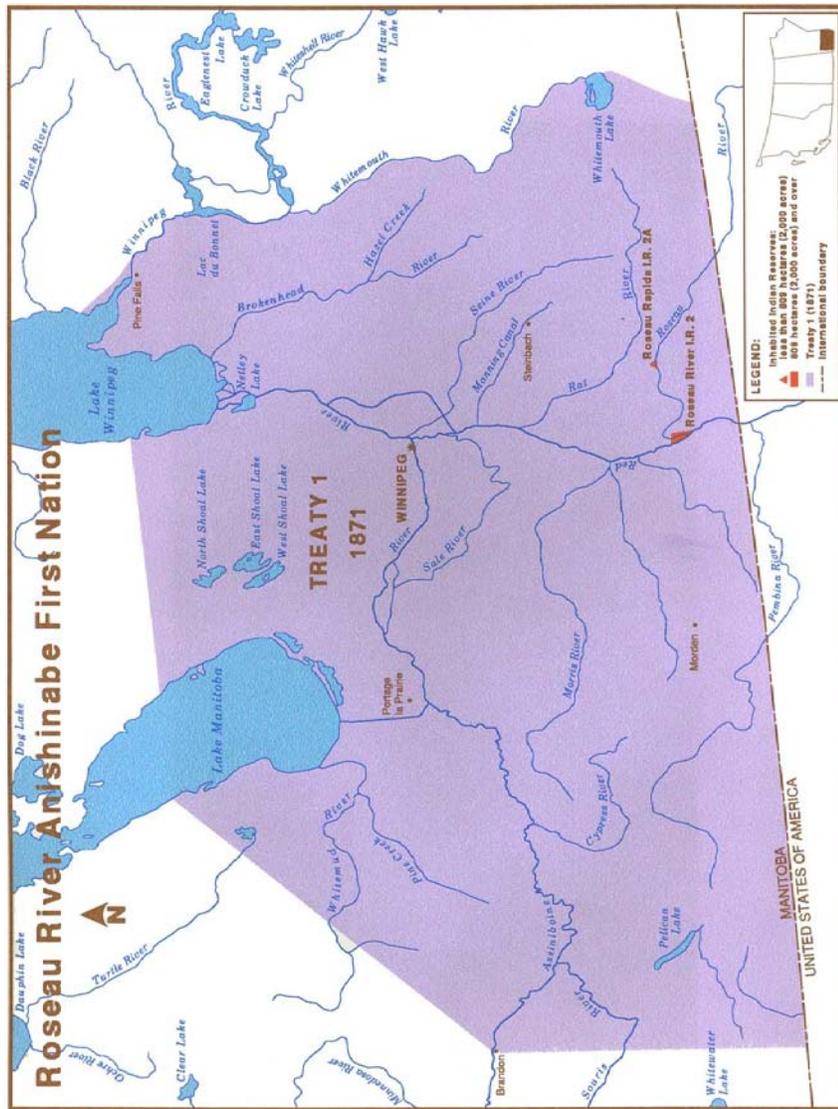
1 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

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.

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PART II

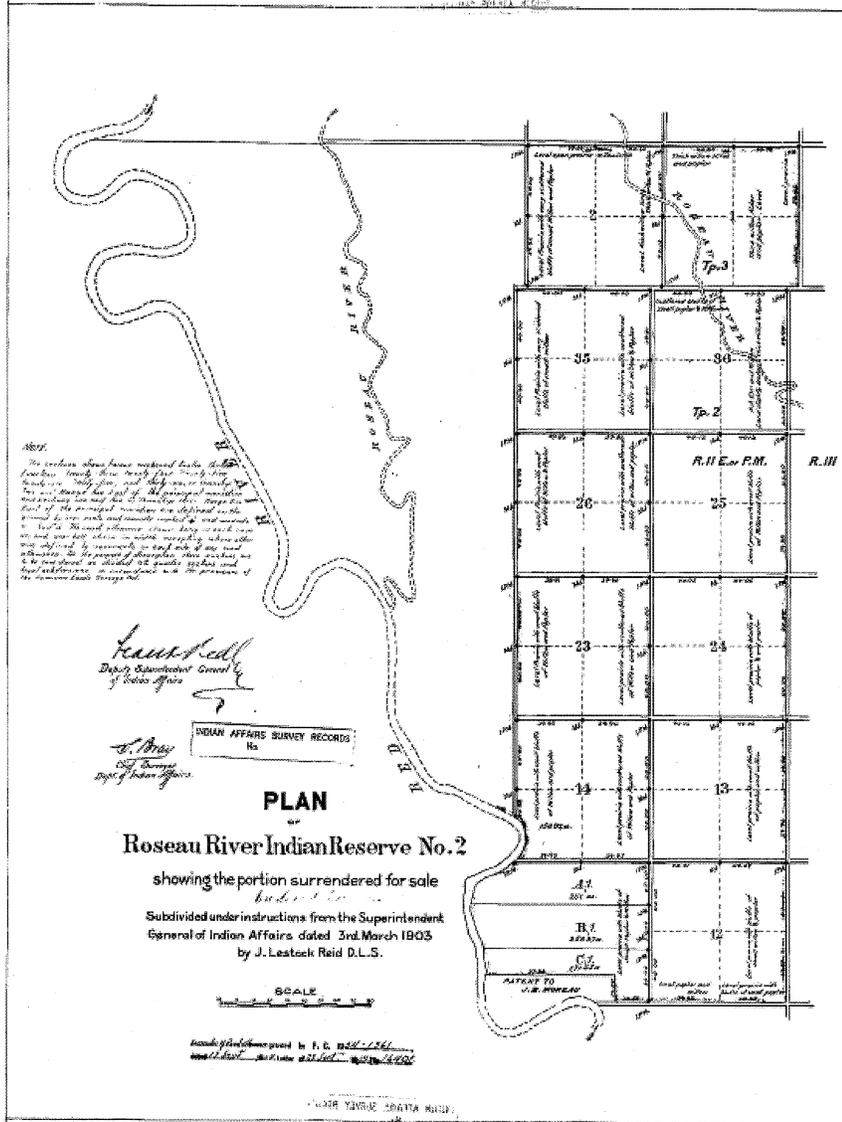
THE FACTS

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 Nanawanaw 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

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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 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 Nanawanaw 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

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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

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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

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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

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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

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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.

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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.

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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?

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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 Band⁵ 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.

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.

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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 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

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.

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Treaty 5, signed in 1875, included language similar to Treaty 3 regarding the 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 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.

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).

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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 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

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).

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*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 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 Ordinance 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

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.

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

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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 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

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.

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.

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“[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 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,

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).

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.

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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 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.

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).

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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 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

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

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created by legislation that the Band would 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 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 Ordinance Lands Act*, in force in 1871, and through successive versions of the

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.

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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 Surrender³⁰ 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.

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

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.

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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 – Shesheban³¹, 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.

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

31 Also referred to as "Seeseepance".

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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 and 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.

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,

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.

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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.

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

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*).

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

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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.

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,

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.

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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" 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

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.

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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.

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 Larocque 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.

Oral History

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

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.

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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:

- 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;

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*).

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- 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 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:

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*).

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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 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

49 *Matbias 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.

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).

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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.

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

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.

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

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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.

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.

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).

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] 1 CNLR 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.

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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 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:

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

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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

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 membership increased to 202, with 57 members being males over the age of 21.⁶⁴ The basis for these numbers are

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

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.

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).

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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 Canada, for and acting on behalf of the whole people of our said Band in Council assembled, do hereby release, remise, surrender⁶⁷

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

65 Treaty annuity payroll, Roseau River Band, July 10 and 11, 1902, LAC, RG 10, vol. 9377, pp. 67–96 (ICC Exhibit 1j, pp. 1–15); Treaty annuity payroll, 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.

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

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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 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

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.”

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

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

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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 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.

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.

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

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In conclusion, we would be reluctant to find that a surrender was a nullity by comparing a number deduced from payroll 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

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

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

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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

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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*:

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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

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 that in different circumstances a band might give its decision-

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

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.

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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 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

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.

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.

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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 *Semiabmoo 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, *Semiabmoo* 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 *Semiabmoo*, 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.

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?

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

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

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

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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.

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.

91 Reply Submission on Behalf of the Roseau River Anishinabe First Nation, February 10, 2006, p. 20, para. 58.
 92 ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 261.

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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

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 1906⁹⁵ 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

- 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).
- 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).

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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 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:

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.

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).

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*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 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

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.

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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 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 *Kabkewistabaw 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 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

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 *Kabkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 82-83. Emphasis added.

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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

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

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.

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).

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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 Nanawanaw 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 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:

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).

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).

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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 Nashwasoop¹¹² 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:

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:

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 "Nashwaskoobe" and "Nashwashoope."

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

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.

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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.

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

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.

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

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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

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:

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

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).

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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

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

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

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.

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week if 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 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

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).

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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

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

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.

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

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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.

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

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).

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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 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,

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

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.

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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

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

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.

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.

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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, 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

134 J.A. Smart, Deputy Superintendent General of Indian Affairs (DSGLA), 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 DSGLA, 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).

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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 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

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.

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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 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 –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

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.

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).

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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

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

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).

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).

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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 arable¹⁵⁰ 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

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

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.

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.

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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 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 reputedly 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

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).

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.”

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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 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:

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

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).

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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 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 flooding¹⁶⁵ 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 events, “it is the Red River that dictates whether or not flooding will occur on the Reserve or

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

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).

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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.

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

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).

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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 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.

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.

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).

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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 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

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).

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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.

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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

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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
Commissioner (Chair)

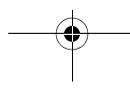
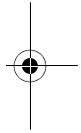
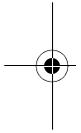
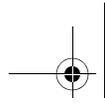


Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

Dated this 18th day of September, 2007



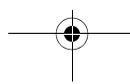
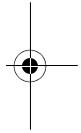
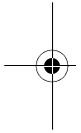
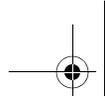
ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

APPENDIX A

HISTORICAL BACKGROUND

ROSEAU RIVER ANISHINABE FIRST NATION 1903 SURRENDER INQUIRY

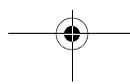
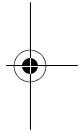
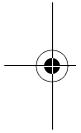
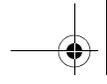
INDIAN CLAIMS COMMISSION



ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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

That surrender, dated November 19, 1869⁴ was subsequently accepted by the Queen.⁵ On June 23, 1870, the *Rupert's Land and North-Western*

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.

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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:

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

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).

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).

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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 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

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.

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).

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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

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

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).

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).

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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 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

- 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).

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with comforts by what you 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 “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

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).

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

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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

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

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).

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).

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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.

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

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).

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).

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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 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 inaccessible [*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 exceedingly [*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

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 E.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).

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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

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

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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).
- 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).

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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 20.86 square miles (approximately 13,350 acres) as “Indian Reserve No. 2 on Roseau River for the bands of Wakowush, Kewetoyash & 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:

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).

⁴⁵ “Treaty No. 1 Manitoba, Survey of Indian Reserve No. 2, on Roseau River for the bands of Wakowush, Kewetoyash & 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.

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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 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 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.

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 E.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 SGLA, 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).

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).

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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

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

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- 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).
 - 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).

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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 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

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).

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).

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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

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 reserve⁶⁸ “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

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).

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).

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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 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 Nanawanaw 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

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

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).

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with them in not giving them the Reserve at the Rapids.” He concluded with 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 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

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).

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).

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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 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

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).

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).

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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 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

- 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).
- 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).

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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

On August 29, 1888, Chief Nashwasoop⁹⁴ 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

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).
 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).

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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

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

- 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).
- 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).

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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 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

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).

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).

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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 operations [*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 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

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).

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).

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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 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

- 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).
- 115 Chief Nayshousoupe 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).

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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 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

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).

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).

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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

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

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

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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 Council, is a purely [*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

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).
 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).

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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 explanations [*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

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

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).

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).

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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 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 paposes 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,

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).
 139 “Waste Land in the Roseau Reserve,” *Dominion City Weekly Echo*, January 23, 1902 (ICC Exhibit 1a, p. 615).

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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:

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

140 “That Roseau Reserve Question,” *Dominion City Weekly Echo*, February 13, 1902 (ICC Exhibit 1a, p. 618).

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. LaRivière Speaks of the Indian Reserve,” *Dominion City Weekly Echo*, June 26, 1902 (ICC Exhibit 1a, p. 628).

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

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 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,

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).

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).

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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 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 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

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).

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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

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

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).

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).

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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

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

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).

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).

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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

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

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).

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).

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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 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:

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).
 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).

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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 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

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).

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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.

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

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).

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).

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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

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

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).

186 Roy Felix Antoine, notes attached to "Report on Research," prepared for the Manitoba Indian Brotherhood, August 31, 1973 (ICC Exhibit 12, p. 17).

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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 “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

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 payroll, dated July 8, 1903, LAC, RG 10, vol. 9378, p. 70 (ICC Exhibit 1j, p. 24).

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).

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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 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.

¹⁹⁴ Canada, House of Commons, *Debates* (July 18, 1904), 6952–53 (ICC Exhibit 1a, pp. 904–5).

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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. Insp. 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

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 newspapers¹⁹⁹ 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

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).
 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).

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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 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

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).

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).

INDIAN CLAIMS COMMISSION PROCEEDINGS

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

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

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).

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).

ROSEAU RIVER ANISHINABE FIRST NATION – 1903 SURRENDER INQUIRY

APPENDIX B

INTERIM RULING, FEBRUARY 17, 2005

February 15, 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. Pillipow 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.

INDIAN CLAIMS COMMISSION PROCEEDINGS

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

INDIAN CLAIMS COMMISSION PROCEEDINGS

-
- 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.

INDIAN CLAIMS COMMISSION

LOWER SIMILKAMEEN INDIAN BAND VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY

PANEL

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

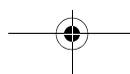
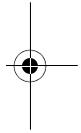
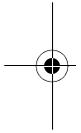
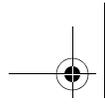
COUNSEL

For the Lower Similkameen Indian Band
Rory Morahan

For the Government of Canada
Douglas Faulkner

To the Indian Claims Commission
John B. Edmond

FEBRUARY 2008



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LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

SUMMARY

LOWER SIMILKAMEEN INDIAN BAND VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY British Columbia

The report may be cited as Indian Claims Commission, *Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry* (Ottawa, February 2008), reported (2009) 23 ICCP 143.

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 J. Dickson-Gilmore, Commissioner S.G. Purdy

British Columbia – Indian Reserve Commission – McKenna-McBride Commission – Reserve Creation – Terms of Union, 1871; **Constitution** – *Constitution Act, 1867*; **Right of Way** – Expropriation – Railway – Reversionary Interest; **Compensation** – Criteria – Damages – Injurious Affection; **Fiduciary Duty** – Reserve Creation – Right of Way; **Indian Act** – Expropriation; **Reserve** – Compensation – Reserve Creation

THE SPECIFIC CLAIM

In 1995, the Lower Similkameen Indian Band submitted a specific claim alleging inadequate compensation for the taking of a right of way in 1905 through what are now its Indian Reserves 2, 7, and 8 for the use of the Vancouver, Victoria and Eastern Railway and Navigation Company (VV&E). The claim also asserted that because the VV&E has abandoned the line, the right of way has reverted to reserve status.

The claim was rejected in 1996. In April 2003, the Indian Claims Commission agreed to the Band's request to hold an inquiry into the rejected claim. The community session, including a site visit, was held at Keremeos on April 19–20, 2004. Thirty-seven community members testified. Counsel for the parties presented legal arguments at Penticton on January 26, 2005, based on previously filed briefs.

INDIAN CLAIMS COMMISSION PROCEEDINGS

BACKGROUND

In 1878, Indian Reserve Commissioner Gilbert Sproat set aside certain lands in the Similkameen River valley for the Lower Similkameen Indian Band, from northwest of what is now Keremeos to the U.S. border. In 1884 and 1888, his successor Peter O'Reilly set aside further lands for the Band. The reserves were surveyed in 1889, and listed in 1902 in the Schedule of Indian Reserves in the Dominion.

In 1905, the VV&E requested, and was granted by order in council, a right of way through the Lower Similkameen reserves for its rail line, which was intended to convey ore from mines at Hedley and Princeton, upstream from Keremeos, to the United States, to link with its parent, the Great Northern Railway. A total of 116.84 acres was taken for the purpose.

Although the railway offered compensation of \$25 per acre, the Indian Agent set the value of land at \$5 per acre. An additional \$2,370 was included in the compensation package for improvements made by individual band members and removal of buildings. The railway paid a total of \$2,954.25, giving it possession.

The next year, Chief Newhumpson complained that compensation for the reserve lands compared unfavourably to that paid to settlers in the area. Local Justice of the Peace R.C. Armstrong supported this complaint, writing that he had received \$100 per acre for equivalent land. Superintendent A.W. Vowell in Victoria thereupon dispatched surveyor Ashdown Green to investigate the apparent discrepancy in values. Green reported that there were no grounds for disturbing the original compensation, and this view was accepted by the department.

The *Indian Act* made reference to arbitration respecting compensation for the compulsory taking of reserve lands. No arbitration ensued in this case.

The railway had significant impact on the reserves and its community. It displaced one village, divided individual holdings, caused injury and death to livestock, and generally disrupted life on the reserves.

In 1913, the McKenna-McBride Commission "confirmed" the reserves as shown in the Schedule of Indian Reserves of that year. The acreages so shown were not reduced for the right of way.

In 1938, the provincial government, in discharge of its obligation under the Terms of Union, 1871, conveyed the reserve lands, including the right of way, to Canada "in trust for the use and benefit of the Indians."

Rail traffic south of Keremeos ceased in 1972 with the wash-out of the bridge over the Similkameen River. The line above Keremeos had been abandoned in 1954. In 1985, the railway, by then the Burlington Northern, applied for and was granted permission by the Canadian Transport Commission to abandon the remainder of the line, from Keremeos to the U.S. border. The Band advised the Commission at the time that it did not object so long as the right of way was returned to it.

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

The status of the right of way is disputed not only by Canada and the Band but also by the Burlington Northern and Sante Fe Railway, as it now is, which lays claim to it.

ISSUES

Did Canada, at the time of the expropriation owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the VV&E Railway for railway purposes?

Did Canada breach a statutory and/or fiduciary duty to the Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the VV&E Railway for railway purposes?

Did Canada owe a statutory and/or fiduciary duty to the Band to name an arbitrator pursuant to the *Indian Act* regarding the taking of the lands in this claim?

Did Canada breach a statutory and/or fiduciary duty to the Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the VV&E Railway for railway purposes?

Did Canada breach a statutory and/or fiduciary duty to the Band to ensure that the lands taken by the VV&E Railway for railway purposes reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Band once those lands were no longer required for railway purposes?

FINDINGS

Canada acknowledged from the outset that it owed a fiduciary duty to obtain adequate compensation for the Band. The level of such duty was in issue. As the Supreme Court of Canada has held, lands set aside for reserve in British Columbia did not fully become Indian reserves until conveyed by the province to Canada in 1938. Before that date, the fiduciary duty owed by Canada respecting the lands was a somewhat lesser duty than after the *Indian Act* reserves were created in 1938. There is nevertheless a substantial fiduciary duty in the pre-reserve creation state. In the Lower Similkameen case, band members, Canada, the province, and the surrounding community all believed in 1905 that reserves had been created. In this circumstance, Canada owed the highest pre-reserve creation fiduciary duty.

There was also a statutory duty arising from the *Railway Act, 1903* to ensure compensation to the Band as in the case of non-reserve lands. Compensation under the statute was to take injurious affection into account. There is also a common law duty to compensate where enjoyment of possession is reduced by Crown action.

INDIAN CLAIMS COMMISSION PROCEEDINGS

The amount paid the Band, \$5 per acre, was grossly disproportionate to that paid for non-reserve lands, the average of which was \$104.91 per acre. The statutory requirement that compensation to the Band should be based on the value of equivalent non-reserve lands was therefore breached. Acceptance of such a low value fell seriously short of the standard of prudence required of a fiduciary. Canada thus breached its fiduciary duty to the Band. This breach was exacerbated by Canada's failure to consider the serious adverse effects on the reserves and community life, thus failing to account for injurious affection.

The *Indian Act* makes reference to arbitration. There was no statutory or fiduciary duty to initiate an arbitration, but the pre-reserve fiduciary duty required Canada to address seriously and conscientiously the valuation problem. This it did not do.

While there is basis for criticism of surveyor Ashdown Green's report, it is not possible to make a finding of breach of either statutory or fiduciary duty in respect of his investigation.

The right of way was taken under the *Railway Act, 1903*, which permitted the taking of provincial lands for railway purposes. What was taken was a mere easement, which ceased no later than 1985, when abandonment of the line was formally approved. The right of way, together with the other reserve lands, had been conveyed to Canada in trust for the Band in 1938. With the cessation of the easement, the full reserve interest in the right of way revived. This finding is supportable on both legal and equitable grounds.

RECOMMENDATIONS

That the Lower Similkameen Indian Band's claim for compensation be accepted for negotiation under Canada's Specific Claims Policy.

That Canada take the necessary steps, by litigation or otherwise, to ensure that the legal status of the former VV&E right of way lands is in every respect that of Indian reserve land set apart for the use and benefit of the Lower Similkameen Indian Band.

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

Wewaykum Indian Band v. Canada, [2002] 4 SCR 245; *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816; *Kruger et al. v. The Queen*, [1986] 1 FC 3; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and*

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

Northern Development), [1995] 4 SCR 344 (sub nom. *Apsassin*); *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101; *Belfast Corporation v. O.D. Cars Ltd.* [1960] AC 490; *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302; *Minister of Highways (B.C.) v. British Pacific Properties*, [1960] SCR 561; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 CNLR, affirmed [1986] BCJ No. 407 (QL), reaffirmed 2002 BCCA 478; *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSC 933, affirmed in part 2002 BCCA 478; *Reference re: British North America Act, 1867, s. 108 (B.C.)*, [1906] AC 204; *Reference re: Railway Act, s. 189 (Canada)*, [1926] SCR 163; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895; *A.G. v. DeKeyser's Royal Hotel Ltd.*, [1920] AC 508; *Canadian Pacific Limited v. Paul*, [1988] 2 SCR 654; *Canadian Pacific Limited v. Matsqui Indian Band*, [2000] 1 FC 325; *Squamish Indian Band v. Canada*, 2001 FCT 480; *Peter v. Beblow*, [1993] 1 SCR 980.

ICC Reports Referred To

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

Treaties and Statutes Referred To

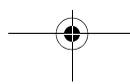
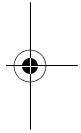
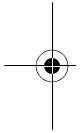
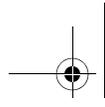
Indian Act, RSC 1886; *Railway Act, 1903*, SC 1903; *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898; *Railway Act*, RSC 1927; *An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, 1880, SBC 1880.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992); P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007); Donovan W.M. Waters, *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005); A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004).

COUNSEL, PARTIES, INTERVENORS

R. Morahan for the Lower Similkameen Indian Band; D. Faulkner for the Government of Canada; J.B. Edmond to the Indian Claims Commission.



LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

PART I

INTRODUCTION

The Similkameen River flows southeasterly from its origins in British Columbia's Cascade Mountains, entering the state of Washington and emptying into the Okonagan River (Okanagan in Canada). From 1878 on, lands were set aside in the Similkameen Valley from above Cariamas (now Keremeos) south to the United States border in order to establish Indian reserves for the Lower Similkameen Indian Band.

In 1897 the Vancouver, Victoria and Eastern Railway and Navigation Company (VV&E), a subsidiary of the Great Northern Railway (now a part of the Burlington Northern and Santa Fe Railway), was incorporated.¹ In 1905 it asked the federal government for a right of way through some of the Lower Similkameen Band's reserve lands – specifically, Indian Reserves (IR) 3, 5, 7, 8, 10, and 10B. The request was granted. The right of way, for the most part 99 feet wide except for an expanded section at the international boundary, was constructed to connect the mine at Hedley, in the Similkameen River valley northwest of the reserves of the Lower Similkameen Band, to the Great Northern line in Washington state. As such, the right of way passed through the heart of the reserves, with no regard for the reserve communities, structures, and other improvements along the way. The railway operated until 1972 and was formally abandoned in 1985.

In this inquiry, the panel is required to consider issues related to the compensation made for the 116.84 acres taken from the reserves then known as IR 3, 5, 7, and 8,² as well as the nature of the reversionary interest in those lands following abandonment. These issues, as agreed to by the parties, are set out in Part III of this report.

- 1 The company was incorporated "for the purpose of constructing, equipping, maintaining and operating a line of railway from some point on Burrard Inlet or English Bay, at or near the City of Vancouver, in the Province of British Columbia, to the City of Westminister; thence eastward through the valley of the Fraser River and the southern part of British Columbia by the most feasible route to the City of Rossland," though that objective was never achieved. *An Act to Incorporate the Vancouver, Victoria and Eastern Railway and Navigation Company*; SBC 1897, c. 75, Preamble.
- 2 These are the reserves put in issue by the Band in its claim. Because IR 2, 3, and 5 were amalgamated as IR 2 in 1959, the Band's claim is in respect to the current IR 2, 7, and 8. IR 10 and 10B are not included in the Band's claim, and we have not been asked to make any findings with respect to them.

INDIAN CLAIMS COMMISSION PROCEEDINGS

With respect to compensation, the panel must consider whether Canada owed the Lower Similkameen people a statutory or fiduciary obligation, or both, to obtain adequate compensation for the lands taken, and, if so, whether Canada breached such obligation. A further issue is whether

Canada was required to name an arbitrator to determine the adequacy of the compensation once it was questioned shortly after the taking.³ The final issue respecting compensation concerns an investigation conducted in 1906 by the surveyor Ashdown Green regarding the value of the lands taken. The panel is required to determine whether Canada breached a duty by relying on this investigation.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission (ICC) 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.”⁴ This Policy, outlined in the 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) 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.⁵ The term “lawful obligation” is defined in *Outstanding Business*:

The government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation”, i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

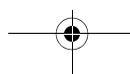
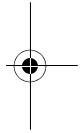
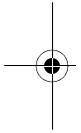
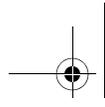
- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.⁶

3 In this report, we use the terms “take” and “taking” rather than “expropriate” and “expropriation” in order to be consistent with the terminology of the *Indian Act* and the *Railway Act, 1903*.

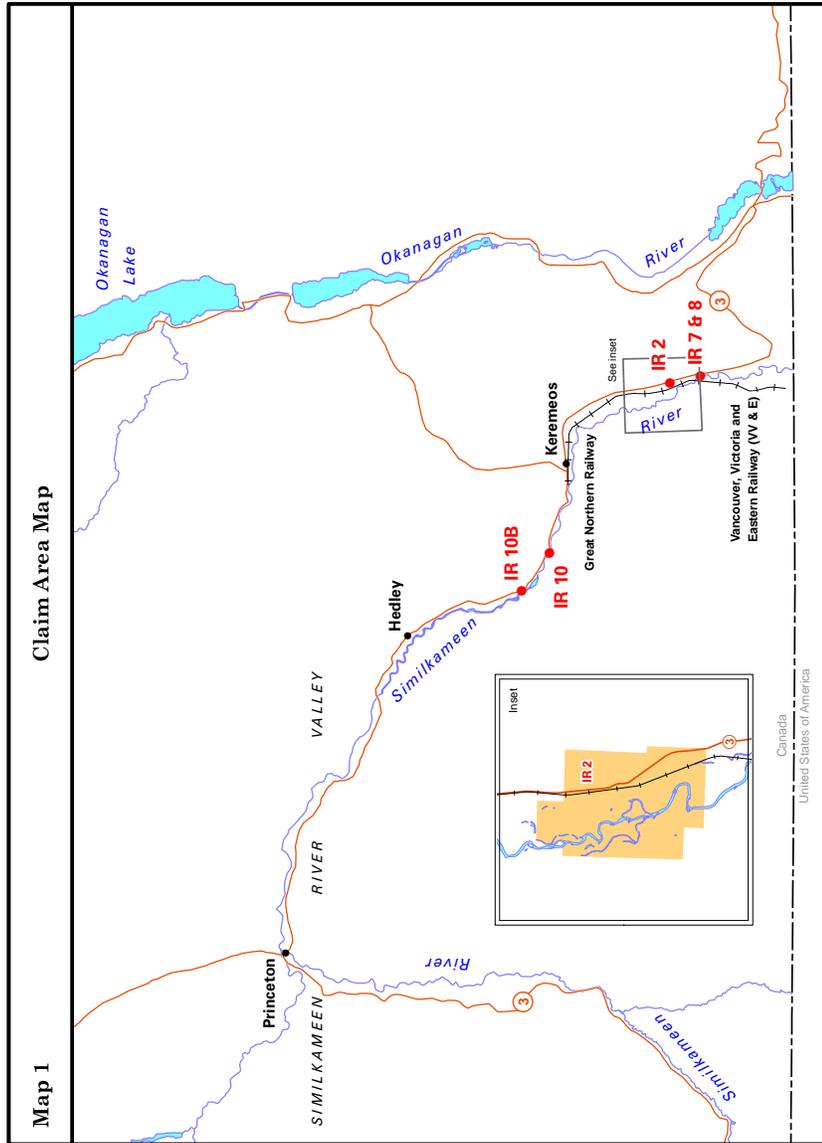
4 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

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

6 *Outstanding Business*, 20, reprinted (1994) 1 ICCP 179.



INDIAN CLAIMS COMMISSION PROCEEDINGS



LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

PART II

THE FACTS

In April 1878 the province of British Columbia appointed Gilbert Malcolm Sproat as Indian Reserve Commissioner. Later that year, in October, Sproat visited the Similkameen Valley, which he described as being narrow and gravelly, but valuable for winter grazing and for producing hay. He also found that most of the best land had already been pre-empted by settlers. He set aside lands which would eventually become IR 5, 7, 8, and 10, as well as some smaller pieces of land already occupied by Lower Similkameen band members. Because there was a great deal of uncertainty about what lands had not yet been taken by settlers and were still available for use by the Band, Sproat also temporarily reserved a larger tract of land.

Following his initial attempts to set down reserves for the Lower Similkameen people, Sproat resigned his position as Indian Reserve Commissioner and did not return to the Lower Similkameen Valley. In 1880 Peter O'Reilly became Indian Reserve Commissioner, but he did not go to the Similkameen Valley until 1884, six years after Sproat's visit. By this time, the provincial government had sold off most of the land temporarily reserved by Sproat, though O'Reilly was able to set aside IR 3 that autumn, and in 1888 he set aside IR 5.

In 1889 W.S. Jemmett surveyed the Similkameen Indian Reserves 3, 5, 7, 8, and 10. O'Reilly returned in 1893 and enlarged IR 10 by adding IR 10B. In 1902 the Schedule of Indian Reserves in the Dominion listed the lands surveyed as being set aside for the Lower Similkameen Band.

The Vancouver, Victoria and Eastern Railway and Navigation Company was incorporated in British Columbia in 1897 and brought under federal jurisdiction the following year. In October 1905 the railway's solicitors, McGiverin & Haydon, informed the Deputy Superintendent General that the company planned to build a railway line from the border with the United States to Keremeos, and that this project would require a right of way over IR 7 and 8. In November the company made a request for a right of way over

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IR 3, 5, 10, and 10B. McGiverin & Haydon stated that its client was anxious to start construction of the railway and had already begun the work in some areas. The law firm told the department that as far as it was concerned, a fair price for the reserve lands would be \$25 per acre.

The department instructed the Indian Agent for the Kamloops-Okanagan Agency, Archibald Irwin, to provide a valuation of the lands required for the rights of way through the reserves. Agent Irwin valued the lands to be taken for the right of way at \$5 per acre and made separate valuations for improvements, clearing, and cultivation, which would be paid directly to individual band members. The total valuation amounted to \$2,954.25, with \$584.25 allocated for the land, \$2,070 allocated for improvements, and \$300 for removing buildings.

A.W. Vowell, the Indian Superintendent located in Victoria, forwarded Agent Irwin's valuations to the Secretary of the Department of Indian Affairs on November 15, 1905, noting that Irwin had paid considerable attention to the valuations, that the agent for the VV&E concurred with them, and that the VV&E was anxious for a speedy settlement. Surveyor J.K. McLean reviewed Irwin's figures and concluded they were fair. Less than two weeks after Vowell had forwarded the valuations to Ottawa, Secretary J.D. McLean wrote to the railway company's solicitors, informing them that they could have immediate possession of the rights of way on payment of \$2,954.25. On behalf of the railway, McGiverin & Haydon completed payment on December 10, 1905.

On December 23, 1905, through order in council, the Minister recommended that under the authority of the *Indian Act*, the land should be sold to the company. This order in council was amended a month later, in January 1906, because the first order had misnamed the railway company. On March 20, 1906, two letters patent were issued for the rights of way, one for the line running through IR 3, 5, 7, and 8, and the other for the right of way through IR 10 and 10B. Each patent states it is for the absolute purchase of the right of way lands.

Six weeks later, on May 1, 1906, Chief Johnie Newhumpson of the Lower Similkameen Band wrote the first of a number of letters to the Department of Indian Affairs, protesting the valuations and stating that the Band had not received any money. On May 21 the Secretary of the department credited the Band with the amount owed for the land and forwarded a cheque for \$2,070 to Vowell to be paid to the band members for improvements. The Secretary also responded to Chief Newhumpson's letter, stating that the valuations were very liberal. Agent Irwin also replied, defending his actions and pointing out

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that the Band had been allowed almost \$100 per acre for good cultivated land.

A local justice of the peace, R.C. Armstrong, wrote to the Department of Indian Affairs on behalf of the Band, saying that he had received \$100 per acre for uncleared bush land, whether cultivated or not, which was adjacent to that belonging to the Band. The Band wanted arbitration, he stated, and also wanted Armstrong to act for it.

Although Irwin claimed that the Band had received \$100 per acre, he was in fact allocating only \$5 per acre for the land. The difference between the valuations for the Band's land and Armstrong's land was not lost on the Secretary of the department, who contacted Indian Superintendent Vowell and expressed concern about the disparity between the land valuations for the Lower Similkameen Band and for R.C. Armstrong. Vowell observed that Indian lands should be valued at the same rate as lands outside the reserves, something that Irwin had apparently not done. The Secretary noted that because the matter with the railway was closed, it would be difficult, if not impossible, to reopen it. Nevertheless, the Superintendent instructed Vowell to investigate the disparity in the valuations.

Vowell responded that he would review the matter and commented that he could not understand how the Agent could value land at \$5 per acre if adjoining land was valued at \$100 per acre. The prices paid to settlers for the rights of way through non-reserve land ranged from \$50 to \$124.92 per acre, the average being \$104.91 per acre.

In August 1906 Vowell assigned surveyor Ashdown Green to investigate Irwin's valuations. Later that month Green visited the reserves, in the company of Agent Irwin, and reported on August 27, 1906. The next summer Ashdown Green learned that Irwin had been instructed to value each parcel of land irrespective of any arrangements made with adjacent settlers. Green reviewed the prices paid for each parcel of land as well as payments made for the improvements and concluded that the average price for the land taken from IR 3, 5, 7, and 8 was \$24.85 per acre. He also reviewed the value of lands surrounding the reserve and the Provincial Government Assessment Roll for 1906. These rolls show that wild land in the Similkameen Valley had an assessed value for tax purposes of between \$1.25 to \$5.00 per acre. He examined the prices that had been paid for non-reserve lands and acknowledged that they were generally between \$50 and \$100 per acre. Green looked specifically at R.C. Armstrong's land and reported that the justice of the peace had indeed been paid \$100 per acre, though he himself

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would have valued it much lower. He assumed that the railway company had been willing to pay the higher figure to avoid the risk of arbitration.

Green concluded that the general value of lands in the Similkameen Valley was low, because of the lack of water, and that Agent Irwin's valuation of \$5 per acre was very liberal, with the amounts paid for improvements far in excess of their worth. He acknowledged that land values were rising in other nearby areas, but thought that the prices were inflated and would return to a real level once the railway was finished.

During his trip to the valley, Ashdown Green had visited Armstrong. He explained in his report that he told Armstrong he did not agree with the values put on his land at the time of sale. In Armstrong's account of the meeting, however, Green made such outrageous statements that Armstrong could only conclude that someone had been paid to lie about the land. As an example, he pointed to Green's statement that the land was mostly stony. He agreed that a little of the land was stony, but most, he stated, was good fruit land as long as there was water for irrigation. Green, he wrote, was a "coast man," the wrong type of person to value land in the interior.

The money for improvements was paid to the band members at a meeting arranged by Agent Irwin and attended by Green. Later, the fact that the band members accepted the payment was cited by Indian Superintendent Vowell as proof that they accepted Green's valuation and the amount paid to them. When Indian Superintendent Vowell forwarded Ashdown Green's report to the Secretary of the Department of Indian Affairs in Ottawa on August 29, 1906, he observed that the Indians had apparently been dealt with liberally and had no reasonable cause for complaint.

Chief Newhumpsion and the band members continued to complain, however, and in 1911 Armstrong raised the issue again. The department responded that the matter had been thoroughly investigated in 1906.

In 1913 the Department of Indian Affairs compiled another Schedule of Indian Reserves. It lists IR 7 and 8 as confirmed and IR 3 and 5 as approved. The acreage listed for the reserves was the same as that for 1902, with no adjustment, it seems, for the rights of way.

Indian Agent Fred Ball reported in 1927 that band members were still asking him questions about the right of way. For them, he stated, it remained a live question.

In 1938 the provincial BC government dealt with the legal status of the lands occupied by the Lower Similkameen people, as well as the lands occupied by most of the First Nations in British Columbia. Although some of the lands in the Similkameen Valley had been surveyed and set aside as early

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

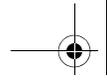
as 1878, the formal requirements of the Terms of Union of 1871, when British Columbia entered Confederation, had not yet been met. When the McKenna-McBride Commission (formally the Royal Commission on Indian Affairs for the Province of British Columbia) examined the reserved lands in the Similkameen Valley in the years 1913–15, the Commissioners issued minutes of decision confirming the reserves. Finally, in 1938, the provincial government passed Order in Council 1036, which transferred title to the reserved lands to Canada, to be held in trust for the use and benefit of the Indians. The acreage transferred from the province to the federal government, as listed in the schedules attached to the order in council, was the same as that listed in the Schedule of Indian Reserves in 1902.

In 1944 Canada approved the lease of the VV&E's railway to the Great Northern Railway Company of Minnesota, which used the lines for 10 years, until 1954. At that time the company applied to the Board of Transport Commissioners to abandon that portion of the rail line that ran through IR 10. In 1956, the government of British Columbia authorized the acquisition of the abandoned rights of way for the use of the Department of Highways. The province purchased the land from the Great Northern Railway for \$1 and acquired the certificates of title to the land.

In 1970, Burlington Northern Inc., the successor to the Great Northern Railway, informed the federal government that it was studying further abandonment of the line but had not yet made a final decision. Two years later, when a flood washed away the railway bridge, the line became impassable. In response, the railway developed a truck route over the affected part of the right of way, and the bridge was never rebuilt.

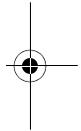
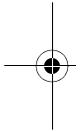
In 1977 the Lower Similkameen Indian Band contacted Burlington Northern to find out how it could reacquire the rights of way through IR 2, 7, and 8, IR 2 being the amalgamation of what had previously been IR 3 and 5. The company responded that no decision had been made about abandoning the line, but it noted the Band's interest in possibly purchasing the land.

After several years of correspondence among the Band, the company, and the governments of both the United States and Canada, the Burlington Northern Railway officially applied to the Railway Transport Committee (RTC) in 1985 for permission to abandon the railway between Keremeos and the international boundary. After an investigation in which the RTC reported that the line was impassable and invited comment from the public, the committee concluded that abandonment was in the public interest. Among the comments received was one from the Lower Similkameen Band, stating that the Band



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had no objection to the abandonment of the line as long as the rights of way were returned to the Indians.



LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

PART III

ISSUES

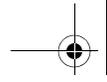
The Indian Claims Commission is inquiring into the following five issues.

Compensation

1. Did Canada, at the time of the expropriation of the lands referred to in the Claim Submission of the Lower Similkameen Indian Band, owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?
2. Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?
3. Did Canada owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to name an arbitrator pursuant to section 35 of the 1886 *Indian Act* (as amended in 1887 and later became section 46 of the 1906 *Indian Act*) regarding the taking of the lands in this claim? If yes, was this obligation(s) breached?
4. Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

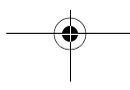
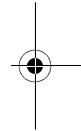
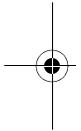
Reversionary Interest in Land

5. Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to ensure that the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes



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reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Lower Similkameen Indian Band once those lands were no longer required for railway purposes?



LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

PART IV

ANALYSIS

ISSUE 1 DUTY TO OBTAIN COMPENSATION

- 1 Did Canada, at the time of the expropriation of the lands referred to in the Claim Submission of the Lower Similkameen Indian Band, owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?**

This issue requires the panel to consider the following questions:

- 1 Did Canada owe either a statutory or a fiduciary duty, or both, to the Lower Similkameen Band with respect to compensation for the taking⁷ of the lands for the right of way of the Victoria, Vancouver and Eastern Railway and Navigation Company (“VV&E”)?
- 2 If Canada did owe such a duty or duties, how is the compensation determined?⁸

Reserve Land Selection and Surveys

The creation of reserves for the Lower Similkameen Indian Band began in 1878 with the somewhat imprecise setting aside of lands by Indian Reserve Commissioner Gilbert Malcolm Sproat, and it was not completed until 50 years later with British Columbia’s Order in Council 1036.⁹

7 “Expropriation” does not appear in either of the statutes purportedly authorizing the taking of lands: *Indian Act*, RSC 1886, c. 43, as amended, or *Railway Act, 1903*, SC 1903, c. 58. Following statutory usage, we have employed the word *take* and its cognates throughout in preference to *expropriate*.

8 The factual issue of the adequacy of compensation, assuming it was required, is to be addressed under Issue 2. Issue 1 requires only the determinations of law.

9 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

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In April 1878 Mr Sproat was appointed Indian Reserve Commissioner by the BC provincial government, with authority to make “decisions regarding Indian land questions in the Electoral District of Yale.”¹⁰ In October of that year, Sproat visited the Similkameen Valley to set aside reserves for the “the Cariamias Indians.”¹¹ The lands he reserved would later form IR 5, 7, 8, and 10, but at the time an impending winter and settlers’ pre-emptions made any determination of available lands almost impossible.¹² Sproat therefore “temporarily reserved” those portions of the valley “where cultivation was progressing or seemed possible.”¹³ These temporary reserves, stretching the length of the valley from the Ashnola River west of Keremeos to the United States border, were intended to protect the interests of the Band until Sproat could return to finalize these and additional reserves for the people of the Lower Similkameen.¹⁴

Sproat resigned in 1880¹⁵ and was replaced by Peter O’Reilly.¹⁶ When O’Reilly returned to the valley four years later, he discovered that the provincial government had sold most of the temporary reserves to settlers.¹⁷ He moved with relative speed to secure the remaining lands and, in September 1884, issued a minute of decision setting aside 1,920 acres of land bordering the Similkameen River and within Sproat’s original temporary reserve.¹⁸ These lands would later become IR 3. In 1888 he set aside a further 960 acres adjoining IR 3, which became IR 5.¹⁹

In 1889 Dominion Land Surveyor W.S. Jemmett surveyed Lower Similkameen Indian Reserves 3, 5, 7, 8, and 10. IR 7 and 8, located south of Keremeos near the United States border, were said to contain 3,800 acres, while IR 10, west of Keremeos, comprised 4,153 acres.²⁰ The plans of these three reserves were approved by the Chief Commissioner of Lands and Works

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- 10 British Columbia Order in Council 615-1878, April 26, 1878, BC Archives (BCARS), GR0113 (ICC Exhibit 1c).
 11 G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, p.13). “Cariamias” is the older spelling of Keremeos.
 12 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 19–20).
 13 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, pp. 7–9).
 14 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 7–9).
 15 Order in Council PC 1880-1334, July 19, 1880, Library and Archives Canada (LAC), RG 2, vol. 2762 (ICC Exhibit 1d, p. 1).
 16 Order in Council PC 1880-1334, July 19, 1880, LAC, RG 2, vol. 2762 (ICC Exhibit 1d, pp. 2–3); Order in Council PC 1881-532, April 5, 1881, LAC, RG 2, vol. 2763 (ICC Exhibit 1e, pp. 1–3).
 17 P. O’Reilly, Indian Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).
 18 Minute of Decision, author unidentified, September 22, 1884, no file reference available (ICC Exhibit 1a, p. 24).
 19 Minute of Decision, P. O’Reilly, Indian Reserve Commissioner, October 30, 1888, no file reference (ICC Exhibit 1a, p. 28).
 20 Natural Resources Canada, Plan BC 25, Canada Lands Surveys Records (CLSR), “Plan No. III of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia, surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7f).

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

in 1891.²¹ Jemmett found IR 3 and 5, lying along the river between Keremeos and IR 7 and 8, to contain 1,750 and 1,278 acres, respectively, and the Chief Commissioner of Lands and Works approved the plan of these reserves in 1895.²²

In its Schedule of Indian Reserves in the Dominion for 1902, the Department of Indian Affairs listed reserves that had been set aside for the Lower Similkameen Band. IR 3, 5, 7, and 8 were recorded as “confirmed,”²³ with acreages as shown on the approved survey plans: IR 3 as 1,750 acres; IR 5 as 1,278 acres, and IR 7 and 8, together referred to as “Skemeoskuankin,” with a combined area of 3,800 acres.²⁴ The reserve sizes appearing on the 1902 Schedule match the acreages that appear on the approved plans for each reserve.²⁵ Errors in the 1899 survey of IR 7 and 8 led to a 1902 re-survey of those reserves, resulting in their being found to have a combined acreage of 4,075 acres.²⁶ This amendment was approved in December 1902, after compilation of the dominion schedule.

The VV&E Right of Way

The VV&E had been incorporated under provincial law in 1897 and brought within federal jurisdiction the following year.²⁷ As a railway company, it was able in due course to take advantage of the provisions of the *Railway Act, 1903* that provided for the taking of Crown lands by railways with the consent of the Governor in Council:

134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been

- 21 E.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34–35).
- 22 Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).
- 23 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).
- 24 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).
- 25 Natural Resources Canada, Plan BC 24, CLSR, “Plan No. 1 of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d); Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).
- 26 A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, December 3, 1902, no file reference available (ICC Exhibit 1a, p. 48); Natural Resources Canada, Plan BC 1028, CLSR, “Amended Plan Nos. 7, 8, 12 & 12A, Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by F.A. Devereaux, PLS, 1900 and 1902 (ICC Exhibit 7k).
- 27 *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898, c. 89, s. 1 (ICC Exhibit 6i, p. 1).

INDIAN CLAIMS COMMISSION PROCEEDINGS

granted or sold, and as is necessary for such railway ... and whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the Company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.²⁸

The Act also provided for the taking of reserve lands:

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.²⁹

Relying, presumably, on these provisions, the railway's Ottawa solicitors, McGiverin & Haydon, wrote on October 17, 1905, to the Deputy Superintendent General of Indian Affairs as follows:

We are acting on behalf of the Vancouver Victoria and Eastern Railway and Navigation Company.

Plans for the construction of the section of this Company's railway between the United States line and Cariamas, B.C. have been approved by the Railway Commission and this portion of the line crosses Indian Reserves Nos. 7 and 8.

We beg to offer herewith plans of the Company's right of way across these Reserves over the location in question and these plans have been certified in the usual way by the Chief Engineer of the Railway Commission.

We are asking if you can give your immediate consideration to the right of way asked for as our clients are most anxious to get on with construction work having the contractors in the field.³⁰

On November 3, 1905, the solicitors made a further request for a right of way through IR 3, 5, 10, and 10B.³¹ Plans for this extension, signed by the Deputy Minister of Railways and Canals in October 1905, accompanied the letters.³²

28 *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40).

29 *Railway Act, 1903*, SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

30 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

31 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 54).

32 Natural Resources Canada, Plan 695, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR, "Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.," surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3," June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR, "V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5," June 3, 1905 (ICC Exhibit 7s).

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The Department of Indian Affairs then conducted the valuations discussed under Issue 2 of this report, and, on November 28, 1905, the Secretary of the department wrote to McGiverin & Haydon notifying them that VV&E could have “possession of the right of way upon payment to this Department of \$2954.25.”³³ Two payments were made, the second on December 10, 1905.³⁴

An order in council authorizing the taking of the requested right of way, purportedly under section 35 of the *Indian Act* of 1886 as amended in 1887, was made on December 23, 1905:

On a Memorandum dated 15th December, 1905, from the Superintendent General of Indian Affairs, stating that the Victoria, Vancouver and Eastern Railway Company has applied to the Department of Indian Affairs for right of way through reserves Nos. 3, 5, 7, 8, 10 and 10B of the Lower Similkameen Band of Indians, in the Osoyoos Division of Yale District, in the Province of British Columbia, and has deposited with the Department of Indian Affairs a plan of the land required, with a certificate endorsed thereon of the Chief Engineer of the Department of Railways and Canals that the Land applied for is actually required for railway purposes and is such as the company should be allowed to acquire.

The Minister, knowing of no objection to the railway company being allowed to acquire the land above referred to, recommends that, under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 33, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon.

The committee submits the same for approval.³⁵

As the railway was misnamed in this order in council, another one was made on January 22, 1906, correcting the name to “Vancouver, Victoria and Eastern Railway and Navigation Company.”³⁶

Section 35 of the *Indian Act*, RSC 1886, c. 43, as amended by SC 1887, c. 33, s. 5, provided in relevant part as follows:

No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council.

On March 20, 1906, letters patent were issued for the “absolute purchase” of IR 3, 5, 7, and 8, the conveying term of which was as follows:

33 J.D. McLean, Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, Solicitors & Notaries, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 66).
 34 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Secretary, Department of Indian Affairs, December [10], 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 76–77).
 35 Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).
 36 Order in Council, January 22, 1906, no file reference available (ICC Exhibit 1a, p. 81).

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We by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever: all these parcels or tracts of land ... composed of the Right of Way of the said Company through Indian Reserves numbers seven, eight, three and five of the Lower Similkameen Indians.³⁷

Events Confirming the Reserves

In 1913 a further Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, was released. This schedule lists IR 7 and 8 as “confirmed” and IR 3 and 5 as “approved” for the Lower Similkameen Band.³⁸ The reserves have the same numbers and acreages as those listed in the 1902 Schedule: IR 3 being 1,750 acres, IR 5 being 1,278 acres, and IR 7 and 8 together containing 3,800 acres (instead of 4,075 acres as re-surveyed in 1902).³⁹ An additional notation appears for each of these reserves: “Right of way of the V.V. & E. Ry. and Nav. Co. through this reserve.” However, no specific acreage for the rights of way were listed, and the reserve acreage was not reduced to account for the rights of way.⁴⁰

Later in 1913, the Royal Commission on Indian Affairs for the Province of British Columbia, known as the McKenna-McBride Commission, examined the Lower Similkameen reserves and interviewed the occupants about land use and some of the characteristics of the land. After their inspection, the Commissioners issued minutes of decision confirming the Lower Similkameen reserves. The first minute, dated November 22, 1913, ordered that IR 3 and 5 “BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indians Reserves, 1913.”⁴¹ IR 3 contained 1,750 acres in total,⁴² while IR 5 contained 1,278 acres.⁴³ The Commissioners valued 150 acres at \$100 per acre, 450 acres at \$60 per acre, and the balance as “benchland worthless without irrigation facilities.”⁴⁴ Another minute of decision, dated

37 Letters Patent No. 14388, March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).
 38 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252). Given that IR 3, 5, 7, and 8 had all been listed in the 1902 Schedule as “confirmed,” it is not clear why different terminology was employed in the 1913 Schedule.
 39 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).
 40 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).
 41 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 718–19 (ICC Exhibit 1a, pp. 361–62).
 42 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).
 43 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).
 44 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 701, 704 (ICC Exhibit 1a, pp. 344, 347).

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November 22, 1913, ordered that “Skemeoskuankin Reserves Nos. 7 and 8, Similkameen District of the Lower Similkameen Tribe, BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indian Reserves, 1913.”⁴⁵ These reserves, containing 3,800 acres in total, are described as “range with cultivable bottomland,” including 500 acres of “choice cleared meadow” and 1,000 acres of uncleared bottomland. Most of the land was said to contain “fairly good soil” that supported the production of grain, fruit, and hay; good timber was also available. The Commissioners valued 500 acres at \$100 per acre, 1,000 acres at \$60 per acre, 1,000 acres at \$30 per acre, and 1,300 acres at \$20 per acre.⁴⁶

On July 29, 1938, the British Columbia government passed Order in Council 1036. This order read as follows:

THAT under authority of Section 93 of the “Land Act,” being Chapter 144, “Revised Statutes of British Columbia, 1936,” and Section 2 of Chapter 32, “British Columbia Statutes 1919,” being the “Indian Affairs Settlement Act,” the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands to such manner as they may deem best suited for the purpose of the Indians.⁴⁷

Reserves 2–13 of the Lower Similkameen Band were listed in the schedule to this order. The acreages given in the schedule were identical to those listed in the 1902 and 1913 Dominion Schedules,⁴⁸ except that the combined area of IR 7 and 8 is corrected for the 1902 re-survey. Thus, IR 3 was listed at 1,750 acres, “Joe Nahumpcheen” IR 5 at 1,278 acres, and “Skemeoskuankin” IR 7 and 8 at 4,075 acres.⁴⁹ The acreages of IR 3, 5, 7, and 8 were not adjusted on account of the right of way.⁵⁰ Nor was a reduction made for the railway right

45 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 719 (ICC Exhibit 1a, p. 362).

46 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, 702, 704 (ICC Exhibit 1a, pp. 345, 347).

47 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

48 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46); Schedule of Indian Reserves in the Dominion, Supplement to *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 105 (ICC Exhibit 1a, p. 252).

49 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

50 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

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of way through IR 10, though the acreage of that reserve was reduced by 2.6 acres, apparently for an irrigation ditch right of way.⁵¹

Indian Reserve Creation in British Columbia: *Wewaykum*

The Band's claim that is the subject of this inquiry was rejected by the Department of Indian Affairs by letter of September 9, 1996, and accepted for inquiry by the Indian Claims Commission on April 10, 2003. During that interval, on December 6, 2002, the landmark decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*⁵² was released, dealing with the issue of reserve creation in British Columbia and the application of fiduciary principles to Indian lands. This decision therefore played no part in Canada's rejection of the Band's claim, but it assumed significant proportions in the inquiry. It is appropriate here to explain that decision briefly.

In the context of a dispute between the Wewaykum and Wewaikai Indian Bands and between the bands and Canada, Mr Justice Binnie explained for a unanimous court how reserves were created in British Columbia: "Federal-provincial cooperation was required in the reserve creation process,"⁵³ he wrote, because neither level of government had the constitutional ability to create reserves on its own. The federal government had jurisdiction over Indians and Indian lands, but no land in British Columbia to set apart;⁵⁴ the provincial government, in contrast, as the holder of title to Crown lands, had no power to create reserves. "At the highest levels of both governments," Binnie J stated, "the *intention* was to proceed by mutual agreement."⁵⁵

The Court concluded that the mutual intention to create Indian reserves in British Columbia was accomplished by British Columbia Order in Council 1036 of July 29, 1938, which, as already noted, conveyed "the lands set out in schedule attached hereto [listing Indian Reserves 2–13 of the Lower Similkameen Band] ... to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia."⁵⁶

51 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 385); see also Department of Mines and Resources, Indian Affairs Branch, *Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia*, March 31, 1943, 111–13 (ICC Exhibit 1a, pp. 394–96).

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

53 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

54 The exception being the Railway Belt and Peace River Block, which were federal lands from 1880 until 1930 as a result of the grant by British Columbia in aid of construction of the Canadian Pacific Railway. These lands were not discussed in *Wewaykum*.

55 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 51. Emphasis in original.

56 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381); see *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 18–19.

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It follows from this finding of the Supreme Court that, before 1938, what had been thought to be reserves set apart pursuant to the *Indian Act* were not. Provincial surveys, federal treatment of the lands as reserved, and acceptance by a band may have indicated intention but did not constitute the reserve-creating act. Before Order in Council 1036, reserves were in a pre-reserve creation state. Speaking of the degree of protection to which the pre-*Indian Act* lands were entitled in the case before the Court, Binnie J wrote:

[The] survey of a proposed reserve was not enough to create a reserve within the meaning of the *Indian Act* but, if approved by the provincial government, the effect was to withdraw the subject lands from other inconsistent uses, such as preemption by settlers. *It thus created a measure of what might be termed administrative protection*, but this fell well short of the various statutory protections under the federal *Indian Act*.⁵⁷

A fiduciary duty may apply in this context, but it is a lesser duty than obtains when an *Indian Act* reserve has been created. Mr Justice Binnie went on to discuss the content of the Crown’s fiduciary duty both before and after reserve creation, finding the duty expanded in the latter case “to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.”⁵⁸ The application of *Wewaykum* to the facts of this inquiry is explored more fully in our analysis below.

Issue 1 involves the nature of the fiduciary obligation, if any, of Canada to the Band in 1905–6. The question of whether the purported reserves were in fact *Indian Act* reserves therefore became the subject of substantial submissions by both the Band and Canada.

Positions of the Parties

The parties agree that the question posed in Issue 1, whether Canada owed a duty to the Lower Similkameen Band for compensation for taking lands for the right of way for the VV&E, should be answered in the affirmative so far as fiduciary duty is concerned, though Canada’s answer is somewhat qualified. Without addressing the question of statutory obligation, Canada acknowledges, in response to the question:

57 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 22. Emphasis added.

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

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Yes, Canada owed a fiduciary duty to obtain adequate compensation for the band, which duty was limited by the fact that the lands occupied by the Band at the time of the taking were not reserve lands.⁵⁹

The Band does not press the case for any statutory duty, relying rather on its claim to a fiduciary duty. On that question, the Band submits that the Lower Similkameen “reserves” were *Indian Act* reserves in 1905 and that the full scope of reserve-based fiduciary duty was engaged at that time. Though acknowledging *Wewaykum*, the Band nevertheless relies on the reserve creation criteria set out in the earlier decision of the Supreme Court on the subject of reserve establishment in the Yukon, *Ross River Dena Council Band v. Canada*,⁶⁰ to support this submission. It points to the senior officials involved in purporting to set the reserves apart, and it notes that both levels of government and the Lower Similkameen people themselves were all of the view that true *Indian Act* reserves had been created. From all of this, the Band submits that the proper conclusion to be drawn is that the land that was considered Indian reserve land in 1905 should now be held to have been reserves under the *Indian Act* at that time, notwithstanding *Wewaykum*. However, in oral submissions, counsel for the Band, noting Canada’s position that the reserves in question were not Indian reserves in 1905, stated, “We say in the alternative, if you find that they aren’t Indian reserves, we say that doesn’t matter at all.”⁶¹ He went on to explain, “The same standards of fiduciary duty should apply ... even if the lands had not met the formal requirements of being an Indian reserve.”⁶²

With respect to the issue of compensation, in particular, the Band submits, without further elaboration, that “adequate” compensation means that compensation is to be paid with regard to “current land values.”⁶³

Canada relies entirely on *Wewaykum*, concluding “that the Lower Similkameen Indian Band reserves at issue in this inquiry, were not finally and formally created until 29 July 1938.”⁶⁴ Canada distinguishes *Ross River* on the ground that it contains an express caution against its application beyond the Yukon.⁶⁵ However, as noted above, Canada accepts that it “owed a fiduciary duty to obtain adequate compensation for the band,” though maintaining that the “duty was limited by the fact that the lands occupied by

59 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. I.1.

60 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816.

61 ICC Transcript, January 26, 2005 (Rory Morahan, pp. 10, ll. 2–4).

62 ICC Transcript, January 26, 2005 (Rory Morahan, p. 10, l. 23–p. 11, l. 1).

63 Written Submission on Behalf of the Lower Similkameen Indian Band, October 26, 2004, para. 111.

64 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 56.

65 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 41.

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the Band at the time of the taking were not reserve lands.”⁶⁶ Canada does not explain the effect of this limitation, but, since there is either a duty to obtain adequate compensation or there is not, we have difficulty comprehending how this duty might be limited. In any case, the fiduciary duty pertinent to the circumstances, Canada acknowledges, required that adequate compensation be obtained.

Canada elaborates on this duty by reference to *Kruger et al. v. The Queen*:

When the Crown expropriated reserve lands ... there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered. The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.⁶⁷

Noting that, in *Kruger*, it was the taking of *reserve* lands that was at issue, Canada nevertheless does not submit that any lesser duty applies in this case; to the contrary, Canada argues that “the duty, if any, in the present matter does not exceed the duty set out above.”⁶⁸ The odd qualification, “if any,” disappears when one refers to the closing words of the same paragraph of Canada’s submission: “It is submitted that the process followed by the Crown both in granting the right of way and obtaining appropriate compensation completely fulfilled the Crown’s pre-reserve creation fiduciary duty as specifically set out in *Wewaykum*.”⁶⁹ While the “appropriateness,” or adequacy, of the compensation is a question of fact to be addressed under Issue 2, this statement, taken together with Canada’s statement that it “owed a fiduciary duty to obtain adequate compensation for the band,” clearly acknowledges, in our view, a degree of fiduciary duty requiring adequate compensation for the taking of the right of way.

Canada’s submission with respect to the meaning of “adequate” compensation relies on *Kruger*⁷⁰ and on the Supreme Court decision

66 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. I.1.
 67 *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 48, Urie JA, quoted in part in Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 76.
 68 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.
 69 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.
 70 *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 48, Urie JA.

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*generally known as Apsassin.*⁷¹ Canada submits that it has “an obligation to ensure that the Indians are ‘properly[’] or ‘fairly’ compensated,” that how this is ensured “lies within the Crown’s discretion,” and that “it is sufficient if the price falls within the range of appraised values.”⁷²

Panel’s Reasons

Since the parties are in agreement that Canada owed a fiduciary obligation in 1905–6 to obtain adequate compensation, we might take the view that there is no issue between them and move on to Issue 2. However, we consider that it is important for us to address this issue independently of the parties’ positions.

Duty Owed by Canada

1 Did Canada owe either a Statutory or a Fiduciary Duty, or both, to the Lower Similkameen Band with respect to compensation for the taking of the lands for the right of way of the VV&E?

In order to answer this question, we must consider the status of the lands regarded as reserve lands in 1905–6, at the time of the taking and subsequent valuation of the right of way.

Statutory Duty

Applying the *Wewaykum* decision to the situation of the Lower Similkameen reserves, there can be no doubt that these lands were not Indian Act reserves in 1905, nor were they until 1938. But this status by no means vitiates the duty owed to the Band by Canada. Although it eliminates any duty owed under the Indian Act, as that Act did not apply to these lands, the duty under the Railway Act, 1903 encompasses more than Indian reserves:

Indian Lands

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve *or lands* is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.⁷³

71 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 55 (sub nom. *Apsassin*).

72 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 76.

73 *Railway Act, 1903*, SC 1903, c. 58, s. 136. Emphasis added.

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By employing the phrase “Indian reserves or lands,” the legislator intended a broad compass for the obligation to compensate. The obligation arose for the taking of not only reserves but also Indian lands, clearly a broader term, with compensation to be made “as in the case of lands taken without the consent of the owner.” It is not necessary to consider the limits of what may have been intended by “Indian lands”; lands that were thought by all concerned at the time to be Indian reserves were at the least “Indian lands.” These lands had been “temporarily reserved” by Commissioner Sproat; more precisely secured by his successor, Commissioner O’Reilly; and surveyed in 1889 and approved in 1895 in the configurations and areas (as corrected in 1902 for IR 7 and 8) that were finally confirmed by British Columbia Order in Council 1036 in 1938. If the phrase “Indian lands,” as distinct from reserves, is to be given meaning, there can be no question that the Lower Similkameen lands, intended for no use other than for the Lower Similkameen Indians, were “Indian lands” in 1905. The *Railway Act, 1903* therefore required that “compensation shall be made ... as in the case of lands taken without the consent of the owner.” The implication that “Indian lands” are not lands taken from an “owner” makes it clear that it is the Indians, not the Crown, who are to receive the compensation, as title to Indian reserves or lands rests with the Crown, not the Indians. Compensation is to be made when, with the Governor in Council’s consent, “any portion of any such reserve or lands is taken possession of, used or occupied by any [railway] company, or when the same is injuriously affected by the construction of any railway.” We do not read these conditions as being mutually exclusive; where the taking of a portion of a reserve also incurs injurious affection,⁷⁴ both conditions are compensable.

Though the obligation to produce funds for the payment was the company’s, there was a concomitant public law duty on the Crown to ensure that the obligation was met. This duty arose from statute, triggered by the giving of the Governor in Council’s consent, and the concept of fiduciary duty need not be invoked for this purpose.

Common Law Duty

While not raised by the parties, the Crown has a common law duty to compensate not only in cases of taking of title but also in cases where “enjoyment of possession” is eliminated or depreciated by actions of the Crown:

74 Injurious affection refers to the harmful effect of a “taking,” or other appropriation on land not taken – that is, on the remaining land of the same owner or on neighbouring lands. It is usually measured by reduction in value of the land not taken.

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[T]here would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was “taking.”⁷⁵

The Crown, and not the Lower Similkameen Band or its members, had title to the right of way taken, so that taking of title is not at issue. However, the Band, or its members, did have the right to “enjoyment of its possession,” which was taken from them. This loss provides another basis on which compensation was due. The compensation is to be “full.”

Fiduciary Duty

For the reasons already explained, the Lower Similkameen reserves were in a pre-reserve creation situation in 1905. We must look to *Wewaykum* to determine the fiduciary duty owed to the Band at that time. The Court has clearly delineated the contrast between the pre-reserve creation and post-reserve creation duties:

Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

Once a reserve is created, the content of the Crown’s fiduciary duty expands to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.⁷⁶

The Court goes on to explain that, at the reserve creation stage, “the imposition of a fiduciary duty attaches to the Crown’s intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary.”⁷⁷

There can be no question that, if the actual creation of the reserves had not crystallized in 1905, the lands were nevertheless at the highest pre-reserve creation state at least from 1895 onward, for the reasons already mentioned –

75 *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 110, Ritchie J, quoting Lord Radcliffe in *Belfast Corporation v. O.D. Cars Ltd.*, 1960 AC 49 at 523 (HL(NI)).

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

77 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 94.

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the roles of Commissioners Sproat and O'Reilly, the 1889 survey, and the 1891 and 1895 approvals. This status was confirmed by the listings in the 1902 and 1913 Dominion Schedules, which corresponded, with one correction, to the actual reserve confirmation by the 1938 provincial transfer of control, or conveyance. It is not possible to conceive of a more certain state of pre-reserve creation in 1905.

The conditions for creation of an Indian reserve are examined in *Ross River Dena Council Band v. Canada*.⁷⁸ The Ross River Dena Council Band is located on lands in the Yukon which, were they an *Indian Act* reserve, would have exempted them from tobacco tax. The Court set out the conditions for the creation of a reserve:

Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. ... Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart.⁷⁹

In the case of the Ross River Band, the Court found that the requisite intention to create the reserve was lacking.

The Court cautions against the universal application of the *ratio* of this case:

A word of caution is appropriate at the start of this review of the process of reserve creation. Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.⁸⁰

The Yukon, as a territory, is a single-jurisdiction entity, in that the title to Crown lands remains with the federal Crown. The federal-provincial constitutional context of British Columbia is more complex, leading to the

⁷⁸ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816.

⁷⁹ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 67.

⁸⁰ *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 41.

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finding in *Wewaykum* that reserve creation was deferred to 1938. It is nevertheless instructive to consider how the conditions set out in *Ross River* apply to the Lower Similkameen facts:

- the Crown must have intended to create a reserve, given that Crown agents possessed sufficient authority to bind the Crown to this intention;
- steps must have been taken to set the lands apart for the benefit of Indians; and
- the Indians must in turn have accepted the setting apart of the lands and started to make use of them.⁸¹

All these conditions existed in the case of Lower Similkameen in 1905. The historical record demonstrates the requisite intention, and clearly the Band had accepted the lands (which they understood as “set apart”) and had started to make use of them. However, the difficulty is that, for constitutional reasons, all these steps were without legal effect. The final step was taken only in 1938. As *Wewaykum* points out:

Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over “Indians, and Lands reserved for the Indians.”⁸²

As the judgment goes on to explain, the required crystalizing act of federal-provincial cooperation was provincial Order in Council 1036.⁸³

Not to be overlooked, however, are the words by which *Ross River* enjoins the Crown respecting its fiduciary duty even where no reserve has been created (as the Court found in that case):

It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the sui generis nature of native land rights.⁸⁴

81 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 67; see also para. 60.

82 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

83 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 18 and 51.

84 *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816 at para. 68.

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Taking into account the belief of all concerned – both governments and the Band – that reserves had been created for the Lower Similkameen people, the fact that the intention to do so existed and the lands had been set apart, and mindful of the exhortation from *Ross River* just quoted, it is our view that the highest level of fiduciary duty obtained in this case short of the duty owed once a reserve is established. This duty was to fulfill “the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.”⁸⁵ There can be no question that this description translates in this case into a manifest duty to ensure that the Band was adequately and fully compensated for the taking of the right of way.

To summarize, in the case of the taking of the VV&E right of way over IR 3, 5, 7, and 8:

- There was a statutory duty under the *Railway Act, 1903* to ensure that the Band was compensated for the taking of the right of way “as in the case of lands taken without the consent of the owner.” This obligation was a public law duty.
- There was a common law duty to provide or ensure “full compensation” for loss of “enjoyment of possession,” including an obligation to compensate for injurious affection. This duty was also a public law duty.
- There was also a fiduciary duty on the Crown of the highest nature available in the pre-reserve creation context to ensure that the Band obtained compensation for the lands taken. We have reached this conclusion because of the certainty at the time that the Lower Similkameen lands were indeed Indian reserves, an understanding shared by both levels of government and the Lower Similkameen people.

There were therefore three parallel and consistent sources of Crown duty to ensure that the Lower Similkameen Band obtained compensation for the taking of the VV&E right of way, including any compensation arising from injurious affection. As already noted, Canada does not dispute that it “owed a fiduciary duty to obtain adequate compensation for the band.”

⁸⁵ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

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Determination of Compensation

2 If Canada did owe such a duty or duties, how is the compensation determined?

Before addressing this second question posed at the beginning of this section, we reiterate that Issue 1 does not require us to consider whether the compensation was in fact adequate. That question is dealt with in Issue 2.

The issue as agreed by the parties refers to “adequate compensation,” though the adjective is probably redundant; if the question is turned on its head to ask whether inadequate compensation would suffice, the answer is obviously no. One is compensated only if the compensation is in some sense adequate. However, the issue as stated qualifies “adequate compensation” as compensation “based on fair market value and/or compensation as was provided to other land owners in the area.” Compensation “provided to other land owners in the area” is strong evidence of “fair market value,” and in the Lower Similkameen case probably the best evidence.

The statutory standard for compensation in the *Railway Act, 1903* was that “compensation shall be made ... as in the case of lands taken without the consent of the owner.” Where compensation is to be made “as in the case of lands taken without the consent of the owner,” the same level of compensation is to be provided as if the land were held in fee simple by non-Indians. Thus, the starting point for compensation would be fair market value of the land if it were not reserve land, determined by reference to compensation paid to other land owners in the area, if such compensation was paid, or other evidence of fair market value.

The common law duty applied by the Supreme Court in *Manitoba Fisheries*, to ensure “full compensation” for loss of “enjoyment of possession,” is a “general principle” of compensation.⁸⁶ In fact, compensation in that case was for the loss of a business as a result of passage of an Act of Parliament that created a Crown corporation which displaced the business. The judgment declared “that the appellant is entitled to compensation in an amount equal to the fair market value of its business as a going concern ... minus the residual value of its remaining assets.”⁸⁷ Again, compensation is to be determined by reference to fair market value.

It might be argued that in the case of a railway right of way, where the railway’s right to use the land concludes on cessation of use (see Issue 5), the compensation should be discounted on account of the possibility that the land

86 *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 110.

87 *Manitoba Fisheries Ltd. v. Canada*, [1979] 1 SCR 101 at 118.

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might revert to reserve use at some unspecified future date. The panel does not agree. The Commission has dealt with this argument previously, in *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry*, an inquiry also having to do with a Band's interest in another abandoned VV&E right of way. Having held that the railway's interest was determinable, the Commission stated:

A fee simple determinable ... may in theory be valued as a fee simple, depending on the uncertainty of when and if the terminating event will occur. It is likely that in 1910 most thought the railway would continue operating in perpetuity. Under that assumption, a fee simple determinable is equivalent in value to a fee simple absolute.⁸⁸

We conclude that compensation to the Lower Similkameen Indian Band for the taking of the VV&E right of way will be adequate if it is based on fair market value as evidenced by compensation paid to other land owners in the area whose land was also taken for the VV&E. Factual questions of land quality will of course be relevant to valuations, as will the issue of injurious affection.

So far as compensation is concerned, the central question in this inquiry is not whether adequate compensation should be obtained (Issue 1) but whether in fact it was obtained (Issue 2). We shall therefore proceed to address that issue.

ISSUE 2 DID THE BAND RECEIVE ADEQUATE COMPENSATION?

2 Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to obtain adequate compensation based on fair market value and/or compensation as was provided to other land owners in the area for the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

We have already determined that the Crown owes fiduciary, statutory, and common law duties to the Band with regard to ensuring that the VV&E Railway paid adequate compensation for the lands taken up for railway purposes. We must now decide whether the Crown discharged these duties. The parties have agreed that this issue must take into account both fair market value and the level of compensation paid to other land owners in the area.

⁸⁸ ICC, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 3–31.

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Factual Background

In the fall of 1905, when the VV&E Railway Company approached the Department of Indian Affairs for a right of way over the Lower Similkameen Reserves, the company offered to pay \$25 per acre for the land – a sum that, in their view, was a “fair average price for Indian lands.”⁸⁹

In response, the department asked Archibald Irwin, the Indian Agent for the Kamloops-Okanagan Agency, to provide a valuation for the lands requested by the railway. Agent Irwin was asked to value the land itself, and then to value improvements made by band members, such as seeding or tilling previously uncultivated land and the cost of removing and relocating structures. The purpose of breaking down the payment was to allow the government to compensate individuals for the effort they had put into improving their lands while, at the same time, to pay the Band for the land itself. Since the land set aside for the Band was held in trust by the Crown, payment for the land was also to be held in trust by the Crown for the Band. Payments for the improvements and the costs of buildings were made to individual band members.

The department instructed Superintendent A.W. Vowell in Victoria “to be guided in the valuation of land and damages taken for the Right of Way of the C.P.R. through the Indian reserves” to the northwest, near Spence’s Bridge and Nicola Lake.⁹⁰ Compensation for the lands in these areas was set at \$100 per acre for land under cultivation and for meadows; compensation for lands capable of cultivation and for waste land was set at \$25 and \$2, respectively.⁹¹

In November 1905 Agent Irwin set the “actual net value on all the lands of \$5.00 per acre, for a total possible compensation of \$584.25.”⁹² Vowell passed on Irwin’s recommendations within the week, and, in his letter to the Secretary of the Department of Indian Affairs in Ottawa, he stated that the railway company was “desirous of a speedy settlement.”⁹³ These letters found their way to the Deputy Superintendent General via the offices of the department’s Chief Surveyor, who implicitly acknowledged the difference between the Company’s and the Agent’s valuations:

89 McGivern & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).
 90 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, pp. 51–52).
 91 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, pp. 51–52).
 92 Archibald Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent for British Columbia, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 93 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E3667-07399 (ICC Exhibit 1a, pp. 61–62).

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As these gentlemen have been pressing for immediate action so that construction can proceed, I beg to recommend that the valuation by Mr. Agent Irwin be approved and that Messrs. McGivern & Haydon be informed that their Company can have possession upon payment of \$2954.25.⁹⁴

This total was the sum of three different amounts: \$584.25 paid to the Band's trust account for the land, plus two amounts paid to individuals – \$2,070 for improvements and \$300 for moving buildings. Nothing appears in the documentary evidence from that time that would suggest that the department considered paying the \$25 per acre suggested by the railway as a fair price for the land. Equally absent is any consideration of whether Agent Irwin's valuations reflected the fair-market value of the lands or of whether his valuations were related to the prices paid by the railway for similar non-Indian land abutting the reserves.

Notwithstanding these apparent omissions, the Secretary of the Department of Indian Affairs wrote from Ottawa to Indian Superintendent Vowell in British Columbia on November 28, 1905, to confirm that the "valuation has been approved"⁹⁵ for IR 3, 5, 7, and 8. Identical valuations for lands and improvements on IR 10 and 10B were forwarded to the department by November 30⁹⁶ and were also quickly processed and accepted. On December 23, 1905, the Governor General in Council passed an order in council consenting to and confirming the takings from IR 3, 5, 7, 8, 10, and 10B.⁹⁷

Almost a year later, Chief Johnie Newhumpsion raised concerns with the department regarding the fairness and accuracy of the valuations of the lands taken from the Band:

We the undersigned are appealing to your Department for Justice. We inclose Names and Stations of the Line of Rail now Building By the Great Northern RR and as yet we have not got anything for same and am Led to believe by Gov. agt in Kamloops Mr. Irwin That we are to get [illegible] average of \$10.00 pr. acre or thereabouts; all Right of way In this Parts is Valued by Great Northern \$100 and

94 J.K. McLean for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General, Department of Indian Affairs, Ottawa, November 22, 1905, DIAND file E3667-07399 (ICC Exhibit 1a, p. 65).

95 J.D. McLean, Secretary, Department of Indian Affairs, to [A.W. Vowell], Indian Superintendent, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 67).

96 A.W. Vowell, Indian Superintendent, BC, to Secretary, Department of Indian Affairs, November 30, 1905, no file reference available (ICC Exhibit 1a, pp. 73–74).

97 Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

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[as] high as \$200. Such Land as we [have] would average from \$100 to \$200 and we have not got any satisfaction so far.

However we intent getting our Money and what is Just and Right [before] allowing the Great Northern [to] Lay Track on our Land untill [illegible] Just Settlement.

We are notifying the RR of [our] actions.

Kindly advise us as what [to do.] All we want is near what [the white Men] gets. [Advise us] if it would be just & [illegible] to Demand our money Before Laying Track.⁹⁸

The department's response was to instruct Superintendent Vowell to pay out as much of the remaining balance owed to the Band as soon as possible.⁹⁹ In the responding letter to Chief Newhumpson, the Secretary of the Department of Indian Affairs stated that the valuations appeared to be "very liberal."¹⁰⁰

Chief Newhumpson continued to protest against the valuations. Superintendent Vowell in Victoria asserted that "the question was fully gone into by our Indian Agent, Mr. Irwin, of Kamloops, B.C., who decided as to the valuations" that were later accepted by the department.¹⁰¹ The Superintendent passed the letters on to Agent Irwin, who wrote directly to Chief Newhumpson. Agent Irwin stated:

I told you when last down the amount each of you would receive besides \$5.00 per acre which would go to the credit of the whole band. The Department at Ottawa in commenting on your letters, and in fact at the time I made the valuation considered I made you a liberal allowance for improvements, &c. And I may as well tell you that you will be bound by my award in the matter. You state what is not true to the Department when you say that most of right of way through reserves was garden, but it is a matter of little concern to me. You have been allowed nearly \$100.00 per acre for good cultivated land and that should satisfy you. If white men have made land in the section valuable they should profit accordingly.¹⁰²

What Irwin did not say is that \$100 per acre for cultivated land represented only \$5 per acre for the land itself. Chief Newhumpson and those his letters represented were not the only people residing in and around the

98 Johnie Newhumpson to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 95-97).

99 Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, May 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 100); Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, BC, May 21, 1906, DIAND file E 5667-07399 (ICC Exhibit 1a, p. 102).

100 Secretary, Department of Indian Affairs, to Johnie Newhumpson, May 21, 1906, DIAND, file E5667-07399 (ICC Exhibit 1a, p. 101).

101 A.W. Vowell, Indian Superintendent, BC, Indian Office, to Johnie Newhumpson, June 11, 1906, DIAND file E5667-07899 (ICC Exhibit 1a, p. 107).

102 A. Irwin, Indian Agent, to Johnie Newhumpson, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108-9).

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Lower Similkameen Valley who had concerns about the fairness and accuracy of the valuations. R.C. Armstrong, a local Justice of the Peace, had, for the past 21 years, resided on lands directly abutting the Lower Similkameen lands. In June 1906 he wrote to the department in support of Chief Newhumpson and his Band:

As the Indians have come to me to ask me to state the price of the RR Co. paid me for right of way across my land and, as their reserve joins my land, they think they should receive the same price for their land as I did. I may say that I have lived joining the reserve for 21 years. I ought to know something about it. *I was paid one hundred (\$100.00) dollars an acre for bush land (none cleared) and I may say their land is (most of it) as good as mine. It seems strange that their land was valued to only five dollars an acre and mine beside it at one hundred. Now most of their land is worth one hundred dollars an acre, if mine is, and their improvements extra.* Some of the land in reserve is stony, perhaps ten acres in all or about that much, but as they have water all their bench land, even that is good for orchards. Very poor land in the valley is selling at two hundred dollars an acre, where there is water for it. One hundred dollars an acre and five dollars for the same kind of land is rather too much of a difference. *The Indians wish to have the price of the land left to arbitration and wish me to act as their man.* I should like to see them get fair treatment and shall act for them if I am authorized to do so, if so left for settlement. The Indians a man, the RR Co. a man, and them two to choose a third. I may say the Indians says [sic] they have lost all confidence in the local agent. They are intending to write themselves, but wished me to make these statements as I have lived so long near them.¹⁰³

As far as Armstrong was concerned, the difference between \$5 per acre and \$100 per acre was too great to be fair. He also stated that the Band wished not only to have arbitration but also to have him represent them.

The department did not respond directly to the request for arbitration but stated that it had little choice but to “rely upon the judgment of its Agents for valuations of this and in fact of any nature.”¹⁰⁴ It thereupon directed Indian Superintendent Vowell to look into the Lower Similkameen valuations:

The matter appears to require special investigation, as the difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong and the Indians is absurdly great. *Also the lands in Indian reserves should be valued*

103 R.C. Armstrong, Justice of the Peace, to Department of Indian Affairs, June 23, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 110–11). Emphasis added.

104 Secretary, Department of Indian Affairs to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

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exactly the same as similar lands outside the reserves. It would appear from a passage in Mr. Irwin's letter that he has not done this.

The Department has necessarily to rely on the judgment of its Agent for valuations of this and in fact of any nature. It would appear in this case that the Agent did not consult the Indians as to the value of their improvements. This should have been done very carefully, in order to avoid discontent. *It is to be regretted that the matter is closed with the Railway Company, and very difficult, if not impossible to re-open it.* I have to request you to be good enough to make a strict investigation as early as may be convenient.¹⁰⁵

Three aspects of the letter of direction are important: first, it is clear the department recognized there was a problem with the valuations of the lands; second, the department states that Indian lands should be valued in the same way as similar non-Indian lands; and third, regardless of any apparent unfairness, it was too late to demand a higher price from the railway company.

Superintendent Vowell of Victoria agreed to conduct the investigation, remarking that he “cannot understand how the Agent could value land at \$5.00 an acre and if that adjoining it had been paid for at the rate of \$100.00 per acre.”¹⁰⁶ He arranged to have Ashdown Green, a surveyor with the department in Victoria, travel into the interior with Agent Irwin to conduct new valuations.

Ashdown Green's report of August 1906 reviewed each parcel of land in the reserves separately, including amounts paid to individual band members as compensation for improvements. Green gave his opinion that the reason R.C. Armstrong had been paid \$100 per acre for his land was “doubtless it paid the Company to give him his price rather than go to arbitration, with the loss of time such action would entail.”¹⁰⁷ Green also stated that the area was dry, waterless, sage brush country and that the “greater part of the land taken from the reserves is absolutely worthless.”¹⁰⁸ The amounts paid for improvements were, in his opinion, “far in excess of their actual worth.”¹⁰⁹

In September 1906 the Secretary of the department wrote to Superintendent Vowell in Victoria and advised that Ashdown Green had gone “very thoroughly into the matter”¹¹⁰ and that the Indians had accepted the

105 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118). Emphasis added

106 A.W. Vowell, Indian Superintendent, Indian Office, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

107 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

108 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

109 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

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awards. Five years later R.C. Armstrong wrote again on behalf of the band members, restating that he was paid \$100 per acre for land while the Band received only \$5 per acre and that Green had “lied about the quality of the land.”¹¹¹

Band’s Position

The Band takes the position that Canada has breached both fiduciary and statutory duties with regard to the compensation that was paid to the Band more than a century ago. According to the Band, the \$5 per acre payment to the Band when the fair market value of the land was \$100 demonstrates that the “compensation package being imposed was not in the best interest of the Indian people and was not to the standard of a prudent man managing his own affairs.”¹¹² The Band also argued that the settlement amount was exploitative¹¹³ and was forced upon the Lower Similkameen people. Such a forced settlement, the Band argues, is a breach of fiduciary duty.¹¹⁴

Canada’s Position

Canada acknowledged that the Crown has a fiduciary duty to ensure that proper or fair compensation is paid when land is taken, but it argued that in this particular case the Crown’s conduct did not result in a breach of fiduciary duty. Canada put forward the following as rules for determining whether the compensation paid for reserve land was adequate:

1. The Crown has an obligation to ensure that the Indians are “properly” or “fairly” compensated for the lands taken;
2. Exactly how fair compensation is ensured lies within the Crown’s discretion, and as long as that discretion is exercised honestly, prudently, and for the benefit of the Indians, there can be no breach of duty;
3. It is not necessary for the Crown to obtain the highest appraised value for the lands, but absent evidence that the compensation was unreasonable, it is sufficient if the price falls within the range of appraised values.¹¹⁵

110 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, September 18, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 139).
 111 R.C. Armstrong, [J.P.] to Department of Indian Affairs, October 15, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, pt. 1 (ICC Exhibit 1a, p. 238).
 112 Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 196.
 113 Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 198.
 114 Written Submission on Behalf of the Lower Similkameen Indian Band, October 25, 2004, para. 216.
 115 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 76.

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Canada cited the process as evidence that there was no breach of duty: “When the initial valuation was questioned, the DIA [Department of Indian Affairs] treated those questions with respect and moved quickly to retain a highly regarded individual to enquire into the matters. Once his report was received, it was disclosed to and discussed with the Indians at a public meeting and the Indians, when so informed, agreed that the evaluations had been fair.”¹¹⁶

Canada concluded that the conduct of the department showed the “proper loyalty, good faith, appropriate disclosure and ordinary prudence for the best interests of the Indians as required by the rules of pre-reserve creation fiduciary obligations of the Crown to First Nations.”¹¹⁷

With regard to a statutory duty, Canada argued that because the lands were not reserves, section 35 of the *Indian Act*, requiring compensation to be made “in the same manner as is provided with respect to the lands or rights of other persons,”¹¹⁸ did not apply.

Test for Breach of Duty

The courts do not provide us with much guidance to determine what would constitute a breach of fiduciary duty with regard to compensation paid to a First Nation for expropriated land. Most of the case law has focused on whether the expropriation itself was a breach of fiduciary duty, not whether the money paid for the land was sufficient. As we discussed earlier in this report, we are guided by *Kruger v. Canada*, which imposes a fiduciary duty on the Crown when it expropriates Indian lands and requires the Crown to pay proper compensation. *Kruger* also requires the Crown to act honestly, prudently, and for the benefit of the Indians when it exercises discretion over Indian lands.

The question of the relationship between the fiduciary duty and compensation was also explored in *Apsassin*.¹¹⁹ In this case, the Band had surrendered lands to the Crown for sale, and one of the issues was whether the Crown had breached its fiduciary duty in selling the lands for less than the highest appraised value, but more than the lowest appraised value. In stating that the Crown did not breach its duty, Madam Justice McLachlin stated that the “duty on the Crown as fiduciary” was “that of a man of ordinary prudence in managing his own affairs.”¹²⁰ The Crown therefore must do no less for the Band than it would in managing its own affairs, keeping in mind that the Band

116 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

117 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 77.

118 *Indian Act*, RSC 1886, s. 35.

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

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had no ability to deal directly with the railway and was completely dependent on the Department of Indian Affairs to negotiate with the VV&E Railway.

We must also be guided by the statutes: section 136 of the *Railway Act* required that compensation be paid for “any portion of any Indian reserve or lands ... compensation shall be made therefor as in the case of lands taken without the consent of the owner.”¹²¹ The Act sets out the requirement for compensation and also directs what would be considered to be sufficient compensation. Section 35 of the *Indian Act* referred specifically to “reserves,” but in these circumstances we are mindful that the officials of the days referred to the lands as reserves and acted as if they were reserves. They could not have known at the time that many years later the Supreme Court would rule that these lands set aside for the Lower Similkameen people had not attained the legal status of reserves. Accordingly, the officials ought to have respected and enforced the laws that would have protected the Lower Similkameen Band.

We find that there was a statutory requirement for the Crown to ensure that the Lower Similkameen Indian Band was adequately and fully compensated for the lands that were taken for railway purposes. We also find that the level of compensation was required by statute to be equal to the amounts paid by the railway to the neighbouring non-Aboriginal land owners.

Breach of Statutory Duty

The historical evidence shows that the Lower Similkameen Indian Band was paid less for its land than the neighbouring non-Aboriginal land owners were paid. The record also shows that, from the outset, the department did not follow the statutory requirements.

Agent Irwin had been specifically instructed in July 1905 to place a fair value on the land taken and to value lands and improvements separately. These instructions directly contradicted the statutes that governed this and similar situations. Indian Superintendent Vowell was told by departmental officials in

Ottawa: “It does not appear advisable that the Agent should be governed by any general arrangement made with the adjacent white land owners.”¹²²

120 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*), McLachlin J, at para. 104, citing *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302 at 315.

121 *Railway Act, 1903*, SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

122 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 27, 1905, LAC, RG 10, vol. 7676, file 22169-13 CP (ICC Exhibit 1a, p. 51).

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From the beginning, the correspondence among the department, the railway company, and its solicitors shows that the department was more eager to please the company than it was to ensure that the Lower Similkameen Indian Band received fair compensation. The railway company had suggested that a fair price would be \$25 per acre. The department approved Agent Irwin's valuation of \$5 per acre and moved immediately to invoice the company for a total based on that amount for the land plus the value allowed for improvements.

Certainly departmental officials were aware that the band members were unhappy. Chief Newhumpston stated specifically that his people thought their land had been undervalued. There is no explanation for Agent Irwin's statement in response to Chief Newhumpston that they had been "allowed nearly \$100.00 per acre for good cultivated land"¹²³ and no evidence to show that anything near that amount was paid. There is also no reference to the instructions to Agent Irwin in which he was told to separate the value of improvements from the value for the land itself.

The neighbouring Justice of the Peace, R.C. Armstrong, was clear that he was paid \$100 per acre for his land and that it was of the same quality as the Band's land. There is no evidence to support surveyor Ashdown Green's supposition that the railway paid Armstrong so it would not need to face an arbitration. Armstrong allowed that some of the Band's land was stony, but he also stated that there was water for all the Band's land and that the presence of water for irrigation was the key to valuing land. Armstrong's letter also stated that very poor land with water was selling in the valley for \$200 an acre.

Other than Armstrong's letters and some valuations provided by Ashdown Green in his 1906 report, there is little direct evidence in the record about how much the non-Aboriginal settlers were paid for their land. As a result, subsequent to the oral hearing in this inquiry, on agreement of the parties, the ICC undertook independent research and examined the transfer documents for non-reserve lands held in the provincial land titles office. These documents indicated that the average price paid for the non-reserve lands was \$104.91 per acre.¹²⁴ Because the transfer documents do not break down the price paid for bare land and improvements, we must assume that the amounts paid for non-reserve lands included improvements that may have been on those lands.

123 A. Irwin, Indian Agent, to Johnie Newhumpston, Chief, Lower Similkameen Indian Band, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108-9).

124 K. Faulkner, ICC Research Officer, "Further Research on Sales of Non-reserve Lands to VV & E," May 26, 2005 (ICC Exhibit 9a).

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It appears to us that the transfer documents validate Armstrong’s observations that the Band and its members were underpaid relative to the nearby settlers. We make no comment on the magnitude of the difference, except that we cannot find anything in the evidence presented to us that would justify any difference between the values placed on and the prices paid for Aboriginal and non-Aboriginal lands. We must conclude that there has been a breach of the Crown’s statutory duty to the Band and its members to compensate them fully and equally for the land taken for railway purposes.

Breach of Fiduciary Duty

We have reviewed Canada’s statement of the law on breach of fiduciary duty with regard to compensation, and we approve of this formulation of appropriate Crown conduct. We find that the standard of conduct is that of an honest, prudent person acting for the benefit of the beneficiary, which in this case is the Lower Similkameen Indian Band. We accept Canada’s argument that the price paid to the Band need be only within the range of acceptable valuations, not necessarily equal to the highest price paid for similar or identical land. We would add, however, that, given the very high nature of the fiduciary duty on the Crown, even in the pre-reserve creation phase, particularly where land was being taken for a railway, the prudent fiduciary would surely accept a price only at the high end of a potential range of values.

Having said that, in turning to the question of whether Canada breached its fiduciary duty to the Lower Similkameen Indian Band, we can only conclude that it has. The values placed on the Band’s lands by the Crown itself are clearly not within a range of acceptable values, and certainly nowhere near the top of the range. We have not been presented with any evidence or argument that would justify why a prudent fiduciary would accept 22 per cent of the land’s fair market value, nor can we find an explanation that would show how accepting this low valuation was to the benefit of the Band.

We have also considered whether the historical record shows that the department did its best to negotiate with the VV&E Railway in such a way that the price paid was the best that could be bargained, given the circumstances. Again, we do not find any evidence to support that view. Instead, we find that the department was eager to provide land for the company and that it did not appear to have questioned the valuations from Indian Agent Irwin that ran contrary to both the statutes and the instructions sent to Superintendent Vowell in Victoria. When Chief Newhumpsion questioned the valuations, the department’s immediate response was that they were “very liberal.” Agent Irwin responded that the band members “were bound by my award.” Only

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when the Secretary responded to R.C. Armstrong and instructed Superintendent Vowell to investigate was there any suggestion that someone in the department was concerned: “[T]he difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong is absurdly great,” he wrote. The Secretary reiterated that the “lands in Indian reserves should be valued exactly the same as similar lands outside the reserves.”¹²⁵ Vowell’s response, that he could not understand the difference in valuation, indicated that he too was concerned.

Regardless of those concerns, the department did not seek further payment from the railway company but merely asked Ashdown Green to investigate.

There is little question that the Crown could have required the railway company to pay more in compensation for the lands that were taken from the Band. To focus on the government’s public policy agenda in using the railways as a method of opening up the country in these years and bringing economic growth to remote areas is too easy an explanation. The fact that the VV&E paid the non-Aboriginal settlers more than \$100 per acre for their land is evidence that the company knew the cost of putting the railway through the Lower Similkameen Valley. We cannot conceive that the railway would have abandoned the project if the Government of Canada had wanted more money for the Indian lands.

We find that there was no point at which the Crown tried to balance any competing interests and that quite the opposite is true: the Crown appeared to be concerned only with the need for the railway company to build its line quickly and most economically. The Crown’s attitude, which seems to us to be that the deal was a closed matter, cannot be said to reach the standard of the highest order of pre-reserve fiduciary duty.

Compensation for Injurious Affection

It is clear from a review of the historical documents that at no time did the Crown consider whether the Band and its members should be compensated for “injurious affection.” Injurious affection is the damage caused to other lands as a consequence of expropriation. With regard to compensation for injurious affection, the Supreme Court has stated:

[W]here a statute requires compensation to be paid for lands compulsorily taken, one element to be included, in determining the compensation for the lands taken,

125 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND, file E5667-07399 (ICC Exhibit 1a, p. 118).

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is in respect of damage sustained by the owner, by reason of injurious affection to his adjoining lands because of the severance.¹²⁶

The maps are clear that, in many places, the rail lines laid down by the VV&E bisected each reserve it crossed. At the community session held during this inquiry, several Elders spoke to the experiences of their grandparents. John Terbasket, for instance, recalled that his grandfather, William Terbasket, who had a home on IR 3, found, after the railway was built, that “his house was on one side and his barns were on the other side of the track.”¹²⁷ The construction of the rail line cut off access to irrigation water; one Elder noted that parts of the reserves are no longer used because of lack of access to water. Many community members recalled that the fences along the rail bed were poorly maintained by the company within the reserve, although they were well maintained elsewhere. As a result, many of the band members’ cattle and horses were injured or killed, either from being hit by the train or being tangled in barbed wire.

The railway also had an impact on wildlife migration patterns because the noise from trains frightened deer and other small game animals away from the reserves. The loss of this ready supply of food led to shifts in traditional subsistence patterns and required band members to travel further to hunt. The Elders testified that the railway right of way followed an old trail used by the Similkameen people and that a number of spiritual sites and traditional markers were destroyed or disturbed, including a gravesite on IR 7.

We do not find anything in either the historical record or the evidence put before us to indicate that Canada considered the impact of the railway on the way of life of the Similkameen people. There is no evidence that the compensation paid was to include this kind of damage, and we find no indication that Canada either forced or encouraged the railway company to take the lives of the Similkameen people into account. We note the words of Justice Iacobucci in *Osoyoos*, in which he stated some of the unique characteristics of reserve lands:

... an Indian band cannot unilaterally add to or replace reserve lands,

and,

¹²⁶ *Minister of Highways (B.C.) v. British Pacific Properties*, [1960] SCR 561 at 567.

¹²⁷ ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13, John Terbasket).

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... it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community.¹²⁸

We have already stated that the lands taken were not fully constituted legal reserves. However, regardless of their status in 1905, they had been set apart, and the Lower Similkameen people had been located there permanently. The Band had no opportunity whatsoever to select another land base. As we have said before, everyone acted as if the *Indian Act* and its restrictions governed the lives of the people of Lower Similkameen. We think Justice Iacobucci's comments are as applicable to the Lower Similkameen Band in 1905 as they were to the Osoyoos Band almost a century later.

We also note that even though the rail line has been abandoned, the rail bed continues to exist and continues to run through the heart of this community. We find that for the Crown to have fully compensated the Band at the time the lands were taken, it should have turned its mind to the impact that taking these lands would have on people who had no choice in the matter and nowhere else to go.

ISSUE 3 DUTY TO NAME AN ARBITRATOR

3. **Did Canada owe a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to name an arbitrator pursuant to section 35 of the 1886 *Indian Act* (as amended in 1887 and later became section 46 of the 1906 *Indian Act*) regarding the taking of the lands in this claim? If yes, was this obligation(s) breached?**

Section 35 of the 1886 *Indian Act* provided for compensation to a band of Indians for any railway, road, or public work that passed through or caused injury to a reserve, or any act authorized by an Act of Parliament or of the Legislature that caused damage to a reserve. The section also spelled out the rules for determining the compensation to the Indians:

compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; *and the Superintendent General shall, in any case where an arbitration is bad, name an arbitrator on*

¹²⁸ *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at paras. 45 and 46.

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*behalf of the Indians and shall act for them on any manner in any manner relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General ...*¹²⁹

The question is whether the Crown had a duty under this section of the statute, or a fiduciary duty, to name an arbitrator. The underlying question is whether the Crown had a statutory or fiduciary duty to initiate the arbitration in the first place.

Band’s Position

The First Nation argues that because arbitration was foreseen under the Act, the Crown had a fiduciary duty to use arbitration where there was a dispute over compensation. The only way to alter the agreement made with the railway, it states, was to use arbitration to force a new compensation package.

The Band also argues that, once it had notified the Crown that it was not happy with the compensation paid, a prudent fiduciary would have sought arbitration because of its duty of loyalty and as a way to act in the best interests of the beneficiary – the Band. According to the First Nation, the Crown breached its duty of loyalty by imposing an exploitative bargain and by not fulfilling the request for arbitration.

Canada’s Position

Canada takes the position that the wording of section 35 of the Act leaves the decision about whether to conduct an arbitration to the discretion of the Superintendent General of Indian Affairs – that it is permissive, not obligatory. As a result, the Superintendent General was not under a fiduciary obligation to hold an arbitration. Canada also argues that the department met its obligations when it appointed surveyor Ashdown Green to review the valuations of the lands that had been taken for the railway.

Panel’s Reasons

We have already stated that, in 1906, only one final step remained before the lands set aside by Canada and British Columbia, and occupied by the Lower Similkameen people, would become reserves. Everything that was required up to that final step had clearly been done, and for all intents and purposes Canada, British Columbia, the Band, and the surrounding settlers treated the lands as a reserve. We have concluded that, with respect to the lands occupied by the Lower Similkameen people, the Crown owed pre-reserve fiduciary

¹²⁹ *Indian Act*, RSC 1886, s. 35. Emphasis added.

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duties of the highest order to the Band. These pre-reserve fiduciary duties required the Crown to act with loyalty, good faith, appropriate disclosure, and ordinary prudence in the best interests of the Band.¹³⁰

From our perspective, it is not conclusive that, because the lands were not fully constituted reserves, the *Indian Act*, which applies to reserve lands, can be disregarded. Clearly, all the parties involved at the time not only thought that the Band's lands were reserve lands but acted as though they were. The Crown had a fiduciary duty to act with loyalty towards the Lower Similkameen people with regard to their lands, and we think that this requirement can have been met only with a carefully considered response.

The section 35 reference to arbitration is poorly worded. The section is silent on the role of the Crown, if any, in demanding or encouraging the parties, in this case the VV&E and the Lower Similkameen Band, to settle the compensation issue by arbitration. One wonders how this or any Band, whose lands were being taken for a right of way, would have had the knowledge or capacity in those days to initiate an arbitration on its own. Further, the section does not address the situation that the Lower Similkameen Band faced. This Band was pitted against both the Crown and the railway in trying to obtain adequate compensation. Yet, if an arbitration had been initiated, section 35 of the Act would have required the Crown to take charge of the Indians' case, including naming the arbitrator on behalf of the Indians and acting for them throughout the process. The conflict of interest could not be more pronounced.

Unfortunately, our hands are tied by the wording of the section. On a plain reading, it appears that, in the case of a disagreement over compensation, arbitration was not a mandatory process. The section only stipulated that, once the parties were in an arbitration process, the Crown would have a statutory duty to name the arbitrator for the Indians and represent their interests. There was no arbitration in this case, and therefore no statutory breach.

Still, we are left with the question of whether the Crown had a fiduciary duty in these circumstances to initiate the arbitration itself. The department knew that the band members were not satisfied with the compensation paid, and a respected non-band member, R.C. Armstrong, had told the department that he and others were paid much more for the same quality of land than was the Band. Further, two officials remarked on the low valuations put on the land by Agent Irwin: Secretary J.D. McLean and Indian Superintendent A.W.

¹³⁰ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 94.

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Vowell exchanged correspondence indicating that they were both disturbed at the disparity between the \$5 an acre received by the Band and \$100 an acre for similar land near the reserves.¹³¹ Although the department knew full well that there was a serious problem with the compensation, it appears that officials concluded that it was too late to take any remedial action, as the railway had already paid the compensation agreed to by the department and, reluctantly, by the Band.

Given the permissive language of the statute, however, we are unable to find that the Crown was under a fiduciary or any duty to order the parties to appear before a board of arbitration; hence, there was no duty to name an arbitrator for the Band. The Crown, in its discretion, may have opted for arbitration but there is no basis for finding a fiduciary duty to do so. Moreover, as we have mentioned, this was not a case in which the Crown could fairly represent the interests of the Band. The fact that the Crown had already agreed to a deal based on the valuation of its own official, Agent Irwin, put the Crown in an adverse position to that of the Band.

In conclusion, the Crown was not in breach of a statutory or fiduciary duty when it failed to name an arbitrator under the *Indian Act* or make any attempts to have the compensation dispute placed before a board of arbitration. This is not to say, however, that the Crown met its fiduciary duty to take other steps to rectify the situation once senior officials became apprised of the problem. Apart from sending out Ashdown Green to investigate, the Crown did nothing to resolve the matter. As we have already discussed, this failure was one aspect of the Crown's breach of fiduciary duty to obtain adequate compensation for the Band.

ISSUE 4 ASHDOWN GREEN'S INVESTIGATION

4. Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band with respect to the 1906 investigation conducted by Ashdown Green regarding the value of the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes?

After both the Lower Similkameen Band and R.C. Armstrong had complained, departmental officials in Ottawa instructed the Superintendent, A.W. Vowell,

¹³¹ A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

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“to make a strict investigation.”¹³² Vowell appointed surveyor Ashdown Green to investigate the matter a month later. Green visited the reserves with Agent Irwin and reported on August 27, 1906.

Green’s report is fairly detailed, and it is apparent that he visited most, if not all, of the band members’ farms from which land was taken for the railway. It is also clear that he did not separate bare land values from the values for improvements, as was necessary to properly value Indian lands, and that he did not think that Armstrong’s statements about his own lands were persuasive. He acknowledged that the railway had paid Mr Armstrong \$100 per acre but stated: “I should not have valued it at more than \$10 per acre.”¹³³ He concluded that the railway had paid Armstrong to avoid the time and cost of an arbitration.

Green compared the price paid for the Indian lands to the assessed value for tax purposes of non-Indian lands, rather than comparing the price paid for the Lower Similkameen lands to the market prices paid. He used prices paid for land two years earlier, before the railway came through the valley. What is entirely lacking is an explanation by Green of the significant difference between the prices paid to the settlers and to the band members; instead, he describes the land the Band had, much of which he thought was worthless. The tone of Green’s report is very much one of an after-the-fact rationalization of the department’s valuations and actions. In valuing the Band’s lands, he collapsed values of bare land, improvements, and compensation for moving buildings into a single value, in spite of long-standing instructions to separate out those values for Indian lands. He concluded that the average price paid for 116.85 acres of land in IR 3, 5, 7, and 8 was \$24.85 per acre, a sum that included improvements and payments made for buildings.

We cannot consider his report without noting the fact that Agent Irwin accompanied Green on his travels and acted as his guide. Irwin was present at Green’s meetings with both band members and non-reserve residents. This is the same Agent Irwin that Green was supposed to be investigating. We do not see how he could have conducted an independent assessment in the company of the person whose values he was investigating, and we do not find it surprising that his conclusion about this “arid and water-less country covered with sage brush”¹³⁴ was that “the greater part of the land taken from the

132 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

133 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

134 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

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reserves is absolutely worthless for any purpose.”¹³⁵ Nor is it surprising that he concluded that Agent Irwin’s \$5 valuation was “a very liberal one.”¹³⁶ We note that he states that “Mr. Irwin’s instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers.”¹³⁷ The historical record is clear that the department’s instructions were inconsistent and contradictory. Irwin’s instructions were the opposite. Superintendent Vowell, for instance, stated that Irwin had been “fully instructed as to the requirements of the department touching such valuations.”¹³⁸ Later in 1906, when the Secretary was writing from departmental headquarters in Ottawa to Vowell, after both Chief Newhumpson and R.C. Armstrong had written in protest, he stated that “the lands in Indian reserves should be valued exactly the same as similar lands outside reserves”¹³⁹ – the requirement that is set out by the statute.

We note that R.C. Armstrong was similarly unimpressed. The day after Ashdown Green and Agent Irwin visited him, he wrote a strongly worded letter to the department:

As Mr. Green called on me yesterday as he was returning from the Ind[ian] reserve with Irwin, he made such outrageous statements re the Indian land I wish to say I think some one has been paid to lie about the land. I felt sure when I saw him with Irwin. I felt sure the Indians would be done for and you made to believe a wrong value. [T]he first false statement he mad[e] was the land was mostly stony[. N]ow the fact is there is not ten acres of the right of way stony. Of course, if there is a cut made on any of these benches there will be stones struck, as all the benches is made from the mountains ages ago. Then as to sand he said a lot of it was sandy a straight lie. Now the weather has been so dry for months that the land is dry in spots and dusty. A coast man was the worst kind of a man to send to value land in the upper country as it looks so different from the wet coast land but as I wrote before the stony land in this valley and all these valleys is good fruit land if there is water to irrigate them and there is plenty of water to irrigate all this reserve[.] At Keremeos there has been 1600 acres sold for \$35.00 on an acre, more than half of which is high gravelly and stony land and is now selling in small lots of 5 and ten acres for from one to two hundred dollars an acr[e]. There was another ranch of 800 acres sold for about the same per acre more than half of which is bench land

- 135 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).
 136 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).
 137 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).
 138 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).
 139 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

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and no way to irrigate it either. I will give \$20.00 twenty dollars an acre for any amount of the Indian land measured from the river to the mountain and I have offered \$20 an acre for a very stony piece of reserve (ten acres) but it can be irrigated (for fruit purposes). I think some one has been squared in this deal. ... I enclose on the back a list of names and prices paid by the R.R. here.¹⁴⁰

Positions of the Parties

The Band has argued that Canada breached a fiduciary duty with regard to Ashdown Green’s investigation. Conversely, Canada has argued that it did not.

We do not find the issue clear. Green was a surveyor employed by the Department of Indian Affairs. He was asked by his superiors to investigate and report, and he did so, albeit, we think, not very well. R.C. Armstrong may have thought he “was the wrong kind of man” to do this report, but we have not been presented with any evidence that Green was unskilled or unable. There is nothing on the record about whether the department had any concerns.

Panel’s Reasons

Accordingly, we are unable to make a finding that Canada breached either a statutory or a fiduciary duty to the Band with regard to Ashdown Green’s investigation.

ISSUE 5 REVERSIONARY INTEREST IN THE LANDS

5. **Did Canada breach a statutory and/or fiduciary duty to the Lower Similkameen Indian Band to ensure that the lands taken by the Victoria, Vancouver and Eastern Railway for railway purposes reverted back to Her Majesty the Queen and, particularly, to Her Majesty the Queen in Right of Canada and then to reserve status for the benefit of the Lower Similkameen Indian Band once those lands were no longer required for railway purposes?**

Though framed in the past tense, this issue requires the panel to determine whether there has been and continues to be a duty to ensure that the right of way over IR 3, 5, 7, and 8 reverts to Indian reserve status with the abandonment of its use for railway purposes, and whether that duty has been breached. For the reasons that follow, the panel has concluded that the lands in question have been reserve lands since conveyance by British Columbia to

¹⁴⁰ R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 128–30).

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Canada for that purpose, and that the interest of the railway has reverted to the Crown for the use and benefit of the Lower Similkameen Indian Band. Canada had and continues to have a fiduciary duty to ensure that this result occurs.

Background

In response to requests in October and November 1905 from the Ottawa solicitors for the VV&E, and subsequent payment, an order in council issued December 23, 1905, recommending that, “under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 33, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon.”¹⁴¹

Section 35 of the *Indian Act*, RSC 1886, c. 43, as amended by SC 1887, c. 33, s. 5, provided in relevant part as follows:

No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council.

On March 20, 1906, letters patent were issued for the “absolute purchase” of the right of way over IR 3, 5, 7, and 8, the conveying term of which was as follows:

We by these Presents, do grant, sell, alien, convey and assure unto the said The Vancouver Victoria and Eastern Railway and Navigation Company, their successors and assigns forever: all these parcels or tracts of land ... composed of the Right of Way of the said Company through Indian Reserves numbers seven, eight, three and five of the Lower Similkameen Indians.¹⁴²

As discussed under Issue 1, British Columbia Order in Council 1036 of July 29, 1938, provided:

THAT under authority of Section 93 of the “Land Act,” being Chapter 144, “Revised Statutes of British Columbia, 1936,” and Section 2 of Chapter 32, “British Columbia Statutes 1919,” being the “Indian Affairs Settlement Act,” the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion

¹⁴¹ Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

¹⁴² Letters Patent No. 14388, March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).

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Government to deal with the said lands to such manner as they may deem best suited for the purpose of the Indians.¹⁴³

Among the lands listed in the schedule were Reserves 2–13 of the Lower Similkameen Band. For the reserves in question, the acreages listed in the schedule as conveyed were not reduced by an amount corresponding to the area occupied by the right of way. The acreages that in 1902 made up IR 3, 5, and 7 and 8 combined – 1,750 acres, 1,278 acres, and 4,075 acres, respectively – were the same identical acreages that were conveyed to the federal Crown by the provincial order in council.

At the community session in this inquiry, held April 19–20, 2004, Elders of the Lower Similkameen Band gave their evidence about the oral history of the Band with respect to events surrounding the taking of the right of way in 1905–6. A century having passed, these Elders were testifying as to the understanding of their parents and the community generally, as conveyed to them in their younger years. A consistent theme in the evidence was that the land was to return to the reserve whenever the trains stopped running. The evidence of Mrs Margaret Kruger, born in 1914, is typical. Speaking of conversations of Elders she listened to when she was about 20 years old, she said:

Well, they just said that the railway took over the land and they felt that they were going to get it back, whenever the trains (indiscernible). ... whenever they quit using it, the land would go back to the Indians. That's been the number one thoughts of all the native people. When the white man uses the land and when they're finished with it, it automatically goes back to the band.¹⁴⁴

Several Elders, speaking of the right of way in the Okanagan language, employed the term *kwúlen*, which the interpreter explained means “loan.”¹⁴⁵

Use of the trackage ceased with the wash-out of the Similkameen River railway bridge in 1972. When, in 1985, the VV&E's successor, the Burlington Northern, applied to abandon the line from Keremeos to the international boundary (the upstream portion having been abandoned in 1954), the Railway Transport Committee of the Canadian Transport Commission approved the abandonment on October 4, 1985.

143 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381).

144 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, Margaret Kruger, p. 140).

145 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, Interpreter, p. 128). Several witnesses also offered “to lend” or “to borrow” as the meaning of *kwúlen*.

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In the course of the committee’s investigation into the abandonment application, Band Administrator Delphine Terbasket notified the Canadian Transport Commission: “The Upper and Lower Similkameen Indian Band advise that [there] is no objection [to] the abandonment as long as the crossing right of ways are returned to the Upper and Lower Similkameen Indian Reserves.”¹⁴⁶ In its decision, the Railway Transport Committee noted that “the determination of Native land claims is a matter outside the scope of the jurisdiction of the Commission.”¹⁴⁷ Responding to the decision, Hubert J. Ryan, then Acting Director of the Department of Indian Affairs’ Land Directorate, informed the British Columbia Region Reserves and Trusts office of the commission’s order, noting: “As the rail line in question passes through a number of reserves belonging to the Similkameen Band you may wish to approach the company in question with the view of re-acquiring these lands for the use and benefit of the Band.”¹⁴⁸ While this letter appears to have led to some internal discussion, no action was taken. The Band subsequently commenced litigation, though our most recent information is that it is in abeyance.¹⁴⁹

Positions of the Parties

The Band makes alternative submissions: If what were known as “reserves” in 1905 were in fact true Indian reserves, the alienation created by the 1905 orders in council was merely an easement, notwithstanding the language of the letters patent. Alternatively, if no reserve was created until 1938, the Band takes the position that the federal Crown lacked jurisdiction to take the lands in question under the *Indian Act*, with the result that the orders in council were void *ab initio* (from the beginning). The Band relies on *Osoyoos Indian Band v. Oliver (Town)*¹⁵⁰ for the position that, in case of ambiguity about a taking from a reserve, an interpretation that minimally impairs the reserve interest is to be preferred. The Band did not, however, point to any ambiguity in the orders or letters patent on which it relied.

146 Delphine Terbasket, Administrator, to R.W. Lebell, Canadian Transport Commission, Western Division, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 449).

147 Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985 (ICC Exhibit 1a, p. 453).

148 Hubert J. Ryan, Acting Director, Land Directorate, Reserves and Trusts, to Director, Reserves and Trusts, BC Region, October 15, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 457).

149 In its written submissions, Canada states: “The Lower Similkameen Indian Band did in fact commence litigation pursuing both Canada and the railway company that has moved parallel to this claim” (para. 45). By letter of January 4, 2005, counsel for the Band advised counsel for the Commission as follows: “In the past, there was a formal abeyance agreement for the litigation, however it has expired. Though the abeyance agreement has expired, neither the Lower Similkameen Indian Band nor the Federal Crown has proceeded with litigation.”

150 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

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The Band also traced the history of the restraint on alienation contained in the *Railway Act, 1903* and its successors, pointing out that a railway was authorized to “take and appropriate” Crown lands (including provincial Crown lands) for railway purposes, but prohibited from alienating such lands. In this regard, the Band relies on case law dealing with the reversionary interest in railway right of way lands when the railway use has been abandoned: *Canada (Attorney General) v. Canadian Pacific Ltd.*¹⁵¹ (the “Kettle Valley case”) and *Canada (Attorney General) v. Canadian Pacific Ltd.*¹⁵² (the “False Creek case”). In the Band’s view, the ultimate result of the reversionary interest logic is a constructive trust in favour of the Band.

Canada takes the position, relying on *Wewaykum*,¹⁵³ that the federal authority over the lands in 1905 was limited to “legislative and administrative jurisdiction” such that the federal Crown was unable to grant fee simple rights, saying what was conveyed is best characterized as an easement. Canada agrees with the Band that the *Railway Act, 1903* and the case law cited by the Band preclude the railway alienating the right of way lands once they are no longer used as trackage, but it says that the reversionary interest accrues only to the federal Crown, not to the benefit of the Band. In support of this position, Canada argues that, despite the inclusion of the right of way lands in provincial Order in Council 1036 of 1938, and their consequent apparent conveyance to Canada “in trust for the use and benefit of the Indians,” these lands could not have acquired reserve status because they were already subject to an easement in favour of the railway.

No one has argued before the panel that the railway has title to the lands. The parties agree that the reversionary interest in the right of way lands accrues to the federal Crown, differing only on the central question – whether that interest is ultimately for the use and benefit of the Band.

Panel’s Reasons***Were the 1905 Orders in Council Effective?***

We must first consider what the federal Crown effected in 1905 by its orders in council. The Governor in Council, invoking as authority section 35 of the *Indian Act* of 1886 as it then stood, purported to give, by order, “authority ... for the sale of the [right of way] land” to the VV&E. Had the lands in question been Indian reserves, as all parties at the time believed them to be, the *Indian*

151 *Canada (Attorney General) v. Canadian Pacific Ltd.*, [1986] 1 CNLR, affirmed [1986] BCJ No. 407 (QL).

152 *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSC 933, affirmed without pronouncement as to reversion to reserve status, 2002 BCCA 478; [2002] 4 CNLR 32.

153 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 51.

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Act would have applied. However, as *Wewaykum* tells us, they were not reserves, and the statute did not apply. Moreover, section 35 prohibited a “portion of any reserve” from being taken without Governor in Council consent, but arguably it did not in itself give the power to take reserve lands.¹⁵⁴ For Crown lands and reserve lands, that power lay in the *Railway Act, 1903*, the relevant provisions of which were as follows:

134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.¹⁵⁵

The terms “Lands vested in the Crown” and “Lands of the Crown” in the various *Railway Acts* include provincial Crown lands: *Reference re: British North America Act, 1867, s. 108 (B.C.)*;¹⁵⁶ *Reference re: Railway Act, s. 189 (Canada)*.¹⁵⁷ The federal Crown was therefore able to give valid consent to the taking by a railway of an interest in provincial Crown lands to the extent provided by the *Railway Act, 1903*.

Any legal difficulties that might be thought in this case to arise from the questionable reliance by the federal Crown exclusively on the *Indian Act* dissipate in the face of the doctrine that “executive legislation need not indicate the source of its authority.”¹⁵⁸ As Mr Justice La Forest has stated: “All that is constitutionally required of subordinate bodies – as of federal and

154 The prohibitory language of s. 35 of the *Indian Act* of 1886 as amended in 1887 – “No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council” – stands in contrast to the corresponding section of the 1906 *Indian Act*, s. 46, amended in 1911 to give express power to specified entities to take reserve lands with Governor in Council consent. “[T]he right to expropriate ... must be found in the express words of a statute for the right is never implied.” See G.S. Challies, *The Law of Expropriation* (2nd ed., 1963), p. 12, quoted with approval by L’Heureux-Dubé J in *Leiriao v. Val-Bélair (Town)*, [1991] 3 SCR 349 at para. 12.

155 *Railway Act, 1903*, SC 1903, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

156 [1906] AC 204.

157 [1926] SCR 163. See also *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 101–10.

158 John Mark Keyes, *Executive Legislation: Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992), 138 (footnote omitted), mentioned with approval in *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895 at paras. 6 and 20.

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provincial governments – is that they act within their jurisdiction, not that they state the source of this jurisdiction.”¹⁵⁹ Thus, given that it is not disputed that the lands in question were Crown lands, their taking was effective. The *Railway Act, 1903* had that effect, despite its not being mentioned in the order. This fact disposes of the argument that the taking, purportedly under the *Indian Act*, was void *ab initio*. In fact, it was effective.

What Interest Was Taken?

The next question to be considered is, “What was taken?” The language employed in the order in council, “authority be given for the sale of the land to the said Company,” and in the letters patent, “We ... do grant, sell, alien, convey and assure unto the said ... Company, their successors and assigns forever,” is the language of conveyance of fee simple title (though it is the language of the order that governs, the letters patent being unable to exceed what was in the order). However, the power to take under the *Railway Act, 1903* was constrained by the prohibition against alienation contained in section 134:

[W]ith such consent [of the Governor in Council], any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, *but not alienate*, so much of the lands of the Crown ... as is necessary for such railway.¹⁶⁰

Since the granting of fee simple title is equivalent to alienation,¹⁶¹ we conclude that any intention on the part of the federal Crown to grant title is overridden by the statutory prohibition against alienation, executive action being unable to exceed the power given by statute.¹⁶² A lesser interest was granted.

Meredith J of the British Columbia Supreme Court dealt with similar circumstances in *Canada (Attorney General) v. Canadian Pacific Limited et al.*,¹⁶³ where the order in council in question spoke of the “sale ... without any terms or conditions” of the reserve lands, in this case of the Penticton Indian Band, to the Canadian Pacific Railway (CPR). Meredith J held that

159 *British Columbia (Milk Board) v. Grisnich (c.o.b. Mountainview Acres)*, [1995] 2 SCR 895 at para. 30.

160 *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40). Emphasis added.

161 See *Kruger et al. v. The Queen*, [1986] 1 FC 3 at 41, Urie JA.

162 “[I]t would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions.” *A.G. v. DeKeyser’s Royal Hotel Ltd.*, [1920] AC 508 at 542 (HL). See P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), para. 29.3, n.10.

163 Known as the “Kettle Valley case”: [1986] 1 CNLR 1 (BCSC), affirmed [1986] BCJ No. 407 (BCCA); reaffirmed by a five-judge panel in the “False Creek case”: 2002 BCCA 478, [2002] 4 CNLR 32.

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notwithstanding the language of the order, “the purported alienation of the lands ... is illegal as contrary to the *Railway Act*. And further because the lands are no longer necessary, and are thus no longer used, for purposes of the railway they must be restored to the Crown.”¹⁶⁴ On examining the restraint against alienation in the *Railway Act*, RSC 1927, c. 170, s. 189, “The company may not alienate any such lands so taken, used or occupied,” he commented: “The restraint against alienation is clear.”¹⁶⁵ In our view, the phrase “such company may ... take and appropriate, for the use of its railway and works, but not alienate” in s. 134 of the *Railway Act, 1903* makes the restraint against alienation in that Act equally clear. The decision of Meredith J was upheld on appeal,¹⁶⁶ and subsequently reaffirmed by a five-judge panel of the British Columbia Court of Appeal in *Canada (Attorney General) v. Canadian Pacific Ltd.* (the “False Creek case”).¹⁶⁷

This reasoning is supported by that of another case in the same court involving the same main parties, *Canada (Attorney General) v. Canadian Pacific Ltd.*,¹⁶⁸ in which Saunders J (as she then was) also considered the effect of section 189 of the *Railway Act*, RSC 1927. Acknowledging in that case that the intention was to give the Canadian Pacific Railway a fee simple title, she nevertheless held that the statutory authority overrode any intention of the parties:

I am satisfied on the evidence that CPR and the government officials acting for Canada intended that the entire title, not a lesser estate, was to be conveyed to CPR. However, at the time of the Grant, Canada still lacked title. This transaction, therefore, cannot be forced away from the language of the *Railway Act* into the language of the CPR Contract. This mistake, while mutual, does not, in my view, alter the statutory authority which must be taken to have applied to this transaction.¹⁶⁹

The further point needs to be made that the interest granted was in provincial Crown land; if the Governor in Council’s powers were limited under the *Railway Act* to consenting to a taking without alienation, he could not have consented to more, as the federal Crown had no fee simple to grant. This is an

164 *Canada (Attorney General) v. Canadian Pacific Limited et al.*, [1986] 1 CNLR 1at 2 (BCSC). The Penticon Indian Band was not a party to the proceeding, and the decision did not address their possible interest in the reversion.

165 *Canada (Attorney General) v. Canadian Pacific Limited et al.*, [1986] 1 CNLR 1 at 4 (BCSC).

166 [1986] BCJ No. 407 (BCCA).

167 *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2002 BCCA 478.

168 The “False Creek case”: 2000 BCSC 933.

169 2000 BCSC 933, [2000] 4 CNLR 39 at para. 157.

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instance of the general rule that one cannot give what one does not possess, sometimes expressed by the Latin maxim *nemo dat qui non habet*.

There can be no doubt, therefore, that the result of the 1905 orders in council, whatever the intention (of which we have no evidence other than the words of the order itself), was to grant the VV&E a lesser interest than fee simple. What was taken is best described by the term employed by the Supreme Court in *Canadian Pacific Limited v. Paul* as “a statutory right of way, i.e., an easement,”¹⁷⁰ or by that Court in *Osoyoos Indian Band v. Oliver (Town)* as a “statutory easement.”¹⁷¹

We note parenthetically that we find no ambiguity of the type central to *Osoyoos* that would require us to decide between alternative degrees of interest obtained by the VV&E. In that case, the federal order in council was ambiguous, and the majority of the Court preferred the interpretation that “impairs the Indian interest as little as possible.”¹⁷² In our case, however, whatever the intention of the order in council, it was effective only to grant an easement, because of the restriction against alienation contained in the applicable *Railway Act* (not at issue in *Osoyoos*). It is sufficient, therefore, to regard what was taken as an easement.

What Is the Disposition of the Easement?

The easement was “for the use of [the VV&E’s] railway and works.”¹⁷³ Such use ceased at the latest on October 4, 1985, when the Canadian Transport Commission approved the abandonment of the line, if not with the actual cessation of use in 1972. Given the purpose for which it was granted, the easement ceased not later than the second of these dates.

Was There a Reversionary Interest in the Easement? If So, to Whom?

On this question of reversion, we again adopt the reasoning of Saunders J in Canada (Attorney General) v. Canadian Pacific: “I have found that CPR’s interest ... is not an absolute fee simple. The corollary is that there is a reversionary interest of some nature held by another party. That party must be

170 *Canadian Pacific Limited v. Paul*, [1988] 2 SCR 654 at 670. See also *Canadian Pacific Limited v. Matsqui Indian Band*, [2000] 1 FC 325 at para. 87, Robertson JA, who (in dissent, but terminology was not at issue) employs the term “statutory easement or licence.”

171 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at para. 89.

172 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at para. 89.

173 *Railway Act, 1903*, SC 1903, c. 58, s. 134 (ICC Exhibit 6c, p. 40). Emphasis added.

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Canada because British Columbia’s entire remaining interest in the land was passed to Canada.”¹⁷⁴ Later, she says: “Even though the Railway Act does not discuss the possibility of the reversion, it is, I consider, a reasonable inference.”¹⁷⁵

When this decision was appealed to the British Columbia Court of Appeal, the appeal was heard by a five-judge panel, convened because the correctness of the 1986 decision of that court in the Kettle Valley case had been put in issue. Commenting on the latter decision, and by implication affirming the finding of Saunders J that the CPR’s interest had reverted to the federal Crown, Esson JA wrote for the court: “I would hold that *Kettle Valley*, in finding a necessary implication that cessation of use for railway purposes would cause the land to revert to the Crown, was rightly decided.”¹⁷⁶

In our case also, British Columbia’s “entire remaining interest in the land,” in the words of Saunders J, was passed to Canada; the lands conveyed to Canada by British Columbia by Order in Council 1036 of July 29, 1938, were identically the lands occupied by the reserve in 1902, before the taking of the right of way. This interest was subject to the easement granted in 1905 to the VV&E. It follows that, as a matter of law, the interest of the VV&E, or its then-successor, the Burlington Northern, in its former right of way reverted to Canada not later than October 4, 1985.¹⁷⁷

The parties do not disagree that the reversionary interest in the right of way lands accrued to the federal Crown. That position is supported by the foregoing reasoning. The parties differ, however, on whether that interest is ultimately held for the use and benefit of the Band. We will address this question in the next section.

Is the Reversionary Interest for the Use and Benefit of the Lower Similkameen Indian Band?

There are both legal and equitable grounds on which to conclude that the VV&E right of way has reverted to the federal Crown for the use and benefit of the Lower Similkameen Indian Band. Both grounds rest on the effect of British Columbia Order in Council 1036.

174 *Canada (Attorney General) v. Canadian Pacific*, 2000 BCSC 933, [2000] 4 CNLR 39 at para. 202.

175 *Canada (Attorney General) v. Canadian Pacific*, 2000 BCSC 933, [2000] 4 CNLR 39 at para. 252.

176 2002 BCCA 478, [2002] 4 CNLR 32 at para. 120.

177 This finding expresses our view of the correct legal position. We have not concerned ourselves with real property records, positions taken by parties in any litigation, or any court decisions that may have been made, none of which is on the record.

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Legal Ground

Article 13 of the British Columbia Terms of Union imposed the following obligation on the province:

[T]racts of land ... shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians.¹⁷⁸

As Binnie J explains in *Wewaykum*:

Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over “Indians, and Lands reserved for the Indians” under s. 91(24) of the Constitution Act, 1867, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property.¹⁷⁹

In the course of discharge of its obligation, the province conveyed its interest in Reserves 2–13 of the Lower Similkameen Band by Order in Council 1036 of July 29, 1938. The condition for the conveyance tracked the language of Article 13, approving,

THAT ... the lands ... be conveyed ... *in trust for the use and benefit of the Indians* of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands to such manner as they may deem best suited for the purpose of the Indians ...¹⁸⁰

So far as the reserves at issue here are concerned, the lands so conveyed to Canada were identically the lands occupied by the reserve in 1902, before the taking of the right of way. On conveyance, the lands, including the right of way, became Indian reserve lands, subject to any administrative steps Canada may have had to take in order to set the lands apart as such.¹⁸¹

In *Kruger et al. v. The Queen*, Urie JA discusses the direct effect of Order in Council 1036. Following a recital of the order, he says: “The Penticton Indian Band, as one of the Indian bands in the province, *thereby* became entitled to the use and benefit of the lands described [for them] in the Schedule.”¹⁸²

178 Imperial Order in Council, May 16, 1871, reproduced in RSC 1985, Appendix II, No. 10.

179 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 15.

180 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 381). Emphasis added.

181 See *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 16. If this final step was not taken post-Order in Council 1036, this would again be a failure of fiduciary duty for which the Crown, not the Band, should bear the burden.

182 *Kruger et al. v. The Queen*, [1985] 3 CNLR 15 at 17 (FCA). Emphasis added.

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It is trite law that a conveyance of land is subject to any pre-existing interest in that land, and it follows that the interest granted to Canada in 1938 in those lands “in trust for the use and benefit of the Indians” was subject to the easement granted in 1905 to the VV&E. Canada has submitted that “the right to use and occupy those railway lands did not form part of the reserve created in 1938 as the Province had no authority to convey that interest.”¹⁸³ In the face of the language of the 1938 order, this proposition does not withstand scrutiny. While it is true that “that interest” – the easement – was already conveyed and so subtracted from the province’s interest, the province’s residual interest – namely, the fee simple subject to the easement, or what Canada in the same paragraph acknowledges as “the underlying title” – was transferred to Canada in 1938, becoming reserve lands by virtue of the terms of the provincial order. The reserve lands so created were thus subject to the easement. As we have already explained, the reserve lands were freed of this burden not later than 1985, with the result that the former right of way, in our view, now has full reserve status.

In any case, if, as Canada maintains, the province has not transferred title of the right of way to the federal Crown, it remains to this day provincial Crown land. In that case, any reversionary right would accrue to the provincial Crown, the federal Crown having no interest whatever on cessation of use by the railway.

We find support for the view that the reversionary interest accrues to the Band’s benefit in the conclusion of Saunders J in *Canada (Attorney General) v. Canadian Pacific* (the “False Creek case”) respecting whether the Crown’s reversionary interest in that case was held for the use and benefit of certain Indian bands.¹⁸⁴ She was bound in her findings by the decision of the British Columbia Court of Appeal in *Osoyoos*¹⁸⁵ (the Supreme Court decision not yet having issued), where the majority held that the taking of the irrigation canal right of way at issue, done under section 35 of the 1952 *Indian Act*, removed the right of way from the reserve. Thus, in order to determine the ultimate disposition of the reversionary interest in the right of way at issue before her, Saunders J had to consider whether the reserve interest that had existed before the taking had “revived.” Her finding on that point is as follows:

183 Written Submission on Behalf of the Government of Canada, December 17, 2004, para. 6.

184 The question of which band or bands were entitled to the use and benefit was the subject of a separate proceeding in the Federal Court: *Squamish Indian Band v. Canada*, 2001 FCT 480. See *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSC 933, [2000] 4 CNLR 39 at para. 15.

185 *Osoyoos Indian Band v. Oliver (Town)*, 1999 BCCA 297.

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[T]he title [the CPR] acquired was not absolute because the statutory powers exercised were limited by a prohibition on alienation. I conclude that the taking in s. 48 included a taking under s. 189 of the 1927 *Railway Act* which did not extinguish the reserve status, but rather suspended it.¹⁸⁶

On appeal, the British Columbia Court of Appeal declined either to agree with or reverse this part of Madam Justice Saunders' decision:

The issue of revival is complex and potentially of very substantial general importance. We are told that this is the first case in which the concept of revival has been squarely raised. The fact pattern in this case is highly unusual and in many respects unique. The issue, therefore, is one which it may be preferable not to decide if it need not be decided. ...

In short, while I do not say that the trial judge's interpretation of the statutes and the concept of revival of reserve status is in error, I cannot say that it is right.¹⁸⁷

Given, however, the majority decision of the Supreme Court in *Osoyoos*, that the taking of the right of way in that case did not remove the land from the reserve, reversing the Court of Appeal, the question of "revival" of the Indian interest is moot. Thus, the ultimate finding of Saunders J, that the reversionary interest was indeed for the use and benefit of a band or bands, would appear to have been buttressed, if anything, by the Supreme Court's decision. However, the Court of Appeal did not find it necessary to consider how the "revival" question might have been affected by the Supreme Court decision or to deal with the constructive trust issue. The Court did, however, affirm Saunders J's conclusion that the interest did in fact accrue to the band or bands, resting its decision on the "resulting trust" finding preferred by Saunders J.

Since the facts in this inquiry do not support a finding of "resulting trust,"¹⁸⁸ it is necessary to consider whether the alternatives proposed by Saunders J apply to our situation. While in our view, in the light of the decision of the Supreme Court in *Osoyoos*,¹⁸⁹ the "revival" argument is no longer required, we do regard the "constructive trust" argument as applicable, and that approach is analyzed below.

186 2000 BCSC 933, [2000] 4 CNLR 39 at para. 224.

187 *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2002 BCCA 478.

188 For a resulting trust to have arisen, the claimant had either to transfer the property in question to the alleged trustee, or supply all or part of the money to purchase it. See Donovan W.M. Waters, *Waters Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005), p. 365. In the False Creek case, the Squamish Band had advanced \$350,000 to purchase the provincial interest in the lands in question.

189 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

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The legal reasoning on which we rest our conclusion that the interest in the VV&E right of way is held by Canada for the use and benefit of the Lower Similkameen Indian Band is quite straightforward:

1. When the right of way was taken in 1905, the “reserve” lands were in fact provincial Crown lands.
2. As we have already held, the taking created an easement in favour of the VV&E over the provincial lands.
3. In 1938 British Columbia conveyed lands that included the right of way lands to Canada “in trust for the use and benefit of the Indians.”
4. On that conveyance, the right of way became part of the reserve, subject to the easement to VV&E or, by then, its parent/successor.
5. That easement terminated not later than 1985.
6. It follows that the lands are now fully reserve lands.

We have described this result as legal because it turns on the fact that the 1938 conveyance included the right of way. The alternative ground on which we would reach the same conclusion is an equitable ground.

Equitable Ground

In order to argue that the right of way reverts to it, Canada must rely on the fact that the right of way was conveyed to it by provincial Order in Council 1036. Were that not so – had the right of way been excepted from the provincial order – the right of way would have remained provincial Crown land subject to an easement; on cessation of that easement, the burden on the provincial title would be lifted and the full title of the province would revive, as mentioned above. The federal Crown would have no claim. The case for a reversionary interest in favour of Canada rests, therefore, on the content of Order in Council 1036, by which the right of way was conveyed to Canada “in trust for the use and benefit of the Indians.” It was accepted by Canada on that basis. We can only conclude that it would be a most serious breach of that express trust for Canada to obtain title to the right of way, yet refuse to accept that it is for the use and benefit of the Lower Similkameen Indian Band.

There can be no doubt of the fiduciary obligation on Canada in these circumstances, given the language of the provincial conveyance, made to satisfy a constitutional imperative. The right of way having, in 1938, been created reserve land, the highest fiduciary obligation arises. Specifically, the

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obligation is to ensure that the lands have, or acquire, so far as title is concerned, full reserve status:

Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.¹⁹⁰

Should Canada now have, or obtain, title to the right of way lands,¹⁹¹ but treat the lands otherwise than held in trust for the Band, Canada would be unjustly enriched.¹⁹² This point leads us to observe that, in addition to our finding above of an express trust, the equitable concept of constructive trust applies to such circumstances:

An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. ... [An] equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust.¹⁹³

Canada has submitted that it is entitled to the reversionary interest in the right of way. By retaining the right of way other than in trust for the Band, Canada would clearly be enriched, the Band correspondingly deprived, and no juristic reason for the enrichment has been suggested. While invocation of a constructive trust may be superfluous in the circumstances, given the clear words of the provincial conveyance, the concept nevertheless buttresses our view. As one authority describes the constructive trust, "Someone who acquired property in breach of trust, or otherwise by taking advantage of a fiduciary position, could not benefit from the property; he was deemed to hold the property in trust instead."¹⁹⁴

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

191 The current legal status of the lands is not known to us. The Band's 1995 claim submission states, "To this day, Burlington Northern Railway remains the holder of title of the lands which formed the right of way" (para. 69), while Canada states, "[P]resently the Burlington Northern Railway Company claims to own the fee simple [but] in fact, the railway company's interest in the lands has reverted or must revert to the Federal Crown" (paras. 2-3). As noted above, the legal status of the lands has been the subject of litigation, which we are told has been placed in abeyance.

192 See *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3 at paras. 93-97.

193 *Peter v. Beblow*, [1993] 1 SCR 980, McLachlin J (as she then was) at para. 3.

194 A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 6th ed. (Toronto: Thomson Carswell, 2004), 627.

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In the False Creek case, one of the three grounds on which Saunders J held the reversionary interest to accrue to bands was that a constructive trust existed. It is pertinent to repeat what she said on this point:

[I]n a case such as this in which Canada only acquired the province's title as administrator of Indian affairs, and had no interest in the land independent of the Indian interest, at any time, there is little merit to the suggestion that it now has an exclusive interest in those very parcels with the result that use and benefit would flow not to the Indians for whose benefit it was reserved, or to the province that held proprietary title before it was reserved for Indian use, but to Canada.¹⁹⁵

While we have not inquired in detail into the current legal situation respecting the right of way lands, we have been told that litigation has been commenced (though now in abeyance) to establish title to these lands. In our view, the fiduciary duty that infuses the taking of reserve lands for public purposes, demands that a compulsory taking “impairs the Indian interest as little as possible”¹⁹⁶ and obliges Canada to pursue vigorously whatever steps are required to ensure that the title to the right of way lands is held in the federal Crown for the use and benefit of the Lower Similkameen Indian Band.

Precedent

The Indian Claims Commission has previously considered the question of reversionary interest in reserve lands on abandonment by a railway – in fact, the VV&E – in *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry*.¹⁹⁷ In that inquiry, too, the Commission found that the interest in the right of way reverted to Canada for the Band, rejecting the proposition that “the Indian interest in reserve lands may be taken absolutely while the Crown's interest ... is preserved.”¹⁹⁸ In the result, the Commission recommended in February 1995 that the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claims Policy.

In response, the Minister of Indian Affairs of the day, Minister Irwin, informed the Commission that, in view of litigation then under way, “judicial guidance is appropriate prior to substantively responding to [the

195 *Canada (Attorney General) v. Canadian Pacific Ltd.*, 2000 BCSG 933, [2000] 4 CNLR 39 at para. 220.

196 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746 at para. 89.

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

198 Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 43. Since our report on that inquiry was released in February 1995, we have had the benefit of significant developments in the case law; to the extent that these developments have clarified certain matters, our reasoning in this report differs somewhat from that of *Sumas*.

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Commission's] recommendations."¹⁹⁹ In June 2005 his successor, Minister Scott, advised the Chief Commissioner as follows: "I am pleased to inform you that, after a careful review of the Sumas First Nation's claim and in light of the current case law, Canada has chosen to accept the Sumas First Nation's Railway Right-of-Way claim for negotiation."²⁰⁰

While the Minister did not provide further detail, we regard his decision as endorsement of the general proposition that, in the circumstance of a railway's cessation of use of its right of way over reserve land, the land reverts to the federal Crown for the use and benefit of the band whose reserve it is. From the following brief analysis, we conclude that the taking of the VV&E right of way over the Sumas Band's IR 6 is strongly analogous to the taking of the Lower Similkameen right of way into which we are asked to inquire. Acceptance for negotiation of the Sumas Band claim would appear to be an acknowledgment by Canada that the reversionary interest in analogous rights of way is in each case an interest in trust for the First Nation.

The Sumas Band's IR 6, together with other reserves for the Band, was purportedly set apart by Indian Reserve Commissioner Sproat on May 15, 1879.²⁰¹ However, as *Wewaykum* reminds us, neither the federal nor the provincial government could unilaterally create reserves on provincial Crown land.²⁰² In 1879 Crown land in British Columbia was provincial; it was not until the following year that lands on which the Sumas "reserves" stood were conveyed to Canada as part of the Railway Belt.²⁰³ Thus, what were thought in 1879 to be Sumas *Indian Act* reserves, including IR 6, were, like the Lower Similkameen "reserves" from 1895, in a pre-reserve creation state. By the time the right of way over IR 6 was taken, in 1910, purportedly under section 46 of the *Indian Act*,²⁰⁴ the lands had become federal Crown lands within the Railway Belt. As no step had been taken after 1880 to set the reserves apart, they remained in their pre-reserve creation state at that time. It is difficult to conceive of a closer analogy than this one to the Lower Similkameen situation.

Conclusion

The question the panel was required to answer was as follows:

- 199 Letter of December 20, 1995, to Co-chairs Commissioners Bellegarde and Prentice, reproduced at 4 ICCP 205.
- 200 Letter from the Honourable Andy Scott, Minister of Indian Affairs and Northern Development, to Chief Commissioner Renée Dupuis, June 16, 2005.
- 201 Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3 at 9.
- 202 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at paras. 15–16.
- 203 *An Act to grant public lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, 1880, SBC 1880, c. 11. The Sumas Band's lands fell within the Railway Belt; those of the Lower Similkameen Band did not.
- 204 RSC 1906, c. 81. Section 46 is the successor to section 35 of the *Indian Act* of 1886.

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Did Canada breach a ... duty to the Lower Similkameen Indian Band to ensure that the lands taken ... reverted ... to reserve status ... once those lands were no longer required for railway purposes?

As noted at the outset, the panel has interpreted this question as requiring it to determine not only whether there was such a duty in the past but whether there is a continuing duty to ensure that the legal status of the lands is that of reserve land for the benefit of the Band, and whether that duty has been breached to date. In failing to make best efforts to fulfill that duty since 1985, Canada has been in breach of its fiduciary duty. It is not too late, however, for Canada to carry out that duty as the fiduciary duty is ongoing. We encourage Canada to execute its obligation in this case in the immediate future by whatever legal steps may be required.

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PART V

CONCLUSIONS AND RECOMMENDATIONS

This inquiry has required us to address both historical and contemporary questions. These are, first, the compensation issues arising from the events of 1905–6, and, second, the nature of the current reversionary interest in the lands taken for railway purposes at that time.

With respect to compensation, we find that both public law and fiduciary duties in 1905–6 combined so as to have required that adequate compensation be paid for the taking of the railway lands. The public law duties are both statutory and those of common law. All these duties require that compensation should be paid based on fair market value; anything less is not “adequate.” Acting as a prudent fiduciary, the Crown should have accepted a value only at the high end of the potential range. We have also concluded that compensation, to be adequate, must also provide for injurious affection to the lands adjacent to the right of way.

As to whether the compensation paid was in fact adequate, we have compared the compensation paid for band lands to that paid for other lands in the vicinity and concluded that the compensation for the band lands was far from adequate, being as little as 22 per cent of the land’s value. Not only is the value that was accepted by Canada not at the high end of the range but it was not even within an acceptable range.

This inadequate valuation and compensation does not account for the injury to the band lands as a whole, bisected as they were by the railway. Compensation was also due for the serious disruption of band life and culture, damage to livestock, and impact on band members resulting from changes in wildlife behaviour, all of which were caused by the construction and operation of the line.

We find the arbitration provisions of the *Indian Act* to have had no application to the circumstances presented.

The evidence respecting the investigation by surveyor Ashdown Green is at best equivocal and at worst inadequate. We are unable to reach a conclusion

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

as to whether this investigation constituted a breach of Canada’s duty to the Band.

With respect to the reversionary interest, we have found that the 1905 taking of the right of way over provincial Crown lands created an easement in favour of VV&E. In 1938, when British Columbia conveyed lands, including the right of way, to Canada “in trust for the use and benefit of the Indians,” the right of way became part of the reserve, subject to the easement then belonging to the VV&E’s parent/successor (now the Burlington Northern and Santa Fe Railway). That easement terminated no later than 1985, and it follows that the lands are now federal Crown lands held in trust for the Lower Similkameen Band – that is to say, reserve lands. Moreover, given that Canada obtained the lands in its trust capacity (without which they would have returned to the province), the only equitable result is that Canada should make every effort to secure the lands for the Band’s use and benefit.

We therefore recommend to the parties:

RECOMMENDATION 1

That the Lower Similkameen Indian Band’s claim for compensation be accepted for negotiation under Canada’s Specific Claims Policy.

RECOMMENDATION 2

That Canada take the necessary steps, by litigation or otherwise, to ensure that the legal status of the former VV&E right of way lands is in every respect that of Indian reserve land set apart for the use and benefit of the Lower Similkameen Indian Band.

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde (Chair)
Commissioner

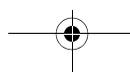
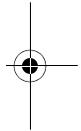
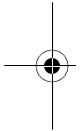
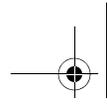


Jane Dickson-Gilmore
Commissioner



Sheila G. Purdy
Commissioner

Dated this 26th day of February 2008.

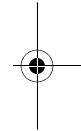
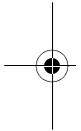




APPENDIX A

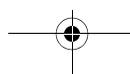
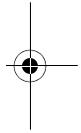
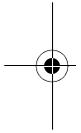
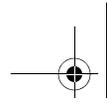
HISTORICAL BACKGROUND

LOWER SIMILKAMEEN INDIAN BAND VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY



INDIAN CLAIMS COMMISSION

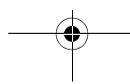
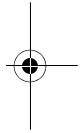
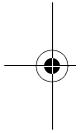
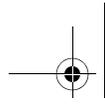




LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

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LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

INTRODUCTION

In 1995 the Lower Similkameen Indian Band submitted a specific claim to the Department of Indian Affairs and Northern Development regarding the taking of a right of way by the Vancouver, Victoria and Eastern Railway Company (VV&E, a subsidiary of the Great Northern Railway, now part of the Burlington Northern and Santa Fe Railway) through Indian Reserves (IR) 2, 7, and 8 in 1905.¹ IR10 and 10B are not included in this claim. These reserves are located in the Similkameen River valley in southern British Columbia between the village of Keremeos and the international boundary. According to their oral history, the Similkameen people, also known as Smalq'mixw, are part of the Okanagan Nation, having occupied the Similkameen Valley since time immemorial.²

RESERVE ALLOCATION AND CONFIRMATION, 1878–1902

Indian Reserve Commission: G.M. Sproat, 1878

In April 1878 Gilbert Malcolm Sproat was appointed Indian Reserve Commissioner by the provincial government, with authority to make “decisions regarding Indian land questions in the Electoral District of Yale”³ – the district that included the Similkameen Valley. In October 1878 he visited the area to set aside reserves for “the Keremeus Indians.”⁴ He described the valley itself as “narrow and gravelly,” but valuable for winter grazing and producing hay for stock.⁵ Sproat also reported that he “found the Indians in a state of discontent and dejection” because most of the best land in the area had already been pre-empted by white settlers, while the Similkameen people had not been granted any land of their own.⁶ Sproat set to work allotting reserves in the Similkameen Valley from the remaining available land.

Sproat reserved lands for the “Okanagan Indians – Keremeus Group” which would eventually form IR 5, 7, 8, and 10. Part of IR 7 was located on

- 1 In 1905 the reserve we know today as IR 2 existed as three separate reserves: IR 2, 3, and 5. (They were amalgamated in 1959. See Exhibit 1a, p. 405.) The right of way passed through IR 3 and 5 as they existed at the time. For ease of reference, the old Indian Reserve numbers will be used in this history before 1959. The VV&E also expropriated a right of way through Lower Similkameen IR 10 and 10B (also amalgamated in 1959, along with IR 10A, to form one reserve known as IR 10), but these lands are not included within the claim submitted to the ICC for inquiry. However, the allocation and survey of IR 10 and 10B are included within this history for completeness.
- 2 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 159–60, Lillian Allison; pp. 226–28, Leon Louis).
- 3 British Columbia OC 615-1878, April 26, 1878, BC Archives (BCARS), GR0113 (ICC Exhibit 1c).
- 4 G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, p. 13).
- 5 G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, pp. 15–17).
- 6 G.M. Sproat, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, February 13, 1879, no file reference available (ICC Exhibit 1a, pp. 14–18).

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the west bank of the Similkameen River “opposite the old Custom House” and was to “include the cultivable land.”⁷ For the “Keremeus Group – Ashnola Subgroup,” he set aside a reserve at the confluence of the Similkameen and Ashnola Rivers which later formed part of IR 10.⁸

In addition, Sproat “reserved absolutely” other small parcels of arable land in the valley occupied by Lower Similkameen band members.⁹ He noted that the exact locations could not be confirmed without survey, but that “the fact of occupation will enable the places to be easily found.”¹⁰ Included among these parcels were two 40-acre farms belonging to “John (son of Nah-hum-cheen)” and “Bauley.” Both parcels were later included within IR 5 and 8, respectively.¹¹

While Sproat was engaged in setting aside reserves, settlers were preempting land and water rights, making it “impossible for the Commissioner to know what arable land was really available without disturbing white settlers.”¹² Because winter was approaching and considerable uncertainty existed with respect to what lands were available for reserve purposes, Sproat did not set aside any additional “definite reserves” at this time. Instead, he “temporarily reserved” a large tract of land in the Similkameen Valley, after “having made certain definite reserves where cultivation was progressing or seemed possible.”¹³ This temporary reserve stretched the length of the valley between the Custom House (opposite IR 7) and the Ashnola River west of Keremeos (near IR 10), and it was intended to protect the interests of band members until he could return to finalize additional reserves for them.¹⁴ Sproat explained that the lands in the temporary reserve were suitable chiefly for winter grazing, especially on the east bank (IR 3 and 5) of the Similkameen River. He also noted that “arable patches” of land could be found along the west bank (IR 7 and 8).¹⁵

In March 1880 Sproat resigned his position as Indian Reserve Commissioner.¹⁶ He was succeeded by Peter O’Reilly in the summer of 1880.¹⁷

7 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 3).
 8 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 4).
 9 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 8).
 10 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 8).
 11 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 9).
 12 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, p. 20).
 13 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, pp. 19–20).
 14 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, pp. 7–9).
 15 G.M. Sproat, undated memorandum, no file reference available (ICC Exhibit 1a, p. 23).
 16 Order in Council PC 1880-1334, July 19, 1880, Library and Archives Canada (LAC), RG 2, vol. 2762 (ICC Exhibit 1d, p. 1).
 17 Order in Council PC 1880-1334, July 19, 1880, LAC, RG 2, vol. 2762 (ICC Exhibit 1d, pp. 2–3); Order in Council PC 1881-532, April 5, 1881, LAC, RG 2, vol. 2763 (ICC Exhibit 1e, pp. 1–3).

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Indian Reserve Commission: Peter O'Reilly, 1884–95

Indian Reserve Commissioner Peter O'Reilly returned to the Similkameen Valley in 1884, by which time the provincial government had sold most of the land temporarily reserved by Sproat.¹⁸ On September 22, 1884, O'Reilly issued a minute of decision setting aside a tract of land consisting of 1,920 acres “situated on the banks of the Similkameen river” within Sproat’s temporary reserve, later known as IR 3.¹⁹ In his covering letter to the Chief Commissioner of Lands and Works, O'Reilly explained that “much the larger portion of this reserve is of little value, being a mountain slide [sic],” but that “about 200 acres on the banks of the river, though poor gravelly soil, may when cleared, be converted into hay land.”²⁰

O'Reilly visited again in 1888 and set aside IR 5. The minute of decision describes this allotment as “a Reserve of nine hundred and sixty (960) acres ... south of, and adjoining Reserve No. 3.”²¹ It included the 40 acres reserved by Sproat in 1878 for John “Nah-hum-cheen’s” farm.²²

Survey of IR 3, 5, 7, 8, and 10

W.S. Jemmett surveyed the Similkameen IR 3, 5, 7, 8, and 10 in 1889. IR 7 and 8, located south of Keremeos near the international boundary, contained 3,800 acres, according to “Plan No. 1 of Similkameen Indian Reserves.”²³ IR 10, located west of Keremeos, contained 4,153 acres, according to “Plan No. 3 of Similkameen Indian Reserves.”²⁴ Plans 1 and 3, containing IR 7, 8, and 10, were approved by F.G. Verson, the Chief Commissioner of Lands and Works, on April 28, 1891.²⁵

IR 3 and 5 were located along the Similkameen River between Keremeos and the international boundary. According to “Plan No. 2 of Similkameen Indian Reserves,” IR 3 and 5 contained 1,750 and 1,278 acres, respectively.²⁶

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- 18 P. O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).
 - 19 Minute of Decision, author unidentified, September 22, 1884, no file reference available (ICC Exhibit 1a, p. 24).
 - 20 P. O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands and Works, November 29, 1884, no file reference available (ICC Exhibit 1a, p. 26).
 - 21 Minutes of Decision, P. O'Reilly, Indian Reserve Commissioner, October 30, 1888, no file reference available (ICC Exhibit 1a, p. 28).
 - 22 G.M. Sproat, Minute of Decision, October 12, 1878, no file reference available (ICC Exhibit 1a, p. 9).
 - 23 Natural Resources Canada, Plan BC 24, CLSR, “Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).
 - 24 Natural Resources Canada, Plan BC 25, CLSR, “Plan No. III of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7f).
 - 25 F.G. Verson, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Reserve Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34–35).
 - 26 Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).

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Plan No. 2, containing IR 2 through 5, was approved by the Chief Commissioner of Lands and Works on June 8, 1895, after delays caused by settler objections to IR 1 led to the cancellation of that reserve.²⁷

O'Reilly again visited the Similkameen Valley in the summer of 1893. He reported that, "having made a careful examination of the neighbourhood of IR 10, I came to the conclusion that it could be increased with advantage to the Indians by additions both in the eastern and western boundaries."²⁸ A minute of decision set aside 350 acres for IR 10B, located to the east of and adjoining IR 10.²⁹ O'Reilly reported that the greater portion of this allotment was "on a steep rocky mountain side with little pasturage," although it also included 80 acres "already fenced in by the Indians who farm several small fields."³⁰ Provincial Land Surveyor E.M. Skinner surveyed IR 10B the next year, and "Plan No. 4 of the Similkameen Indian Reserves" shows that the final reserve was enlarged somewhat to 411 acres.³¹ This plan was approved by George Martin, the Chief Commissioner of Lands and Works, on June 8, 1895.³²

Schedule of Indian Reserves, 1902

The 1902 Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, listed reserves set aside for the Lower Similkameen Band. IR 3, 5, 7, and 8 are noted as "confirmed."³³ The acreage of IR 3 was listed as 1,750 acres, and IR 5 was said to contain 1,278 acres. IR 7 and 8 are referred to together as "Skemeoskuankin" reserve, with a combined acreage of 3,800 acres.³⁴ The reserve sizes appearing on the 1902

27 Natural Resources Canada, Plan BC 23, CLSR, "Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a); F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, Indian Reserve Commissioner, April 28, 1891, no file reference available (ICC Exhibit 1a, pp. 34-35); Minutes of Decision, P. O'Reilly, Indian Reserve Commissioner, August 9, 1893, no file reference available (ICC Exhibit 1a, p. 39).

28 P. O'Reilly, Indian Reserve Commissioner, to Deputy Superintendent General of Indian Affairs, November 3, 1893, LAC, RG 10, vol. 1278 (ICC Exhibit 1a, p. 43).

29 Minutes of Decision, author unidentified, August 9, 1893, no file reference available (ICC Exhibit 1a, p. 40).

30 P. O'Reilly, Indian Reserve Commissioner, to Deputy Superintendent General of Indian Affairs, November 3, 1893, LAC, RG 10, vol. 1278 (ICC Exhibit 1a, p. 44).

31 Natural Resources Canada, Plan BC 26, CLSR, "Plan No. IV of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by E.M. Skinner, P.L.S., 1894 (ICC Exhibit 7i); Natural Resources Canada, Field book, FBBC182, CLSR BC, E.M. Skinner, "Keremeos Forks IR 12A, Ashnola IR No. 10B, Ashnola IR No. 10A," May 22-June 8, 1894 (ICC Exhibit 7j).

32 Natural Resources Canada, Plan BC 26, CLSR, "Plan No. IV of the Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia," surveyed by "E.M. Skinner, P.L.S.," 1894 (ICC Exhibit 7i).

33 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

34 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 61 (ICC Exhibit 1a, p. 46).

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

schedule match the acreages that appear on the approved plans for each reserve.³⁵

Re-survey of IR 7 and 8, 1902

In the fall of 1902, Provincial Land Surveyor F.A. Devereux re-surveyed IR 7 and 8 after errors were discovered in the original survey. CLSR Plan BC1028, “showing the boundary lines as they actually are on the ground and as re-surveyed by Mr. F.A. Devereux,” displays a combined area for IR 7 and 8 of 4,075 acres.³⁶ This amended plan was approved in December 1902.³⁷

**RAILWAY RIGHT OF WAY THROUGH LOWER SIMILKAMEEN RESERVES
Legislative Provisions relating to Lands Taken for Public Purposes**

With respect to Crown lands, the *Railway Act, 1903*, stated:

134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, but not alienate, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway ... and whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the Company pays therefor shall be held or applied by the Governor in Council for the like purpose or trust.³⁸

The provisions for the taking of Indian reserve lands were as follows:

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without consent of the owner.³⁹

35 Natural Resources Canada, Plan BC 24, CLSR, “Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d); Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).
 36 A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, December 3, 1902, no file reference available (ICC Exhibit 1a, p. 48); Natural Resources Canada, Plan BC 1028, CLSR, “Amended Plan Nos. 7, 8, 12 & 12A, Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by F.A. Devereux, PLS, 1900 and 1902 (ICC Exhibit 7k).
 37 A.W. Vowell, Indian Reserve Commissioner, to Deputy Commissioner of Lands and Works, March 17, 1903, no file reference available (ICC Exhibit 1a, p. 49).
 38 *Railway Act, 1903*, c. 58, s. 134 (ICC Exhibit 6c, p. 40).
 39 *Railway Act, 1903*, c. 58, s. 136 (ICC Exhibit 6c, p. 40).

INDIAN CLAIMS COMMISSION PROCEEDINGS

The provisions of the *Indian Act*, 1886, as amended, also required the consent of the Governor in Council for the taking of reserve lands. It also required compensation to be made “in the same manner as is provided with respect to the lands or rights of other persons” and provided a mechanism for arbitration. Section 35 states:

35. No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements thereon.⁴⁰

Incorporation of the VV&E Railway and Navigation Company

The VV&E was incorporated by British Columbia statute in 1897, with the powers conferred under the British Columbia Railway Act, including the right to “purchase, hold, receive or take land or other property, and also to alienate, sell or otherwise dispose of the same.”⁴¹ The following year a dominion statute brought the VV&E under federal jurisdiction, declaring, “the works which the Company by its said Act of incorporation is empowered to undertake and operate ... to be works for the general advantage of Canada.”⁴²

Request by the VV&E for a Right of Way

On October 17, 1905, McGiverin & Haydon, solicitors for the VV&E, informed the Deputy Superintendent General of Indian Affairs that the company planned to build a railway line from the U.S. border to the town of Keremeos, and that a right of way over Lower Similkameen IR 7 and 8 would be required.⁴³ McGiverin & Haydon requested the department to give its “immediate

40 *Indian Act*, RSC 1886, c. 43, s. 35, as amended by SC 1887, c. 33, s. 5 (ICC Exhibit 6a, pp. 18–19).
 41 *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SBC 1897, c. 75, s. 11(d) (ICC Exhibit 6h, p. 2).
 42 *An Act Respecting the Vancouver, Victoria and Eastern Railway and Navigation Company*, SC 1898, c. 89, s. 1 (ICC Exhibit 6i, p. 1).
 43 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

consideration to the right of way asked for” because their client was “most anxious to get with construction work having the contractors in the field.”⁴⁴ An additional request for a right of way through IR 3, 5, 10, and 10B was made on November 3, 1905, by McGiverin & Haydon on behalf of the VV&E.⁴⁵ Plans of each right of way, signed by the Deputy Minister of Railways and Canals in October 1905, accompanied the letters from McGiverin & Haydon.⁴⁶

A.W. Vowell, the British Columbia Indian Superintendent, reported on November 15, 1905, that, in accordance with previous instructions received from the department, arrangements for “the amount to be paid” for lands and improvements in the Lower Similkameen reserves had been made with the company’s Right of Way Agent.⁴⁷ In regard to the matter of compensation, McGiverin & Haydon wrote to the department on November 3, 1905, and stated:

In pursuance of your request as to what price we should propose for payment of these lands, we have to say that we telegraphed Mr. A.H. McNeil, K.C., the Solicitor for this Company at Rossland, and who, we think, has a good reliable knowledge of the country generally, and in answer to our telegram, he replied as follows: “Fair average price per acre for Indian lands is \$25.”⁴⁸

They again requested that the department grant permission “as soon as possible,” explaining that “the Company is building through the open parts of this section of their location and are very desirous of having the Department’s direction in the matter.”⁴⁹

Valuation of Rights of Way through IR 3, 5, 7, and 8

The department instructed Archibald Irwin, the Indian Agent for the Kamloops-Okanagan Agency, to provide a valuation of the lands required for

- 44 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, October 17, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 53).
- 45 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 54).
- 46 Natural Resources Canada, Plan 695, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3,” June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5,” June 3, 1905 (ICC Exhibit 7s).
- 47 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).
- 48 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 55).
- 49 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Deputy Superintendent General of Indian Affairs, November 3, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 55).

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the rights of way through IR 3, 5, 7, and 8. According to Indian Superintendent A.W. Vowell, Irwin had been “fully instructed as to the requirements of the department touching such valuations.”⁵⁰ Ashdown Green, a representative of the Indian Office, later reported that “Mr. Irwin’s instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers.”⁵¹

Indian Agent Irwin carried out his inspection of the Lower Similkameen rights of way and provided his valuations to the department on November 10, 1905. He reported that the total acreage desired for the right of way was 116.85 acres, on which he placed “a net actual value” of \$5.00 per acre, or \$584.25 in total, to be credited to the Band as a whole. In addition, he made separate valuations for the improvements, clearing, and cultivation for a number of individuals whose holdings were directly affected by the right of way.⁵²

According to CLSR Plan 698, the right of way through IR 3 required 24.51 acres.⁵³ In addition to \$5 per acre for the land, Agent Irwin awarded “William Terrabasket” and “Charles Yackemticken” \$200 each for their improvements. Charles Yackemticken’s allotment had a 300-foot-wide strip taken for station grounds, while the strip taken through the rest of the reserve was 99 feet wide and passed through at least one cabin and three fences.⁵⁴ The 1889 reserve survey plan of IR 3 described the land in the vicinity of the right of way as “grassland” and “low bottomland.”⁵⁵

CLSR Plan 699 shows a 99-foot-wide right of way passing through IR 5, taking 14.76 acres in total and passing through three “old barns,” three fences, and a small corner of swamp.⁵⁶ Those improvements, owned by “Johny Nhumcheen’s,” were valued by Irwin at \$200.⁵⁷ The 1889 reserve

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- 50 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).
 - 51 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).
 - 52 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 - 53 Natural Resources Canada, Plan 698, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District BC, Right of Way Required Across Indian Reserve No. 3,” June 2, 1905 (ICC Exhibit 7r).
 - 54 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56); Natural Resources Canada, Plan 698, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3,” June 2, 1905 (ICC Exhibit 7r).
 - 55 Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).
 - 56 Natural Resources Canada, Plan 699, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5,” June 3, 1905 (ICC Exhibit 7s).
 - 57 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

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survey plan of IR 5 described the land in the vicinity of the right of way as “low bottomland.”⁵⁸

With regard to IR 8, Irwin awarded “Andrew,” “Nwhimkin,” and “Pierre” the sum of \$360, \$100, and \$225, respectively, for the IR improvements.⁵⁹ CLSR Plan 695 shows a 99-foot-wide right of way, comprising a total area of 18.26 acres, through this reserve.⁶⁰ The 1889 survey plan and field notes described the land along the right of way as “grassland” and “lowland” and indicated several fields in the area.⁶¹ During the community session site tour, Lower Similkameen Elder John Terbasket identified a small village site on the IR 8 right of way which had not been reported by Irwin.⁶² The farm of R.C. Armstrong adjoined the northern end of this reserve and will be discussed more below.

Finally, 59.31 acres were taken for the right of way through IR 7, as shown on CLSR Plan 696.⁶³ The plan shows that the right of way passed directly through or immediately beside two villages, two cemeteries, a church, a corral, and various cabins, barns, fences, and fields. Except for a large station ground at the international boundary (2,000 feet long and 300 feet wide), the right of way was 99 feet wide. Indian Agent Irwin assessed a value of \$785 for the improvements of seven individuals, in addition to \$135 paid directly by the company for the removal of buildings.⁶⁴ Lower Similkameen Elders recall the existence of at least three main villages along the IR 7 right of way, containing between 20 and 30 homes each.⁶⁵ Elder Henry Dennis explained what a village site would have looked like at the time the railway went through:

Their village is more like a little subdivision, but a little different them days, because they had their barnyards and fences and corrals and garden grounds and everything around amongst every little lot that they had. I mean, they disturbed that by going through it and getting rid of all of their belongings and their chicken

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- 58 Natural Resources Canada, Plan BC 23, CLSR, “Plan No. 2 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7a).
 - 59 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 - 60 Natural Resources Canada, Plan 695, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, no date (Exhibit 7o).
 - 61 Natural Resources Canada, Plan BC 24, CLSR, “Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).
 - 62 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 20–21, John Terbasket).
 - 63 Natural Resources Canada, Plan 696, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p). See also, Natural Resources Canada, Plan BC 24, CLSR, “Plan No. 1 of Similkameen Indian Reserves, Osoyoos Division, Yale District, British Columbia,” surveyed by W.S. Jemmett, 1889 (ICC Exhibit 7d).
 - 64 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 - 65 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–85, Henry Dennis).

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coops and all this. I mean, there's a lot of them never got a chance to move them. They were just burned and moved on.⁶⁶

In addition, all the village sites contained one- and two-storey log houses, and at least one site contained pit houses (structures that were built into the ground and could not be moved).⁶⁷ John Terbasket stated at the community session that no one living in any of the villages received compensation, either for damages or for moving homes or buildings, or for their improvements.⁶⁸ According to the community, the large gravesite near the southernmost village site on IR 7 was disturbed by the railway, which was constructed directly through the middle of the site despite band protests. The company apparently relocated some of the graves, but not all of them.⁶⁹ The company also moved the large church in this southernmost village site, which appears on the right of way plan.⁷⁰ Indian Agent Irwin did not mention any of these village or grave sites within his valuation reports to the department.

In summary, Agent Irwin valued the total improvements on IR 3, 5, 7, and 8 at \$2,070.00, not including an additional \$300.00 already paid directly by the company for “removing buildings.”⁷¹ The total valuation came to \$2,954.25, including \$584.25 for the land, \$2,070.00 for improvements, and \$300.00 for removing buildings.⁷²

Approval of Valuations for the VV&E Rights of Way

Indian Superintendent A.W. Vowell forwarded Irwin’s valuations for the rights of way to the Secretary of the Department of Indian Affairs on November 15, 1905, commenting that the Agent had “bestowed considerable attention” to the matter of the valuations.⁷³ Furthermore, he reported:

The Right of way Agent of the Victoria, Vancouver and Eastern Railway Company called at the office some time ago, and informed me that the Agent went very carefully over the ground with him and that every care was taken to have fair and equitable estimates made of the land and improvements &c.

66 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–83, Henry Dennis).
 67 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 382–84, Henry Dennis).
 68 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 30, 32, 303–4, John Terbasket; p. 177, Henry Allison).
 69 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 173, Barbara Allison; pp. 175, 209, Henry Allison; p. 303, John Terbasket; p. 340, Mary Louie; p. 395, Henry Dennis).
 70 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 303, John Terbasket).
 71 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 72 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 73 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 61).

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At the same time he expressed himself on behalf of the Company as being particularly desirous of a speedy settlement so that the construction of the Railway might proceed without let or hindrance.⁷⁴

J.K. McLean, on behalf of the Chief Surveyor, wrote a memo to the Deputy Superintendent General of Indian Affairs summarizing the matter of valuations for the right of way through IR 3, 5, 7, and 8. He noted that Superintendent Vowell considered Irwin's valuation "fair and equitable" and only slightly higher than the railway company's offer of \$25 per acre, or \$2,921.25 for 116.85 acres,⁷⁵ although it is unclear whether the \$25 per acre offered by the company was inclusive of improvements or reflected only the value of the land. McLean concluded:

As these gentlemen have been pressing for immediate action so that construction can proceed, I beg to recommend that the valuation by Mr. Agent Irwin be approved and that Messrs. McGiverin & Haydon be informed that their Company can have possession upon payment of \$2954.25.⁷⁶

Secretary J.D. McLean wrote to McGiverin & Haydon on November 28, 1905, to inform them "that the Railway Company can have possession of the right of way upon payment to this Department of \$2954.25," specifically noting that "this sum includes payment for Indian improvements."⁷⁷ McLean notified Superintendent Vowell on November 28 that Irwin's valuation had been approved by the department⁷⁸ and, on the next day, advised McGiverin and Haydon that "\$300 included in the sum of \$2954.25 has already been paid by the Company to the Indians," leaving \$2,654.25 outstanding.⁷⁹

On December 10, 1905, McGiverin and Haydon forwarded a cheque for \$2,654.25 to the department, "being the amount of purchase price for right of way" through Lower Similkameen IR 3, 5, 7, and 8.⁸⁰

74 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, November 15, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 61–62).

75 J.K. McLean, for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, November 22, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 65).

76 J.K. McLean, for Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, November 22, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 65).

77 J.D. McLean, Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 66).

78 J.D. McLean, Secretary, Department of Indian Affairs, to Indian Superintendent, November 28, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 67).

79 Secretary, Department of Indian Affairs, to McGiverin & Haydon, Barristers, November 29, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 71).

80 McGiverin & Haydon, Barristers, Solicitors & Notaries, to Secretary, Department of Indian Affairs, December [10], 1905, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 76–77).

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Community Understanding of Agreements Made with the Railway

There is no written record of whether Indian Agent Irwin consulted the Lower Similkameen Band regarding his valuation of their lands or improvements, or whether he discussed any terms or made any agreements with the Band as a whole regarding the rights of way. Neither the historical record nor the Elders' oral evidence indicates that a band council meeting or a general meeting of Lower Similkameen band members was held to discuss the railway right of way collectively.

According to Lower Similkameen Elder John Terbasket, the concept of selling or leasing land was foreign to them:

I think this is probably the first ever negotiations on – any kind of negotiation concerning lease or rent or buy. And in our culture, there was no such thing as buying land or selling land to others. This was our territory when the railway come in, that our people understood that the lands were to be borrowed for a time of the use of the railway.⁸¹

Elder John Terbasket recounted that the Indian Agent approached a few landowners individually, to offer compensation for improvements.⁸² He explained that “the Indian agent came in, as we understood, and dealt with individuals. The train’s going to come through here, we’ll give you money for this, this, this. And there was not time to really call meetings.”⁸³ Mr Terbasket explained that agreements respecting the right of way were made with a handshake:

And in our culture, that the handshake, word, was law. And so a lot of the deals that were made with these railway people were handshake, eh. They explained what they were going to do and they shook hands, and our people took that for law. But we found out later that whatever was written was what they used to – it was a different version of what was said.⁸⁴

Violet Barber explained that the people “had nothing to say ... I doubt if they gave consent to have the railroad going through their property. That’s what I mean. They had nothing to say. They were going to put the railroad through, and it went.”⁸⁵ Hazel Squakin stated that

81 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket).
 82 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 31, 269, 284–85, John Terbasket).
 83 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 269–70, John Terbasket).
 84 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 262, John Terbasket); see also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 59–60, Henry Allison; p. 351, Moses Louie).
 85 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 349, Violet Barber).

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all of the meetings were held after the fact, after the railroads were going through and everything else like that, because ... in the beginning it was basically decided that it was going to go through. And even they said no and they were opposed to it, and they were told that it was going to go through anyway. And it still went through. So they gathered mostly after the fact at these places to complain more about it as a group.⁸⁶

Elder Barbara Allison stated “our people fully expected that the right of way would be returned to them, because that was the promise.”⁸⁷

Oral evidence was also presented at the community session concerning the existence of a written agreement made with the railway, stating that the right of way lands would be returned to the reserves. Elder Henry Dennis attested that a written agreement stating that the railway land would revert back to the Band once existed between the railway company and the Band:

[T]here was supposed to have been papers made out. I don’t know whether it was –I think myself it has something to do with the Indian agent at the time. It was supposed to have been written in a paper that they called, in the government office, the black and white. And Pierre John, I think, and Johnny Holmes and Bobby Allison, that said they’ve seen this black and white paper in their younger days. They said that they seen this written in there, that when the railroad was discontinued, it would automatically revert back to reserve.⁸⁸

During the community session, Elders shared the Okanagan words they heard used to describe the railway agreement: *kwúlen*, meaning “to lend,” and *kwelnúla?xw*, meaning “to borrow.”⁸⁹ Elder Maggie Kruger remembers hearing her Elders talking about the railway and about meetings in which the railway was discussed:

Whenever the Great Northern, whenever it – whenever they quit using it, the land would go back to the Indians. That’s been the number one thoughts of all the native people. When the white man uses the land and when they’re finished with it, it automatically goes back to the band.⁹⁰

86 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 115–16, Interpreter for Hazel Squakin). See also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 140, Margaret Kruger).

87 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 213, Barbara Allison). See also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 103–4, Mike Allison; p. 116, 126 Hazel Squakin; p. 130, Carol Allison; p. 140 Margaret Kruger; p. 389, Henry Dennis; p. 407 Robert Dennis; and pp. 421–22, Ralph Bent.)

88 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 392, Henry Dennis).

89 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 130, Carol Allison; p. 167, Lillian Allison; p. 172, Barbara Allison; p. 187, Antoine Qualtier; p. 307, John Terbasket; pp. 225, 239, Leonard Louis; pp. 345–46, Interpreter for Moses Louie; p. 346, Kenneth Richter).

90 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 140, Margaret Kruger).

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At least two of the Elders from whom Ms. Kruger heard this information, Bertie Allison and Crooked Mouth Pierre, were alive at the time the railway was built, and their names are listed among those compensated for improvements in IR 7 and 8.⁹¹ Henry Dennis further explained:

They said when the railroad was going to be discontinued, they said it wouldn't – they told the people it wouldn't be in there that many years. That these mines would all run out. But they told them when it was discontinued that it would be going back to – well, back to reserve and back to each locatee that owned property along the line. They said that if a man owned that property right across the line, he'd get all that land back, and if there's two different people on each side, they would fence it right down the middle, which never really happened.⁹²

In addition, the community understood that before the land was returned, it would be cleaned up “as it was back then.”⁹³

Aside from promises regarding the return of the land, there was also an understanding that once the train was operating, the Similkameen people would have access to conveniences such as stores on the station grounds in IR 3 and IR 7, and free rides on the train.⁹⁴ During the site tour Henry Dennis recalled that

they more or less gave the people the idea of the convenience they were going to have of this railroad going through, that they'd have a store and a station. People that catch the train, there was supposed to be free trips to town, whichever way they wanted to go.⁹⁵

Later on at the community session, Henry Dennis reiterated this fact when he stated that the lack of free train rides “made them complain because they were supposed to get all that free because they weren't getting compensation for land. They were getting all these conveniences.”⁹⁶ Some Elders understood that these free rides were being offered in lieu of monetary compensation.⁹⁷ Finally, there was an understanding that band members

91 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 141, Margaret Kruger); and, A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).
 92 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 388–89, Henry Dennis).
 93 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 346, Kenneth Richter); see also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 60, 178, Henry Allison; pp. 166–67, Lillian Allison).
 94 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 7–8, 33, Henry Dennis; p. 33, John Terbasket; p. 132, Nancy Allison; pp. 174–75, Henry Allison).
 95 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 7–8, Henry Dennis).
 96 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 388, Henry Dennis); see also, ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 380, Henry Dennis).
 97 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 33, John Terbasket; p. 393, Henry Dennis).

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would be offered jobs working on the railway and packing supplies up to the mines in Hedley.⁹⁸

Order in Council and Letters Patent for the VV&E Rights of Way

The Order in Council which purportedly authorized the expropriation under section 35 of the *Indian Act*, dated December 23, 1905, reads as follows:

On a Memorandum ... from the Superintendent General of Indian Affairs, stating that the Victoria, Vancouver and Eastern Railway Company has applied to the Department of Indian Affairs for right of way through reserves Nos. 3, 5, 7, 8, 10 and 10B of the Lower Similkameen Band of Indians, in the Osoyoos Division of Yale District, in the Province of British Columbia, and has deposited with the Department of Indian Affairs a plan of the land required, with a certificate endorsed thereon of the Chief Engineer of the Department of Railways and Canals that the Land applied for is actually required for railway purposes and is such as the company should be allowed to acquire.

The Minister, knowing of no objection to the railway company being allowed to acquire the land above referred to, recommends that, under the provisions of Section 35 of the Indian Act, as amended by Section 5 of Chapter 35, 50–51 Victoria, authority be given for the sale of the land to the said Company upon such terms as may be agreed upon.⁹⁹

A subsequent Order in Council issued on January 22, 1906, recommended that the December 23, 1906, Order in Council be amended “by substituting for the title of the railway company therein mentioned the following – ‘Vancouver, Victoria and Eastern Railway and Navigation Company.’”¹⁰⁰

On March 20, 1906, two letters patent were issued for the rights of way: one for the rights of way through IR 3, 5, 7, and 8 (sale 1), and another for the right of way through IR 10 and 10B (sale 2). Each patent states that the terms are for “absolute purchase” of the right of way lands.¹⁰¹ The letters patent for sale 1 are for 59.31 acres from “Indian Reserve Number Seven,” 18.26 acres from “Indian Reserve Number Eight,” 14.76 acres from “Indian Reserve Number Five,” and 24.51 acres from “Indian Reserve Number Three.”¹⁰² The letters patent for sale 2 describe an area of 20.85 acres within “Indian Reserve Number Ten B,” and an area of 44.9 acres within “Indian Reserve Number Ten.” The total area of the rights of way described in the two

98 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 35–36, 265, John Terbasket; pp. 36, 393, Henry Dennis; p. 187, Antoine Qualtier).

99 Order in Council, December 23, 1905, no file reference available (ICC Exhibit 1a, p. 80).

100 Order in Council, January 22, 1906, no file reference available (ICC Exhibit 1a, p. 81).

101 Letters Patent No. 14388 (sale 1), March 20, 1906, no file reference available (ICC Exhibit 1a, p. 83); Letters Patent No. 14389 (sale 2), March 20, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 88).

102 Letters Patent No. 14388 (sale 1), March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 84–85).

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letters patent was 182.59 acres, 116.84 acres of which was conveyed in sale 1 and the remaining 65.75 acres in sale 2.¹⁰³

Protests regarding Valuations, 1906

On May 1, 1906, only six weeks after the letters patent were issued, the Chief of the Lower Similkameen Band, "Johnie Newhumpston,"¹⁰⁴ sent a letter protesting the valuations made by Agent Irwin and informing the department that compensation for the right of way had not yet been received:

We the undersigned are appealing to your Department for Justice. We inclose Names and Stations of the Line of Rail now Building By the Great Northern RR and as yet we have not got anything for same and am Led to believe by Gov. agt in Kamloops Mr. Irwin That we are to get [illegible] average of \$10.00 pr. acre or thereabouts; all Right of way In this Parts is Valued by Great Northern \$100 and [as] high as \$200. Such Land as we [have] would average from \$100 to \$200 and we have not got any satisfaction so far.

However we intent getting our Money and what is Just and Right [before] allowing the Great Northern [to] Lay Track on our Land untill [illegible] Just Settlement.

We are notifying the RR of [our] actions.

Kindly advise us as what [to do.] All we want is near what [the white Men] gets. [Advise us] if it would be just & [illegible] to Demand our money Before Laying Track.¹⁰⁵

Enclosed with this letter was a list of individuals holding allotments, and their respective locations along the right of way through IR 7 and 8. Chief Newhumpston's list included the same individuals identified by Irwin with the addition of a large holding belonging to "Marcell & Boy," who Irwin did not identify. Also included on the list are gardens and two townsites not mentioned in Indian Agent Irwin's report.¹⁰⁶

Following receipt of Chief Newhumpston's letter, Chief Surveyor Samuel Bray recommended that, since payment in full had already been received from the railway company, an amount of \$584.25 should be credited to the Band's capital account, and the balance of \$2,070 forwarded to Superintendent Vowell "with instructions to pay the same with as little loss of time as possible

¹⁰³ Letters Patent No. 14389 (sale 2), March 20, 1906, no file reference available (ICC Exhibit 1a, pp. 89–90).

¹⁰⁴ Several variant spellings of Chief Nahumcheen's last name appear in the documentary record: Newhumpston, Nah-hum-cheen, Nah-hump-cheen, Nhumcheen, Nahumcheen, and N'Humcheen.

¹⁰⁵ Johnie Newhumpston to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 95–97).

¹⁰⁶ Johnie Newhumpston to Department of Indian Affairs, May 1, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 97).

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to the Indians entitled to receive it, in accordance with letter from Mr. Agent Irwin dated the 10th November, 1905.”¹⁰⁷ The Secretary forwarded a cheque in the amount of \$2,070 (the amount Irwin awarded for improvements) to Vowell, with instructions that the money should be “paid out as suggested by Agent Irwin” in his letter of November 10, 1905.¹⁰⁸ Vowell reported to the Secretary on May 28, 1906, that the cheque had been received and that arrangements would be made “without delay for the payment of same to the Indians.”¹⁰⁹

The Secretary of the Department of Indian Affairs responded to Chief Newhumpson’s letter on May 21, 1906:

[A] sum of money has been this day forwarded to Mr. Indian Superintendent Vowell, Victoria, with instructions to pay with as little delay as possible the Indian occupants to whom the same is due. I think that you will all be satisfied with the sums you will receive. The valuations were made by Mr. Agent Irwin, and appear to be very liberal.¹¹⁰

In response to another letter from Chief Newhumpson, Indian Superintendent Vowell wrote to the Chief, on June 11, 1906, explaining that Indian Agent Irwin’s valuations were approved by the department and enclosing a copy of Irwin’s report in order for the Chief to “better understand exactly the awards made.”¹¹¹ A copy of Chief Newhumpson’s letter was also forwarded to Indian Agent Irwin, who responded to Newhumpson shortly thereafter:

I told you when last down the amount each of you would receive besides \$5.00 per acre which would go to the credit of the whole band. The Department at Ottawa in commenting on your letters, and in fact at the time I made the valuation considered I made you a liberal allowance for improvements, &c. And I may as well tell you that you will be bound by my award in the matter. You state what is not true to the Department when you say that most of right of way through reserves was garden, but it is a matter of little concern to me. You have been allowed nearly \$100.00 per

107 Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, May 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 100).

108 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, May 21, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 102–3).

109 A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, May 28, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 104).

110 Secretary, Department of Indian Affairs, to Johnie Newhumpson, May 21, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 101).

111 A.W. Vowell, Indian Superintendent BC, to Johnie Newhumpson, June 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 107).

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acre for good cultivated land and that should satisfy you. If white men have made land in the section valuable they should profit accordingly.

I have received the money for Indian's improvements, as you have been told from Ottawa and I shall be down to pay same as soon as I can. It will probably be a month or more before I can come as I have much to do. I shall let you know when I have decided to come.¹¹²

On June 23, 1906, R.C. Armstrong wrote his own appeal to the department regarding the valuations made by Irwin. Armstrong, a local landowner and Justice of the Peace, stated that he had received \$100 per acre for the right of way through his own land, which was adjacent to the northern portion of IR 8. He wrote:

As the Indians have come to me to ask me to state the price of the RR Co. paid me for right of way across my land and, as their reserve joins my land, they think they should receive the same price for their land as I did. I may say that I have lived joining the reserve for 21 years. I ought to know something about it. I was paid one hundred (\$100.00) dollars an acre for bush land (none cleared) and I may say their land is (most of it) as good as mine. It seems strange that their land was valued to only five dollars an acre and mine beside it at one hundred. Now most of their land is worth one hundred dollars an acre, if mine is, and their improvements extra. Some of the land in reserve is stony, perhaps ten acres in all or about that much, but as they have water all their bench land, even that is good for orchards. Very poor land in the valley is selling at two hundred dollars an acre, where there is water for it. One hundred dollars an acre and five dollars for the same kind of land is rather too much of a difference. The Indians wish to have the price of the land left to arbitration and wish me to act as their man. I should like to see them get fair treatment and shall act for them if I am authorized to do so, if so left for settlement. The Indians a man, the RR Co. a man, and them two to choose a third. I may say the Indians says [sic] they have lost all confidence in the local agent. They are intending to write themselves, but wished me to make these statements as I have lived so long near them.¹¹³

Around the same time, Chief Newhumpsion wrote another undated letter to the department in which he again asserted that "all lands of our Class [have] sold from one to two hundred Dollars an acre. What we are Fighting For or asking Peacibly for is [illegible] less not ten dollars an acre."¹¹⁴ The letter concludes with a request for arbitration regarding the right of way

112 A. Irwin, Indian Agent, to Johny Nhumcheen, June 17, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 108-9).

113 R.C. Armstrong, Justice of the Peace, to Department of Indian Affairs, June 23, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 110-11).

114 Johnie Newhumpsion, Chief, to J.D. McLean, Secretary, Department of Indian Affairs, no date, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 112-13).

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valuations: “We again appeal to you to give us a hearing and [do] justis to our Indians. We ask you or government to appoint one Man, we appoint one man RR to appoint one man to value our land we pay our man and government. We all are willing to abide by their decision.”¹¹⁵

Following these requests for reconsideration of the valuations, the department finally decided to consider the matter. The Secretary wrote to Indian Superintendent Vowell on July 10, 1906:

The matter appears to require special investigation, as the difference between the value placed on the land by Mr. Irwin and as valued by Mr. Armstrong and the Indians is absurdly great. Also the lands in Indian reserves should be valued exactly the same as similar lands outside the reserves. It would appear from a passage in Mr. Irwin’s letter that he has not done this.

The Department has necessarily to rely on the judgment of its Agent for valuations of this and in fact of any nature. It would appear in this case that the Agent did not consult the Indians as to the value of their improvements. This should have been done very carefully, in order to avoid discontent. It is to be regretted that the matter is closed with the Railway Company, and very difficult, if not impossible to re-open it. I have to request you to be good enough to make a strict investigation as early as may be convenient.¹¹⁶

Vowell replied on July 18, 1906, saying he would review the matter. He commented: “[I] cannot understand how the Agent could value land at \$5 an acre if that adjoining it had been paid for at the rate of \$100 an acre.”¹¹⁷ In addition, Vowell noted that he had advised Irwin that land values in the area were increasing rapidly “with a view towards having him pay particular attention to the matter.”¹¹⁸

On July 11, 1906, the Secretary acknowledged Chief Newhumpsion’s request that “the land and improvements taken in the right of way ... shall be revalued as the valuation made by Mr. A. Irwin, the Indian Agent is in your opinion altogether too low.” He explained that “[a] few years ago these lands were of very little value; it was not known here that they had increased so rapidly in value, as you state,”¹¹⁹ and informed the Chief that “[t]he Railway

115 Johnie Newhumpsion, Chief, to J.D. McLean, Secretary, Department of Indian Affairs, no date, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 112–13).

116 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 10, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 118).

117 A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

118 A.W. Vowell, Indian Superintendent, to Secretary, Department of Indian Affairs, July 18, [1906], DIAND file E5667-07399 (ICC Exhibit 1a, p. 122).

119 Secretary, Department of Indian Affairs, to John Newhumpsion, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 119).

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Company has paid all the money demanded, and it will be practically impossible to again open the matter.”¹²⁰

The Secretary also wrote to R.C. Armstrong on the same date, saying that “[t]he wide discrepancy between the values of the land within the Indian Reserves and the amounts which you state have been paid for the lands of adjacent White men has been noted and the matter will be duly investigated.”¹²¹

Report of Ashdown Green regarding IR 3, 5, 7, and 8, 1906

Unable to make a personal investigation of Irwin’s valuations, Vowell assigned surveyor Ashdown Green to investigate the matter in August 1906. Green’s report stated that his instructions were “to investigate the statement made by Mr. R.C. Armstrong of Keremeos to the effect that Indian land valued by Mr. Agent Irwin was sold to the V.V.& E. Railway Company at \$5 an acre, while for similar land \$100 was obtained from the Company by Mr. Armstrong.” Green visited the reserves with Indian Agent Irwin and reported on his findings on August 27, 1906.¹²²

Green remarked that the valley in the vicinity of IR 3 and 5 was about one mile wide and surrounded by steep mountains. The railway line itself followed “the base of the foothills on a give and take line between the high land and the swamp, the cuttings being through loose rock and gravel and the fillings on low land.” He also noted the presence of “borrowing pits on the right of way” and said that “a slough of the river at the base of the foothills has in many places been filled up.”¹²³ The evidence from the community session suggested that the railway company used gravel and other resources from the reserves to build up the railway grade, and that the “borrowing pits” described by Green, from which gravel and dirt were extracted, are still visible in some places.¹²⁴ There is no historical record of any compensation being paid for the use of these resources.

Green’s report also discussed each of the allotments on the reserves along the right of way. On IR 3, he found that 8.59 acres of

120 Secretary, Department of Indian Affairs, to John Newhumpson, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 119).

121 Secretary, Department of Indian Affairs, to R.C. Armstrong, Justice of the Peace, July 11, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 120).

122 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 131).

123 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 131).

124 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 50, unidentified speaker [Ed Louie]; pp. 52, 266, 306, John Terbasket; p. 186, Henry Allison; p. 339, Mary Louie; p. 406, Robert Dennis; pp. 416–17, Ralph Bent).

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Charley Yackemticken's allotment has been appropriated by the Railway Co. and that, in addition to the \$5 an acre to the band, \$200 has been paid him as compensation. No cultivation or improvements had been made, and the land was principally the bed of a slough or low swamp with willow and rough grass valueless for any purpose.¹²⁵

In regard to "William Terrabasket's" holding, located between stations 426 and 496, he found that

[a]most the whole of the 15-3/4 acres taken is practically valueless, being either dry gravel bench covered with sagebrush, or the bed of the slough before mentioned. The improvements, for which he received \$200, consist of about an acre of light slashing on the banks of the slough, the real value of which is about \$8.00.

Subsequent to Mr. Irwin's award a slight change in the line cut off about 1/20 of an acre of Terrabasket's garden with six fruit trees, and necessitated the removal of a log stable at a cost of say \$10. For this the Company paid Terrabasket an additional \$115.¹²⁶

In summary, Green calculated that a total of \$637 was paid by the company for 24.4 acres of land and improvements on IR 3, or an average of \$26.00 per acre.¹²⁷

Surveyor Green then examined IR 5, which was occupied by Chief Newhumpsion. Green found that "10 acres of the land taken by the Railway is gravel foothill through which there is a deep cutting, the remaining 5 acres is unimproved swamp now covered with an embankment."¹²⁸ Chief Newhumpsion was paid \$200 in compensation. Green calculated that the company paid a total of \$274.00 for land and improvements on IR 5, or approximately \$18.50 per acre.¹²⁹

On IR 8, three occupants (Andrew, Nwhimkin, and Pierre) received compensation for severance and improvements. Andrew was paid \$360 for 4 acres of "clayey soil" cultivated with timothy grass.¹³⁰ Nwkimkin was paid \$100 as severance for 2 acres of "sandy soil capable of easy cultivation,"

125 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 131–32).

126 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

127 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

128 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

129 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

130 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 132).

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although “no use had been made of it.”¹³¹ Pierre received \$225 for his improvements. Green described Pierre’s holding as “Light soil about 4 inches deep,” on which “about 1½ acre had been cultivated, and on another 1½ acre the natural grass and weeds had been cut for hay.”¹³² Another locatee, Louis, did not receive any allowance for severance or improvements on his allotment at the northern end of the reserve.¹³³ Green reported that “the land is level and the soil alluvial of fair quality, heavily covered with brush, and cottonwood trees. Nothing whatever had been done on this part of ‘Louis’ claim, and no allowance for improvements or severance has been made to him.”¹³⁴ However, he also noted that “to the north of this allotment lie the two acres belonging to Mr. Armstrong for which he received \$100 an acre.”¹³⁵ In total, \$776.25 was paid for 18.26 acres of right of way through IR 8, including payments made thereon, or about \$42.50 per acre.¹³⁶

On IR 7, Green reported that “Station 0 to 30 embraced about 7½ acres of sour swampy land” on which occupant Seymour used to cut “rough wild grass,” and that he had received \$150 as compensation.¹³⁷ The right of way plan shows that two-thirds of this portion (station 1-20) consists of a 300-foot-wide strip taken for station grounds.¹³⁸ Indian Agent Fred Ball later commented in 1925:

I see absolutely no reason why they should have been allowed to take a width of three hundred feet for a distance of two thousand feet north from the International Boundary, as this width is not at all necessary for a single track line and it takes some really valuable land from the Reserve for the apparent purpose of using it as a site for a house for the section man, and to give him about fourteen acres of good land for a farm.¹³⁹

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- 131 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 132 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 133 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 132–33).
 - 134 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 135 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 136 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 137 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).
 - 138 Natural Resources Canada, Plan 696, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group BC,” surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p).
 - 139 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy and Secretary, Department of Indian Affairs, July 30, 1925, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 373).

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John Terbasket recalls that the station grounds at the border were intended for side tracks for storage of empty rail cars, although they were rarely or never used for this purpose.¹⁴⁰

North of Seymour's allotment, the line took 4 acres from an improved meadow claimed by Narcisse, who received \$360 as compensation.¹⁴¹ Joe, whose allotment was described by Green as "very poor sandy soil," received \$90 as compensation for 1½ acres of ploughed land.¹⁴² Between stations 59 and 69, Green reported that the railway passed "near the garden of an old woman named 'Cecille,'" and also took "less than ½ acre" from Lammea's garden.¹⁴³ Cecille was paid \$30, and Lammea received \$50 in compensation.¹⁴⁴ "B. Allison" received \$75 for "a small strip" taken from his garden and the removal of four peach trees, as well as an additional \$35 paid "by the Company for the removal of a corral."¹⁴⁵ Finally, William Quartelle received \$30 as severance for the right of way through his holding, which Green described as "worthless rocky soil" with "no cultivation," as well as \$100 "paid by the Company for the removal of a small cabin."¹⁴⁶ For the entire right of way through IR 7, the VV&E paid \$296.60 for 59.31 acres, in addition to \$785 for improvements and \$135 for removing buildings, for a total of \$1,216.60. According to Green, this amount worked out to an average of \$20.50 per acre.¹⁴⁷

In his conclusion, Green reported that a total of \$2,904.25 was paid for 116.85 acres by the VV&E for the right of way through IR 3, 5, 7, and 8.¹⁴⁸ Included in this total is \$250 of "additional payments by the Company," consisting of \$145 for buildings and \$105 for William Terbasket's garden.¹⁴⁹ This total is less than the amount reported by Irwin in his report, which stated

140 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 55–56, John Terbasket).

141 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

142 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 133).

143 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 133–34).

144 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 133–34).

145 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

146 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

147 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

148 His calculation includes payment for the lands (116.85 acres at \$5 per acre = \$584.25), improvements (\$2,070.00), and additional payments by the railway company (\$250.00).

149 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

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that band members were paid \$300 for the removal of buildings.¹⁵⁰ Overall, Green calculated that “an average of \$24.85 per acre had been paid for 116.85 acres in Reserves Nos. 3, 5, 7, and 8.”¹⁵¹

Sales of Non-reserve Lands to VV&E, 1906

After outlining the holdings within the reserves, Green proceeded to discuss the value of lands surrounding the reserves, a matter he felt was subject to “a wide difference of opinion.” He explained that “Mr. Irwin's valuation was made about a year ago, and the only basis he could go on was the Provincial Government Assessment roll for 1906 which was made about that time, and which is generally very reliable.”¹⁵² Green reported that the average assessment of “improved farms in the immediate neighbourhood” was \$14.30 per acre, and that Armstrong's farm was valued at \$15.50 per acre.¹⁵³ He also noted that the Hudson's Bay Company property near Keremeos had been sold two years previously for approximately \$21 per acre, and was “far more valuable than the land now under consideration,” being in a central location, with good water, an orchard, and “extensive improvements.”¹⁵⁴ Green noted, however, that the same property had been subdivided into 10-acre lots and was “advertising at from \$100 to \$200 an acre.”¹⁵⁵

The 1905–7 Property Tax Assessment Rolls for land in the Princeton District show that “wild land” in the Similkameen Valley had an assessed value between \$1.25 and \$5.00 per acre. At the same time, it appears that improved properties were rarely valued any higher. The assessed property values in the Similkameen Valley in 1906 ranged from \$0.83 to \$10 per acre, with an average slightly below \$5 per acre. No assessments for properties adjacent to the Lower Similkameen IR 3, 5, 7, and 8, including R.C Armstrong's land, could be found on these assessment rolls.¹⁵⁶

Regarding the amounts paid by the railway, Green reported that adjacent landowners received between \$50 and \$100 per acre, while settlers closer to

150 A. Irwin, Indian Agent, to A.W. Vowell, Indian Superintendent, November 10, 1905, DIAND file E5667-07399 (ICC Exhibit 1a, p. 56).

151 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

152 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

153 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 134).

154 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

155 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

156 Property Tax Assessment Rolls for the Princeton Assessment District, 1905–7, BCARS, GR 1999, B487, vols. 2–4 (ICC Exhibit 1b). These figures are rough averages only.

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Keremeos had received as much as \$200 per acre.¹⁵⁷ Green commented that, although Armstrong had received \$100 per acre for unimproved land, “I should not have valued it at more than \$10 an acre, but doubtless it paid the Company to give him his price rather than go to arbitration, with the loss of time such action would entail.”¹⁵⁸

As to the general value of lands in the Similkameen Valley, Green felt that the “intrinsic value” was very small. He reported that most of the valley was “an arid and waterless country covered with sage brush,” suited mainly for grazing.¹⁵⁹

In general, Green concurred with Irwin’s valuations, stating:

Mr. Irwin’s instructions were that he should value each parcel of land irrespective of any arrangement made with adjacent white settlers. The greater part of the land taken from the reserves is absolutely worthless for any purpose, and as the improved land is only second class I consider his valuation of \$5.00 an acre a very liberal one.

The award for improvements I believe in most cases to be far in excess of their actual worth, for it must be noted that the land taken from the Indians did not require clearing or other work before ploughing, etc., and that there is much more similar land in the possession of the Indians that they can use.¹⁶⁰

He admitted, however, that land prices were rising dramatically:

At the present time there is at the Okanagan Lake, from Vernon to Penticton, a boom in land values, caused by Land Companies who buy land and subdivide it into ten acre lots, each one of which is supposed to support a family when planted with peach trees.

The boom has spread to the Similkameen though there the conditions for transport of fruit are not so favourable. There are now three rival townsites at Keremeos and no doubt inflated prices will prevail until the railway is finished when the value of land will find its real level and return to normal conditions.¹⁶¹

During Surveyor Green’s visit, Indian Agent Irwin called a meeting of the Band “for the purpose of paying them the several amounts awarded for

157 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

158 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

159 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 135).

160 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

161 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 137).

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improvements.”¹⁶² Green informed the band members at this meeting about his own views:

I considered they had been very liberally dealt with, that they were quite mistaken in supposing that land was as valuable in the Similkameen as they had been told, that Indians in the Nicola country for similar land had only been paid at half the rate, and that as a railway would benefit the valley it would be unfair to hold up the Company for twenty times what the land was worth before the railway was thought of.

Subsequently the Indians agreed to receive the amounts and were paid by Mr. Irwin in my presence.¹⁶³

In regard to the receipt of payments for the right of way, community knowledge is mixed. Elder John Terbasket stated that a few people received payments for it from the Indian Agent, although not everyone who was affected received compensation:

Certain landowners, they had to make sure that they gave some, eh, to show that they bought here and there, that this was bought, this was bought, this was bought. But the ones that lived in the villages, a lot of them didn't get a penny.¹⁶⁴

Elder John Terbasket explained that those with “maybe horses and cows” were dealt with, while others were seen as “not important.”¹⁶⁵ He said that the people were told their land was “worth nothing.”¹⁶⁶ However, most community members never heard anything about people receiving payment for the right of way, although compensation was promised.¹⁶⁷ Henry Dennis recalls that he often heard Elders complain about not being paid.¹⁶⁸

Following the completion of his investigation, surveyor Ashdown Green paid a visit to R.C. Armstrong on August 13, 1906, and informed him

that I could not agree with the valuation he placed upon property in the neighbourhood; that I did not consider the sum paid him by the Railway any criterion; that the prices he quoted were speculative, and out of all proportion to the real value. Mr. Armstrong did not appear to attach much importance to his own

162 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

163 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 136–37).

164 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 32, John Terbasket).

165 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 30, John Terbasket).

166 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 264, John Terbasket).

167 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 168, Lillian Allison; p. 143, Margaret Kruger; p. 144, Carol Allison; pp. 30–32, 381, Henry Dennis; pp. 32, 185, Henry Allison; p. 187, Antoine Qualtier).

168 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 381, 392–93, Henry Dennis).

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letter. He said that the Indians had asked him to tell the Department that he had received for his land, and that he merely did so.¹⁶⁹

Green noted that, at this meeting, Armstrong “valued his own farm at \$50 an acre all round, and that the sage brush in front of his house was worth at least \$20 an acre.”¹⁷⁰

On August 14, 1906, Armstrong described his meeting with Green in a letter written to the department:

As Mr. Green called on me yesterday as he was returning from the Ind[ian] reserve with Irwin, he made such outrageous statements re the Indian land I wish to say I think some one has been paid to lie about the land. I felt sure when I saw him with Irwin. I felt sure the Indians would be done for and you made to believe a wrong value. [T]he first false statement he mad[e] was the land was mostly stony[. N]ow the fact is there is not ten acres of the right of way stony. Of course, if there is a cut made on any of these benches there will be stones struck, as all the benches is made from the mountains ages ago. Then as to sand he said a lot of it was sandy a straight lie. Now the weather has been so dry for months that the land is dry in spots and dusty. A coast man was the worst kind of a man to send to value land in the upper country as it looks so different from the wet coast land but as I wrote before the stony land in this valley and all these valleys is good fruit land if there is water to irrigate them and there is plenty of water to irrigate all this reserve[.] At Keremeos there has been 1600 acres sold for \$35.00 on an acre, more than half of which is high gravelly and stony land and is now selling in small lots of 5 and ten acres for from one to two hundred dollars an acr[e]. There was another ranch of 800 acres sold for about the same per acre more than half of which is bench land and no way to irrigate it either. I will give \$20.00 twenty dollars an acre for any amount of the Indian land measured from the river to the mountain and I have offered \$20 an acre for a very stony piece of reserve (ten acres) but it can be irrigated (for fruit purposes). I think some one has been squared in this deal. ... I enclose on the back a list of names and prices paid by the R.R. here.¹⁷¹

Attached with the letter was a sketch of the land surrounding Armstrong’s land property, with the following amounts paid to each land holder: R.C. Armstrong received \$100, Manery received \$92 for “half bench, no water,” McCurdy

169 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

170 Ashdown H. Green, Indian Office, to A.W. Vowell, Superintendent of Indian Affairs, BC, August 27, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 136).

171 R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, pp. 128–30).

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received \$95, another Armstrong received \$100 for “good land,” Mrs Lowe received \$200, and Mrs Daly received \$50 for “stone and gravel.”¹⁷²

Superintendent Vowell forwarded Ashdown Green’s report to the Secretary on August 29, 1906, offering his view that “[f]rom the report it seems that the Indians have been most liberally dealt with, leaving them no reasonable cause for complaint on the whole.” However, he also noted:

[I]n some cases what might have reasonably been allowed as the value of the land has, on the contrary, been devoted to pay for improvements of Indians and as compensation for severance, &c. Under the circumstances especially as the Indians have accepted the different amounts allotted them, I do not think that any re-opening of the case, if such were possible, would lead to any good results.¹⁷³

The Secretary informed Vowell that, in light of Green’s report, and “the fact that the Indians have accepted the several awards, there appears to be no necessity for further action.”¹⁷⁴

In the course of this inquiry, we carried out a comparative land titles search. To summarize our findings, we found that prices paid to settlers for non-reserve lands ranged from \$50.00 to \$124.92, with the average price for non-reserve lands being \$104.91 per acre.¹⁷⁵ It is noteworthy that the settlers were paid a lump sum for the right of way through each lot, although is not certain whether additional amounts were paid for improvements or for the removal of buildings.¹⁷⁶ The sales agreements do not make reference to any separate payments of that nature.¹⁷⁷

By the summer of 1907 the construction of the railway had progressed through the Lower Similkameen reserves to the town of Keremeos.¹⁷⁸

Impact of the Railway on the Lower Similkameen Community

According to the Elders at the community session, the construction of the railway line through the Lower Similkameen reserves had a dramatic impact

172 R.C. Armstrong, to Secretary, Department of Indian Affairs, August 14, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 130).
 173 A.W. Vowell, Superintendent of Indian Affairs, BC, to Secretary, Department of Indian Affairs, August 29, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 138).
 174 Secretary, Department of Indian Affairs, to A.W. Vowell, Indian Superintendent, BC, September 18, 1906, DIAND file E5667-07399 (ICC Exhibit 1a, p. 139).
 175 K. Faulkner, “Further Research on Sales of Non-reserve Lands to VV& E,” May 26, 2005 (ICC Exhibit 9a, p. 2). This report is additional research that was requested by the panel following the oral session in January 2005. Kristen Faulkner, ICC Research Officer, supervised the research and produced the report.
 176 K. Faulkner, “Further Research on Sales of Non-reserve Lands to VV& E,” May 26, 2005 (ICC Exhibit 9a, p. 2).
 177 K. Faulkner, “Further Research on Sales of Non-reserve Lands to VV& E,” May 26, 2005 (ICC Exhibit 9a, p. 2).
 178 A. McGraw, Inspector of Indian Agencies, Southeastern Inspectorate, to J. Robert Brown, Indian Agent, May 5, 1916, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 335).

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on the community. The railway right of way survey plans indicate that the rights of way bisected each one of the reserves they crossed.¹⁷⁹ During the community session site tour, John Terbasket pointed to the location of individual holdings along the right of way and said that “all these lands were cut in half as a result of the railway.”¹⁸⁰ He recalled that his grandfather, William Terbasket, had a home on IR 3, and, after the railway was built, “his house was on one side and his barns were on the other side of the track.”¹⁸¹ Henry Dennis explained that in each of the villages, “they had to move their quite a few buildings and sheds, barns, corrals. And if they didn’t move them, they destroyed them for them.”¹⁸² Carol Allison heard from her father, former Chief Barnett Allison, that it took weeks to tear down and relocate homes and buildings, and that this work took away from the regular work, such as haying, that needed to be done.¹⁸³ Some buildings took as long as two to five years to rebuild.¹⁸⁴ It is unclear how long the band members were given to move their homes off the right of way before the railway came through. Henry Dennis explained:

They never really said how much time, but they didn’t give them very much time because a lot of them never got a chance to finish moving their belongings out, like tearing their buildings down, because that was a lot of work. You had to tear log buildings down and move them off the property before you get it all off before they could – before they went through.¹⁸⁵

Elders during the community session spoke of pit houses being destroyed when the railway came through because they could not be moved. Elder Moses Louie recounted:

Back then, the village sites were in the ground. Our people called them ptsie (phonetic). I guess they were – parts of it was covered with the ground and they mostly lived in the ground. The graveyards were right there too. The train track

- 179 Natural Resources Canada, Plan 695, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company through Reserve No. 8, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, no date (Exhibit 7o); Natural Resources Canada, Plan 696, CLSR, “Vancouver, Victoria and Eastern Rwy. and Navigation Company, R. of Way Plan through Indian Reserve No. 7, Similkameen Group B.C.,” surveyed by Jas. Hislop, PLS, undated (ICC Exhibit 7p); Natural Resources Canada, Plan 698, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 3,” June 2, 1905 (ICC Exhibit 7r); Natural Resources Canada, Plan 699, CLSR, “V.V. & E. Ry., Osoyoos Division – Yale District B.C., Right of Way Required Across Indian Reserve No. 5,” June 3, 1905 (ICC Exhibit 7s).
- 180 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 19–21, 303–4, 310–11, John Terbasket).
- 181 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 13, John Terbasket).
- 182 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 384–85, Henry Dennis).
- 183 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 121–23, Carol Allison).
- 184 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 184, Henry Allison).
- 185 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 385, Henry Dennis).

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went right through the middle of all of those ptsie sites. I'm not sure what the English call the ptsie. I think they call it kikwilie or pit houses – pit houses, yeah. And that's where the original people lived, and that's what was ruined and lost by the railroad.

He [Moses Louie] was saying after the destruction of the pit houses, teepees were put up, and during then, that they lived in teepees also, back then too. But teepees were easy to move. The pit houses, you couldn't move them, so they were just totally lost and destroyed, along with everything that they owned, their belongings.¹⁸⁶

The construction of the railway line not only cut off access to water for irrigation and the personal needs of band members or their livestock but also displaced at least one village.¹⁸⁷ During the community session site tour, John Terbasket identified the former location of a small village on IR 8 which was vacated because access to water had been cut off.¹⁸⁸ Nancy Allison noted that parts of the reserves are no longer used because of the lack of water.¹⁸⁹

Raising cattle and horses was important in the local economy. Many community members recall that the railway fences within the reserves were poorly maintained, while those off reserve were kept in good repair.¹⁹⁰ This neglect resulted in injury or death to many livestock and horses, which were either hit by the train or tangled up in barbed wire. There is no record of compensation paid for injured or killed animals, and community members do not recall being compensated for such injuries.¹⁹¹

The noise level from the train and the high right of way fences affected migration patterns for wildlife.¹⁹² Deer were very important to the economic welfare of the community, as many people hunted them for food and for clothing. Elders Carrie Allison, Maggie Kruger, and Hazel Squakin explained that the communities “depended on game not only as a food, but they used the buckskin for gloves and for everything that they needed.”¹⁹³ John Terbasket's mother used to trade buckskin gloves for groceries and other necessities, and

186 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 344–45, interpreter for Moses Louie). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 30, John Terbasket; pp. 382–85, 387–88, Henry Dennis).

187 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 21, 304, John Terbasket; p. 44, unidentified speaker; p. 103, Nancy Allison; p. 220, Lillian Allison; p. 222, Henry Allison; p. 391, Henry Dennis); also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 220, Lillian Allison; p. 328, Mary Louie).

188 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 21–22, John Terbasket).

189 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 103, Nancy Allison).

190 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 17, 305, John Terbasket; p. 28, Henry Allison; p. 206, Bernie Allison; p. 401, Henry Dennis).

191 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 17, John Terbasket; p. 104, Mike Allison; pp. 28, 177–78, Henry Allison; pp. 189–91, Bernie Allison; p. 204, Antoine Qualtier; p. 243, Leonard Louis; p. 328, Mary Louie; p. 28, 400–3, Henry Dennis).

192 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 188–89, Antoine Qualtier).

193 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 112, interpreter for Carrie Allison, Maggie Kruger, and Hazel Squakin).

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he recalled that this was an important part of many families' incomes.¹⁹⁴ Once the railway came, the deer and other wildlife were scared away, forcing people to travel farther to hunt. Carrie Allison and others explained: "When the railroads came through they didn't – all the game was scared away. It was hard to get. They had to go higher in the mountains."¹⁹⁵

People also complained about how the railway had "spoiled everything," including food, game, berry picking, medicine areas, and the water in the valley.¹⁹⁶ Specifically, Elders complained that the water was polluted by tar and creosote from the railway ties as well as chemicals sprayed along the track to keep down weeds.¹⁹⁷ Ore and other material from the mines at Hedley also dropped from open box cars along the right of way.¹⁹⁸

The right of way through the valley followed an old trail used by the Similkameen people, and a number of spiritual sites and traditional markers were destroyed or disturbed by the right of way.¹⁹⁹ As well, the disturbance of the gravesite on IR 7 was extremely upsetting to the community. Henry Allison said that many meetings were held to try to get the railway to go around the cemetery, but the company refused.²⁰⁰ Burial sites are still visible on both sides of the railway bed at the location of this gravesite.²⁰¹

The Reverend John McDougall's "Report on British Columbia Indians," 1909

In 1909 the Reverend John McDougall investigated the Indian reserves in British Columbia to determine "if in the interests of the Indian in the first place, and then the general settlement in the second place, there were any of these reserves or portions of these reserves which might be surrendered by the Indians and sold for their benefit."²⁰² McDougall reported that lands in the Similkameen and Okanagan valleys had become valuable and coveted by the white settlers since the beginning of the fruit and vegetable industry there:

194 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 265, 312–13, John Terbasket).
 195 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 111, Carrie Allison; p. 112, interpreter for Carrie Allison, Maggie Kruger, and Hazel Squakin).
 196 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 107, Hazel Squakin; pp. 329, 339, Mary Louie; p. 331, Ed Louie; p. 344, Moses Louie; p. 348, Violet Barber).
 197 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 120, Hazel Squakin; p. 166, Lillian Allison; pp. 179–80, Henry Allison; pp. 331, 334–35, Ed Louie; pp. 329–30, Mary Louie; p. 347, Kenneth Richter; p. 353, Moses Louie; pp. 394–95, Henry Dennis; p. 437, Herman Edward; p. 442, Robert Edward).
 198 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 413, Henry Dennis).
 199 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 138, Carol Allison; p. 280, Jeanine Terbasket; pp. 273–74, John Terbasket; pp. 327, 341, Mary Louie; p. 355, Moses Louie; pp. 411, 415–16, Theresa Dennis).
 200 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 175, Henry Allison).
 201 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 48–50, unidentified speakers).
 202 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219). His full name was "John C. (for Chantler) McDougall," although he almost never used his middle initial in correspondence.

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Considering demands for Indian Reserves these are mostly to be found in the Okanagan and Similkineen [sic] valleys where of late a considerable number of settlers and fruit growers have gone in and at the present there are large enterprises undertaken in the bringing in of water onto lands which hitherto were considered wild or at best only fit for pasturing during certain periods of the year, but it has been found that given water, here are both soil and climate fitted for fruit and vegetables of the very best quality. These climatic and soil conditions in connection with the large and growing markets of the Middle West have made all land values in these valleys jump up into high price, therefore, Indian Reserves situate all up and down in these areas are much coveted by the speculator and also the bonafide settler.²⁰³

McDougall's report identified a number of reserves within British Columbia "as being possible of surrender without prejudice to the interest and well being of the Indians."²⁰⁴ The locations included lands adjacent to the towns of "Keremeos and Hedley, and Princeton in the Similkineen [sic]."²⁰⁵ The report also drew attention to the "quality and fitness" of the Indian agents he dealt with in his travels across the province:

In the case of the Kamloops and Okanagan Districts, I reluctantly have come to the conclusion that the present agent is altogether unfit for the work which is necessary in the management of this large district. In the first place, Wm. [sic] Irwin (in my judgement) is physically incapable of accomplishing the necessary amount of travel required to give the oversight and protection, and instruction these Indian Bands require. The consequence has been that, from the testimony of the Indians and adjacent settlers, many of these bands have not seen him for years, possibly some of them never in all the time since he was made agent. In the second place, I found a deplorable lack of respect for or confidence in your agent, both by the Indians generally and also to a large extent by the older settlements of white people. In this connection, I found that there was no bond of sympathy between the Indians and their agent, many times it was said to me "The agent good for white man, but very bad for Indian." From casual remarks, which fell from the Indians, as I travelled with them over these Reserves, I was sorry to find that they did not have any faith in the agents moral character, one chief charges the agent with being "a regular gambler" and laughed at the idea of such a man working for the Indians' good. All this and much more I came up against, and was to that degree made ashamed of, as I travelled over this large district, and, right here I may be pardoned, if I presume to suggest that this district be divided and two agencies created and two of the best men possible fo [sic] this work be placed in charge of

203 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 218).

204 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219).

205 Rev. John McDougall, "Report on British Columbia Indians," 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, p. 219).

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these Indians and their Reserves. Surely, sympathetic and fair minded honest men can be found for these responsible positions.²⁰⁶

In 1910 the Agency was divided in accordance with McDougall’s recommendations, and J. Robert Brown was appointed Indian Agent for the newly created Okanagan Agency.²⁰⁷ Irwin was dismissed from his post as Indian Agent on February 8, 1911, on grounds of “mismanagement,” although the specific events leading to his dismissal are not certain.²⁰⁸

Lower Similkameen Band Protests Regarding Compensation, 1908–12

On October 10, 1908, Chief Ashnola, a minor chief of the Ashnola reserves (IR 10, 10A, and 10B) located west of Keremeos, wrote to the department concerning compensation for an irrigation ditch built within the limits of those reserves.²⁰⁹ In the same letter, he also inquired whether the “Great Northern Railroad” had paid compensation for the railway right of way and requested that the department to inform him of the rate of compensation on a per acre basis.²¹⁰ The historical record does not reveal any subsequent correspondence regarding communication between the department and Chief Ashnola in response to his queries about the railway right of way compensation.

Elder Henry Dennis recalls that in the early years, Bertie Allison and Chief Newhumpson complained the most about the railway, especially concerning compensation for themselves and others.²¹¹

R.C. Armstrong raised the issue of compensation next in 1911, again complaining about the rate of compensation given by the VV&E to the band members and saying that some of them had not yet been remunerated for the right of way:

206 Rev. John McDougall, “Report on British Columbia Indians,” 1909, LAC, RG 10, vol. 4020, file 280470-3 (ICC Exhibit 1a, pp. 223–25).
 207 Record of Employment for Archibald Irwin, Department of Indian Affairs Establishment Books, Outside Service, c. 1870–1920, LAC, RG10, vol. 9180, p. 165 (ICC Exhibit 1a, p. 234).
 208 Record of Employment for Archibald Irwin, Department of Indian Affairs Establishment Books, Outside Service, c. 1870–1920, LAC, RG10, vol. 9180, p. 165 (ICC Exhibit 1a, p. 234).
 209 John Ashnola, Chief, to Superintendent General of Indian Affairs, October 10, 1906, LAC, RG 10, vol. 7660, file 21164-17 (ICC Exhibit 1a, p. 207).
 210 John Ashnola, Chief, to Superintendent General of Indian Affairs, October 10, 1906, LAC, RG 10, vol. 7660, file 21164-17 (ICC Exhibit 1a, p. 207).
 211 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 380–81, 397–98, Henry Dennis).

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You will perhaps remember of me writing to you re the value put on the Indian land for right of way of the GNR.

Although a man was sent with Irwin to look at the land, both Irwin and Green lied about the quality of the land they represented it was mostly stony bench. The fact is it was almost all first class bottom land from my place to the Wash[ington] line, about six miles. The Indians only got five dollars an acre while I was paid one hundred dollars an acre along side theirs exactly the same kind of land. I suppose Irwin was fixed by the RR Co. Even now some of the Indians tell me they never recieved [sic] even the five an acre from Irwin. It is a shame if they are kept out of their money.²¹²

The department replied to Armstrong, saying that the matter “was thoroughly investigated in 1906 by Mr. Ashdown H. Green” and that “the Department does not see why the question should be re-opened.”²¹³ Only a few months later, Indian Agent J.R. Brown reported: “At a recent meeting of the Skemeosquamkin Band of Indians of the South Similkameen, I was instructed to ask the Department, that the sum of money paid by the Great Northern Railway [Company], for Right of Way, through Indian Reserve, be distributed among the Indians of that Reserve.”²¹⁴ The department replied that the proceeds “cannot be distributed as suggested,” since “[t]his money represents capital and can only be expended in improvements of a permanent character.”²¹⁵

Schedule of Indian Reserves, 1913

The 1913 Schedule of Indian Reserves in the Dominion, compiled by the Department of Indian Affairs, lists IR 7 and 8 as “confirmed” and IR 3 and 5 as “approved” for the Lower Similkameen Band.²¹⁶ The reserves have the same names and acreages as those listed in the 1902 Schedule: IR 3 being 1,750 acres, IR 5 being 1,278 acres, and IR 7 and 8 together containing 3,800 acres (instead of 4,075 acres as re-surveyed in 1902).²¹⁷ An additional notation appears for each of these reserves: “Right of way of the V.V. & E. Ry. and Nav. Co. through this reserve.” However, no specific acreage for the rights

- 212 R.C. Armstrong, Justice of the Peace, to the Department of Indian Affairs, October 15, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 238–39).
- 213 S. Stewart, Assistant Secretary, Department of Indian Affairs, to R.C.A. Armstrong, October 26, 1911, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 240).
- 214 Indian Agent to Secretary, Department of Indian Affairs, March 11, 1912, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 248).
- 215 Assistant Deputy and Secretary, Department of Indian Affairs, to J.R. Brown, Indian Agent, March 25, 1912, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 249).
- 216 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).
- 217 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

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of way were listed, and the reserve acreage was not reduced to account for them.²¹⁸

Royal Commission on Indian Affairs for the Province of British Columbia

During the fall of 1913, the Royal Commission on Indian Affairs for the Province of British Columbia (also known as the McKenna-McBride Commission) examined the Lower Similkameen reserves and interviewed the occupants about land use and some of the characteristics of the land. Following their inspections, the Commissioners issued minutes of decision confirming the Lower Similkameen reserves. These decisions were published in the Royal Commission’s *Report* in 1916, along with information regarding the character and valuations of reserve lands.

The first minute of decision, dated November 22, 1913, regarding the “Lower Similkameen Tribe,” ordered that IR 3 and 5 “BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indians Reserves, 1913.”²¹⁹ IR 3, containing 1,750 acres in total, was described in the report as “dry farm land and rocky bluffs,” with 600 acres of good soil that produced hay, oats, vegetables, and fruit. The Commissioners valued 300 acres at \$100 per acre, 700 acres at \$60 per acre, and the balance as “bench and rocky bluffs, valueless unless irrigated.”²²⁰ IR 5, containing 1,278 acres in total, was described therein as “cultivable bottomlands and dry bench” that produced hay, oats, vegetables, and fruit, and supported horses and cattle. The Commissioners valued 150 acres at \$100 per acre, 450 acres at \$60 per acre, and the balance as “benchland worthless without irrigation facilities.”²²¹

Another minute of decision, also dated November 22, 1913, ordered that “Skemeoskuankin Reserves Nos. 7 and 8, Similkameen District of the Lower Similkameen Tribe, BE CONFIRMED as now fixed and determined and shewn in the Official Schedule of Indian Reserves, 1913.”²²² These reserves, said to contain 3,800 acres in total, are described as “range with cultivable bottomland,” including 500 acres of “choice cleared meadow” and 1,000

218 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).

219 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 718–19 (ICC Exhibit 1a, pp. 361–62).

220 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 701, 704 (ICC Exhibit 1a, pp. 344, 347).

221 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 701, 704 (ICC Exhibit 1a, pp. 344, 347).

222 Minute of Decision, November 22, 1913, in Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, p. 719 (ICC Exhibit 1a, p. 362).

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acres of uncleared bottomland. Most of the land was said to contain “fairly good soil” that supported the production of grain, fruit, and hay; good timber was also available. The Commissioners valued 500 acres at \$100 per acre, 1,000 acres at \$60 per acre, 1,000 acres at \$30 per acre, and 1,300 acres at \$20 per acre.²²³

The report also included information regarding the economic and agricultural activities engaged in by reserve residents. It was reported that all the residents of IR 3, 5, 7, and 8 were “generally comfortably situated” and engaged in farming and stock raising.²²⁴

Flooding Damage to Skemeoskuankin Reserves, IR 7 and 8

In 1915 Indian Agent J.R. Brown informed the department that Bertie Allison had made a claim against the Great Northern Railway for damage to his meadow allegedly caused by the flooding of a creek that was diverted during construction of the railway. Although the company held that it was “in no way responsible for the trouble complained of,”²²⁵ the Agent argued that the railway’s diversion of the creek was the cause of the damage and urged the department to seek compensation from the company.²²⁶ There is no record of how this issue was resolved.

Further Inquiries Regarding Compensation, 1925–36

In response to questions as to whether the right of way in IR 7 and 8 was “correctly fenced,” Indian Agent Fred Ball noted in July 1925 that more land than necessary had been taken for the right of way and used as a farm by the railway’s “section man.”²²⁷

In July 1927 Agent Ball reported that, during a recent visit with the Lower Similkameen Band, he was asked “a number of questions” about the right of way. He commented that “it seems a late date to be making inquiries

223 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, pp. 702, 704 (ICC Exhibit 1a, pp. 345, 347).
 224 Royal Commission on Indian Affairs for the Province of British Columbia, *Report*, 1916, p. 707 (ICC Exhibit 1a, p. 350).
 225 E.D. Belaney, Division Superintendent, Great Northern Railway Company, to J. Robert Brown, Indian Agent, March 15, 1915, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 322–23).
 226 J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, June 21, 1915, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 326); J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, March 6, 1916, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 331); J. Robert Brown, Indian Agent, to Secretary, Department of Indian Affairs, August 9, 1916, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 336–37).
 227 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy and Secretary, Department of Indian Affairs, July 30, 1925, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 373).

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regarding it, but apparently it is still a live question with the Indians.”²²⁸ Furthermore, he reported:

I noticed a letter in one of the small local papers recently – a letter written by the wife of a liquor supplier and about as badly misinformed as could be – in which it was stated that “the Indians never received compensation for their land taken by the Railway Company and that they were offered a threshing machine in payment, which was refused.” I know this statement is not correct, because one Indian, Pierre Alec, admits receiving \$250 and was promised \$600 altogether, but the balance was never paid to him.

...

While this may seem an ancient matter to deal with, the Indians do not consider it a closed incident by any means. For instance, Pierre Alec showed me a packet of papers which proved to be consecutive pages torn from calendars for the past twenty years with marks on various dates which gave him sundry information, the whole forming rather a complete diary so far as he is concerned. It showed the visits of Mr. Irwin, the Indian Agent at that time, and the payments made to Pierre Alec and the amounts promised later etc., but none of the other Indians had any documents of this kind.²²⁹

Indian Agent Ball requested information on the original settlement and remarked: “I believe they will be quite satisfied if I can go in[to] this matter in detail with them and show them they have been properly compensated.”²³⁰ The information was provided to the agent as requested, but it did not quiet the concerns expressed by band members.

In 1936 Indian Agent James Coleman reported:

From time to time some Indian or the other brings up the question of payment for the right of way of the Great Northern railroad through their Reserves and as there is absolutely no information or plans regarding the transaction in this office, I am unable to give them any information. A few days ago a Pierre Alex, of the Lower Similkameen Band, stated that the railroad took six acres of his land at the rate of \$100.00 per acre, a total of \$600.00, of which he was paid \$225.00 by Mr. Indian Agent Irwin, who informed him that the balance was left to his credit with the Department. Whether such was the case or not I have no information.²³¹

228 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

229 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

230 Fred Ball, Indian Agent, Okanagan Agency, to Assistant Deputy & Secretary, Department of Indian Affairs, July 29, 1927, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 374).

231 James Coleman, Indian Agent, to Secretary, Department of Indian Affairs, June 8, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 376).

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A.F. McKenzie, the Acting Assistant Deputy and Secretary, provided a statement showing the valuations and allowances for improvements for the right of way. He pointed out that “Pierre appears in each statement with \$225.00 paid each time. However, it may not be the same man.”²³² He further remarked: “The land was not sold at \$100.00 per acre. It was valued at varying prices. The band lands brought \$5.00 per acre. The individuals received the enhanced value of the better land they had cultivated by Indian Improvements.”²³³

The community evidence suggests that there were two separate men with names similar to the “Alex Pierre” mentioned in the correspondence. Theresa Dennis noted that a “Pierre Alexees” (phonetic) lived in the Ashnola area and that the railway went through his property.²³⁴ John Terbasket clarified that another man named Alex Pierre, or Crooked Mouth Pierre, lived at IR 8, and his lands were also affected by the railway.²³⁵

Abandonment of Railway Line between Hedley and Princeton, 1937

On September 30, 1937, the Board of Railway Commissioners granted authorization to the VV&E Railway and Navigation Company for “the abandonment of its line of railway between Hedley and Princeton.”²³⁶ However, the line between Hedley and Chopaka, Washington, continued to operate, including use of the right of way through the Lower Similkameen Reserves.

Provincial Order in Council 1036, 1938

On July 29, 1938, the provincial government passed Order in Council 1036. It read:

That under authority of Section 93 of the “Land Act,” being Chapter 144, “Revised Statutes of British Columbia, 1936,” and Section 2 of Chapter 32, “British Columbia Statutes 1919,” being the “Indian Affairs Settlement Act,” the lands set out in schedule attached hereto be conveyed to His Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia, subject however to the right of the Dominion Government to deal with the said lands in such manner as they may deem best suited for the purpose of the Indians including a right to sell the said lands and

232 A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to James Coleman, Indian Agent, June 16, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 378).
 233 A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to James Coleman, Indian Agent, June 16, 1936, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 378).
 234 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 398–99, Theresa Dennis).
 235 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 399, John Terbasket).
 236 Order No. 54909, Board of Railway Commissioners for Canada, September 30, 1937, no file reference available (Exhibit 1a, p. 379).

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fund or use the proceeds for the benefit of the Indians subject to the condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct that any lands hereby conveyed for such tribe or band, and not sold or disposed of as heretofore provided, or any unexpended fund being the proceeds of any such sale, shall be conveyed or repaid to the grantor, and that such conveyance shall also be subject to the following provisions:—

PROVIDED NEVERTHELESS that it shall at all times be lawful for Us, Our heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads, canals, bridges, towing paths, or other works of public utility or convenience; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands of which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings:

PROVIDED also that it shall be lawful for any person duly authorized in that behalf by Us, our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation:

PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work:

PROVIDED also that it shall be at all times lawful for any person duly authorized in that behalf by Us, our heirs and successors, to take from or upon any part of the hereditaments hereby granted, any gravel, sand, stone, lime, timber or other material which may be required in the construction, maintenance, or repair of any roads, ferries, bridges, or other public works. But nevertheless paying therefor reasonable compensation for such material as may be taken for use outside the boundaries of the hereditaments hereby granted:

PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant.²³⁷

The Lower Similkameen reserves, including IR 3 (1,750 acres), “Joe Nahumpcheen” IR 5 (1,278 acres), and “Skemeoskuankin” IR 7 and 8 (4,075 acres), were covered by Order in Council 1036.²³⁸ It should be noted

²³⁷ British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).

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that the schedule to this Order shows the correct acreage of 4,075 acres for IR 7 and 8, in contrast with previous schedules produced by the Department of Indian Affairs.²³⁹ This Order in Council did not reduce the acreage of Lower Similkameen reserves 3, 5, 7, and 8. In comparison, the acreage of IR 10 was reduced by 2.6 acres, apparently on account of an irrigation ditch right of way, although no extra reduction was made for the railway right of way through the same reserve.²⁴⁰

Petition and Band Council Resolution, 1940

In January 1940, 16 band members²⁴¹ signed a petition stating: “[T]his is all our neams [sic] signed for Perrie Alex’s railway mony [sic] he received 225.00 and 375.00 come to him.”²⁴² A Band Council Resolution dated March 30, 1940, followed the petition and requested

that a sum not exceeding Three Hundred seventy five Dollars, be paid out of money standing to the credit of this Band, for the purpose of reimbursing Pierre Alex for land taken for Railway (G.N.) purposes in 1905 for which he was never paid, receiving \$225.00 instead of the \$600.00 which he should have received.²⁴³

When forwarding the Band Council Resolution to the department, Indian Agent Adrian Barber explained in his covering letter:

On each of my visits to the Lower Similkameen Band of Indians an old Indian, Pierre Alex, brings up an old claim for compensation for six acres of improved land which he alleges were taken for right of way purposes by the V.V. and E. Railway, now the Great Northern, in 1905, the money having been paid to the Department and he only having received \$225.00 instead of \$600.00 for six acres at \$100 per acre.

...

238 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 384).
 239 Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, p. 61 (ICC Exhibit 1a, p. 46); Schedule of Indian Reserves in the Dominion, Supplement to Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, p. 105 (ICC Exhibit 1a, p. 252).
 240 British Columbia Order in Council 1036, July 29, 1938, no file reference available (ICC Exhibit 1a, p. 385); see also Department of Mines and Resources, Indian Affairs Branch, “Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia,” March 31, 1943, pp. 111–13 (ICC Exhibit 1a, pp. 394–96).
 241 The 16 signatures on the petition are [Chief] Joseph Louie, Johnny [Jasket], Harry [McKanzz], George [McKanzz], Michel, Abraham Louie, Willie Terbasket, Gabriel Terbasket, Alex [Squise], Frank Terbasket, Eneas Nehumchin, Charlie Joe, Johanny Edward, Billy Francis, Eneas Squakin, and “Perrie” Alex.
 242 Joseph Louie and others to A.H. Barber, January 26, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, pp. 386–87).
 243 Band Council Resolution, March 30, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 388). It is signed by [Chief] Joseph Louie, Charlie Joe, Niel Bent, Billie Terbasket, and Joe Dennis.

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... in January I received the attached letter from the Chief of the Band and further on March 30th last, when I presided at a meeting of the Band the matter was again brought up and the meeting insisted I have the money paid to this man out of the Band Account and passed a resolution requesting this be done, which I also forward hereto attached.

Whilst this claim has the support of the old members of the Band, it is very old and has apparently been taken up by a number of Agents previous to this time without satisfaction to the old fellow. I am submitting the resolution as requested by the Band for consideration by the Department, but would be pleased if the Department could let me have a statement giving the acreage and price per acre received for improved and cultivated land and it may be possible that I could explain the matter to the Band but do not expect to be able to satisfy Pierre Alex without payment of the amount he claims is due to him.²⁴⁴

The Secretary replied to Agent Barber on April 24, 1940, with an explanation of the original valuations and amounts paid to the Band and to individuals.²⁴⁵ It is not known whether the money requested in the Band Council Resolution was paid to Pierre.²⁴⁶

Schedule of Indian Reserves, 1943

In 1943 the Indian Affairs Branch of the Department of Mines and Resources published a “Schedule of Indian Reserves in the Dominion of Canada,” intended to be “a ready reference to pertinent information necessary for administrative purposes both for office and the field.”²⁴⁷ This Schedule differs from all previous similar Schedules of Indian Reserves in that the lands taken for any rights of way, including the VV&E Right of Way, are excluded from the total acreage listed for each reserve:

- IR 3 was said to contain 1,714.29 acres
1,750.00 (surveyed in 1889) – 25.21 (VV&E right of way) – 11.20 (Road right of way)
- IR 5 was said to contain 1,251.99 acres
1,278.00 (surveyed in 1887) – 14.76 (VV&E right of way) – 11.25 (Road right of way)

²⁴⁴ Adrian Barber, Indian Agent, to Secretary, Department of Indian Affairs, April 17, 1940 (ICC Exhibit 1a, p. 389).

²⁴⁵ T.R.L. MacInnes, Secretary, Indian Affairs Branch, Department of Mines and Resources, to A.E. Barber, Indian Agent, April 24, 1940, LAC, RG 10, vol. 8080, file 982/31-2-4-2-1, GN, part 1 (ICC Exhibit 1a, p. 390).

²⁴⁶ Henry Dennis, whose father owned Pierre Alexees’ land in later years, recalls that Pierre never received compensation. See ICG Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 400, Henry Dennis).

²⁴⁷ Department of Mines and Resources, Indian Affairs Branch, “Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia,” March 31, 1943 (ICC Exhibit 1a, p. 392).

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- IR 7 and 8 (combined) were said to contain 3,957.69 acres
4,075.00 (re-surveyed in 1902) – 59.31 (VV&E right of way) – 58.00
(Road right of way)²⁴⁸

It is noteworthy that the 59.31 acres shown on the Schedule as the area of the VV&E right of way through IR 7 and 8 was, in fact, the area within IR 7. The Schedule omitted the area of 18.26 acres required for the right of way through IR 8.

ABANDONMENT OF THE VV&E RIGHT OF WAY

Status of the VV&E Princeton Line, 1944–85

In 1944 a dominion statute approved the lease of “the railway and all undertakings of the Vancouver, Victoria and Eastern Railway and Navigation Company” to the Great Northern Railway Company, based in Minnesota. The agreement included VV&E’s “main line of railway extending from Hedley, British Columbia, to the international boundary line north of Chopaka, Washington.”²⁴⁹

On December 14, 1954, the Board of Transport Commissioners approved the abandonment of the portion of railway between Hedley and Keremeos which passes through IR 10.²⁵⁰ On January 10, 1956, a provincial order in council authorized the acquisition of the abandoned rights of way “for the use of the Department of Highways.”²⁵¹ The land was purchased from the Great Northern Railway for \$1, and the province acquired the certificates of title to the land.²⁵²

Henry Dennis owned land adjacent to the IR 10 right of way at this time. He recalls that sometime after the railway ceased to operate in that area, four men from the Highways Department came to ask his permission to “borrow” Mr Dennis’ right of way property for three years, so they could use it as a temporary road while building a new bridge over the Ashnola River.²⁵³ They acknowledged in their conversation that “we know this goes back to you, it’s your property, so we have to borrow it off you.”²⁵⁴ Later, after the highway

248 Department of Mines and Resources, “Schedule of Indian Reserves in the Dominion of Canada, Part 2: Reserves in the Province of British Columbia,” March 31, 1943 (ICC Exhibit 1a, pp. 394–95).

249 *An Act respecting Vancouver, Victoria and Eastern Railway and Navigation Company, the Nelson and Fort Sheppard Railway Company and Great Northern Railway Company*, SC 1944, c. 55 (ICC Exhibit 6g, pp. 2 and 5).

250 Order No. 54909, Board of Transport Commissioners for Canada, December 14, 1954, National Transportation Agency, [file 33882, vol. 5] (Exhibit 1a, p. 398).

251 Provincial Order in Council, January 10, 1956 (Exhibit 1a, pp. 399–400).

252 J.E. Moore, Departmental Comptroller, Department of Highways, to Superintendent of Lands, Department of Lands and Forests, May 22, 1957 (ICC Exhibit 1a, p. 401).

253 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 389, Henry Dennis).

254 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 389–90, Henry Dennis).

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was built on the right of way through IR10, Mr Dennis made numerous attempts to get the Highways Department to erect a fence along the highway, because a number of his animals were being killed. He was informed that the land “belongs to the Indians,” and that “they couldn’t fence that property because it belonged to the reserve.”²⁵⁵

It appears that the possibility of abandoning the remaining portion of the railway between Keremeos and the international boundary at Chopaka (passing through IR 2, 7, and 8) was discussed as early as 1970. The present day IR 2 was once made up of three reserves, IR 2, 3, and 5. They were amalgamated in 1959 to form one reserve, designated as IR 2.²⁵⁶ At the time, the attorney for the Burlington Northern Inc.²⁵⁷ informed the Secretary of the Railway Transport Committee that “the matter of abandonment of line is being given further study,” but that no formal decision regarding abandonment had yet been made.²⁵⁸ However, flooding damage to the tracks in 1972 halted railway service along the line and obliged the company to provide “substituted motor carrier service,” which continued until 1982.²⁵⁹ The 1972 flood washed out the railway bridge across the Similkameen River at the northern end of IR 8. There is no indication that the railway company made any efforts to repair the bridge or clean up the debris from the washout. An attempted cleanup carried out by the Lower Similkameen Band resulted in the death of one community member when part of the bridge collapsed.²⁶⁰

The Village of Keremeos made inquiries to the Railway Transport Committee in 1974 about how it might acquire a portion of the apparently unused right of way. It was informed that no application to abandon the right of way had been made:

Under these circumstances, there is nothing you can do to acquire a portion or portions of the Railway right of way. In the event, the Railway was to apply for

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- 255 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 390, Henry Dennis). See also ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 60–61, Henry Dennis).
 - 256 D.M. Hett, Superintendent, Okanagan Indian Agency, to A.F. Paget, Comptroller of Water Rights, Department of Lands and Forests, December 23, 1959 (ICC Exhibit 1a, p. 405).
 - 257 In 1965 the Great Northern Railway Company in Canada was authorized to amalgamate with Great Northern Pacific & Burlington Lines, and other railway companies. The merger became effective in 1970, and the Company was first known as Burlington Northern Inc., and later as the Burlington Northern Railroad Company. See Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 434).
 - 258 E.D. Pratt, Attorney for British Columbia, Burlington Northern Inc., to C.W. Rump, Secretary, Railway Transport Committee, September 17, 1970, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 406).
 - 259 Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 435).
 - 260 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, pp. 17, 71, John Terbasket; p. 426, Gloria Bent; pp. 435–36, Delphine Terbasket).

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authority to abandon this trackage and their request was subsequently approved, the Railway could then dispose of the right of way in any manner they chose.²⁶¹

In June 1974 the attorney for Burlington Northern, F.D. Pratt, informed the Railway Transport Committee: “[I]t is [Burlington Northern’s] present intention not to apply to abandon this line but to continue the present trucking service ... until such time as additional freight warrants restoration of train service.”²⁶²

In February 1977 the Lower Similkameen Band apparently contacted the Burlington Northern to find out how the rights of way through IR 2, 7, and 8 could be reacquired.²⁶³ A company representative replied on February 24, informing them that a decision had not yet been made to abandon the right of way but that “once a line is discontinued, our policy is to deal with the adjoining owners for sale of our ownership unless government edict directs otherwise. I note your interest in possible purchase of the right of way on behalf of the Band.”²⁶⁴

Over four years later, on June 29, 1981, the Burlington Northern notified the Interstate Commerce Commission (in the United States) that it anticipated abandoning its line between Oroville, Washington, and Keremeos, British Columbia, within three years.²⁶⁵ Chief Barnett Allison immediately forwarded the notice to the Department of Indian Affairs and advised:

Our people and Council resolved that three sections of the line through our reserve No 2, No 7 & 8 and Ashnola [No.] 10 & 10B be returned to the Band immediately. We urge the Department to act on behalf of the Government of Canada to demand the said right of way to be transferred to Reserve land status as it was before.

Your immediate action is required and please keep us informed of your progress in this matter.²⁶⁶

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- 261 J.D. Beaton, Secretary, Railway Transport Committee, to Viola Sales, Municipal Clerk, Corporation of the Village of Keremeos, April 2, 1974, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 407).
 - 262 F.D. Pratt, Attorney for British Columbia, Burlington Northern Inc., to the Secretary, Railway Transport Committee, Canadian Transport Commission, June 12, 1974, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 408).
 - 263 J.C. Kenady, Vice President, Industrial Development and Property Management, Burlington Northern, to Joe Terbasket, Land Claims Worker, Lower Similkameen Band Office, February 24, 1977, DIAND file E5667-07399 (ICC Exhibit 1a, p. 409).
 - 264 J.C. Kenady, Vice President, Industrial Development and Property Management, Burlington Northern, to Joe Terbasket, Land Claims Worker, Lower Similkameen Band Office, February 24, 1977, DIAND file E5667-07399 (ICC Exhibit 1a, p. 409).
 - 265 Notice, Burlington Northern Railroad Company, June 29, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 411).
 - 266 Chief Barnett Allison, Lower Similkameen Indian Band, to Peter Clark, Director, Reserves and Trusts, BC Region, July 14, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 410).

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On July 31, 1981, Peter Clark, the Director of Reserves and Trusts for the BC Region, wrote to the Director of the Lands Branch in Ottawa to ask for information “so that I might provide the Band with advice as to the proper means of obtaining the return of the lands.”²⁶⁷ He also commented: “It would appear that Burlington Northern understand that the land should be purchased by the Band/Crown whilst the Band understand that the lands revert when no longer required.”²⁶⁸ The Band was informed in November 1981 that “the Department was proceeding through the Courts to obtain a (legal) decision as to the ownership of the land.”²⁶⁹

In 1983 Vic Hulley of the Similkameen Indian Administration wrote to Peter Clark, asking for an update on the department’s legal action. Hulley informed Clark that the Band was simultaneously continuing its “direct and persistent representation to Burlington Northern to make the old RR-R/W available to the Lower Similkameen Band on a first refusal basis.”²⁷⁰ In the same letter, he stated: “The old documents wherein title to the subject lands was vested in Burlington Northern as near as I can determine did not provide for the reversion of the lands to Crown Canada.”²⁷¹

Official Abandonment of Right of Way, 1985

On March 28, 1985, the Burlington Northern Railway officially applied to the Railway Transport Committee for permission to abandon the railway line between Keremeos and the international boundary.²⁷² The application stated that, due to the 1972 washout and a lack of maintenance work since that time, “the Keremeos Line is in a state of bad disrepair and over a large part thereof the tracks have been removed by persons unknown.”²⁷³ Furthermore, an earlier order by the Interstate Commerce Commission in the United States had

267 Peter Clark, Acting Director, Reserves and Trusts, BC Region, Indian and Northern Affairs, to F.J. Singleton, Acting Director, Lands Branch, Reserves and Trusts, Departmental Headquarters, July 31, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 412).
 268 Peter Clark, Acting Director, Reserves and Trusts, BC Region, Indian and Northern Affairs, to F.J. Singleton, Acting Director, Lands Branch, Reserves and Trusts, Departmental Headquarters, July 31, 1981, DIAND file E5667-07399 (ICC Exhibit 1a, p. 412).
 269 Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).
 270 Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).
 271 Vic Hulley, Lands and Estates, Similkameen Indian Administration, to Peter Clark, Acting Director, Reserves and Trusts, BC Region, February 28, 1983, DIAND file E5667-07399 (ICC Exhibit 1a, p. 430).
 272 Malcolm G. King, Barrister and Solicitor, Douglas, Symes & Brissenden, to J. O’Hara, Secretary, Railway Transport Committee, Canadian Transport Commission, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 431); and Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 432–41).
 273 Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 437, 440).

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effectively isolated the portion of the railway between Keremeos and the border by authorizing the abandonment of the portion within Washington between Chopaka and Oroville.²⁷⁴

The Railway Transport Committee conducted a field investigation regarding the impact of the proposed abandonment. On July 22, 1985, it was reported that the rail line between Keremeos and Chopaka was “impassable and in poor state of repairs” and that “[t]here is no opposition to the abandonment.”²⁷⁵ A public notice of the proposed abandonment was issued accordingly on August 27, 1985, including a statement that “any person who is of the opinion that a Public Hearing is required on this matter should make his or her views known by writing on or before September 17, 1985.”²⁷⁶

On September 18, 1985, Band Administrator Delphine Terbasket notified the Canadian Transport Commission that “[t]he Upper and Lower Similkameen Indian Band advise that [there] is no objection [to] the abandonment as long as the crossing right of ways are returned to the Upper and Lower Similkameen Indian Reserves.”²⁷⁷ On the same date the Okanagan Nations Research Institute notified the Commission that their research indicated a “prior claim on proposed abandonment of Burlington Northern Railway by Lower and Upper Similkameen Indian Band on those portions of this right of way which transgres [sic] reserve land.”²⁷⁸ R.W. Lebell, Secretary of the Canadian Transport Commission, Western Division, acknowledged the submission of the Okanagan Nations Research Institute and stated:

The nature of your claim is not clear in your telex, but it appears that you are contemplating shipments by rail on this line. Instead, it appears that you are asserting a land claim with respect to a portion of the railway right of way. In deciding an abandonment case, the Commission is restricted by law to matters involving train service and the Commission does not have any power to decide the title to lands or to make orders for the disposition of the right of way. If the line is ordered abandoned, the title to the right of way will be held by Burlington Northern in the same manner as any other landowner within the Province. Any claim of prior title to those lands may be determined in a Court within the Province of British

- 274 Burlington Northern Railroad Company, Submission to the Railway Transport Committee, March 28, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 438).
- 275 L.P. Trainor for J.J. Eisler, Regional Director, Railway Transport Committee, to J. Kimpinski, Executive Director, Western Division, [Railway Transport Committee], July 22, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 443–45).
- 276 Notice, Railway Transport Committee, Canadian Transport Commission – Western Division, August 27, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 446–47); also located in DIAND file E5667-07399 (ICC Exhibit 1a, p. 448).
- 277 Delphine Terbasket, Administrator, to R.W. Lebell, Canadian Transport Commission, Western Division, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 449).
- 278 Okanagan Nations Research Institute, to R.W. Lebell, Canadian Transport Commission, September 18, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 450).

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Columbia because, as I have indicated, the Commission has no jurisdiction to decide land titles.²⁷⁹

On October 4 the Railway Transport Committee issued a decision stating that “no objections were received respecting the proposed abandonment.” However, it noted:

The Okanagan Nations Research Institute and the Upper and Lower Similkameen Indian Bands asserted land claims against the right of way of the railway, but the determination of Native land claims is a matter outside the scope of the jurisdiction of the Commission.²⁸⁰

The decision concluded that abandonment of the Burlington Northern line between Keremeos and the international boundary would be “in the public interest.”²⁸¹ An order issued on the same date approved “abandonment of the operation of the said trackage.”²⁸²

Hubert J. Ryan, Acting Director for the Land Directorate at Department of Indian Affairs headquarters, informed the BC Region Reserves and Trusts Office of the order for abandonment of the railway line. He stated that “[a]s the rail line in question passes through a number of reserves belonging to the Similkameen Band you may wish to approach the company in question with the view of re-acquiring these lands for the use and benefit of the Band.”²⁸³

On November 7, 1985, A.J. Broughton, the Manager of Indian Lands for Reserves and Trusts, BC Region, wrote to DIAND Regional Legal Services, informing them that “[t]he Band wishes to reacquire the right of way through its reserves.”²⁸⁴ Broughton asked to be advised whether “the Crown and/or the Band have any right to reacquire the right of way without compensating the railway.”²⁸⁵ On the same date, Broughton wrote to Peter Keltie, the DIAND Central District Manager, instructing him to “notify the Band, and take part in any discussions on the reacquisition of the right of way as you think

279 R.W. Lebell, Secretary, Canadian Transport Commission, Western Division, to Okanagan Nations Research Institute, September 20, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 451).

280 Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985 (ICC Exhibit 1a, p. 453).

281 Decision No. WDR1985-07, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, pp. 453, 455).

282 Order No. WDR1985-00198, Railway Transport Committee, Canadian Transport Commission, Western Division, October 4, 1985, National Transportation Agency, file 33882, vol. 5 (ICC Exhibit 1a, p. 456).

283 Hubert J. Ryan, Acting Director, Land Directorate, Reserves and Trusts, to Director, Reserves and Trusts, BC Region, October 15, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 457).

284 A.J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to E.L. Morris, Regional Legal Services, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 458).

285 A.J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to E.L. Morris, Regional Legal Services, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 458).

INDIAN CLAIMS COMMISSION PROCEEDINGS

appropriate. It appears that the Band has been interested in this reacquisition for some time.”²⁸⁶

On April 17, 1986, Councillor John Terbasket wrote to Peter Keltie at the Department of Indian Affairs in Vancouver to request assistance. The letter stated:

The Burlington Northern Railway has been abandoned and the land is no longer required by Burlington Northern for railway purposes.

We have submitted a claim with the Railway to have the right of way land returned to the band.

We solicit the support of the Department of Indian Affairs towards this effort, and request a letter from the Department supporting the return of the land.²⁸⁷

There is no further record of what action followed this request, but it appears that the Lower Similkameen Band reached an agreement of some kind with the railway company by the end of 1986 for the return of the right of way lands. Internal correspondence of the BC Ministry of Transportation and Highways, dated December 16, 1986, stated:

[The] Lower Similkameen Indian Band confirmed they have made an agreement with Burlington Northern for the right of way through the Similkameen I.R. #2 and through Skemeoskuankin I.R. #7.

All portions of the old railway right of way, through these reserves, are to be transferred back to the Band.²⁸⁸

Further details of this agreement are unknown.

At this time, the BC Ministry of Transportation was interested in obtaining the right of way and establishing it as a “public highway.” However, the Band “would not consider” the proposal.²⁸⁹ Nothing in the historical record of this inquiry indicates that either of these proposals was ever carried out.

In the mid-1990s a developer had apparently expressed an interest in obtaining the remaining Lower Similkameen right of way lands. Nothing further is known of this proposal, although it was apparently the impetus for filing the

286 Allan J. Broughton, Manager, Indian Lands, Reserves and Trusts, BC Region, to Peter D. Keltie, District Manager, Central District, November 7, 1985, DIAND file E5667-07399 (ICC Exhibit 1a, p. 459).

287 John Terbasket, Councillor, Lower Similkameen Indian Band, to Peter Keltie, Department of Indian Affairs, April 17, 1986, DIAND file E5667-07399 (ICC Exhibit 1a, p. 465).

288 G.A. Ward, Regional Property Agent, Kamloops Region, to D.I.F. MacSween, Manager of Operations, Property Services, Ministry of Transportation and Highways, December 16, 1986, no file reference available (ICC Exhibit 1a, p. 467).

289 G.A. Ward, Regional Property Agent, Kamloops Region, to D.I.F. MacSween, Manager of Operations, Property Services, Ministry of Transportation and Highways, December 16, 1986, no file reference available (ICC Exhibit 1a, p. 467).

LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

Specific Claim respecting those lands.²⁹⁰ At the time of the submission of its Specific Claim to the Department of Indian Affairs in 1995, the Lower Similkameen Indian Band had an option to purchase the land from the railway company for US\$233,680. The option expired on December 25, 1995.²⁹¹

290 ICC Transcript, April 19–20, 2004 (ICC Exhibit 5a, p. 58, Henry Allison; pp. 58–59, Barbara Allison).
291 “Lower Similkameen Burlington Railway Specific Claim,” November 20, 1995 (ICC Exhibit 2a, p. 4).

INDIAN CLAIMS COMMISSION PROCEEDINGS

APPENDIX B

CHRONOLOGY

LOWER SIMILKAMEEN INDIAN BAND

VANCOUVER, VICTORIA AND EASTERN RAILWAY RIGHT OF WAY INQUIRY

- 1 Planning conference Vancouver, September 26, 2003
- 2 Community session Keremeos, April 19–20, 2004

The Commission heard from Carol Allison, Nancy Allison, Mike Allison, Carrie Allison, Margaret Kruger, Hazel Squakin, Bernie Allison, Ramona Allison-Heinrich, Antoine Qualtier, Lillian Allison, Casey Sanders, Henry Allison, Barbara Allison, Leonard Louis, Les Louis, Leon Louis, Lauren Terbasket, John Terbasket, Jeanine Terbasket, A.J. Terbasket, Raymond Terbasket, Lyle Terbasket, Mary Louie, Edward Louie, Kenneth Richter, Violet Barker, Richard Dixon Terbasket, Theresa Terbasket, Moses Louie, Robert Dennis, Teresa Dennis, Gloria Bent, Ralph Bent, Henry Dennis, Herman Edwards, Delphine Terbasket, Robert Edward.

- 3 Written legal submissions
 - Submission on Behalf of the Lower Similkameen Indian Band, October 26, 2004
 - Submission on Behalf of the Government of Canada, December 17, 2004
 - Reply Submission on Behalf of the Lower Similkameen Indian Band, December 30, 2004
- 4 Oral legal submissions Penticton, January 26, 2005
- 5 Content of formal record

The formal record of the Lower Similkameen Indian Band: Vancouver, Victoria and Eastern Railway Right of Way Inquiry consists of the following materials:

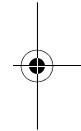
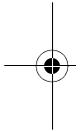
- Exhibits 1a–9a tendered during the inquiry
- transcripts of community session (1 volume) (Exhibit 5a)

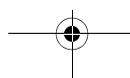
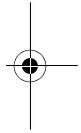
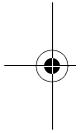
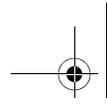


LOWER SIMILKAMEEN INDIAN BAND – VV&E INQUIRY

- transcript of oral session (1 volume)

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

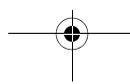
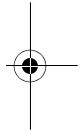
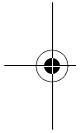
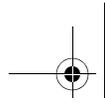




INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE FORT PELLY AGENCY PELLY HAYLANDS CLAIM NEGOTIATIONS

MARCH 2008



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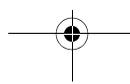
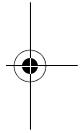
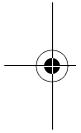
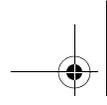
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FORT PELLY AGENCY – PELLY HAYLANDS CLAIM MEDIATION

SUMMARY

**FORT PELLY AGENCY
PELLY HAYLANDS CLAIM MEDIATION
Saskatchewan**

The report may be cited as Indian Claims Commission, *Fort Pelly Agency: Pelly Haylands Claim Mediation* (Ottawa, March 2008), reported (2009) 23 ICCP 279.

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

Treaties – Treaty 4 (1874); **Reserve** – Reserve Creation – Alienation; **Mandate of Indian Claims Commission** – Mediation; **Saskatchewan**

THE SPECIFIC CLAIM

For the purposes of this claim, three Saskatchewan First Nations – The Key, Keeseekoose, and Cote – joined together as the Fort Pelly Agency to collectively present their individual claims to a block of land which they alleged had been set apart for them in 1891 as a reserve under the *Indian Act* and which was later alienated without a surrender or consent from the First Nations. The claim was submitted to the Department of Indian Affairs and Northern Development (DIAND) in October 1997 and was accepted for negotiation in July 2000. The ICC monitored the progress of the claim during the review leading to acceptance, and was invited to facilitate the negotiations, which began in November 2000.

BACKGROUND

The ICC's involvement in this claim related only to its mediation mandate. As such, the ICC did not receive historical records or legal submissions from the parties.

The Key, Cote, and Keeseekoose First Nations adhered to Treaty 4 in 1874 and had their respective reserves in the Swan River–Fort Pelly region of eastern Saskatchewan between 1877 and 1883. All three reserves were confirmed by order in council in 1889. Hunting and fishing could not sustain the First Nations in their traditional ways, and they turned to agriculture, particularly stock raising, to improve their condition. In 1891, a 20-square-mile parcel of land in townships 30 and 31 in range 32, west of the 1st meridian (lying immediately west of the Keeseekoose and Cote Reserves, between the Assiniboine and White Sand Rivers) was surveyed to pro-

INDIAN CLAIMS COMMISSION PROCEEDINGS

vide the hay required to maintain the cattle herds. On March 1, 1893, Order in Council 574 was passed under the *Dominion Lands Act*, ordering that townships 30 and 31 be “withdrawn from the sale and entry and vested in the Superintendent General of Indian Affairs to be held as haylands for the benefit of the Indians of the Pelly District.”

In 1898, the Pelly haylands in township 31 were inadvertently included in a block of land reserved for a Doukhobor settlement. Indian Affairs officials believed that a surrender of these lands was not necessary because they had not been set aside as a full reserve but simply as a reserve for hay purposes, and on March 15, 1899, Order in Council 759 was passed relinquishing township 31 from the Department of Indian Affairs to the Department of the Interior for the Doukhobor settlers.

In 1905, Cote First Nation surrendered a part of its reserve in exchange for the haylands in township 30. No surrender of the Pelly haylands was taken by The Key or Keeseekoose First Nations.

MATTERS FACILITATED

The ICC’s role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for meetings. The ICC coordinated land appraisals and loss-of-use studies concerning land appraisals, agriculture, minerals and forestry, traditional activities, social impact, special economic advantage, and water. The ICC also provided mediation to assist the three First Nations to reach agreement for the division of the settlement money.

OUTCOME

In October 2004, the parties reached an agreement in principle for a total compensation package of \$73.5 million plus negotiation and ratification costs. In April 2005, the three First Nations agreed on an equitable division of the money. Cote and Keeseekoose successfully ratified the proposed settlement in February and April 2006, respectively. Although The Key also ratified the agreement in April 2006, some members of The Key Band sought a judicial review of the ratification vote, and the case is still pending. The settlement agreement will not be implemented until the matter has been decided.

REFERENCES

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

FORT PELLY AGENCY – PELLY HAYLANDS CLAIM MEDIATION

PART I

INTRODUCTION

The Pelly Haylands specific claim, put forward by The Key, Keeseekoose, and Cote First Nations, relates to events dating back over 100 years. The Indian Claims Commission (ICC) was involved with this claim from its initial presentation to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND) in 1997 to its successful resolution in 2006.

Cote, Keeseekoose, and The Key are Treaty 4 First Nations with three reserves bordering on the Assiniboine River, south of Fort Pelly in central Saskatchewan, close to the Manitoba border. Keeseekoose Indian Reserve (IR) 66 (currently 4,415.9 hectares) and Cote IR 64 (currently 8,088.2 hectares) adjoin each other, and The Key IR 65 (currently 6,404.8 hectares) is slightly farther west along the river. As of November 2007, the registered population of the three First Nations was:

	Total On Reserve	
Cote	3038	754
Keeseekoose	2106	659
The Key	<u>1107</u>	<u>280</u>
Grand Total	6251	1693¹

They joined together as the “Fort Pelly Agency” in 1997 to collectively present their individual claims to a separate block of land, designated as haylands for the Indians of the Fort Pelly District, which they alleged had been set apart for the three Bands in 1891 as a reserve under the *Indian Act* and which was later alienated without a surrender or consent from the First Nations.

¹ Canada, Indian and Northern Affairs Canada (INAC), First Nation Profiles, The Key, Keeseekoose, and Cote First Nations, <http://sdiprod2.inac.gc.ca/fnprofiles> (December 29, 2007).

INDIAN CLAIMS COMMISSION PROCEEDINGS

This report will not provide a full history of the Pelly Haylands land claim but will summarize material submitted during the negotiations to provide the historical background. It will also summarize the events leading up to the settlement of the claim and describe the Commission's role in the resolution process. In this case, the Commission's involvement began when the claim was presented to the Specific Claims Branch in October 1997. At the request of the First Nations, the Indian Claims Commission attended that initial meeting and agreed to monitor the progress of the claim through the Specific Claims Branch and Department of Justice processes. No further meetings were required in this capacity, only regular telephone communication to ensure continued progress by the parties. The claim was accepted for negotiation on July 28, 2000, and in October of the same year, the First Nations asked, and Canada agreed, to have the ICC facilitate the negotiation meetings.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council² on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into specific claims; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process. An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable

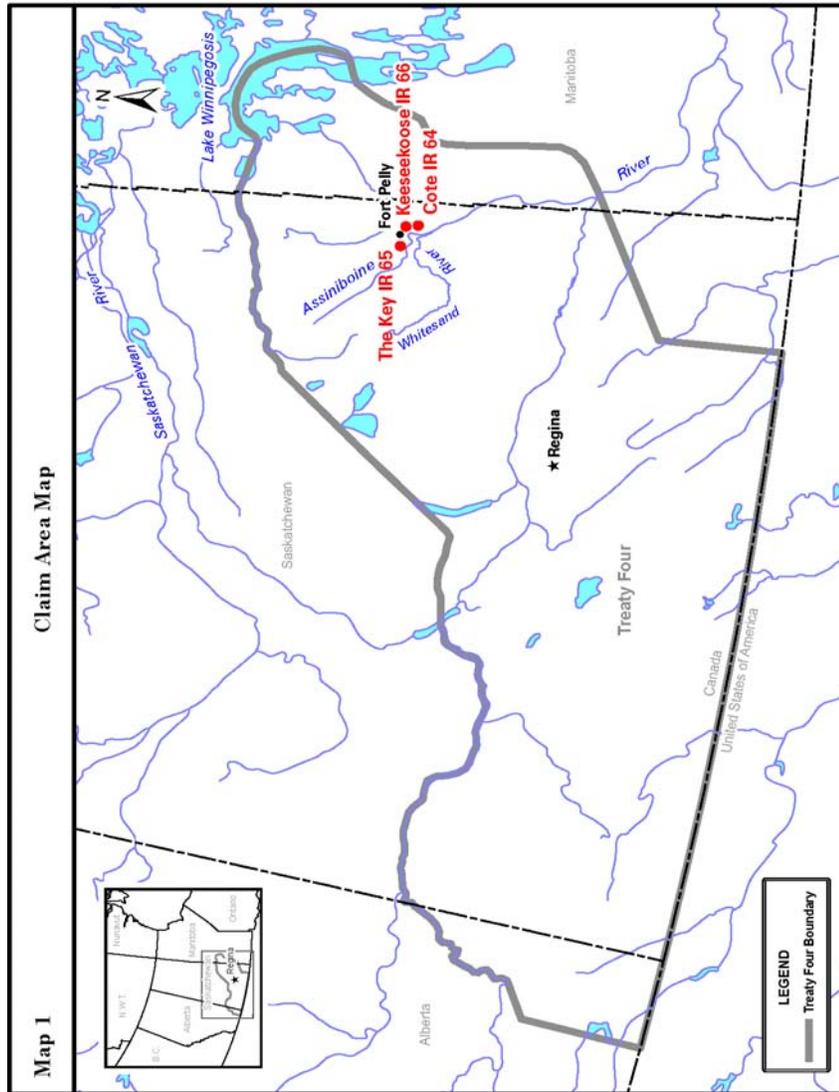
² The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, inter alia, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.

FORT PELLY AGENCY – PELLY HAYLANDS CLAIM MEDIATION

compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

The Commission provides broad mediation and facilitation services at the request of both the First Nation and the Government of Canada. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.

INDIAN CLAIMS COMMISSION PROCEEDINGS



FORT PELLY AGENCY – PELLY HAYLANDS CLAIM MEDIATION

PART II

A BRIEF HISTORY OF THE CLAIM

In September 1874, representatives of Her Majesty the Queen and Chiefs and Headmen of the Cree and Saulteaux tribes of Indians negotiated Treaty 4 at Fort Qu'Appelle. In exchange for the surrender of 195,000 square kilometres of land in what is now southern Saskatchewan and west central Manitoba, the Crown promised perpetual annuities, reserve lands, and agricultural assistance. The treaty specified that government officials and individual bands were to select the location of reserves to be surveyed based on a formula of one square mile for each family of five, that is, 128 acres per person, and that those reserves could only be sold by the Crown after the band had consented by way of a surrender:

And Her Majesty the Queen hereby agrees through the said Commissioners to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; ... and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.³

The agricultural assistance was in the form of tools, seed, and cattle (“one yoke of oxen, one bull, four cows” for each band) “for the encouragement of the practice of agriculture among the Indians.”⁴

Chief Gabriel Coté or Mee-may (The Pigeon) played a prominent role at the negotiations at Qu'Appelle, being described by Lieutenant Governor

³ 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.

⁴ 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), 7.

INDIAN CLAIMS COMMISSION PROCEEDINGS

Alexander Morris, one of the Treaty Commissioners, as the principal Chief of the Saulteaux⁵ and he was among the Chiefs who signed the treaty on September 15, 1874. IR 64, measuring 56.5 square miles on the left bank of the Assiniboine River about 10 miles southeast of Fort Pelly, was surveyed by William Wagner, Dominion Land Surveyor, in January 1877 for Chief Cote and his followers. It was confirmed by Order in Council PC 1151 dated May 17, 1889.⁶

On September 24, 1875, Chief Ow-tah-pee-ka-kaw (The Key) representing 27 families and Chief Kii-shi-kouse with 36 families met with Commissioners W.J. Christie and M.G. Dickieson at Shoal River (which runs between Swan Lake and Dawson Bay in Lake Winnipegosis) and signed an adhesion to Treaty 4, agreeing to the terms negotiated the previous year. It was noted at the time that both Bands had been settled on opposite sides of the Woody River near Swan Lake for some time and that they had cultivated land and owned cattle and horses.⁷ In 1878, Surveyor William Wagner surveyed two reserves in this area for The Key and Keeseekoose Bands, but two years later, an inspection found both reserves to be subject to annual flooding. Keeseekoose and his followers, and a part of The Key Band were persuaded to relocate to the Fort Pelly district (some 90 miles southwest of their original location) where Gabriel Cote was already established. In 1883, A.W. Ponton surveyed IR 66 for Keeseekoose's Band on the left bank of the Assiniboine River, adjacent to Cote's land, and IR 65 for The Key, on the same river but approximately 16 miles north and west of the other two reserves. Both of these reserves were confirmed by Order in Council PC 1151, on May 17, 1889.⁸

In the early years, the government did little to encourage these Bands to take up agriculture. Small plots were cultivated and some families kept cattle, but, for the most part, they continued to sustain themselves with their hunting, fishing, and gathering traditions. Since "these Indians have been, in the main, good hunters, and in good fur country,"⁹ this situation was not initially regarded as a serious matter. In the late 1880s, however, the game in the area rapidly began to disappear and it became apparent that the First Nations would have to turn to agriculture to improve their living conditions. In

5 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords, Clarke & Co., 1880; facsim. reprint., Toronto: Coles Publishing Company, 1979), 80.

6 Order in Council PC 1151, May 17, 1889, Library and Archives Canada (hereafter LAC), RG 2, series 1, vol. 419.

7 Commissioners Christie and Dickieson to the Minister of the Interior, October 7, 1875, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1875*, xxv.

8 Order in Council PC 1151, May 17, 1889, LAC, RG 2, series 1, vol. 419.

9 [Hayter Reed], Indian Commissioner, Regina, to Superintendent General of Indian Affairs, September 6, 1888, LAC, RG 10, vol. 3805, file 51162, reel C-10140.

FORT PELLY AGENCY – PELLY HAYLANDS CLAIM MEDIATION

1888, an Indian Agent, William E. Jones, was assigned to reside near them to assist them in their transition to agriculture and stock raising.

On September 4, 1889, the Deputy Superintendent General of Indian Affairs asked the Department of the Interior to set apart certain lands as haylands for the Indians in the Fort Pelly area:

[I]n view of the difficulty of raising grain in the Fort Pelly District, it is considered very important that hay lands sufficient for the requirements of the Indians in that neighbourhood should be secured to them.¹⁰

A specific block of land, approximately 19 square miles in area, between the Assiniboine and Whitesand Rivers in townships 30 and 31, range 32, west of the 1st meridian, was identified as the lands to be set aside, and on May 5, 1890, the Department of Interior confirmed that Indian Affairs could take those lands over.¹¹ On May 14, 1890, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, acknowledged that Interior had consented “to this Dept. the right of taking over for use of the Fort Pelly Ind^{ns} for hay purposes the lands therein described.”¹²

In 1891, Surveyor A.W. Ponton was sent to survey these lands, which he then identified as measuring 15 square miles¹³ (although he later described them as containing 20.5 square miles.¹⁴) Surveyor Ponton described the land as “high, dry, scrubby prairie of excellent land,” suitable more for farming or grazing than for hay.¹⁵ Both the local Indian Agent and the Indian Commissioner defended the need for the additional land. In March 1892, Agent Jones wrote in response to a petition circulated by local settlers opposed to the reservation of the haylands that “this land was awarded to the Fort Pelly Indians in 1890, and is of the utmost value and importance to the Department and the Indians.”¹⁶ Commissioner Reed reinforced that opinion:

- 10 Draft letter, [Deputy Superintendent General of Indian Affairs] to A.M. Burgess, Deputy Minister of the Interior, September 4, 1889, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.
- 11 A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, May 5, 1890, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.
- 12 L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to A.M. Burgess, Deputy Minister of the Interior, May 14, 1890, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.
- 13 A.W. Ponton, Regina, to Hayter Reed, Indian Commissioner, January 9, 1892, LAC, RG 10, vol. 3575, file 215, reel C-10101.
- 14 A.W. Ponton, Ottawa, to Secretary [Department of Indian Affairs], December 28, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.
- 15 A.W. Ponton, Regina, to Hayter Reed, Indian Commissioner, January 9, 1892, LAC, RG 10, vol. 3575, file 215, reel C-10101.
- 16 Memorandum for File No. 60759, extract from a letter from Mr Indian Agent Jones, March 22, 1892, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

INDIAN CLAIMS COMMISSION PROCEEDINGS

in my opinion it would not be possible to do without the additional Reserve, if any hope is to be entertained of relieving the Government of the permanent burden of supporting almost entirely the Indians concerned.

Much of the land on the Reserves is worthless, and the cultivation of wheat has proved a failure, and it is to the raising of stock, necessitating the possession of good grazing and hay lands, that we must look to enable the Indians to materially contribute toward their own maintenance.¹⁷

There was considerable correspondence on file about whether the existing reserves (IR 64, 65, and 66) should be expanded to include the haylands or whether reserve land should be surrendered in exchange for the required haylands. Until this matter could be resolved, the Indian Commissioner asked that the lands be granted to the Superintendent General to be held for the Indians of the Fort Pelly Agency.¹⁸ On March 1, 1893, Order in Council PC 574 was passed, ordering that the required lands in townships 30 and 31, range 32, “be withdrawn from sale or entry and vested in the Superintendent General of Indian Affairs to be held as hay lands for the benefit of the Indians of the Fort Pelly District.”¹⁹

In 1893, Inspector T.P. Wadsworth reported on the Pelly Agency and concluded that “stock raising is to be the great industry that will lead those Indians – if any business will – to solve successfully the great issue of self-support, other farming must be to them but secondary – profitable also, but small in comparison to that which stock-raising may become.”²⁰ For the next five or six years, Agent Jones reported on the progressive and successful increase in stock raising by the Fort Pelly Indians.²¹

In 1896, Wilfrid Laurier’s Liberals won a general election, and Clifford Sifton, the former Attorney General of Manitoba, was appointed Minister of the Interior, the department which also had responsibility for Indians. Sifton immediately removed the previous Deputy Minister of the Interior and Deputy Superintendent General of Indian Affairs, and replaced them with his friend and colleague from Brandon, Manitoba, James A. Smart who, as Deputy Minister of the Interior, would also have responsibility for the Indian

17 Hayter Reed, Indian Commissioner, Regina, to the Secretary, Department of the Interior, May 9, 1892, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.

18 Hayter Reed, Commissioner, Ottawa, to A.M. Burgess, Deputy Minister of the Interior, February 11, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

19 Order in Council PC 574, March 1, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055.

20 Inspector T.P. Wadsworth, North-West Territories, to Superintendent General of Indian Affairs, July 1, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1893*, 138.

21 See, especially, W.E. Jones, Indian Agent, Cote, to Secretary, Department of Indian Affairs, Ottawa, December 22, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

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Department. It soon became evident what the Minister and Deputy Minister of the Interior were most interested in:

Of the two departments over which Sifton and Smart presided, Indian Affairs was quite evidently regarded as of lesser importance. Sifton's principal interest lay in the development of the Western prairies.

...

Instituting a widespread reorganization and expansion of the [Interior] Branch, he [Sifton] set about to effectively promote the immigration of farmers to Western Canada.²²

Under Sifton and Smart, Canada began actively to solicit new settlers from the United States and Europe. In 1898–99, the Department of the Interior supported the immigration application of a large group of Doukhobors, a sect of Russian dissenters who were being persecuted in their homeland because they rejected church liturgy and secular governments and preached pacifism. It was important to the Doukhobors that land be reserved in a block to accommodate their communal way of life. The only other stipulation was regarding the usual attributes of agricultural land:

Fred Fisher, an assistant to the Indian Agent at the Cote Reserve, who assisted in the search for land, noted: "They were looking for running water, wood and good soil, and they were not particular where it was as they intended to live within themselves."²³

The Doukhobors eventually chose three blocks of land in the Yorkton–Swan River area. One of the blocks granted to them included the land set aside as the Pelly Haylands. On December 22, 1898, the Assistant Secretary of the Department of the Interior wrote to Indian Affairs, stating that, "by oversight," the lands in township 30, range 32 "were included in a reserve recently made for settlement of the Doukhobors exclusively." He went on to say:

Under the circumstances, I am to inquire whether such reservation is still required by the Indians, as, if not, it will be removed and the land made available for settlement by the Doukhobors.²⁴

22 "The Spoils of Victory: Clifford Sifton Assumes Control of the Departments of Indian Affairs and Interior," chapter 1 in Tyler, Wright & Daniel Ltd., "The Alienation of Indian Reserve Lands during the Administration of Sir Wilfrid Laurier, 1896–1911: The St. Peter's Reserve #1," vol. 1, July 1979, pp. 25, 37.

23 Carl J. Tracie, *Toil and Peaceful Life: Doukhobor Village Settlement in Saskatchewan, 1899–1918* (Regina: Canadian Plains Research Centre, January 10, 1996), 11.

24 Assistant Secretary, Department of the Interior, to Secretary, Department of Indian Affairs, December 22, 1898, IAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

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Surveyor Ponton was adamant that most of the tract was unsuitable as a hay reserve,²⁵ and Agent Jones was equally convinced that the haylands were vital to the continued success of the three Bands' cattle operations.²⁶ The Chief Surveyor for the Department of Indian Affairs, Samuel Bray, took a middle course and recommended that the land along the Assiniboine River, to a depth of one mile, be retained as haylands for the Indians and the remaining tract be relinquished to the Department of the Interior for the Doukhobor settlement.²⁷ However, when Surveyor Hubbell inspected the lands, he disagreed with Mr. Bray. Hubbell wrote:

In my opinion it would be unfair to deprive Indians of these Townships which is their only supply for over 1100 stock; True they cut a small quantity of hay 7 or 8 miles East of Reserve but this with the hay cut on these Townships is not more than sufficient to supply stock; As Chief Cote says the cattle are their only means of livelihood, and they must have hay for same. There is not sufficient hay on Reserve for stock, and they have looked on this portion of land as their own since 1893.²⁸

As a compromise, he recommended that "Township 30, Range 32 be set apart entirely for the use of Indians, and will be satisfactory to them, although by relinquishing Township 31 they lose over four hundred tons of hay."²⁹

On March 6, 1899, the Department of the Interior informed J.D. McLean, Secretary of Indian Affairs of the decision to retain township 30, and instructed him to take a surrender of township 31:

I am now directed to inform you that the Indians may retain the hay lands already reserved in Township 30, but that the portion of this reserve situated in Township 31 is to be surrendered for the Doukhobor colony.

The Deputy Minister wishes you to take the necessary steps at once to carry out the surrender of the latter lands.³⁰

Chief Surveyor Bray, however, was of the opinion that no surrender was required because the lands were set aside as haylands and were not added to

-
- 25 A.W. Ponton, Dominion Land Surveyor, Ottawa, to Secretary, [Department of Indian Affairs], December 28, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.
- 26 W.E. Jones, Indian Agent, Cote, to Secretary, Department of Indian Affairs, Ottawa, December 22, 1898, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.
- 27 S. Bray, Ottawa, to Secretary, Department of Indian Affairs, January 23, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.
- 28 E.W. Hubbell, Dominion Land Surveyor, Yorkton, to E. Deville, Surveyor General, Ottawa, February 15, 1899, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.
- 29 E.W. Hubbell, Dominion Land Surveyor, Yorkton, to E. Deville, Surveyor General, Ottawa, February 15, 1899, LAC, RG 15, vol. 607, file 215631-1, reel T-13855.
- 30 Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, March 6, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

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any reserve; instead, “the lands might be simply relinquished under an O.C. [Order in Council].”³¹ As a result, on May 15, 1899, an Order in Council was passed relinquishing township 31 from the Department of Indian Affairs and vesting it again with the Department of the Interior.³² There was no surrender of this land by any of the Indians in the Pelly District. The remaining hayland, township 30, was directly across the river from the Cote Reserve.

In 1902, Inspector of Indian Agencies, Alexander McGibbon, reported that the Cote Band was willing to surrender part of its reserve in order secure the haylands on the opposite side of the Assiniboine River:

6. They [Cote Band] are anxious that the hay lands on the western side, or end of the Reserve now reserved for them, should be kept, as it is the only place they can depend on for a supply of hay and if they lose this they would have to part with some of the cattle.

& &

8. In regard to the hay land referred to in item No. 6 the Indians are willing to surrender a portion of the Reserve equal to the hay sections.³³

A surrender was allegedly obtained on December 14, 1905, by which Cote surrendered some 20,000 acres on IR 64, of which 6,000 acres were to be exchanged for part of the Pelly haylands.³⁴ Neither The Key nor Keeseekoose First Nations surrendered their interest in township 30.

31 [S. Bray] to Secretary, December 30, 1898, and March 7, 1899, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

32 Order in Council PC 503, May 15, 1899, LAC, RG 2, vol. 778, file 2008C; copy LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

33 Extract from report of Alexander McGibbon, Inspector of Indian Agencies, Pelly Agency, June 25, 1902, LAC, RG 10, vol. 7770, file 27117-1, pt 2, reel C-12055.

34 Surrender, December 14, 1905, LAC, RG 10, vol. 4011, file 260260-1, reel C-10,172. Note that this surrender is the subject of a separate claim by the Cote First Nation, one of a number of claims currently being negotiated by the Cote First Nation as part of the Cote First Nation Pilot Project, a confidential process also being facilitated by the ICC.

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PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

In the late 1990s, the Specific Claims Branch (SCB) was experimenting with different methods of processing land claims so that they could be resolved in a more expeditious manner. In a number of cases, including the Pelly Haylands claim, the Indian Claims Commission was asked to join the process at an early stage. In this instance, at a meeting chaired by the Commission held in Ottawa on October 7, 1997, the three First Nations jointly presented their Pelly Haylands specific claim to the Director General of the Specific Claims Branch, and asked the Indian Claims Commission to monitor the progress of the SCB review of the claim. Specific Claims analysts expedited its assessment of the claim and on December 23, 1997, sent it to the Department of Justice's Specific Claims Legal Services unit for advice as to whether this claim gave rise to an outstanding lawful obligation under Specific Claims Policy. No meetings or conference calls were held: the primary role of the ICC was to make periodic phone calls to ensure that the legal opinion was completed with as little delay as possible and to report to the First Nations as requested.

The claim was accepted for negotiation by the Minister of Indian Affairs in July 2000, on the basis that the Pelly Haylands "was set aside as a reserve, within the meaning of the *Indian Act*, by an 1893 Order in Council" and that the lands had been disposed without a surrender.³⁵ The three First Nations asked that the ICC remain involved in the negotiation process as a neutral facilitator, and Canada agreed. Negotiations began in November 2000.

For the most part, facilitation focussed on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. In its mediation and

35 Order in Council PC 574, March 1, 1893, LAC, RG 10, vol. 7770, file 27117-1, reel C-12055, and Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief James Severight, Cote First Nation, June 28, 2000 (ICC 2107-37-1M, vol. 1).

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dispute resolution role, the Commission enabled the three First Nations to reach agreement on an issue they were unable to decide among themselves. The ICC also assisted the parties in arranging for subsequent meetings and coordinating any research undertaken by the parties to support negotiations.

Although the Commission is not at liberty based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, it can be stated that the three First Nations and representatives of the DIAND worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at mutually acceptable resolution of the Pelly Haylands claim.

Elements of the negotiation included agreement by the parties on a negotiation protocol; the nature of the Commission’s role in the negotiations; agreement on haylands acreage; identification of damages and compensation criteria; land appraisals and loss-of-use-studies; compensation to bring forward historical losses; consideration of reserve creation and acquisition costs; negotiation and ratification expenses; and, finally, settlement issues and agreements, division of the settlement money among the three First Nations, communications and ratification plans and processes.

In order to properly assess the First Nations’ losses arising from the illegal taking of the claim lands, the negotiating teams decided that Canada and the First Nations would jointly commission two land appraisals, as well as loss-of-use studies relating to agriculture, minerals, and forestry. The First Nations also decided that they would unilaterally contract for loss-of-use studies relating to traditional activities, social impact, special economic advantage, and water. The Commission was asked to coordinate these studies, monitor their progress, schedule meetings, arrange for a series of consultant interviews with community Elders, and facilitate communications among the parties –in other words, take on extensive and time-consuming duties and responsibilities in undertaking and completing these studies that the parties would otherwise have had to perform over and above the challenge of negotiating a claim of this size and importance.

All of these studies were completed by the end of 2003 and there followed several months of offers and counter-offers, culminating in an agreement in principle in October 2004 for a total compensation package of \$73.5 million plus negotiation and ratification costs. Canada did not make any recommendations to the First Nations as to how they should divide the compensation, leaving the First Nations to come to an agreement among themselves. The three First Nations were able to agree to an equal split among

INDIAN CLAIMS COMMISSION PROCEEDINGS

them with respect to the land component and the debt to be repaid; however, for several months, the three First Nations met to try to agree on an equitable division of the settlement moneys, without success. They wanted some combination of a per capita distribution to band members, with an equal division of part of the remainder and a per capita division of the rest, but could not agree on certain elements of these choices. In April 2005, they asked the Indian Claims Commission to mediate this matter, and meetings were subsequently held on April 12 and April 13, when the matter was successfully resolved. By agreement, Cote First Nation would receive \$28 million; The Key, \$21.8 million; and Keeseekoose \$23.7 million.

While Canada went through its own approval processes, legal counsel for each of the three First Nations worked on the documents required for the agreement. Settlement agreements were initialled in October 2005, and ratification votes in each of the three First Nations were scheduled. In February 2006, Cote First Nation ratified the agreement in a first vote. The voter turnout at Keeseekoose was too low in the first vote to establish a quorum, but the agreement was ratified at a second vote on April 8, 2006. Again, due to low voter turnout in the first vote, The Key also required two votes before the agreement was ratified on April 29, 2006; in June 2006, however, some members of The Key Band sought a judicial review of the ratification vote. The courts have not yet heard this case, and, until all three First Nations have completed the ratification process, the settlement of this claim will not be implemented.

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PART IV

CONCLUSION

ICC ROLE IN MONITORING THE CLAIM REVIEW

First Nations are often frustrated because they hear nothing about the progress of their claims in the SCB process until they receive an acceptance or rejection letter. The ICC was pleased to support the parties in ensuring that the review of the Pelly Haylands claim was completed as quickly as possible. Regular phone calls to monitor progress helped to ensure that the claim did not get lost in the process.

ICC FACILITATION

The Pelly Haylands negotiation is a case where meeting facilitation by experienced Commission staff was of fundamental importance. The parties to the negotiation of this claim involved representatives of each of the three First Nations, sometimes with their own legal counsel and technical experts, as well as members of the federal negotiating team. The usual attendance at meetings was between 20 and 25 people, and it sometimes swelled to 40 or more when interested community members attended. Through experience and skilful time management, ICC facilitators were able to chair scheduled meetings, ensure all parties had the required information, and enable all who wanted to contribute to meetings, and still accomplish everything set out in the agenda.

ICC STUDY COORDINATION

The Pelly Haylands claim negotiations were completed in less than six years, and most of that time was taken up with the very time-consuming land appraisals, loss-of-use studies, and other studies necessary to establish the financial losses on which to base compensation. The ICC's role in this case was substantial. Jointly, the negotiating parties required two land appraisals and three loss-of-use studies, relating to agriculture, minerals, and forestry. In addition to these five major studies, the ICC coordinated a number of additional studies for the First Nations including traditional activities, social

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impact, special economic advantage, and water. The ICC's work in providing study coordination services and support ensured that the contractors had what they needed to complete their work in a timely manner and that the negotiating parties were kept informed about the progress of the reports and any problems that needed to be addressed along the way.

ICC MEDIATION

Commission staff who chair negotiation meetings over a long period of time become knowledgeable about the issues involved, and a mutual respect and trust develops between them and the parties at the table. The development of this relationship allows the Commission chairperson to facilitate the resolution of other disputes and, in this case, enabled the three First Nations to reach resolution on the distribution of the settlement moneys among them.

FOR THE INDIAN CLAIMS COMMISSION



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

Date this 18th day of March, 2008.

INDIAN CLAIMS COMMISSION

LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT PHASE II INQUIRY

PANEL

Chief Commissioner Renée Dupuis, C.M., *Ad.E.* (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan C. Holman

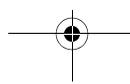
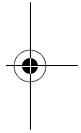
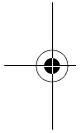
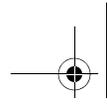
COUNSEL

For the Lucky Man Cree Nation
David Knoll

For the Government of Canada
Vivian Russell

To the Indian Claims Commission
John B. Edmond

FEBRUARY 2008



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LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

SUMMARY

LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT PHASE II INQUIRY Saskatchewan

The report may be cited as Indian Claims Commission, *Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry* (Ottawa, February 2008), reported (2009) 23 ICCP 301.

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

Panel: Chief Commissioner R. Dupuis (Chair), Commissioner J. Dickson-Gilmore, Commissioner A.C. Holman

Treaties – Treaty 6 (1876); **Treaty Land Entitlement** – Date of First Survey – Policy – Settlement Agreement; **Saskatchewan** – North-West Rebellion

THE SPECIFIC CLAIM

This is the second request for inquiry to be brought by the Lucky Man Cree Nation (LMCN) to the Indian Claims Commission (ICC) with regard to its treaty land entitlement (TLE) claim under Treaty 6. The first request, brought by the First Nation in December 1995, asked that the ICC conduct an inquiry into whether it was able to bring a claim in light of an 1989 TLE Settlement Agreement. In March 1997, the ICC concluded that the date of first survey (DOFS) for the First Nation was 1887 and recommended further paylist analysis to determine whether there was a DOFS shortfall.

Canada's analysis led it to reject the First Nation's claim that it was owed further treaty land, and in 2003, the Lucky Man Cree Nation requested that the ICC hold a further inquiry into whether it had a TLE shortfall. The ICC accepted this request and initiated Phase II of the Lucky Man Cree Nation: TLE Inquiry.

The parties prepared written submissions; oral legal submissions took place on August 18, 2005. During oral argument, both parties made reference to other claims and to Canada's TLE analysis for other First Nations. The panel released three interim rulings on the objections by counsel for both parties and asked the parties

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for further written and oral evidentiary submissions. An oral evidentiary session was held on October 25, 2006.

BACKGROUND

The parties reached a TLE Settlement Agreement in 1989 that resulted in the LMCN obtaining a reserve of 7,680 acres, or sufficient land for 60 people, based on Treaty 6. The Settlement Agreement provided for the First Nation to receive compensation in lieu of land if at some point it could prove a treaty land shortfall. On the basis of the payroll for 1887, which is the date of first survey, the First Nation claims it is entitled to land for at least two additional people. Canada takes the position that the DOFS payroll contains many names of band members who cannot be counted because, although their names appear on a payroll, they were not present and not paid. The Lucky Man Cree Nation was one of a number of bands designated as “rebel” or “disloyal” as a result of the North-West Rebellion, and many members, including Lucky Man, fled to Montana, never to return to the Treaty 6 area.

ISSUES

On the basis of an 1887 “date of first survey,” what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes? With what quantum of land is Canada to be credited for treaty land entitlement purposes? Having regard to the answers to both questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation with regard to land quantum?

FINDINGS

On the basis of an 1887 DOFS, a preliminary payroll analysis shows that the LMCN had at least 62 members with entitlement to treaty land. The panel rejects Canada’s position that those band members who had fled to the United States as a result of the North-West Rebellion cannot be counted for TLE purposes. There is nothing in Canada’s published guidelines that would exclude these members from being counted.

Canada is to be credited with providing 7,680 acres in treaty land through the Treaty Land Entitlement Settlement Agreement of 1989.

The First Nation has established that the Government of Canada owed an outstanding lawful obligation to provide land to the First Nation under the terms of Treaty 6.

RECOMMENDATION

That the Lucky Man Cree Nation’s treaty land entitlement claim be accepted for negotiation under Canada’s Specific Claims Policy.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

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

Lac La Ronge Indian Band v. Canada, 2001 SKCA 109, (2001) sub nom. *Venne; R. v. Marshall*, [1999] 3 SCR 533; *Shepherd v. Canada (Royal Canadian Mounted Police)*, [2004] FCJ No. 1188 (FCA); *Durant v. Canada (Minister of Fisheries and Oceans)*, [2002] FCJ No. 441.

ICC Reports Referred To

Lucky Man Cree Nation: Treaty Land Entitlement Inquiry (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

Treaties and Statutes Referred To

Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River, with Adhesions*, IAND Publications No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964).

Other Sources Referred To

Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983); DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines, October 1998.

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INDIAN CLAIMS COMMISSION PROCEEDINGS

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

The Lucky Man Band (today referred to as the Lucky Man Cree Nation or LMCN) entered Treaty 6 on July 2, 1879. Pursuant to the terms of the treaty, the Band was entitled to a reserve the equivalent of one square mile (640 acres) for each family of five, or 128 acres per person. Lucky Man was among a group of Chiefs who were reluctant to settle down. Before the reserve could be surveyed, the North-West Rebellion broke out near the Battleford area. Some of Lucky Man's followers were involved, and the Band was one of a number of bands designated as "rebel" by the government in the summer of 1885. Lucky Man and many of his followers fled to the United States.

In 1887, Canada surveyed Indian Reserve (IR) 116 for the Lucky Man and Little Pine Bands. The reserve was surveyed for 125 people. In a later treaty land entitlement (TLE) settlement with the Little Pine Band, the entire acreage was credited to Little Pine. (The historical background to this claim is set out in Appendix A to this report.) In 1989, the Lucky Man Cree Nation negotiated a TLE settlement with Canada, receiving 7,680 acres of land, sufficient for 60 people (see Appendix B to this report).

In 1995, the Lucky Man Cree Nation submitted a claim to Canada to be compensated for a TLE shortfall. Canada rejected the claim on July 7, 1995, on the basis of the negotiated Settlement Agreement. In December 1995, the LMCN requested that the ICC hold an inquiry into the claim. In 1997, the Commission issued an inquiry report, finding that 1887 should be used as the date of first survey (DOFS), and recommending that the parties conduct additional payroll analysis to establish the First Nation's TLE population. On the basis of additional research and analysis, Canada concluded there was no shortfall and rejected the claim again. In November 2003, the Lucky Man Cree Nation requested that the ICC hold a further inquiry into the DOFS population.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.”¹ This Policy, outlined in the 1982 booklet of the Department of Indian Affairs and Northern Development (DIAND) 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:

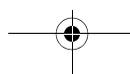
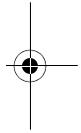
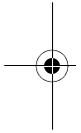
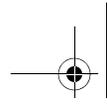
- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can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

The Commission received both oral and written submissions with regard to how TLE policy has evolved and how Canada has validated claims. During oral argument, both parties introduced arguments that resulted in three interim

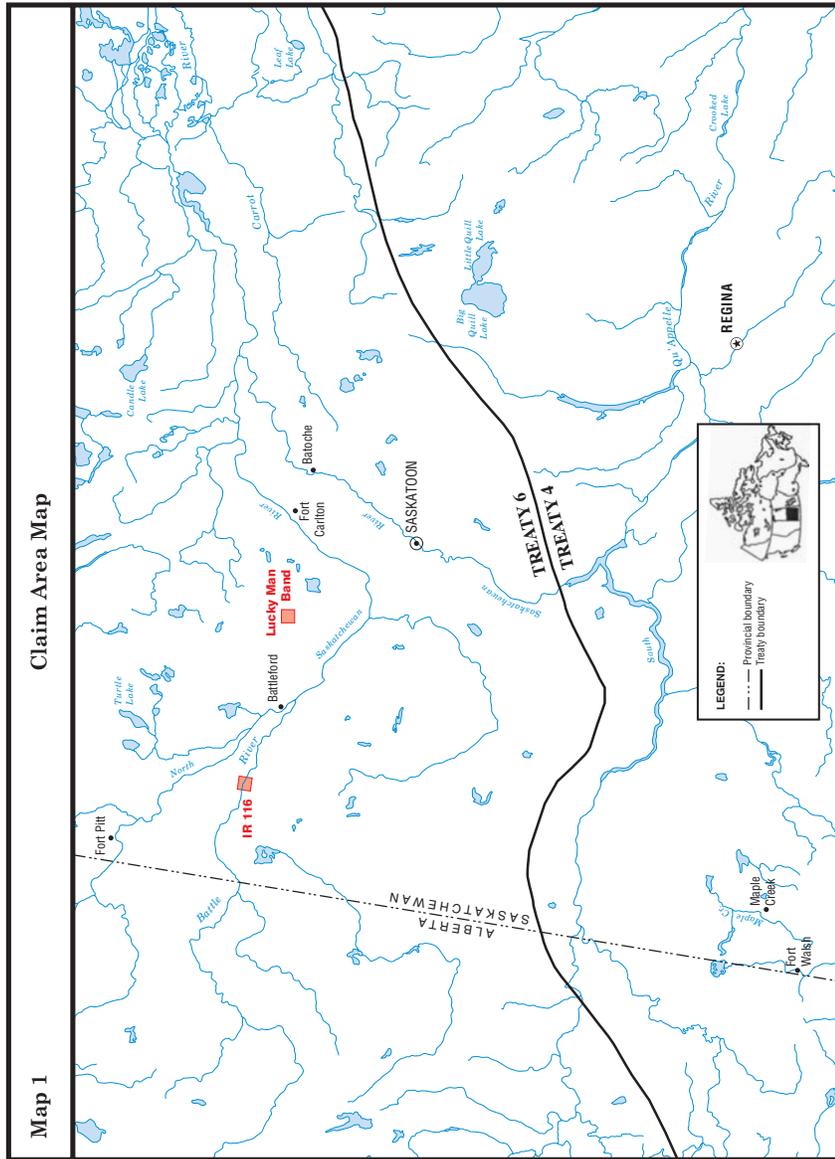
1 Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.
 2 Department of Indian Affairs and Northern Development (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 179–80.
 4 *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

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rulings and a further oral evidentiary session. The panel issued its Interim Ruling on September 19, 2005, a first amendment to the Interim Ruling on December 15, 2005, and a second amendment to the Interim Ruling on June 22, 2006 (see Appendices C, D, and E). The oral evidentiary hearing, with evidence presented on behalf of both the Lucky Man Cree Nation and Canada was held on October 25, 2006. The panel has now completed its inquiry into phase II of the Lucky Man Cree Nation's Treaty Land Entitlement Claim. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is detailed in Appendix F.



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PART II

THE FACTS

In 1876, Treaty Commissioners Alexander Morris, W.J. Christie, and James McKay met with Chiefs of the Cree and Assiniboine at Fort Carleton and Fort Pitt. These negotiations resulted in the signing of Treaty 6. Under the treaty, the Bands ceded their rights to the land included within the boundaries of Treaty 6; in exchange, the Commissioners promised them reserve lands, annuities, farm implements, and instruction to help them move from a nomadic life of hunting buffalo to a more settled agricultural existence. To set aside reserves, the Department of Indian Affairs was to send out a surveyor who would mark out a band's reserve, but only after consulting with the Chiefs about where they wanted it to be.

Lucky Man was one of Big Bear's headmen. Big Bear was an influential Cree Chief, well known as a protector of Aboriginal rights and autonomy. Big Bear arrived at Fort Pitt on the last day of negotiations for Treaty 6, not to sign but to tell Canada's negotiators that there were other bands out on the Prairies and that he could not sign on their behalf without their being present. He assured the Treaty Commissioners that he would sign the next year, but he did not; instead, Big Bear waited to see if the government would keep the promises it had made to the Chiefs. While he waited, he sought changes to the treaty that he thought would benefit his people. Most notably, he tried to have the Cree reserves located together, so that the Bands would gain strength from each other.

One of the most significant changes of the era was the disappearance of the buffalo. Big Bear and other Cree Chiefs attempted to follow the quickly diminishing herds and spent much of their time in the Cypress Hills in what is now southwestern Saskatchewan. Many of their followers were ill and starving.

Some members questioned Big Bear's opposition to signing the treaty before better terms could be negotiated, believing that the benefits of treaty would alleviate some of the hardships they were enduring. One was Lucky

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Man, now a Chief in his own right, head of 20 lodges that had broken away from Big Bear. Both Lucky Man and Little Pine signed an adhesion to Treaty 6 on July 2, 1879. However, Lucky Man remained closely aligned with Big Bear and travelled with him for several more years.

During the next five years, government officials attempted to persuade Lucky Man to settle down and select reserve lands, but it was difficult to induce the nomadic, buffalo-hunting Cree to do so. Lucky Man told officials he wished to settle in the Battleford area of Treaty 6, but he continued to chase the few remaining buffalo south of there in the Treaty 4 area. During this time his Band's population reached 872 people, as recorded on the annuity payroll.

By 1882, the Plains Indians were starving, and in December of that year, Big Bear signed an adhesion to Treaty 6. By late 1883, Lucky Man and Little Pine were finally camped near Battleford, near to where the government was hoping they would settle.

Tension between the Cree and the government was exacerbated by Big Bear's reluctance to take treaty and Lucky Man's resistance to selecting a reserve and settling down. The Department of Indian Affairs believed that Big Bear was trying to establish the bands that had not yet settled on adjacent reserves, and viewed this apparent consolidation of bands as a threat.

Late in 1883, Lucky Man and Little Pine had stopped over at Poundmaker's reserve, awaiting a council with Big Bear. At the same time as the Cree appeared to be gathering, the Department of Indian Affairs was trying to separate the Cree bands who had yet to select reserves and had decided to withhold rations from band members who would not settle down. Because of that, several younger members of the Lucky Man and Little Pine Bands broke ranks with their Chiefs and did start farming. They were joined shortly after by Chief Little Pine himself.

By the time Big Bear arrived at Poundmaker's reserve in the spring of 1884, tension was running high. Two of Lucky Man's sons who were recovering from illness sought rations from Inspector John Craig, who decided that one of them, Kaweechatwaymat, had healed enough to be able to work. When Craig refused him rations and treated him roughly, Kaweechatwaymat retaliated and struck the Inspector with an ax handle. It was Lucky Man himself who turned his son over to the police. Kaweechatwaymat was tried and imprisoned for a brief period.

Shortly after, Big Bear apologized for what had happened, and requested a reserve between the camps of Lucky Man and Little Pine, near to where Poundmaker had established his reserve in 1879. The government was strongly against this. Little Pine and most of his Band had settled down. The

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department decided to provide rations to Little Pine, but to withhold them from Lucky Man, Poundmaker, and Big Bear.

By the end of July 1884, Lucky Man and Big Bear went to Duck Lake to attend a council of Battleford and Carlton area Chiefs, organized to address their common grievances. In August, the Chiefs met with Sub-Agent J.A. Macrae and presented a list of grievances for transmittal to Ottawa. Big Bear told government officials that what the Chiefs wanted was to be given what they had asked for and that all treaty promises should be fulfilled.

After the council, Big Bear went to Prince Albert and met with Louis Riel to gain support for the Chiefs' grievances. Shortly after meeting with Riel, Big Bear returned to Fort Pitt.

During this time, Lucky Man remained with Big Bear and was paid his annuities with him. The departmental official making the payments recorded Lucky Man as an ex-Chief and paid him as a member of Big Bear's band. There is no indication that Lucky Man had relinquished his chieftainship, but, because he had not yet selected a reserve, the department recommended that he be deposed from what it called a temporary chieftainship and be regarded only as an ordinary Indian. It appears that by this time the government had identified Lucky Man and Big Bear as a source of trouble.

By the end of 1884, the Cree were at a breaking point; the buffalo were gone, the people were starving, and the government was withholding rations because they would not move onto reserves. Again, some of the younger Indians questioned Big Bear's delay in selecting a reserve.

At the end of January 1885, Assistant Indian Commissioner Hayter Reed reported to the Superintendent General of Indian Affairs about the grievances the Cree Chiefs had presented in August 1884. Reed's lengthy report dismissed most of the grievances and placed the blame primarily on Big Bear and the growing influence of the Métis. All the while promising he would settle down, Big Bear continued to press for a meeting with Crown officials, who by this time had decided the troublesome Cree Chief would either settle down or have his Band broken up.

Events overtook the Cree. In March 1885, Louis Riel declared his provisional government and on March 18, the North-West Rebellion began when Riel took prisoners and seized stores at Batoche. When news spread to the Frog Lake settlement, a group of Indians killed several white settlers, including the Indian Sub-Agent, in an event that became known as the Frog Lake Massacre. It appears that Big Bear tried to stop the violence, but by then he was losing his influence to a war Chief, Wandering Spirit.

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It does not appear from the historical documents that Lucky Man participated in the killings at Frog Lake, but he was there when they took place. Retaliation followed shortly, and the Cree were defeated by the much healthier, better-armed militia. Following the short-lived rebellion, Lucky Man fled to Montana.

In the summer of 1885, in the wake of the rebellion, Commissioner Edgar Dewdney wrote to the Superintendent General of Indian Affairs and identified those bands that were considered to be disloyal. Among the bands were the Lucky Man, Little Pine, and Big Bear Bands. The 1885 annuity paylists indicate that 82 Lucky Man band members who had remained at the area set aside for Little Pine's reserve were considered disloyal and were not paid their annuities that year.

The government instituted further restrictions. Annuity payments were to be withheld from disloyal bands; if investigation proved that certain Indians were responsible for damage to property, their annuities were to be withheld until compensation could be made. The government decided to disarm Indians and instituted the pass system to prevent rebellious band members from leaving their reserves. It confiscated horses and sold them to buy cattle for bands so that they would be more likely to settle down into an agricultural existence. Big Bear's Band, now without a leader, was disbanded and scattered.

The department noted that Lucky Man was no longer a problem, since he had fled and his band members had distributed themselves among other Battleford area bands.

Although many members of Little Pine's Band and some of Lucky Man's Band had been settled for several years, it was not until 1887 that the department sent a surveyor to the area to lay out and document the boundaries of their reserve. This reserve, recorded as IR 116, comprised 25 square miles, which by the terms of Treaty 6 was sufficient land for a population of 125 people. The reserve was confirmed by order in council in 1889. Both the survey plan and the description of IR 116 indicate the reserve was set aside for the Bands of Lucky Man and Little Pine. Neither Chief was present at the time, however; Little Pine had died in 1885 and Lucky Man had fled south and was living in Montana. The 1887 annuity payroll shows the population of the Lucky Man Band, paid at Little Pine's reserve, to be 62. Notations on the payroll indicate that many of the members listed there were living somewhere else.

In 1890, the names of band members who had fled to the United States after the North-West Rebellion were struck from the treaty annuity paylists.

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In 1896, after 11 years in the United States, Lucky Man and Little Bear, Big Bear's son, were returned with their followers to Canada by American authorities. When they crossed the border, Lucky Man and Little Bear were arrested for participating in the Frog Lake massacre, but were released in July 1896 when officials decided that there was not enough evidence to support the prosecution of charges. At the time, Lucky Man was sick and old. After his release, he and Little Bear set out for the Hobbema Agency in Alberta to rejoin some of their companions. They settled on the vacant Bobtail Reserve 139. Two years later, some returned to the United States; those who remained in Alberta came to be known as the Montana Band.

There is no evidence Lucky Man ever returned to IR 116 near Battleford. It is believed he returned to Montana and died around 1899. His band members had mostly scattered. The few on IR 116 were a tiny minority of the population. In 1918, five more families believed to be in the United States were struck from the list, leaving only two families for a recorded total of seven people. The Band did not have a Chief of its own.

In 1961, at the request of Lucky Man band members, a letter was sent to Ottawa requesting that the department recognize the Band's entitlement to a reserve. Thirteen years later, in 1974, members of the Band assembled and elected its first Chief since Lucky Man. As one of its first orders of business, the members at the meeting decided to set about getting their own reserve.

In 1980, Canada and the Lucky Man Band agreed to settle the Band's claim to a separate reserve on the basis of its 1976 population of 60 people. Based on this understanding, the Band selected 7,680 acres of land at Meeting Lake, and Canada and the Lucky Man Band signed a Treaty Land Entitlement Settlement Agreement on November 23, 1989. Canada set aside the 7,680 acres as a reserve for the First Nation in exchange for the Band's providing an absolute surrender of any interest it had in IR 116. Band members approved the Settlement Agreement and the surrender in a referendum.

One provision of the agreement enabled the Band to bring a claim for compensation in lieu of land if, at some time, it was determined that the Band had a greater treaty land entitlement than the amount of land that had been set aside under the agreement.

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PART III

ISSUES

The Indian Claims Commission is inquiring into the following three issues:

- 1 On the basis of an 1887 “date of first survey,” what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes?
- 2 With what quantum of land is Canada to be credited for treaty land entitlement purposes?
- 3 Having regard to the answers to these questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation, with respect to land quantum?

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PART IV

ANALYSIS

ISSUE 1: TREATY LAND ENTITLEMENT POPULATION

- 1 On the basis of an 1887 “date of first survey,” what was the population of the Lucky Man Cree Nation for treaty land entitlement purposes?

Lucky Man Cree Nation TLE Settlement

In 1976, Canada accepted the claims of four First Nations in Saskatchewan as having treaty land shortfalls according to the terms of the treaties they signed during the 1870s. Among the four were both the Lucky Man Cree Nation and the Little Pine First Nation, signatories to Treaty 6 in 1879, as well as the Nekaneet (Treaty 4) and Thunderchild (Treaty 6) First Nations. Both the Lucky Man and the Little Pine claims were negotiated and settled.

Part of the settlement for both First Nations was the apportionment of IR 116, which had been surveyed in 1887 and set aside for both the Lucky Man and Little Pine Bands by order in council in 1889. IR 116 had been surveyed as 25 square miles, an area sufficient for 125 people. A reading of the settlement agreements shows that the entire reserve was allocated to Little Pine as reserve land that had been set aside at the time of survey. Lucky Man’s corresponding agreement states that it gives an “absolute surrender to Canada ... of whatever right, title, interest and benefits ... the Band had, now have or may hereafter have in Indian Reserve No. 116.”⁵ One hundred years after the order in council creating the reserve, Canada, Saskatchewan, and the two First Nations agreed that all the land surveyed in 1887 belonged to Little Pine, and Lucky Man had, in effect, received nothing.

In 1989, the Lucky Man Cree Nation negotiated a settlement of 7,680 acres of land, or enough for a population of 60. That figure was agreed by the

⁵ The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 2 (ICC Exhibit 10b, p. 2).

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parties to be the population of the Lucky Man Band at the time of the negotiated settlement. It was not based upon a determination of Lucky Man's historical entitlement, which would have been calculated from the Band's population at the date of first survey. Also included within the settlement were clauses that allowed the First Nation to seek compensation for having been denied the use of reserve land for a century⁶ and to seek compensation if, at a later time, it was determined that the settlement had not fulfilled the Band's treaty land entitlement.⁷ After signing the agreement, Lucky Man took the position that, based on its historical population, Canada had not provided it enough land. The First Nation brought forward another claim.

Canada rejected the First Nation's claim in July 1995. In December 1995, the Lucky Man Cree Nation requested that the Indian Claims Commission conduct an inquiry into the rejected claim. In 1996, the Commission accepted the claim for inquiry. The only stated issue in the inquiry was to determine the date of first survey, which the parties had agreed was pivotal to determining the historical treaty land entitlement population, and preliminary to determining whether a TLE shortfall remained after the Settlement Agreement. In 1997, the panel in that inquiry concluded that, for it to make that determination, there were subsidiary issues that needed to be considered. Among these issues was whether the 1989 Settlement Agreement precluded the First Nation from bringing a subsequent claim, and second, whether the principles enunciated in what was then the recently concluded *Kahkewistahaw* report with regard to Treaty 4 could also be applied to Treaty 6.

The panel found that the Settlement Agreement did not preclude the First Nation from bringing forward a claim, and interpreted the agreement to mean that "in exchange for Lucky Man giving up all rights to IR 116, Canada provided the First Nation with the 1989 reserve containing 7680 acres, or sufficient land for 60 people – the First Nation's population in 1980."⁸ The panel concluded that the agreement did not preclude the First Nation from seeking compensation in lieu of treaty land should it be determined that the First Nation's settlement should be based on a population of more than 60 people.⁹

6 The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 4 (ICC Exhibit 10b p. 4).

7 The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, p. 4 (ICC Exhibit 10b, p. 4).

8 Indian Claims Commission (ICC), *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109 at 150.

9 ICC, *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

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The panel in what became the first phase of the Lucky Man Cree Nation’s TLE inquiry concluded that the date of first survey (DOFS) was 1887, and recommended further payroll analysis to determine whether there was a DOFS shortfall.

After the release of the Commission’s report, Canada conducted additional research on the Lucky Man Band’s population in 1887 and reported to the First Nation that the population at date of first survey was fewer than 60. The First Nation disagreed, but based on its research, Canada rejected the claim again. The government’s position was that the negotiated TLE settlement of 7,680 acres, or land for 60 people, was sufficient and that the Lucky Man Cree Nation did not have a valid claim for additional land. The First Nation requested that the Commission conduct a further inquiry into the DOFS population. In December 2003, the ICC accepted the First Nation’s request, creating a second phase of this TLE inquiry.

The panel in the present phase of the inquiry has accepted the first panel’s determination of the date of first survey as 1887, and the date has been accepted by the parties. All argument from the parties about the historical population of the Lucky Man Cree Nation for the purpose of determining whether a TLE shortfall remains centres on the application of the guidelines to the population in 1887.

Development of TLE Policy

The guidelines and the working assumptions Canada uses in interpreting its policy are at the heart of the disagreement between Canada and the Lucky Man Cree Nation. During the course of this inquiry, the Commission decided to hold an evidentiary session to hear from both parties how TLE policy has evolved and been applied.

The Relationship between Treaty and TLE Policy

An analysis of Canada’s treaty land entitlement policy begins with the treaty itself, in the case of Treaty 6, the “reserve clause”:

And her Majesty The Queen hereby agrees and undertakes to lay aside reserves for farming land, due respect being had to lands at present cultivated by the said Indians and other reserves for the benefit of the said Indians, to be administered and dealt with for them by her Majesty’s Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after

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consulting with the Indians thereof as to the locality which may be found to be most suitable for them.¹⁰

Although the treaty provision is clear about how much land is to be set aside for each family – one square mile, or 640 acres for a family of five, which works out to 128 acres per person – it is not clear about which persons are to be counted. The treaty speaks to setting aside reserves for bands, but offers no guidance about how to decide whether an individual Indian is a band member, entitled under the treaty to be counted for the purpose of setting aside reserve land. As well, there is no guidance about how to count Indians who may leave one band and join another, who may marry into a band or who may seem not to belong to a band at all, even though they consider themselves to have adhered to the treaty.¹¹ Treaty land entitlement policy grew out of a need to set guidelines, both for the First Nations, who believed that their reserve lands did not meet the requirements of the treaty, and for Canada, which bears the legal duty of fulfilling the Crown's obligations under treaty.

Canada's TLE guidelines have been formulated and reformulated several times and continue to be published in draft form. The most recent set of draft guidelines was issued in 1998 and has yet to be published in final form.

The Lucky Man Cree Nation argues that, to be fair, Canada must treat it in the same way it has treated other First Nations and must validate its claim on the same basis, using the same criteria as it has for others, particularly others in similar or the same circumstances. Canada argues that there are unique factors in this claim that inevitably lead to a unique answer.

Since it first began to conduct inquiries into rejected TLE claims, the Indian Claims Commission has had little guidance from the courts on the principles that should be applied to TLE policy; however, there is the Saskatchewan Court of Appeal's decision in *Lac La Ronge Indian Band v. Canada*.¹² In a unanimous decision, Justice Vancise summarized the principles of treaty interpretation as they had been set out by Chief Justice McLachlin of the Supreme Court in *R. v. Marshall*.¹³ Among those that are relevant to the interpretation of the reserve clause are these:

- 10 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River, with Adhesions*, IAND Publications No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer, 1964), 3.
- 11 The treaty was also silent about exactly when Indians were to be counted, but the courts have settled that question by stating that a band's TLE entitlement crystallized at the date of first survey, when the dominion surveyor arrived to set aside land. In the case of the Lucky Man Cree Nation, the date of first survey (DOFS) is 1887.
- 12 *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, (2001), sub nom. *Venne*.
- 13 *R. v. Marshall*, [1999] 3 SCR 533.

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1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation:
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories:
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one that best reconciles the interests of both parties at the time the treaty was signed:
4. In searching for the common intention of the parties, the honour and integrity of the Crown is presumed:¹⁴

These are principles that the Indian Claims Commission endeavours to uphold and which we will keep foremost in our minds as we consider the issues in this inquiry.

Early TLE Policy

In the earliest years, the usual practice followed by departmental officials was to calculate entitlement by counting the number of people listed on the treaty payroll for the year in which Crown officials surveyed the reserve. If the land set aside was less than the band's entitlement under the treaty, based on the population recorded on the payroll at the DOFS, the band had a shortfall and therefore a validated claim. One of the early difficulties was whether the method used for validating a claim, that of the historical population, would also be used to settle the claim. In 1976, Canada continued to use the DOFS population as the method for determining whether a band had a valid claim, but agreed with the government of Saskatchewan and First Nations in the province that, for the purpose of settling an outstanding shortfall, it would use what became known as the Saskatchewan formula.

The Saskatchewan formula used band populations as of December 31, 1976, for the purpose of settling a claim. Problems quickly arose with this method of calculating settlement and it was soon discontinued. However, one of the claims negotiated on the basis of a current, rather than a historical, population was that of the Lucky Man Cree Nation, and it resulted in the First Nation being credited with land for a population of 60 people, that is, for its

14 *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109 at para. 39, citing *R. v. Marshall*, [1999] 3 SCR 456 at 511-12.

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population as it existed in 1976. When the Saskatchewan formula was discontinued, with the cooperation of the province of Saskatchewan, Canada decided it would use the population at date of first survey for settling claims as well as deciding whether a First Nation had a valid claim.

The separation between validation and settlement remains. The first stage of a TLE claim is determination of whether a valid claim exists. Only First Nations that have validated claims enter into settlement negotiations. In 1977, Canada validated claims for four Saskatchewan First Nations – Lucky Man,¹⁵ Little Pine, Thunderchild, and Nekaneet. The population used to determine validation was that shown as “Total Paid” on the annuity payroll for the year of survey. Some people were specifically excluded from the accounting, such as band members who were absent at the time of treaty payment, new members who transferred into the band from bands that did not have reserve land set aside, new members who subsequently adhered to treaty, and band members who left the band to join another band.

In 1983, Canada published a set of guidelines to be used by the Office of Native Claims (ONC). The 1983 guidelines accounted for a number of categories of people who had previously not been considered for the purpose of calculating TLE, such as absentees, double counts, landless transferees, and late adherents. Absentees were Indians who were considered to be band members, but who were away at the time of treaty payments; double counts were people who appeared on more than one annuity payroll at date of first survey for different bands; landless transferees were people who transferred in from bands that did not have reserve land. The fourth category of people, late adherents, were those Indians who adhered to treaty after the reserve had been surveyed.

What is of particular relevance to this claim is found in the category of “persons not included.” These people were defined as “[a]bsentees, new adherents and transfers from landless bands, who do not retain a reasonable continuity of membership to the band, i.e.: they are away most of the time.”¹⁶ The guidelines went on to state that “these are dealt with on a case by case basis and there may be circumstances which warrant the inclusion of a band member even though he may be absent for an extended period of time.”¹⁷

The next iteration of TLE policy took place after the Department of Indian Affairs conducted a policy review in the late 1980s. In 1990, the federal

15 This led to the Settlement Agreement dated 1989.

16 DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 3 (ICC Exhibit 9c, p. 3).

17 DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 3 (ICC Exhibit 9c, p. 3).

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government created the Office of the Treaty Commissioner (OTC) in Saskatchewan to work with the Federation of Saskatchewan Indian Nations, to facilitate the resolution of outstanding treaty issues, including claims for treaty land entitlement.¹⁸ In 1991, through the Office of the Treaty Commissioner, Canada restated its guidelines for validation of a claim.¹⁹ It rejected claims where validation occurred only because of the addition of late adherents or landless transfers; instead, claims were validated on the basis of two criteria: first, whether there was a shortfall at DOFS based on the treaty annuity paylists, and, second, whether there were people considered to be band members who were absent at the time of the payments. Landless transfers and late adherents were factored in only during negotiations to settle a validated claim.

However, the criteria did anticipate the situation where an Indian appears on the DOFS payroll but does not appear on another payroll for that band. The OTC assumed that the surveyor would have counted these people. Otherwise, people who appeared on only one or two paylists, neither of which was the DOFS payroll, were not counted. These people were considered to be transient, unless they died with the band, could in some other way establish an affiliation with the band, or the Elders could provide information that would allow them to be counted. One or two years of affiliation was not sufficient to establish membership within the community. One of the exceptions noted in the 1991 document was that of the Sweetgrass Indian Band:

There have been references to an exception made in the case of the Sweetgrass Band where persons appearing after the date of survey for “one-time-only” have been counted. Sweetgrass is an example of where external circumstances (the Rebellion) impacted upon the membership of the Band and warranted careful consideration to determine [what] happened to the 70 odd people who were affected.

Sweetgrass Fact Situation:

Sweetgrass' DOFS is 1884, but the 1883 payroll was used. In 1884, approximately 70 people entered the band. In 1885, as a consequence of the Rebellion, many band members disappeared, including some of the 1884 people. A few reappeared in later years, but most did not.

18 The Office of the Treaty Commissioner had been scheduled to close on March 31, 2007; however, in June 2007, the then Minister of Indian Affairs and Northern Development, James Prentice, announced that the OTC would resume its work in Saskatchewan on treaty issues until March 31, 2008. The Minister appointed former DIAND Minister, William McKnight, as Treaty Commissioner.

19 Office of the Treaty Commissioner, Treaty Land Entitlement Research, Appendix E, September 23, 1991 (ICC Exhibit 3k, p. 21).

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These people were counted, even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion.²⁰

As a result of the new statement of policy, several First Nations brought their rejected claims to the Indian Claims Commission for an inquiry, and the Lac La Ronge Indian Band took its claim to court. As a result, Canada reformulated its policy again in 1998. The 1998 guidelines, published in draft form, remain as Canada's stated TLE policy.

Current Policy

Draft Guidelines of 1998

In October 1998, DIAND released its "Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines." This document, which came to be known as the "Draft Guidelines of 1998," was part of the department's attempts to improve its TLE policy "to better reflect historic realities and to bring a greater measure of fairness to the process."²¹ According to Canada, these guidelines remain the most current statement of the government's TLE policy and have been applied to the validation of every claim since they were announced to determine the "adjusted date of first survey population."²² Once a claim has been validated and Canada agrees that insufficient land has been set aside for the First Nation under the treaty, the parties enter into negotiations, which often include the relevant provincial government.²³

Part of the Draft Guidelines is quoted below.

4.1 Subject to 4.2 and 4.3, the following treaty Indians will generally be included towards a band's entitlement calculation:

- 20 Office of the Treaty Commissioner, Treaty Land Entitlement Research, Appendix E, September 23, 1991 (ICC Exhibit 3k, p. 21).
- 21 DIAND, "Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines," October 1998 (ICC Exhibit 9b).
- 22 ICG Transcript, Evidentiary Hearing, October 25, 2006, p. 118 (John Scime).
- 23 At the time that most of the Numbered Treaties were signed, Canada had jurisdiction over the land because the provinces had not yet been formed, and, as a result, the creation of reserves in what are now the Prairie Provinces was entirely within the jurisdiction of the federal government. Since 1930, the creation of "new" reserve land in Numbered Treaty areas requires the cooperation of both the federal and provincial levels of government, with the exception of the Northwest Territories, because it is a federal territory.

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4.1.1 Inclusions:

(a) Date of First Survey (DOFS) Population

i) DOFS Paylist

This population consists of treaty Indians whose names appear on the paylist at DOFS. Generally, the paylist from the year of the DOFS best reflects the band's membership.

ii) Individuals who remained with the band for a short time at DOFS

These individuals that appear on the DOFS paylist for a particular band, will generally be considered towards the DOFS population for that band, unless there is stronger evidence that they were members of another band.

iii) Arrears and Absentees

a) Arrears

Treaty Indians who were absent on the date of first survey, but appear on a paylist subsequent to DOFS and were paid arrears for the year of the first survey with that band.

b) Absentees

Treaty Indians who were not on the DOFS paylist but appeared on a paylist for that band before and after DOFS, demonstrating they were band members at DOFS.

b) Late Additions – shortly after DOFS

There are two categories of late additions:

i) Indians who were bound by and eligible to receive the benefits of treaty but who had not yet appeared on any band's paylist nor been included in any band's entitlement calculations. Such individuals may be eligible to be counted by the band on whose paylist they appear.

ii) Treaty Indians who were originally members of a landless band (i.e. a band that had not yet had land set aside) and who then transferred to another band that already had reserve land set aside. An individual will be counted with the first band the individual joined that had had reserve land set aside. The effective date of transfer to the new band is the date that the individual actually appears on the annuity paylist or membership list.

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4.2 In order to be counted towards a band's collective TLE entitlement, the individuals must not fall into any of the following categories:

4.2.1 Exclusions

- a) The following people are excluded from the TLE calculation to prevent "double counts":
 - 1) anyone who has already been included in the calculation of another band's TLE, or alternatively, has a *paternal* ancestor who has already been included in the calculation of a band's TLE;
 - 2) and anyone who has taken scrip^[24] or severalty^[25] or who has a *paternal* ancestor who took scrip or severalty, before they were born or of the age of majority. However, anyone who took scrip after DOFS is not removed from the DOFS payroll count.²⁶

Once the adjusted date of first survey population has been calculated, that population is compared to the area of land that was surveyed and set aside as a reserve for the First Nation; if too little land had been set aside – in the case of Treaty 6, calculated at 128 acres per person – the First Nation has a TLE shortfall.

Working Assumptions

At the planning conference held for this inquiry on April 28, 2004, Commission counsel asked Canada to "provide the ICC and the LMCN with a synopsis of any working assumptions that are employed by the Specific Claims Branch when applying the 1998 Historic Treaty Land Entitlement (TLE) Shortfall Policy."²⁷ John Scime, Senior Policy Advisor, confirmed the following assumptions.²⁸

- 24 Métis scrip is not relevant for bands within Treaty 6, although some individuals who decided to identify themselves as Métis may have taken scrip. By taking scrip and exchanging it for either land or money, an individual was no longer eligible to be counted for TLE purposes. Explanatory footnote added.
- 25 Severalty is not relevant for bands within Treaty 6, because there no provisions for Indians to receive land as individuals. Treaty 8 in Northern Alberta and British Columbia is the first of the Numbered Treaties to allow individuals to elect to take land in severalty, rather than be allocated an amount of land to be added to a reserve. Explanatory footnote added.
- 26 DIAND, "Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines," October 1998 (ICC Exhibit 9b, pp. 2–4).
- 27 John Scime, Senior Policy Advisor, DIAND, to John Edmond, Commission Counsel, ICC, September 7, 2004, p. 1 (ICC Exhibit 9a, p. 1).
- 28 Only the section of John Scime's letter that is relevant to the disagreement between the parties is reproduced. That part of his letter dealing with the effective date of transfer and paternal line tracing was not relevant to this inquiry.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

1. Requirement for Continuity of Membership

As discussed during the Planning Conference, Canada takes the position that individuals must show a continuity of membership with a First Nation in order to be counted for the purposes of that First Nation's TLE. As I pointed out, this was a proposition that the ICC supported in its report on the *Kahkewistahew* Inquiry.

As a working assumption, an individual who is only paid once or twice on a First Nation's payroll (i.e. a "One-time-only" or "Two-time-short-stay") before being paid on another First Nation's payroll does not demonstrate the required continuity of membership. In other words, as a general practice, it is Canada's position that a minimum of three years payment on a First Nation's payroll must occur to show a continuity of membership.

However, as per Section 4.1.1.a.ii of the 1998 policy, individuals whose names appear on a First Nation's payroll only once or twice may be counted in that first Nation's TLE population if the individuals' names appear on the First Nation's date of first survey (DOFS) payroll, and if there is no stronger evidence linking these individuals to another First Nation's membership. In addition, in cases where an individual dies shortly after joining the First Nation at DOFS or later, the possibility of subsequent affiliation with another First Nation or inclusion in another TLE calculation is removed. Such individuals can be included in the First Nation's TLE population. In both of these cases, though, the individual must still meet other eligibility criteria (i.e., they have not previously been counted for TLE, they have not received scrip, etc.).²⁹

This letter is almost identical to a letter written earlier that year by another departmental official to the ICC.³⁰ Because the two letters are so similar, we understand them to be a standard letter, sent by the department when there is a request for additional information about how Canada applies its TLE policy.

We also received information in this inquiry in the form of an affidavit from John Scime, which included the following paragraphs:

10. ... Canada takes the position that individuals must show a continuity of membership with a First Nation in order to be counted for the purposes of that First Nation's TLE validation. This is a proposition that the ICC supported in its report on the *Kahkewistahew* TLE inquiry. Canada has applied this criteria consistently since October 1998.
11. An individual's [*sic*] who is only paid with a particular First Nation prior to the DOFS date of that First Nation and is not paid subsequent to the DOFS date of

29 John Scime, Senior Policy Advisor, DIAND, to John Edmond, Commission Counsel, ICC, September 7, 2004, pp. 1–2 (ICC Exhibit 9a, pp. 1–2).

30 John L. Hall, Senior Policy Advisor, DIAND, to Steve Bouris, Head of Research, ICC, March 31, 2004, pp. 1–3 (ICC Exhibit 2g, p. 25).

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said First Nation, does not demonstrate the required continuity of membership. As a general practice, it is Canada's position that a minimum of three years payment on a First Nation's payroll must occur to show a continuity of membership.

12. As a working assumption, to be counted for TLE validation, an eligible individual must meet the continuity of membership criteria in one of three scenarios:
 - i) paid before DOFS and at DOFS for a total of three or more payments;
 - ii) paid at DOFS and after DOFS for a total of three or more payments; and/or
 - iii) paid before DOFS and after DOFS for a total of three or more payments.

13. In addition, Canada takes the position that membership is merely the first threshold that must be met for the purpose of TLE validation. However, it is not enough to be merely a member of a band – a person must also be eligible to be counted for TLE validation. As outlined in section 4.2.1 of the *(Draft) 1998 Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines*, double counts, scrip takers and severalty electors are excluded from the validation count because they have already received land and are therefore ineligible. Likewise, absentees are not considered eligible for TLE validation unless they have returned to the band following their noted absence, as evidenced by the receipt of treaty annuity payments following said absence.³¹

The letters stating the working assumptions and the affidavit use the expression “continuity of membership.” The concept appears to have been formulated first in the 1983 guidelines, in Canada's description of absentees. Under the 1983 guidelines, absentees – described as people whose names were not on the DOFS payroll – were required to show “continuity in band memberships.”³² The guidelines went on to explain that for an absentee to be counted within a band's population, it “must be shown that they were not included in the population base of another band for treaty land entitlement purposes while absent from the band.”³³ These guidelines and the working assumptions are at the heart of the dispute between Canada and the Lucky Man Cree Nation, specifically, how to apply the guidelines to assess the eligibility of the 62 names that appear on the Band's 1887 payroll. Of the 62, 37 are noted as being “south.” It is agreed between the parties that “south” almost certainly means they had fled Canada to the United States as the result

31 Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005 (ICC Exhibit 3J p. 12).

32 DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), pp. 3–4 (ICC Exhibit 9c, pp. 3–4).

33 DIAND, “Office of Native Claims Historical Research Guidelines for TLE Claims” (Ottawa, May 1983), p. 4 (ICC Exhibit 9c, p. 4).

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of Canada’s designating the Lucky Man Band as a “rebel” band in the wake of the North-West Rebellion. They also agree that none of the 37 returned to the Lucky Man Band, and that, in 1890, when the Crown reinstated payment of annuities to rebel bands, it also struck the names of the 37 people from the annuity payroll. As a result, the stated membership of the Lucky Man Band dropped substantially. Others are noted as being at different places, such as Qu’Appelle or Maple Creek. It is agreed that, at the time, probably only about 10 Lucky Man members were resident in the area that had been set aside as one reserve for both the Lucky Man and Little Pine Bands.

The Lucky Man Cree Nation says the correct starting point for the analysis is to take the 62 names on the payroll at face value, including the 37 who are thought to have left the country. The First Nation says all should be counted for treaty land entitlement purposes. Canada says that only those who were actually resident at the time should be counted, that the 37 cannot be counted, because they were not present and not paid at the annuity payment in the year the reserve was surveyed, and they never returned to take up residence, and never received annuity payments again on the reserve.

Lucky Man Cree Nation’s Interpretation of TLE Policy

The Lucky Man Cree Nation takes the position that the guidelines are to be applied as they are written. The First Nation argues that the starting point to determine the amount of reserve land that should have been set aside is the DOFS payroll, and that, as a general principle, if names appear on a payroll, those names are eligible to be counted.³⁴

The sequence of criteria the First Nation would apply is as follows:

- How many names are on the date of first survey payroll?
- How many absentees should be added?
- Are any of the names on the payroll those of “short-stays,” people who were with Lucky Man less than three years? If they were with Lucky Man less than three years, is there stronger evidence that they should be counted with another band?
- How many people are “late additions,” people who joined the band after the reserve was surveyed, but who have not been counted elsewhere for TLE?

³⁴ ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 18 (Jayme Benson).

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- Deduct from the DOFS payroll those people who should not be counted because either they have received land (or its equivalent) or another Band has received land on that person's behalf: people who have been counted already, people who have taken scrip or severalty; people with a paternal ancestor who has already been counted, taken scrip or taken severalty.

The First Nation has also taken the position that only those people whose names did not appear on the DOFS payroll were required to show three years on paylists other than the DOFS payroll to show continuity of membership.³⁵

An element of the policy the First Nation says is important is stated in the section that deals with "one-time-onlys" and "two-time-short-stays," those people whose names were on the DOFS payroll, but who did not remain with the First Nation for more than one or two years. The policy states that the short-timers should be counted with the First Nation, "unless there is stronger evidence that they were members of another band."³⁶ The Lucky Man Cree Nation states that "you'd look whether any of those names were members of other bands and we did that research and couldn't find evidence that they were counted anywhere else or members anywhere else."³⁷ The First Nation does not say that the 37 people are "short-stays," but does state that since they do not appear to have been counted as part of any other TLE settlement, they should be counted with Lucky Man.

As far as the First Nation is concerned, the word "appear" means exactly that: the names are written down and therefore "appear" on a list; further, there is no requirement in the 1998 guidelines that individuals be present and paid to be counted.³⁸

One aspect of the 1887 payroll the First Nation considers to be important is that, because the list is a "dummy" payroll, it does not account for people who were actually paid; instead it accounts for people who were entitled to be paid had the North-West Rebellion not taken place.

The First Nation also argues that the Department of Indian Affairs would not have put the names of people on a payroll if it had not considered them to be members of a particular band. In its view, it does not matter whether the members were paid or not paid, the department considered them to be band

35 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 19 (Jayme Benson).

36 DIAND, "Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines, October 1998 (ICC Exhibit 9b).

37 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 26 (Jayme Benson).

38 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 204 (David Knoll).

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members. “There is agreement that they were not paid on that day, but it doesn’t indicate that they were not members of that band.”³⁹

The argument made by the First Nation is that the Lucky Man members who were not physically present, but whose names appear on the list are not “absentees” because according to the policy, absentees are people who are not on the DOFS payroll, and the names of the 37 were on the payroll.

Lucky Man’s position is that the members who had gone south because they were afraid of retaliation after the Rebellion do not fit any of the categories of exclusions. These members do not qualify as double counts (that is, people who are counted towards another First Nation’s treaty land entitlement, either through themselves or through their fathers or grandfathers); they did not take scrip or severalty; they were not “non-Aboriginal”; and their names had not been entered fraudulently.

The First Nation says it first saw the working assumptions when they were produced for this inquiry but also states that, as far as it is concerned, they do not contradict the guidelines and do not support the position Canada has taken in this inquiry. The First Nation also says there is nothing in the working assumptions that says members must be “present and paid” before they can be counted.

Canada’s Interpretation of TLE Policy

Canada states that in this claim, the DOFS payroll cannot be taken as written, that it is wrong for the First Nation to rely on what Canada calls a “sanctity of the base payroll” approach.⁴⁰ Canada states that, “if the individual’s name appears on the base payroll but they are not present, they are not paid and they never return, then they don’t meet the eligibility to be included with that particular First Nation.”⁴¹

Canada also argues there was nothing standing in the way of band members who had gone south returning to Canada. The amnesty was proclaimed in 1886 and it is Canada’s position that by putting the amnesty in place, the government was clearing any obstacles that may have been in the way of band members returning to Canada. Canada acknowledged the fear that sent many people to the United States, but also stated that “certainly Canada can’t be impugned for having granted an amnesty.”⁴²

39 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 204 (David Knoll).

40 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 121 (John Scime).

41 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 121 (John Scime).

42 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 164 (John Scime).

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Canada agrees that the framework for determining TLE entitlement is set out in the 1998 Guidelines, but also adds that there is a requirement for continuity, that the DOFS list in itself is only a starting point.⁴³ Canada states that several key criteria must be considered in addition to the names on the payroll, that “mere appearance”⁴⁴ is not enough. Canada points to the fact that the policy specifically enumerates exclusions, members whose names appear on the list but who are not eligible to be counted for treaty land entitlement.

It is Canada’s position that among the criteria used to determine TLE eligibility is one that it describes as “continuity of membership”⁴⁵ and that a band member must show a minimum of three years payment on a First Nation’s payroll in order to demonstrate the required continuity. These three years must, in some way, span the date of first survey. According to Canada, to be considered band members eligible to be counted for treaty land entitlement, members must fall within one of the following three categories:

- i) paid before DOFS and at DOFS for a total of three or more payments;
- ii) paid at DOFS and after DOFS for a total of three or more payments;
- iii) paid before DOFS and after DOFS for a total of three or more payments.⁴⁶

Canada states the problem that arises in counting the Lucky Man band members is that, although most had been on the paylists for several years before the North-West Rebellion, from 1885 on none of the named members were either paid or present, and, in 1890, their names were removed, never to appear on a Lucky Man band list again. Canada did not dispute the First Nation’s contention that the flight from the Battleford area, resulting in the striking of band members’ names from the annuity paylists was the result of the North-West Rebellion, but it did not concede that, had the Rebellion not happened, the band members would have stayed where they were in 1884.

To counter the First Nation’s position that the guidelines state the names must “appear” on the list, Canada states: “We’re not so much stating that “appear” equals “must be paid and present,” we’re asking that the entire context of the exercise be taken into consideration when assessing the guidelines. And we’re asking that we look at more than just the mere words ... what we’re trying to do inside the policy which is to recreate a population at a particular time.”⁴⁷

43 Written Submissions on Behalf of Canada, September 22, 2006, p. 3.

44 Written Submissions on Behalf of Canada, September 22, 2006, p. 4.

45 Written Submissions on Behalf of Canada, September 22, 2006, p. 4.

46 Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005, para. 5 (ICC Exhibit 3J p. 11).

47 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 159 (John Scime).

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Canada acknowledges that the group that never comes back cannot be considered to be absentees, because the guidelines define absentees as being members whose names are not on the DOFS payroll. Nevertheless, Canada considers them to be absent yet not absentees, because they were not on the reserve at the time of survey and never return.

Canada’s position is that the only exception to the requirement for a continuity of membership is individuals who remained with the band for a short time at first survey, but where there is no stronger evidence they were members of another band.⁴⁸

The Parties’ Positions on Fairness and Consistency

A unique aspect of this inquiry was the question of whether Canada had dealt fairly with the Lucky Man Cree Nation and, particularly, whether it was applying an interpretation of the Guidelines in this claim that it had not applied to any other claim. One of the First Nation’s primary arguments was that “the way other claims were settled in Saskatchewan is the basis on which you should be proceeding with Lucky Man.” With regard to Canada’s argument that the names on the base payroll had to be analyzed for criteria such as whether they were “present and paid,” the First Nation states that “you can’t ignore the approach the department has taken in all the previous TLE claims because they applied what we would submit is a consistent approach to determining who should count at date of first survey,”⁴⁹ and that “the department itself, in settling those claims never deducted people from the base pay sheet, except those that were considered double counts. That is the consistent approach that the department has taken.”⁵⁰

The Lucky Man Cree Nation also pointed to the reports of two other validated claims in Saskatchewan, the Sweetgrass First Nation and the Little Pine First Nation, as examples of unique circumstances in which the department could have applied restrictive criteria to validating TLE claims but did not do so.

48 Written Submissions on Behalf of Canada, September 22, 2006, p. 10.

49 ICC Transcript, Oral Submission on Behalf of the First Nation, August 18, 2005, p. 50 (David Knoll).

50 ICC Transcript, Oral Submission on Behalf of the First Nation, August 18, 2005, p. 51 (David Knoll).

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The Sweetgrass First Nation's reserve was surveyed in 1884, the year before the North-West Rebellion; the base payroll was 1883.⁵¹ In 1884, about 70 people entered the Band. Then, in 1885, as a result of the North-West Rebellion, many band members disappeared, including some of the members who entered the Band in 1884. According to the Office of the Treaty Commissioner, "a few reappeared in later years, but most did not."⁵² One of the letters sent from the Office of the Treaty Commissioner to the First Nation during the claim validation process dealt with the issue of how to treat band members who had been affected by the North-West Rebellion. The letter states: "Sweetgrass is an example of where external circumstances (The Rebellion), impacted upon the membership of the Band and warranted careful consideration to determine what happened to the approximately 70 people who were affected."⁵³

The First Nation points to the Sweetgrass TLE validation, because it is almost the mirror image of the claim in this inquiry: in the case of Sweetgrass, members who entered the Band after the survey and stayed with the Band only for a year were counted even though they were not on the base payroll. The letter from the OTC states: "[T]hese people were counted even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion."⁵⁴ The First Nation states that the impact of the North-West Rebellion must be taken into account when assessing Lucky Man's TLE claim, in the same way as it was for the Sweetgrass TLE claim. The argument is that the impact of these events is clear in the case of Lucky Man, as "it was Canada that removed Lucky Man as chief of his band, that withheld rations for no work, labeled Lucky Man Band members as rebels, which caused them to flee south to the border after the 1885

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- 51 Which payroll becomes the base payroll has changed over the years. In the early years of TLE, researchers and the Office of the Treaty Commissioner in Saskatchewan used the payroll immediately before the survey, reasoning that this is the payroll that would have been available to the surveyor at the time. In later years, however, both as a result of the Saskatchewan Court of Appeal's ruling in *Lac La Ronge Indian Band v. Canada*, 2001 SKCA 109, (2001) and the ICC's report on *Kabkewistabaw*, the standard practice became to use the payroll closest in time to the survey, even if the annuity payments were made after the survey. The reasoning was that the closest payroll would most accurately reflect the actual membership of the band at the time of survey. The Sweetgrass First Nation's treaty land entitlement was validated prior to the change and so the payroll available to the surveyor was used; in this case, it was the payroll for 1883, even though the date of first survey was 1884.
- 52 Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).
- 53 Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).
- 54 Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket Band, September 25, 1991 (ICC Exhibit 2G, p. 129).

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rebellion,”⁵⁵ and that “Canada cannot take advantage of the reduced circumstances faced by Lucky Man that Canada was partially responsible for, to justify that they had no entitlement.”⁵⁶

Canada does not dispute the historical circumstances but, as was stated earlier, points to the 1886 amnesty as mitigation of any of Canada’s actions that affected the First Nation negatively. Canada also points to the fact that the 70 members who entered the Sweetgrass First Nation whose names were not on the base payroll, actually entered in the year of the survey and were paid that year. Canada says the facts are too different to afford a useful comparison, because “it’s based on a different fact scenario; the individuals in Sweetgrass were actually paid; the individuals in Lucky Man were not paid.”⁵⁷

The First Nation states that the best example of how Canada has not been consistent and has been unfairly penalizing the Lucky Man Cree Nation is how Canada dealt with the Little Pine First Nation’s TLE claim. Counsel for the First Nation says Canada must have regard for the following facts: Little Pine and Lucky Man shared a reserve since it was first surveyed in 1887; Little Pine and Lucky Man were the only First Nations designated as rebel bands for whom the date of first survey falls in the years when no annuities were paid. In 1992, the Little Pine Band signed a treaty land entitlement agreement with Canada. In determining the band’s adjusted DOFS population, the researchers began with the base population, that is, the population on the base payroll of 1887, and adjusted it, factoring in absentees, double counts, and other classes of inclusions and exclusions. What Lucky Man says is important is that there was no attempt to strike names from the base payroll, even though many of those people went south after the Rebellion and did not return to Little Pine. It points to researcher Jim Gallo’s 1990 report in which he states “Little Pine’s band was considered to be ‘Rebel Indians’ and as such most were not paid annuities from 1885 to 1889. To arrive at a number of 299 people for October 8, 1887, the number actually paid that day (7) is added to the ‘Rebel’ list of the same day (292).”⁵⁸

Canada acknowledges there is very little difference and does not dispute that the Little Pine settlement was done as Lucky Man would like its TLE settlement to be done; however, according to Canada, what is important is

55 ICC Transcript, Oral Submissions on Behalf of the Lucky Man Cree Nation, August 18, 2005, p. 58 (David Knoll).
 56 ICC Transcript, Oral Submissions on Behalf of the Lucky Man Cree Nation, August 18, 2005, p. 58 (David Knoll).
 57 ICC Transcript, Evidentiary Hearing, October 25, 2006, pp. 67–68 (Perry Robinson).
 58 Jim Gallo, “Little Pine DOFS Summary,” October 23–31, 1990, attached to Response to Canada’s position on the outstanding Treaty Land Entitlement of the Lucky Man Cree Nation, prepared by Knoll & Co., June 2002 (ICC Exhibit 2e, p. 642).

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whether the criteria now applied to Lucky Man are the correct criteria. Canada's view is that what had been done in the past should not establish a benchmark for what it ought to do in the present, that "[w]e're obligated to do what the law in the best of our interpretation tells us. And there is no obligation to get it wrong twice but only to get it right in this circumstance."⁵⁹

Application of TLE to the Lucky Man Cree Nation

We think the analysis of this treaty land entitlement claim cannot be made without taking into account the impact of the North-West Rebellion on the Lucky Man Cree Nation, consistent with Canada's practice in similar claims. The Rebellion lasted only a few months in the spring of 1885, but for some First Nations, the ripple effects endure today.

Although we have limited evidence about the extent of the Lucky Man Band's involvement in the events of 1885, it is clear that Lucky Man himself was in the company of Big Bear and others when they were involved in a skirmish at the settlement at Frog Lake, in which some settlers and the Indian Sub-Agent were killed. Undoubtedly, it was in part as a result of this event that, following its defeat of the Métis at Batoche and its quashing of the potential Cree uprising, Canada designated the Lucky Man Band as one of a number of "disloyal" or "rebel" bands and suspended annuity payments to members of those bands. We do not find it surprising that many band members left Canada, not knowing what actions the government might take against them after the Rebellion. There is little evidence about whether many of the Lucky Man band members returned to Canada; however, Lucky Man himself returned in 1896, to be arrested but released when prosecutors realized there was insufficient evidence to support prosecution for the killings at Frog Lake.⁶⁰

The last pre-Rebellion payroll for the band is dated 1884. It shows that 82 people were paid as Lucky Man band members,⁶¹ although Lucky Man himself was not on that list. He and a group of followers had travelled to be with Big Bear and were paid their annuities at Fort Pitt.⁶²

The government did not pay annuities to band members of rebel bands, but it did maintain the paylists, which are now referred to as "dummy" paylists. Although it is not known whether the agents actually visited the

59 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 202 (John Scime).

60 A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).

61 Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

62 Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

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communities to count the band members, the lists from 1885 to 1890 show a careful accounting of deaths and movement in and out of the Band.

The other fact we consider to be important is the timing of the Crown’s survey of the Lucky Man reserve in 1887. The survey took place at a time when both Lucky Man and Little Pine had been designated as rebel bands and were not being paid their treaty annuities. As a result, the annuity list compiled at the date of first survey for the reserve set aside in 1887 is a dummy payroll.

It is this background that lies at the heart of Canada’s argument – that because there are Lucky Man Cree Nation members who appear on the payroll, but who are not present and not paid, they are absent and should not be counted for the purposes of treaty land entitlement.

We reject this argument for two reasons. First, we find that there is nothing in the current TLE policy, as published by Canada in 1998, that would justify removal of these people from the TLE calculation; there is no category that would exclude people who are listed on the annuity payroll but who are believed to be not paid and not present. Second, we think there are significant fairness issues, and that there are compelling reasons why the Lucky Man Cree Nation should be treated similarly to other First Nations in similar circumstances. Our examination of Canada’s policy and practice regarding continuity of membership leads us to the conclusion that it does not and should not exclude the members who fled in the aftermath of the North-West Rebellion.

We begin by examining the 1998 Draft Guidelines, which are the most recent guidelines published by Canada. We find that the First Nation has met the first criteria listed for the inclusion of members entitled to be counted for TLE purposes, that of the number of people whose names appear on the DOFS annuity payroll.

Section 4 of the Guidelines deals with inclusions, exclusions, and clarifications. “Inclusions” are categories of people to be counted for the purpose of TLE; “exclusions” are not included within the count, and “clarification” deals with individuals who fall within areas that might be considered to be grey. Section 4.1.1 of the policy states that the first category of inclusions are those people whose names appear on a DOFS payroll.⁶³ There is no disagreement between the parties as to whether the 1887 list is a DOFS payroll, although both parties agree no-one on that list was actually paid. Another inclusion is “absentees,” defined as “Treaty Indians who were not on

63 DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b pp. 2–3).

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the DOFS payroll but appear on a payroll for that band before and after DOFS, demonstrating they were band members at DOFS.”⁶⁴ The people Canada wishes to exclude from the calculations appear on the DOFS payroll and, therefore, they are not absentees as defined in the 1998 Guidelines. There is nothing in the inclusions part of the policy that deals with the specific situation of members whose names appear on a DOFS payroll but who are not present and not paid except for the general provision that the people whose names appear on a DOFS payroll should be included.

We also examined the “exclusions” part of the policy, which accounts for circumstances where people whose names appear on a payroll should not be counted for the purpose of treaty land entitlement. Section 4.2.1 of the 1998 Guidelines lists the exclusions. We consider this list to be exhaustive, and there is no category for people whose names are on the list but who are “absent” from the reserve, and no category for people who are not present and not paid. These criteria that Canada wishes to apply are not in the 1998 Guidelines. We note that section 4.3 dealing with clarification does not deal with this particular fact situation, although we note 4.3.c in which individuals who “commuted,” generally women who left the band because they married non-Aboriginal men, were not removed from the DOFS payroll.

Canada has argued that it is not fair to count the 37 people who never return. There is nothing in the criteria that requires a person whose name is on the DOFS payroll to remain with the band; the fact that an individual leaves and does not return is not a relevant criterion, and the criterion it most resembles is 4.3.c dealing with commutations. Like the Lucky Man members who left for the United States, women who commuted did not return to their bands. Since the names of the members appear on the Lucky Man payroll, the Lucky Man Cree Nation should not be penalized for the fact that they never returned, any more than it would be if a member had died, a woman had commuted, or a member had decided to leave the band permanently. Canada’s challenge when members moved from band to band is to ensure they were not counted twice, so that two different First Nations received treaty land for the same person; that is the purpose behind section 4.2.1.a of the exclusions. In this case, however, there is no evidence that the individuals were ever paid with another band, or that any other band has received treaty land on their behalf. The Indian Claims Commission has previously stated the principle that every treaty Indian is to be counted once for TLE purposes, and

64 DIAND, “Historic Treaty Land Entitlement (TLE) Shortfall Policy Validation Criteria and Research Guidelines,” October 1998 (ICC Exhibit 9b, p. 2).

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we see no reason to deviate from that principle and not count these individuals.

The North-West Rebellion of 1885 was a significant historical factor that had the effect of triggering involuntary population displacements. This effect has been widely recognized by historians and by the government in other claims, notably the Little Pine First Nation’s TLE settlement, and that of the Sweetgrass First Nation. We accept the words of the Office of the Treaty Commissioner in the 1991 letter to Chief Irvin Starr of the Starblanket First Nation, which gave an explanation of why the Commission included names of members whose names appeared on the 1884 payroll, but not on the 1885 payroll “as a consequence of the rebellion”⁶⁵ and who disappear after that. In the letter, the OTC stated “these people were counted even though they were only there for one year because the events of the Rebellion were beyond their control. These people may well have stayed on at Sweetgrass had they not been forced to leave because of the Rebellion.”⁶⁶ We consider that the same can be said of the Lucky Man Band after 1885, and we have not been presented with any evidence that would justify our taking a different approach. Canada has not presented any justification for adopting an interpretation for Lucky Man that is different from its interpretation of other First Nations’ treaty land entitlements.

THE 1886 AMNESTY

Canada has argued that the 1886 amnesty allowed any Indian who had fled the country to return without fear of sanctions, that there was no reason for anyone to remain in the United States, and that, as a result, the 37 members should have and could have been on the reserve in 1887 at the date of first survey.

We have no evidence of how or whether the amnesty was communicated to anyone across the border. The language of the amnesty left open enough questions that, even if band members had known about it, it is quite possible they were still afraid of what might happen if they came back to Canada. We do know that 10 years after the amnesty, in 1896, when Lucky Man himself returned, he was arrested. It is not difficult to think that Indians south of the border would have been skeptical about the amnesty.

65 Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket First Nation, September 25, 1991 (ICC Exhibit 2g, p. 129).
 66 Emil Korchinski, Executive Director, Office of the Treaty Commissioner, to Chief Irvin Starr, Starblanket First Nation, September 25, 1991 (ICC Exhibit 2g, p. 129).

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We have no evidence that the Indians south of the border knew of section 10 of the 1886 *Indian Act*, which stripped them of band membership if they lived for five years outside Canada.⁶⁷ Similarly, we have no evidence that they were aware that a reserve was being surveyed for the Lucky Man Band in 1887.

In any event, the repercussions of historical events such as the Rebellion cannot be used by Canada to void the obligations it assumed when it signed treaties. We consider it to be an important principle that historical circumstances do not provide an excuse to avoid treaty obligations. The obligation to provide reserve land arose when Lucky Man signed Treaty 6 in 1879, and crystallized in 1887 when John C. Nelson surveyed the reserve. None of the events surrounding the North-West Rebellion change the Crown's treaty obligations. Canada's arguments would have the First Nation bearing the entire brunt of all the changes that occurred during this time, when there is no evidence any of the band members were aware of what was happening or of the significance of their actions.

If anything, the results from the North-West Rebellion would seem to bolster the First Nation's point of view. For instance, even if Lucky Man band members believed the amnesty gave them safe passage to Canada, why would they have returned to a reserve if they believed they were not to be paid? We understand from the historical record, and the parties agree, that the annual cash payments were not made to those band members who continued to reside on the reserve near Battleford, but we do not know whether the agent actually visited the reserve or whether the list was amended on the basis of reports and other attendance.

Canada had a purpose for maintaining the paylists in the aftermath of the Rebellion. Both Canada and the First Nation agreed that one purpose of the "dummy" paylist was to determine how much was to be paid in reparations to settlers who suffered damage to their homes and farms during the Rebellion. Historical documentation records another purpose – that of maintaining the annuity lists for the year that the members returned to the reserve. Regardless of the purpose for keeping the lists, Canada must have considered these people to have been members of the Lucky Man Band. We also know that Canada took some care with these lists, since these "dummy" paylists are as detailed as any other paylists for that era. At the time and in 1887, when the

67 *Indian Act*, RSC 1886, c. 43, s. 10 reads: "Any Indian who has for five years continuously resided in a foreign country without the consent in writing of the Superintendent General or his agent shall cease to be a member of the band of which he or she was formerly a member and he shall not again become a member of that band, or of any other band unless the consent of such band, with the approval of the Superintendent General is first obtained." The text of the 1880 Act is almost identical.

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reserve was surveyed, Canada would have had no way of knowing whether members would return to the reserve, just as it would have no ability to foresee births or deaths in the coming year.

The Panel’s Analysis of Fairness and Consistency

There are two components that comprise this element of our analysis. The first is general in nature and concerns the working assumptions that Canada has utilized to determine continuity of membership. We are concerned about whether it is fair for Canada to apply claims assessment criteria that have not been made public. The second pertains to the specific circumstances of the Lucky Man Cree Nation and whether it is fair for Canada to treat it differently from the way in which it treated other First Nations in the same situation.

Continuity of Membership and the Working Assumptions

Canada has argued that, as a working assumption,⁶⁸ individuals need to demonstrate continuity of membership in order to be counted for TLE purposes. The First Nation has argued that continuity of membership is a concept to be examined only when it is not clear which First Nation is entitled to land on behalf of an individual.

We wish to state first that we are concerned about the application of these working assumptions as the basis for validating a claim because of their unpublished nature. This internal document has no official status. We think that using these assumptions in the validation of TLE claims raises serious questions of administrative law and procedural fairness. This internal working document was not provided by Canada to the Lucky Man Cree Nation at the time it made its initial application, nor was it available to the First Nation at the time it was gathering its evidence and making its case for consideration to the government. These working assumptions were disclosed to the Indian Claims Commission in the course of inquiries because the ICC asked for them. According to well-established principles of administrative law, “the right to be heard fundamentally requires that a person know the case to be met and be given an opportunity to answer it.”⁶⁹ Had it not been for the Commission’s inquiry, the Lucky Man Cree Nation would not have known the criteria that were being applied to assess its claim.

This is not to say that Canada cannot change its policy in order to fully implement its treaty obligations. It is obvious that has happened during the past two decades in response to the Commission and the courts and the

68 See earlier reference for the wording of the working assumptions.

69 *Shepherd v. Canada (Royal Canadian Mounted Police)*, [2004] FCJ No. 1188 (FCA) at para. 22.

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Crown's own assessment of its policies. What is required is that Canada disclose any policy changes it has made and, where a change is contemplated that would have a negative impact on people who have relied on a policy, the doctrine of legitimate expectations requires Canada to give notice of the change and provide an opportunity for response.⁷⁰ Procedural fairness requires that the department publish its working assumptions and state clearly that they are a complement to its 1998 Draft Guidelines, and that these working assumptions will be used in the validation of claims.

We do not accept Canada's practice of giving equal weight to the published guidelines and its unpublished working assumptions. It is almost 10 years since the Draft Guidelines were published, and almost five years since the Indian Claims Commission was notified during the course of an inquiry that working assumptions existed. Canada has had ample time to publish the assumptions and has offered no reason why it has not done so. The fact that the working assumptions do not appear to be inconsistent with the Guidelines is not enough to justify their use without the First Nation's knowledge.

Having stated our concerns about the use of these assumptions in the first place, we still do not see how applying them in this claim results in the outcome claimed by Canada. Furthermore, there is nothing in this section of the assumptions that would contradict the Guidelines, or for that matter, that excludes the 37 members listed on Lucky Man's 1887 payroll, noted as having gone "south." The 37 people are not "one-time-onlies" or "two-time-short-stays." Their names appear on several earlier annuity paylists. Their names are on the DOFS payroll and there is no evidence that they had stronger ties to another treaty band.

We have concerns about what appears to be an attempt to deal more strictly with the Lucky Man Cree Nation's claim through the use of the working assumptions than would be warranted under the existing policy Guidelines. It also appears that Canada is using these assumptions as a method of diminishing its treaty obligations. In his affidavit, Canada's representative stated that to be counted for TLE validation, an individual must meet these continuity of membership criteria in one of three scenarios: all required a total of three payments, with combinations of being paid before, at, and after DOFS.⁷¹

Two of the scenarios would appear to contradict the working assumptions, in that the working assumptions state that in some cases only one or two years

70 *Durant v. Canada (Minister of Fisheries and Oceans)*, [2002] FCJ No. 441, at para. 34.

71 Affidavit of John Scime, Senior Policy Advisor, DIAND, December 2, 2005 (ICC Exhibit 3J, p. 12).

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of membership is sufficient for TLE. At the oral hearing, Canada’s representative agreed and said he wasn’t “thinking in terms of one-time-only and two-time-short-stays on the base payroll because Lucky Man doesn’t contain any of those individuals,”⁷² but agreed they would be exceptions to the continuity of membership requirements.⁷³

We can find no reason for applying criteria that are more restrictive to Lucky Man than are applied to other First Nations. We also find that the third scenario cited by Canada, that an individual’s name appears on a payroll before DOFS, after DOFS, but not on DOFS itself, is part of the Guidelines, as that is almost exactly what we understand is the definition of absentees.

Canada’s explanation of “continuity of membership” has added little to our understanding of the policy. What the policy indicates to us is that to be included within a band’s membership for the purpose of calculating TLE, a member’s name must appear on the DOFS payroll. If the name is on the DOFS payroll and is not on any other payroll,⁷⁴ that is sufficient.⁷⁵ If a name is not on a DOFS payroll, then that person must show three years of continuity of membership before he or she can be counted for TLE. If continuity of membership is to be applied, it would be applied only to absentees or late additions, people whose names are not on the DOFS payroll, as part of the inquiry to determine the nature of the best evidence of membership. We accept the First Nation’s arguments about the meaning of continuity of membership. We can find no reason why it might be applied to the Lucky Man Band, where the DOFS payroll indicates a population of 62 and there is no disagreement about how many names appear on the payroll.

There is nothing in the working assumptions that would justify Canada’s position that for a person on the DOFS payroll to be counted, that person must have been present and paid.

Canada has argued that the Indian Claims Commission has approved the

72 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 150 (John Scime).

73 ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 150 (John Scime).

74 The Guidelines do account for the possibility of a band member’s name appearing on a DOFS payroll and then on one other payroll. In this situation, the person would be counted in the DOFS population if there was no better evidence that the person belonged to the other band. It was common for band members to take their annuities with another band, and be recorded on that band’s payroll if they were hunting or trapping away from the band.

75 We understand this to mean that, if a name appears on a DOFS payroll but the next year that same person takes annuities with a different First Nation and remains there, a payroll analysis of both First Nations would reveal the individual had stronger ties to the second First Nation, and should be counted in that First Nation’s TLE, either as a name that appears on a DOFS payroll or as a late addition. Both possibilities are accounted for in the 1998 Draft Guidelines.

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concept of continuity of membership in the *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry*.⁷⁶ In that inquiry, the Band's population had varied considerably between the time of signing treaty to the time of first survey. One of the questions the panel considered was whether or how the variation in the band's membership over several years should be taken into account when determining the band population for TLE. The panel considered the difference between "objective," "subjective," and "continuity of membership" approaches to playlist selection. The "continuity of membership" considered by the panel and proposed by Canada would have required a consideration of whether an Indian was a member over a period of time that spanned the date of first survey. The panel rejected this concept in favour of one that mirrors the current policy – one that takes as a starting point the population at date of first survey and adjusts for individuals who were not counted, but who demonstrated they were members of the band. The panel did not think that individuals needed to show they were members at, before, and after the survey. As well, there is nothing in the inquiry report stating that, to be counted, individuals needed to be both paid and present.

We find there is nothing in Canada's draft policy that would substantiate the exclusion of the 37 members on the basis that they did not display a continuity of membership. Our reading of the policy is that only those individuals whose names did not appear on a DOFS playlist needed to show a continuity of membership. The names of these members do appear on the 1887 playlist, they are not double counted, and their names do not appear on any other annuity playlist; therefore, they do not meet the circumstances where their eligibility for TLE would need to be examined further.

Similarity of Circumstances – Lucky Man and Little Pine

A second aspect of fairness must be examined in this inquiry. There was only one reserve surveyed for "rebel" bands during the years in which Canada was not paying annuities to members of rebel bands and this was the common reserve for Lucky Man and Little Pine. Canada agreed several years ago that the two Bands continued to exist and that each should be considered separately for the purposes of treaty land entitlement. No other First Nation is in the same situation, and we find it is only fair that Canada should treat First Nations with identical fact situations in the same way.

76 ICC, *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported [1998] 6 ICCP 21.

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Like Lucky Man, Little Pine’s DOFS payroll is 1887 and, like Lucky Man’s, it is a dummy payroll. It shows 292 members were designated as being rebels, with only seven members eligible to actually receive annuity payments. Many of the members are noted as being “south,” and in October 1887, when Surveyor Nelson arrived, only 114 people were on the reserve. In calculating Little Pine’s TLE, Canada did not discount those members who had fled to the United States and never returned to the reserve. The analysis prepared by the Office of the Treaty Commissioner states: “Only 114 can be said to have been present at the survey. Most of those listed as “unknown” or “south” never return and in fact had been absent since 1885 according to the payroll notes for the period.”⁷⁷

Since only these two First Nations are in this unique situation, fairness dictates that Lucky Man should be treated in the same way as Little Pine. Canada’s argument that “there is no obligation to get it wrong twice”⁷⁸ misses the mark. Since the Little Pine First Nation’s TLE settlement is not the subject of this inquiry, we do not wish to comment on whether the method for calculating Little Pine’s TLE was right or wrong, but, where there are only two First Nations in the same circumstances, there is no justification for treating them differently. The decision to reject the Lucky Man claim appears to be arbitrary, based upon an analysis crafted after the fact to justify the decision.

We find that the starting point for the analysis must be the 62 members listed as being on the annuity payroll for the Lucky Man band in 1884. Canada’s confirming research has shown that there may be additions to that number, but there are insufficient exclusions to reduce the entitlement count to less than 60. We find no basis for excluding the 37 band members who fled as a result of the aftermath of the North-West Rebellion, and think that had the Rebellion not happened, they would have been on the reserve at the time of survey and would have remained there.

ISSUE 2: QUANTUM OF LAND CREDITED FOR TLE PURPOSES

- 2 With what quantum of land is Canada to be credited for treaty land entitlement purposes?

⁷⁷ Jim Gallo, “Little Pine DOFS Summary,” October 23–31, 1990, attached to Response to Canada’s position on the outstanding Treaty Land Entitlement of the Lucky Man Cree Nation, prepared by Knoll & Co., June 2002 (ICC Exhibit 2e, p. 667).

⁷⁸ ICC Transcript, Evidentiary Hearing, October 25, 2006, p. 202 (John Scime).

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The question at the heart of this issue is how to characterize the 25 square miles of land that were set aside for the Lucky Man Cree Nation in the Settlement Agreement of 1989. The First Nation takes the position that this question must be answered by examining what was set aside by the surveyor, and then goes on to state that, “if there was no land received or surveyed for Lucky Man in 1887, then there was a shortfall no matter what the size of the population at the date of first survey.”⁷⁹ This would mean that it would not matter whether any of the Lucky Man members who had gone south returned once treaty annuity payments resumed, because it is common ground between the parties that there were a small number of Lucky Man band members who remained on IR 116 after 1885. The names of the people who remained appeared on the payroll of 1884, the last year before the Rebellion, which is also the last year that annuity payments were made, were repeated in the “dummy” paylists, and appear from 1890 onwards when treaty annuity payments were reinstated. The First Nation argues that, since this small number is greater than zero, which was the acreage set aside for the Band in 1887, Canada must validate its claim.

To reinforce its point, the First Nation points out that the 16,000 acres that were surveyed in 1887 were all credited to the Little Pine First Nation in its negotiated TLE settlement. According to the First Nation, that would mean that “it would essentially be double counting land”⁸⁰ if the 7,680 acres of the 1989 settlement were counted as if they had been surveyed in 1887. In addition to the argument about validation, the First Nation says it is important to characterize the land in its proper time frame, because to allocate the land in calculating TLE as if it had been set aside in 1887 “would potentially compromise the loss of use claim that the Lucky Man Cree nation has under the provisions of the settlement agreement.”⁸¹

The First Nation’s position is that it has two claims that should be negotiated. First, it has a claim for a TLE shortfall: the First Nation should have received land for more than 60 people and that the land it did receive in 1989 was only a partial settlement. Second, it has a claim because for 100 years it did not have reserve land.

Canada’s position is that the 7,680 acres received by Lucky Man in 1989 constitute a TLE settlement such that, for the First Nation to now have a valid

79 ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

80 ICC Transcript, Oral Submission of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

81 ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 26 (David Knoll).

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claim, it must prove that in 1887 it had more than 60 members entitled to be counted and, “if they don’t do it, they haven’t got an entitlement claim.”⁸²

Canada argues that the First Nation was not deprived of land between 1887 and 1989, because band members lived on IR 116, had a legal entitlement to live there, and had to surrender their interest in the land as a condition of the 1989 Settlement Agreement.

Canada also takes the position that, if the Lucky Man Cree Nation does have a treaty land entitlement of more than 60, according to the Settlement Agreement of 1989 it can be compensated only with money, and not with additional land that can acquire reserve status.

We do not think we need to decide whether the First Nation has a valid claim based on any number greater than zero, because we have previously stated that we accept the payroll of 1887, which shows a band membership of 62 as the starting point of the analysis. We are satisfied that applying the 1998 Guidelines would generate an entitlement number higher than 62. Accordingly, we do not need to decide whether an entitlement population of less than 60 but greater than zero would generate a validated claim for the First Nation.

We think the starting point for this analysis is the Treaty Land Entitlement Settlement Agreement signed between the Lucky Man Band and the Government of Canada in 1989. In the preamble to that agreement, the First Nation and Canada agree that “Canada has recognized and validated the Band’s claim to treaty land entitlement.”⁸³ In that agreement, Canada set aside 7,680 acres of land which it would “recommend to the Governor in Council that the Entitlement Lands be set aside for the use and benefit of the Lucky Man Band of Indians.”⁸⁴ Using the formula in Treaty 6, of a square mile or 640 acres for a family of five, this is sufficient land for 60 band members. The release clause, which states that the Band may have “a greater TLE than the quantum of land set aside as the Band’s reserve”⁸⁵ and therefore contemplates that the Band may be owed a greater amount of land,

82 ICC Transcript, Oral Submissions of the Lucky Man Cree Nation, August 18, 2005, p. 107 (Perry Robinson).

83 The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, Preamble (ICC Exhibit 10b, p. 2).

84 The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, section 2 (ICC Exhibit 10b, p. 2).

85 The Lucky Man Band of Indians, Treaty Land Entitlement Settlement Agreement, November 23, 1989, section 3 (ICC Exhibit 10b, pp. 3–4). The release clause is “given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band ... to any claim ...
a) to compensation for allegedly being denied the privilege of the full use and benefit of Reserve lands to which the Band had treaty entitlement;
b) to compensation in lieu of land should it be determined at some future date that the Band had a greater TLE than the quantum of land set aside as the Band’s reserve.”

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specifically refers to the quantum of land set aside as treaty land entitlement. We acknowledge that the First Nation and Canada made detailed argument about the characterization of the land but we find the Settlement Agreement unambiguous. Our interpretation of the Settlement Agreement is that it reflects the common intent of the parties, and that intent was to negotiate a settlement of outstanding treaty land entitlement, and to consider the 7,680 acres put into reserve status as TLE lands.

We conclude that Canada is to be credited with a TLE settlement of 7,680 acres, which satisfies an entitlement for 60 people. The date of this credit is 1989.

ISSUE 3: QUANTUM OF LAND IN RELATION TO TLE OBLIGATION

3 Having regard to the answers to these questions, has Canada satisfied its treaty land entitlement obligation to the Lucky Man Cree Nation with regard to land quantum?

In light of the evidence put before us, we find that Canada has not satisfied its TLE obligation to the Lucky Man Cree Nation, and we find a TLE shortfall of at least two people. We invite the parties to review the extensive additional research and payroll analysis that has already been conducted in this claim, and, if necessary, conduct additional research and analysis into the treaty land entitlement population of the Lucky Man Cree Nation, according to the 1998 Draft Guidelines. The payroll analysis should include all the names which appear on the 1887 DOFS payroll. We acknowledge the land quantum for 60 people that was negotiated between the parties in 1989. We also note that, according to that agreement, if it is later discovered that there is a TLE shortfall, section 3.B (b) provides for compensation in lieu of land.

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PART V

CONCLUSIONS AND RECOMMENDATION

We find that the Lucky Man Cree Nation has established that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under the terms of Treaty 6. We also find that Canada is to be credited with having provided 7,680 acres of TLE land to the First Nation. We therefore recommend:

That the Lucky Man Cree Nation's treaty land entitlement claim be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis, C.M., *Ad.E.* (Chair)
Chief Commissioner

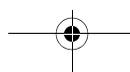
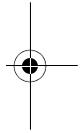
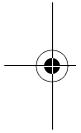
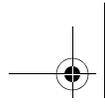


Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 28th day of February, 2008.



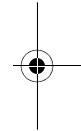
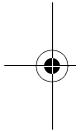


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APPENDIX A

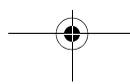
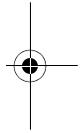
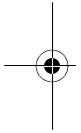
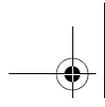
HISTORICAL BACKGROUND

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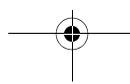
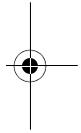
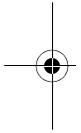
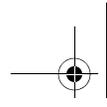




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LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

**TREATY 6: BIG BEAR'S RESISTANCE AND LUCKY MAN BAND'S FORMATION,
1876–79**

Negotiation and Signing of Treaty 6, 1876

Throughout the late 1860s and early 1870s, the Plains Cree were growing concerned about increasing encroachments on their territory by white settlers. The buffalo herds that had once been the cornerstone of their culture were vanishing from the prairie. Word had already spread to the Cree that the government had entered treaty negotiations with the Chippewa Indians to the east and the increasing presence of boundary and railway surveyors made the Cree uneasy about their security. These and other factors led some Cree chiefs to consider negotiating a treaty with the government to assure their future in the new dominion. The government, too, was anxious to formalize relations with the people of the plains so that the settlement of western Canada could proceed smoothly.¹

To that end, Treaty Commissioners were appointed in the 1870s by the Government of Canada to negotiate treaties with the Indian nations of the western Prairies. In 1876, Treaty Commissioners Alexander Morris (Lieutenant Governor of Manitoba and the North-West Territories, including present-day Saskatchewan), W.J. Christie (Hudson's Bay Company chief factor), and James McKay (Minister of Agriculture for Manitoba) met with Chiefs of the Cree and Assiniboine Nations at Fort Carlton and Fort Pitt.² Those negotiations resulted in a number of Chiefs signing Treaty 6 at or near Fort Carlton on August 23 and 28, 1876, and at Fort Pitt on September 9, 1876. Under the terms of the treaty, the Indian signatories agreed to “cede, release, surrender and yield up” to Canada “all their rights, titles and privileges, whatsoever, to the lands included within the ... limits” of the Treaty 6 area, as well as “all other lands wherever situated in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.”³ In exchange, the Indians were promised, among other things, reserve lands, annuities, farm implements, and instruction to ease their transition from a buffalo-based subsistence to an

- 1 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 168–72 (ICC Exhibit 1e, pp. 1–5); John L. Tobias, “A Brief History of Little Pine / Lucky Man Bands: 1870–1910,” Report prepared for the Federation of Saskatchewan Indians, [1975], p. 4 (ICC Exhibit 2a, p. 4).
- 2 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 196–244 (ICC Exhibit 1e, pp. 29–77).
- 3 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 1–2 (ICC Exhibit 1b, pp. 1–2).

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agrarian economy. Of greatest interest in the present inquiry are the following terms of Treaty 6:

Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that *the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.*⁴

At the time of treaty, Lucky Man was a headman under Big Bear, one of the most powerful of the Cree Chiefs, who later became known for protesting government attempts to erode native rights and autonomy.⁵ Big Bear was not present at the initial treaty negotiations at Fort Carlton and did not arrive at Fort Pitt until September 13, 1876, the final day of treaty talks that year.⁶ He appeared without his Band, informing the Commissioners that he represented other bands still out on the plains and that he would not sign treaty on their behalf without representatives from those bands being present. As Morris reported the exchange, Big Bear stated:

"I am glad to meet you, I am alone; but if I had known the time, I would have been here with all my people. I am not an undutiful child, I do not throw back your hand; but as my people are not here, I do not sign. I will tell them what I have heard, and next year I will come." About an hour afterwards the Big Bear came to Fort Pitt House to see the Governor, and again repeated that he accepted treaty as if he had signed it, and would come next year, with all his people, to meet the Commissioners and accept it.⁷

Several more Cree bands adhered to Treaty 6 in the years that followed. Despite Big Bear's assurance in 1876 that he would consider signing the

⁴ Canada, *Treaty No. 6 Between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 3 (ICC Exhibit 1b, p. 3). Emphasis added.

⁵ John L. Tobias, "A Brief History of Little Pine / Lucky Man Bands: 1870–1910," Report prepared for the Federation of Saskatchewan Indians, [1975], pp. 6–8 (ICC Exhibit 2a, pp. 6–8).

⁶ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 239–42 (ICC Exhibit 1e, pp. 72–76); John L. Tobias, "A Brief History of Little Pine / Lucky Man Bands: 1870–1910," Report prepared for the Federation of Saskatchewan Indians, [1975], p. 5 (ICC Exhibit 2a, p. 5).

⁷ Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 242 (ICC Exhibit 1e, p. 75).

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treaty the following year, he did not sign.⁸ Over the next few years, in fact, Big Bear became a leading advocate for revising Treaty 6 to reflect more favourable terms, both for those Indians who had already signed treaty and for those who had not yet adhered.⁹ Since he had not been present at the initial treaty meetings, he decided to wait and see whether the government would honour its treaty obligations, but in the meantime, he tried to negotiate and improve upon what he and other Cree leaders, such as Piapot and Little Pine, perceived to be inadequate treaty provisions. Big Bear also resisted attempts by the government to have the Crown's law become the exclusive law by which his people were governed and sought to preserve and strengthen Indian autonomy and influence.¹⁰ As historian John Tobias states:

Believing that small reserves were more susceptible to the control of the Canadian government and its officials, Big Bear, Piapot, and Little Pine sought to effect a concentration of the Cree people in an Indian territory similar to the reservation system in the United States. In such a territory the Cree would be able to preserve their autonomy, or at least limit the ability of others to control them; they would be better able to take concerted action on matters of importance to them.¹¹

The strong stands taken by Big Bear and other Indian leaders at this time led to their being regarded with a mixture of respect and fear – the latter often due to misunderstanding and misinformation.¹² As Big Bear biographer Hugh Dempsey wrote:

Big Bear was not the only chief to protest the lot of the Crees. Little Pine had refused to accept treaty in 1877 because it would mean losing his freedom, and *Piapot*, complaining that the terms of Treaty Four were inadequate, would not take a reserve. Even the peaceful chief Star Blanket was concerned about insufficient

- 8 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 10–18 (ICC Exhibit 1b, p. 10–18).
- 9 David Laird, Lieutenant Governor and Indian Superintendent, to the Minister of the Interior, May 9, 1878, Library and Archives Canada (hereafter LAC), RG 10, vol. 3655, file 9000 (ICC Exhibit 1a, pp. 44–47).
- 10 Edgar Dewdney, Indian Commissioner, to the Superintendent General of Indian Affairs (SGIA), January 2, 1880, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 77 (ICC Exhibit 1a, p. 124); John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 214–16 (ICC Exhibit 8c, pp. 3–5).
- 11 John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 217 (ICC Exhibit 8c, p. 6).
- 12 See L.N.F. Crozier, Superintendent, North-West Mounted Police (NWMP), to James MacLeod, Commissioner, NWMP, December 29, 1879, Canada, *North-West Mounted Police Force, Commissioner's Report, 1879*, 18 (ICC Exhibit 1a, p. 107); Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 74, 80, 86 (ICC Exhibit 3h, pp. 124, 130, 136); M.G. Dickieson to L. Vankoughnet, Deputy Superintendent General of Indian Affairs (DSGIA), July 26, 1879, LAC, RG 10, vol. 3672, file 10853 (ICC Exhibit 1a, pp. 84–86).

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help to start farming, while Beardy angrily demonstrated against the low rations. But Big Bear's dramatic appeals at Fort Pitt and Sounding Lake in 1877 and 1878 had made him the symbol of government defiance, both among disaffected Indians and the white people in nearby settlements. To the Cree, Big Bear was a determined, unyielding leader who was trying to unite the Indians and thus negotiate a better deal from the government. To many whites, he was an untrustworthy scoundrel who wanted to lead the plains tribes in a war of extermination. The growing community of Battleford feared the Cree chief, and wild rumours circulated that made it sound as though the plains would erupt in violence at any moment. In disgust, the Indian commissioner [Edgar Dewdney] commented that "the inhabitants have shown a great amount of unnecessary nervousness."¹³

Edgar Dewdney, the newly appointed Indian Commissioner for the North-West Territories who later became the lightning rod for Cree disaffection, also acknowledged after meeting Big Bear in 1879: "I have not formed such a poor opinion of 'Big Bear,' as some appear to have done. He is of a very independent character, self-reliant, and appears to know how to make his own living without begging from the Government."¹⁴

With the spread of settlement and the disappearance of the buffalo, the last quarter of the 19th century represented a time of great social, economic, and spiritual upheaval for the Plains Indians. In the years immediately following the initial execution of Treaty 6 in 1876, buffalo became more difficult to find. Big Bear and other Chiefs moved their bands into the Cypress Hills area near the border with the United States, in what would later become southwest Saskatchewan. That location brought them closer to the last remaining herds and the Cree bands regularly travelled south across the 49th parallel into the United States in pursuit of the great beasts.¹⁵

Initially, Canadian authorities were not opposed to the Cree crossing the border in search of food. They believed that the eventual depletion of buffalo stocks, together with the government's continued promotion of farming, would persuade Canada's Indians to enter treaty and take reserves. In the meantime, since Canadian authorities also believed that any problems with

- 13 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 86–87 (ICC Exhibit 3h, pp. 136–37). Emphasis in the original.
- 14 Edgar Dewdney, Indian Commissioner, to the SGIA, January 2, 1880, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 77 (ICC Exhibit 1a, p. 124).
- 15 L.N.F. Crozier, Superintendent, NWMP, to James MacLeod, Commissioner, NWMP, December 29, 1879, Canada, *North-West Mounted Police Force, Commissioner's Report, 1879*, 18–19 (ICC Exhibit 1a, pp. 107–8); Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 81–82 (ICC Exhibit 3h, pp. 131–32); DSGIA to the SGIA, December 31, 1879, Canada, *Report of the Deputy Superintendent General of Indian Affairs, 1879*, 12 (ICC Exhibit 1a, p. 117).

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Canadian Indians in the United States were related to the scarcity of buffalo, they requested that the Americans allow hunting within their borders:

The Canadian Government is making great exertions to settle these Indians and to induce them to become herdsmen and to cultivate land and raise supplies of food for themselves, but in the meantime and until this is accomplished Half-Breeds & Indians alike depend upon the chase, particularly of the Buffalo, for sustenance.¹⁶

Lucky Man Band's Formation and Adhesion to Treaty 6, 1879

As buffalo hunting became increasingly inconsistent and unproductive, some members of Big Bear's Band began to question his strategy of refusing to adhere to treaty, believing that the benefits of treaty might alleviate some of the hardships they were facing. Acceptance of treaty, some felt, would at least secure annuity payments, with which they could purchase provisions for their struggling families. As Tobias notes, Commissioner Dewdney was ready and willing to use the situation to his advantage:

The new Indian commissioner quickly sought to use rations as a means of getting control over the Cree. In the fall of 1879 he announced that rations were to be provided only to Indians who had taken treaty. To get the Cree into treaty more easily and to reduce the influence of recalcitrant leaders, Dewdney announced that he would adopt an old Hudson's Bay Company practice of recognizing any adult male Cree as chief of a new band if he could induce 100 or more persons to recognize him as leader. He expected that the starving Cypress Hills Cree would desert their old leaders to get rations. As a means of demonstrating Canada's control over the Cree, Dewdney ordered that only the sick, aged, and orphans should receive rations without providing some service to one of the government agencies in the west.

Dewdney's policies seemed to work, for when the Cree and Assiniboine who had gone to hunt in Montana returned starving, their resolve weakened. Little Pine's people convinced their chief to take treaty in 1879, but when Big Bear refused to do the same, almost half of his following joined Lucky Man or Thunderchild to form new bands in order to receive rations.¹⁷

On July 2, 1879, at Fort Walsh, Lucky Man signed an adhesion to Treaty 6 as the new Chief of a Band comprised of 20 lodges who had separated from

16 Canada, Order in Council PC 1322, September 22, 1879, LAC, RG 10, vol. 3652, file 8589-1 (ICC Exhibit 1a, pp. 94–102).

17 John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 216–17 (ICC Exhibit 8c, pp. 5–6).

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Big Bear's Band.¹⁸ The adhesions signed by Lucky Man and Little Pine stated:

And whereas the said Commissioner [Dewdney] has recognized the said "Little Pine" as the Headman of his Band, and the said Band of twenty lodges have selected and appointed Pap-a-way, "The Lucky Man," one of their number as the Headman of their Band, and have presented him as such to the said Commissioner, who has recognized and accepted him as such Headman;

Now, This Instrument Witnesseth that the said "Little Pine" and "Pap-a-way," or "the Lucky Man," for themselves and on behalf of the Bands which they represent, do transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of the Dominion of Canada, all their right, title and interest whatsoever which they have held or enjoyed of, in and to the territory described and fully set out in the said treaty [6]; also, all their right, title and interest whatsoever to all other lands wherever situated, whether within the limits of any other treaty heretofore made or hereafter to be made with Indians or elsewhere in Her Majesty's territories, to have and to hold the same unto and for the use of Her Majesty, the Queen, Her heirs and successors for ever. And do hereby agree to accept the several benefits, payments and reserves promised to the Indians adhering to the said treaty at Carlton and Fort Pitt on the dates above mentioned; and further, do solemnly engage to abide by, carry out and fulfil all the stipulations, obligations and conditions contained on the part of the Indians therein named, to be observed and performed, and in all things to conform to the articles of the said treaty, as if the said "Little Pine" and Pap-a-way or "the Lucky Man," and the Bands whom they represent had been originally contracting parties thereto, and had been present at the treaty at Carlton and Fort Pitt, and had there attached their signatures to the said treaty.¹⁹

Although Dewdney formally recognized Lucky Man as the leader of the 20 lodges referred to in the adhesion to Treaty 6 in 1879, Lucky Man and his followers remained closely aligned with Big Bear and Little Pine and continued to travel with them for several years.²⁰

At the annuity payments in September 1879 at Fort Walsh, 470 individuals were identified as belonging to the Lucky Man Band, including Lucky Man and four headmen.²¹ Although Fort Walsh was situated at the Cypress Hills, within the boundaries of Treaty 4 and well south of the limits of Treaty 6, Dewdney agreed to pay annuities to Little Pine and Lucky Man at that location because

18 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 14–15 (ICC Exhibit 1b, p. 15).

19 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 15 (ICC Exhibit 1b, p. 15).

20 Edgar Dewdney, Indian Commissioner, to L. Vankoughnet, DSGIA, July 4, 1879, LAC, RG 10, vol. 3636, file 6694-2 (ICC Exhibit 1a, p. 61); C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 267).

21 Lucky Man Band, Treaty annuity payroll, 1879, LAC, RG 10, vol. 9413, pp. 49–51 (ICC Exhibit 1c, pp. 1–3).

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he thought it would be onerous for the bands to travel to more northerly agencies when most of their hunting was confined to the south.²²

**GOVERNMENT ATTEMPTS TO SECURE THE SETTLEMENT
OF LUCKY MAN BAND, 1880–84**

Lucky Man did not select reserve land immediately after adhering to treaty. Like some other bands, he and his people struggled to subsist by traditional means. The buffalo were practically extinct by the end of the 1870s, however, and the Cree living in the Cypress Hills were constantly threatened with starvation. In his report for 1880, Dewdney reported: “The bulk of the Indians in the North-West Territories are to-day and have been for the last 12 months, almost entirely dependent on the Government for their existence.”²³ Nevertheless, they continued to hunt, travelling ever farther in search of sustenance and using the provisions allocated under treaty as a means of subsidizing their traditional pursuit of the buffalo.

Despite the depletion of the buffalo herds and increasing pressure from American authorities to block Cree access to hunting grounds south of the border, the government continued to have difficulty inducing the traditional hunters to settle on reserves. Treaty 4 Indian Agent Edwin Allen commented in his annual report for 1880 that Lucky Man, Little Pine, and another band, Piapot, had returned to Fort Walsh from hunting buffalo in the Missouri River district, but had arrived too late to receive the distribution of annuities in July that year. The Bands, he wrote, were weary from their search for buffalo and “in a very destitute condition, almost without clothing of any description.”²⁴

The first discussions between Lucky Man and the government regarding reserve locations appear to have occurred in the fall of 1880. Indian Agent Allen met with the chiefs of several bands at Fort Walsh to determine whether they intended to select and settle on reserves:

I held several councils with the Indians who had not yet determined on a reservation with a view of ascertaining their opinion on the matter; there were several chiefs present, the principal being Pie-à-pot, Little Pine and Lucky Man. The first two of these chiefs expressed a wish of settling in this mountain, and *Lucky Man wished to locate in the neighbourhood of Battleford. I could get no definite answer from any of the chiefs as to when they would settle down. They were anxious to*

- 22 Edgar Dewdney, Indian Commissioner, to L. Vankoughnet, DSGIA, July 4, 1879, LAC, RG 10, vol. 3636, file 6694-2 (ICC Exhibit 1a, p. 62).
- 23 E. Dewdney, Indian Commissioner, to the SGIA, December 31, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 91 (ICC Exhibit 1a, p. 153).
- 24 Edwin Allen, Indian Agent, to the SGIA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133).

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receive their annuity payments. ... I consulted Colonel Macleod, and he agreed with me in recommending the payment of those who had not arrived for the regular payment in July. The Indians ... *came from the plains with the expectation of receiving their payments and purchasing clothing, &c., before returning again,* the camp numbered about 2,500 persons drawing rations.²⁵

Between October 1 and 6, arrangements were made to pay the bands that had missed the earlier annuity distributions. The Lucky Man payroll shows that 754 individuals were paid with the Band at Fort Walsh in 1880.²⁶

Despite indicating that he wished to locate near Battleford within the boundaries of Treaty 6, Lucky Man continued to pursue the buffalo in southern Saskatchewan and the United States, showing no inclination to settle on a reserve during the ensuing year. No reserve was set apart for the Band at that time, although Commissioner Dewdney and many of his colleagues maintained a belief that the ever-decreasing supply of buffalo would soon force the Cree onto reserves. In 1881, Dewdney instructed the new Indian Agency Inspector, T.P. Wadsworth, to attempt to convince the Treaty 6 Indians to move north:

From Mr. Allen you will get a copy of the payroll of Indians paid last October at Fort Walsh. You will see from it that Stragglers from no less than 43 different Bands were paid there. They must be told that they must join their own Chiefs and cannot be paid this year unless they accede to this request.

There are three Bands, viz: "Little Pine" "Pie Pot" and "Lucky-Man" who have not settled on their Reservations – altho "Pie pot" agreed, I believe, to take one of Reservations surveyed at Crooked Lakes, and he should move there with his Band. "Little Pine" & "Lucky-Man" when they joined the treaty, were anxious to be in Treaty 6. You will see the agreement in Mr. Morris' Book of Treaties made with the Indians – page 366. Last year they returned so late from the South and in such a wretched condition that it was thought advisable to pay them at Ft. Walsh but, at that time, they were told they must go North this year, and I hope you will be able to bring this about. These Indians are the wildest of our Plain Indians and have remained out as long as there was any chance of getting buffalo. I am of the opinion that this spring they will see that it is useless to depend any longer on that source of food supply and you sh[oul]d take the earliest opportunity of informing them of the urgent necessity there is for their settling down. If they agree to this proposition & you feel yourself satisfied that they are in earnest – let me know at once in order that provisions might be made to meet their demand.

I promised "Lucky-Man" that if I came south this year, I would take him with me and let him see that those already settled were making a very good start and

25 Edwin Allen, Indian Agent, to the SGLA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133). Emphasis added.

26 Lucky Man Band, Treaty annuity payroll, 1880, LAC, RG 10, vol. 9414, pp. 18–21 (ICC Exhibit 1c, pp. 4–7).

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that the reports they heard from Half Breeds and interested parties that Indians could not live on the assistance given them by the Government, were untrue. Inform him that I find it impossible to visit the South as I had expected during this Spring, but that if he is anxious to go North & see for himself, you will assist him. He could arrange for his Band to go to the Saskatchewan and you might take him with you and assist him to look out for a location. I would not object to his taking another of the Headmen of his Band with him.²⁷

Still, the Cree remained resolute. In 1881, 802 people were paid annuities with the Lucky Man Band at Fort Walsh.²⁸

The Fort Walsh area remained a rendezvous point for the Cree. Lucky Man, Little Pine, and Big Bear continued to hunt for buffalo during part of the year in the United States,²⁹ and although it was reported that Big Bear was “trying to get a reserve from the US Government,”³⁰ he and the other Cree returned to Fort Walsh when the hunt was over to receive annuities and purchase provisions.³¹

The government and the North-West Mounted Police (NWMP) eventually decided that Fort Walsh should be closed to discourage this practice and to force the bands that had not yet chosen reserves to make their site selections.³² A report by Indian Agent Denny reflected the government position at the time:

It will be a good thing should the Police and Indian Dept leave this place altogether as early as possible next summer, before the big camp of mixed Crees, now across the line come back.

The Indians will always make this a centre, as long as the Police and I[ndian] Dept remain, and I can see that the only way to get them on to their reserves is for this place to be abandoned.

...

If all were not here, the Indians certainly would not come here, and if the Police and I[ndian] Dept wait till the Indians go back to their reserves, they will remain here always. This big camp I speak of is comprised of Indians from all points some from Edmonton, there are about 200 lodges, the principle Chiefs being Little Pine, Little Poplar, Lucky Man and Big Bear. This camp is now across

27 Edgar Dewdney, Indian Commissioner, to T.P. Wadsworth, Inspector of Indian Agencies, February 21, 1881, LAC, RG 10, vol. 3726, file 27335 (ICC Exhibit 1a, pp. 171–73).

28 Lucky Man Band, Treaty annuity paylist, 1881, LAC, RG 10, vol. 9415, pp. 6–10 (ICC Exhibit 1c, pp. 8–12).

29 C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 267).

30 C.E. Denny, Indian Agent, to the Indian Commissioner, October 24, 1881, LAC, RG 10, vol. 3740, file 28748-1 (ICC Exhibit 1a, pp. 194–95).

31 Draft telegram to E. Dewdney, Indian Commissioner, April 21, 1885, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, pp. 335–36).

32 Edgar Dewdney, Indian Commissioner, to Lieutenant Colonel Irvine, Commissioner, NWMP, October 27, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 364).

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the line, but in case they run out of Buffalos or are driven back by the Americans will at once make for this place, but if this place were abandoned I think they would gradually break up and go back to where they belong.³³

Denny reiterated his views in a subsequent letter to Dewdney:

As long as there are a few Buffalo South and around these Hills and as long as the Police and Indian Department remain at this place this camp of Crees will remain away from their Reserves and come in here for their payments and when they run out of provisions for grub.

They go across the line for Buffalo and whiskey and have easy times and then congregate and come to this place, which is within easy reach when they get a little hard up.

This combination is a hard one to break up and can only be done in two ways. Either men enough should be stationed here to make them do what is required or else this point should be altogether abandoned and that as early as possible.³⁴

The government was also concerned that the Cypress Hills offered limited agricultural potential. As early as 1880, Indian Agent Allen had noted the difficulties experienced by the Assiniboines in the area:

I next visited the Assiniboine Reservation at the Head of Cypress Mountain. The reserve is situated in an excellent locality, for wood and water, but the climate is such that it is useless to think of continuing agriculture in that locality owing to the early frosts and snow storms which are so prevalent. ... Although their crops were a failure they appear in no way discouraged, on the contrary, they speak of looking for a better location for their reserve next year.³⁵

These sentiments were echoed by the NWMP Commissioner the following year in his recommendation that the government close Fort Walsh:

In making this recommendation I am in a great measure prompted by the knowledge of the fact that the Indian Department do not consider that the farming

33 C.E. Denny, Indian Agent, to the Assistant Indian Commissioner, December 6, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, pp. 266–67).
 34 C.E. Denny, Indian Agent, to Edgar Dewdney, Indian Commissioner, December 14, 1881, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 273).
 35 Edwin Allen, Indian Agent, to the SGLA, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880*, 106 (ICC Exhibit 1a, p. 133).

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operations at Maple Creek have been successful in the past, and that they are still less likely to prove so in the future.

...

It has been proved beyond a doubt that the Cypress Hills are not suited for agricultural purposes. The police force has been stationed here for six years, and yet there is not a *bona fide* settler within one hundred miles of Fort Walsh.³⁶

Another aggravation for the Crown was the fact that Fort Walsh and the Cypress Hills were located within the Treaty 4 area. Dewdney and the government made it clear that they did not want to have Lucky Man or any other band selecting lands outside its own treaty area.

The removal of Indians from within the limits of a treaty to which they were parties to another treaty in which they have no interest is, as you are aware, considered very objectionable by the Department.

Complications which it is most desirable to avoid are almost certain to arise at some time or another unless the status of the Bands included with the various treaties is carefully preserved³⁷

Although the department desired the Cree to return north to the Treaty 6 area, the Cree were not easily persuaded to cooperate. In a report to the Minister of the Interior, NWMP Commissioner A.G. Irvine described his attempt to convince the Cree to move north:

At the time of “Pie-a-pot’s” departure from Fort Walsh [June 23, 1882], the Cree chief “Big Bear” (non-treaty Indian), “Lucky Man,” and “Little Pine,” with about 200 lodges, finding that I would not assist them in any way unless they went north, started from Fort Walsh to the plains in a southerly direction. These chiefs informed me that their intention was to take “a turn” on the plains in quest of Buffalo, and after their hunt to go north. They added that they did not intend crossing the international boundary line, – a statement which I considered questionable at the time.

I, therefore, at the request of the officer commanding the United States troops at Fort Assinaboine, informed the American authorities of the departure of these chiefs. The Americans in expressing their thanks were much gratified with the information imparted.³⁸

36 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, February 1, 1882, Canada, *Report of the Commissioner, North-West Mounted Police, 1881*, 13 (ICC Exhibit 1a, p. 303).

37 Draft, Department of Indian Affairs to Edgar Dewdney, Indian Commissioner, May 11, 1882, LAC, RG 10, vol. 3744, file 29056-2 (ICC Exhibit 1a, p. 337–38).

38 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 392).

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Irvine went on to state that, with the departure of these Chiefs, “Fort Walsh was entirely rid of Indians.”³⁹ Irvine’s assessment, however, turned out to be premature; with the coming of fall, he realized that the fort could not be closed as planned.

In the fall of 1882, the Cree again returned to Fort Walsh following the annual buffalo hunt. The hunt had not gone well that season. Some 2,000 Indians representing various bands gathered at the fort, their condition apparently so poor that it was later described by the NWMP surgeon, Augustus Jukes, as a state of “extreme wretchedness.”⁴⁰ Irvine himself thought their condition to be so dire that they could not make a journey north even if they could be persuaded to do so.⁴¹ Nevertheless, he convened a general council with the Chiefs at Fort Walsh on September 17, 1882, to discuss the matter. Several Chiefs at the meeting indicated that they were prepared to select reserve sites, although some were still reluctant to move north:

For some considerable time they made no demand for aid from the Government, but as the cold weather came on, being very poorly clad, and insufficiently supplied with food, they experienced much hardship from exposure and starvation. It was then that they requested me to transmit to you their message to the effect that “Pie-a-pot” wished to settle on the reserve given him by Mr. Wadsworth last summer. “Little Pine” who is a relation of “Pie-a-pot’s” to settle alongside of him, “Lucky man” and “Front man” wanted their reserves at Big Lake [located within the Treaty 4 boundaries] about thirty miles east of Fort Walsh. All wanted to receive their annuity money to enable them to make their winter Buffalo hunt.⁴²

Although Irvine had earlier told the Chiefs “that they must go north or forfeit any help from the Government,”⁴³ he now believed that “if no aid was accorded them, they would starve, and in a starving condition might have attempted to commit depredations.”⁴⁴

Despite Dewdney’s reluctance to pay annuities again at Fort Walsh, he eventually agreed to do so. He instructed Irvine, however, to inform the Indians that requests from the northern Cree for reserves in the Cypress Hills

39 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 392).

40 Dr Augustus Jukes, Surgeon, NWMP, to F. White, Comptroller, NWMP, October 17, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, p. 355).

41 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 5 (ICC Exhibit 1a, p. 393).

42 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 4 (ICC Exhibit 1a, p. 393).

43 J.N. McIlree, Superintendent, NWMP, to the Indian Commissioner, December 2, 1882, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, p. 380).

44 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1883, Canada, *Report of the Commissioner of the North-West Mounted Police, 1882*, 5 (ICC Exhibit 1a, p. 393).

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would not be entertained, nor would the Cree receive further assistance unless they moved north:

You are aware that the Southern Country is not the Country of the Crees and they should be told that it is no good their making a request to be given Reserves in the South.

I hope you will impress upon the Indians that they have brought their helpless condition on themselves, that they have been warned that they would suffer if they remained South and the longer they continue to act against the wishes of the Govt the more wretched will they become.⁴⁵

The department was forced to abandon its original plan to close Fort Walsh during the summer of 1882, despite its expectation that the longer the post remained open, the more difficult it would be to entice the Indians to move northward. Treaty 4 Indian Agent Allan McDonald distributed annuity money in the fall of 1882 at Fort Walsh, at which time the payroll recorded 872 Indians paid with the Lucky Man Band.⁴⁶ In the department's annual report, however, Lucky Man was said to be leading a Band of about 1,200 – Pie-a-pot, Foremost Man, Big Bear, and Little Pine were leading another 3,200 – and that the “bulk of these Indians belong to a chief in the north, but who have temporarily joined these chiefs in order that they may obtain their annuity in the south.”⁴⁷ Fort Walsh remained open through the winter of 1882–83, and additional provisions were distributed to prevent starvation among the approximately 4,000 Indians camped in the Cypress Hills.⁴⁸

On December 8, 1882, Chief Big Bear finally signed an adhesion to Treaty 6 at Fort Walsh.⁴⁹ At this time, Dewdney reasserted his intention to have the Cree move north to the areas set out in Treaty 6. In Dewdney's eyes, the situation at Fort Walsh was worsening. In his annual report to the department, he wrote:

The large sum expended last year in assisting Indians to remove to their reserves was, to a great extent, thrown away, the greater number of them having

45 Edgar Dewdney, Indian Commissioner, to A.G. Irvine, Commissioner, NWMP, October 27, 1882, LAC, RG 10, vol. 3744, file 29506-2 (ICC Exhibit 1a, pp. 364–65).

46 Lucky Man Band, Treaty annuity payroll, 1882, LAC, RG 10, vol. 9415A, pp. 83–87 (ICC Exhibit 1c, pp. 13–17).

47 Tabular statement entitled “Number of Indians in the North-West Territories and their whereabouts on the 31st December, 1882,” in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1882*, 202–3 (ICC Exhibit 1a, pp. 389–90).

48 Frank Norman, Inspector, NWMP and Acting Indian Agent, to E.T. Galt, Assistant Indian Commissioner, January 3, 1883, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, pp. 415–16).

49 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 16 (ICC Exhibit 1b, p. 16).

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returned to Fort Walsh, where they had been accustomed to be fed without work, and where they had been bribed by the traders to remain and receive their payments.

These Indians until lately made the Cypress Hills their point of rendezvous, and were a source of more or less anxiety, as, owing to their proximity to the International boundary line, they were constantly tempted to make incursions across the border into the camps of the United States Indians on horse-thieving expeditions; these, of course, being followed up by reprisals, which in the end, if not stopped, might have led to more serious complications of an international nature.

I consequently decided to make another effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion.

On being approached in this direction it was discovered that they were desirous of procuring fixed ammunition, of making one final horse-stealing expedition across the line in all the force at their command, return with as many scalps as possible, then after a certain delay acquiesce with our wishes. Their requests were refused, and on being told that every effort would be made on our behalf, as well as by the United States troops, to frustrate any such attempt, and to catch and punish the offenders, the idea, in the main, was abandoned. Repeated promises were then made on the part of the Indians, and as often broken by them, to leave Cypress Hills, until after two months constant talking and urging, the 2nd of July saw all but some 125 lodges of recalcitrants with their backs towards the hills on the trails leading to their respective reserves.⁵⁰

Lucky Man and some of his followers were among those who went north following the demolition of Fort Walsh in 1883 but they soon returned to the Cypress Hills. Upon arriving in Maple Creek, they were met by Dewdney's Assistant Commissioner, Hayter Reed, and told to return north. Lucky Man explained that he had only returned to gather up some of his members who had stayed behind. Dewdney, who later questioned the Chief's motives in his 1883 annual report, had instructed Reed to have Lucky Man and his people escorted northward, if necessary, by a detachment of the NWMP to ensure they would not stray.⁵¹ Irvine reported on the NWMP's efforts in this regard:

During the month of July, a strong escort was furnished to proceed with the Indians travelling from Maple Creek to Battleford, with a view of their settling upon their legitimate reserves. In the month of September it was found that notwithstanding the number of Indians who, at the request of the Indian Department, had proceeded to their reserves, we had still a very large camp

50 Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426).

51 Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426)

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remaining at Maple Creek, at which place they desired to remain for the winter. Knowing it to be the policy of the Government that these Indians should be removed from the proximity of the boundary, and located on their reserves north of the Canadian Pacific Railway line, and being fully aware how important it was that this judicious policy should be carried into effect, I was but too willing, at the request of [His] Honour the Lieutenant-Governor, to accompany the Acting Assistant Indian Commissioner to Maple Creek for the purpose of moving the Indians as desired.

It affords me much pleasure to be able to report that the result of my mission was an eminently successful one. On mustering the Indians, I inform[ed] them that it was not the intention of the Government to allow them to remain at Maple Creek as they had no reserve there, and further that their loitering about the Canadian Pacific Railway line was contrary to their own interests. I explained to them the terms of the Vagrant Act recently extended to these Territories, stating to them that no body of men would be allowed to remain idly about the country, and that unless the wishes of the Government were acceded to, I should be forced to make arrests. In the case of “Lucky Man” who had returned from his reservation with the buckboards and carts given him by the Indian Department, I explained to that Chief that these articles had been supplied with a view of enabling the Indians to follow agricultural pursuits on their reserves, and thus gain their own livelihood. I told “Lucky Man” that he had accepted the articles in question, and other aid from the Indian Department, upon these conditions, and that unless he promptly returned with his entire camp, to their reservation, he would be arrested.

The Indians brought forward all manner of frivolous excuses in view of having their move delayed. These excuses I would not entertain for a moment. I told the Indians so in the plainest of language, and they proceeded northward the same day.⁵²

Dewdney knew that the government policy of moving the Cree onto reserves meant they would have to abandon their traditional ways, and he acknowledged that this decision was difficult for them to accept:

It is a matter of no wonder that such a strong stand should have been made against our repeated efforts to cause them to leave their old haunts, places associated with thoughts of freedom and plenty, whilst the buffalo roamed the Plains in countless numbers. Leaving these hills behind them dashed to the ground the last hope to which they had so strenuously and fondly clung, of once more being able to live by the chase.⁵³

By November 1883, the Lucky Man and Little Pine Bands had camped near Battleford. The department’s year-end report included the following

52 A.G. Irvine, Commissioner, NWMP, to the Minister of the Interior, January 1, 1884, Canada, *Report of the Commissioner of the North-West Mounted Police, 1883*, 15–16 (ICC Exhibit 1a, pp. 452–53).
 53 Edgar Dewdney, Indian Commissioner, to the SGIA, October 2, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 93 (ICC Exhibit 1a, p. 426).

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comments with regard to Little Pine's people: "These Indians are at Battleford and not actually on the land selected by them, but are to move on to it so soon as the warm weather of the spring will permit."⁵⁴ The Lucky Man Band was described in these terms: "These Indians may be considered as virtually settled, as they are being kept working in neighbourhood of Battleford prior to moving to Reserve, being adjacent."⁵⁵ The payroll indicates that at the November 15, 1883, distribution of annuities at Battleford, 366 Indians were paid with the Lucky Man Band.⁵⁶

Numbering of Reserves in Manitoba and the North-West Territories, 1883

In the spring of 1883, Dewdney informed Assistant Indian Commissioner E.T. Galt of his intention to number all reserves, whether they had been surveyed or not, in Manitoba and the North-West Territories.⁵⁷ Reserves 116, 117, and 118 were assigned to Little Pine, Lucky Man, and Big Bear, respectively.⁵⁸ Since 1918, however, the number 117 has been used to denote the Witchekan Lake Indian Reserve, which was set apart in that year for the Witchekan Lake Band.⁵⁹ Whether the number 117 was ever associated with an actual site on which Lucky Man *intended* to settle is unclear. In 1883, Lucky Man appears to have camped in the Battleford area, although there is no precise description of his location. Similarly, there is no evidence before us that a reserve 117 was ever *formally* set aside for the Lucky Man Band. Still, it is interesting to note that, later in the spring of 1883, Commissioner Dewdney purchased 10 yoke of oxen as required by Treaty 6 "to go North with the Indians, for 'Big Bear,' 'Little Pine' and 'Lucky Man.'"⁶⁰

BIG BEAR'S RESISTANCE AND THE DISINTEGRATION OF LUCKY MAN BAND, 1884–85

Throughout this period, tensions between the government and the Cree increased. The government believed that Big Bear was trying to establish the Cree on adjacent reserves so that they could be readily organized into a

- 54 Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 205 (ICC Exhibit 1a, p. 449).
- 55 Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 205 (ICC Exhibit 1a, p. 449).
- 56 Lucky Man Band, Treaty annuity payroll, 1883, LAC, RG 10, vol. 9416, pp. 82–83 (ICC Exhibit 1c, pp. 18–19).
- 57 Edgar Dewdney, Indian Commissioner, to E.T. Galt, March 5, 1883, LAC, RG 10, vol. 3582, file 889 (ICC Exhibit 1a, pp. 419–20).
- 58 Edgar Dewdney, Indian Commissioner, to the SGIA, August 21, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 1a, pp. 716–17).
- 59 G.A. Poupore, Director, Lands and Membership, to Director of Operations, Saskatchewan Region, April 28, 1977 (ICC Exhibit 1a, pp. 1307–8).
- 60 W. McGirr for the Indian Commissioner, to the SGIA, May 25, 1883, LAC, RG 10, vol. 3744, file 29506-3 (ICC Exhibit 1a, p. 422).

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unified confederation.⁶¹ The Department of Indian Affairs viewed this as a potential threat and instituted plans to maintain distance between sites of proposed reserves. Hayter Reed wrote to the Superintendent General of Indian Affairs in April 1884 to inform him of the Commissioner's intentions concerning reserves:

The Agent was ordered to place [farming] instructors on Red Pheasant's, Poundmakers, Little Pines, Lucky Mans, Thunder Child and Big Bears Reserves—; but as the bands of Chiefs Little Pine, & Lucky Man have not fulfilled their promises by settling on Reserves, and working, I am under the belief none have been engaged for them.

...

If the Bands of Little Pine and Lucky Man should consent to settle on Reserves where the Commissioner considers it most desirable to place them, they will be well away from other Indians (viz at the Two Ponds about 30 miles above Poundmakers on the Battle River.) Consequently it would be advisable to have an Instructor, instead of an Overseer for them, if not one for each band; and the latter course I respectfully submit would be found to be in the interests of the Department; owing to their numbers, (over 700 between the two bands).⁶²

Battleford District Indian Agent J.M. Rae advised Reed in April 1884 that “Little Pine's and Lucky Man's Bands started from here [Battleford] to go to *their Reserves* as per agreement.”⁶³ The location of Lucky Man's “reserve” was later described by Rae as being “near Poundmaker's,”⁶⁴ but, by the end of spring in 1884, there was still no formal survey of a reserve for the Lucky Man Band.

Lucky Man and Little Pine stopped at Poundmaker's Reserve en route from Battleford to “their Reserves.” Poundmaker invited the Chiefs to be present when Chief Big Bear arrived for a council planned for later that spring.⁶⁵ Rae sent a proxy, Mr Gardner, to meet the Lucky Man and Little Pine Bands at Poundmaker's Reserve. Gardner had instructions to persuade the two Chiefs to accept their treaty provisions and to move from Poundmaker's Reserve to establish their own settlements. Gardner informed Lucky Man and Little Pine

- 61 DIA to Edgar Dewdney, Indian Commissioner, July 7, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 514); Hugh Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 125 (ICC Exhibit 3h, p. 190).
- 62 Hayter Reed, Acting Indian Commissioner, to the SGIA, April 14, 1884, LAC, RG 10, vol. 3664, file 9843 (ICC Exhibit 1a, pp. 467–68).
- 63 J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473). Emphasis added.
- 64 J.M. Rae, Indian Agent, to the SGIA, October 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884*, 85 (ICC Exhibit 1a, p. 540).
- 65 J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).

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that, until they accepted their farming implements and cattle and started to work, they would receive no further rations.⁶⁶

Rae reported that Gardner was unable to convince the Chiefs to accept the treaty provisions:

Mr. Gardner whom I sent out with the Instructor tried to get the young men to take their implements and cattle (the latter I had to take from the other reserves as I did not want them to have as an excuse that they had nothing to work with). The Chiefs however prevailed on the young men not to take them. Under the circumstances and acting on my order, Mr. Gardner stopped their rations.⁶⁷

Kamanitowas Leaves Lucky Man to Settle with Little Pine's Band, Spring 1884

Eventually, some younger members of the two Bands decided to break ranks with their Chiefs and start farming. They were joined shortly by Chief Little Pine himself. As Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, noted in his annual report:

On the opposite side of Battle River [from the reserves of Thunder Child and Nepahase] are the reserves of Chiefs Pondmaker [sic] and Little Pine. The band of the latter chief only settled on their reserve last spring [i.e., spring 1884]. They however ploughed seventy acres, fenced fifty acres and planted thirty acres of land, besides cutting one hundred tons of hay, and erecting twelve houses, two stables, a store house and a building in which to keep their implements and tools.⁶⁸

In May 1884, the Deputy Superintendent General of Indian Affairs gave instructions to Indian Commissioner Dewdney in anticipation of the possibility of "Little Pine and Lucky Man consenting to settle on Reserves where you consider it most desirable to place them." Dewdney was instructed that, "[i]n the selection of Instructors, the importance of a Band should in all cases be considered. Bands like Lucky Man and Little Pine for instance, numbering 700 souls, will require a more experienced and intelligent man."⁶⁹

The arrival of Big Bear at Poundmaker's Reserve in May 1884 and an altercation over Instructor Craig's control of rations pre-empted the

66 J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).

67 J.M. Rae, Indian Agent, to the Indian Commissioner, April 23, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 473).

68 SGIA to the Governor General in Council, Annual Report, January 1, 1884 [sic 1885], Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, xlv (ICC Exhibit 1a, p. 614).

69 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, May 10, 1884, LAC, RG 10, vol. 4486, p. 518 (ICC Exhibit 1a, p. 478).

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government's plans, at least temporarily. In his annual report written in the fall of 1884, Indian Agent Rae recounted the events of the preceding year:

In respect to the bands of Little Pine and Lucky Man, I may say that having come in late in the fall [of 1883], they were kept close to Battleford, so as to avoid expense in freighting provisions. They, however, were not idle and cut several hundred cords of wood during winter. In spring they moved off towards their reserve near Poundmaker's, and though I had sent out their implements and cattle, through evil counsel, they remained at Poundmaker's for a long time. During this period I refused to feed them. At last, owing to hunger, they agreed to go on to their reserve. Most of Lucky Man's men joined Little Pine, who has always shown himself well inclined. In this respect, however, his head councillor, Mistutinwas, is the better of the two. They then began working, and did well, getting in thirty-four acres crop and fencing the same, also putting up a house and storehouse for the instructor. In May Big Bear and his party came down from Pitt, and Lucky Man's people began to leave their work. Kamanitowas, the headman, however, said he wished to leave his chief and join Little Pine. There was not much trouble with those who now remained on the reserve, until a Thirst Dance was begun, when even Little Pine and his people left their work for a short time, and the affair nearly ended in a riot, as one of the Indians struck Instructor Craig, and when the police attempted to arrest the man, they at first refused to give him up.⁷⁰

Lucky Man's Sons' Conflict with Instructor Craig over Rations, June 1884

The incident referred to by Rae began when two of Lucky Man's sons – recovering from illness –sought rations from Instructor Craig, who deemed one of them, Kaweechatwaymat, had healed sufficiently to work. When Craig refused him rations and treated him roughly, Kaweechatwaymat retaliated by striking the instructor with an axe handle. Craig reported the incident to the police, and Lucky Man's sons reported it to the rest of the Indians assembled for the thirst dance. Tensions escalated.⁷¹ Colonel Crozier, who went to apprehend the accused man, later reported:

The chiefs including Big Bear were doing, or seemed to be doing all they could to have the man given up quietly; they said however from the first, they did not think their influence was sufficient to induce the young men to consent to this course,

70 J.M. Rae, Indian Agent, to the SGIA, October 13, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year ended 31st December, 1884*, 85 (ICC Exhibit 1a, p. 540).

71 Hugh Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 128 (ICC Exhibit 3h, p. 194).

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and if an attempt was made to take him forcibly, they felt sure bloodshed would follow.⁷²

In the end, it was Lucky Man, with the support of the other Chiefs, who finally delivered his son to the police.⁷³ Although Indian Commissioner Dewdney was convinced “that Farming Instructor Craig was too overbearing in his manner towards the Indians,”⁷⁴ the Deputy Superintendent General of Indian Affairs, in his annual report, placed the blame on the Indians: “[t]he instructor’s refusal was in accord with the general requirements of the Department. ... the offender ... was brought to Battleford, tried, and imprisoned for a brief period.”⁷⁵

Following this incident, Big Bear requested a meeting with Indian Agent Rae, Colonel Crozier, and William McKay:

Big Bear speaking for the rest of the Indians stated that they were very sorry for what had occurred, and promised that the like would not occur again, and that they did not fully understand the law in the stand they took in protecting the prisoners. He (Big Bear) wants his Reserve between Lucky Mans and Little Pines, who is moving to his new Reserve at Wolf Dung Hill, about 40 miles beyond Poundmakers.⁷⁶

Although the actual location of Wolf Dung Hill is not clearly described in the documentation, Big Bear’s proposed site reportedly would have positioned him next to Poundmaker, which the department strongly resisted. In May 1884, Vankoughnet had advised Dewdney that “Big Bear should not be allowed to take his Reserve near [Poundmaker’s reserve, close to] Battleford, his country being in the Fort Pitt district, and for other obvious reasons.”⁷⁷ In a telegram to the Commissioner at the end of June, Vankoughnet was more

- 72 Colonel Crozier, NWMP, to Edgar Dewdney, Lieutenant Governor of the North-West Territories, June 22, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 493). See also A.G. Irvine, Commissioner, NWMP, Annual Report, 1884, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1884*, 10–11 (ICC Exhibit 1a, pp. 622–23).
- 73 Colonel Crozier, NWMP, to Edgar Dewdney, Lieutenant Governor of the North-West Territories, June 22, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 495).
- 74 Edgar Dewdney, Indian Commissioner, to the Indian Agent, Battleford, July 4, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 509).
- 75 SGIA to the Governor General in Council, January 1, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, x (ICC Exhibit 1a, p. 607).
- 76 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, June 28, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 503).
- 77 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, May 12, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 479).

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direct: “Fear more serious complications in future if Big Bear and Pound Maker have Reserves adjoining.”⁷⁸

A few days later, Rae reported to Commissioner Dewdney that he had heard that Lucky Man, Poundmaker, and Big Bear were planning to take up a reserve at Buffalo Lake, near Hobbema, Alberta.⁷⁹ He also warned Poundmaker that he would not receive any assistance from the government if he was to abandon his existing reserve.⁸⁰ Shortly thereafter, Dewdney wired the following instructions to Rae:

As Little Pine behaving his band to be well rationed. Lucky Man band to be fed if in any way acquiescing to your demands in this you to judge. Poundmaker will not be allowed another Reserve or take cattle.⁸¹

The warning did not sway Poundmaker or Lucky Man; both departed with Big Bear for Buffalo Lake.⁸² Chief Little Pine and most of his Band, however, chose not to follow Big Bear and remained at their reserve. On June 28, Indian Agent Rae reported: “Since the prisoner was taken his [Little Pine’s] men have been working every day; he has about 30 tents and some of Lucky Man’s men have joined him.”⁸³

A week later, in early July 1884, Dominion Land Surveyor John C. Nelson arrived in the Battleford area to survey reserves for bands desiring them. Chief Little Pine, however, “expressed a wish to have the survey of his Reserve postponed,”⁸⁴ and Nelson left without conducting a survey.

Some members of the Lucky Man Band continued to travel with Big Bear and Lucky Man during the summer of 1884, while others apparently remained with Little Pine. According to the October 20, 1884, payroll, only 82 Indians were paid with the Lucky Man Band at a “reserve,” which was not specifically identified.⁸⁵ Lucky Man himself did not appear on the payroll for that year.⁸⁶

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- 78 DSGIA to Edgar Dewdney, Indian Commissioner, June 27, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 502).
 - 79 J.M. Rae, Indian Agent, to the Indian Commissioner, June 29, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 507).
 - 80 J.M. Rae, Indian Agent, to the Indian Commissioner, June 29, 1884, LAC, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Exhibit 1a, p. 507).
 - 81 Edgar Dewdney, Indian Commissioner, to the Indian Agent, Battleford, July 5, 1884, LAC, RG 10, vol. 3576, file 309, pt A (ICC Exhibit 1a, p. 513).
 - 82 J.M. Rae, Indian Agent, to the Indian Commissioner, June 30, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 508).
 - 83 J.M. Rae, Indian Agent, to the Indian Commissioner, June 30, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 503).
 - 84 John C. Nelson, Dominion Land Surveyor, to the Indian Commissioner, December 31, 1884, LAC, RG 10, vol. 3703, file 17728 (ICC Exhibit 1a, pp. 596–97).
 - 85 Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).
 - 86 Lucky Man Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 109 (ICC Exhibit 1c, p. 20).

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Lucky Man's and Other Chiefs' Grievances: August 1884 Duck Lake Council

At the end of July 1884, Lucky Man and Big Bear went to Duck Lake in the Carlton Agency to attend a council of the Battleford and Carlton area Chiefs, which had been organized to address common grievances.⁸⁷ The council was hosted by Chief Beardy, whose reserve at Duck Lake was close to Carlton House. Among the other Chiefs in attendance were Big Child, Star Blanket, James Smith, Okemasis, One Arrow, Petequaquay, John Smith, and Joseph Badger.⁸⁸ Although Louis Riel appears to have played a role in encouraging Beardy to organize the council, the extent of any further influence is unclear.⁸⁹

On July 31, the Chiefs, accompanied by a number of men, went to Carlton and “asked for food for the purpose of holding this council. Their request was refused.”⁹⁰ In order to monitor the situation, however, and reduce “malign influences that were said to be at work,” Sub-Agent J.A. Macrae subsequently agreed to provide rations on condition that the council relocate to Carlton and the working men be sent home to their reserves.⁹¹

After another week of discussions, the Chiefs met with Macrae on August 12 and presented their grievances for transmittal to the government in Ottawa. In his report on this meeting, Macrae summarized “the gist of what the different speakers had to say ... as they all spoke in the same terms, and with the same objects in view” under the following 18 headings: “Work,” “Cows,” “Horses,” “Waggon,” “Conveyance for Chiefs,” “Eleemosynary [charitable] Aid,” “Clothing,” “Schools,” “Machinery,” “Request,” “Renewals,” “Insufficiency of Government assistance,” “Lack of confidence in the Government,” “Medicines,” “Beef,” “Effect of not fulfilling promises,” “Maps of reserves,” and “Harness.”⁹² The key grievances raised were these:

The promise made to them at the time of their treaty was that when they were destitute, liberal assistance would be given to them. ... With the present amount of

87 J.M. Rae, Indian Agent, to Edgar Dewdney, Indian Commissioner, July 29, 1884, LAC, RG 10, vol. 3576, file 309, pt A (ICC Exhibit 1a, p. 521).

88 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 135–39 (ICC Exhibit 3h, p. 202).

89 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 135–39 (ICC Exhibit 3h, pp. 201–5).

90 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 525).

91 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 525).

92 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 526–530).

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assistance they cannot work effectively on their reserves, and it should be increased.

...

... they were told that they would see how the white man lived and would be taught to live like him. It is seen that he has threshing mills, mowers, reapers, and rakes. As the Govt. pledged itself to put them in the same position as the white man, it should give them these things.

... requests for redress of these grievances have been again & again made without effect. They are glad that the young men have not resorted to violent measures to gain it. That it is almost too hard for them to bear the treatment received at the hands of the Government after its “sweet promises” made in order to get their country from them. They now fear that they are going to be cheated. They will wait until next summer to see if this council has the desired effect failing which they will take measures to get what they desire. (The proposed “measures” could not be elicited, but a suggestion of the idea of war was repudiated.)

... That all bad things, implements and tools, as well as stock &c should be replaced by gifts of better articles.

... many are forced to wander from the reserves, who desires to settle, as there is not enough of anything supplied to them to enable all to farm. – Although a living by agriculture was promised to them.

... at the time of making the treaty they were comparatively well off, they were deceived by the sweet promises of the Commissioners, and now are “full of fear” for they believe that the Government which pretended to be friendly is going to cheat them. They blame not the Queen, but the Government at Ottawa.

...

... had the Treaty promises been carried out “all would have been well”, instead of the present feeling existing.

... every Chief should be given a map of his reserve in order he may not be robbed of it.⁹³

Macrae noted that Joseph Badger “spoke very plainly on the alleged grievances, and warns the Government that it must redress them, to escape the Measures that may be taken.”⁹⁴ Big Bear, after requesting permission to address Macrae, also spoke firmly, but diplomatically:

He said that the Chiefs should be given what they asked for, that all treaty promises should be fulfilled. A year ago, he stood alone, in making these demands; Now the whole of the Indians are with him. That the Mounted Police treated him very well after a disturbance was created at B’ford. That he averted any serious results at that place, by his efforts as a peacemaker.⁹⁵

93 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 528–531).

94 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 531).

95 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 531).

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Macrae closed his report by emphasizing that a detailed answer was “expected by the council, which declared itself to be a representative one of the Battleford as well as Carlton Cree. No doubt need be entertained that the Indians regard it as such.”⁹⁶

After the council, most of the Chiefs departed. Big Bear, however, went to Prince Albert, declaring to the local population that his intentions were entirely peaceful. About a week later, he met with Louis Riel in order to obtain support for the grievances outlined by the Chiefs at Carlton, but following their meeting, the *Saskatchewan Herald* reported that Big Bear did “not seem to have been favourably impressed with the prospects held out to him by Riel.” After the meeting with Riel, Big Bear returned to Fort Pitt.⁹⁷

Department’s Rejection of Lucky Man’s Chieftainship, 1884

Lucky Man apparently remained with Big Bear and was paid annuities with him at Fort Pitt in October 1884. The department official recording the payments, however, identified Lucky Man as an ex-Chief and paid him as Big Bear band member 100.⁹⁸ Moreover, remarks on the payroll indicate at least 123 people who were paid with Big Bear’s Band in that year – including Lucky Man – had previously been paid with Lucky Man’s Band, and others had been paid with Little Pine’s Band.⁹⁹

There is no indication, however, that Lucky Man had relinquished his chieftainship. On the contrary, a report written by Inspector Wadsworth later in the month of October implicitly acknowledged Lucky Man’s continued leadership:

In passing through Fort Pitt I was interviewed by Big Bear, Lucky Man, Little Poplar, and their followers. I endeavored to convince them how much better off they would be if they chose a reserve and settled down.¹⁰⁰

Nevertheless, Lucky Man’s chieftainship was being put into question by other department officials. In a report to the Superintendent General of Indian Affairs dated November 25, 1884, Indian Commissioner Dewdney expressed frustration with the leaders of the Cree bands that had not yet selected reserves.

96 J.A. Macrae, to unknown recipient, August 25, 1884, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, p. 532).
 97 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 139–141 (ICC Exhibit 3h, pp. 205–07).
 98 Big Bear Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, p. 125 (ICC Exhibit 1c, p. 224).
 99 Big Bear Band, Treaty annuity payroll, 1884, LAC, RG 10, vol. 9417, pp. 123–26 (ICC Exhibit 1c, pp. 222–25).
 100 T.P. Wadsworth, Inspector of Indian Agencies, to the SGIA, October 25, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 150 (ICC Exhibit 1a, p. 542).

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A few of the Indians that came from the South the year before last, have not selected a reserve, notably those under Big Bear and Lucky Man.

...

It has been recommended that Lucky Man be deposed from the temporary position of chief, which he occupies. He is utterly worthless, and was paid as an ordinary Indian at the last payment.

His followers have joined Big Bear.¹⁰¹

A table accompanying the department's report for 1884 indicates that neither Little Pine nor Lucky Man had selected reserves to be surveyed or otherwise set apart for the benefit of their respective band members.¹⁰² Little Pine, however, was at least settled down and working.¹⁰³ Big Bear is shown as having a reserve in the Long Lake area, although the table also notes: "Reserve not definitely located."¹⁰⁴ In his introduction to this year-end report, the Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, commented as follows:

It is satisfactory to be able to report that the Indians who, as stated in my report of last year, were induced to remove north from the country bordering on the boundary line between Canada and the United States, have settled upon reserves, and are now making fair progress in farming – with the exception of Big Bear and his band, who delay their selection of a reserve, and who as they roam about the country and visit the reserves of other bands, endeavoring to instil disaffection among them, are a cause of considerable anxiety. Up to the present time, however, their efforts to induce the Cree Indians generally to increase their demands from the Government have been futile.¹⁰⁵

Although Vankoughnet made no reference to Lucky Man, the government apparently had identified Big Bear and Lucky Man as a source of trouble among the Indians in the North-West, despite their receiving the support of other Chiefs in the presentation of grievances at Carlton.

- 101 Edgar Dewdney, Indian Commissioner, to the SGIA, November 25, 1884, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, 158 (ICC Exhibit 1a, p. 565). Emphasis added.
- 102 Tabular Statement entitled "Number of Indians in the North-West Territories and their whereabouts, 31st December, 1884," in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 207 (ICC Exhibit 1a, p. 605).
- 103 J.M. Rae, Indian Agent, to the Indian Commissioner, June 28, 1884, LAC, RG 10, vol. 3576, file 309, pt B (ICC Exhibit 1a, p. 505).
- 104 Tabular Statement entitled "Number of Indians in the North-West Territories and their whereabouts, 31st December, 1884," in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1884*, 206 (ICC Exhibit 1a, p. 604).
- 105 SGIA to the Governor General in Council, Annual Report, January 1, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1884*, x (ICC Exhibit 1a, p. 607).

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1885 Uprising and Lucky Man's Flight to Montana

Big Bear travelled from Duck Lake to Fort Pitt late in the summer of 1884 and, although he had informed department officials that he would settle on a reserve after receiving annuities, again he failed to select a reserve.¹⁰⁶ In November, still accompanied by Lucky Man, Big Bear camped near Frog Lake, approximately 30 miles southeast of Fort Pitt, where he intended to wait out the winter.¹⁰⁷ In the meantime, pressure from the department to have the Chief select a reserve site was mounting, as was resentment within his Band.¹⁰⁸

The Cree were close to their breaking point. The buffalo were gone, and Deputy Superintendent General of Indian Affairs Vankoughnet – who had severely reduced the department's budget – refused to provide them with provisions until they had selected reserves. Some of the younger Indians, including Big Bear's son, Imasees (who later took the name Little Bear), saw the old Chief as an impediment to progress and persisted in the belief that reserves would alleviate their suffering. Growing increasingly impatient of Big Bear's resistance to change, their frustrations continued to mount in the early months of 1885.¹⁰⁹

In January, the Indian sub-agent at Fort Pitt, Thomas Quinn, reported that little progress in having Big Bear select a reserve site had been made over the winter.¹¹⁰ Big Bear had continued with his strategy of delaying that selection in the hope that the "general gathering" he and Beardy were planning for the summer would eventually help them win concessions from the government and revisions in the terms of treaty.¹¹¹ Meanwhile, at the end of January, Assistant Indian Commissioner Hayter Reed had reported to the Superintendent General of Indian Affairs on the grievances laid before Macrae the previous August. His lengthy report dismissed most of the grievances and placed the blame primarily on Big Bear and the influence of the Métis:

106 Thomas Quinn, Indian Office, Frog Lake, to the Indian Commissioner, September 10, 1884, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 533–34).

107 Thomas Quinn, Acting Sub-Indian Agent, to the Indian Commissioner, November 7, 1884, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 551–52).

108 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 121–22 (ICC Exhibit 3h, pp. 187–88).

109 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 121–22 (ICC Exhibit 3h, pp. 187–88); Thomas Quinn to the Indian Commissioner, March 13, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 676–82).

110 Thomas Quinn, Acting Sub-Indian Agent, to the Indian Commissioner, January 3, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 629–31).

111 P. Ballendine to the Indian Commissioner, November 20, 1884, LAC, RG 10, vol. 3701, file 17169 (ICC Exhibit 1a, p. 557).

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Again Big Bear is an agitator and always has been and having received the moral support of the half breed community he is only too glad to have the opportunity of inciting the Indians to make fresh and exorbitant demands.

Big Bear has stated before Indians and to officials that the Treaty stipulations have not been and are not being carried out. I managed to meet him at Pitt after the meeting at Carlton and had two or three long talks with him and although he laughed when I asked him in what way the government was not carrying out its promises with the Indians and what he meant when stating it was at fault in so many particulars he could not enumerate them. I demanded that he give me a few instances and one case in which he had a just claim which could not have been settled, at an earlier date settled on the spot. After this he [said] to the interpreter that the Government was carrying out all its promises.

...

Riel's movement has a great deal to do with the demands of the Indians and there is no possible doubt but that they as well as the Halfbreeds are beginning to look up to him as one who will be the [means] of curing all their ills and obtaining for them all they demand.¹¹²

Quinn managed to obtain a commitment from the Chief in February 1885 to select a reserve in the spring,¹¹³ but the department was not satisfied with this vague promise. Métis interpreter Peter Ballendine was sent to Fort Pitt early in March to persuade Big Bear to select a definite reserve site and, after several meetings, Big Bear finally “picked upon a spot at the mouth of Dog Rump Creek,” 30 miles from Frog Lake.¹¹⁴

Big Bear was not quite through. After meeting with Ballendine, he stipulated that he would not leave Frog Lake until he had first met with either Commissioner Dewdney or Assistant Commissioner Reed.¹¹⁵ Big Bear was hoping for one more audience with the Crown to voice his concerns, but the department was not prepared to bend. On March 19, 1885, the Indian sub-agent at Battleford was instructed to inform Big Bear that the department had “neither the time nor the desire to accede to such demands.”¹¹⁶ About two weeks later, Deputy Superintendent General of Indian Affairs Vankoughnet informed Indian Commissioner Dewdney that, “if Big Bear does not fulfil his

112 Hayter Reed, Assistant Indian Commissioner, to the Superintendent General, January 23, 1885, LAC, RG 10, vol. 3697, file 15423 (ICC Exhibit 1a, pp. 636–50).

113 Thomas Quinn, Indian Sub-Agent, to the Indian Commissioner, February 25, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, pp. 667–69).

114 Thomas Quinn to the Indian Commissioner, March 13, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 677).

115 Thomas Quinn to the Indian Commissioner, March 18, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 683).

116 DIA, Regina, to DIA, Battleford, March 19, 1885, LAC RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 684).

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promises and settle on a Reserve in the Spring, it will be better to break up his Band if practicable.”¹¹⁷ By that time, however, events unfolded which were beyond both the Chief’s and the department’s control. On March 3, 1885, Louis Riel declared his own provisional government in the territories and, on March 18, the North-West Rebellion began after Riel took prisoners and seized stores at Batoche.¹¹⁸

News of the conflict quickly spread to the Frog Lake settlement following the outbreak of the insurrection. The frustration of the younger Chiefs finally came to a head and, with news of the Métis hostilities, violence exploded at the small village. On April 2, 1885, a group of Indians killed several white inhabitants, including Indian Sub-Agent Quinn and two clergymen. Although the motive behind the killings was undoubtedly connected to the Riel revolt, they were more directly related to factors affecting only the Cree. In any case, the slayings were carried out by younger Indians under the influence of alcohol. It appears that Big Bear tried to stop the violence, realizing that any chance of negotiating or holding out for a better deal with the government would end with the deaths of the white men. By then, however, Big Bear had lost his leadership to the war chief Wandering Spirit, who was leading the Band towards further conflict with the government.¹¹⁹

The evidence before the Commission does not suggest that Lucky Man participated in any of the killings that day at Frog Lake, but he was clearly there when they took place.¹²⁰ The armed response anticipated by Big Bear was not long in coming. Relentlessly pursued after Frog Lake and an ensuing battle at Fort Pitt, the Cree were inevitably defeated by the greater numbers of the military and the police. Lucky Man and Little Bear (Imasees) fled to Montana in the United States in late June after the uprising.¹²¹

Four years later, in 1889, Lucky Man recounted the story of his flight to a Canadian trader with whom he was well acquainted, and whose son, W. Henry McKay, published an account almost 60 years later, in 1948. Most of the article chronicled the final stages of Lucky Man’s flight to Montana in June 1885, but it began with Lucky Man’s comments on the 1885 uprising:

117 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, April 7, 1885, LAC, RG 10, vol. 3580, file 730 (ICC Exhibit 1a, p. 685).

118 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 150–51 (ICC Exhibit 3h, pp. 216–17).

119 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 151–64 (ICC Exhibit 3h, pp. 217–30).

120 A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).

121 Hugh A. Dempsey, *Big Bear: The End of Freedom* (Toronto: Greystone Books, 1984), 163–81 (ICC Exhibit 3h, pp. 229–46).

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Nechiwam (meaning brother), I would like very well to go back and see my old friends and my old hunting ground and to die on my native soil but through the foolishness of two of my young men there is a rope ready to be placed around my neck should I return to the land which now belongs to the Great White Queen (Victoria). I am not guilty of any crime; even in the battle of Cut Knife I refused to fight but I was forced to take part in a small way, but I never shot anyone. When some of Big Bear's people came to Cut Knife and told us that a big army of Red Coats had come from Beaver Hills House (Edmonton) and killed some of their fellow tribesmen at Frenchman's Butte, my brother and I and some others decided to try and skip to the land of the Big Knives (America) where we thought we would be safer. That was four years ago. We started about the beginning of the Egg-laying Moon (June).¹²²

In Lucky Man's view, his flight to Montana "was a narrow escape ... from the oppression of our Indian agents and the privations we suffered on the reservations."¹²³ The Government of Canada's view of the matter, however, was quite different.

Lucky Man Band Labelled as Rebels and the Consequences, 1885 Onwards

On August 21, 1885, Commissioner Dewdney wrote to the Superintendent General of Indian Affairs, identifying the bands considered to be either loyal or disloyal during the 1885 rebellion. On that list, Dewdney categorized the Bands of Lucky Man, Little Pine, and Big Bear (among others) as disloyal.¹²⁴ The 1885 annuity paylists indicate that 82 Lucky Man band members who had remained at the Little Pine reserve were considered disloyal and were not paid their annuities that year.¹²⁵ Both Lucky Man and Big Bear were later identified by Indian Affairs as having been key leaders in the 1885 rebellion:

With the exception of Big Bear's Band these Indians were disposed to be loyal. However, Big Bear (and Lucky Man who was there from Battleford, carried most of the older Indians with them. They were followed by the scum of the Indians, & had long resisted entering Treaty & after doing so had been a constant source of trouble, as they had before been in the U[nited] States.¹²⁶

122 W. Henry McKay, "Lucky Man's Flight," *Canadian Cattlemen* (December 1948), 133 (ICC Exhibit 1f, p. 2).
 123 W. Henry McKay, "Lucky Man's Flight," *Canadian Cattlemen* (December 1948), 137 (ICC Exhibit 1f, p. 4).
 124 Edgar Dewdney, Indian Commissioner, to the SGIA, August 21, 1885, LAC, RG 10, vol. 3710, file 19550-3 (ICC Exhibit 1a, p. 716).
 125 Lucky Man Band, Treaty annuity paylist, 1885, LAC, RG 10, vol. 9418, p. 147 (ICC Exhibit 1c, p. 21).
 126 Indian Affairs, "Memo re Indians who took part in Rebellion of 1885," March 19, 1894, LAC, RG 10, vol. 3710, file 19550-4 (ICC Exhibit 1a, p. 1074).

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In his annual report for 1885, Indian Commissioner Dewdney insisted that blame for the uprising should fall on a few misguided individuals, not the government's policy. Dewdney wrote:

It may be fairly presumed, therefore, when regarding the matter without prejudice, and in the light of Indian utterances before and after the rebellion, that their participation in it sprang, not from universal race hatred, from the existence of grievances, discontent or general malignity, but rather from a feeling that the action of a few Indian discontents, who were influenced by the half-breed movement, and of their young men, who, when excited by these, lost their heads and commenced raiding, committed them to association with the rebels in order – after the sources of supply from the Department were closed to them, from the causes before described – to gain the necessities of life and protection against individual white men, which the law at the moment was unable to afford. We may rest assured, I think, that the past policy of the Government was not to blame, as none of the Indians, when spoken to of their conduct on the reserves, have pleaded grievances in extenuation of it.¹²⁷

In the wake of the rebellion, the department instituted policies designed to ensure that another revolt could not occur. Although not as harsh as those originally suggested by Assistant Commissioner Hayter Reed,¹²⁸ they were nonetheless very restrictive. Annuity payments were temporarily withheld from bands considered to have been disloyal to the Crown. If investigations proved that Indians had been responsible for any damages to property, their annuities were to be withheld until all such damages had been paid for.¹²⁹

The tribal system in the North-West Territories was to be “broken up as much as possible, so that each individual Indian may be dealt with instead of through the Chiefs.”¹³⁰ One method of “striking at the heart of the tribal system and that of community of lands” was to subdivide reserves into individual farms, which was expected “to foster self-reliance, to increase a spirit of emulation in their labours, and hasten the attainment of independence ... [and] the sense of personal proprietorship and responsibility.”¹³¹

127 Edgar Dewdney, Indian Commissioner, to the SGIA, December 17, 1885, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1885*, 140 (ICC Exhibit 1a, pp. 747).

128 Hayter Reed, Assistant Indian Commissioner, “Memorandum for the Honorable the Indian Commissioner relative to the future management of Indians,” July 13, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1a, pp. 696–701).

129 L. Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, July 3, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1a, pp. 692–95); Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, pp. 731–32).

130 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 730).

131 Edgar Dewdney, Indian Commissioner, to the SGIA, November 17, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 108–9 (ICC Exhibit 1a, pp. 769–70).

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Efforts were made to disarm all Indians, “not by compulsion, but by persuasion and by keeping ammunition from them.”¹³²

The pass system was instituted “to prevent ... Indians who were involved in the rebellion from leaving the Reserves without passes signed by an official of the Department,” and was also “introduced as far as practicable in the loyal Bands as well.”¹³³

Transfers of membership between bands – which was previously common practice – were to be restricted:

There must be no changing from Band to Band, without it is considered advisable by the Agent, and has his sanction and no change from Agency to Agency without express permission from this Office. No Indians not already in the Treaty are to be taken on the Paysheets without Authority from this Office. As in all probability many Indians from Bands, lately disaffected, will endeavour to join other Bands, and remain on the Reserves for Payment, Agents will make every effort to have these Indians warned that they are not to remain, but join their own Bands, as they will not be paid. The names of these should be taken and sent to the Head Office.¹³⁴

Horses belonging to rebel Indians were to be confiscated and sold, with the proceeds to be applied to the purchase of cattle and other necessities for the bands.¹³⁵

Since the department considered that Big Bear’s Band “would doubtless continue to be a source of trouble ... which will be greatly minimized if they are scattered amongst a number of Bands,”¹³⁶ the Band – already dispersed to a large degree – was broken up and its members redistributed.

For the time being, Lucky Man, too, was gone and no longer a concern of the department. In the department’s annual reports for 1885 and 1886, it was noted that the Indians of Lucky Man Band had “been incorporated with the other bands of the Battleford district, some few having joined the Peace Hills reserves.”¹³⁷ This comment appears to refer to the band members who, after 1884, had remained with Lucky Man (and Big Bear) instead of Kamanitowas (and Little

132 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 732).
 133 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, pp.732–33).
 134 Edgar Dewdney, Indian Commissioner, circular letter to Indian Agents, July 20, 1885, LAC, RG 10, vol. 3714, file 21223 (ICC Exhibit 1a, p. 705).
 135 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 741).
 136 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 736).
 137 Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, 220 (ICC Exhibit 1a, p. 745); Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 254 (ICC Exhibit 1a, p. 766).

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Pine). In 1886, Battleford Indian Agent J.A. MacKay reported that Little Pine's reserve "is the most recently settled of any in this agency, and the bands that occupy it (Little Pine's and Lucky Man's) have been very much broken up by the rebellion."¹³⁸ This reserve, however, had still not yet been surveyed.

The Survey of Indian Reserve 116 for Little Pine and Lucky Man Bands, 1887

There is no evidence on record that the Lucky Man Band was ever given a reserve designated exclusively for its members before 1989. Some members of the Band, however, were living on IR 116 when it was surveyed in 1887. In the department's 1887 annual report, Deputy Superintendent General Vankoughnet described the reserve arrangement between the Lucky Man and Little Pine Bands in these terms:

The Battleford Agency embraces at present the reserves and bands of Moosomin, Thunder Child (with the subsidiary bands of Nipahays and young Chipewayan living on the same reserve), Little Pine (with the subsidiary band of Lucky-man on the same reserve), Poundmaker, Sweet Grass, Red Pheasant, Mosquito (with the subsidiary bands of Bear's Head and Lean Man on the same reserve).¹³⁹

Dominion Land Surveyor John C. Nelson, who had been sent away by Little Pine in 1884, returned to supervise the survey of IR 116 in September 1887. In his report to the Superintendent General of Indian Affairs, Nelson stated:

On our return to camp, Mr. Gopsil [the local farming instructor] and I examined the lands upon which the bands of "Little Pine" and "Lucky Man" have settled, and I decided to make the reserve five miles square as shown by the accompanying plan, marked (d), and proceeded with the survey.

This reserve contains twenty-five sections and a small gore adjoining the west boundary of Poundmaker's Reserve. The townships in which it lies are sub divided. It is situated on Battle River, thirty-five miles west of Battleford. The location is remarkably beautiful and the soil is very much better than that on the reserve of Poundmaker which bounds it on the east side. There are hay meadows, rich soil, plenty of good water, a variety of wild berries, fishing grounds, and on the north

138 J.A. MacKay, Indian Agent, Battleford, to the SGIA, August 13, 1886, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1886*, 127 (ICC Exhibit 1a, p. 762).

139 Thomas White, SGIA, to the Governor General, January 3, 1888, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, lii (ICC Exhibit 1a, p. 806).

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

side of Battle River an abundance of timber; on the north side, however, the soil is generally light and sandy.¹⁴⁰

IR 116 comprised 25 square miles, more or less, and was confirmed by Order in Council PC 1151 on May 17, 1889. The survey plan and the description of IR 116, which appeared in the confirming Order in Council, both indicate that the reserve was surveyed “For the bands of Chiefs ‘Little Pine’ and ‘Lucky Man.’”¹⁴¹ Neither of the old Chiefs was present during the survey, however, since Little Pine had died in 1885¹⁴² and Lucky Man was still in the United States. The 1887 annuity payroll showed the population of the Lucky Man Band “Paid at Little Pine’s Reserve” as 62.¹⁴³ It should be noted, though, that remarks on the payroll indicate almost all of those shown on the list were actually living elsewhere.

There are no indications in any of the documents following the 1885 uprising that the Lucky Man Band ever requested a reserve of its own. In the ensuing years, band members participated in the farming activities on IR 116. In correspondence dated April 28, 1891, however, Indian Commissioner Hayter Reed provided a summary of provisions distributed to bands in the Battleford Agency under the terms of Treaty 6. The Little Pine Band was listed as receiving one horse, eight oxen, one bull and 12 cows, but no separate mention was made of the Lucky Man Band.¹⁴⁴ From time to time in correspondence and official records, IR 116 was variously referred to as the “Little Pine and Lucky Man Indian Reserve”¹⁴⁵ or the “Little Pine Indian Reserve,”¹⁴⁶ but never as the “Lucky Man Indian Reserve.” There is also no evidence that Lucky Man ever went to the IR 116 after it was surveyed, even after he was repatriated in 1896.

140 John C. Nelson, DLS, in charge Indian Reserve Surveys, to the SGIA, December 30, 1887, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1887*, 277–78 (ICC Exhibit 1a, pp. 796–97). The township subdivision referred to by Nelson had been performed by Dominion Land Surveyor C.F. Leclerc in 1884, and the copies of Leclerc’s plans in evidence before the Commission contain handwritten notations indicating the location of “Little Pine’s Reserve.” It seems clear, however, that these notations were inscribed on the plans in 1887 or later since they state that the reserve was “surveyed” in 1887. See *Plan of Township No. 45, Range 21 West of Third Meridian*, surveyed by Chs. Frs. Leclerc, DLS, July & September 1884, CLSR SK 5967-133 (ICC Exhibit 7a).

141 Order in Council PC 1151, May 17, 1889, DIAND, Indian Lands Registry, Instrument no. B4000 (ICC Exhibit 1a, pp. 903–4).

142 Little Pine Band, Treaty annuity payroll, 1885, LAC, RG 10, vol. 9418, p. 144 (ICC Exhibit 1c, p. 117).

143 Lucky Man Band, Treaty annuity payroll, 1887, LAC, RG 10, vol. 9420, p. 220 (ICC Exhibit 1c, p. 26).

144 Hayter Reed, Indian Commissioner, to the DSGIA, April 28, 1891, LAC, RG 10, vol. 3876, file 73870 (ICC Exhibit 1a, pp. 949).

145 W.C. Bethune, Chief, Reserves and Trust Division, Indian Affairs Branch, to Albert Chatsis, Correspondent Secretary, QVTP Association, September 15, 1961, DIAND correspondence file (ICC Exhibit 1a, p. 1220).

146 T.R.L. McInnes, Secretary, Indian Affairs Branch, to J.P.B. Ostrander, Indian Agent, November 4, 1939, DIAND file 671/30-2-116 (ICC Exhibit 1a, p. 1210).

INDIAN CLAIMS COMMISSION PROCEEDINGS

Montana Band”: Lucky Man’s 1896 Repatriation and Final Return to Montana

In January 1889, Indian Commissioner Hayter Reed noted the following with regard to absentee “rebels” on treaty annuity paylists:

Although persons have been struck off, as being unaccounted for, it does not necessarily follow that they have been paid in previous years. Their names have been retained, in order to give every opportunity of their presenting themselves, for identification; and when it has become perfectly evident, either that no such person exists, or will never likely return, the name has been left out.

Since the rebellion, it has been a matter of no little difficulty for the Agents of rebel bands to make accurate estimate for them, owing to so many of them having left the Agencies, for parts other than other Agencies.

It should be borne in mind that the estimates of this and previous years, have been framed to meet the payments of such rebels and absentees as it was considered possible might present themselves at the Agencies.¹⁴⁷

In 1890, the names of these absentees were struck off the treaty annuity paylists.¹⁴⁸

After 11 years in the United States, Lucky Man and Little Bear (Big Bear’s son, Imasees) were returned with their followers to Canada in 1896 by American authorities. When they crossed the border, Lucky Man and Little Bear were arrested for allegedly participating in the Frog Lake massacre but were released in July 1896 when it was decided that the evidence was insufficient to support the prosecution of charges:

“Lucky Man” and “Little Bear,” two chiefs of the Crees, who fled to the United States after the rebellion of 1885, were returned to Canada with their bands by the United States authorities last July. They were arrested by order of Superintendent Deane, at Lethbridge, on the charge of participating in the massacre at Frog Lake, and were brought to Regina for preliminary examination ... The charges against both were dismissed as there was no evidence connecting them with the actual murders, although strenuous efforts were made to obtain it. It was conclusively proved that they were present under arms, and as chiefs directing the Indians, but it was not evident that they had instigated or directed the massacre, consequently they were protected by the terms of the amnesty.¹⁴⁹

147 Hayter Reed, Indian Commissioner, to the SGIA, January 2, 1889, LAC, RG 10, vol. 3809, file 53980 (ICC Exhibit 1a, p. 900).

148 Hayter Reed, Indian Commissioner, to the SGIA, October 31, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1889*, 159 (ICC Exhibit 1a, p. 906).

149 A.B. Perry, Superintendent, NWMP, Annual Report, December 22, 1896, Canada, *Report of the Commissioner of the North-West Mounted Police Force, 1896*, 62 (ICC Exhibit 1a, p. 1151).

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

It was also noted at the time that Lucky Man was “very sick and old and is not, in consequence, expected to live long.”¹⁵⁰

After their release, Lucky Man and Little Bear set out for the Hobbema Agency by train to rejoin some of their party who were awaiting them there.¹⁵¹ They settled on the vacant Bobtail Reserve 139 but, within two years, many of them returned to the United States. The group that remained soon came to be known as the

Montana Band, No. 139

This band is located on Bobtail’s old reserve, and the Indians came from Montana in 1896. About one hundred and fifty came then to this agency, but one hundred returned, either to where they came from or other parts, leaving fifty on the reserve. They are capital workers, and have built nine houses and they had as many fields from four to five acres each.¹⁵²

Lucky Man’s whereabouts after the repatriation is difficult to track but, as noted earlier, there is no evidence that he ever rejoined the rest of the Lucky Man Band on IR 116. Lucky Man appears to have returned south of the border, where – according to W. Henry McKay – he “died in Montana some 10 years later [or 1899, 10 years after McKay’s father encountered Lucky Man].”¹⁵³

Lucky Man First Nation Treaty Land Entitlement (TLE) Claim

Lucky Man, whose leadership waned long before his death in 1899, was not succeeded by another Chief until 1974, a state of affairs that was consistent with the department’s policy following the 1885 rebellion.¹⁵⁴ In addition to the department’s reluctance to replace Chiefs and councillors after the rebellion, section 93 of the 1906 Indian Act and later section 96 of the 1927 Indian Act had important implications for the leadership of the Lucky Man Band. These sections of the Indian Act set out restrictions concerning the election of Chiefs and councillors and required bands to have a population of at least 30 band members before elections could take place.¹⁵⁵

150 A.E. Forget, Indian Commissioner, to the DSGIA, August 5, 1896, LAC, RG 10, vol. 3710, file 19550-4 (ICC Exhibit 1a, p. 1135).
 151 “List of Little Bears Band Paid at Hobbema Indian Agency, November 13, 1897,” LAC, RG 10, vol. 1407, pp. 222–23 (ICC Exhibit 1a, pp. 1156–57).
 152 Alexander McGibbon, Inspector of Indian Agencies, to the SGIA, September 27, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 200 (ICC Exhibit 1a, p. 1174).
 153 W. Henry McKay, “Lucky Man’s Flight,” *Canadian Cattlemen* (December 1948), 153 (ICC Exhibit 1f, p. 5).
 154 Lawrence Vankoughnet, DSGIA, to Edgar Dewdney, Indian Commissioner, October 28, 1885, LAC, RG 10, vol. 3584, file 1130, pt 1B (ICC Exhibit 1a, p. 730).
 155 *Indian Act*, RSC 1906, c. 81, s. 93(4) (ICC Exhibit 6c, p. 35). See also *Indian Act*, RSC 1927, c. 98, s. 96(4).

INDIAN CLAIMS COMMISSION PROCEEDINGS

As previously discussed, the population of the Lucky Man Band was widely scattered after the rebellion. Although annuities which had been withheld from “rebels” after the 1885 uprising were eventually reinstated, many names were removed from the Band’s payroll in 1890.¹⁵⁶ Again in 1918, the names of five more families believed to be living in the United States were removed from the Lucky Man Band annuity payroll, leaving only two remaining families, with a total of seven members.¹⁵⁷ According to the annuity paylists of the Band, that number grew slowly over the ensuing years. In 1955, there were a total of eight families, comprised of 12 people.¹⁵⁸

Lucky Man band members residing on IR 116 comprised a tiny minority on the reserve and, under the provisions of the 1906 and 1927 *Indian Acts*, the Band’s small population was ineligible to elect councillors or a Chief before 1951, when that restriction was repealed. Although the Lucky Man Band shared a common trust account with the Little Pine Band until the fiscal year ending in 1979 (the Lucky Man Band has held a separate trust account since 1980), separate treaty annuity paylists for the Lucky Man Band have been continuously maintained since 1879.¹⁵⁹

At the request of Lucky Man band members, a letter was sent in August 1961 to W.C. Bethune, Chief of Reserves and Trusts Division of what was then the Department of Northern Affairs and National Resources, requesting recognition of the Band’s entitlement to a reserve and band council equal to that of other bands in Canada.¹⁶⁰ Thirteen years later, on April 26, 1974, the members of the Lucky Man Band assembled at the home of member Simon Okemow on IR 116 to consider the election of the Band’s first Chief since Lucky Man. They decided to hold an election on May 7, 1974, with the new Chief and councillors “would be elected by the custom of the Band.”¹⁶¹ Another major concern expressed at the meeting was that the Band did not have its own reserve, and it “was agreed by the Band that we approach the Federation [of Saskatchewan Indians] to assist the Band in getting a separate reserve.”¹⁶²

156 Hayter Reed, Indian Commissioner, to the SGIA, October 31, 1889, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1889*, 159 (ICC Exhibit 1a, p. 906).

157 Lucky Man Band, Treaty annuity payroll, July 11, 1918, LAC, RG 10, vol. 9459, pp. 63–64 (ICC Exhibit 1c, p. 58).

158 Lucky Man Band, Treaty annuity payroll, 1955, DIAND Genealogical Unit (ICC Exhibit 1c, p. 96).

159 H.M. Chapman, Senior Administrative Officer, Indian Affairs Branch, to the Registrar, Indian Affairs Branch, January 28, 1964, file reference unknown (ICC Exhibit 1a, pp. 1225–26).

160 Albert Chatsis, Correspondent Secretary, QVTP Association, to W.C. Bethune, Chief of Reserves and Trust Division, August 20, 1961, file reference unknown (ICC Exhibit 1a, p. 1219).

161 Minutes of meeting of the members of the Lucky Man Band, April 26, 1974 (ICC Exhibit 1a, p. 1262).

162 Minutes of meeting of the members of the Lucky Man Band, April 26, 1974 (ICC Exhibit 1a, p. 1264).

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

The minutes of this meeting were forwarded to H.L. Hansen, Supervisor for the North Battleford District, who stated in a reply dated April 29, 1974, that he had not yet received any response from his Regional Director “as to whether there was any historic reason why Lucky Man Band do not have their own Council and if there is anything to prevent them now from electing their own Band Council.”¹⁶³ However, Hansen refused the Band’s request that a senior departmental official act as Electoral Officer, saying:

Departmental staff can not interpret what your Band Custom is. They can not be influential in helping you determine what your Band Custom is. If you are to elect a Chief and Council by means of Custom, this process must be carried out completely in the absence of Departmental Staff.¹⁶⁴

The results of the Lucky Man Band’s first election were forwarded to the Superintendent of Community Affairs in what was then the Department of Indian Affairs and Northern Development on May 22, 1974.¹⁶⁵ The Band subsequently passed a Band Council Resolution dated June 7, 1974, requesting that the department “recognize our Election by Band Custom, effective May 23, 1974.”¹⁶⁶ Subsequent correspondence indicates that Canada accepted the results of the election and recognized the new Chief and council.¹⁶⁷

In September 1977, the Lucky Man Band passed a Band Council Resolution requesting the establishment of its own reserve with the area to be calculated on the basis of its 1881 population. Subject to the results of additional historical research, however, Canada disagreed with the use of this year.¹⁶⁸

In 1980, Canada and the Lucky Man Band compromised and agreed to settle the Band’s claim for entitlement to a separate reserve based on its 1976 population of 60 people. This settlement acknowledged that the Band could proceed in future with a TLE shortfall grievance based on its claim that the

163 H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, file reference unknown (ICC Exhibit 1a, p. 1265).

164 H.L. Hansen, District Supervisor, North Battleford District, to Rod King, Federation of Saskatchewan Indians, April 29, 1974, file reference unknown (ICC Exhibit 1a, p. 1265).

165 Pat Burglar, Electoral Officer, Lucky Man Band, to Jim McIntyre, Superintendent of Community Affairs, Department of Indian Affairs and Northern Development, May 22, 1974, file reference unknown (ICC Exhibit 1a, p. 1266).

166 Lucky Man Band, Band Council Resolution 1974-75/2, June 7, 1974, file reference unknown (ICC Exhibit 1a, p. 1268).

167 V.M. Gran, Chief, Band Management Division, to the Chief, Special and Administrative Services Division, Indian and Eskimo Affairs, June 18, 1974, file reference unknown (ICC Exhibit 1a, p. 1270).

168 Lucky Man Band, Band Council Resolution, undated, file reference unknown (ICC Exhibit 1a, p. 1311); Report by the Lucky Man Band, July 16, 1990, file reference unknown (ICC Exhibit 1a, pp. 1445–46).

INDIAN CLAIMS COMMISSION PROCEEDINGS

Band should have been granted a reserve at the 1882 population level.¹⁶⁹ Under this agreement, lands were selected at Meeting Lake and the Lucky Man Band signed a TLE Settlement Agreement on November 23, 1989. Canada agreed to set apart 7,680 acres of land as a reserve for the use and benefit of the Band. In return, the Band provided Canada with an absolute surrender of all the Lucky Man Band's right, title, interest and benefit which the Band, the members of the Lucky Man Band of Indians, for themselves and each of their respective heirs, successors, descendants and permitted assigns, may have (if any) in and to Reserve No. 116 established by Order in Council P.C. 1151 dated the 17th of May, 1889, the description of which Reserve is as follows:

The whole of Little Pine and Lucky Man Indian Reserve No. 116 as shown on a Plan of Survey No. 284 of record in the Canada Lands Survey Records at Ottawa.¹⁷⁰

The Settlement Agreement and surrender were later approved by a referendum of band members. Although this portion of the Band's claim was settled, the TLE shortfall claim continued to be negotiated.

The department officially rejected the Lucky Man TLE claim in July 1995.¹⁷¹ The department took the position that the proper date of first survey (DOFS) was 1887 and that the population from that year should be used to calculate the Band's treaty land entitlement. This rejected claim was subsequently brought before the ICC in December 1995. In 1997, the ICC recommended that the 1887 DOFS be used to calculate the Band's treaty land entitlement and that the parties carry out further treaty playlist analysis to determine the Band's actual population for that year.¹⁷²

169 See Bernard Loiselle, Parliamentary Secretary to the Minister of Indian Affairs, to Rod King, Chief, November 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1370–71); Bernard Loiselle, Parliamentary Secretary to the Minister of Indian Affairs, to Rod King, Chief, November 12, 1980, file reference unknown (ICC Exhibit 1a, pp. 1372–73); Rod King, Chief, to Solomon Sanderson, Chief, Federation of Sakatchewan Indians, December 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1374–75); Rod King, Chief, to Bernard Loiselle, December 7, 1980, file reference unknown (ICC Exhibit 1a, pp. 1376–77).

170 Schedule "A" to the Notice of Referendum, The Lucky Man Band of Indians, Document of Surrender, July 15, 1989, file reference unknown (ICC Exhibit 1a, p. 1434); Submissions on Behalf of the Government of Canada, November 19, 1996, Exhibit 2.

171 Al Gross, Indian Affairs and Northern Development, to Chief and Council, Lucky Man Cree Nation, July 7, 1995 (ICC Exhibit 4a, pp. 1–4).

172 See Indian Claims Commission, *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

APPENDIX B

THE LUCKY MAN BAND OF INDIANS TREATY LAND ENTITLEMENT SETTLEMENT AGREEMENT, NOVEMBER 23, 1989

SCHEDULE 'C' TO THE NOTICE OF REFERENDUM

THE LUCKY MAN BAND OF INDIANS

TREATY LAND ENTITLEMENT SETTLEMENT AGREEMENT

—

This Agreement is made the 23rd day of November A.D. 1989.

BETWEEN:

*HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Indian Affairs and Northern
Development
(hereinafter called 'Canada')*

PARTY OF THE FIRST PARTY

- and -

*THE LUCKY MAN BAND OF INDIANS as represented
by the Chief and Councillors
(hereinafter called 'the Band')*

PARTY OF THE SECOND PARTY

*WHEREAS Canada and the Band are parties to a Treaty known as Treaty No. 6
signed respectively on their behalf in 1879 (hereinafter referred to as 'Treaty No. 6').*

*AND WHEREAS, in the articles of Treaty No. 6, Canada made certain undertakings
to the Band, including the following:*

*'And Her Majesty the Queen hereby agrees and
undertakes to lay aside reserves for farming
lands, due respect being had to lands at
present cultivated by the said Indians, and
other reserves for the benefit of the said
Indians to be administered and dealt with
for them by Her Majesty's government of the
Dominion of Canada...'*

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AND WHEREAS the parties hereto have agreed on the location and the area in size for the establishment of a reserve for the Lucky Man Band of Indians with the participation of the Government of Saskatchewan in the establishment of such reserve;

AND WHEREAS Canada has recognized and validated the Band's claim to treaty land entitlement notwithstanding the establishment of Indian Reserve No. 116 by Order in Council P.C. 1151 dated May 17, 1889.

AND WHEREAS the electors of the Band have by way of Referendum vote given an absolute surrender to Canada, subject to the terms set out in the Document of Surrender, of whatever right, title, interest and benefit (if any) the Band, the members of the Band, their respective heirs, successors and permitted assigns and each of them or any of them had, now have or may hereafter have in Indian Reserve No. 116, and in the oil and gas Revenue and Capital Trust Fund held by Canada with respect to oil and gas revenues accruing from Indian Reserve No. 116.

NOW WHEREFORE in consideration of the premises and of the mutual covenants and agreements hereinafter set out, Canada and the Band agree as follows:

1. DEFINITIONS

In this Agreement:

- a) the terms 'Band', 'Chief', 'Council of the Band', 'Minister' and 'Reserve' shall have the same meaning as they have in the Indian Act, R.S.C. 1985, c. I-5 and amendments thereto; and*
- b) the term 'Saskatchewan' means Her Majesty the Queen in right of Saskatchewan.*

2. RESERVE LANDS

- a) Subject to third party interests in the lands described in Schedule '1' hereto (hereinafter referred to as 'the Entitlement Lands'), being satisfied by Saskatchewan and the Band in a manner acceptable to Canada, Saskatchewan and the Band, and upon approval by the Council of the Band of the selection of the Entitlement Lands containing some 7,680 acres, more or less, as the lands and their location are more particularly shown outlined in Schedule '2' hereto, and upon the transfer to Canada of the administration and control of the Entitlement Lands by Saskatchewan in accordance with the terms of the Settlement Agreement between Canada and Saskatchewan, a copy of which agreement between Canada and Saskatchewan is annexed hereto as Schedule '3', Canada shall recommend to the Governor in Council that the Entitlement Lands be set apart as a reserve for the use and benefit of the Lucky Man Band of Indians.*
- b) Prior to the Entitlement Lands being set apart as a reserve for the use and benefit of the Band, but made effective upon the Entitlement Lands being set apart as a reserve (hereinafter referred to as the 'Reserve'), the Chief and Council of the Band shall*

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

provide to Canada a Band Council Resolution duly executed by a quorum of the Band Council, approving at no cost and without further compensation therefore:

1. the transfer of administration and control by Canada to Saskatchewan, pursuant to section 35 of the *Indian Act*, a 30 metre wide road right of way, as the said right of way is more particularly described in section 12 of the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'; said right of way to be more particularly described by Plan of Survey filed in the Canada Land Survey Records.
2. the grant of Letters Patent in favour of Saskatchewan Telecommunications, pursuant to section 35 of the *Indian Act*, of an easement for a telephone cable right of way, as the same is more particularly described in section 13 of the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'.
3. a permit pursuant to section 28(2) of the *Indian Act* to the Minister of Agriculture of Canada, in the form of the Memorandum of Understanding hereinafter referred to, authorizing him, Canada's employees in his department and their contractors, agents, licensees and invitees, to use and occupy the reserve, or portions thereof, in accordance with the terms of a Memorandum of Understanding made between the Minister of Agriculture and the Minister of Indian Affairs and Northern Development annexed as Appendix 'C' to the Settlement Agreement between Canada and Saskatchewan, a copy of which is annexed hereto as Schedule '3'.

3. **RELEASE**

(A) In consideration of this Treaty Land Entitlement Settlement Agreement and in particular the covenants and agreements contained herein and subject to the provisions of paragraph (B), the Band does hereby:

- i) cede, release and surrender to Canada all claims, rights, title, interests and benefits the Band ever had, now has or may hereafter have by reason of or in any way arising out of land quantum pursuant to Treaty No. 6, up to 7,680 acres, more or less, as such lands are more particularly described in Schedule '1' annexed hereto; and,
- ii) release and forever discharge Canada, Her servants, agents and successors from all obligations imposed on, and from all promises and undertakings made by Canada under Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, and does hereby waive any rights, actions or causes of action, claims or demands of whatever nature or kind which the Band ever had, now has or may hereafter have against Canada by reason of or in any way arising out of Treaty No. 6 relating to land entitlement of up to 7,680 acres, more or less, it being further understood by the parties hereto that this agreement, and in particular the covenants contained herein, represent full and final satisfaction of all obligations or undertakings of Canada relating to land entitlement of up to 7,680 acres, more or less, contained in Treaty No. 6; and is in full satisfaction of all

INDIAN CLAIMS COMMISSION PROCEEDINGS

manner of costs, legal fees, travel and other expenses expended by the Band or its representatives for the purpose of arriving to and entering into this Settlement Agreement”

“(B) The Release referred to in paragraph (A) herein is given without prejudice to and without it being construed in any way as a forfeiture or waiver by the Band, its members or each or any of them, to any claim the Band, its members or each or any of them may have:

a) to compensation for allegedly being denied the privileges of the full use and benefit of Reserve lands to which the Band had Treaty Entitlement.

b) to compensation in lieu of land should it be determined at some future date that the Band had a greater Treaty Land Entitlement than the quantum of the land set aside as the Band’s Reserve as such lands are more particularly described in Schedule ‘A’ hereto.

4. INDEMNITY

The Band hereby and forever agrees to indemnify and save harmless Canada from and to be responsible for, all manner of actions, suits, causes of actions, claims, demands, damages, costs or expenses, liability and entitlement, initiated, made or incurred after the execution of this Treaty Land Entitlement Settlement Agreement (hereinafter referred to as the ‘Settlement Agreement’) whether known or unknown, against Canada which any person who is eligible to participate in this Settlement Agreement including any heirs, successors or permitted assigns of such person ever had, now has or may hereafter have against Canada relating to the subject matter of this Settlement Agreement.

5. FURTHER ASSURANCES

The parties hereto covenant each with the other to do such things and to execute such further documents and to take all necessary measures to carry out and to implement the terms of this Settlement Agreement; and the Band hereby authorizes, empowers and directs its present Council of the Band and succeeding Councils of the Band, to act for and on behalf of the Band in executing such documents and taking such further necessary measures to carry out and implement the terms, intent and meaning of this Settlement Agreement.

6. REFERENDUM

The acceptance of the terms and entry into this Settlement Agreement by the Band shall be by the majority of the electors of the Band voting in favour of this Settlement Agreement at a referendum held in accordance with the definitions and procedures set out in the Indian Referendum Regulations made pursuant to the Indian Act, a copy of which is annexed as Schedule ‘4’ hereto.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

7. ENUREMENT

This Settlement Agreement shall enure to the benefit of and be binding upon Canada, Her Heirs and Successors, and upon the Band, its heirs, successors and permitted assigns.

8. APPROVAL

a) *This Settlement Agreement shall be signed by the Chief and Councillors of the Band in accordance with the approval and ratification of this Settlement Agreement by a referendum of the Band duly called and held in accordance with the definitions and procedures set out in Schedule "4" hereto.*

b) *This Settlement Agreement shall come into effect upon the happening of the last of the following events which shall be deemed to be conditions precedent:*

- (1) Approval by Canada prior to Referendum*
- (2) Ratification and execution by the Band*
- (3) Execution by the Minister of Indian Affairs and Northern Development on behalf of Canada*

9. NOTICES

Any notice or other written communication required or permitted to be given pursuant to this Settlement Agreement, may be given as follows:

a) *To Canada:*
Assistant Deputy Minister,
Lands, Revenues & Trusts,
Indian and Northern Affairs,
Ottawa, Ontario,
K1A 0H4

b) *To the Band:*
Chief and Councillors of the
Lucky Man Band of Indians

INDIAN CLAIMS COMMISSION PROCEEDINGS

10. *ENTIRE AGREEMENT*

a) *All of the schedules attached hereto form part of this Settlement Agreement.*

b) *This Settlement Agreement shall be the entire agreement and there is no representation, warranty, collateral agreement or condition affecting this Settlement*

Agreement except as expressed within it. $\frac{1}{2}$

11. *PRESUMPTIONS*

There shall not be any presumption that doubtful expressions in this Settlement Agreement be resolved in favour of either party.

12. *MISCELLANEOUS*

a) *Subject to the terms and provisions herein, this Settlement Agreement may be signed in counterpart.*

b) *The headings are inserted solely for convenience and shall not control or affect the meaning or construction of any part of this agreement.*

c) *The Band acknowledges it has retained independent legal advice during the negotiations leading up to this Settlement Agreement and regarding all the matters associated with it.*

d) *In this Settlement Agreement, words in the singular include the plural and words in the plural include the singular, and words importing male persons include female persons and corporations.*

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

IN WITNESS WHEREOF, the Minister of Indian Affairs and Northern Development on behalf of Her Majesty the Queen in right of Canada has executed this agreement under his hand this 23rd day of November, A.D. 1989 at the City of North Battleford, in the Province of Saskatchewan.

Signed by

HER MAJESTY THE QUEEN, IN RIGHT OF CANADA as represented by the Minister of Indian Affairs and Northern Development

in the presence of

[Handwritten signature]
Witness

[Handwritten signature]
Minister of Indian Affairs and Northern Development

IN WITNESS WHEREOF the Lucky Man Band of Indians, as represented by the Chief and Councillors of the Band, for themselves and on behalf of the members of the Band, have executed this agreement under their respective hands this 23rd day of November, A.D. 1989 at the City of North Battleford, in the Province of Saskatchewan.

Signed by

THE LUCKY MAN BAND OF INDIANS

in the presence of

Per: *[Handwritten signature]*
Chief of the Lucky Man Band of Indians

Witness

Signed by

[Handwritten signature]
Councillor

in the presence of

[Handwritten signature]
Witness

Signed by

[Handwritten signature]
Councillor

in the presence of

[Handwritten signature]
Witness

Signed by

[Handwritten signature]
Councillor

in the presence of

[Handwritten signature]
Witness

INDIAN CLAIMS COMMISSION PROCEEDINGS

APPENDIX C

LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY – INTERIM RULING, SEPTEMBER 19, 2005

INDIAN CLAIMS COMMISSION

INTERIM RULING: LUCKY MAN CREE NATION INQUIRY TREATY LAND ENTITLEMENT CLAIM PHASE II

PANEL

Chief Commissioner Renée Dupuis (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan C. Holman

COUNSEL

For the Lucky Man Cree Nation
David C. Knoll

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Karen L. Webb

SEPTEMBER 19, 2005

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

BACKGROUND

The oral hearing in the Lucky Man Cree Nation Treaty Land Entitlement Inquiry was held on August 18, 2005 at the Wanuskewin Heritage Park. During the hearing, counsel for both parties were assisted in their presentations by non-counsel. Toward the end of the hearing, counsel for Canada objected to submissions put forth on behalf of the First Nation by Mr. Jayme Benson. Mr. Benson is Director of Specific Claims for the Federation of Saskatchewan Indian Nations and had, we understand, assisted the Lucky Man Cree Nation in the research and preparation of their submission. The Panel met briefly to consider Canada’s request and made an initial ruling on whether the Commission would strike from the transcript those of Mr. Benson’s remarks regarding claims that were not the subject of this inquiry.

Subsequently, counsel for the Lucky Man Cree Nation objected to submissions made on behalf of the Government of Canada by Mr. John Scime, Senior Policy Advisor of the Specific Claims Branch, INAC, who had assisted counsel for Canada. Counsel for Lucky Man stated that Mr. Scime had provided evidence in his remarks about claims that were not the subject of the inquiry.

As a result of the combined requests, the Panel further determined that it would consider the issue as a whole.

RULING

The Panel notes that both parties have argued that the Lucky Man Cree Nation Treaty Land Entitlement claim must be treated consistently with other claims, even though they disagree on what consistency would mean for this particular claim. However, prior to the oral hearing, at the stage in the process when the inquiry’s record was being created, neither party presented the Panel with evidence that would support their respective arguments respecting consistency; counsel have only argued the point. Both counsel have allowed their clients to put evidence before the oral hearing and then asked the Panel to strike evidence of the other party.

As a result of this turn of events, the Panel is put in the position of being asked to weigh evidence that has not been properly put before it. Without remedial action, it would also result in unfairness, since each party has put forward evidence at a point in the proceeding, namely the oral hearing, when the opposing party has no opportunity to assess or rebut it.

INDIAN CLAIMS COMMISSION PROCEEDINGS

As a Commission of Inquiry, created by Order in Council under the *Inquiries Act*, the Commissioners may adopt methods they consider expedient for the conduct of the inquiry. The Commission may adopt its own process and may vary that process when it is necessary to determine the issues the parties have agreed to put before it.

To maintain the integrity of the oral hearing, the Panel has decided to retain the written transcript of the oral hearing in its entirety. Rather than disregard the passages objected to by counsel and in keeping with its ability to amend its process when necessary in the interests of conducting a full inquiry, the Panel will supplant or supplement the submissions with additional evidence and submissions.

Accordingly, the Panel requires both parties to put forward new evidence and related argument on the matter of consistency. Since both parties have argued the matter, we think it is only fair that both parties put forward their new evidence and their legal submissions grounded in that evidence in a single submission and concurrently with one another. Since at that time, neither party will have seen the evidence put forward by the other, both parties will be given adequate and equal time to respond and reply.

The dates set by the Panel for submission of the additional evidence and legal argument by both parties are as follows:

Submission of evidence and legal argument:	November 18, 2005
Response to evidence and argument	December 16, 2005
Reply	January 16, 2006

The Panel may require a further oral hearing, should it prove necessary, but would urge the parties to put forward their full evidence and argument in writing.

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis (Chair)
Chief Commissioner



Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 19th day of September 2005.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

APPENDIX D

LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY – INTERIM RULING, AMENDMENT, DECEMBER 15, 2005

INDIAN CLAIMS COMMISSION

INTERIM RULING: LUCKY MAN CREE NATION INQUIRY TREATY LAND ENTITLEMENT CLAIM PHASE II AMENDMENT TO SEPTEMBER 19, 2005 RULING

PANEL

Chief Commissioner Renée Dupuis (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan C. Holman

COUNSEL

For the Lucky Man Cree Nation
David C. Knoll

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Karen L. Webb

DECEMBER 15, 2005

INDIAN CLAIMS COMMISSION PROCEEDINGS

The ruling of September 19, 2005 is amended as follows:

At the request of the First Nation, the dates set by the Panel for submission of the additional evidence and legal argument by both parties are as follows:

Submission of evidence and legal argument:	December 2, 2005
Response to evidence and argument	January 13, 2006
Reply	January 27, 2006

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis (Chair)
Chief Commissioner



Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 15th day of December 2005.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

APPENDIX E

**LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II
INQUIRY – INTERIM RULING, AMENDMENT, JUNE 22, 2006**

INDIAN CLAIMS COMMISSION

**INTERIM RULING: LUCKY MAN CREE NATION INQUIRY
TREATY LAND ENTITLEMENT CLAIM PHASE II
AMENDMENT TO SEPTEMBER 19, 2005 RULING**

PANEL

Chief Commissioner Renée Dupuis (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan C. Holman

COUNSEL

For the Lucky Man Cree Nation
David C. Knoll

For the Government of Canada
Perry Robinson

To the Indian Claims Commission
Karen L. Webb

JUNE 22, 2006

INDIAN CLAIMS COMMISSION PROCEEDINGS

The ruling of September 19, 2005 is further amended as follows:

BACKGROUND

As a result of objections made by both counsel to information presented at the oral hearing by non-counsel, the Panel made an interim ruling on September 19, 2005, amended December 15, 2005, with regard to additional evidence to be provided by the parties.

Both parties submitted additional evidence and legal argument on December 2, 2005 and their responses to the other's material on January 13, 2006. Canada has objected to the Lucky Man Cree Nation's response, on the grounds that in addition to legal argument responding to Canada's submission, the First Nation's response contains additional evidence. In its letter of objection, dated January 26, 2006, Canada argued that the First Nation could not submit new evidence at the response stage, since doing so violated the terms of the Panel's ruling of September 19, 2005.

RULING

The panel reviewed Canada's letter of objection, the Lucky Man Cree Nation's letter in answer to Canada, its ruling of September 19, 2005 and the background to that ruling. The Panel also considered the mandate of the Indian Claims Commission to review the application by the Government of Canada of the Specific Claims Policy to individual claims. The Commissioners have been authorized to adopt such methods as they consider expedient for the conduct of the inquiry.

The Panel's interest is in ensuring it has a full body of evidence, so that it can deliberate on the issues decided and agreed to by the parties. To fulfill its mandate, once informed of evidence that is available, the Panel has a responsibility to consider whether that evidence may be relevant to the issues in the inquiry and to gather relevant evidence.

Rather than ask First Nation to resubmit its response, the panel has decided that the response and reply stages of the Order of September 19, 2005 will be replaced by an oral hearing. The Panel has concluded that a hearing is necessary to gather evidence from the parties about the nature and consistency in application of Treaty Land Entitlement policy.

The Panel ruling of September 19, 2005 had stated that the first submission by both parties was to contain both evidence and legal argument.

LUCKY MAN CREE NATION – TREATY LAND ENTITLEMENT PHASE II INQUIRY

The ruling did not provide for the submission of additional evidence after the initial submission. As a result, the Lucky Man Cree Nation's submissions in response to Canada's evidence and argument, dated January 13, 2006 will not be accepted as submitted. Canada's Response submission, dated January 13, 2006 will not be accepted.

Both parties are to provide a brief written report, outlining the scope and nature of the evidence to be provided, with documentation as required. Both parties are to provide a witness to provide oral evidence, in both direct and cross-examination. Both parties will have an opportunity to present legal argument following the oral examination.

The Panel will not accept any additional evidence following the conclusion of the oral hearing.

The dates set by the Panel for the submission of the additional evidence, oral hearing and legal argument are as follows:

Submission of written report and supporting documentation:

Lucky Man Cree Nation:

July 7, 2006

Canada

September 22, 2006

Hearing of Oral Evidence

October 24, 2006

FOR THE INDIAN CLAIMS COMMISSION



Renée Dupuis (Chair)
Chief Commissioner



Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 22 day of June, 2006.

INDIAN CLAIMS COMMISSION PROCEEDINGS

APPENDIX F

CHRONOLOGY

LUCKY MAN CREE NATION: TREATY LAND ENTITLEMENT PHASE II INQUIRY

- 1 Planning conference April 28, 2004, Saskatoon
January 27, 2005, Saskatoon
- 2 Community session No session held at the request of the First Nation.
- 3 Written legal submissions
 - Submission on Behalf of the Lucky Man Cree Nation, May 2, 2005
 - Submission on Behalf of the Government of Canada, July 7, 2005
 - Reply Submission on Behalf of the Government of Canada, July 28, 2005
- 4 Oral legal submissions August 18, 2005, Saskatoon
- 5 Written evidentiary submissions
 - Submission on Behalf of the Lucky Man Cree Nation, July 6, 2006
 - Submission on Behalf of the Government of Canada, September 25, 2006
- 6 Evidentiary hearing October 25, 2006, Saskatoon
- 7 Interim rulings
 - Panel ruling September 19, 2005
 - Amendment to panel ruling of September 19, 2005, December 15, 2005
 - Amendment to panel ruling of September 19, 2005, June 22, 2006
- 8 Content of formal record

The formal record of the Lucky Man Cree Nation: Treaty Land Entitlement Phase II Inquiry consists of the following materials:

- Exhibits 1 – 11a tendered during the inquiry
- transcript of oral session (1 volume)
- transcript of evidentiary hearing (1 volume)

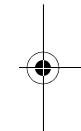
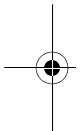
The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.

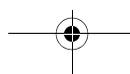
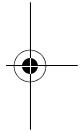
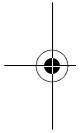
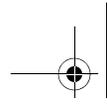


INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE MUSKODAY FIRST NATION TREATY LAND ENTITLEMENT NEGOTIATIONS

APRIL 2008

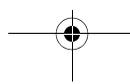
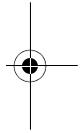
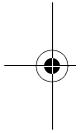
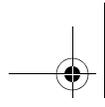




THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

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THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

SUMMARY

MUSKODAY FIRST NATION TREATY LAND ENTITLEMENT MEDIATION Saskatchewan

The report may be cited as Indian Claims Commission, *Muskoday First Nation: Treaty Land Entitlement Mediation* (Ottawa, April 2008), reported (2009) 23 ICCP 411.

*This summary is intended for research purposes only.
For greater detail, the reader should refer to the published report.*

Treaties – Treaty 6 (1876); **Treaty Interpretation** – Treaty Land Entitlement; **Treaty Land Entitlement** – Policy – Population Formula – Saskatchewan TLE Framework Agreement; **Mandate of Indian Claims Commission** – Mediation; **Saskatchewan**

THE SPECIFIC CLAIM

Muskoday First Nation submitted its treaty land entitlement (TLE) claim to the Department of Indian Affairs and Northern Development (DIAND) in 1992, alleging a shortfall of entitlement lands based on additions to the band membership after the date of first survey (DOFS). The claim was rejected in 1996. After the Indian Claims Commission (ICC) held a number of inquiries relating to TLE issues, DIAND amended its TLE policy. Muskoday resubmitted its claim, and it was accepted under the 1998 Historic Treaty Land Entitlement Shortfall Policy on April 11, 2003. When negotiations to settle this claim began in June 2004, all parties at the table requested that the Commission provide administrative and facilitation services throughout the negotiations.

BACKGROUND

The ICC's involvement in this claim related only to its mediation mandate. As mediator, the ICC did not receive historical records or legal submissions from the parties.

Chief John Smith and his councillors signed Treaty 6 in 1876 on behalf of their followers, the descendants of whom now call themselves the Muskoday First Nation. Treaty 6 specified that government officials and individual bands were to

INDIAN CLAIMS COMMISSION PROCEEDINGS

select the location of reserves which were to be surveyed according to a formula of one square mile for each family of five (128 acres per person). Indian Reserve (IR) 99 was surveyed in 1878 and re-surveyed in 1884. Order in Council PC 1151, dated May 17, 1889, confirmed the 37.4-square-mile reserve straddling the South Branch of the Saskatchewan River (about 20 kilometres southeast of Prince Albert).

In 1998, following several ICC inquiries into TLE matters, Canada amended its policy and agreed to include eligible new adherents to treaty and transferees from landless bands after the date of first survey when calculating treaty land entitlement. It was on this basis that the Minister of Indian Affairs accepted the Muskoday First Nation TLE claim in April 2003.

MATTERS FACILITATED

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

OUTCOME

On May 23, 2007, the Muskoday First Nation ratified the proposed settlement of \$10.25 million in compensation, with authorization to purchase up to 38,014 acres of land, which can be converted to reserve status.

REFERENCES

The ICC does no independent research during mediation and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

PART I

INTRODUCTION

In the 1870s, some reserves set aside in what is now the Province of Saskatchewan under Treaty 6 did not meet the terms as negotiated and specified in that agreement. This is a report on how, almost 130 years after the survey and establishment of a reserve, a treaty land entitlement (TLE) claim based on such an error was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

Muskoday Indian Reserve (IR) 99 contains 9,686 hectares of land straddling the South Saskatchewan River, approximately 20 kilometres southeast of Prince Albert, Saskatchewan. Although IR 99 has been called “Muskoday” periodically from the time it was first surveyed, the people who lived on it were referred to as the John Smith Band until 1993, when they formally changed their name to the Muskoday First Nation. The total registered band population as of February 2008 was 1,555, of whom 558 lived on reserve.¹

This report will not provide a full history of the Muskoday TLE claim but instead will briefly outline the historical background. It will also summarize the events leading up to the settlement of the claim and illustrate the Commission’s role in the resolution process.

Muskoday First Nation submitted its first TLE claim to the Department of Indian Affairs and Northern Development (DIAND) in 1992; it was rejected in 1996. After the Indian Claims Commission held a number of inquiries and made recommendations regarding TLE claims, Canada revised its TLE research guidelines in 1998, and Muskoday resubmitted its claim using the new criteria. This claim was accepted by the Minister of Indian Affairs by letter dated April 11, 2003.² When negotiations to settle this claim began in February 2004, all parties at the table requested that the ICC facilitate the

1 Canada, Indian and Northern Affairs Canada [INAC], First Nation Profiles, Muskoday First Nation, <http://sdiprod2.inac.gc.ca/fnprofiles> (February 8, 2008).

2 Robert D. Nault, Minister of Indian Affairs, to Chief Carl Bear, Muskoday First Nation, April 11, 2003, ICC file 2107-55-1M, vol. 1.

INDIAN CLAIMS COMMISSION PROCEEDINGS

negotiations and provide neutral third party administrative services throughout the negotiations.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

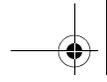
The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council³ on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into its specific claim; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process. An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

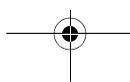
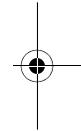
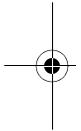
The Commission provides broad mediation, facilitation, and other administrative services at the request of both the First Nation and the

³ The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, among other things, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.



THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

Government of Canada. These services are available at any stage of the specific claims process, including research, submission, review, acceptance, and negotiation. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The mediation process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.



INDIAN CLAIMS COMMISSION PROCEEDINGS

PART II

A BRIEF HISTORY OF THE CLAIM

In August 1876, representatives of Her Majesty the Queen met with Plains Cree, Wood Cree, and other tribes of Indians at Fort Carlton in the vicinity of Duck Lake north of Saskatoon to negotiate Treaty 6. In exchange for the surrender of Aboriginal title to 121,000 square miles of land in what is now central Saskatchewan and Alberta, the Crown promised to provide the Indians with perpetual annuities, schools, agricultural assistance, a medicine chest, and reserve lands. The treaty specified that government officials and individual bands were to select the location of reserves, which were to be surveyed based on a formula of one square mile for each family of five (that is, 128 acres per person):

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.⁴

Chief John Smith and Councillors William Badger, Benjamin Joyful, John Badger, and James Bear signed Treaty 6 at Fort Carlton on August 23, 1876,⁵ on behalf of the 22 families paid with them at that time.⁶ In 1879, M.G.

⁴ Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 3.

⁵ Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 5-7.

⁶ W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, in Library and Archives Canada (hereafter LAC), RG 10, vol. 3636, file 6694-1.

THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

Dickieson, the Acting Indian Superintendent for the North-West Territories, stated that they were “largely composed of half-breeds and Swampy Indians who have removed from Manitoba.”⁷

According to one of the Treaty Commissioners who negotiated Treaty 6, John Smith initially requested a reserve “on South Branch of Sask” River below Red Deer Hill, on north side of said River.”⁸ A year later, however, the acting Indian Agent reported that the Band had begun to cultivate the land and now wanted its reserve on both sides of the river:

John Smith and band would like their reservation on both sides of the south branch about due east from Prince Albert. They complain that after they took treaty last year that they went and took their reservation and commenced improving it but no sooner had they done so than a number of Half-breed came in and built along side of them. This band have about 80 acres in crop and have erected the walls of a school house.⁹

In the summer of 1878, Surveyor Elihu Stewart received verbal instructions from Lieutenant Governor David Laird and Assistant Surveyor General Lindsay Russell to define the boundaries of the reserve for John Smith. Stewart began his work on August 9, but “the Indian Chief objected to line on south side of reserve, as I was instructed to run it.”¹⁰ On September 9, the Lieutenant Governor met with the Chief to try to resolve the problem with the survey, “and in the afternoon the Reserve of John Smith was satisfactorily arranged by giving the Indians Crossing Island in addition to their other lands.”¹¹ Stewart resumed his survey of John Smith’s reserve (which he called the Muskoday Reserve) on September 23 and completed both the definition of the rectilinear boundaries and a subdivision of part of the reserve into farm lots on September 30, 1878. His survey plan shows 24,097 acres on both sides of the South Branch of the Saskatchewan River, including Crossing Island. On the plan, he notes: “The

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- 7 M.G. Dickieson, Acting Superintendent, Department of Indian Affairs, Battleford, NWT, to Minister of the Interior, Ottawa, July 21, 1879, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1879*, 105.
 - 8 W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, LAC, RG 10, vol. 3636, file 6694-1.
 - 9 James Walker, Acting Indian Agent, Battleford, NWT, to Lt. Governor, NWT, Battleford, August 20, 1877, LAC, RG 10, vol. 2656, file 9092.
 - 10 Natural Resources Canada, Field book 729, Canada Lands Survey Reports (CLSR), E. Stewart, Dominion Land Surveyor (DLS), Indian Reserve Survey Diary, 1878–79, August 9, 1878.
 - 11 Natural Resources Canada, Field book 729, CLSR, E. Stewart, DLS, Indian Reserve Survey Diary, 1878–79, September 9, 1878.

INDIAN CLAIMS COMMISSION PROCEEDINGS

number of souls in the band for which this Reserve has been set off is 170 (under Chief John Smith) to which add 10% for increase – 187.”¹²

Stewart apparently sketched the river that bisected the reserve but failed to physically survey the shoreline; in 1884, Surveyor A.W. Ponton re-surveyed IR 99 to correct this error. The plan of this second survey, which is attached to Order in Council PC 1151 dated May 17, 1889, confirming the reserve, shows a corrected area of 37.4 square miles (23,936 acres). This acreage satisfied the land entitlement under Treaty 6 for 187 people ($23,936 \div 128 = 187$). The Order in Council describes the reserve land briefly:

The portion of the reserve situated north and west of the river is generally a rolling prairie of rich black loam, interspersed with poplar bluffs and numerous ponds and small lakes. South and east of the river the country is generally level. The soil is a rich black loam, and being of a more sandy quality in the north-eastern corner. This portion is grown up with small poplar, scrub and willow. Ponds and lakes abound. The large island in the river, containing an area of three hundred and four and a half acres, more or less, and which is included in the reserve, contains large balm of Gilead and birch.

A majority of the Indians of this band are settled along the river on a level bottom, or flat, about a mile wide.¹³

ESTABLISHING A TREATY LAND ENTITLEMENT CLAIM

The 19th- and 20th-century treaties negotiated with the Indians in northern Ontario, the Prairies, and northern British Columbia – the Numbered Treaties – all included a formula (either 32 acres per person or 128 acres per person, depending on the treaty) for calculating the size of reserve lands.¹⁴ Unfortunately, neither the treaties nor the correspondence and reports associated with them explained when or how those population figures were to be obtained, leaving unanswered many important questions. Were the figures determined by the number of people in the band at the time of the treaty, or when the survey was done, or at some other time? Were the numbers to be determined from the treaty annuity paylists, by a separate census, or by a count of those present when the survey was done?

After the federal government announced in 1973 its intention to settle specific claims where Canada had not fulfilled its treaty obligations to set aside reserves, researchers needed policy guidelines to answer these questions.

12 Natural Resources Canada, Plan B1033, CLSR, E. Stewart, DLS, “Plan of the Muskoday Indian Reserve on the South Saskatchewan River in Treaty No. 6,” September 1878. There was no reason given for the 10 per cent increase.
 13 Order in Council PC 1151, May 17, 1889, pp. 50–51.
 14 This section relies on Donna Gordon, *Treaty Land Entitlement, A History*, report prepared for the ICC (Ottawa, December 1995), reprinted in (1996) 5 ICCP 339.

THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

Initially, Canada only validated claims where a shortfall of land was established based on the band's population according to the treaty annuity paylists at the date of first survey, with no consideration given to people who were absent or who joined the band after the survey. In 1983, the Office of Native Claims Branch of the Department of Indian Affairs distributed "Research Guidelines" for the validation of TLE claims which expanded the eligibility criteria to include people who joined the band after the date of the first survey:

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims.¹⁵

Under the heading, "Persons included for entitlement purposes," the guidelines included, with certain defined restrictions, those who appeared on the payroll for the year of survey, absentees, new adherents to treaty, transfers from landless bands, and non-treaty Indians who marry into a treaty band.¹⁶

In 1989, Canada and the Federation of Saskatchewan Indian Nations (FSIN) agreed to establish the Office of the Treaty Commissioner (OTC), which was charged with, among other things, developing proposals for the settlement of TLE claims in Saskatchewan that would satisfy both Canada and the First Nations. On September 22, 1992, after two years of research and negotiations, representatives of the federal and provincial governments (Saskatchewan had a legal obligation under the 1930 *Natural Resources Transfer Agreement* to provide "unoccupied Crown lands" for the creation of Indian reserves), along with most of the First Nations in Saskatchewan with recognized TLE shortfalls, signed a Framework Agreement defining the manner in which the parties agreed to fulfill outstanding TLE obligations to Entitlement Bands in Saskatchewan.

According to this negotiated agreement, the basis for determining the final settlement for each First Nation that signed the Framework Agreement was the "equity formula": historical percentage shortfall x current population x acres per treaty (128 acres in Treaty 6) equals the quantum of land that could be

15 DIAND, Office of Native Claims, "Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983, reprinted in (1996) 5 ICCP 512.

16 DIAND, Office of Native Claims, "Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983, reprinted in (1996) 5 ICCP 512 at 515.

INDIAN CLAIMS COMMISSION PROCEEDINGS

purchased by a First Nation to settle a claim. The historical percentage shortfall was determined by comparing the amount of land that the First Nation did receive with the amount of land that it should have received; in order to establish that acreage, it was necessary to define who could be counted with the First Nation for entitlement purposes. The procedures established by the OTC were based on the 1983 Office of Native Claims guidelines, with additional interpretations and definitions that were accepted by both Canada and the First Nations.

Twenty-six Saskatchewan First Nations had established a TLE shortfall and were parties to the Framework Agreement, but during the negotiations, there was a recognition that there were other bands who could later prove to have valid TLE claims. As a result, Article 17 was included to ensure that those Bands would be dealt with on the same basis as those covered by the Framework Agreement, if they chose that approach.

The issue of Article 17 and its relevance to both validation and negotiation of TLE claims in Saskatchewan was considered by the ICC in 1996 in its inquiries into the rejected TLE claims of both Kawacatoose and Kahkewistahaw First Nations. After reviewing documentation and hearing from many of the people who participated in the negotiation of the Framework Agreement, the ICC concluded in the Kawacatoose Inquiry that Article 17 did not apply to the criteria to validate a claim, but was to apply to the settlement of claims after validation:

While the Commission has determined that the Framework Agreement does not give non-Entitlement Bands an independent basis for validation ...

... once substantiation of the claim of a non-Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to that band.¹⁷

The ICC reiterated this position in its subsequent report on the TLE claim of the Kahkewistahaw First Nation:

Since the release of the Kawacatoose report, we remain unchanged in our view that section 17.03 is limited to circumstances in which a band's treaty land entitlement claim has *already* been accepted for negotiation in accordance with the terms of treaty. In other words, section 17.03 applies in the context of *settlement*. It does *not* afford a separate basis for *validation* apart from treaty. It represents an

¹⁷ Indian Claims Commission, *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73 at 229.

THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

agreement among Canada, Saskatchewan, and the Entitlement Bands, that, once a non-Entitlement Band's claim has been accepted for negotiation independently of the Framework Agreement itself, then the settlement of that claim can be dealt with much more expeditiously by avoiding protracted bargaining on points that have already been negotiated.¹⁸

Article 17 is significant because, after the Framework Agreement was signed, Canada changed its criteria on who to include in calculating TLE at the validation stage. In 1993, it allowed only those who were members of the First Nation at date of first survey (including people who were absent at that date). In 1998, after the ICC recommendations in a number of TLE inquiries, Canada expanded the categories to also include additions to membership after the survey – new adherents to treaty, transferees from landless bands, and non-treaty people marrying into the band. Even so, some specific aspects of the OTC working assumptions allowed the inclusion of some people who would be excluded under Canada's guidelines and the application of the less inclusive criteria would mean that post-Framework Agreement TLE settlements would not receive levels of compensation equivalent to those received by First Nations who were parties to the Framework Agreement. This variance in eligibility made it difficult for Canada and Saskatchewan First Nations to reach final agreement on the total number of people to include in the treaty land entitlement formula, leaving the question to be worked out at each individual negotiation table.

¹⁸ Indian Claims Commission, *Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 100. Original emphasis.

INDIAN CLAIMS COMMISSION PROCEEDINGS

PART III

MEDIATION OF THE CLAIM

Negotiations towards settlement of the Muskoday treaty land entitlement claim began in February 2004. Parties to the negotiations included Canada, Muskoday First Nation, and the Province of Saskatchewan (because of its legal obligation to provide “unoccupied Crown lands” for the creation of Indian reserves). At the request of all the parties, the ICC facilitated the discussions.

For the most part, facilitation focussed on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes if and when requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate any studies or other research that might be undertaken by the parties to support negotiations.

Although the Commission is not at liberty, based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, it can be stated that the First Nations and representatives of the Department of Indian Affairs and Northern Development and the Province of Saskatchewan worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at a mutually acceptable resolution of the Muskoday TLE claim.

In addition to agreement on the terms of a negotiation protocol, other elements of the negotiation included agreement by the parties on the nature of the Commission’s role in the negotiations; agreement on final population figures for determining shortfall acres for settlement purposes; the effect of Article 17 of the 1992 Saskatchewan Framework Agreement on the settlement criteria; integration of settlement lands into the Muskoday First Nation Land Code; varying the payment schedule stipulated in the Framework Agreement; the impact of the bilateral (Canada and Saskatchewan) discussions relating to

THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

the cost-sharing provisions in the Framework Agreement; compensation for land and mineral resources, as well as negotiation and ratification expenses; and, finally, settlement issues and agreements, communications, and ratification of the final settlement.

One issue – the application of the appropriate TLE guidelines, before and after validation, to the negotiation of TLE claims in Saskatchewan in light of Article 17 of the Framework Agreement and past practices followed by Canada in settling other claims – was also of concern to three other Saskatchewan First Nations who were proceeding to negotiations on treaty land entitlement claims. The four First Nations (Muskoday, Sturgeon Lake, Gordon, and Pasqua) and Canada agreed that an appropriate and cost-effective way to address this issue was to come together at a common table. The ICC was asked to facilitate the discussions. After an exchange of relevant documents and after meetings held in fall 2004, the parties were able to agree on eligibility criteria. Each First Nation then subsequently proceeded with its individual negotiations.

Researchers for Canada and Muskoday First Nation exchanged information relating to the background of certain band members who had been added to the Band’s annuity payroll after the date of survey to reach agreement on those eligible to be counted towards treaty land entitlement. As well, survey plans, field notes, and correspondence were reviewed by staff of the Legal Surveys Division of Natural Resources Canada in Regina to assist the parties in discussions on the size of the reserve when it was first established.

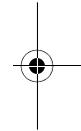
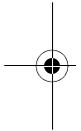
By the end of January 2005, the parties were able to agree on acreage and population figures. Canada made an offer to settle on October 31, 2006, which the First Nation accepted by Band Council Resolution dated November 6, 2006. The negotiated settlement included cash compensation for land and minerals of approximately \$10.25 million plus negotiation and ratification costs, and authorization to purchase up to 38,014 acres to be added to the Muskoday reserve.

The settlement agreement was finalized and initialled by the parties in February 2006 and was presented to the members of the Muskoday First Nation for ratification on March 19, 2007. An absolute majority of eligible voters in favour of the agreement was required, and the first vote failed to meet this requirement. The agreement was successfully ratified on the second vote on May 23, 2007. On January 10, 2008, a ceremony was held at the Muskoday First Nation to sign a ceremonial document acknowledging the TLE settlement agreement, attended by the Chief, Council, Elders, and community



INDIAN CLAIMS COMMISSION PROCEEDINGS

members, the federal Minister of Indian Affairs, and the Minister of First Nations and Métis Relations for the Province of Saskatchewan.



THE MUSKODAY FIRST NATION – TREATY LAND ENTITLEMENT MEDIATION

PART IV

CONCLUSION

Credit for the successful negotiation and settlement of the Muskoday treaty land entitlement claim belongs to the parties. They were diligent and thorough as they worked towards agreement on the many important issues before them. The Commission, in its role as a neutral third party facilitator, helped maintain the focus and momentum of the discussions. With the ICC also performing many of the necessary administrative tasks, the negotiating parties were able to concentrate their full attention on the substantive details of the negotiations and settlement.

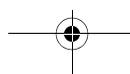
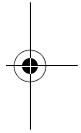
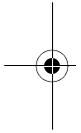
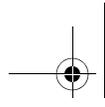
The experience that the ICC has gained over the years, together with the expertise that it has developed, was especially beneficial at the common table. The Commission was pleased to have provided these additional services to the discussions involving the four Saskatchewan First Nations with TLE claims and similar issues. The early success at the common table in resolving these issues has led, at the time of this writing, to the successful negotiation and resolution of three of the individual TLE claims, with the fourth First Nation heading towards ratification of its claim.

FOR THE INDIAN CLAIMS COMMISSION



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

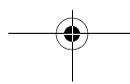
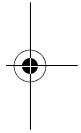
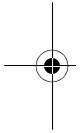
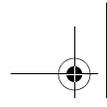
Dated this 12th day of April, 2008.



INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE METEPENAGIAG MI'KMAQ NATION HOSFORD LOT AND RED BANK INDIAN RESERVE 7 NEGOTIATIONS

MAY 2008



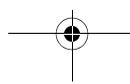
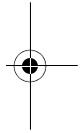
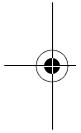
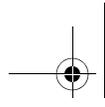
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METEPENAGIAG MI'KMAQ NATION – HOSFORD LOT AND IR 7
NEGOTIATION MEDIATION

SUMMARY

METEPENAGIAG MI'KMAQ NATION HOSFORD LOT AND RED BANK INDIAN RESERVE 7 NEGOTIATIONS MEDIATION New Brunswick

The report may be cited as Indian Claims Commission, *Metepenagiag Mi'kmaq Nation: Hosford Lot and Indian Reserve 7 Negotiations Mediation* (Ottawa, May 2008), reported (2009) 23 ICCP 431.

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

**Indian Act – Surrender; Mandate of Indian Claims Commission – Mediation;
New Brunswick**

THE SPECIFIC CLAIM

The Hosford Lot and Indian Reserve (IR) 7 claims were researched jointly by Canada and the First Nation in a pilot project initiated in May 1996. The IR 7 claim was submitted to the Department of Indian Affairs and Northern Development (DIAND) in July 1996 and was accepted for negotiation in 1998. The parties negotiated an agreement in principle in 1999 but that settlement was not ratified in two votes held in the community. The Hosford Lot claim was submitted to the department in January 1999 and accepted for negotiation on January 22, 2001.

In 2002, Canada agreed to reopen discussions on the IR 7 claim and to include it in negotiations for the Hosford Lot claim. The parties negotiated the claims without assistance until April 2005 when difficulties arose and they asked that the Indian Claims Commission (ICC) provide neutral, third-party facilitation.

BACKGROUND

The ICC's involvement in these claims related only to its mediation mandate. As such, the ICC did not receive historical records or legal submissions from the parties.

The IR 7 claim was based on the allegation that Canada alienated parts of that reserve without the benefit of a surrender. A survey conducted in 1904 resulted in the First Nation losing approximately 64 acres of land from Red Bank IR 7, located approximately 25 kilometres southwest of Miramichi, New Brunswick.

INDIAN CLAIMS COMMISSION PROCEEDINGS

The Hosford Lot claim involves approximately 100 acres of land in another of the First Nation's reserves, Big Hole Tract No. 8, located about 20 kilometres north-west of Miramichi, which was sold and patented to William Hosford in April 1906 without a surrender as required under the *Indian Act*

MATTERS FACILITATED

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for meetings.

OUTCOME

On June 14, 2007, the Metepenagiag Mi'kmaq Nation ratified the proposed settlement of \$1.4 million in compensation, with authorization to purchase 300 acres of replacement land which can be converted to reserve status.

REFERENCES

The ICC does no independent research during mediation and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

METEPENAGIAG MI'KMAQ NATION – HOSFORD LOT AND IR 7
NEGOTIATION MEDIATION

PART I

INTRODUCTION AND BACKGROUND

The two specific claims relating to the Hosford Lot and Red Bank Indian Reserve (IR) 7, put forward by Metepenagiag Mi'kmaq Nation, relate to events dating back over 100 years. The Indian Claims Commission (ICC) assisted in the negotiation of this claim in 2005 and 2006, leading to the settlement of the claim in 2007.

The Metepenagiag Mi'kmaq Nation (also known as the Red Bank First Nation) have a total of 3,907 hectares of land in four reserves near the confluence of the Little Southwest and Northwest branches of the Miramichi River in northeastern New Brunswick, about 22 kilometres west of Newcastle and 160 kilometres northwest of Moncton. This is an area with many prehistoric archeological sites with artifacts dating back some 2,500 years:

From the age, number, size and type of archeological sites present, it is clear that Red Bank was an important social and cultural center for the ancestors of the Miramichi Micmac.¹

As of January 2008, the registered population of the Metepenagiag Mi'kmaq Nation is 553, of whom 387 live on reserve (primarily on Red Bank IR 4).²

This report will provide a brief summary of the Hosford Lot and IR 7 land claims. It will also summarize the events leading up to the settlement of the claim and describe the Commission's role in the resolution process.

The First Nation and the Specific Claims Branch (SCB) of the Department of Indian Affairs and Northern Development (DIAND) agreed in May 1996 to jointly research various potential claims involving Metepenagiag's land and assets. The Red Bank IR 7 claim was submitted to DIAND in July 1996 and accepted for negotiation in 1998, "based on the allegation that Canada

1 Patricia Allen, *Metepenagiag: New Brunswick's Oldest Village* (Fredericton, NB: Goose Lane and Red Bank First Nation, 1994), 19.
2 Canada, Indian and Northern Affairs Canada [INAC], First Nation Profiles, Metepenagiag Mi'kmaq Nation, <http://sdiprod2.inac.gc.ca/fnprofiles> (consulted January 6, 2008).

INDIAN CLAIMS COMMISSION PROCEEDINGS

alienated certain parts of the reserve without the benefit of a surrender. A survey, conducted in 1904, resulted in the First Nation losing approximately 64 acres of land from the Red Bank Indian Reserve No. 7, located 25 km south-west of Miramichi, New Brunswick.”³ An agreement in principle was reached in 1999, but the settlement was not ratified in two votes held in the community.

The Hosford Lot is approximately 100 acres of land in Big Hole Tract No. 8, located about 20 kilometres northwest of Miramichi. This parcel was sold and patented to William Hosford in April 1906 without a surrender as required under the *Indian Act*. The claim was submitted to the department in January 1999 and accepted for negotiation on January 22, 2001. The First Nation and Canada negotiated the claim without assistance until April 2005 when difficulties arose and they asked that the ICC provide neutral, third-party facilitation.

THE COMMISSION’S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission’s establishment by Order in Council⁴ on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into specific claims; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process. An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim.

As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable

³ INAC Press Release, November 30, 2007, Background.

⁴ The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, inter alia, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.

METEPENAGIAG MI'KMAQ NATION – HOSFORD LOT AND IR 7
NEGOTIATION MEDIATION

compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

The Commission provides broad mediation and facilitation services at the request of both the First Nation and the Government of Canada. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.

INDIAN CLAIMS COMMISSION PROCEEDINGS

PART II

NEGOTIATION AND MEDIATION OF THE CLAIM

In 2002, Canada agreed to reopen discussions on the IR 7 claim and to include it in negotiations for the Hosford Lot claim. The Indian Claims Commission was not involved with these negotiations at the beginning. It was not until April 2005 that both the federal and First Nation negotiating teams agreed to ask the ICC to play a facilitation and mediation role because the negotiations were not progressing satisfactorily. The ICC subsequently chaired three meetings in May 2005, January 2006, and May 2006, providing accurate records of those discussions, following up on undertakings, and consulting with the parties to establish mutually acceptable agendas, venues, and times for the meetings.

Although the Commission is not at liberty, based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions that took place, it can be stated that with the assistance and support of the ICC, the First Nation and representatives of DIAND were able to overcome their differences and arrive at a mutually acceptable resolution of the Hosford Lot and IR 7 claims.

Shortly after the parties reached agreement on the nature of the Commission's role in the negotiations, the First Nation presented a "without prejudice" offer to settle in May 2005. Working from this initial offer, Canada and the First Nation were able to arrive at an agreement in principle in January 2006. The next stages in the settlement process involved drafting the agreement and organizing the referendum; the parties decided that they could continue this work without the facilitation services of the ICC. In his letter to the ICC in June 2006, the federal negotiator thanked the Commission for its "positive contribution to the future settlement of these claims" and left it open for the ICC to become involved in the future, if required.⁵

⁵ Martin Sampson, Federal Negotiator, Quebec and Atlantic Negotiations, INAC, to Ralph C. Brant, Director, Mediation, Indian Claims Commission, June 13, 2006, ICC file 2100-11-1M.

METEPENAGIAG MI'KMAQ NATION – HOSFORD LOT AND IR 7
NEGOTIATION MEDIATION

By April 2007, the settlement agreement was completed and initialled by the parties. At a referendum held on June 14, 2007, “70 per cent of the eligible Metepenagiag members who voted cast their votes in favour of the agreement.”⁶ More than 100 years after the unlawful alienation of those two parcels of land, Canada agreed to provide approximately \$1.4 million in compensation, which the First Nation could use to purchase 300 acres of replacement lands.

6 INAC, News Release, “Land Claim Settlement Provides Economic Boost for Metepenagiag Mi’kmaq Nation,” <http://www.ainc-inac.gc.ca/nr/prs/s-d2007/2-2972-eng.asp> (consulted December 6, 2007).

INDIAN CLAIMS COMMISSION PROCEEDINGS

PART III

CONCLUSION

ICC FACILITATION: EXPERIENCED AND SKILLED

Negotiations can break down at any time and for any number of reasons and, if the parties are not able to overcome their differences, many months or years of work can be lost and the settlement of a long-standing grievance delayed or halted altogether. When the discussions relating to the Hosford Lot and IR 7 claims became stalled, the parties decided to ask the Indian Claims Commission to assist them in the negotiations. The skill and expertise that the ICC has acquired over the years enabled it to enter into ongoing discussions, to be a neutral third party that can help to keep the parties focused on the issues, and to provide informal mediation during meetings so that the negotiations can move forward toward a successful resolution. The parties still control the process and, as in these claims, they can elect to forgo facilitation once the hurdle has been cleared, with the understanding that the ICC is willing and able to come back should its assistance be needed in the future.

FOR THE INDIAN CLAIMS COMMISSION



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

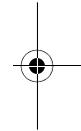
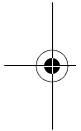
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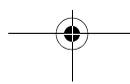
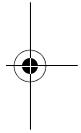
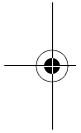
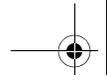


INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE GEORGE GORDON FIRST NATION TREATY LAND ENTITLEMENT NEGOTIATIONS

MAY 2008





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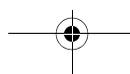
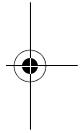
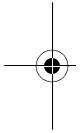
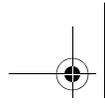
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GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

SUMMARY

**GEORGE GORDON FIRST NATION
TREATY LAND ENTITLEMENT NEGOTIATIONS MEDIATION
Saskatchewan**

The report may be cited as Indian Claims Commission, *George Gordon First Nation: Treaty Land Entitlement Negotiations Mediation* (Ottawa, May 2008), reported (2009) 23 ICCP 443.

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

Treaties – Treaty 4 (1874); **Treaty Interpretation** – Treaty Land Entitlement; **Treaty Land Entitlement** – Policy – Population Formula – Saskatchewan TLE Framework Agreement; **Mandate of Indian Claims Commission** – Mediation; **Saskatchewan**

THE SPECIFIC CLAIM

George Gordon First Nation submitted its treaty land entitlement (TLE) claim to the Department of Indian Affairs and Northern Development (DIAND) in 1992, alleging a shortfall of entitlement lands based on additions to the band membership after the date of first survey (DOFS). The claim was rejected in 1996. After the Indian Claims Commission (ICC) reported on a number of inquiries relating to TLE issues, DIAND amended its TLE policy. The George Gordon TLE claim was reassessed and accepted under the 1998 Historic Treaty Land Entitlement Shortfall Policy on March 9, 2004. When negotiations to settle this claim began in July 2004, all parties at the table requested that the Indian Claims Commission provide administrative and facilitation services throughout the negotiations.

BACKGROUND

The ICC's involvement in this claim related only to its mediation mandate. As mediator, the ICC did not receive historical records or legal submissions from the parties.

Chief Ka-ne-on-us-ka-tew (also known as George Gordon) signed Treaty 4 in 1874 on behalf of his followers, whose descendants now call themselves the George Gordon First Nation. Treaty 4 specified that government officials and individual bands

INDIAN CLAIMS COMMISSION PROCEEDINGS

were to select the location of reserves, which were to be surveyed according to a formula of one square mile for each family of five (128 acres per person). Indian Reserve (IR) 86 was surveyed in 1876 and resurveyed in 1881, 1883, and 1884. Order in Council PC 1151, dated May 17, 1889, confirmed the 48-square-mile reserve on the western edge of the Little Touchwood Hills, approximately 61 kilometres northwest of Fort Qu'Appelle, Saskatchewan.

In 1998, following several ICC Inquiries into TLE matters, Canada amended its policy and agreed to include eligible new adherents to treaty and transferees from landless bands after the date of first survey when calculating treaty land entitlement. It was on this basis that the Minister of Indian Affairs accepted the George Gordon First Nation TLE claim in March 2004.

MATTERS FACILITATED

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

OUTCOME

On February 15, 2008, the George Gordon First Nation ratified the proposed settlement of \$26.6 million in compensation, with authorization to purchase up to 115,712 acres of land which can be converted to reserve status.

REFERENCES

The ICC does no independent research during mediation and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

PART I

INTRODUCTION

In the 1870s, some reserves set aside in what is now the Province of Saskatchewan under Treaty 4 did not meet the terms as negotiated and specified in that agreement. This is a report on how, almost 130 years after the survey and establishment of a reserve, a claim based on such an error was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

Gordon Indian Reserve (IR) 86 contains 14,438.3 hectares of land on the western edge of the Little Touchwood Hills, approximately 61 kilometres northwest of Fort Qu'Appelle, Saskatchewan. The Gordon First Nation changed its name to the George Gordon First Nation in 2007. The total registered band population as of December 2007 was 3,021, of whom 992 lived on reserve.¹

This report will not provide a full history of the George Gordon First Nation treaty land entitlement (TLE) claim but instead will briefly outline the historical background. It will also summarize the events leading up to the settlement of the claim and illustrate the Commission's role in the resolution process.

George Gordon FN submitted a TLE claim to the Department of Indian Affairs and Northern Development (DIAND) in 1992; it was rejected in September 1996. After the Indian Claims Commission held a number of inquiries regarding TLE claims, Canada revised its TLE research guidelines in 1998, and George Gordon's TLE claim was considered under the new criteria. This claim was accepted by the Minister of Indian Affairs in letters from him and the Assistant Deputy Minister dated March 9, 2004.² After the First Nation passed a Band Council Resolution (BCR) agreeing to enter into negotiations

1 Canada, Indian and Northern Affairs Canada [INAC], First Nation Profiles, Gordon First Nation, <http://sdiprod2.inac.gc.ca/fnprofiles> (consulted January 18, 2008).

2 Andy Mitchell, Minister of Indian Affairs, to Chief Bryan A. McNabb, Gordon First Nation, March 9, 2004, and Michel Roy, Assistant Deputy Minister, Claims and Indian Government to Chief McNabb, March 9, 2004, ICC file 2107-56-1M, vol. 1.

INDIAN CLAIMS COMMISSION PROCEEDINGS

on the basis of these letters, the Chief wrote to the Specific Claims Branch requesting a meeting during which Canada would outline its position. In that letter, dated May 11, 2004, the Chief also asked that the ICC facilitate the negotiations.³ Canada agreed. Negotiations began in July 2004.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council⁴ on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into its specific land claim; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process.

An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim. As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes

3 Band Council Resolution BCR 2003/04-39, March 24, 2004, and letter, Chief Glen Pratt to Specific Claims Branch, May 11, 2004, ICC file 2107-56-1M, vol. 1.

4 The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, among other things, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
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principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

The Commission provides broad mediation, facilitation, and other administrative services at the request of both the First Nation and the Government of Canada. These services are available at any stage of the specific claims process, including research, submission, review, acceptance, and negotiation. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The mediation process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.

INDIAN CLAIMS COMMISSION PROCEEDINGS

PART II

A BRIEF HISTORY OF THE CLAIM

In September 1874, representatives of Her Majesty the Queen met with Cree and Saulteaux Indians at Qu'Appelle Lakes in what was then the North-West Territories, to negotiate Treaty Four. In exchange for the surrender of Aboriginal title to "195,000 square km of territory ranging from the southeast corner of present-day Alberta through most of southern Saskatchewan to west-central Manitoba"⁵ the Crown promised to provide the Indians with perpetual annuities, schools, agricultural assistance, and reserve lands. The treaty specified that government officials and individual bands were to select the location of reserves to be surveyed based on a formula of one square mile for each family of five (that is, 128 acres per person):

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.⁶

Chief Ka-ne-on-us-ka-tew (One That Walks on Four Claws) – also known as George Gordon – signed Treaty 4 at Qu'Appelle Lakes on September 15, 1874,⁷ on behalf of the 47 families of Plains Cree, Swampy Cree, Saulteaux, Scottish mixed blood, and Métis⁸ paid with him at that time.

As instructed by the Indian Commissioner and the Surveyor General, William Wagner, Dominion Land Surveyor (DLS) travelled to the Treaty 4 area late in the summer of 1875 to begin the survey of the reserves promised in the

5 "Treaty 4," *The Encyclopaedia of Saskatchewan*, http://sk.uregina.ca/entry/treaty_4.html
 6 Canada, *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6.
 7 Canada, *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5, 8.
 8 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990, paperback 1993), 46.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
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treaty. After travelling to Fort Ellice and Fort Pelly, Wagner arrived at Touchwood Hills sometime after mid-September 1875 and met with Chief George Gordon. At first, the Chief stated he did not want his reserve surveyed that fall, preferring to first hold a council with all Chiefs at the Touchwood Hills. Several days later, Charles Pratt (a member of Gordon's Band who had been an interpreter at the Treaty 4 negotiations) came to Wagner and asked him to return to meet with Chief Gordon. The surveyor was able to reach an agreement with the Chief regarding the location of the reserve and he began to define the boundaries.

On my arrival at Touchwood Hills I called on the Chief to point out to me the place of commencement of the Reserve, but he asked me to meet them next day since his Headman was not present. I did so and after waiting a few hours they began to speak and the result was, that they did not want it surveyed that fall, but would hold a council, with all the chiefs who intended to settle at Touchwood Hills.

I explained to them that it was not their business, that each tribe had to look out for themselves, their objections too ridiculous to mention. I over ruled but it was of no avail. No survey could be done.

On my return to my camp I fell in with a halfbreed⁹ – McNab – who is interested in this Reserve and speaks good English, engaged him to take my supplies to the Hudson's Bay Company Post for storage and at the same time talked the question of Reserve over with him, told him the foolishness of the chief, since as long as the Reserve was not surveyed, the land being Public property and therefore anyone could settle on it without the Government being able to forbid it.

This McNab also informed me that Pisqua, the Chief who had chosen Duck Lake for his reserve, had a messenger and presents sent up to Gordon, to advise him to oppose the survey of the Reserve – his reason I could not make out.

Next day was Sabbath and stormy so I remained in my tent, but on awakening Monday morning, I found Charles Pratt and his son waiting for me to ask me to come back, to which I consented, and so I moved my camp nearer to the centre of the Reserve. It took me again two days before I could come to an understanding ...¹⁰

Wagner reported that he had received instructions from the Indian Commissioner that the Band was entitled to 41 square miles. To this he added another 7 square miles to compensate for the Hudson's Bay Company and old settler claims and to meet the entitlement for 30 people who had indicated

9 People of mixed ancestry were permitted to take treaty if the Commissioners decided that they generally lived the traditional Indian lifestyle (see report of M.G. Dickieson to the Minister of the Interior, October 7, 1876, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30th, 1876*, xxxiii–xxxv). The McNab referred to by Wagner was in fact a member of Poor Man's Band.
 10 William Wagner, DLS, Ossowo, to Minister of the Interior, January 1876, Library and Archives Canada (LAC), RG 88, vol. 300.

INDIAN CLAIMS COMMISSION PROCEEDINGS

that they, although currently paid with other bands, wished to be included with Gordon:

According to instructions from the Indian Commissioner the Band was entitled to 41 square miles but during the councils which were held at Touchwood Hills the following 5 families with 30 heads wished to be included in this band, viz: – formerly belonging to the Poor Man’s Band –

Andrew McNab	1 man, 1 woman, 8 children
Thomas McNabb	1 [man], 1 [woman], 4 [children]
Alex McNabb	1 [man], 1 [woman]
Francis Cyre	1 [man], 1 [woman], 7 [children]
John Corcoran	1 [man], 1 [woman], 1 [child]

The last belonging to Prince’s Band, his wife to Gordon’s and he wished to be with his relations.

Total 5 men, 5 women, 20 children

which would entitle them to 6 square miles more and calculating for the Hudson’s Bay Company claim and old Settlers claim 1 square mile gives a total of 48 square miles, which I laid out in 6 miles north and 8 miles west.¹¹

Wagner began the survey after his meeting with the Chief but was unable to complete the work because of a snowstorm in late October. He returned to Touchwood Hills the following summer and completed the survey by the end of July 1876.

In 1881, Indian Agent McDonald reported that Gordon’s Band wanted to exchange some of the wooded area for prairie land more suitable for agriculture. Surveyor J.C. Nelson was instructed to make the necessary changes. In October 1881, Nelson added land on the west side where the Band was already farming outside the reserve boundaries, plus a small amount of land on the northwest corner and cut off an equal amount of land from the south and east side.

I had visited Gordon’s band, at the Mission, with a view of ascertaining the nature of the country that would be taken into their reserve by changing the boundaries as these Indians desired.

They said they were anxious to make a change of good, timbered land for open prairie for farming purposes, and asked for a strip a mile deep to be added to

¹¹ William Wagner, DLS, Ossowo, to Minister of the Interior, January 1876, LAC, RG 88, vol. 300.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
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the north and west sides of the reserve; and to have a similar strip cut off the south and east sides.

I found, upon investigation, that the strip they wanted on the north side would take in the remainder of a patch of valuable timber land, most of which they had already on their reserve.

A strip added to the west side of the reserve, of about a mile wide would take in the farms and improvements made by this band outside the west boundary; and a small bit added to the north side of the north-west corner would be all that is necessary to cover improvements.¹²

There was no change in the total acreage.

In 1883 and 1884, Surveyors Ponton and Nelson made additional changes to the boundaries of the reserve, altering the north and west boundaries, but still without adding to or subtracting from the acreage. IR 86, measuring 48 square miles (30,720 acres), was confirmed by Order in Council PC 1151 dated May 17, 1889. A brief description of the reserve was included in the Order in Council:

The surface is generally rolling and covered, for the most part, with poplar timber, generally of small size. A valuable tract, however, of large poplar and birch, lies in the north-east corner. The country for about two miles in width on the western side is more open, being prairie with poplar bluffs; and prairie openings of considerable extent seem to penetrate the reserve for some miles from the west. There are numerous good sized lakes and sloughs. The soil is generally black loam with clay sub-soil, but a small portion at the north-west corner is of a more sandy nature.¹³

ESTABLISHING A TREATY LAND ENTITLEMENT CLAIM

The 19th and 20th century treaties negotiated with the Indians in northern Ontario, the Prairies, and northern British Columbia – the Numbered Treaties – all included a formula (either 32 acres per person or 128 acres per person, depending on the treaty) for calculating the size of reserve lands.¹⁴ Unfortunately, neither the treaties nor the correspondence and reports associated with them explained when or how those population figures were to be obtained, leaving unanswered many important questions. Were the figures determined by the number of people in the band at the time of the treaty, or when the survey was done, or at some other time? Were the numbers to be

12 John C. Nelson, DLS, Annual Report, January 10, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881*, 133.

13 Order in Council PC 1151, May 17, 1889, p. 41.

14 This section summarized from Donna Gordon, "Treaty Land Entitlement, A History," prepared for the Indian Claims Commission, Ottawa, December 1995, reprinted (1996) 5 ICCP, 339.

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determined from the treaty annuity paylists, by a separate census, or by a count of those present when the survey was done?

After the federal government announced in 1973 its intention to settle specific claims where Canada had not fulfilled its treaty obligations to set aside reserves, researchers needed policy guidelines to answer these questions. Initially, Canada only validated claims where a shortfall of land was established based on the Band's population according to the treaty annuity paylists at the date of first survey, with no consideration given to people who were absent or who joined the band after the survey. In 1983, the Office of Native Claims Branch of the Department of Indian Affairs distributed "Research Guidelines" for the validation of TLE claims which expanded the eligibility criteria to include people who joined the band after the date of the first survey:

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims.¹⁵

Under the heading "Persons included for entitlement purposes," the guidelines included, with certain defined restrictions, those who appeared on the payroll for the year of survey, absentees, new adherents to treaty, transfers from landless bands, and non-treaty Indians who marry into a treaty band.¹⁶

In 1989, Canada and the Federation of Saskatchewan Indian Nations (FSIN) agreed to establish the Office of the Treaty Commissioner (OTC), which was charged with, among other things, developing proposals for the settlement of TLE claims in Saskatchewan that would satisfy both Canada and the First Nations. On September 22, 1992, after two years of cooperative research and negotiations, representatives of the federal and provincial governments and most of the First Nations in Saskatchewan with recognized TLE shortfalls, signed the Saskatchewan Treaty Land Entitlement Framework Agreement (Framework Agreement) defining the manner in which the parties agreed to fulfill outstanding TLE obligations to Entitlement Bands in Saskatchewan.

15 DIAND, Office of Native Claims, "Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983, reprinted (1996) 5 ICCP 512.

16 DIAND, Office of Native Claims, "Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983, reprinted (1996) 5 ICCP 512 at 515.

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According to this negotiated agreement, the basis for determining the final settlement for each First Nation that signed the Framework Agreement was the “equity formula”: historical percentage shortfall × current population × acres per treaty (128 acres in Treaty 6) equals the quantum of land that could be purchased by a First Nation to settle a claim. The historical percentage shortfall was determined by comparing the amount of land that the First Nation actually received with the amount of land that it should have received, and in order to establish that acreage, it was necessary to define who could be counted with the First Nation for entitlement purposes. The procedures established by the OTC were based on the 1983 Office of Native Claims guidelines, with additional interpretations and definitions that were accepted by both Canada and the First Nations.

Twenty-six Saskatchewan First Nations had established a TLE shortfall and were parties to the Framework Agreement, but during the negotiations, there was a recognition that there were other Bands who could later prove to have valid TLE claims. As a result, Article 17 was included to insure that those Bands would be dealt with on the same basis as those covered by the Framework Agreement, if they chose to opt into that approach.

The issue of Article 17 and its relevance to both validation and negotiation of TLE claims in Saskatchewan was considered by the Indian Claims Commission in 1996 in its inquiries into the rejected TLE claims of both Kawacatoose and Kahkewistahaw First Nations. After reviewing documentation and hearing from many of the people who participated in the negotiation of the Framework Agreement, the ICC concluded in the Kawacatoose Inquiry that Article 17 did not apply to the criteria to validate a claim, but was to apply to the settlement of claims after validation:

While the Commission has determined that the Framework Agreement does not give non-Entitlement Bands an independent basis for validation ...
... once substantiation of the claim on a non-Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to that band.¹⁷

The ICC reiterated this position in its subsequent report on the TLE claim of the Kahkewistahaw First Nation:

¹⁷ Indian Claims Commission, *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73 at 229.

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Since the release of the Kawacatoose report, we remain unchanged in our view that section 17.03 is limited to circumstances in which a band's treaty land entitlement claim has *already* been accepted for negotiation in accordance with the terms of treaty. In other words, section 17.03 applies in the context of *settlement*. It does *not* afford a separate basis for *validation* apart from treaty. It represents an agreement among Canada, Saskatchewan, and the Entitlement Bands, that, once a non-Entitlement Band's claim has been accepted for negotiation independently of the Framework Agreement itself, then the settlement of that claim can be dealt with much more expeditiously by avoiding protracted bargaining on points that have already been negotiated.¹⁸

Article 17 is significant because after the Framework Agreement was signed, Canada changed its criteria on whom to include in calculating TLE at the validation stage. In 1993, it allowed only those who were members of the First Nation at date of first survey (including people who were absent at that date). In 1998, after the ICC recommendations in a number of TLE inquiries, Canada expanded the categories to also include additions to membership after the survey – new adherents to treaty, transferees from landless bands, and non-treaty people marrying into the Band. Even so, some specific aspects of the OTC working assumptions allowed the inclusion of some people who would be excluded under Canada's guidelines and the application of the less inclusive criteria would mean that post-Framework TLE settlements would not receive levels of compensation equivalent to those First Nations who were parties to the Framework Agreement. This variance in eligibility made it difficult for Canada and Saskatchewan First Nations to reach final agreement on the total number of people to include in the treaty land entitlement formula, leaving the question to be worked out at each individual negotiation table.

18 Indian Claims Commission, *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 100. Emphasis in original.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

PART III

NEGOTIATION AND MEDIATION OF THE CLAIM

Negotiations toward settlement of the George Gordon TLE claim began in July 2004. Parties to the negotiations included Canada, George Gordon First Nation, and the Province of Saskatchewan, which had a legal obligation under the 1930 *Natural Resources Transfer Agreement* to provide “unoccupied Crown lands” for creation of Indian reserves. At the request of all the parties, the ICC facilitated the discussions.

For the most part, facilitation focussed on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes when requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate any research that might be undertaken by the parties to support negotiations.

Although the Commission is not at liberty, based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, it can be stated that the First Nation and representatives of the Department of Indian Affairs and Northern Development and the Province of Saskatchewan worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at mutually acceptable resolution of the George Gordon TLE claim.

Elements of the negotiation included agreement by the parties on the nature of the Commission’s role in the negotiations; the final population figures for determining shortfall acres for settlement purposes; the effect of Article 17 of the 1992 Saskatchewan Framework Agreement on the settlement criteria; the applicability of an honour payment to the George Gordon First Nation; use of entitlement moneys prior to the shortfall acre acquisition date; varying the payment schedule stipulated in the Framework Agreement; the

INDIAN CLAIMS COMMISSION PROCEEDINGS

impact of the bilateral (Canada and Saskatchewan) discussions relating to the cost-sharing provisions in the Framework Agreement; compensation for land and minerals as well as negotiations and ratification expenses; and, finally, settlement issues and agreements, communication, and ratification.

One issue – the application of the appropriate TLE guidelines before and after validation to the negotiation of TLE claims in Saskatchewan in light of Article 17 of the Framework Agreement and past practices followed by Canada in settling other claims – was also of concern to three other Saskatchewan First Nations who were proceeding to negotiations on treaty land entitlement claims. The four First Nations (Muskoday, Sturgeon Lake, George Gordon, and Pasqua) and Canada agreed that an appropriate and cost effective way to address this issue was to come together at a Common Table. The ICC was asked to facilitate the discussions. After an exchange of relevant documents and after meetings held in the fall of 2004, the parties were able to agree on eligibility criteria. Each First Nation subsequently proceeded with its individual negotiations.

Researchers for Canada and George Gordon First Nation exchanged information relating to the background of certain band members who had been added to the Band's annuity payroll after the date of first survey to reach agreement on those eligible to be counted toward treaty land entitlement. In November 2006, the three parties reached an agreement in principle. While the federal negotiator waited for a financial mandate from Treasury Board, the table proceeded to draft the settlement agreement and trust agreement. Canada made its formal offer to settle on June 14, 2007, the First Nation accepted the offer by Band Council Resolution dated June 18, 2007 and the settlement agreement was initialled on July 3, 2007. The negotiated settlement included cash compensation for land and minerals of approximately \$26.6 million plus negotiations and ratification costs, and authorization to purchase up to 115,712 acres to be added to the George Gordon reserve.

The settlement agreement was presented to the members of the George Gordon First Nation for ratification on September 26, 2007. An absolute majority of eligible voters in favour of the agreement was required, and the first vote failed to meet the requirement. The agreement was successfully ratified on the second vote on February 15, 2008.

GEORGE GORDON FIRST NATION – TREATY LAND ENTITLEMENT
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PART IV

CONCLUSION

Credit for the successful negotiation and settlement of the George Gordon treaty land entitlement claim belongs to the parties. They were diligent and thorough as they worked toward agreement on the numerous issues before them. The Commission, in its role as a neutral third party, helped maintain the focus and momentum of the discussions, and with the ICC performing many of the necessary administrative tasks, the parties were able to concentrate their full attention on the substantive details of the negotiations and settlement.

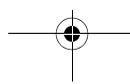
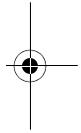
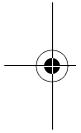
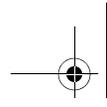
The experience and expertise that the Commission has developed over the years was especially beneficial at the Common Table discussions involving three other First Nations with TLE claims and similar issues that had to be resolved before the claims could be considered. The early success at the Common Table in resolving these issues has led to the successful negotiation and resolution of three of the individual TLE claims, with a fourth First Nation heading toward ratification of its claim.

FOR THE INDIAN CLAIMS COMMISSION



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

Dated this 23rd day of May, 2008.

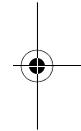
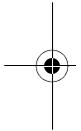


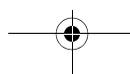
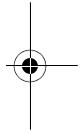
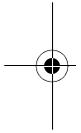
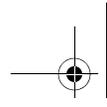


INDIAN CLAIMS COMMISSION

REPORT ON THE MEDIATION OF THE STURGEON LAKE FIRST NATION TREATY LAND ENTITLEMENT NEGOTIATIONS

MAY 2008





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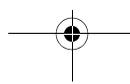
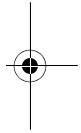
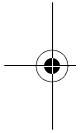
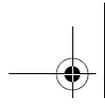
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STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
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SUMMARY

STURGEON LAKE FIRST NATION TREATY LAND ENTITLEMENT NEGOTIATIONS MEDIATION Saskatchewan

The report may be cited as Indian Claims Commission, *Sturgeon Lake First Nation: Treaty Land Entitlement Negotiations Mediation* (Ottawa, May 2008), reported (2009) 23 ICCP 463.

*This summary is intended for research purposes only.
For greater detail, the reader should refer to the published report.*

Treaties – Treaty 6 (1876); **Treaty Interpretation** – Treaty Land Entitlement;
Treaty Land Entitlement – Policy – Population Formula – Saskatchewan
Framework Agreement; **Mandate of Indian Claims Commission** – Mediation;
Saskatchewan

THE SPECIFIC CLAIM

Sturgeon Lake First Nation submitted its treaty land entitlement (TLE) claim to the Department of Indian Affairs and Northern Development (DIAND) in 1996, alleging a shortfall of entitlement lands based on additions to the band membership after the date of first survey (DOFS). It was accepted under the 1998 Historic Treaty Land Entitlement Shortfall Policy on March 31, 2004. When negotiations to settle this claim began in June 2004, all parties at the table requested that the Indian Claims Commission (ICC) facilitate the negotiations and provide other administrative services throughout the negotiations.

BACKGROUND

The ICC's involvement in this claim related only to its mediation mandate. As such, the ICC did not receive historical records or legal submissions from the parties.

Chief Ah-yah-tus-kum-ik-im-am (William Twatt) and his councillors signed Treaty 6 in 1876 on behalf of their followers, the descendants of whom now call themselves the Sturgeon Lake First Nation. Treaty 6 specified that government officials and individual bands were to select the location of reserves to be surveyed according to a formula of one square mile for each family of five (128 acres per person). Indian Reserve (IR) 101 was surveyed in 1878. Order in Council PC 1151, dated May

INDIAN CLAIMS COMMISSION PROCEEDINGS

17, 1889, confirmed the 34.4-square-mile reserve about 30 kilometres northwest of Prince Albert.

In 1998, following several ICC Inquiries into TLE matters, Canada amended its policy and agreed to include eligible new adherents to treaty and transferees from landless bands after the date of first survey when calculating treaty land entitlement. It was on this basis that the Minister of Indian Affairs accepted the Sturgeon Lake First Nation TLE claim in March 2004.

Matters Facilitated

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

Outcome

On January 25, 2007, the Sturgeon Lake First Nation ratified the proposed settlement of \$10.4 million in compensation, with authorization to purchase up to 38,971 acres of land which can be converted to reserve status.

REFERENCES

The ICC undertakes no independent research during mediation, drawing on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

PART I

INTRODUCTION

In the 1870s, some reserves set aside in what is now the province of Saskatchewan under Treaty 6 did not meet the terms as negotiated and specified in that agreement. This is a report on how, almost 130 years after the survey and establishment of a reserve in Saskatchewan, a treaty land entitlement (TLE) claim based on such an error was, with the assistance of the Indian Claims Commission (ICC), successfully resolved.

The people of the Sturgeon Lake First Nation are descended from the Cree Chief, Ah-yah-tus-kum-ik-im-am. According to the records of the Department of Indian Affairs, after 1880 the Band was usually referred to as William Twatt's Band after the Chief's English name. In about 1963, the name was changed to the Sturgeon Lake Band and later to the Sturgeon Lake First Nation.¹ Sturgeon Lake Indian Reserve (IR) 101, which is the primary reserve, measures 8,889 hectares and is located approximately 29 kilometres northwest of Prince Albert, Saskatchewan. A second reserve, IR 101A, measures 320.5 hectares. The total registered band population as of January 2008 was 2,410, of whom 1,648 lived on reserve.²

This report will not provide a full history of the Sturgeon Lake treaty land entitlement claim but instead will briefly outline the historical background. It will also summarize the events leading up to the settlement of the claim and illustrate the Commission's role in the resolution process.

Sturgeon Lake First Nation submitted its TLE claim to the Department of Indian Affairs and Northern Development (DIAND) in 1996. It was accepted under the 1998 Historic Treaty Land Entitlement Shortfall Policy on March 31, 2004.³ When negotiations to settle this claim began in June 2004, all parties at the table requested that the Indian Claims Commission facilitate the

- 1 Indian Claims Commission, *Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998), 10 ICCP 3 at 12.
- 2 Canada, Indian and Northern Affairs Canada [INAC], First Nation Profiles, Sturgeon Lake First Nation, <http://sdiprod2.inac.gc.ca/fnprofiles> (consulted November 21, 2007).
- 3 Andy Mitchell, Minister of Indian Affairs, to Chief Earl Ermine, Sturgeon Lake First Nation, March 31, 2004, ICC file 2107-31-2M, vol. 1.

INDIAN CLAIMS COMMISSION PROCEEDINGS

negotiations and provide other neutral third-party administrative services throughout the negotiations.

THE COMMISSION'S MANDATE AND MEDIATION PROCESS

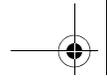
The Indian Claims Commission was created as a joint initiative after years of discussion between First Nations and the Government of Canada on how the process for dealing with Indian land claims in Canada might be improved. Following the Commission's establishment by Order in Council⁴ on July 15, 1991, Harry S. LaForme, a former commissioner of the Indian Commission of Ontario, was appointed as Chief Commissioner. With the appointment of six Commissioners in July 1992, the ICC became fully operative. The ICC is currently being led by Chief Commissioner Renée Dupuis (QC), along with Commissioners Daniel J. Bellegarde (SK), Jane Dickson-Gilmore (ON), Alan C. Holman (PEI), and Sheila G. Purdy (ON).

The Commission has a double mandate: to inquire, at the request of a First Nation, into its specific land claim; and to provide mediation services, with the consent of both parties, for specific claims at any stage of the process.

An inquiry may take place when a claim has been rejected or when the Minister has accepted the claim for negotiation but a dispute has arisen over the compensation criteria being applied to settle the claim. As part of its mandate to find more effective ways to resolve specific claims, the Commission has established a process to inquire into and review government decisions regarding the merits of a claim and the applicable compensation principles when negotiations have reached an impasse. Since the Commission is not a court, it is not bound by strict rules of evidence, limitation periods, and other technical defences that might present obstacles in litigation of grievances against the Crown. This flexibility removes those barriers and gives the Commission the freedom to conduct fair and objective inquiries in as expeditious a way as possible. In turn, these inquiries offer the parties innovative solutions in their efforts to resolve a host of complex and contentious issues of policy and law. Moreover, the process emphasizes principles of fairness, equity, and justice to promote reconciliation and healing between Aboriginal and non-Aboriginal Canadians.

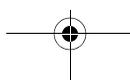
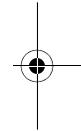
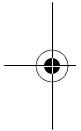
The Commission provides broad mediation, facilitation, and other administrative services at the request of both the First Nation and the

⁴ The original Commission has been substantively amended in the years since 1991, most recently on November 22, 2007, whereby the Commissioners are, among other things, directed to complete all inquiries by December 31, 2008, including all inquiry reports, and to cease, by March 31, 2009, all their activities and all activities of the Commission, including those related to mediation.



STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

Government of Canada. These services are available at any stage of the specific claims process, including research, submission, review, acceptance, and negotiation. Together with the mediator, the parties decide how the mediation process will be conducted. This method ensures that the process fits the unique circumstances of each particular negotiation. The mediation process used by the Commission for handling claims is aimed at increasing efficiency and effectiveness in resolving specific claims.



INDIAN CLAIMS COMMISSION PROCEEDINGS

PART II

A BRIEF HISTORY OF THE CLAIM

In August 1876, representatives of Her Majesty the Queen met with Plains Cree, Wood Cree, and other tribes of Indians at Fort Carlton in the vicinity of Duck Lake north of Saskatoon to negotiate Treaty Six. In exchange for the surrender of Aboriginal title to 121,000 square miles of land in what is now central Saskatchewan and Alberta, the Crown promised to provide the Indians with perpetual annuities, schools, agricultural assistance, a medicine chest, and reserve lands. The treaty specified that government officials and individual bands were to select the location of reserves, which were to be surveyed based on a formula of one square mile for each family of five (that is, 128 acres per person):

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.⁵

Chief Ah-yah-tus-kum-ik-in-win and four councillors signed Treaty 6 at Fort Carlton on August 23, 1876,⁶ on behalf of the 23 families paid with them at that time.⁷ When interviewed after the treaty negotiations, the Chief indicated

- 5 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 3.
- 6 Canada, *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964), 5-7.
- 7 W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, in Library and Archives Canada (LAC), RG 10, vol. 3636, file 6694-1.

STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
NEGOTIATIONS MEDIATION

that his people wanted the reserve on the north side of Sturgeon Lake.⁸ A year later, the acting Indian Agent reported that the Band had already built houses and had begun to cultivate the land:

Ah-yah-tus-kum-ik-in-win and band would like their reservation around Sturgeon Lake about 18 miles north of Prince Albert. They have built some houses and have wood out for four more. They have six bushels of barley sown and 20 of potatoes besides a garden.⁹

In the summer of 1878, surveyor Elihu Stewart received verbal instructions from Lieutenant Governor David Laird and Assistant Surveyor General Lindsay Russell to define the boundaries of the reserve at Sturgeon Lake. Stewart began his work on August 19, and completed it on September 20, after the Chief had met with the Lieutenant Governor to resolve a disagreement concerning the boundaries.¹⁰ The reserve as surveyed by Stewart measured 34.4 square miles (22,042 acres) and was confirmed by Order in Council PC 1151, dated May 17, 1889. This acreage satisfied the land entitlement under Treaty 6 for 172 people ($22,042 \div 128 = 172$). The Order in Council provided a brief description of the reserve land:

In the north-eastern part the surface is chiefly rolling and covered with poplar, most of which is small and scrubby, and jack-pine. There is little open ground, some tamarac muskegs occur. The soil is a sandy loam containing much vegetable fibre. North of the lake there are stretches of open land well adapted to farming. The western extremity is heavily timbered with spruce of superior quality. Sturgeon Lake is a long narrow expansion of Sturgeon or Net-Setting River, and runs easterly, across the reserve. This stretch of water has high bold shores, and abounds with fish and fowl. It is used by lumbermen to get out timber.¹¹

Subsequent to Stewart's survey, there were two alterations to the land holdings of the Sturgeon Lake Band, neither of which affected the acreage for treaty land entitlement purposes. In 1913, the Sturgeon Lake Band surrendered 2,145.47 acres of its reserve land and received in exchange 1,425 acres as an addition to IR 100 and 792.4 acres that were set apart as IR

- 8 W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, LAC, RG 10, vol. 3636, file 6694-1.
9 James Walker, Acting Indian Agent, Battleford, NWT, to Lt. Governor, NWT, Battleford, August 20, 1877, LAC, RG 10, vol. 2656, file 9092.
10 Natural Resources Canada, Field book 729, Canada Lands Surveys Records (CLSR), E. Stewart, Dominion Land Surveyor (DLS), Indian Reserve survey diary, 1878–79, September 9, 1878.
11 Order in Council PC 1151, May 17, 1889, pp. 50–51.

INDIAN CLAIMS COMMISSION PROCEEDINGS

101A. The addition and new reserve were confirmed by Order in Council PC 2379, dated September 24, 1913.

ESTABLISHING A TREATY LAND ENTITLEMENT CLAIM

The treaties negotiated with the Indians in the 19th and 20th centuries in northern Ontario, the Prairies, and northern British Columbia – the Numbered Treaties – all included a formula (either 32 acres per person or 128 acres per person, depending on the treaty) for calculating the size of reserve lands.¹² Unfortunately, neither the treaties nor the correspondence and reports associated with them stated when or how those population figures were to be obtained, leaving many important questions unanswered. Were the figures determined by the number of people in the band at the time of the treaty, or when the survey was done, or at some other time? Were the numbers to be determined from the treaty annuity paylists, by a separate census, or by a count of those present when the survey was done?

After the federal government announced in 1973 its intention to settle specific claims where Canada had not fulfilled its treaty obligations to set aside reserves, researchers needed policy guidelines to answer these questions. Initially, Canada only validated claims where a shortfall of land was established based on the band's population according to the treaty annuity paylists at the date of first survey, with no consideration given to people who were absent or who joined the band after the survey. In 1983, the Office of Native Claims Branch of the Department of Indian Affairs distributed "Research Guidelines" for the validation of TLE claims which expanded the eligibility criteria to include people who joined the band after the date of the first survey:

The general principle which applies in all categories of land entitlement claims is that each Treaty Indian Band is entitled to a certain amount of land based on the number of members. Conversely, each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian Band.

The following criteria are intended as guidelines in the research and validation process for treaty land entitlement claims.¹³

Under the heading "Persons included for entitlement purposes," the guidelines included, with certain defined restrictions, those who appeared on

12 This section summarized from Donna Gordon, "Treaty Land Entitlement, A History," prepared for the Indian Claims Commission, Ottawa, December 1995, reprinted (1996) 5 ICCP 339.

13 DIAND, Office of Native Claims, "Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983, reprinted (1996) 5 ICCP 512.

STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
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the payroll for the year of survey, absentees, new adherents to treaty, transfers from landless bands, and non-treaty Indians who marry into a treaty band.¹⁴

In 1989, Canada and the Federation of Saskatchewan Indian Nations (FSIN) agreed to establish the Office of the Treaty Commissioner (OTC), which was charged with, among other things, developing proposals for the settlement of TLE claims in Saskatchewan that would satisfy both Canada and the First Nations. On September 22, 1992, after two years of research and negotiations, representatives of the federal and provincial governments (Saskatchewan had a legal obligation under the 1930 *Natural Resources Transfer Agreement* to provide “unoccupied Crown lands” for the creation of Indian reserves) along with most of the First Nations in Saskatchewan with recognized TLE shortfalls, signed the Saskatchewan Treaty Land Entitlement Framework Agreement defining the manner in which the parties agreed to fulfill outstanding TLE obligations to Entitlement Bands in Saskatchewan.

According to this negotiated agreement, the basis for determining the final settlement for each First Nation that signed the Framework Agreement was the “equity formula”: historical percentage shortfall × current population × acres per treaty (128 acres in Treaty 6) equals the quantum of land that could be purchased by a First Nation to settle a claim. The historical percentage shortfall was determined by comparing the amount of land that the First Nation actually received with the amount of land that it should have received. In order to establish that acreage, it was necessary to define who could be counted with the First Nation for entitlement purposes. The procedures established by the OTC were based on the 1983 Office of Native Claims guidelines, with additional interpretations and definitions that were accepted by both Canada and the First Nations.

Twenty-six Saskatchewan First Nations had established a TLE shortfall and were parties to the Framework Agreement, but during the negotiations, there was a recognition that there were other bands who could later prove to have valid TLE claims. As a result, Article 17 was included to ensure that those Bands would be dealt with on the same basis as those covered by the Framework Agreement, if they chose that approach.

The issue of Article 17 and its relevance to both validation and negotiation of TLE claims in Saskatchewan was considered by the Indian Claims Commission in 1996 in its inquiries into the rejected TLE claims of both Kawacatoose and Kahkewistahaw First Nations. After reviewing documentation

14 DIAND, Office of Native Claims, “Historical Research Guidelines for Treaty Land Entitlement Claims,” May 1983, reprinted (1996) 5 ICCP 512 at 515.

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and hearing from many of the people who participated in the negotiation of the Framework Agreement, the ICC concluded in the Kawacatoose Inquiry that Article 17 did not apply to the criteria to validate a claim, but was to apply to the settlement of claims after validation:

While the Commission has determined that the Framework Agreement does not give non-Entitlement Bands an independent basis for validation ...

... once substantiation of the claim on a non-Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Framework Agreement to that band.¹⁵

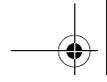
The ICC reiterated this position in its subsequent report on the TLE claim of the Kahkewistahaw First Nation:

Since the release of the Kawacatoose report, we remain unchanged in our view that section 17.03 is limited to circumstances in which a band's treaty land entitlement claim has *already* been accepted for negotiation in accordance with the terms of treaty. In other words, section 17.03 applies in the context of *settlement*. It does *not* afford a separate basis for *validation* apart from treaty. It represents an agreement among Canada, Saskatchewan, and the Entitlement Bands, that, once a non-Entitlement Band's claim has been accepted for negotiation independently of the Framework Agreement itself, then the settlement of that claim can be dealt with much more expeditiously by avoiding protracted bargaining on points that have already been negotiated.¹⁶

Article 17 is significant because, after the Framework Agreement was signed, Canada changed its criteria on whom to include in calculating TLE at the validation stage. In 1993, it allowed only those who were members of the First Nation at the date of first survey (including people who were absent at that date). In 1998, after the ICC had made recommendations in a number of TLE inquiries, Canada expanded the categories to also include additions to membership after the survey – new adherents to treaty, transferees from landless bands, and non-treaty people marrying into the Band. Even so, some specific aspects of the OTC working assumptions allowed the inclusion of some people who would be excluded under Canada's guidelines and the application of the less inclusive criteria would mean that post-Framework TLE settlements would not receive levels of compensation equivalent to those First

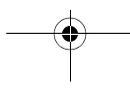
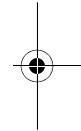
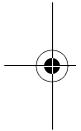
15 Indian Claims Commission, *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73 at 229.

16 Indian Claims Commission, *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21 at 100. Emphasis in original.



STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
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Nations who were parties to the Framework Agreement. This variance in eligibility made it difficult for Canada and Saskatchewan First Nations to reach final agreement on the total number of people to include in the treaty land entitlement formula, leaving the question to be worked out at each individual negotiation table.



INDIAN CLAIMS COMMISSION PROCEEDINGS

PART III

MEDIATION OF THE CLAIM

Negotiations toward settlement of the Sturgeon Lake TLE claim began in June 2004. Parties to the negotiations included Sturgeon Lake First Nation, Canada, and the Province of Saskatchewan (because of its legal obligation to provide “unoccupied Crown lands” for the creation of Indian reserves). At the request of all the parties, the ICC facilitated the discussions.

For the most part, facilitation focussed on matters relating to process. With the agreement of the negotiating parties, the Commission chaired the negotiation sessions, provided an accurate record of the discussions, followed up on undertakings, and consulted with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The Commission was also available to mediate disputes if requested to do so by the parties, to assist them in arranging for further mediation, and to coordinate any studies or other research that might be undertaken by the parties to support negotiations.

Although the Commission is not at liberty, based on an agreement made with the negotiating parties and addressing in part the confidentiality of negotiations, to disclose the discussions during the negotiations, it can be stated that the First Nations and representatives of the Department of Indian Affairs and Northern Development and the Province of Saskatchewan worked to establish negotiating principles and a guiding protocol agreement, which helped them to arrive at mutually acceptable resolution of the Sturgeon Lake TLE claim.

In addition to agreement on the terms of the negotiation protocol, other elements of the negotiation included agreement by the parties on the nature of the Commission’s role in the negotiations; the final population figures for determining shortfall acres for settlement purposes; the effect of Article 17 of the 1992 Saskatchewan Framework Agreement on the settlement criteria; the applicability of an honour payment to the Sturgeon Lake TLE claim; the variation of the payment schedule stipulated in the Framework Agreement; the

STURGEON LAKE FIRST NATION – TREATY LAND ENTITLEMENT
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impact of the bilateral (Canada and Saskatchewan) discussions relating to the cost-sharing provisions in the Framework Agreement; compensation for land as well as negotiation and ratification expenses; and, finally, settlement issues and agreements, communications, and ratification of the final settlement.

One issue – the application of the appropriate TLE guidelines, before and after validation, to the negotiation of TLE claims in Saskatchewan in light of Article 17 of the Framework Agreement and past practices followed by Canada in settling other claims – was also of concern to three other Saskatchewan First Nations who were proceeding to negotiations on treaty land entitlement claims. Canada and the four First Nations (Muskoday, Sturgeon Lake, George Gordon, and Pasqua) agreed that an appropriate and cost effective way to address this issue was to come together at a Common Table. The ICC was asked to facilitate the discussions. After an exchange of relevant documents and after meetings held in the fall of 2004, the parties were able to agree on eligibility criteria. Each First Nation then proceeded with its individual negotiations.

At the Sturgeon Lake table, researchers for Canada and the First Nation exchanged information relating to the background of certain band members who had been added to the Band's annuity payroll after the date of first survey to reach agreement on those eligible to be counted toward treaty land entitlement. By March 2005, the parties were able to agree on acreage and population figures. The parties worked diligently to arrive at negotiated agreements on the other outstanding issues, and in November 2006, Canada tabled its formal settlement offer which included cash compensation for land of approximately \$10.4 million plus negotiation and ratification costs, and authorization to purchase up to 38,971 acres of land, which could be converted to reserve status.

The settlement agreement was finalized and initialled by the parties in November 2006 and was presented to the members of the Sturgeon Lake First Nation for ratification on January 25, 2007, at which time 92 per cent, of those members who voted, voted to accept the settlement. On June 19, 2007, a ceremony was held at the Sturgeon Lake First Nation to sign a ceremonial document acknowledging the TLE settlement agreement, attended by the Chief, Council, Elders, and community members, the Minister of Indian Affairs, the provincial Minister of Regional Economic and Co-operative Development, and the ICC's Director of Mediation.

INDIAN CLAIMS COMMISSION PROCEEDINGS

PART IV

CONCLUSION

Credit for the successful negotiation and settlement of the Sturgeon Lake treaty land entitlement claim belongs to the parties. They were diligent and thorough as they worked toward agreement on the numerous issues before them. The Commission, in its role as a neutral third-party facilitator, helped maintain the focus and momentum of the discussions. With the ICC performing many of the necessary administrative tasks, the negotiating parties were able to concentrate their full attention on the substantive details of the negotiations and settlement.

The experience gained and expertise developed by the Commission over the years was especially beneficial at the Common Table. The ICC was pleased to have provided the additional facilitation and administrative services to the discussions involving the four Saskatchewan First Nations with TLE claims and similar issues. The early success at the Common Table in resolving these issues has led, at the time of this writing, to the successful negotiation and resolution of three of the individual TLE claims, with the fourth First Nation anticipating ratification of its claim in the next few months.

FOR THE INDIAN CLAIMS COMMISSION



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

Dated this 23rd day of May, 2008.

INDIAN CLAIMS COMMISSION

ESKETEMC FIRST NATION WRIGHT'S MEADOW PRE-EMPTION INQUIRY

PANEL

Commissioner Daniel J. Bellegarde (Chair)
Commissioner Jane Dickson-Gilmore
Commissioner Alan C. Holman

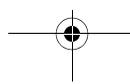
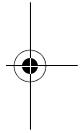
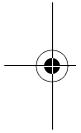
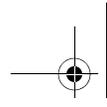
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Stan H. Ashcroft

For the Government of Canada
Douglas Faulkner

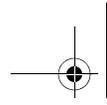
To the Indian Claims Commission
John B. Edmond / Diana Kwan

JUNE 2008



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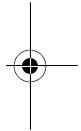
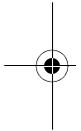
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ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

SUMMARY

ESKETEMC FIRST NATION WRIGHT’S MEADOW PRE-EMPTION INQUIRY British Columbia

The report may be cited as Indian Claims Commission, *Esketemc First Nation: Wright’s Meadow Pre-Emption Inquiry* (Ottawa, June 2008), reported (2009) 23 ICCP 481.

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. Bellegarde (Chair), Commissioner J. Dickson-Gilmore, Commissioner A.C. Holman

British Columbia – Indian Settlement – Pre-emptions – Reserve Creation – Joint Indian Reserve Commission – Village Sites; **Culture and Religion** – Pithouses – Seasonal Round; **Fiduciary Duty** – Pre-Reserve Creation; **Reserve** – Reserve Creation

THE SPECIFIC CLAIM

On February 14, 1995, the Esketemc First Nation submitted its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND), and, on January 10, 2000, the claim was rejected. On August 23, 2004, the First Nation requested that the Indian Claims Commission (ICC) review its rejected specific claim. At issue in this inquiry is the pre-emption of a meadow used by the First Nation.

BACKGROUND

The Esketemc First Nation, descendants of the Secwepemc or Shuswap people, make their home on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia.

In 1861, 40 acres of land were set apart for use of the Esketemc First Nation within the area now known as Indian Reserve (IR) 1. Although the salmon fishery was once the main economy, the Esketemc First Nation had considerable success

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raising horses and cattle. In July 1881, additional lands were set aside for the Esketemc by Indian Reserve Commissioner Peter O'Reilly. O'Reilly stated that he had difficulty finding suitable agricultural land because settlers had occupied the best locations; nevertheless, IR 1 was expanded by 550 acres, and six additional reserves were set aside with two fishing stations. These reserves were surveyed by W.S. Jemmett in 1883 and approved by the Chief Commissioner of Lands and Works in 1884.

By the early 1890s, almost every family was farming. With growing farms and increased livestock, the Band was faced with a critical need for haylands. To meet this need, in approximately 1891 or 1892 the Band drained a lake that had been formed by a beaver dam. Draining the lake created a meadow with abundant haylands. This meadow, which is the subject of this inquiry, was pre-empted in July 1893 by William Wright. Once the pre-emption was registered, Chief August wrote to the Indian Superintendent protesting the pre-emption and requesting assistance. The dispute over possession of the meadow led to an investigation conducted by three Indian Agents over the course of two years. The investigations revealed the Band's efforts in creating the meadow, and its seasonal use.

Provincial officials became involved in 1893. The province suggested to O'Reilly that, if Wright's pre-emption was falsely obtained, then the pre-emption record would not be granted. In February 1894, O'Reilly stated that he did not set aside the particular meadow pre-empted by Wright, and that he had not been asked to have the meadow set aside. However, O'Reilly indicated that he would attempt to set aside for the Esketemc Band other meadows used for hay and not subject to pre-emption.

Indian Superintendent Vowell visited the area in July 1894. In his report, he stated that the other haylands used by the Band should be set aside for it and that it could not claim lands that were not set aside for it. Later, a letter from O'Reilly dismissed the Band's claim to the meadow. The province then concluded that the Band should receive the value of its improvements to the land as it could not acquire the land.

In 1895, O'Reilly set aside an additional seven reserves for the Esketemc Band, which included additional meadow lands. One of the new reserves set aside was known as "Sampson's Meadow," located immediately west of Wright's Meadow.

On May 23, 1899, Wright received a certificate of improvement for lot 323. A month later, Wright received Crown grant no. 1145/103 for Wright's Meadow. As required by the *Land Act, 1884*, Wright declared that he made "improvements amounting in the aggregate of two dollars and fifty cents an acre on such Pre-emption claim."

In 1953, a dam on Place Lake was constructed to hold water for the Alkali Lake Ranch. The dam flooded Wright's Meadow and, as a result, it no longer exists.

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

ISSUES

Did the Alkali Lake Band, as it was then known, have an interest in the lands that William H. Wright pre-empted in 1893? If the Band had an interest in the lands, did the federal Crown have a duty to protect that interest? If the federal Crown had a duty to protect the Band’s interest, did it discharge that duty? In all the circumstances, did the federal Crown breach any lawful obligation to the Band, as specified in the Specific Claims Policy?

FINDINGS

The panel concludes that the Alkali Lake Band, as it was then known, had an interest in the meadow that Wright pre-empted in 1893. In reaching this conclusion, the panel acknowledges that this interest can be based on a cognizable interest of demonstrated use, which constitutes Indian settlement lands. The opinion of the panel diverges on the issue of finding a breach of fiduciary duty. The panel agrees in finding that a fiduciary duty exists in relation to the meadow, but disagrees on whether that duty has been breached. The majority of the panel find that the Crown has breached its fiduciary duty to the Band. The minority does not agree with this finding and expresses this dissent in a minority report. As the focus of the analysis has been on the fiduciary duty and the majority found a breach of fiduciary duty, it is not necessary for the fourth issue to be addressed.

RECOMMENDATIONS

Commissioners Bellegarde and Holman recommend that the claim of the Esketemc First Nation for the lands comprising Wright’s Meadow be accepted for negotiation under Canada’s Specific Claims Policy. Commissioner Dickson-Gilmore recommends that the claim of the Esketemc First Nation for the lands comprising Wright’s Meadow not be accepted for negotiation under Canada’s Specific Claims Policy.

REFERENCES

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

Cases Referred To

Wewaykum Indian Band v. Canada, [2002] 4 SCR 245; *Guerin v. The Queen*, [1984] 2 SCR 335; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 3 SCR 377; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *M. (K) v. M. (H)* (1992) 96 DLR (4th) 289 (SCC); *Blueberry River Indian Band v. Canada*

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(1995), 130 DLR (4th) 193 (SCC); *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *R. v. Sparrow*, [1990] 1 SCR 1075.

ICC Reports Referred To

Mamalelegala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006); *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 51.

Treaties and Statutes Referred To

Land Act, RSBC 1884.

Other Sources Referred To

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

COUNSEL, PARTIES, INTERVENORS

S. Ashcroft for the Esketemc First Nation; D. Faulkner for Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

PART I

INTRODUCTION

The Esketemc First Nation, descendants of the Secwepemc or Shuswap people, make their home on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia.

In 1861, 40 acres of land were set apart for use of the Esketemc First Nation within the area now known as Indian Reserve (IR) 1. Although the salmon fishery was once the main economy, the Esketemc First Nation had considerable success raising horses and cattle. In July 1881, additional lands were set aside for the Esketemc by Indian Reserve Commissioner Peter O’Reilly. O’Reilly stated that he had difficulty finding suitable agricultural land because settlers had occupied the best locations; nevertheless, IR 1 was expanded by 550 acres, and six additional reserves were set aside with two fishing stations. These reserves were surveyed by W.S. Jemmett in 1883, and approved by the Chief Commissioner of Lands and Works in 1884.

By the early 1890s, almost every family was farming. With growing farms and increased livestock, the Band was faced with a critical need for haylands. To meet this need, in approximately 1891 or 1892 the Band drained a lake that had been created by a beaver dam. Draining the lake created a meadow with abundant haylands. This meadow, which is the subject of this inquiry, was pre-empted in July 1893 by William Wright. Once the pre-emption was registered, the Band’s Chief August wrote to the Indian Superintendent protesting the pre-emption and requesting assistance. The dispute over possession of the meadow led to an investigation conducted by three Indian Agents over the course of two years. The investigations revealed the Band’s efforts in creating the meadow, and its seasonal use.

Provincial officials became involved in 1893. The province suggested to O’Reilly that, if Wright’s pre-emption was falsely obtained, then the pre-emption record would not be issued. In February 1894, O’Reilly stated that he did not set aside the particular meadow pre-empted by Wright, as the First Nation had not expressed any interest in his doing so. However, O’Reilly

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indicated that he would attempt to set aside other meadows used for hay and subject to pre-emption for the Esketemc Band.

Indian Superintendent Vowell visited the area in July 1894. In his report, Vowell described the disputed haylands and noted that the other haylands used by the Band should be set aside for it as it could not claim lands that were not set aside for it. Later, a letter from O'Reilly dismissed the Band's claim to the meadow. The province then concluded that the Band should receive the value of its improvements to the land as it could not acquire the land.¹

In 1895, O'Reilly set aside an additional seven reserves for the Esketemc Band, which included additional meadow lands. One of the new reserves set aside was known as "Sampson's Meadow," located immediately west of Wright's Meadow.

On May 23, 1899, Wright received a certificate of improvement for lot 323. A month later, Wright received Crown grant no. 1145/103 for Wright's Meadow. As required by the *Land Act, 1884*, Wright declared that he made "improvements amounting in the aggregate of two dollars and fifty cents an acre on such Pre-emption claim."

In 1953, a dam on Place Lake was constructed to hold water for the Alkali Lake Ranch. The dam flooded Wright's Meadow and, as a result, it no longer exists.

On February 14, 1995, the Esketemc First Nation submitted its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND); the claim was rejected on January 10, 2000. On August 23, 2004, the First Nation requested that the Indian Claims Commission (ICC) review its rejected specific claim.

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."² 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

1 Chief Commissioner of Lands and Works, Victoria, to F. Soues, Government Agent, September 4, 1894, no file reference available (ICC Exhibit 1a, p. 42).

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

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they disclose an outstanding “lawful obligation” on the part of the federal government.³ 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.⁴

³ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

⁴ *Outstanding Business*, 20, reprinted (1994) 1 ICCP 179.

PART II

THE FACTS

The Esketemc First Nation, originally known as the Alkali Lake Band, are descendants of the Secwepemc or Shuswap people, and make their home on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia. The traditional Secwepemc way of life was based on a seasonal round that revolved around hunting, gathering, and salmon fishing. People would move or camp in regular cycles depending on what resources were available in the area and each winter they would return to their winter villages.

In 1849, the colony of Vancouver Island was established by Britain, the Hudson’s Bay Company (HBC) was granted proprietary rights to the colony for 10 years, and, in 1851, James Douglas, HBC Chief Factor, was appointed Governor. Following the Fraser gold rush, Douglas was also appointed the Governor of the new mainland colony of British Columbia in 1858. One of Governor Douglas’s initial instructions was to reserve Indian villages and lands. On January 4, 1860, Governor James Douglas issued *Proclamation No. 15*, a pre-emption policy which allowed for the acquisition of unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Sites constituting an Indian reserve or settlement were prohibited from occupation and acquisition. The pre-emption policy eventually evolved into provincial legislation in the form of the *Land Act, 1884*, which allowed grants of 320 acres of land per pre-emption. The legislation also contained provisions prohibiting the pre-emption of Indian reserves and settlements.

In 1861, 40 acres of land were set apart for use of the Esketemc First Nation within the area now comprising IR 1. At this time, while the salmon fishery remained the main economy, the Esketemc First Nation began to have considerable success raising horses and cattle. In July 1881, Indian Reserve Commissioner Peter O’Reilly met with the Band to set aside additional lands for reserves. O’Reilly stated that he had difficulty finding suitable agricultural land because settlers had occupied the best locations. However, IR 1 was expanded by 550 acres, and six additional reserves were set aside with two

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fishing stations in consultation with the Band. These reserves were surveyed by W.S. Jemmett in 1883, and approved by the Chief Commissioner of Lands and Works in 1884.

By the early 1890s, with growing farms and increased livestock, the Band was faced with a critical need for haylands. To meet this need, in approximately 1891 or 1892 the Band drained a lake by destroying a beaver dam to create a meadow with abundant haylands. On July 8, 1893, William Wright applied for and received a pre-emption record for lot 323 in the Lillooet District of Alkali Lake Creek of 320 acres. Wright's application included a declaration that the lot he was seeking to pre-empt was unoccupied and unreserved.

Once the pre-emption was registered, Chief August wrote to the Indian Superintendent protesting the pre-emption and requesting assistance. Concurrently, Wright reported being threatened by Chief August. The dispute over possession of the meadow led to an investigation conducted by three Indian Agents over the course of two years. The initial investigation was conducted by Indian Agent William Laing-Meason. He reported that, when O'Reilly laid out the reserve that became IR 1, not many families were actively farming. However, the situation had changed, and, by 1893, every family was farming. Laing-Meason advised that the land in dispute between Wright and the Esketemc Band was originally a lake, which the Band had drained to become a meadow. He described the First Nation's haying activities the year before on the land and reported that the First Nation claimed possession of the area Wright pre-empted.

In August 1893, Indian Agent Gomer Johns (successor to Meason) visited the meadow with Wright. Johns later reported that Wright offered to compensate the Band \$200 for work done or wanted \$250 to give up his pre-emption. The Esketemc Band was still in possession of the meadow at this time and still harvesting haylands. Provincial officials became involved in late 1893. A preliminary investigation by Government Agent F. Soues presumed that the First Nation was granted enough land when reserves were allocated and that if they had asked for the meadow at that time they would have gotten it. As a result, Soues stated there was no reason why Wright's pre-emption record could not be granted. However, the province received a letter from the Reverend Father Lejacq of the St Joseph's Mission at William's Lake on behalf of the Band, which advised that the First Nation had complained to O'Reilly about a lack of haylands when O'Reilly was setting aside reserve lands. Father Lejacq also advised that O'Reilly had told the Band to look for suitable lands to hay and that these lands would eventually be set aside for First Nation.

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Father Lejacq suggested that the government should grant the haylands as the shortest and cheapest way to settle the matter. As a result, Attorney General Davie requested that Soues delay the issuing of Wright’s pre-emption and then wrote to O’Reilly. The province suggested to O’Reilly that, if Wright’s pre-emption was falsely obtained, then the pre-emption record would be set aside.

In February 1894, O’Reilly stated that he did not set aside the particular meadow pre-empted by Wright, as he had not been requested to do so by the First Nation. However, O’Reilly indicated that he would attempt to set aside for the Esketemc Band other meadows used for hay and subject to pre-emption. He stated that Father Lejacq was incorrect, and that he had at no time encouraged the First Nation to occupy and improve land outside of the lands set aside as a reserve. O’Reilly also questioned why the First Nation had, at no time, requested the lands in the many times he had met with them and passed through their lands.

With the matter still unresolved, Indian Agent Bell (successor to Johns) requested Indian Superintendent Vowell to visit the meadow personally. Vowell visited the area in July 1894. In his report, he stated that the other haylands used by the Band should be set aside for it and that it could not claim lands that were not set aside for it. The Deputy Superintendent of Indian Affairs then wrote to Vowell and directed that, if Wright relinquished his claim, then Vowell should contact the provincial authorities to “secure the land to the Indians” and to reserve any other haylands that the band members were using.

Later, a letter from O’Reilly dismissed the Band’s claim to the meadow. The province then concluded that the Band should receive the value of its improvements to the land as it could not acquire the land.

The province proceeded to assess and evaluate the improvements made to the meadow. In

September 1894, Chief Commissioner of Lands and Works (CCLW) Vernon wrote to Soues and instructed him to visit the meadow to estimate the value of improvements made by the Band and by Wright. On October 16, 1894, Acting Government Agent Phair reported that the total value of the improvements was \$190.00. He also stated that the Indian people advised him that they dammed the lake in 1889. It was concluded that Wright had not made any improvements on the land, which, up until this time, he had not occupied as directed by the Crown, given the dispute over the meadow. Indian Agent Bell had accompanied Phair, and his report was identical to Phair’s report.

On September 26, 1895, Indian Reserve Commissioner O’Reilly set aside an additional seven reserves for the Esketemc First Nation. O’Reilly then wrote

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to the Deputy Superintendent General of Indian Affairs advising that the reserve was increased to provide additional meadow lands. One of the new reserves set aside was known as "Sampson's Meadow" and was located immediately west of Wright's Meadow.

On May 23, 1899, Wright received a certificate of improvement for lot 323. A month later, Wright received Crown grant no. 1145/103 for Wright's Meadow. As required by the *Land Act, 1884*, Wright declared that he made "improvements amounting in the aggregate of two dollars and fifty cents an acre on such Pre-emption claim."

In 1953, a dam on Place Lake was constructed to hold water for the Alkali Lake Ranch. The dam flooded Wright's Meadow and, as a result, it no longer exists.

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

PART III

ISSUES

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

- 1 Did the Alkali Lake Band, as it was then known, have an interest in the lands that William H. Wright pre-empted in 1893?
- 2 If the Band had an interest in the lands, did the federal Crown have a duty to protect that interest?
- 3 If the federal Crown had a duty to protect the Band’s interest, did it discharge that duty?
- 4 In all the circumstances, did the federal Crown breach any lawful obligation to the Band, as specified in the Specific Claims Policy?

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PART IV

ANALYSIS

ISSUE 1: THE ESKETEMC FIRST NATION'S INTEREST IN WRIGHT'S MEADOW

1 Did the Alkali Lake Band, as it was then known, have an interest in the lands that William H. Wright pre-empted in 1893?

In this issue, the panel is being asked to make a finding as to whether the predecessor of the Esketemc First Nation (the Alkali Lake Band) held an interest in the lands pre-empted by William H. Wright in 1893. The First Nation asserts that the Esketemc people held a specific interest in the meadow for a significant period prior to and immediately preceding the arrival of Wright. Canada argues that the First Nation's use of Wright's Meadow was not sufficient to create a cognizable Indian interest in the land.

Based on the oral history and the documentary evidence, the panel finds that the Alkali Lake Band, now known as the Esketemc First Nation, had an interest in the lands pre-empted in 1893 by William H. Wright.

Background

The members of the Esketemc First Nation are descendants of the Secwepemc people (otherwise known as the Shuswap); they are currently situated on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia.⁵

The Esketemc First Nation traditionally used and occupied an area known as "Tselute" meaning "cattail" in the Secwepemc language.⁶ During the community session, the Elders indicated that Tselute is a large area that encompasses what is known as Wright's Meadow.⁷ It should be noted that

⁵ Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).

⁶ ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 23, J. Roper; p. 129, A. Wycott).

⁷ Map of Esketemc First Nation Reserves with legend, prepared by V.L. Robbins, June 25, 2005, produced at community session, April 5 and 6, 2006, held at the Esketemc First Nation, Alkali Lake, BC, with markings made at community session held April 5, 2006 (ICC Exhibit 5c, p. 1).

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Wright’s Meadow no longer exists. The construction of a dam on nearby Place Lake has flooded it.

According to the report prepared by the First Nation’s expert Beth Bedard, the remains of pithouses⁸ found near the location of Wright’s Meadow are the earliest evidence of the Esketemc people’s use and occupation of the meadow.⁹ Elder Morris Chelsea stated during the community session that he had viewed the remains of a pithouse located “on the northern side” and “towards the middle of the north side”¹⁰ of Place Lake.

The Secwepemc people followed a traditional subsistence pattern which consisted of seasonal mobility in the search for food.¹¹ During the community session, several Elders testified that Wright’s Meadow was used by the Esketemc people for a variety of purposes. Elder Dorothy Johnson stated that community members would stay near the meadow in winter to fish, trap, and hunt.¹² Elder Augustine Wycotte confirmed that the Esketemc people used the area known as Tselute for gathering medicines, fishing, hunting, trapping, and conducting traditional ceremonies.¹³ Mr Wycotte also stated that his father once had a cabin at Tselute.¹⁴ Several Elders also testified during the community session to the existence of stackyards, barns, and fencing near the area of Wright’s Meadow.¹⁵

On January 4, 1860, Governor James Douglas issued *Proclamation No. 15*, which allowed for the acquisition of unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Governor Douglas’s *Proclamation* prohibited settlers from pre-empting an “Indian Settlement.”¹⁶ After 1860, colonial land policies in the province of British Columbia were established and revised through a series of pre-Confederation land ordinances. However, the prohibition on pre-empting Indian settlements continued after British Columbia joined Confederation in 1871.¹⁷

- 8 A pithouse is a semi-subterranean winter dwelling that was used by the Shuswap people prehistorically. They are also referred to as “Keekwillies” or “Quigley” huts. See Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).
- 9 Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).
- 10 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 97, M. Chelsea).
- 11 Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).
- 12 ICC Transcript, April 6, 2006 (ICC Exhibit 5a, p. 159, D. Johnson).
- 13 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 125, A. Wycotte).
- 14 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 125, A. Wycotte).
- 15 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 98, M. Chelsea).
- 16 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 1 (ICC Exhibit 3b, p. 4).
- 17 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, pp. 20–21 (ICC Exhibit 3b, pp. 23–24).

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In 1861, the Alkali Lake Band was allotted a 40-acre reserve located in the area now referred to as IR 1. In July 1881, Indian Reserve Commissioner Peter O'Reilly expanded the size of the original reserve and allotted the First Nation six additional reserves and two fishing stations in consultation with the Band, who had accompanied O'Reilly and selected the areas.¹⁸ Commissioner O'Reilly's 1881 reserve allotments were made prior to the creation of Wright's Meadow. The meadow was therefore not included in any of the 1881 reserve allotments nor is there any evidence that the Esketemc people requested that the lake or lands adjacent to the meadow area be reserved at that time.

According to the documentary record, in approximately 1892, the Esketemc people began damming and flooding Place Lake.¹⁹ These actions created a meadow which the First Nation called "U.S. Meadow" but was referred to as Wright's Meadow following the pre-emption.²⁰ Elder Irvine Johnson provided evidence that the hay produced from Wright's Meadow was very important to the community as many families at the time owned large numbers of horses and cattle.²¹

On July 8, 1893, William Harrison Wright applied for and received pre-emption record no. 745 for lot 323 in Lilloet District at Alkali Lake Creek.²² Wright's pre-emption was for a lot comprised of 320 acres. Shortly after Wright's pre-emption, Indian Agent Laing-Meason wrote to Indian Superintendent Vowell advising him of Alkali Lake Band's creation of the meadow and the pre-emption by William Wright. In particular, he advised that the government should try to arrange for the meadow to be secured to the Indians to "avoid what appears at present a matter likely to cause serious trouble."²³

Esketemc First Nation's Position

The First Nation argues that its interest can be established through its immediate and short-term use of the meadow prior to Wright's pre-emption and through the long-term use of the larger surrounding area commonly

- 18 P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 143–66 (ICC Exhibit 1c, p. 12).
- 19 Gomer Johns, Indian Agent, Williams Lake Indian Agency, 150 Mile House, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, Library and Archives Canada (LAC), RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 16–20). See also ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 28, J. Roper).
- 20 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 78, C.Y. Wycotte).
- 21 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 250, I. Johnson).
- 22 Certificate of pre-emption record, July 8, 1893, British Columbia Archives (BCA), [8319/93] (ICC Exhibit 1b, pp. 4–5).
- 23 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).

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referred to as Tselute.²⁴ The First Nation further argues that it held a specific interest in the land at the time of the pre-emption and relies on both the oral testimony and the historical document collection to substantiate this claim. The First Nation points to its traditional irrigation process used at Place Lake which it claims resulted in the creation of the meadow more than two years prior to Wright’s pre-emption.

Canada’s Position

Canada argues that the First Nation must establish that there was an Indian settlement located on Wright’s Meadow in order to establish a cognizable Indian interest. With respect to the term “Indian settlement,” Canada points out that it is not defined by the pre-emption legislation at the time the dispute arose.²⁵ However, Canada interprets the pre-emption legislation to presume that “Indian settlement” refers to a residential area or cultivated fields of some permanence.²⁶ Canada further states that cultivation requires tillage or actually applied labour.²⁷ As such, Canada argues that Wright’s Meadow was not truly cultivated as wild hay grew naturally in an area that was drained and dried out. Canada argues that the First Nation’s use of the meadow was limited, short-term, and not extensive enough to qualify as an Indian settlement or to create a cognizable interest.

Findings Re Indian Interest

This first issue focuses on whether or not the Esketemc Band had an interest in Wright’s Meadow. It is clear to the panel that the parties have approached this question in two distinct ways. The Band argues that the use of the land creates an interest, while Canada argues that an interest is based on whether the land was specifically used as an Indian settlement. In other words, Canada argues that an interest hinges on the existence of an Indian settlement. The panel finds that both approaches to assessing whether an interest exists are valid, and that both approaches support a finding that the Esketemc Band held an interest in Wright’s Meadow.

The starting point for the panel’s analysis is defining a cognizable interest, a concept developed in *Wewaykum Indian Band v. Canada*.²⁸ In this case, the Supreme Court of Canada examined the claim of two Bands, the Cape Mudge Band and the Campbell River Band, to each other’s reserve lands.

24 Written Submission on Behalf of the Esketemc First Nation, March 2, 2007, p. 1.
 25 Written Submission on Behalf of the Government of Canada, April 20, 2007, para. 54.
 26 Written Submission of Behalf of the Government of Canada, April 20, 2007, para. 56.
 27 Written Submission of Behalf of the Government of Canada, April 20, 2007, para. 61.
 28 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

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Although the Supreme Court dismissed the claim, it confirmed that a fiduciary relationship exists between the Crown and First Nations, but that this relationship did not always give rise to fiduciary obligations as not all obligations are fiduciary in nature. Instead, fiduciary duties arise when there is a specific interest²⁹ and where the Crown acts as exclusive intermediary for the Band in relation to this interest.³⁰ In summary, Justice Binnie stated:

The starting point in the analysis, therefore, is the Indian bands' interest in specific lands that were subject to the reserve-creation process for their benefit, and in relation to which the Crown constituted itself the exclusive intermediary with the province. The task is to ascertain the content of the fiduciary duty in relation to those specific circumstances.³¹

In *Wewaykum*, the Indian interest was identified as land. Justice Binnie went on to state:

In this case, we are dealing with land, which has generally played a central role in aboriginal economies and cultures. Land was also the subject matter of *Ross River* ("the lands occupied by the Band"), *Blueberry River* and *Guerin* (disposition of existing reserves). Fiduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*.³²

As the Indian interest in *Wewaykum* was easily identified as reserve land in dispute between two Bands, the Supreme Court of Canada did not actually provide criteria in defining what aspects of land constitute a cognizable interest. However, the Court indicates the importance of land to Aboriginal economies.

In determining whether the Esketemc Band held an interest in Wright's Meadow, the panel must assess what aspects lead to recognizing an Indian interest in land. As noted above, the parties have provided two alternate arguments. The First Nation states that a cognizable interest is based on demonstrated use, while Canada argues this interest is based on the establishment of an Indian settlement. The panel acknowledges that both arguments are valid and demonstrate a cognizable interest in land. This report will proceed with an analysis of both perspectives.

29 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286.

30 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 288.

31 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 292.

32 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286–87.

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Use of Land and the Indian Interest

During the community session, several Elders provided oral history describing the traditional use and occupation of a large geographical area they called Tselute. The Elders’ oral history states that the area of Tselute includes Wright’s Meadow.

Prior to the pre-emption, there was an immediate need for additional haylands as the First Nation was in possession of a large number of livestock. This situation was the result of the Band developing its farming activities after the time reserves were set aside.³³ Originally, Wright’s Meadow was submerged under water. However, the Band had destroyed a beaver dam and drained the meadow in order to develop the haylands. As described by Indian Agent Laing-Meason in a letter dated July 19, 1893, to Indian Superintendent Vowell:

When Mr. O’Reilly laid out the Alkali Lake Reserve very few meadows were asked for, as only those Indians who had cattle required hay; no sleighs or waggons being then used by the Indians and there being a sufficiency of grass in the immediate neighborhood of the Reserve for their saddle horses; at present the [natural] grass has all been fed off everywhere, and hay is absolutely necessary even for saddle horses, but every Indian family now has its sleigh and Span of horses the latter being stabled during the winter and of course requiring hay; it therefore becomes most desirable and a simple of act of justice, that they be allowed to acquire more meadow land; the resident settlers of this neighborhood have hitherto [practically] respected the squatters rights of the Indians to Meadows, [never] attempting to [pre-empt] or purchase such lands [where] utilized by the Indians.

The meadow in question was until last year a Lake, this being drained has become a meadow, which was cut by these Indians for the first time last year – they have since erected fencing and buildings and were preparing to cut their hay this summer when Mr. Wright pre-empted it; under these circumstances I beg to submit for your consideration the possibility of effecting some arrangement with the Provincial Government whereby the Meadow could be secured to the Indians and thus avoid what appears at present a matter likely to cause serious trouble.³⁴

The Band then harvested the hay, and periodically flooded and drained the land. Elder Andy Chelsea stated as follows:

All they said was they stopped the creek during – like they’d dam it up in the fall and then watch it in the spring, and if there was going to be too much water, they’d

33 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).
 34 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).

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let some of it go. And then during – in May or April, if there’s going to be a lot of water, they open the whole dam and let it dry off for cutting hay in July and June or August. So they cut all that.³⁵

In addition to haying, when the dam on the creek was broken the Band was able to catch fish from the creek. Elder Willard Dick stated:

they got a big dam now up Place Lake. ... Before that was just a beaver dam there where we used to open it and set a big net in the bottom and catch fish while they’re coming out. It was a main resource for food right in the springtime when all other foods are still not out.³⁶

The meadow would not have existed but for the intervention of the First Nation. The meadow provided haylands and a source of fish necessary to sustain the First Nation. These uses were key to the First Nation’s well-being and economy. Clearly, the Esketemc Band had an interest in the meadow prior to Wright’s pre-emption.

Indian Settlement and the Indian Interest

Can Wright’s Meadow be described as an Indian settlement, and, if so, is the interest in it cognizable? Canada argues that, in order for an Indian interest to exist, the land must be used as an Indian settlement, which refers to a residential area and / or cultivated fields of some permanence. Canada further specifies that the cultivated fields require tillage or actual applied labour. Consistent with past ICC precedent and an examination of the facts, the panel concludes that Wright’s Meadow can be described as an Indian settlement.

As this inquiry deals with pre-emptions and provincial legislation dealing with pre-emptions, the panel begins its analysis by focusing on the *Land Act* of 1884. This provincial legislation provides that:

3. Any person being the head of a family, a widow, or single man over the age of eighteen years, and being a British subject, or any alien, upon his making a declaration of his intention to become a British subject, ... may record any tract of unoccupied and unreserved Crown lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent ... Provided, that such right shall not be held to extend to any of the aborigines of this continent, except to such as shall have obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council.³⁷

35 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 56, A. Chelsea).

36 ICC Transcript, April 5, 2006 (ICC Exhibit 5a, p. 141, W. Dick).

37 *Land Act*, RSBC 1884, c. 16, s. 5–23 (Exhibit 6a, pp. 2–4, 7).

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This legislation does not define Indian settlement, nor is there much insight to be gained from the case law. As a result, the panel is guided by previous ICC inquiries which have dealt with this term. We begin our analysis with the definition of “Indian settlement” contained in the *Mamalelegala Inquiry*³⁸ in the context of the *Land Act*:

Section 56 of the provincial *Land Act* expressly provided that no timber licences were to be granted “in respect of lands forming the site of an Indian settlement or reserve.” Although we do not purport to offer any exhaustive definition of the term “Indian settlement,” when section 56 [of the *Land Act*] was enacted it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether or not they were immediately adjacent to or in the proximity of other dwellings. Furthermore, it was not strictly necessary for there to be a permanent structure on the land, providing there is evidence of collective use and occupation by the band.

... In assessing whether any of the lands encompassed by the Band’s McKenna-McBride applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamalelegala Qwe’Qwa’Sot’Enox used the land and the type of houses they built and used during the early part of this century. Since one traditional house could house a number of families, the existence of even one house provides ample evidence that an Indian settlement existed at that location.³⁹

In the *Williams Lake* inquiry,⁴⁰ the ICC expanded on its definition of an Indian settlement by including cultural uses of the land:

Based on principles developed in the *Mamalelegala* inquiry, the panel in this inquiry must take into consideration the distinctive way this Band used the land and the type of houses its members built. This Band traditionally used its lands on the basis of “seasonal rounds” in which specific areas of land were used for specific reasons at specific times.⁴¹

The ICC has adopted a broad approach to defining the term “Indian settlement” to acknowledge the various ways in which land has been used and occupied by First Nations, and to highlight underlying cultural approaches to settlement. This broad approach has conflicted with Canada’s definition of an

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

39 ICC, *Mamalelegala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199 at 274.

40 ICC, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

41 ICC, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006), 24.

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Indian settlement, which previously required present use (that is, active use at the time of pre-emption) and occupation. In this inquiry, while Canada appears to acknowledge that cultivated fields can be an Indian settlement, Canada argues that this cultivated field must demonstrate tillage or applied labour. Canada suggests that the meadow grew wild hay naturally without the need of cultivation or tillage of the soil, and therefore the activities briefly carried out on the lands prior to the pre-emption do not meet the test to be considered an Indian settlement. However, the panel finds that this narrow approach is not supported by the historical facts.

The panel must consider the approach of officials at the relevant historical time to an “Indian settlement.” In a report prepared for this inquiry, Anne Seymour wrote that the drafters of the first pre-emption legislation defined “Indian Settlements” as follows:

We understand an Indian Settlement to be not a permanent standing Village but such a Village or Home as Indians are accustomed to have and it appears to be an understood custom with the Indians of this District as with many others to leave their Homes or Villages for months together taking their House with them.⁴²

In addition, the Band pointed out that, in 1862, Colonial Secretary William Young’s direction was that “Indian settlements include fields, habitation sites, and lands recently used.”⁴³ From this evidence, it appears that officials understood the term Indian settlement to include areas that the Band would have occupied on a seasonal basis, and which may or may not have included permanent, standing structures. Both the documentary and oral histories confirm that this Band had built and lived in A-frame houses in the area of Place Lake and resided there during summer and winter months.⁴⁴ More importantly, officials at the time also appeared to acknowledge a broad range of uses of land which might include, but were not limited to, cultivation or tillage. Based on the research prepared for this inquiry and government reports, the panel finds that officials at the time of the pre-emption were more likely to consider a broad use of land, including the Band’s winter and summer use of this land, combined with their A-frame houses and other structures, as Indian settlement lands. The panel infers that officials were likely to accept meadows as Indian settlements. Moreover, in this claim’s

42 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, pp. 20–21 (ICC Exhibit 3b, p. 13).

43 Written Submission on Behalf of the Esketemc First Nation, April 30, 2007, para. 10.

44 A.W. Vowell, Indian Superintendent, Victoria, BC, August 6, 1894, to Hayter Reed, Deputy Superintendent General of Indian Affairs, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 33–38).

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history, it was recommended that haylands and meadows be set aside for the Esketemc Band. A.W. Vowell, Indian Superintendent, writing to the Deputy Superintendent General in a report on his July 1894 trip to the Alkali Lake area wrote:

For my own part I consider that their demands are worthy of consideration and I would strongly urge that all these patches of meadow lands situated in the mountains which have for years been used by them and which come under the head of “waste lands of the Crown” be reserved to them without delay.⁴⁵

The panel further considered what local settlers living in the area might have thought of the Band’s use of this land and concluded that local settlers were aware of the Band’s assertion to a right of ownership. Indian Agent Laing-Meason, in reporting the dispute between the Band and Wright, wrote that “the resident settlers of this neighbourhood have hitherto [practically] respected the squatters rights of the Indians to Meadows.”⁴⁶

From the perspective of local settlers and government officials, the panel concludes that it appears that there was common knowledge that the Esketmec Band had been occupying the land around Place Lake as an Indian settlement and had further turned Place Lake into a meadow, making improvements to the land and asserting it as their own. The panel therefore concludes that the Band took sufficient steps and made distinctive use of its irrigation process which resulted in the creation of the meadow and in the Band’s ability to cultivate hay.

Lastly, Canada argues that the Band’s use of the land was limited and short-term and not extensive enough to establish those lands as Indian settlement lands. The panel, however, holds that this negates the findings of pithouses as reported by Beth Bedard, which establish long-term occupation of the lands surrounding the meadow by the Esketemc Band. The evidence indicates that the Esketemc people practised traditional cultivation and alternating flooding and hay-raising within the meadowlands, and the location of pithouses in the immediate environs of the cultivated lands establishes that this usage was a well-established, consistent part of the Esketemc Band’s traditional seasonal round of subsistence. Insofar as Canada takes the position that the status of “Indian settlement lands” may be obtained through settlement and/or cultivation, we find that the traditional cultivation practised

45 A.W. Vowell, Indian Superintendent, Victoria, BC, August 6, 1894, to Hayter Reed, Deputy Superintendent General of Indian Affairs, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 33–38).

46 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).

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by the Esketemc in Wright's Meadow is sufficient to ground a clear, cognizable interest in those lands commensurate with their status as Indian settlement lands. That the Band resided in the immediate area of the cultivated lands merely underscores the presence and importance of that usage to the Esketemc people.

After applying principles from past ICC reports and reviewing the documentary and oral history evidence, the panel concludes that the site at Wright's Meadow constituted Indian settlement lands at the time of the pre-emption.

ISSUES 2 AND 3: FIDUCIARY DUTY

- 2 If the Band had an interest in the lands, did the federal Crown have a duty to protect that interest?**
- 3 If the federal Crown had a duty to protect the Band's interest, did it discharge that duty?**

The heart of this claim is whether the Crown's fiduciary duties to the Esketemc First Nation were breached; consequently, the focus of this report is on the fiduciary analysis. As the panel has found that the Esketemc Band held a cognizable interest in Wright's meadow, the panel must now determine if a fiduciary duty existed and, if so, whether that fiduciary duty was breached. As these two issues are related, they will be dealt with by the panel in the same section. With respect to these issues, the panel finds that a fiduciary duty exists in relation to the meadow. However, the panel differs in opinion on whether there was a breach of fiduciary duty. While a majority finds a breach, a dissenting opinion on this issue follows this analysis.

Background

On July 16, 1893, Indian Agent William Laing-Meason advised Indian Superintendent A.W. Vowell that conflict had arisen between the Alkali Lake band members and a settler named William Wright over the meadowlands at Place Lake, which Mr. Wright had pre-empted.⁴⁷ A few days later, Laing-Meason sent another report to Vowell requesting that he arrange to have the meadow set aside as a reserve for the Alkali Lake Band:

⁴⁷ William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 16, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 3-4).

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under these circumstances I beg to submit for your consideration the possibility of effecting some arrangement with the Provincial Government whereby the Meadow could be secured to the Indians and thus avoid what appears at present a matter likely to cause serious trouble.⁴⁸

Laing-Meason’s successor, Indian Agent Gomer Johns also advised that an agreement should be made to secure the meadow for the Alkali Lake Band.⁴⁹ On October 26, 1893, Chief August of the Alkali Lake Band wrote to Indian Superintendent A.W. Vowell, appealing to him to resolve the conflict with Wright and to allow the Band to keep the meadow. Chief August stated:

I must acknowledge the Government has given us quite a lot of land but the biggest and best piece of land it gave us is no account to us only for a short time in the winter for pasture as there is no water on it, when my people go there in the Summer to gather berries they have to go to the river to get water to cook with and there is no show of getting any water on it and on all of the other land the Government gave us there is not more than enough meadow to cut 15 ton of hay so if those other meadows are taken away from us we will have to dispose of our stock and how we will live I do not know as it is if we were left alone I think we could support ourselves, this trouble has been going on since July and now Mr. Laing W. Meason, your former Indian Agent, he has gone and Staked off another of the Meadows that my people have been cutting, the trouble had been layed before your present Indian Agent this long time but there has been nothing done in regard to it so I appeal to you for help, please excuse me for bothering you but I do not know how else to look to for help. I forgot to state there is over 200 people in my reserve and it will starve all of us if we do not be allowed to keep those meadows so please come and settle this trouble for us.⁵⁰

On November 17, 1893, Agent Gomer Johns again wrote to Indian Superintendent Vowell informing him that he had investigated the matter and concluded that the meadow would be a “very serious loss” to the Alkali Lake Band, but would “not lead to starvation.”⁵¹ In early 1894, Father Lejacq, OMI, reported that the Alkali Lake Band had consulted him in its attempts to have the meadow set aside as reserve. Father Lejacq stated:

When the Commission, appointed by the Government, had marked out the Reservation for the Alkali Lake Band; the Indians made the remark that there was

48 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).
 49 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 11).
 50 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).
 51 Gomer Johns, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 16–21).

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no meadow land in the said reservation, so they begged the Commission for [illegible word] land; then Judge O'Reilly told them to look round and try to find some good place for making hay, to take what they could find, to fix it and the Government would grant it to them. Now the Indians acting according to the suggestion of the Commissioner, located a place, a swampy place, at the head of this creek drained it, cut the brush, put fences, built stables, even houses, in a word, made a good meadow out of useless swamp and now when they are beginning to reap the fruits of their hard labour, a white man comes and wants to snatch it from their hands ...

I do not know what is the policy of the Government in such cases as this; but if I were asked any advice, I would tell the Government to grant to the Indians that piece of land and send warning to Mr. Wright to pre-empt somewhere else: this would be the shortest and cheapest way of settling the matter, and coming out of the [illegible word]; and Mr. Wright, if he had had a grain of common sense would never have tried to take that piece of land from the Indians; the place will be a great boon to the Indians, fixed as they are; but neither Mr. Wright nor any other white man can make a living on the same place ...⁵²

Soon after Father Lejacq's letter was received by Provincial Attorney General Theodore Davie, Davie asked BC Government Agent Soues whether the issuance of Wright's pre-emption could be delayed in order to investigate the allegation made by Father Lejacq.⁵³ Soues suggested that Indian Reserve Commissioner O'Reilly be consulted.⁵⁴ Davie then wrote to O'Reilly:

If it should be the case that the pre-emption has been obtained by Mr. Wright under false pretences, for lands practically set aside for the use of the Indians and improved for their purposes, steps should be, I think, at once taken on behalf of the Indians before the Commissioner to set the record aside.⁵⁵

In a letter dated February 7, 1894, O'Reilly stated that he did not set aside the particular meadow pre-empted by Wright, and that he had not been requested to set the meadow aside. However, O'Reilly indicated that he would attempt to set aside other meadows used for hay and subject to pre-emption for the Esketemc Band. He stated that he did not encourage the First Nation to occupy and improve land outside of the lands set aside as a reserve. O'Reilly also questioned why he had not been informed of the First Nation's request for the

52 J.M.J. Lejacq, OMI, St Joseph's Mission, Williams Lake, to [unidentified recipient], January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 46).
 53 Theodore Davie, Victoria, BC, to [E. Soues], Government Agent, Clinton, BC, January 26, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 49).
 54 F. Soues, Clinton, BC, to Theodore Davie, Attorney General, Victoria, BC, January 29, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit, 1c, pp. 51-52).
 55 Theodore Davie, Victoria, BC, to P. O'Reilly, February 3, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 54).

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lands sooner. In addition, O’Reilly suggested that the Government Agent not accept any further pre-emption applications.⁵⁶

Vowell visited the disputed meadow in July 1894. In his report dated August 6, 1894, he wrote:

At present from 100 to 160 tons of wild hay can be cut upon it and it has been their custom to cut hay there and in the winter drive their cattle there and feed them; they have also for a distance of some seven miles cut a sleigh road through the timber to enable them when required to haul some of the hay to other places. They have also done some fencing around a portion of it, and have built some houses for winter use. I may also state that when on my way to the meadow ... several smaller ones were brought to my notice where different members of the band have for years been cutting hay. They ... claim that such facilities for feeding their stock during the winter months is an absolute necessity, as the amount of hay possible to obtain from their reserves is insignificant when compared with their requirements. They have amongst them over 200 head of cattle besides many horses. ... and as they have comparatively little cultivable land, their chief support centres in their cattle. ... They were not unreasonable, but still kept strongly to the point that without the meadows they and their children would be without sufficient means for their support. For my own part I consider that their demands are worthy of consideration and I would strongly urge that all these patches of meadow lands situated in the mountains which have for years been used by them and which come under the head of “waste lands of the Crown” be reserved to them without delay. ...

I may say that the Indians have promised not to interfere with Mr. Wright should he go to take possession, in the meantime the Chief and his people are going to make an effort to settle the matter amicably with Wright whereby they can still retain possession of the meadow, in which case it should be at once made an Indian Reserve.⁵⁷

The Deputy Superintendent General of Indian Affairs wrote to Indian Superintendent A.W. Vowell on August 16, 1894, instructing him as follows:

[I]f the Indians manage to induce Mr. Wright to relinquish his claim you should, without delay, approach the Provincial authorities, through the Reserve Commissioners if necessary, and endeavour to get them to secure the land to the Indians, or failing that, ask them to apportion some others in lieu of the meadow, and also reserve to the Indians any other hay lands used by them, and considered by you really necessary for the support of their stock.⁵⁸

56 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Theo. Davie, Attorney General, Victoria, BC, February 7, 1894, LAC, RG 10, vol. 1278, pp. 298–300 (ICC Exhibit 1a, pp. 22–24).

57 A. W. Vowell, Indian Superintendent, Indian Office, Department of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 34–37).

58 Deputy Superintendent General of Indian Affairs to Indian Superintendent A.W. Vowell, August 16, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 39).

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The BC Chief Commissioner of Lands and Works (CCLW), F.G. Vernon, wrote to Indian Reserve Commissioner O'Reilly, asking whether the Esketemc First Nation had any right to or need of the meadow.⁵⁹ O'Reilly replied on August 26, 1894, referring the CCLW to his February 7, 1894, letter to Attorney General Davie, in which O'Reilly had dismissed the First Nation's claim to the meadow.⁶⁰ As a result, on September 4, 1894, Vernon wrote to Soues, BC Government Agent, informing him that the Esketemc First Nation could "claim compensation if they are debarred from acquiring the land"⁶¹ and instructed him to visit the meadow to "make an approximate estimate of the value of the improvements made by the Indians and also by Mr. Wright (if any)."⁶² On October 16, 1894, C. Phair, Acting Government Agent, reported on his visit to the meadow and his evaluations. Indian Agent Bell also reported to Indian Superintendent Vowell on this evaluation of the First Nation's improvements.⁶³

In 1895, Indian Reserve Commissioner O'Reilly set aside an additional seven reserves for the Esketemc First Nation. In a report to the Deputy Superintendent General of Indian Affairs, O'Reilly wrote:

Though these Indians are already in possession of reserves allotted to them in 1881, and which contain 5587 [*sic*] acres,⁶⁴ they have recently complained of a scarcity of hayland as their bands of cattle, and horses have largely increased, and it was with a view to supplying this want that my present visit to Alkali lake was undertaken.

The Chief "August" and a large number of his people accompanied me to point out the several pieces of land which they desired to have secured to them; Mr. Agent Bell also was present, and assisted much in the selection of the seven following locations.

...

59 F. G. Vernon, Chief Commissioner of Lands and Works (CCLW), to P. O'Reilly, Indian Reserve Commissioner, Victoria, August 22, 1894, LAC, RG 10, vol. 11014, p. 28 (ICC Exhibit 1a, p. 40).
 60 P. O'Reilly, Indian Reserve Commissioner, Victoria, to CCLW, August 26, 1894, LAC, RG 10, vol. 1279, p. 1 (ICC Exhibit 1a, p. 41). See also P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Theo. Davie, Attorney General, Victoria, BC, February 7, 1894, LAC, RG 10, vol. 1278, pp. 298–300 (ICC Exhibit 1a, pp. 22–24).
 61 CCLW, Victoria, to F. Soues, Government Agent, September 4, 1894, no file reference available (ICC Exhibit 1a, p. 42).
 62 CCLW, Victoria, to F. Soues, Government Agent, September 4, 1894, no file reference available (ICC Exhibit 1a, p. 42).
 63 [Bell, Indian Agent], to A.W. Vowell, October 16, 1894, LAC, RG 10, vol. 11014, p. 47A (ICC Exhibit 1a, p. 51).
 64 This should read 3,587 acres.

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The meadow lands in all the above reserves are capable of being enlarged by clearing, with a very small amount of labor; the Indians at present only using those portions that are naturally free of brush. They are at too great an altitude to admit of their being used for any other purpose.⁶⁵

Esketemc First Nation’s Position

The First Nation argues that it looked solely to the Department of Indian Affairs (DIA) to protect its interests. The actions of the Indian Agents clearly show that they, together with Indian Superintendent Vowell as well as other government officials took it upon themselves to act as “exclusive intermediaries.”⁶⁶ The Indian Agents involved in the matter including Laing-Meason and Bell requested that some arrangement be made to secure the meadow to the Band. However, in the end, the DIA left the matter to the Band to sort out itself.⁶⁷ The Band argues that the federal Crown failed to discharge the duty that it owed by:

- 1 failing to challenge Wright’s pre-emption;
- 2 failing to investigate whether Wright had been in occupation of the lands as he claimed, which said claim allowed him to receive a Crown grant;
- 3 failing to investigate the reasons why Wright wished to pre-empt this particular parcel of land;
- 4 failing to enquire as to the relationship between Wright and Meason;
- 5 failing to acquire the lands in question for the Alkali Lake Band for the sum of \$250 and then failing to have them set aside reserve land when offered the opportunity to do so by Wright on August 13, 1893;
- 6 failing to obtain compensation for the Alkali Lake Band’s improvements when Wright offered to pay \$200 for them on August 13, 1893, or when the improvements were subsequently valued in 1894.⁶⁸

65 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Deputy Superintendent General of Indian Affairs, September 26, 1895, LAC, RG 10, vol. 1279, pp. 74–75; Federal Collection, vol. 14, pp. 117–25 (ICC Exhibit 1c, pp. 66–69).

66 Written Submission on Behalf of the Esketemc First Nation, March 2, 2007, p. 15.

67 Written Submission on Behalf of the Esketemc First Nation, March 2, 2007, p. 21.

68 Written Submission on Behalf of the Esketemc First Nation, March 2, 2007, p. 19.

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Canada's Position

Canada disagrees that the Crown agents at the time were exclusive intermediaries for the Band. Canada argues that, throughout the times in question, the Band was fully engaged in explaining the nature of its complaint to representatives of both the federal and provincial Crowns.⁶⁹ This was not a situation where the Band surrendered all discretionary control to the federal Crown to protect its interest.⁷⁰ On the contrary, the Band lobbied both Crowns with its available evidence in an attempt to secure the meadow for its own use.⁷¹

It is Canada's position that Wright's Meadow was never reserve land; therefore, there is nothing that would trigger the federal Crown's fiduciary duty to protect the land from pre-emption. Canada did not have a duty to protect specific lands from being pre-empted.⁷² The conduct of the federal Crown's agent Commissioner O'Reilly in the initial setting aside of reserve lands in 1881 and continuing until he set aside the second parcels of land in 1895, fully complied with the Crown's fiduciary obligation as set out in *Wewaykum*.⁷³

The meadow in question was provincial Crown land, not subject to control by the federal Crown. The latter had no authority to unilaterally set aside the meadow as a reserve.⁷⁴ The creation of reserves in the province of British Columbia required the joint action of both Crowns.⁷⁵ Although the federal Crown advised the provincial Crown that the Esketemc First Nation believed the meadow should not be available for pre-emption, the provincial Crown, after a thorough investigation, disagreed and approved Wright's application.⁷⁶

Panel's Reasons

As noted above, although the panel is in agreement that a fiduciary duty exists in relation to the meadow, the panel differs in opinion on whether this duty was breached. Commissioners Bellegarde and Holman have found a breach, while Commissioner Dickson-Gilmore has not. Commissioner Dickson-Gilmore's reasons follow those of Commissioners Bellegarde and Holman.

69 Written Submission on Behalf of the Government of Canada, April 20, 2007, p. 23.

70 Written Submission on Behalf of the Government of Canada, April 20, 2007, p. 23.

71 Written Submission on Behalf of the Government of Canada, April 20, 2007, p. 23.

72 Written Submission on Behalf of the Government of Canada, April 20, 2007, p. 20.

73 Written Submission on Behalf of the Government of Canada, April 20, p. 20.

74 Written Submission on Behalf of the Government of Canada, April 20, p. 22.

75 Written Submission on Behalf of the Government of Canada, April 20, p. 22.

76 Written Submission on Behalf of the Government of Canada, April 20, p. 22.

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Reasons of Commissioners Bellegarde and Holman

The Fiduciary Relationship

Both parties have agreed on the background to the fiduciary relationship between First Nations and the Crown. This fiduciary relationship was first acknowledged by the Supreme Court of Canada in *Guerin v. The Queen*.⁷⁷ In this case, the Musqueam Band surrendered reserve land for lease to a golf club; however, the Band later learned that the terms of the lease obtained by the Crown were significantly different – and less favourable – from those the Band had agreed to. The Court unanimously found that, by unilaterally changing the terms of a lease originally agreed to by the Band, Canada had breached its duty to the Band. Dickson J, with the concurrence of Beetz, Chouinard, and Lamer JJ, stated the following regarding fiduciary principles:

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

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.⁷⁸

In identifying a fiduciary relationship, Dickson J quoted Professor E.J. Weinrib’s statement: “[T]he hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.”⁷⁹ This description has been supported in other Supreme Court of Canada judgments.⁸⁰

Although the courts have recognized that a fiduciary relationship exists between the Crown and Aboriginal people, the courts have also noted that not

⁷⁷ *Guerin v. The Queen*, [1984] 2 SCR 335.

⁷⁸ *Guerin v. The Queen*, [1984] 2 SCR 335 at 376.

⁷⁹ *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

⁸⁰ *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574: dependency or vulnerability as an essential element indicating a fiduciary relationship. *Frame v. Smith*, [1987] 2 SCR 99: exercise of discretion or power; unilateral exercise of power; and vulnerability of the beneficiary. The beneficiary is subject to discretionary uses of power as another element characterizing a fiduciary relationship. *Hodgkinson v. Simms*, [1994] 3 SCR 377: reasonable expectations of one party expecting another party to act in their best interests may also characterize a fiduciary relationship.

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all aspects of the fiduciary relationship will give rise to fiduciary obligations.⁸¹ To date, the Supreme Court of Canada has recognized certain fiduciary obligations on the Crown which arise prior to a surrender of reserve lands,⁸² following a surrender of reserve lands,⁸³ before the expropriation of reserve lands,⁸⁴ or as a result of the regulation or infringement of a constitutionally protected Aboriginal or treaty right.⁸⁵ More recently, the Supreme Court of Canada has recognized the existence of a fiduciary duty in relation to reserve creation in *Ross River*, and more importantly, in *Wewaykum Indian Band v. Canada*.⁸⁶ This case is also the Supreme Court of Canada's most recent statement regarding the Crown / Aboriginal fiduciary relationship and when this relationship gives rise to a fiduciary duty.

In *Wewaykum*, the Court said the following regarding fiduciary law:

1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.⁸⁷

Essentially, the Supreme Court confirmed that the Crown / Aboriginal relationship is a fiduciary relationship, and “not all obligations existing between the parties to a fiduciary relationship are fiduciary in nature.”⁸⁸ The

81 *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183; *M. (K) v. M. (H)* (1992) 96 DLR (4th) 289 at 326 (SCC).

82 *Blueberry River Indian Band v. Canada* (1995), 130 DLR (4th) 193 (SCC). In a concurring judgment, McLachlin J observed that, prior to consenting to a surrender proposed by an Indian Band, the Crown has a fiduciary duty limited to preventing exploitative bargains (at 208).

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

84 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

85 *R. v. Sparrow*, [1990] 1 SCR 1075.

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

87 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

88 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 288.

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Court also acknowledged that “[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.”⁸⁹ In *Wewaykum*, this specific Indian interest was identified as land.

An Indian band’s interest in specific lands that are subject to the reserve-creation process and where the Crown acts as the exclusive intermediary with the province can trigger a fiduciary duty. The Court said the following with respect to the content of a pre-reserve-creation fiduciary duty:

Here ... the nature and importance of the appellant bands’ interest in these lands prior to 1938, and the Crown’s intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.⁹⁰

The Court advised that consideration must be given to the context of the time at reserve creation and the likelihood of the Crown facing conflicting demands. The Crown is not an ordinary fiduciary and must balance the public interest with the Aboriginal interest:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 E.C. 762 (C.A.).⁹¹

Having already found that the Esketemc First Nation had a cognizable interest in Wright’s Meadow, as shown through the First Nation’s occupation of the land, seasonal use in summer and winter months, structures built by the First Nation such as roads, homes, fencing, and the creation of the meadow through the First Nation’s irrigation process, the majority must turn its attention to the question of whether the Crown assumed responsibility as the exclusive intermediary to deal with the province and others on behalf of the Band and, if so, whether the Crown breached its pre-reserve creation fiduciary duties. To answer this question, the fiduciary duty must be examined at the time of the 1893 pre-emption.

⁸⁹ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 286.

⁹⁰ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 294.

⁹¹ *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 293.

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The 1893 Pre-emption

As noted in Wewaykum, in the pre-Confederation era in British Columbia, the reserve-creation process required cooperation between both the federal and provincial Crowns as well as the First Nation. By 1893, the Crown and the First Nation were in a fiduciary relationship and, with respect to setting aside lands for reserve purposes, the Crown was acting exclusively for Esketemc. There are three supporting reasons that lead to the conclusion that Canada was an exclusive intermediary in dealing with the province on behalf of the Esketemc Band. First, the Terms of Union recognize the federal Crown as assuming responsibility in dealing with the provincial Crown for the purposes of conveying land for Indian reserves. Secondly, the Land Act, 1884, disallowed Indian bands from acquiring lands through the province directly. As a result, only the federal Crown could act on behalf of Indian bands in British Columbia. Finally, the particular circumstances in which Indian Reserve Commissioner Peter O'Reilly undertook to set aside further lands on behalf of the First Nation indicate that Canada was an exclusive intermediary for the Esketemc Band as early as 1881, when O'Reilly met with the Band to set aside additional reserves. As a result, the majority finds that the Crown was acting as the Band's exclusive intermediary and therefore owed pre-reserve-creation fiduciary duties to the Band. This analysis will now turn to determining whether these pre-reserve-creation fiduciary duties were breached with respect to the meadow.

In July 1881, O'Reilly enlarged IR 1 by 550 acres, and set aside six additional reserves and two fishing stations.⁹² O'Reilly acknowledged difficulty in finding suitable agricultural lands and the Band's inclination to farm,⁹³ but also noted the need for haylands:

The Indians of Alkali Lake possess 561 Horses, besides 123 Cattle, and 69 Sheep; their great desire was to obtain as much hay land as possible: to satisfy their just requirements it became necessary to make six (6) separate reservations, amounting in all to about 3310 acres [plus 3 acres at IR 7], and this embraces all the good land in the neighborhood, not already alienated.⁹⁴

92 P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 143–66 (ICC Exhibit 1c, p. 12).

93 P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp.143–44, 148–49 (ICC Exhibit 1c, pp. 11–12, 16–17).

94 P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, p. 144 (ICC Exhibit 1c, p. 12).

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Notably, O’Reilly set aside land that had already been pre-empted:

I have also reserved for this tribe, two important fisheries; ... As I have been informed, they have never ceased to use this fishery, notwithstanding that as far back as April 1873 the land was included in a pre-emption, made by Thomas Roper, upon which he obtained a Certificate of Improvement, in December 1875. Subsequently Mr. Roper sold his interest to Mr. Felker, who at present claims to be the owner.

Mr. Felker was absent during my stay in this neighborhood, consequently I had no opportunity of seeing him. I am, however, led to believe that he will offer no objection to the land being set apart for the Indians; it possesses little or no value except as an Indian fishing station.⁹⁵

These reserves were surveyed by W.S. Jemmett in 1883 and approved by the Chief Commissioner of Lands and Works in 1884.⁹⁶

With respect to the meadow, the majority must determine whether the Crown was the Band’s exclusive intermediary. If the Crown was the Band’s exclusive intermediary, then a fiduciary duty was owed to the Band. The following facts, set out in detail in Part II of this report and in Appendix A are relevant:

- After Wright pre-empted the meadow in 1893, Chief August wrote to the Indian Superintendent Vowell, advising of the situation and requesting assistance.⁹⁷
- An initial investigation in November 1893 by Indian Agent Gomer Johns revealed that the meadow in dispute produced much of the hay used by the First Nation.
- When provincial officials became involved, BC Government Agent F. Soues believed that the pre-emption was properly made. However, a letter from Father Lejacq advocating on behalf of the Esketemc Band delayed the issuance of the pre-emption and prompted an investigation. The matter was referred to O’Reilly, and the province indicated a willingness to set aside the pre-emption record.

95 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 150–51 (ICC Exhibit 1c, pp. 19–20).

96 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 51.

97 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).

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- In September 1893, Wright offered to sell the pre-emption for \$250 or purchase it for \$200.
- Indian Superintendent Vowell visited the area in July 1894, and noted the history in creating the meadow, as well as its current use by the Band. Vowell specifically noted that, if the Band could settle amicably with Wright, then the meadow could be set aside as a reserve.

Ultimately, it was the federal Crown’s responsibility to ensure that the Band’s interest in the meadow was protected once the Band expressed that interest. Once the interest was expressed, the Crown undertook to act on behalf of the Esketemc Band. As well, the province, once it became aware of the dispute, referred the matter back to the federal Crown to resolve. All of these actions indicate that the federal Crown was acting exclusively on behalf on the Esketemc Band with respect to the meadow. As a result, the majority finds that federal Crown owed a fiduciary duty to the Esketemc First Nation.

As a pre-reserve-creation fiduciary duty was owed to the First Nation with respect to the meadow, the panel must determine whether this duty was breached. The content of this fiduciary duty is for the Crown to act with loyalty, good faith, full disclosure appropriate to the subject matter, and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.⁹⁸ In other words, the Crown, prior to the setting aside of a reserve, owes basic fiduciary duties to a Band with a cognizable interest. In this particular situation, the panel must determine whether the Crown breached its fiduciary duties. The majority’s focus is specifically on Vowell’s visit and his conclusions, as his investigation was the last one conducted.

When Vowell visited the Alkali Lake area in July 1894, the province had not yet issued a pre-emption record to Wright for the meadow. Instead, the province chose to delay its process and seemed willing to not issue the record at all, pending the outcome of a federal investigation. As well, in September 1893, Indian Agent Johns reported that Wright “would take \$250.00 or would give \$200.00.”⁹⁹ Wright was willing to give up his pre-emption for \$250.00. For all intents and purposes, the ball was in the federal Crown’s court. In his report about his visit, Vowell writes that he

98 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 294.

99 Gomer Johns, Indian Agent, Williams Lake Agency to [unidentified recipient], September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 12).

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impressed upon them [the band members] that they should not attempt to interfere with the lawful rights of others, whiteman or Indian, and that at present the only land they could claim was that lawfully reserved for them.¹⁰⁰

Vowell goes on to acknowledge that any other meadow lands used by the Band could be set aside as reserves, and that there would not be any difficulties in convincing the province. However, what stands out to the majority of the panel is Vowell’s impression that the Band was interfering with Wright’s lawful right to the meadow. Even though Vowell’s report contains the background to the meadow, including the Band’s labour in creating the meadow, he still concluded that the Band interfered with Wright’s use of the meadow. Essentially, Vowell dismissed the possibility that Wright had interfered with the Band’s use of the meadow, and disturbed the Band’s possible rights to the meadow.

In the view of the majority, all the elements to cancel the pre-emption and allow the Esketemc to retain the meadow were present. Even before Vowell visited the area, the Crown could have purchased the pre-emption from Wright for \$250.00. The majority of the panel believes that Wright’s offer to sell the land for \$250.00 was a turning point. If the Crown obtained the land for \$250.00 and set it aside for the Band, the entire course of history would have been changed. The failure to purchase the land at this point was a breach of the Crown’s fiduciary duty. This was a case where the First Nation had a demonstrated need for the hayland, created the meadow, and was actively harvesting the hay when the land was pre-empted by Wright. The Crown’s duty to balance the interests between the First Nation and Wright was made simpler when Wright offered to sell the land. By failing to acquire the meadow for the First Nation, the Crown failed to act with loyalty, good faith, full disclosure appropriate to the subject matter, and with “ordinary” diligence in what it reasonably regarded as the best interest of the beneficiaries.

A second opportunity arose when Vowell visited the area. The province willingly delayed issuing the pre-emption record and awaited direction from O’Reilly and Vowell. However, Vowell assumed that the Band had interfered with Wright’s pre-emption instead of realizing that Wright had interfered with the Band’s use of the meadow. As the province was willing to not grant the application, it seems that all Vowell had to do was indicate that the meadow was going to be set aside for the Band. However, Vowell prioritized Wright’s pre-emption over the Band’s use of the land. The majority views Vowell’s

100 A.W. Vowell, Indian Superintendent, Indian Office, Dept. of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 35).

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failure to acknowledge Wright’s pre-emption as interfering with the Band’s use of land as a breach of basic fiduciary duty. This action was not an act of loyalty, good faith, full disclosure appropriate to the subject matter, nor was it in the best interests of the Band or an act of ordinary diligence. The majority of the panel thus concludes that the Crown breached its fiduciary duty to the Band with respect to the meadow.

REASONS OF COMMISSIONER DICKSON-GILMORE

I am in agreement with my colleagues on the first issue, and thus share their finding that the Esketemc First Nation’s ancestors, the Alkali Lake Band, did possess a cognizable interest in the lands which were pre-empted by William Wright in 1893. Having made this finding, our determination on issue 2 becomes obvious, for if there is such an interest in the lands, there arises a concomitant duty on the part of the federal Crown to protect that interest commensurate with the pre-reserve-creation obligations enumerated in *Wewaykum*. I am also in agreement with this finding.

Where our views diverge, however, is with regard to the third and fourth issues, which require the panel to make findings concerning the Crown’s discharge of the duty determined in issue 2, and, from this, whether the Crown breached its lawful obligations to the Esketemc First Nation consistent with the terms of the Specific Claims Policy. As I am in agreement with the majority on issues 1 and 2, I will not revisit those issues here. Rather, I will focus on issues 3 and 4 which will be dealt with in a single analysis.

Was There a Breach of Lawful Obligations?

Did the federal Crown fulfill its duty to protect the Band’s interest, or were lawful obligations breached? As noted above, the fiduciary duty which fell upon the federal Crown to protect the Esketemc Band’s interest in the pre-empted lands was that described in *Wewaykum*, and articulated in the majority analysis, as requiring “basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.”¹⁰¹ Because we are dealing in what is technically a pre-reserve-creation context, the duty is less than that accorded in a post-reserve-creation context but is nonetheless of a very high order. Determination of whether that duty was met requires an assessment of whether the federal Crown’s actions and behaviour, as expressed through

101 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

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their representatives, were characterized by loyalty, good faith, full disclosure, and prudence.

In making that assessment in this case, there are some important contextual matters which must be taken into consideration. The first concerns the nature of the reserve-creation process in British Columbia, a period which lasted from 1878 to 1938.¹⁰² At this juncture, reserve creation in British Columbia was a joint process which required the cooperation of both the dominion and the provincial Crown. Cooperation was imperative because, “while the federal government had jurisdiction over ‘Indians and lands reserved for Indians’ under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property”.¹⁰³ Neither government could act independently of the other to create reserves; the federal government had no power to establish a reserve on public lands of the province, and the province was barred from reserve creation under the *Indian Act* as such action was *ultra vires* its constitutional powers.

In the pre-reserve-creation context, lands were which provincial property remained within the control of the province. Given this fact, where the provincial government wished to pass some of those properties to newcomers to encourage settlement of the province, it was free to do so, restrained only by its respect for its own provincial legislation pertaining to pre-emptions and grants. Not that such restrictions proved unduly constraining on the provincial Crown which, notwithstanding the prohibition against the taking of “Indian settlement lands” within pre-emption policies, issued grants to settlers over lands contained within “temporary reserves” and, in some cases, clearly within areas that showed signs of settlement by First Nations peoples. In such circumstances, the federal Crown, with responsibility for “Indians and lands reserved for Indians,” had an obligation to intervene on behalf of First Nations whose lands, albeit not yet reserved, had been pre-empted. However, the Crown’s rights in regard to Indians could not trump the province’s rights in regard to lands deemed provincial property, and, in situations where Indians claimed lands pre-empted or granted under provincial law, the federal Crown had no power beyond that of persuasion and argument to challenge such pre-emptions and grants. The processes of reserve creation and settlement were

102 As was discussed in the majority report, the reserve-creation period in British Columbia did not conclude until 1938, with the passing of Order in Council 1036, whereby the province conveyed all reserved lands to the dominion to be held for the use of Aboriginal people.

103 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 289–90.

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thus often fraught as between the two Crowns, but one thing was clear: where the province had registered a pre-emption or issued a grant for lands, the federal Crown had no power to cancel those, and, unless the province was willing to do so,¹⁰⁴ or the pre-emptor was willing to give up the pre-emption, the federal Crown was without recourse. It is imperative that the analysis of the efforts made by the federal Crown to respect its obligations to the Alkali Lake Band and its interest in Wright's Meadow, be framed within this context.

As outlined in the majority report, a reserve was first surveyed for the Alkali Lake Band in 1861 (IR 1, 40 acres).¹⁰⁵ In 1881, Indian Reserve Commissioner Peter O'Reilly met and consulted with the Alkali Lake Indians on the allocation of additional reserves, leading to the expansion of IR 1 by 550 acres and the setting aside of six additional reserves and two fishing stations, "amounting in all to about 3310 acres [plus 3 acres at IR 7], and this embraces all the good land in the neighborhood, not already alienated."¹⁰⁶ It is important to recognize that, although the area of Wright's Meadow was centrally located within the reserves selected by the Indians, there is no evidence that the Alkali Lake Band requested that area be reserved in 1881. It has been suggested that this may well have been due to the possibility that, at that time, the lake had yet to be drained and thus the meadow was not yet formed and the lands less desirable. While it is purely speculative, given the absence of evidence on the matter, it is nonetheless curious that in a region as arid as this one, a centrally located lake would not be considered a valuable commodity, especially one which was surrounded by five of the Band's reserves.

The challenges of the larger context of reserve creation are evident in the very first moments of that process. O'Reilly reported some difficulty in locating additional desirable lands, as much of the region's best lands were occupied by white settlers who, he lamented, had long "since obtained Crown

104 An example of this situation is found in one of the two fishing stations reserved by O'Reilly in 1881. The lands had been pre-empted and granted some time previously; however, the Alkali Lake Band had continued to use the station without apparent complaint or interference from the pre-emptor. O'Reilly was confident that the pre-emption would not interfere with the reserve-creation process, as he was "led to believe that he [the present owner] will offer no objection to the land being set apart for the Indians; it possesses little or no value except as an Indian fishing station." P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 150–51 (ICC Exhibit 1c, pp. 19–20).

105 Indian Claims Commission, *Esketmc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 50.

106 P. O'Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, p. 144 (ICC Exhibit 1c, p. 12).

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Grants from the Provincial Government, therefore it was not in my power to interfere with their titles.”¹⁰⁷ That said, the Band seems at this juncture to have been content with the allotment of reserves, which it later referred to as containing “quite a lot of land.”¹⁰⁸

The pre-emption which is central to this inquiry transpired on July 8, 1893, when William Harrison Wright applied to pre-empt 320 acres of Tselute, including and especially the haylands of Wright’s Meadow.¹⁰⁹ Wright was granted his pre-emption by Lands Commissioner and Provincial Government Agent F. Soues immediately upon application.

While the evidence is unclear and contradictory on the matter, there are indications that, between two and five years before the pre-emption application, members of the Esketemc Band had created the haylands by destroying a beaver dam and draining the lake which had previously filled the meadow. Although there is no evidence that the Band expressed any interest in the meadow prior to Wright’s successful application for pre-emption, there is abundant evidence confirming that, once the Band complained to Indian Agent Laing-Meason about the pre-emption, he was quick to offer what support he could. Recognizing that the federal Crown had no power to cancel the pre-emption, and cautioning that he had “often told them [the band] that they have no right to any lands outside of their reserves and that I have no power to give them authority to occupy any such,”¹¹⁰ Laing-Meason nonetheless contacted Indian Superintendent Vowell to pass on the Band’s complaints and advocate for their interest in the meadow:

When Mr. O’Reilly laid out the Alkali Lake Reserve very few meadows were asked for, as only those Indians who had cattle required hay; no sleighs or waggons being then used by the Indians and there being a sufficiency of grass in the immediate neighborhood of the Reserve for their saddle horses; at present the [natural] grass has all been fed off everywhere, and hay is absolutely necessary even for saddle horses, but every Indian family now has its sleigh and Span of horses the latter being stabled during the winter and of course requiring hay; it therefore becomes most desirable and a simple of act of justice, that they be allowed to acquire more meadow land; the resident settlers of this neighborhood have hitherto [practically]

107 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp.143–44, 148–49 (ICC Exhibit 1c, pp. 11–12, 16–17).

108 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).

109 Application to Record (under the *Land Act, 1884*, ss. 7 and 8) by W. H. Wright, July 8, 1893, BCA, GR 1440, F. 2319/93 (ICC Exhibit 1b, pp. 2–3); Certificate of Pre-emption Record, July 8, 1893, BCA 8319/93 (ICC Exhibit 1b, pp. 4–5).

110 William Laing-Meason, Indian Agent, Williams Lake Agency, Lesser Dog Creek, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 16, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 3–4).

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respected the squatters rights of the Indians to Meadows, [never] attempting to [pre-empt] or purchase such lands [where] utilized by the Indians.

The meadow in question was until last year a Lake, this being drained has become a meadow, which was cut by these Indians for the first time last year – they have since erected fencing and buildings and were preparing to cut their hay this summer when Mr. Wright pre-empted it; under these circumstances *I beg to submit for your consideration the possibility of effecting some arrangement with the Provincial Government whereby the Meadow could be secured to the Indians* and thus avoid what appears at present a matter likely to cause serious trouble. [Emphasis added.]¹¹¹

The Agent continued to correspond with Vowell regarding the pre-emption in a July 22, 1893, letter,¹¹² and his efforts were continued by his successor, Gomer Johns, who journeyed to the meadow in the late summer of the same year to inspect the pre-empted lands and speak with both the Esketemc Band and Wright. He reported to Vowell that “after hearing both parties I told the Indians that Wright was legally entitled to his pre-emption.”¹¹³ Notwithstanding this, Johns asserted that Wright seemed amenable to giving up his pre-emption, and

I had strong hopes of an amicable settlement being effected. On the 13th. of August Mr. Wright gave me his terms, viz:- he would take \$250.00 or would [g]ive \$200.00, *this was subsequently communicated to the Indians but they were determined to listen to no terms that would deprive them of the meadow;* they secured the hay crop and are still in possession...

...
I trust that some way may be found of securing the meadow to the Indians; the man Wright could not have expected to obtain peaceable possession of the meadow under the circumstances I have stated. [Emphasis added.]¹¹⁴

Notwithstanding these efforts, Chief August in August wrote directly to Vowell, complaining that, although he had raised the matter with Johns, there had “been nothing done in regard to it” and that “there is over 200 people in my reserve and it will starve all of us if we do not be allowed to keep those meadows so please come and settle this trouble for us.”¹¹⁵ Response to this letter was swift, and Johns was sent in once again to investigate the pre-

111 William Laing-Meason, Indian Agent, to A. W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).
112 William Laing-Meason, Indian Agent, Williams Lake Indian Agency, Lesser Dog Creek, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 22, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 7).
113 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 11).
114 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp.12–13).
115 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).

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emption and assess the quality of those haylands within the reserve. Acknowledging that those haylands contained within the reserve were significant, and that the most abundant haylands were those of the meadow, Johns also observed that

the assertion in Chief August’s letter that his band of 200 people will starve if they lose this meadow is, of course, nonsense, but *it will certainly be a very serious loss to them*; apart from the loss of the meadow itself, *the disturbance caused by the intrusion of a white settler on a range practically enclosed by these 5 reserves will be a continual source of annoyance*, besides the loss of the pasturage of which hitherto they have had a monopoly ... [Emphasis added.]¹¹⁶

Johns had also clearly been in contact with provincial agents regarding the pre-emption, and informed Vowell that he may have found a loophole in Wright’s grant, insofar as he “has never entered into occupation of the land as required by Clause 13 of the Land Act.”¹¹⁷ The record is not clear on whether anything ever came of this situation.

The province, however, did not appear terribly sympathetic to the situation faced by the Esketemc Band or the ongoing efforts of the federal Crown to advocate for them. In an exchange of correspondence between provincial Attorney General Theodore Davie and Government Agent Soues between November 1893 and January 1894, Soues stressed that

I know of no reason why Mr. Wright should not be confirmed in his settlement on the pre-emption.

I presume the Indian Commissioner in laying off the Indian Reserves was satisfied that the Alkali Lake Indians had a sufficient Reserve and with this meadow so close to the line of their Reserve, and the Indians’ knowledge of the distance of the meadow, that if they had applied for it then, it is more than probable that the Commissioner would have granted that also. As the matter stands, Mr. Wright pre-empted Crown lands unoccupied and unreserved ...¹¹⁸

Faced with such provincial recalcitrance, there was little the federal Crown could do. The Band, however, sought assistance through a new route. They contacted the Reverend Father Lejacq of St Joseph’s Mission at Williams Lake

116 Gomer Johns, Indian Agent, Williams Lake Indian Agency, 150 Mile House, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 16–20).

117 Gomer Johns, Indian Agent, Williams Lake Indian Agency, 150 Mile House, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 20–21).

118 F. Soues, Government House, Clinton, BC, to Theodore Davie, Attorney General, Victoria, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, pp. 44–45).

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and requested his assistance in dealing with the province. Lejacq wrote to Davie, asserting that the Band had made improvements to the pre-empted lands at the direction of Indian Reserve Commissioner O'Reilly, who had reportedly sent them out to find and develop additional haylands.¹¹⁹ Upon receipt of this letter, Davie requested that Government Agent Soues delay the issuance of Wright's pre-emption so that the allegations contained in the missionary's letter could be investigated.¹²⁰ Soues acknowledged that Lejacq's letter certainly cast a new light on things, and suggested that the matter be referred back to O'Reilly for clarification.¹²¹ Davie was clear that, should it become apparent that Wright obtained the pre-emption under false pretenses, action would be taken.

O'Reilly replied promptly and clearly to queries from Davie about the reserve allocation process and, specifically, the Wright's Meadow situation, in early February 1894. His comments indicate that, as represented by Father Lejacq, there was some misunderstanding on the part of the Esketemc regarding the securing of additional haylands. It also appears that there was some ambivalence on the part of the Band about the Wright's Meadow both in 1881 and after:

The Reserve Commission visited Alkali Lake in July 1881 ...

...

The Indians were naturally anxious to possess as much hay land as possible, and every acre pointed out by them that had not already been alienated was secured to them. I also invited them to shew [sic] me any other plots of land they were in the habit of using, had they done so, it would have been included in the reserves. I certainly did not in any way encourage them to occupy and improve land outside of their reserves as such advice would have been entirely opposed to my instructions.

It is much to be regretted that the Indians should have improved the land now taken possession of by Mr. Wright under a record of preemption, but *it is strange that since 1881 to the present time no intimation has reached me either from the Indians, or from their Agent that this meadow was so highly prized by them; and no request has been made to me to have it declared a reserve,*

119 Lejacq wrote that O'Reilly "told them to look round and try to find some good place for making hay, to take what they would find, to fix it and the Government would grant it to them. Now the Indians Acting according to the suggestion of the Commissioner, located a place, a swampy place, at the head of this creek drained it, cut the brush, put fences, built stables, even houses, in a word, made a good meadow out of a useless swamp and now when they are beginning to reap the fruits of their hard labour, a white man comes and wants to snatch it from their hands." J.M.J. Lejacq, OMI, St Joseph's Mission, Williams Lake, to unidentified recipient, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 46).

120 Theodore Davie, Victoria, BC, to [E. Soues], Government Agent, Clinton, BC, January 26, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 49).

121 E. Soues, Clinton, BC, to Theodore Davie, Attorney General, Victoria, BC, January 29, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit, 1c, pp. 51-52).

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notwithstanding that I have since then, on several occasions passed through that part of the country.

*If there are any other meadows, not legally held by whites, where the Alkali Lake Indians are in the habit of cutting hay, besides that preempted by Mr. Wright they may yet be secured to their use. In that event I would suggest that the Government Agent of the district be instructed not to accept for the present any further applications to preempt. [Emphasis added.]*¹²²

The dispute over the meadow continued over 1894, and, in July, Indian Agent Bell, Johns’ successor, asked Indian Superintendent Vowell to visit the meadow personally to settle the dispute.¹²³ On the same day, Government Agent F. Soues also asked Vowell to visit the meadow to give “executive attention” to the matter.¹²⁴ Vowell did so on July 23, 1894, and reported back to the Deputy Superintendent General of Indian Affairs on August 6, 1894, detailing the Band’s use of the Wright’s Meadow haylands and any improvements made thereon.¹²⁵ He observed:

*They were not unreasonable, but still kept strongly to the point that without the meadows they and their children would be without sufficient means for their support. For my own part I consider that their demands are worthy of consideration and I would strongly urge that all these patches of meadow lands situated in the mountains which have for years been used by them and which come under the head of “waste lands of the Crown” be reserved to them without delay ... [Emphasis added.]*¹²⁶

In apparent support of Vowell’s observations and recommendations, the Deputy Superintendent General wrote to Vowell 10 days later and instructed him that

-
- 122 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Theo. Davie, Attorney General, Victoria, BC, February 7, 1894, LAC, RG 10, vol. 1278, pp. 298–300 (ICC Exhibit 1a, pp. 22–24).
 - 123 E. Bell, Williams Lake Agency, Clinton, BC, to A.W. Vowel, July 2, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 30).
 - 124 F. Soues, Government Agent, Government Office, Clinton, BC, to A. Campbell Reddie, Deputy Provincial Secretary, Victoria, July 2, 1894, Provincial Collection, binder 12, corr. no. 996/94 (ICC Exhibit 1c, p. 55).
 - 125 Purportedly attached to the reverse of this letter is a ‘draft letter’ whose author and recipient are unknown, and which has been attributed to ‘E. Soues’, Government Agent, Government Office, Clinton, B.C. In this document, there is a direction to cancel Wright’s pre-emption of the meadow based on his wrongful declaration that the lands were not ‘Indian settlement lands’. While this draft document would seem important, there is no evidence to indicate that it was anything other than a draft, nor is there any clarity around its status, authorship or intended recipient. There is nothing else in the record to suggest its contents were in any way official or that it ever transcended draft form and was actually sent to the federal government, Wright, the Band or any other interested party. Given its uncertain status and role in the controversy over the meadow, its probative value is limited.
 - 126 A.W. Vowell, Indian Superintendent, Indian Office, Department of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 34–37).

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if the Indians manage to induce Mr. Wright to relinquish his claim you should, without delay, approach the Provincial authorities, through the Reserve Commissioners if necessary, and endeavour to get them to secure the land to the Indians, or *failing that, ask them to apportion some others in lieu of the meadow, and also reserve to the Indians any other bay lands used by them, and considered by you really necessary for the support of their stock.* [Emphasis added.]¹²⁷

In the fall of 1894, both federal¹²⁸ and provincial¹²⁹ representatives visited Wright's Meadow and attempted to assess its importance as a hayland as well as the extent of any improvements made by the Esketemc Band to the region. Their reports are substantially similar and document limited improvements by the Band and none by Wright, who had not occupied the meadow for any significant period owing to the pre-emption controversy. Both reports also commented on the presence of other viable haylands outside the pre-empted lands.¹³⁰

Apparently unable to successfully challenge the pre-emption, in 1895 the federal Crown took measures to provide additional haylands elsewhere. In that year, Indian Reserve Commissioner O'Reilly once again visited the Esketemc and allotted an additional seven reserves, most of which were either haylands or amenable to development as haylands:

Though these Indians are already in possession of reserves allotted to them in 1881, and which contain 5587 [sic] acres,¹³¹ they have recently complained of a scarcity of hayland as their bands of cattle, and horses have largely increased, and it was with a view to supplying this want that my present visit to Alkali lake was undertaken.

The Chief "August" and a large number of his people accompanied me to point out the several pieces of land which they desired to have secured to them; Mr. Agent Bell also was present, and assisted much in the selection of the seven following locations.

...

127 Deputy Superintendent General of Indian Affairs to A.W. Vowell, Indian Superintendent, Victoria, BC, August 16, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 39).

128 [Bell, Indian Agent], to A.W. Vowell, October 16, 1894, LAC, RG 10, vol. 11014, p. 47A (ICC Exhibit 1a, p. 51).

129 C. Phair, Acting Government Agent, Government office, Clinton, BC, to W.S. Gore, Deputy Commissioner of Lands and Works, Victoria, BC, October 16, 1894, LAC, RG 10, vol. 11014, pp. 51A–51B (ICC Exhibit 1a, pp. 49–50).

130 See Appendix A, Historical Background, pp. 76–77.

131 This should read 3,587 acres.

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The meadow lands in all the above reserves are capable of being enlarged by clearing, with a very small amount of labor; the Indians at present only using those portions that are naturally free of brush. They are at too great an altitude to admit of their being used for any other purpose.¹³²

One of the reserves set aside by O’Reilly in 1895 is IR 11A, also known as “Sampson’s Meadow,” which is located immediately west of Wright’s Meadow.

Although we acknowledge that the federal Crown’s powers to influence the pre-emption were limited, it is nonetheless clear that considerable efforts were undertaken by the successive Indian Agents, by Vowell, and by O’Reilly to see justice done to the Esketemc regarding the meadowlands. The complaints of the Band, over lands which it did not express any interest in possessing as reserve lands save for at the time of the pre-emption, were made known to the department and were championed thereby with the provincial government. It is clear that both Crowns made considerable effort to resolve the matter on the Band’s behalf, launching three different investigations and ensuring that the pre-emptor, Wright, remained off the meadow while the controversy was active. Thus, although the meadow had been the subject of a legal pre-emption, the restriction of the pre-emptor from occupying the lands and the apparent respect of the “squatters’ rights” of the Band in the meadow indicate that the practical implications of the pre-emption were, until relatively recently, moot.

In the end, when both the province and the pre-emptor proved unmovable on the matter of the meadow, the federal Crown took immediate steps to allocate additional haylands to the Band. And although it is not clear from the evidence whether the quantity of hay available from the additional seven haylands reserved in 1895 rivalled that produced in Wright’s Meadow, there is also no evidence indicating that the band members were in any way dissatisfied with this compensation, nor is there any continued expression of a desire to obtain the pre-empted meadow. Indeed, it is noteworthy that, aside from those complaints recorded in the two years spanning the time of the pre-emption in 1893 to the allocation of the additional reserves in 1895, there is no evidence of any expression of concern about Wright’s Meadow by the Band until the present and the laying of a claim to it.

132 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Deputy Superintendent General of Indian Affairs, September 26, 1895, LAC, RG 10, vol 1279, pp. 74–75; Federal Collection, vol. 14, pp. 117–25 (ICC Exhibit 1c, pp. 66–69).

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Furthermore, while the evidence around Wright’s offer to sell his pre-emption for \$250.00 is limited and unclear, it is recorded that the band was “*determined to listen to no terms that would deprive them of the meadow.*”¹³³ Faced with a pre-emptor who was, save for this offer briefly made and apparently cajoled from Wright in discussions with the Indian Agent Johns, averse to selling, a province that saw the pre-emption as legal and valid, and a federal Crown that was powerless to cancel the pre-emption, it is difficult to see what more the federal Crown could have done to challenge Wright’s hold on the meadow. And although it certainly was not legally necessary for the federal Crown to provide additional haylands to a Band already in possession of “quite a lot of land,”¹³⁴ it allocated a further seven reserves.

Based upon this understanding of the history of the federal Crown’s actions in reserve creation for the Esketemc First Nation, and particularly with reference to the pre-emption of Wright’s Meadow, I am of the opinion that its actions demonstrated loyalty, good faith, full disclosure, and prudence. I thus find that the federal Crown discharged its duty to the Esketemc people with regard to Wright’s Meadow, and absolve them of any outstanding lawful obligation in this regard.

ISSUE 4: FURTHER BREACHES OF THE SPECIFIC CLAIMS POLICY

4 In all the circumstances, did the federal Crown breach any lawful obligation to the Band, as specified in the Specific Claims Policy?

As the majority of the panel has concluded that the Crown has failed to fulfill its fiduciary obligations to the Esketemc First Nation, an examination of this issue is not required.

133 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp.12–13).
 134 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

PART V

CONCLUSIONS AND RECOMMENDATIONS

Issue 1 Did the Alkali Lake Band, as it was then known, have an interest in the lands that William H. Wright pre-empted in 1893?

The panel concludes that the Alkali Lake Band, as it was then known, had an interest in the meadow that Wright pre-empted in 1893. In reaching this conclusion, the panel acknowledges that this interest can be based on a cognizable interest of demonstrated use, which constitutes Indian settlement lands.

Issue 2 If the Band had an interest in the lands, did the federal Crown have a duty to protect that interest?

Issue 3 If the federal Crown had a duty to protect the Band’s interest, did it discharge that duty?

As these two issues are related, the panel decided to deal with these issues concurrently in the same section. The opinion of the panel diverges on the issue of finding a breach of fiduciary duty. The panel agrees in finding that a fiduciary duty exists in relation to the meadow, but disagrees on whether that duty has been breached, the majority of the panel finding that it has been breached and the minority finding that it has not.

Issue 4 In all the circumstances, did the federal Crown breach any lawful obligation to the Band, as specified in the Specific Claims Policy?

As the focus of the analysis has been on the fiduciary duty and the majority has found a breach of fiduciary duty, it is not necessary for this issue to be addressed.

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RECOMMENDATIONS

Commissioners Bellegarde and Holman recommend:

That the claim of the Esketemc First Nation for the lands comprising Wright's Meadow be accepted for negotiation under Canada's Specific Claims Policy.

Commissioner Dickson-Gilmore recommends:

That the claim of the Esketemc First Nation for the lands comprising Wright's Meadow not be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS



Daniel J. Bellegarde (Chair)
Commissioner



Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 24th day of June, 2008.

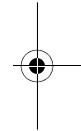
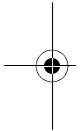


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APPENDIX A

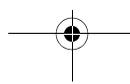
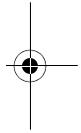
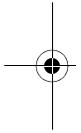
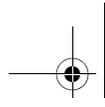
HISTORICAL BACKGROUND

ESKETEMC FIRST NATION WRIGHT’S MEADOW PRE-EMPTION INQUIRY



INDIAN CLAIMS COMMISSION

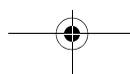
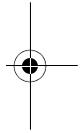
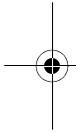
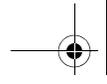




ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

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ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

INTRODUCTION

The Esketemc First Nation,¹ descended from the Secwepemc people (otherwise known as the Shuswap), make their home on Alkali Lake Creek, a tributary of the Fraser River, in central British Columbia. The salmon fishery was once the main economy;² however, the Esketemc First Nation has had considerable success raising horses and cattle.³

According to Esketemc oral history, the community refers to “Wright’s Meadow” as “U.S. Meadow”⁴ or “Tselute,” meaning “Cattail.”⁵ At the community session, Elder Dorothy Johnson indicated on a map that the location of Tselute⁶ began at Sampson’s Meadow (Indian Reserve [IR] 11 and IR 11A) and extended beyond Place Lake.⁷ The Elders’ oral history indicates that Wright’s Meadow is only a small portion of Tselute.⁸ It should be noted that Wright’s Meadow no longer exists. The construction of a dam on Place Lake has flooded it. The oral history of the community indicates that the current “dam was put in in 1953 at Tselute to hold the water on behalf of the Alkali Lake Ranch.”⁹

THE GOLD RUSH AND THE DEVELOPMENT OF PRE-EMPTION POLICY IN BRITISH COLUMBIA

In 1858, gold was discovered along the Fraser River, attracting large numbers of non-Aboriginal people into the traditional Secwepemc territory in central British Columbia, where many of them settled after the end of the gold rush.

The challenges that accompanied increasing rates of settlement were complicated by financial difficulties being experienced by the colonial government of mainland British Columbia. Fiscal constraints resulted in suspending the short-lived practice of entering into treaties with First Nations (the Douglas Treaties, 1850–54) and abandoning plans for a systematic

- 1 The Esketemc First Nation was known as the Alkali Lake Band, or the Alkali Lake Band of Indians, during the relevant time period of this inquiry. Hereafter the terms First Nation and Esketemc First Nation will be used, except where referred to otherwise in quoted passages.
- 2 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 19.
- 3 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, p. 144 (ICC, Exhibit 1c, p. 12).
- 4 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 82, C.Y. Wycotte; p. 129, A. Wycotte).
- 5 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 23, J. Roper; p. 129, A. Wycotte; p. 246, I. Johnson).
- 6 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 159, D. Johnson).
- 7 Map of Esketemc First Nation Reserves with legend, prepared by V.L. Robbins, June 25, 2005, produced at community session, April 5 and 6, 2006, held at the Esketemc First Nation, Alkali Lake, BC, with markings made at community session held April 5 and 6, 2006 (ICC Exhibit 5c, p. 1).
- 8 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 187–90, B. Chelsea); aerial photograph of lot 323, produced at community session, April 5 and 6, 2006, held at the Esketemc First Nation, Alkali Lake, BC, with markings made at community session held April 5 and 6, 2006 (ICC Exhibit 5c, p. 1).
- 9 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 57, A. Chelsea).

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survey of the territory.¹⁰ British Columbia's predicament was this: in order to achieve its primary goal of settling the colony, it had to address First Nations' land rights while minimizing the costs of treaties or surveys. Therefore, the colony required a land policy that would allow settlers to acquire "largely unsurveyed land"¹¹ while simultaneously "protecting certain specified lands, including Government reserves, town sites and Indian settlements."¹²

Thus, in the late 1850s and early 1860s, the colonial government, under the leadership of newly appointed Governor James Douglas, developed a land policy that allowed a settler to claim or pre-empt up to 160 acres of unsurveyed Crown land, provided the land was not (among other restrictions) "an Indian reserve or settlement."¹³

Anne Seymour has summarized the colonial government's attempt to balance the system of pre-emption and the creation of Indian reserves as follows:

In securing the village sites and resource areas by establishing reserves, Douglas clearly believed he would satisfy the basic needs of the Indian communities and maintain a positive relationship with the settlers. The intent of this policy was honourable. Putting it into practice proved to be more complicated than was anticipated. Not only were there issues between settlers and the First Nations populations, there were also difficulties in allocating unsurveyed land for settler use.¹⁴

LAND ACT, 1884

Although colonial land policies had been established and revised through a series of pre-Confederation land ordinances, the prohibition on pre-empting Indian reserves and settlements continued after British Columbia joined Confederation in July 1871. Most relevant to this inquiry is the *Land Act, 1884*, as consolidated and amended in *Statutes of British Columbia*, vol. 1

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- 10 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 23–24.
- 11 Anne Seymour, "Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898," prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 1 (ICC Exhibit 3b, p. 4).
- 12 Anne Seymour, "Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898," prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 1 (ICC Exhibit 3b, p. 4).
- 13 *Pre-emption Consolidation Act, 1861*, August 27, 1861, s. 3, as reprinted in RSBC 1871, App. 80.
- 14 Anne Seymour, "Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898," prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 6 (ICC Exhibit 3b, p. 9).

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Consolidated Acts, 1888, c. 16, s. 77.¹⁵ The sections of the *Land Act, 1884*, which deal most directly with the pre-emption of land read as follows:

3. Any person being the head of a family, a widow, or single man over the age of eighteen years, and being a British subject, or any alien, upon his making a declaration of his intention to become a British subject, ... may record any tract of unoccupied and unreserved Crown lands (not being an Indian settlement) not exceeding three hundred and twenty acres in extent ... Provided, that such right shall not be held to extend to any of the aborigines of this continent, except to such as shall have obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council.

...

5. Any person desiring to pre-empt, as aforesaid, shall, if the land be unsurveyed, first place at each angle or corner of the land to be applied for a stake or post ...

...

After the land is so staked and marked, the applicant shall then make application in writing to the Commissioner of the district in which the land is situate to record such land, and in such application the applicant must enclose a full description of the land intended to be recorded, and enclose a sketch plan thereof ... the applicant shall also make ... a declaration in duplicate, in the Form No. 2 in the schedule hereto; and if the applicant shall in such declaration make any statement, knowing the same to be false, he shall have no right at law or in equity to the land, the record of which he may have obtained by the making of such declaration.

...

7. Every piece of such unoccupied, unsurveyed and unreserved land as aforesaid, sought to be pre-empted under the provisions of this Act, shall, save as hereinafter is provided, be of a rectangular or square shape and 320 acres shall measure 40 chains by 80 chains (equal to 880 yards by 1760 yards.) All lines shall be run true north and south, and true east and west.

...

10. Upon the compliance by the applicant with the provisions hereinbefore contained, and upon payment by him of the sum of two dollars to the Commissioner, the Commissioner shall record such land in his favour as a pre-emption claim and give him a certificate of such pre-emption record ...

...

23. After the grant of a certificate of improvement as aforesaid to the pre-emptor, and payment of one dollar per acre for the land has been made, a Crown grant or conveyance ... of the fee simple of and in the land mentioned as recorded in such certificate shall be executed in favour of the said pre-emptor, upon payment of the sum of five dollars ...¹⁶

15 Please note that both versions of the *Land Act* are included in the record for this claim. In the 1888 Consolidated Acts (ICG Exhibit 6b), however, the sections related to pre-emption are different than those in the *Land Act, 1884* (ICG Exhibit 6a). For the purposes of this history, the *Land Act, 1884*, will be used.

16 *Land Act*, RSBC 1884, c. 16, ss. 5–23 (ICG Exhibit 6a, pp. 2–4, 7).

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In addition to the above, sections 11 to 14 of the *Land Act, 1884*, addressed terms of the pre-emptor's "possession" and occupation of the land and provisions for a pre-emptor to take leave of absence from the land with the consent of the local commissioner.¹⁷

The colonial and early post-Confederation pre-emption policies, which were essentially the same, were not without flaws. Anne Seymour noted:

The responsibility for the surveys of pre-empted land ostensibly fell to the settler pre-empting it. If a settler intended to fulfill the requirements of the act to acquire a title to the land, a survey was a requirement. But, to have settlers pay for the survey of the individual plots of land they purchased, made the correlation of surveyed and unsurveyed land difficult. ... The process relied upon the settler identifying land by geographic features and/or land held by neighbouring settlers. Such descriptions were often vague and difficult to locate. The long-held fear that vast areas could be alienated despite the provisions in the ordinances, and later the legislation, appears to have been well-founded ... With settlers being held responsible for identifying and locating land, declaring if it was used and/or occupied by another settler, the government or an Indian settlement and incurring the cost of survey, and magistrates disinclined to enforce restrictions on acquisition, the limited government presence in land administration came under some criticism ...¹⁸

Section 16 of the *Land Act, 1884*, states:

16. Any pre-emptor of unsurveyed land may have the land recorded by him surveyed at his own expense (subject, however, to a rectification of boundaries) by a surveyor approved of and acting under instructions from the Chief Commissioner of Lands and Works or Surveyor-General. The field notes (original and duplicate) and a sketch of any such survey must be forwarded to the head office of the Lands and Works Department ... and should such survey be accepted by the department, a notice thereof shall be published in the British Columbia Gazette for a period of sixty days, giving the official description of the land, also the name of the pre-emptor for whom the land was surveyed, during which period any other parties having claims to such land must file a statement of their claims thereto with the Commissioner, and unless two or more parties are claimants of the same land, the Commissioner, at the expiration of such sixty days shall record such surveyed land in the name of the pre-emptor.¹⁹

17 *Land Act*, RSBC 1884, c. 16, ss. 11–14 (ICC Exhibit 6a, pp. 4–5).

18 Anne Seymour, "Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898," prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, pp. 20–21 (ICC Exhibit 3b, pp. 23–24).

19 *Land Act*, RSBC 1884, c. 16, s. 16 (ICC Exhibit 6a, p. 5).

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Seymour concluded:

In the absence of an official definition of an Indian settlement, the honour and integrity of the individual pre-empting land, the knowledge of the local Commissioner and the experience of surveyor remained the cornerstone of the policy.²⁰

WHAT IS AN INDIAN SETTLEMENT?

There is no clear and absolute definition of what constitutes an “Indian Settlement” in the colonial land ordinances or in any version of the *Land Act*, including that of 1884. However, historical documents from colonial British Columbia indicate that some officials contemplated the meaning of the term. In 1864, when considering a pre-emption of lands at Chemainus, a panel of colonial officials considered how the term “Indian Settlement” would be defined.²¹ The panel concluded:

We understand an Indian Settlement to be not a permanent standing Village but such a Village or Home as Indians are accustomed to have and it appears to be an understood custom with the Indians of this District as with many others to leave their Home or Villages for months together taking their Houses with them.

... [The] Land in question has always been an Indian Settlement in the Indian sense of the word, a place which the Indians looked on as their Home which they from time to time inhabited and it is conceded that no inhabited Houses actually stood on the spot when the Land was taken up.

This fact of an Indian Settlement existing on the spot is one which we think can only be decided satisfactorily by the evidence of reliable Indians of the tribe or White men who have known the spot for some years and more particularly by a careful examination of the spot itself which, to the eye of one experienced in Indian matters will, we are told, bear indisputable evidence of continued occupation and residence ...²²

When considering the term in 1878, Indian Reserve Commissioner Gilbert Malcolm Sproat stated:

An “Indian Settlement” must mean, not only the soil, but, also, its natural adjunct, and what is reasonably necessary to fit it for human habitation and industry.

- 20 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 21 (ICC Exhibit 3b, p. 24).
- 21 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, pp. 10–11 (ICC Exhibit 3b, pp. 13–14).
- 22 Tho. L. Woody, Acting Attorney General, J.D. Pemberton, Surveyor General, A.W. Weston, Treasurer, to Acting Colonial Secretary, October 3, 1864, British Columbia Archives (BCA), file 909, Lands and Works Department, vol. 1, 1864 Oct. to Dec. (ICC Exhibit 1c, pp. 2–3).

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The same remark applies to reserves, which are simply “settlements” that have been defined by the Government. What is essentially inherent in a “settlement” cannot be removed by its transformation into a “reserve.”²³

RESERVE ALLOTMENTS AT ALKALI LAKE, 1881

The original village site of the Esketemc First Nation is located at the head of Alkali Lake. In 1861, a reserve of 40 acres was set apart at Alkali Lake for the use of the First Nation by A.C. Elliot, within the area that now comprises IR 1.²⁴ In July 1881, Indian Reserve Commissioner Peter O’Reilly met with the Esketemc First Nation to allot additional reserves. O’Reilly decided to enlarge IR 1 by 550 acres and to set aside six additional reserves and two fishing stations.²⁵ In his account of this visit, O’Reilly stated:

This district of country is, for the most part, barren, and destitute of water, consequently I experienced much difficulty selecting even a limited quantity of land suitable for agricultural purposes.

The best locations have for years past been occupied by white settlers, to the exclusion of the Indians, and these parties have since obtained Crown Grants from the Provincial Government, therefore it was not in my power to interfere with their titles.

...

These Indians appear to be industrious, and have shewn a desire to cultivate every possible acre of land.²⁶

O’Reilly also noted the First Nation’s need for hay lands; he reported:

The Indians of Alkali Lake possess 561 Horses, besides 123 Cattle, and 69 Sheep; their great desire was to obtain as much hay land as possible: to satisfy their just requirements it became necessary to make six (6) separate reservations, amounting in all to about 3310 acres [plus 3 acres at IR 7], and this embraces all the good land in the neighborhood, not already alienated.²⁷

- 23 Report of [G. M. Sproat, Indian Reserve Commissioner, Indian Reserve Commission], July 20, 1878, Provincial Collection, binder 2, corr. no. 1769/78 (ICC Exhibit 1c, p. 9).
- 24 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 50.
- 25 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 143–66 (ICC Exhibit 1c, p. 12).
- 26 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp.143–44, 148–49 (ICC Exhibit 1c, pp. 11–12, 16–17).
- 27 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, p. 144 (ICC Exhibit 1c, p. 12).

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It is noteworthy that O’Reilly allotted to the First Nation land already held under pre-emption by a settler. O’Reilly stated:

I have also reserved for this tribe, two important fisheries; ... As I have been informed, they have never ceased to use this fishery, notwithstanding that as far back as April 1873 the land was included in a pre-emption, made by Thomas Roper, upon which he obtained a Certificate of Improvement, in December 1875. Subsequently Mr. Roper sold his interest to Mr. Felker, who at present claims to be the owner.

Mr. Felker was absent during my stay in this neighborhood, consequently I had no opportunity of seeing him. I am, however, led to believe that he will offer no objection to the land being set apart for the Indians; it possesses little or no value except as an Indian fishing station.²⁸

These reserves were surveyed by W.S. Jemmett in 1883 and approved by the Chief Commissioner of Lands and Works in 1884.²⁹ “The Alkali Lake reserves as finally surveyed increased from the 3,313 acres proposed by O’Reilly to 3,587.5 acres.”³⁰

THE PRE-EMPTION

On July 8, 1893, William Harrison Wright³¹ applied for, and received, pre-emption record no. 745 for lot 323 in Lillooet District at Alkali Lake Creek.³² Wright’s pre-emption comprised an area of 320 acres, the maximum area allowed under the *Land Act, 1884*. Wright’s application reads as follows:

I have the honour to request that you will record my name, as a Pre-emptor, under the “Land Land,” [sic] *Three hundred and twenty* acres of unoccupied and unreserved Crown land, within the meaning of the “Land Act”, in the District of *Lillooet*.

The claim is described as follows, and is more particularly shewn on the sketch map drawn on the back of this application, viz: – *about 2½ miles West of Indian Reserve commencing at a stake situated on the North West corner and marked*

- 28 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Superintendent General of Indian Affairs, November 28, 1881, Federal Collection, Minutes of Decision, correspondence & sketches, vol. 8, pp. 150–51 (ICC Exhibit 1c, pp. 19–20).
- 29 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 51.
- 30 Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3 at 51.
- 31 William Wright was sometimes referred to as *Semab*, meaning “non-Native,” by members of the Esketemc First Nation. ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 266, I. Johnson).
- 32 Application to Record (under the *Land Act, 1884*, ss. 7 and 8) by W.H. Wright, July 8, 1893, BCA, GR 1440, E. 2319/93 (ICC Exhibit 1b, pp. 2–3); Certificate of pre-emption record, July 8, 1893, BCA, [8319/93] (ICC Exhibit 1b, pp. 4–5).

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*A. Thence running South eighty chains to a point marked B. Thence east forty chains to a point marked C. Thence North eighty chains to a point marked D. Thence west forty chains to starting point.*³³

According to the *Land Act, 1884*, Wright was required to declare that his pre-emption did not interfere with the prior use or settlement of a First Nation:

*I W.H. Wright of Alkali Lake, do solemnly and sincerely declare that the land for the record of which I have made application, dated the 21st day of June, 1893, is unoccupied and unreserved Crown land, within the meaning of the "Land Act," and is not an Indian Settlement, or any portion thereof; that I have staked off and marked such land in accordance with the provisions of the "Land Act;" that my application to record is not made in trust for, on behalf of, or in collusion with, any other person or persons, but honestly [on] my own behalf for settlement and occupation; and I also declare that I am duly qualified under the said Act to record the said land; and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the "Oaths Ordinance, 1869."*³⁴

Wright's declaration was dated July 8, 1893, and was sworn before Lands Commissioner F. Soues, who also acted as Provincial Government Agent and granted Wright his pre-emption record on July 8, 1893.³⁵

THE MEADOW

Eight days after Wright received his pre-emption, Williams Lake Indian Agent William Laing-Meason wrote to Indian Superintendent A.W. Vowell informing him of the pre-emption. Laing-Meason outlined the Esketemc First Nation's relationship to the meadow and its response to Wright's pre-emption, stating:

Some Indians of the Alkali Lake Band have squatted this past Spring on a meadow of wild grass for the purpose of cutting the same for hay – the meadow is situated about five miles from the reserve – they cut a little hay upon it last year. A person named William Wright, a whiteman [*sic*], has just preempted [*sic*] the meadow and informed me on the 15th. that one of the Indians above mentioned, named August, (the second chief of the Alkali Band) had threatened to kill him – Wm. Wright – if he took possession of the meadow as they claimed it as their own. ... the Indians have not yet come to see me about the matter – as I have often told

33 Application to Record (under the *Land Act, 1884*, ss. 7 and 8) by W.H. Wright, July 8, 1893, BCA, GR 1440, F. 2319/93 (ICC Exhibit 1b, pp. 2–3). Note: Portions shown in italics are handwritten. The remainder of the form is pre-printed.

34 Declaration (form 2, required under the *Land Act, 1884*, ss. 7 and 8), William H. Wright, July 8, 1893 BCA, 32319/93 (ICC Exhibit 1b, p. 1). Note: Portions shown in italics are handwritten. The remainder of the form is preprinted.

35 Declaration, William H. Wright, July 8, 1893 BCA, 32319/93 (ICC Exhibit 1b, p. 1).

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them that they have no right to any lands outside of their reserves and that I have no power to give them authority to occupy any such ...³⁶

Esketemc oral history relates events similar to the documentary accounts of the confrontation between William Wright and the Esketemc First Nation, including accounts of the community confronting Wright and physically removing him from the pre-emption area.³⁷ Elder Willard Dick stated that “[t]he Indians hauled him away out of there.”³⁸

With respect to Laing-Meason’s comment regarding his powers as Indian Agent, a memorandum from Superintendent A.W. Vowell (of unknown date), entitled “Instructions to Indian Agents,” informed the recipients as follows:

The duties of Agents mainly consist in advising the Indians, and in protecting them in the possession of their farming, grazing and woodlands, fisheries or other rights, and preventing trespass upon or interference with the same.

...

The Agent should constantly advise and instruct the Indian in the beneficial use and occupations of their farming, grazing and woodland, fisheries or other privileges or industries possessed or pursued by them; and they, the Agents, should take measures to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc.³⁹

On July 19, 1893, Indian Agent Laing-Meason wrote again to Indian Superintendent Vowell elaborating on the situation:

When Mr. O’Reilly laid out the Alkali Lake Reserve very few meadows were asked for, as only those Indians who had cattle required hay; no sleighs or waggons being then used by the Indians and there being a sufficiency of grass in the immediate neighborhood of the Reserve for their saddle horses; at present the [natural] grass has all been fed off everywhere, and hay is absolutely necessary even for saddle horses, but every Indian family now has its sleigh and Span of horses the latter being stabled during the winter and of course requiring hay; it therefore becomes most desirable and a simple of act of justice, that they be allowed to acquire more meadow land; the resident settlers of this neighborhood have hitherto [practically] respected the squatters rights of the Indians to

36 William Laing-Meason, Indian Agent, Williams Lake Agency, Lesser Dog Creek, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 16, 1893, Library and Archives Canada (LAC), RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 3–4).

37 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 51, A. Chelsea; pp. 133, 147, 149, W. Dick); ICC Transcript, July 5, 2006 (ICC Exhibit 5a, pp. 264, 266–67, I. Johnson).

38 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 149, W. Dick).

39 Copy of Memorandum, A. W. Vowell, Superintendent of Indian Affairs, BC, to unidentified recipient, undated, LAC, RG 10, vol. 4048, file 360377 (ICC Exhibit 1a, p. 8).

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Meadows, [never] attempting to [pre-empt] or purchase such lands [where] utilized by the Indians.

The meadow in question was until last year a Lake, this being drained has become a meadow, which was cut by these Indians for the first time last year – they have since erected fencing and buildings and were preparing to cut their hay this summer when Mr. Wright pre-empted it; under these circumstances I beg to submit for your consideration the possibility of effecting some arrangement with the Provincial Government whereby the Meadow could be secured to the Indians and thus avoid what appears at present a matter likely to cause serious trouble.⁴⁰

In a third letter to Indian Superintendent Vowell, dated July 22, 1893, Indian Agent Laing-Meason stated that he had been “informed by Mr. Wright that the Indians have promised not to trouble him anymore with regard to his occupation of the meadow.”⁴¹

On September 21, 1893, Williams Lake Indian Agent Gomer Johns, Laing-Meason’s successor, provided further detail on how the meadow was created and the Esketemc First Nation’s use of it. Indian Agent Johns stated:

A Lake, formed by a dam on Alkali Lake Creek, was, by cutting this dam changed into a fine piece of meadow land, from which some Alkali Lake Indians have secured a crop of hay for two successive years previous to '93, in the meantime they had erected several large log buildings 5 or 6 – and had also done some fencing; when they were about to commence haying this season, a man named Wright preempted the same land and has been unsuccessfully endeavoring to get possession of the place, up to the present time; at the request of Wright and the Indians I visited the place on the 11th. of August, going along a sleigh road made by the Indians to this meadow – after hearing both parties I told the Indians that Wright was legally entitled to his pre-emption ...⁴²

Indian Agent Johns further reported that Wright

was willing to compensate them [the Esketemc First Nation] for the work they had done, or he would take compensation from them and relinquish his title to the meadow. Mr. Wright was to state his terms on the following day and my reason for not reporting this matter to the Department at the time, was that I had strong hopes of an amicable settlement being effected. On the 13th. of August Mr. Wright gave me his terms, viz:– he would take \$250.00 or would [g]ive \$200.00, this was subsequently communicated to the Indians but they were determined to listen to

40 William Laing-Meason, Indian Agent, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 19, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 5–6).

41 William Laing-Meason, Indian Agent, Williams Lake Indian Agency, Lesser Dog Creek, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, July 22, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 7).

42 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 11).

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no terms that would deprive them of the meadow; they secured the hay crop and are still in possession.

Mr. Wright came to me on Wednesday last the 20th. instant and complained of my doing nothing to assist him. I reminded him that I had cautioned the Indians about threatening him – which they had been guilty of before my visit – and warned them not to molest him in any manner, but as to dispossessing the Indians, I am afraid that it would take force to do so, at least as much force as a Constable may exercise. Yesterday in an interview with Father Lejacq of the Williams Lake Mission he told me that the Indians had sought his advice in the above matter, and that he had stated the case to the Hon. Theo. Davie on the occasion of a visit from Mr. Davie on the 17th. inst. Mr. Davie made notes of the conversation and promised to enquire into the matter.

I trust that some way may be found of securing the meadow to the Indians; the man Wright could not have expected to obtain peaceable possession of the meadow under the circumstances I have stated.⁴³

On October 26, 1893, Chief August wrote directly to Indian Superintendent Vowell appealing for help. Chief August stated:

I would like if you would come and settle the trouble between my people and William Wright. My people have been cutting some meadows that belong to the Government for several years and have built houses and stables on them and cut out and made 7 miles of road to them, they lie back in the woods about 2 miles from one of our reserves. I will now try to explain why we do not wish to give up those meadows. I must acknowledge the Government has given us quite a lot of land but the biggest and best piece of land it gave us is no account to us only for a short time in the winter for pasture as there is no water on it, when my people go there in the Summer to gather berries they have to go to the river to get water to cook with and there is no show of getting any water on to it and on all of the other land the Government gave us there is not more than enough meadow to cut 15 ton of hay so if those other meadows are taken away from us we will have to dispose of our stock and how we will live I do not know as it is if we were left alone I think we could support ourselves, this trouble has been going on since July ... the trouble has been layed before your present Indian Agent this long time but there has been nothing done in regard to it so I appeal to you for help, please excuse me for bothering you but I do not know how else to look to for help. I forgot to state there is over 200 people in my reserve and it will starve all of us if we do not be allowed to keep those meadows so please come and settle this trouble for us.⁴⁴

Chief August also mentioned in this letter that “Mr. Laing W. Meason [William Laing-Meason], your former Indian Agent, he has gone and Staked

43 Gomer Johns, Indian Agent, Williams Lake Agency, 150 Mile House, to unidentified recipient, September 21, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp.12–13).

44 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 14–15).

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off another of the Meadows that my people have been cutting.”⁴⁵ It is also noteworthy that, in 1874, a “William Meason” was one of a group of Lillooet settlers who signed a petition urging the government to intervene on Wright’s behalf in the meadow dispute and to prevent Indians from residing off-reserve or to “hold or possess land known as crown land.” The petition also asserted that “[r]esidents have pre-empted land and have been put to a great deal of trouble to dispossess the Indians.”⁴⁶ Indian Superintendent Vowell later wrote of this petition, stating “the parties supposed to have signed it represent but a portion of the inhabitants in that neighbourhood and many of these did so merely because they were asked to do so by interested persons and not because they believed such a petition actually necessary.”⁴⁷

WILLIAM WRIGHT AND INDIAN AGENT WILLIAM LAING-MEASON

At the community session, Irvine Johnson testified that his grandfather told him that “[t]he Indian Agent knew” the Esketemc First Nation had been using the meadow before Wright pre-empted it.⁴⁸ The testimony of the Elders and community members speculated that the local Indian Agent, William Laing-Meason, supported and assisted William Wright in his pre-emption of the meadow.⁴⁹ Elder Laura Harry recalled that her father, former Chief David Johnson, had said Indian Agent Laing-Meason “was always trying to get a hold of our land and sell it. But you can’t sell no Indian land. You couldn’t do it.”⁵⁰ Elder Andy Chelsea testified that he was told by Chief David Johnson that Wright and Meason were

[i]n-laws or – they were either in-laws or – I know Wright was married to Meason’s daughter or something. I know there was a real close relation there.

...

He [David Johnson] says, well, they helped each other. Meason was the Indian Agent at the time, and they helped each other with lands around here and they were taking over lands that were being used by the Esketemc First Nation.⁵¹

45 Chief August to Vowell, October 26, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 15).

46 Copy of Petition attached to letter from A. Reddie Campbell, Deputy Provincial Secretary, Provincial Secretary’s Office, Victoria, to Indian Superintendent, Victoria, BC, May 19, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 25–27).

47 A.W. Vowell, Indian Superintendent, Indian Office, Department of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 37).

48 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 293, I. Johnson).

49 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 19, J. Roper).

50 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 169, L. Harry).

51 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 88, A. Chelsea).

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Elder Willard Dick testified that former Chief David Johnson told him a similar story about the familial relationship between William Wright and Indian Agent Laing-Meason.⁵²

Although the First Nation attempted to confirm the relationship between William Wright and Indian Agent Laing-Meason, no documentary evidence was located. The 1881 census indicates that William Wright married a woman named Placida, who had been born in British Columbia and was listed as being of Spanish and Roman Catholic heritage.⁵³ The 1901 census shows Placida’s race listed as “r,” and William Wright’s race as “w.”⁵⁴

Why Was Lot 323 Pre-empted by William Wright?

According to Esketemc oral history, Indian Agent Laing-Meason and Wright were interested in the pre-emption because “they figured the highway was going to come through – going to come through Wright’s Meadow. But they built the highway where it is today. That’s where people pick up land.”⁵⁵ At the community session, Irvine Johnson testified that Wright and Meason planned to establish a “roadhouse” on lot 323 this allowing them to profit from those who would be travelling the road.⁵⁶ As a boy listening to his Elders and as a former Chief of the Esketemc First Nation,⁵⁷ Bill Chelsea learned that Indian Agent Laing-Meason and Wright

were trying to get ahead themselves, because Meason did grab Dog Creek, what we call Little Dog, Meason Creek. And after he lose out on the – Wright, I guess, and Meason, they were related in some way. But like I said earlier on, the road – the highway was supposed to come through Tselute, through Wright’s Meadow. It didn’t. It came down Dog Creek. And that’s when – there’s Meason Creek down there now because after they lose out on that, they went and grabbed the piece of property down Little Dog, what we call Little Dog.⁵⁸

Elder Willard Dick stated his Elders told him that

[Wright and Laing-Meason] figured the highway was going to come through from Pigeon’s through here, up there through to Williams Lake. See, that road was used a long time ago ... So I guess in a way they figured this here highway was going to

52 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 132, W. Dick).
 53 “Information on William Wright,” prepared by Beth Bedard for Esketemc First Nation, 2006 (ICC Exhibit 2d, p. 1).
 54 “Information on William Wright,” prepared by Beth Bedard for Esketemc First Nation, 2006 (ICC Exhibit 2d, p. 1).
 55 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 43, J. Johnson).
 56 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 295, I. Johnson).
 57 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 196, B. Chelsea).
 58 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p.195, B. Chelsea).

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go through that same place, and so they get the place and they'll have a stopping place or something. But the highway didn't come that way. Instead it come through 100 Mile around Dog Creek. So that's why Wright was really after that place up there.⁵⁹

Many Elders testified that there was a dirt road through Tselute which they used to travel to the meadows in the area.⁶⁰ Other testimony indicated that the road was gazetted but never constructed.⁶¹ Elder and former Chief Andy Chelsea stated that the road

started – it brokek [*sic*] off the Dog Creek road right now where it's going, the one that you guys come out on. It brokek off at Meason Creek, Little Dog Creek, came up from there through the Rosette Meadows and then went to IR 13, and then from there it connected to the road that comes from Pigeon's to what we call Tselute, and then it goes through to Tselute, from Tselute IR 11 to Springhouse, and then from Springhouse it went to Chimney Lake, to the Onward Ranch below what we used to call St. Joseph's Mission.

...

It was a planned road. It never – I don't think it was really engineered at that time yet, but it was to be gazetted, a gazetted road. I know the one from Pigeon's to Springhouse has been gazetted.⁶²

Elder Andy Chelsea speculated that the road dates back to the "1870s or 60s."⁶³ At the community session, Irvine Johnson, recalled what former Chief David Johnson had told him and shared another story about Wright and Laing-Meason. He testified that,

[a]s far as I can remember, the guy's name was Meason that was living over here looking for his fortune. He couldn't outright go up and pre-empt the land himself, so he hired someone. Wright, I imagine, worked for him or whatever. I don't know what the connection was. Could be son-in-law? Could be. I don't know. But it's just his name that comes up, but we know nothing about that says Tom [William] Wright was the guy that pre-empted these lands here.

...

He [Elder Irvine Johnson's grandfather, former Chief David Johnson] said hired. He knew that this is the way it was, you know. This is what happened. And I guess maybe there was a connection later. I don't know. You see, I can't – I mean,

59 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 132–33, W. Dick).

60 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 121, A. Wycotte; p. 52, A. Chelsea; p. 82, C.Y. Wycotte; pp. 99–100, M. Chelsea; pp. 108–9, V. Johnson); ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 161–62, D. Johnson; pp. 193–95, B. Chelsea).

61 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 52, 86, A. Chelsea).

62 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 85–86, A. Chelsea).

63 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 86, A. Chelsea).

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I’m a little kid hearing all of this here, so I’m not going to be told what he thought or how he thought. It’s just me thinking about things much later, much after, you know what I’m saying, about why would Meason do this. But it’s well known that he once – once the Cariboo road was established, that he left there and actually was one of the foremen on the road construction. He was the last person in that position out there at Little Dog.⁶⁴

IMPROVEMENTS: EVIDENCE OF AN INDIAN SETTLEMENT AND OCCUPATION?

Contrary to William Wright’s pre-emption declaration, which stated lot 323 did not constitute an Indian settlement, a number of the Elders and community members testified at the community session that the Esketemc First Nation had indeed made improvements on Tselute. Elder Victor Johnson testified that he had been shown a stackyard by Elder Patrick Johnson while they visited at Tselute. “He said it was five steps by 20, I think it was. It was opened on both ends. ... [It was on] the southwest side of the lake there now.”⁶⁵ Stackyards were used by the First Nation to keep livestock away from the hay stored there as feed.⁶⁶ Elders Jake Roper, Andy Chelsea, Morris Chelsea, and Bill Chelsea also testified that they have seen stackyards at Tselute.⁶⁷

At the community session, the Elders testified about other improvements made by the First Nation in the area of the pre-emption. Elder Jake Roper testified that there used “to be a barn there. That’s quite a while ago.”⁶⁸ Elder Morris Chelsea stated:

There was some remains of a old building there. And there was a fence along the edge and stackyards on the north side of the lake, and they had a fence further to the northeast right along the edge of the lake there.

...

I imagine it was the people from here [who used them], the older people, because it had to be cut before, I think, the ranch took over.⁶⁹

Elder and former Chief Andy Chelsea stated:

There used to be a little area where there was camps and there’s ... kiglee [*sic*] huts up there where they lived in the past, I guess. I didn’t really look at it. But there are signs of where they had those, and the campgrounds are – when they’re

64 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, pp. 284–85, I. Johnson).

65 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 110, V. Johnson).

66 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 27, J. Roper).

67 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 26, J. Roper; p. 56, A. Chelsea; p. 98, M. Chelsea); ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 191, B. Chelsea).

68 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 27, J. Roper).

69 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 98, M. Chelsea).

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fishing or feeding cattle, are still there. The stackyards are still visible, or was visible seven, eight years ago when I was up there last.⁷⁰

Pithouse

During the course of the inquiry, evidence was put forward by the First Nation of what could be a distinctly Aboriginal improvement at Tselute. Beth Bedard, consultant for the Esketemc First Nation and expert witness in this inquiry, reported as follows:

On May 26th of 2005 while on a field trip with Esketemc community members and elders to Wrights [sic] Meadow a pithouse was located on a gentle south facing slope on the north shore of Place Lake.⁷¹

According to Beth Bedard, this pithouse

would have been overlooking the meadow area, what is the meadow area, or if there was a beaver dam there at an earlier period in time, it would have been overlooking that particular area with all the resources.⁷²

Pithouses were used by many First Nations in British Columbia as “winter housing.”⁷³ Ms Bedard testified “they indicate long-term significant occupation. And what the pithouses also represent is several families usually, an extended family sometimes, that wintered in one location.”⁷⁴ Bedard described a pithouse as follows:

A pithouse is a semisubterranean winter dwelling that was used by First Nations people prehistorically.⁷⁵ The presence of a pithouse indicated a “prehistoric” Aboriginal use and occupation of the land.

... The pit house identified in May 2005 at Tselute fits the pattern of pithouses from the interior of British Columbia. It is a smaller pithouse with a diameter of approximately 7.8 meters and a depth of approximately 1.75 meters at its deepest point. The pithouse is dug into the south-tending slope.⁷⁶ Grasses and growth cover the ground, soil exposure was minimal. No artifactual material was observed

70 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 55–56, A. Chelsea). “Kiglee” is a variation of the traditional name for pithouses.
 71 Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).
 72 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 218, B. Bedard).
 73 Beth Bedard, “Tselute Winter Habitation Feature,” undated PowerPoint presentation at community session, April 5 and 6, 2006 (ICC Exhibit 5l, p. 3).
 74 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 207, B. Bedard).
 75 The term prehistoric is used in this context to mean before written records, or the European arrival in the area. [Footnote in original.]
 76 A GPS reading from the center [sic] of the pithouse was N 51°47.980' and W 121° 59.801 with an 8 meter [sic] margin of error. [Footnote in original.]

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in the limited ground exposures. The presence of a Lodgepole pine *Pinus contorta* with a diameter of 8" within the pithouse indicates a long period since it was abandoned. The pithouse depression does not have a rim, nor are sidewalls steep.⁷⁷

Bedard reported that

[t]he traditional subsistence pattern, or life way for the Esketemc consisted of seasonal mobility in search of food. The Esketemc would travel to where the resources were located. In the spring, this could mean travelling to areas where bulbs such as sunflower root are located, or travel to areas such as Tselute or Gustafson Lake (Tsepeten) to fish. During the summer, berries would be harvested and salmon caught to dry for the winter months. In the fall Esketemc would travel to hunting areas, setting up camp for several weeks and hunting and preserving the meat for winter. Typically, they would spend the time from December through March living in these houses.⁷⁸

Elder Morris Chelsea testified that, as a child, he spent a lot of time at Tselute. His family “didn’t start living up there till the late ’50s and early ’60s, somewhere around there.”⁷⁹ However, Elder M. Chelsea stated that he saw evidence of a pithouse “on the northwest side, and I think there’s more than one towards the middle of the north side of the lake.”⁸⁰

The expert witness could not confirm when the pithouse at Tselute was abandoned; it could have been years before the pre-emption or shortly thereafter. Bedard stated that

subsurface testing would be required to provide more specific information. ... there was not adequate capacity, personnel, funding or time to spend longer in the field to conduct further surveys nor to undertake subsurface testing.⁸¹

Without further testing and analysis, Bedard indicated that she could not “estimate how many winters, or other times for that matter, that the site was occupied.”⁸² Although, Bedard contended that “[a]rtifactual debris is usually found at pithouse sites,”⁸³ she was unable to locate any such debris, perhaps

77 Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, pp. 1, 5).

78 Beth Bedard, untitled report prepared for the Esketemc First Nation, c. March 2006 (ICC Exhibit 5k, p. 1).

79 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 97, M. Chelsea).

80 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 98, M. Chelsea).

81 Canada’s interrogatories; First Nation’s responses; Canada’s supplementary interrogatories; First Nation’s supplementary responses; provided by Beth Bedard, January 17, 2007 (ICC Exhibit 5m, p. 2).

82 Canada’s interrogatories; First Nation’s responses; Canada’s supplementary interrogatories; First Nation’s supplementary responses; provided by Beth Bedard, January 17, 2007 (ICC Exhibit 5m, p. 2).

83 Canada’s interrogatories; First Nation’s responses; Canada’s supplementary interrogatories; First Nation’s supplementary responses; provided by Beth Bedard, January 17, 2007 (ICC Exhibit 5m, p. 6).

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due to the limited resources as stated above. Bedard estimated that the pithouse dwelling fell out of favour with the Esketemc First Nation “between the small pox epidemic in 1862–3 and sometime after the laying out of reserves in 1871.”⁸⁴

Bedard was unable to confirm whether Wright would have been able to identify the pithouse as such. Similarly, it is not known if Wright held the required knowledge to equate the existence of the pithouse as “indisputable evidence of continued occupation and residence”⁸⁵ of the First Nation at the meadow. Bedard stated that, because the Esketemc people had advised Wright of their use and interest in the land, his viewing the pithouse or depression (in whatever condition it was found in 1893) “would not have been pivotal to his understanding that Tselute was being used by the Esketemc.”⁸⁶ However, it is Beth Bedard’s expert opinion that the depression present at Tselute is a pithouse.⁸⁷ Bedard concluded that

they were winter habitations. They are generally not more than four to five thousand years old. There has been some debate about pithouses that have been identified that are older than that, but for certainty, probably not more than four or five thousand years old. They indicated a family or extended family group that put in a great deal of work to have a good location to spend the winter.

And certainly along Tselute, it is an excellent location. With the south-facing slope you’d have the sun; you’d have the early fish in the spring.⁸⁸

FIRST NATION’S USE OF THE MEADOW

At the community session, many Elders and community members gave testimony regarding the use of the meadow and its importance to their way of life. Elder and former Chief Andy Chelsea explained that the meadow was communally organized. He stated that the meadow was “big, and it’s like it’s subdivided into sections. People would have certain areas to cut. There was a gentlemen’s agreement between them, I guess.”⁸⁹

Elder Laura Harry recalled that, when she was a child, the meadow at Place Lake was bigger than the lake, saying “[i]t [the lake] was just a corner

84 Canada’s interrogatories; First Nation’s responses; Canada’s supplementary interrogatories; First Nation’s supplementary responses; provided by Beth Bedard, January 17, 2007 (ICC Exhibit 5m, p. 1).

85 Tho. L. Woody, Acting Attorney General, J.D. Pemberton, Surveyor General, A.W. Weston, Treasurer, to Acting Colonial Secretary, October 3, 1864, BCA, file 909, Lands and Works Department, vol. 1, 1864 Oct. to Dec. (ICC Exhibit 1c, p. 3).

86 Canada’s interrogatories; First Nation’s responses; Canada’s supplementary interrogatories; First Nation’s supplementary responses; provided by Beth Bedard, January 17, 2007 (ICC Exhibit 5m, p. 7).

87 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 219, B. Bedard). See the video *Elder’s Visit to Tselute*, May 26, 2005 (ICC Exhibit 10), for a visual of the depression.

88 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 213–14, B. Bedard).

89 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 54, A. Chelsea).

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way back on the other – on the east side was a small lake, and the rest was just meadow. They dammed it up and spoiled it.”⁹⁰ She said that “[w]e used to cut hay a little on the other side. My dad used to have hay meadows out there.”⁹¹

Elder Willard Dick testified that the Esketemc First Nation cut hay at Tselute, saying “Indians used to cut it before Wright come in and cut it.”⁹² Oral history indicates that the First Nation’s use of the meadow extended beyond haying. Elder Dorothy Johnson stated that the Esketemc people would “stay up there and trap. You know, they’d go up there and stay in the winter. Because they put hay up there and they used to trap and hunt and fish up that way, according to the seasons.”⁹³

Elder Juliana Johnson spoke of Henry and Christine Squinahan, who both lived at Tselute with whom she often visited.⁹⁴ It was during these visits that Elder J. Johnson learned of the Esketemc First Nation’s use of Tselute:

In the winter they would ice-fish there and ... trap in the spring. And there was a lot of Indian medicines they made around Tselute and, well, I guess all over the meadows around there. Because Christine used to share some of those medicines with me that they made, including the swamp tea, and there’s a lot of other medicines ... And all over around Tselute they used to pick berries too.⁹⁵

Elder Dorothy Johnson also spent time with the Squinahans at Tselute as a child.⁹⁶ She indicated on a map that where the Squinahans lived; this area was eventually surveyed as Sampson’s Meadow (or IR 11), on the west side of the power line. She also marked the boundaries of what the community knew as Tselute.⁹⁷

Other Esketemc community members also resided at Tselute. The oral history often refers to a cabin at Tselute which was used by Jimmy Wycotte. Elder Augustine Wycotte, Jimmy Wycotte’s grandson,⁹⁸ stated that

90 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 171, L. Harry).
 91 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 170, L. Harry).
 92 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 133, W. Dick).
 93 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 162, D. Johnson).
 94 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 69, J. Johnson).
 95 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 70, J. Johnson).
 96 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 159, D. Johnson).
 97 Map of Esketemc First Nation Reserves with legend, prepared by V.L. Robbins, June 25, 2005, produced at community session, April 5 and 6, 2006, held at the Esketemc First Nation, Alkali Lake, BC, with markings made at community session held April 5, 2006 (ICC Exhibit 5c, p. 1). See “x” on Map 2.
 98 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 125, A. Wycotte).

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[a]s far as I know, my dad turned over the cabin and the field to his brother-in-law, Patrick Chelsea, at Tselute, and he moved over to a place we call Canada. It actually belonged to his brother, Louie Wycotte.

...

As far as I can gather, ... the Esketemc people used it [Tselute] for fishing, for trapping, hunting, medicine, and they still do ceremonies up there yet. That's what I gather anyway. And they still pick their – some people still pick their medicine bands from Tselute. So it's – I guess it belonged to the Esketemc people as far as I know.⁹⁹

Elder Augustine Wycotte also related what his older sister, Emily, told him about Tselute:¹⁰⁰

she grew up there and she was – she used to help my grandparents pick plants and go fishing. And she was telling me that during the early spring, they make little knolls along the lake there so the ducks could come in and lay their eggs, and she was saying that they take one egg from each nest, take it home for use. ... So I guess they did use Tselute for – not only for fishing and stuff like that. They used it for hay. They cut their hay there and they stored it for the winter for their animals, their horses, their cattle, whoever had cattle.¹⁰¹

Irvine Johnson, who received the oral history of the Esketemc First Nation through his father, former Chief David Johnson,¹⁰² stressed the importance of the meadow to his First Nation:

It was very important that hay meadows be cut because the horse was really important to – and I can't stress enough the importance of the horses within this community. There were some families that had – there was one family that had over a hundred horses, and they were useful horses. They had purpose. All of the horses had purpose. They weren't just left out there to be wild or anything. I mean, there were saddle horses, there were pack horses, there were team.

And they had a purpose. So it was really important that you cut hay during the summers in order to be able to feed your horses over the winter, and if you had cattle. And there were some families that had cattle. There were some that had more cattle than we have now actually, and they were more industrious people.

I guess that when the times that we're talking about – or in this specific instance, the people used to cut their hay with those sickles and a scythe before the mowing machines came around. So in the time that we're talking about, the time during the pre-emption, people were cutting hay by hand.¹⁰³

99 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 118–19, A. Wycotte).

100 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 122, A. Wycotte).

101 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 119, A. Wycotte).

102 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 245, I. Johnson).

103 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 250, I. Johnson).

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Elders Dorothy Johnson and Elder Irvine Johnson both stated that Louie Dan and the Chelsea family also had cabins in the Tselute area.¹⁰⁴

GOVERNMENT RESPONSE: THE SPECIFICS OF THE CONFLICT

In November 1893, Indian Agent Gomer Johns visited Alkali Lake to investigate the disputed meadow and to follow up on allegations contained in Chief August’s letter of October 26. Indian Agent Johns reported:

On receipt of your letter I made a special trip to Alkali Lake, and in Company with Chief August and other Indians, I went carefully over the 5 Reserves situated on Alkali Lake Creek; on four of these, there is a little meadow land, but the total crop of hay is only about 50 tons; – not 15 tons as stated in August’s letter. – their need of more meadow land is evidenced by the fact that for several years they have put up more hay on land outside of their Reserves than on their Reserves; Exclusive of the meadow preempted by Wright the quantity of hay put up outside the Reserves is about 60 tons, but if we include that meadow – which is still in dispute as regards this year’s crop – we have a total of about 140 tons as against 50 tons obtained on the Reserves. I visited the Wright meadow and made a rough estimate of the amount of hay in the different stacks, the result being about 80 Tons, the Indians’ estimate was much higher; 200 Tons could be obtained on this meadow if required; the assertion in Chief August’s letter that his band of 200 people will starve if they lose this meadow is, of course, nonsense, but it will certainly be a very serious loss to them; apart from the loss of the meadow itself, the disturbance caused by the intrusion of a white settler on a range practically enclosed by these 5 reserves will be a continual source of annoyance, besides the loss of the pasturage of which hitherto they have had a monopoly. I may here remark that the Reserves are for the most part fenced in.¹⁰⁵

Indian Agent Johns also noted that:

I am informed by Mr. Soues Gov’t Agent at Clinton, that Wright’s preemption is dated 8th July/93 and that he obtained Leave of Absence for 3 months on the 2nd October; as a matter of fact Wright has never entered into occupation of the land as required by Clause 13 of the Land Act; apparently he intends to grade the requirements of the Act as to residence, and to hold the place as a Hay Ranch the only thing for which it is adapted.¹⁰⁶

- 104 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 166, D. Johnson); ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 268, I. Johnson).
- 105 Gomer Johns, Indian Agent, Williams Lake Indian Agency, 150 Mile House, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 16–20).
- 106 Gomer Johns, Indian Agent, Williams Lake Indian Agency, 150 Mile House, BC, to A.W. Vowell, Indian Superintendent, Victoria, BC, November 17, 1893, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 20–21).

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Provincial officials became involved in the dispute in late 1893. On November 28, 1893, Attorney General Theodore Davie wrote to BC Agent F. Soues saying that he had learned of the dispute between the Esketemc First Nation and Wright and had been informed “that to grant the pre-emption would cause great trouble with the Indians who have no other land on which to cut hay.”¹⁰⁷ Davie wanted to know Soues’s opinion on the matter.¹⁰⁸ Government Agent Soues responded to Davie’s letter on January 18, 1894, stating:

I know of no reason why Mr. Wright should not be confirmed in his settlement on the pre-emption.

I presume the Indian Commissioner in laying off the Indian Reserves was satisfied that the Alkali Lake Indians had a sufficient Reserve and with this meadow so close to the line of their Reserve, and the Indians’ knowledge of the distance of the meadow, that if they had applied for it then, it is more than probable that the Commissioner would have granted that also. As the matter stands, Mr. Wright pre-empted Crown lands unoccupied and unreserved. I may add that I allowed pre-emption last year of some half dozen just such meadows, to the north of Clinton, and on which the Indians here have cut an annual crop of wild hay, but I have always given them to understand that whenever required by white men, that they must give peaceable possession, and have never had the slightest trouble.¹⁰⁹

With respect to Agent Soues’s suggestion that the First Nation could have requested that the meadow be set apart for their use at the time of Commissioner O’Reilly’s visit in 1881, it should be reiterated that the land in question was under water at that time. The First Nation did not remove the beaver dam and drain the meadow until 1891 or 1892.

Still attempting to secure the meadow for its use, the Esketemc First Nation approached the Reverend Father Lejacq of St Joseph’s Mission at Williams Lake, asking him to raise the subject with government officials. In a letter dated January 18, 1894, Father Lejacq stated:

When the Commission, appointed by the Government, had marked out the Reservation for the Alkali Lake Band; the Indians made the remark that there was no meadow land in the said Reservation, so they begged the Commission for some meadow land; then Judge O’Reilly told them to look round and try to find some good place for making hay, to take what they would find, to fix it and the

107 Theodore Davie, Victoria, BC, to F. Soues, Government Agent, Clinton, BC, November 28, 1893, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 43).

108 Theodore Davie, Victoria, BC, to F. Soues, Government Agent, Clinton, BC, November 28, 1893, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 43).

109 F. Soues, Government House, Clinton, BC, to Theodore Davie, Attorney General, Victoria, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, pp. 44–45).

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Government would grant it to them. Now the Indians Acting according to the suggestion of the Commissioner, located a place, a swampy place, at the head of this creek drained it, cut the brush, put fences, built stables, even houses, in a word, made a good meadow out of a useless swamp and now when they are beginning to reap the fruits of their hard labour, a white man comes and wants to snatch it from their hands.¹¹⁰

Father Lejacq quoted the First Nation, saying:

If the Government, they say again, cannot give us that meadow land as a complement to our reservation, we are ready to pay for it just the same as the white man; we badly want the place, as everybody round here knows, we have made the place ourselves, we drained the swamp and we think that we have the first right, in fact that we are entitled to the place. Mr. Wright tells us that the Government considers the Indians as nobody, that it does not care more about us that it does about the coyote, that the sooner we are all dead the better. We would like to know if really such is the case? Not later than yesterday the same Mr. Wright passed through our village and told us that in two weeks and a half from date, the soldiers would be up and they would clean us all off the face of the earth. Now such language sounds harsh in the ears of our young men, and we, old men, have great difficulty in keeping them quiet.¹¹¹

Father Lejacq concluded his letter by offering his opinion that the government should grant the meadow to the First Nation, citing it as the “shortest and cheapest way of settling the matter.”¹¹²

Father Lejacq’s letter prompted Attorney General Davie to request that Government Agent Soues delay the issuance of Wright’s pre-emption so that an investigation could be held into the allegations contained in the missionary’s letter.¹¹³

Government Agent Soues replied to Davie’s request on January 29, 1894, acknowledging that:

In my letter to you of the 18th inst. on this matter, I assumed that there had been no action taken, with regard to the meadow, by Indian Commissioner O’Reilly, when laying off the reserves for that band of Indians.

- 110 J.M.J. Lejacq, OMI, St Joseph’s Mission, Williams Lake, to unidentified recipient, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 46).
- 111 J.M.J. Lejacq, OMI, St Joseph’s Mission, Williams Lake, to unidentified recipient, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 47).
- 112 J.M.J. Lejacq, OMI, St Joseph’s Mission, Williams Lake, to unidentified recipient, January 18, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 47).
- 113 Theodore Davie, Victoria, BC, to [E. Soues], Government Agent, Clinton, BC, January 26, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 49).

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The Rev. Father's letter to you however puts a very different light on the question, and from which it would appear that they – the Indians – were promised meadow land as soon as they could find some place suitable for making hay.

Of this I have no knowledge as on receiving Wright's application and declaration ... in July last, I had no reason to refuse to record his application and issue a certificate of pre-emption record.

...

... In the meantime would it not be advisable to refer the matter to the Hon. P. O'Reilly, Indian Commissioner. He may have made a note, or have some recollection in regard to the arrangement for a hay meadow as stated by the Rev. Father Lejacq.

If the improvements have been made on the meadow as stated by the Rev. Father, then Wright's declaration as to the land being unoccupied falls to the ground.

I must say that I have no admiration for any of these wild meadow pre-emptions by white men. They take them up for the sole purpose of cutting the annual natural crop of wild grass, settlement and occupation in the proper meaning of these words are out of the question. Besides not one of these pre-emptors [but] knows as well as I do that agriculture is out of the question ...¹¹⁴

On February 3, 1894, Attorney General Davie approached Indian Reserve Commissioner Peter O'Reilly regarding Father Lejacq's letter. Davie wrote:

If it should be the case that the pre-emption has been obtained by Mr. Wright under false pretences, for lands practically set aside for the use of the Indians and improved for their purposes, steps should be, I think, at once taken on behalf of the Indians before the Commissioner to set the record aside.¹¹⁵

O'Reilly responded on February 7, 1894, by recounting his visit to Alkali Lake:

The Reserve Commission visited Alkali Lake in July 1881 ...

...

The Indians were naturally anxious to possess as much hay land as possible, and every acre pointed out by them that had not already been alienated was secured to them. I also invited them to shew me any other plots of land they were in the habit of using, had they done so, it would have been included in the reserves. I certainly did not in any way encourage them to occupy and improve land outside of their reserves as such advice would have been entirely opposed to my instructions.

114 F. Soues, Clinton, BC, to Theodore Davie, Attorney General, Victoria, BC, January 29, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, pp. 51–52).

115 Theodore Davie, Victoria, BC, to P. O'Reilly, February 3, 1894, LAC, RG 10, vol. 11013 (ICC Exhibit 1c, p. 54).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

It is much to be regretted that the Indians should have improved the land now taken possession of by Mr. Wright under a record of preemption, but it is strange that since 1881 to the present time no intimation has reached me either from the Indians, or from their Agent that this meadow was so highly prized by them; and no request has been made to me to have it declared a reserve, notwithstanding that I have since then, on several occasions passed through that part of the country.

If there are any other meadows, not legally held by whites, where the Alkali Lake Indians are in the habit of cutting hay, besides that preempted by Mr. Wright they may yet be secured to their use. In that event I would suggest that the Government Agent of the district be instructed not to accept for the present any further applications to preempt.¹¹⁶

On July 2, 1894, Indian Agent Bell (Gomer Johns’s successor at the Williams Lake Agency) reported to Indian Superintendent Vowell that Wright was claiming that the Esketemc First Nation’s improvements were not located within his pre-emption and that Wright “warned” him that he intended to cut hay at the meadow that season.¹¹⁷ Indian Agent Bell requested Indian Superintendent Vowell to visit the meadow personally to settle the dispute.¹¹⁸ On the same day, Government Agent F. Soues also asked Vowell to visit the meadow to give “executive attention” to the matter.¹¹⁹

Indian Superintendent Vowell visited Alkali Lake on July 23, 1894. Reporting to the Deputy Superintendent General of Indian Affairs on August 6, 1894, Vowell stated:

At present from 100 to 160 tons of wild hay can be cut upon it and it has been their custom to cut hay there and in the winter drive their cattle there and feed them; they have also for a distance of some seven miles cut a sleigh road through the timber to enable them when required to haul some of the hay to other places. They have also done some fencing around a portion of it, and have built some houses for winter use. I may also state that when on my way to the meadow ... several smaller ones were brought to my notice where different members of the band have for years been cutting hay. They ... claim that such facilities for feeding their stock during the winter months is an absolute necessity, as the amount of hay possible to obtain from their reserves is insignificant when compared with their requirements. They have amongst them over 200 head of cattle besides many horses. ... and as they have comparatively little cultivable land, their chief support centres in their

116 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Theo. Davie, Attorney General, Victoria, BC, February 7, 1894, LAC, RG 10, vol. 1278, pp. 298–300 (ICC Exhibit 1a, pp. 22–24).

117 E. Bell, Williams Lake Agency, Clinton, BC, to A.W. Vowell, July 2, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 30).

118 E. Bell, Williams Lake Agency, Clinton, BC, to A.W. Vowell, July 2, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 30).

119 F. Soues, Government Agent, Government Office, Clinton, BC, to A. Campbell Reddie, Deputy Provincial Secretary, Victoria, July 2, 1894, Provincial Collection, binder 12, corr. no. 996/94 (ICC Exhibit 1c, p. 55).

INDIAN CLAIMS COMMISSION PROCEEDINGS

cattle. ... They were not unreasonable, but still kept strongly to the point that without the meadows they and their children would be without sufficient means for their support. For my own part I consider that their demands are worthy of consideration and I would strongly urge that all these patches of meadow lands situated in the mountains which have for years been used by them and which come under the head of "waste lands of the Crown" be reserved to them without delay. ...

I may say that the Indians have promised not to interfere with Mr. Wright should he go to take possession, in the meantime the Chief and his people are going to make an effort to settle the matter amicably with Wright whereby they can still retain possession of the meadow, in which case it should be at once made an Indian Reserve.¹²⁰

A marginal note found on this document reads: "D.S.G. Ask [Agent] to [go] & have other lands secured as hay meadows soon as possible."¹²¹

On the day after Vowell's August 6 report, Government Agent Soues wrote to the Deputy Provincial Secretary, A. Campbell Reddie, regarding Indian Superintendent Vowell's July visit to Alkali Lake, stating, "I understand that he [Vowell] has decided that the Indians have no title to that particular piece of land" and that Wright had been informed "that until the matter has been finally settled by the Executive, he must refrain from interfering in any way with the land."¹²² An undated draft letter, however, apparently written on the back of this August 7 letter, indicates the contrary:

I am directed to inform you that it has been decided by the Gov't that you should at once cancel the record of pre-emption which was granted to Mr. W.H. Wright, covering a certain meadow upon which the Alkali Lake Indians have been in the habit of cutting hay. When Mr. Wright applied for a record of this meadow he made a declaration, in error that the land was not an Indian Settlement or any portion thereof whereas the fact that the Indians had been in the habit of occupying this land for hay cutting purpose proves that it was a portion of their settlement.

The Indian Reserve Commr has been requested to make a formal Reserve of the meadow.¹²³

- 120 A. W. Vowell, Indian Superintendent, Indian Office, Department of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, pp. 34–37).
- 121 A. W. Vowell, Indian Superintendent, Indian Office, Department of Indian Affairs, Victoria, BC, to Deputy Superintendent General, August 6, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 33).
- 122 F. Soues, Government Agent, Government Office, Clinton, BC, to A. Campbell Reddie, Deputy Provincial Secretary, Victoria, August 7, 1894, Provincial Collection, binder 12, corr. no. 1161/94 (ICC Exhibit 1c, p. 61).
- 123 Draft letter, author and recipient unknown, date unknown, purportedly attached to reverse side of letter from F. Soues, Government Agent, Government Office, Clinton, BC, to A. Campbell Reddie, Deputy Provincial Secretary, Victoria, August 7, 1894, Provincial Collection, binder 12, corr. no. 1161/94 (ICC Exhibit 1c, pp. 62–63). It should be noted that the draft was written on two pages, whereas the letter to which it is attributed in its transcription is only one page in length. For that reason, it is possible that it is actually found on the reverse of another letter of the same date, August 7, 1894, from A.W. Vowell to the Provincial Secretary. See A.W. Vowell, Indian Superintendent, BC, to Provincial Secretary, Victoria, August 7, 1894, Provincial Collection, binder 12, corr. no. 1140/94 (ICC Exhibit 1c, pp. 57–60).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

The name “E. Soues” appears at the bottom of this draft letter, but it is not clear who wrote it, who the intended recipient was, or if it was ever, in fact, sent. Neither of these letters appears to have resolved the matter, but the documentary record indicates that Indian Superintendent Vowell continued to work to settle the dispute between the Esketemc First Nation and Wright.

The Deputy Superintendent General of Indian Affairs wrote to Indian Superintendent A.W. Vowell on August 16, 1894, instructing him as follows:

[I]f the Indians manage to induce Mr. Wright to relinquish his claim you should, without delay, approach the Provincial authorities, through the Reserve Commissioners if necessary, and endeavour to get them to secure the land to the Indians, or failing that, ask them to apportion some others in lieu of the meadow, and also reserve to the Indians any other hay lands used by them, and considered by you really necessary for the support of their stock.¹²⁴

The provincial Department of Lands and Works became involved in the disputed meadow the following week, when the Chief Commissioner of Lands and Works (CCLW) wrote to Indian Reserve Commissioner O’Reilly, asking whether the Esketemc First Nation had any right to or need of the meadow.¹²⁵ O’Reilly replied on August 26, 1894, referring the CCLW to his February 7, 1894, letter to Attorney General Davie, in which O’Reilly had dismissed the First Nation’s claim to the meadow.¹²⁶

On September 4, 1894, the CCLW, F.G. Vernon, wrote to E. Soues, BC Government Agent, informing him that the Esketemc First Nation can “claim compensation if they are debarred from acquiring the land”¹²⁷ and instructing him to visit the meadow to “make an approximate estimate of the value of the improvements made by the Indians and also by Mr. Wright (if any).”¹²⁸

It was not until October 16, 1894, that C. Phair, Acting Government Agent, reported on his visit to the meadow and his evaluations. Acting Government Agent Phair stated:

- 124 Deputy Superintendent General of Indian Affairs to A.W. Vowell, Indian Superintendent, Victoria, BC, August 16, 1894, LAC, RG 10, vol. 3917, file 116524 (ICC Exhibit 1a, p. 39).
- 125 F. G. Vernon, Chief Commissioner of Lands and Works, to P. O’Reilly, Indian Reserve Commissioner, Victoria, August 22, 1894, LAC, RG 10, vol. 11014, p. 28 (ICC Exhibit 1a, p. 40).
- 126 P. O’Reilly, Indian Reserve Commissioner, Victoria, to Chief Commissioner of Lands and Works, August 26, 1894, LAC, RG 10, vol. 1279, p. 1 (ICC Exhibit 1a, p. 41). See also P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Theo. Davie, Attorney General, Victoria, BC, February 7, 1894, LAC, RG 10, vol. 1278, pp. 298–300 (ICC Exhibit 1a, pp. 22–24).
- 127 Chief Commissioner of Lands and Works, Victoria, to E. Soues, Government Agent, September 4, 1894, no file reference available (ICC Exhibit 1a, p. 42).
- 128 Chief Commissioner of Lands and Works, Victoria, to E. Soues, Government Agent, September 4, 1894, no file reference available (ICC Exhibit 1a, p. 42).

INDIAN CLAIMS COMMISSION PROCEEDINGS

1. The only improvements they made upon the land in question consist of six small stock yards and cutting a dam which I estimate at the value of \$45.00.

2. About 400 yards from the lower line of said pre-emption, and upon Crown lands, they built one dwelling house and partly four others; one stable and partly built another; also a small corral, about 500 yards brush fencing (cut small trees and raised them on the stumps) and cut a road about a mile in length. The value of above I estimate at \$145.00.

Total value of improvements \$190.00

This is a liberal estimate. The road was easily made as they only cut a little brush and a few small trees: Where the houses are built suitable trees for logs are on the spot in abundance.

I was accompanied by Indians of Alkali Lake Tribe and Mr. Bell the Indian Agent. Only a difference of three dollars was between Mr. Bell and myself as to the value of the improvements. The Indians told me that five years ago the meadow in question was a lake: that they cut a dam which has since drained it – for the purpose of catching beaver and after killing some of them the remainders deserted the place: that in [1892] they found the place had been converted into a meadow and in that year they cut upon it a small quantity of hay, and, that last year they cut a good deal which is still stacked on the place. This year none of it has been cut. It is a very good meadow fully one and one fourth miles in length by more than half a mile in width. In my opinion 160 tons of hay can be cut on it as it is at present and it can be improved so that fully 225 tons can be cut. There is a lake on the pre-emption comprising about 80 acres.

As shown by the rough sketch attached there are about 100 acres of good meadow land outside the pre-emption, at both ends of it, which could be easily cleared only a little brush on it.

Mr. W.H. Wright has not made any improvements on the land being instructed by Mr. Soues not to do so until the matter was settled.¹²⁹

Indian Agent Bell also reported this visit to evaluate the First Nation's improvements to his superior, Indian Superintendent Vowell. Bell's report is similar to Phair's; however, Bell pointed out that only a limited number of the First Nation's improvements were included in Wright's pre-emption.¹³⁰ Bell also noted that

Mr. Moore told me that five years ago there was no meadow there but a large lake and no doubt if it were not for the Indians cutting the dams it would still be a lake and Wright would not have known of it.

I enclose you a copy of Wright's application to record also Certificate of preemption records which are not at all alike as you will see from sketch on back.

129 C. Phair, Acting Government Agent, Government office, Clinton, BC, to W.S. Gore, Deputy Commissioner of Lands and Works, Victoria, BC, October 16, 1894, LAC, RG 10, vol. 11014, pp. 51A–51B (ICC Exhibit 1a, pp. 49–50).

130 [Bell, Indian Agent], to A.W. Vowell, October 16, 1894, LAC, RG 10, vol. 11014, p. 47A (ICC Exhibit 1a, p. 51).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

The meadows the longest way – about 1 1/4 miles runs east & west but the way his application shows it will be crossing it and if in actual [illegible] he is compelled to comply with his application the best portions of the meadow will be open for [illegible].¹³¹

As mentioned earlier, section 7 of *Land Act, 1884*, stipulated that all pre-emptions of 320 acres were to be rectangular in shape, with the long sides running north and south. Based on the sketch attached to Wright’s pre-emption application, it appears that he complied with this regulation when applying for his pre-emption record.¹³² However, the sketch attached to the Crown grant for lot 323, which was eventually issued to Wright, shows a rectangular lot with the long sides running east-west.¹³³

RESERVE ALLOTMENTS AT ALKALI LAKE, 1895

Although the historical record contains limited information about the meadow from 1894 on, there is evidence that the Esketemc First Nation received an allotment of additional meadow lands shortly thereafter. In 1895, Indian Reserve Commissioner Peter O’Reilly set aside an additional seven reserves for the Esketemc First Nation. In a report to the Deputy Superintendent General of Indian Affairs, O’Reilly wrote:

Though these Indians are already in possession of reserves allotted to them in 1881, and which contain 5587 [sic] acres,¹³⁴ they have recently complained of a scarcity of hayland as their bands of cattle, and horses have largely increased, and it was with a view to supplying this want that my present visit to Alkali lake was undertaken.

The Chief “August” and a large number of his people accompanied me to point out the several pieces of land which they desired to have secured to them; Mr. Agent Bell also was present, and assisted much in the selection of the seven following locations.

...

The meadow lands in all the above reserves are capable of being enlarged by clearing, with a very small amount of labor; the Indians at present only using those portions that are naturally free of brush. They are at too great an altitude to admit of their being used for any other purpose.¹³⁵

131 Bell, Indian Agent], to A.W. Vowell, October 16, 1894, LAC, RG 10, vol. 11014, p. 47A (ICC Exhibit 1a, p. 51).
 132 Application to Record (under the *Land Act, 1884*, ss. 7 and 8) by W.H. Wright, July 8, 1893, BCA, GR 1440, E 2319/93 (ICC Exhibit 1b, p. 3)
 133 Crown grant no. 1145/103, W.H. Wright, June 22, 1899, BCA, no file reference available (ICC Exhibit 1b, p. 12).
 134 This should read 3,587 acres.
 135 P. O’Reilly, Indian Reserve Commissioner, Victoria, BC, to Deputy Superintendent General of Indian Affairs, September 26, 1895, LAC, RG 10, vol. 1279, pp. 74–75; Federal Collection, vol. 14, pp. 117–25 (ICC, Exhibit 1c, pp. 66–69).

INDIAN CLAIMS COMMISSION PROCEEDINGS

One of the reserves set aside by O'Reilly in 1895 is IR 11A, also known as "Sampson's Meadow" which is located immediately west of "Wright's Meadow."

CROWN GRANT OF LOT 323, 1899

Four years later, on May 23, 1899, William Harrison Wright received a certificate of improvement for lot 323 (or "Wright's Meadow").¹³⁶ On June 22, 1899, Wright received Crown grant no. 1145/103 for the same lot.¹³⁷ The allotment of these newer reserves and Wright's Crown grant seem to have had little effect on how the community used the lands and meadows. At the community session, many Elders testified that they were unaware Wright's Meadow was not reserve land until later in the 1900s, since most of them regularly travelled through the meadow during their seasonal travels as they were growing up.¹³⁸

THE MEADOW POST-CROWN GRANT

The historical documents for this inquiry are silent on the fate of the meadow after Wright received his Crown grant for lot 323 in 1899. There is no indication on the documentary record of this inquiry of how William Wright may have used the meadow. In receiving the certificate of improvement, William Wright declared that he had "made improvements amounting in the aggregate of two dollars and fifty cents an acre on such Pre-emption claim" as required by the *Land Act, 1884*.¹³⁹ The certificate of improvement also indicates that Joseph Place and a second unidentified settler had provided evidence that "improvements consisting of house, stable, corrals, fencing and clearing aggregating \$1000.00 have been made on the pre-emption of the said W.H. Wright."¹⁴⁰ Anne Seymour concludes:

- 136 Certificate of improvement, William H. Wright, May 23, 1899, BCA, no file reference available (ICC Exhibit 1b, p. 7).
 137 Crown grant no. 1145/103, William H. Wright, June 22, 1899, BCA, no file reference available (ICC Exhibit 1b, pp. 8-14).
 138 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 41, J. Johnson; p. 66, R. Dick; p. 73, Juliana Johnson; p. 91, Marilyn Belleau; p. 97, Morris Chelsea); ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 161, D. Johnson; p. 168, L. Harry).
 139 Certificate of improvement, William H. Wright, May 23, 1899, BCA, no file reference available (ICC Exhibit 1b, p. 7).
 140 Certificate of improvement, William H. Wright, May 23, 1899, BCA, no file reference available (ICC Exhibit 1b, p. 7).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

While Wright may have been prevented from going to the pre-emption during the dispute, it is a questionable declaration that he was “in occupation” of the land as required by the 1884 *Land Act* from the date of his pre-emption record to 1899. It has not been possible to confirm where Mr. Wright actually resided.¹⁴¹

Elder Willard Dick stated that, as far as he was aware, Wright never lived at the meadow.¹⁴² Elder W. Dick testified that Joe Place did build a cabin at the meadow after he purchased the land from Wright, but no oral history was shared regarding why Place purchased it.¹⁴³

Documents obtained from the Land Registry Office in Kamloops and submitted by the First Nation indicate that, on July 19, 1901, William Wright transferred his title to lot 323 to Joseph Place who, in turn, held it until 1922.¹⁴⁴ Lot 323 subsequently went through a number of owners before being purchased by the Alkali Lake Ranch in 1940.¹⁴⁵ John Mervin Douglas,¹⁴⁶ described as the “Ranch Manager” of Alkali Lake Ranches [*sic*], currently holds the certificate of indefeasible title, dated October 24, 1977, to lot 323, Lillooet District, or what is referred to as Wright’s Meadow.¹⁴⁷

At the community session, Elder Victor Johnson testified that the First Nation continued to use Tselute after William Wright pre-empted lot 323.¹⁴⁸ During her testimony, Elder Marilyn Belleau was asked: “How long did your family use that meadow?” She stated, “As far as I know, they used it probably three generations, four generations.”¹⁴⁹ It is generally accepted that one generation equates to approximately 20 years, therefore Elder Belleau’s testimony indicates the Esketemc First Nation used the meadow for about 60 or 80 years, or until 1953 or 1973. When asked, “And when did your use of the meadow stop?” Elder Belleau responded: “Probably in the – probably 1962, ’63, around there.”¹⁵⁰

141 Anne Seymour, “Pre-emption Policies, Indian Settlements & Reserve Establishment in British Columbia, 1860–1898,” prepared for Specific Claims Branch, Indian and Northern Affairs Canada, November 17, 2005, p. 83 (ICC Exhibit 3b, p. 86).

142 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 145, W. Dick).

143 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 145, W. Dick).

144 Search of title documents related to the ownership/pre-emption history of Wright’s Meadow, Land Titles Office, Kamloops (ICC Exhibit 1d, pp. 10, 14).

145 Certificate of indefeasible title no. 810219, August 21, 1940, Land Registry Office, Kamloops (ICC Exhibit 1d, p. 4).

146 Referred to as Doug Mervyn by Elder Bill Chelsea at the community session. ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 202, B. Chelsea).

147 Certificate of indefeasible title no. N62872E, October 24, 1977, Land Registry Office, Kamloops, BC (ICC Exhibit 1d, p. 2).

148 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 111, V. Johnson).

149 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 92, M. Belleau).

150 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, p. 93, M. Belleau).

INDIAN CLAIMS COMMISSION PROCEEDINGS

Some Elders at the community session, however, testified to the contrary. When asked if the First Nation made use of the meadow after the pre-emption, community member Irvine Johnson stated that “[a]fter the guy kicked them [the Esketemc First Nation] off, after the *semabs* took over, the Indians didn’t use it. The only time that I can remember any use of it was in wintertime when we went across it, like we used it as a road rather than for any hay.”¹⁵¹ Expanding on why the Esketemc First Nation discontinued its use of the meadow, Irvine Johnson stated:

Well, they weren’t there when he came back and successfully staked out the lands. So after that, when is [*sic*] was staked out, that *semab* owned this piece of land here. ... But they had to get somewhere else. ... I guess rather than start a war or whatever, they were more pragmatic and just went and found another place, because it was a case of, you know, like you can’t stop and say, “That’s ours. That’s ours” and then stand a chance of losing it. You know, they had to feed their horses. You see what I’m saying?

So it wasn’t a case of, you know, this is where we’re going to put our spear and chain ourselves here, you know, because who hears you anyway? Everything is by mail a long ways away. And pretty soon, you know, six months go by and nobody hears anything, you know, and in the meantime you’re still hot under the collar or whatever because white men came and stole this piece of land from you.¹⁵²

Elder J. Roper told a similar story at the community session.¹⁵³ After Place Lake was dammed by the Alkali Lake Ranch in the early 1950s,¹⁵⁴ the meadow ceased to exist and its value as hayland was lost.

151 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, p. 277, I. Johnson).

152 ICC Transcript, July 5, 2006 (ICC Exhibit 5a, pp. 292–93, I. Johnson).

153 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 21–22, J. Roper).

154 ICC Transcript, April 5 and 6, 2006 (ICC Exhibit 5a, pp. 57, 61, J. Johnson).

ESKETEMC FIRST NATION – WRIGHT’S MEADOW PRE-EMPTION INQUIRY

APPENDIX B

CHRONOLOGY

ESKETEMC FIRST NATION WRIGHT’S MEADOW PRE-EMPTION INQUIRY

- 1 Planning conference Vancouver, April 12, 2005
- 2 Community session Alkali Lake, April 5–6, 2006, and July 5, 2006

The Commission heard from Elders Jake Roper, Jim Johnson, Andy Chelsea, Rose Dick, Juliana Johnson, C.Y. Wycotte, Marilyn Belleau, Morris Chelsea, Victor Johnson, Augustine Wycotte, Willard Dick, Dorothy Johnson, Laura Harry, Bill Chelsea, and Irvine Johnson.

The Commission also heard evidence from Beth Bedard, a researcher for the Esketemc First Nation.

- 3 Written legal submissions
 - Submission on Behalf of the Esketemc First Nation, March 2, 2007
 - Submission on Behalf the Government of Canada, April 20, 2007
 - Reply on Behalf of the Esketemc First Nation, April 30, 2007

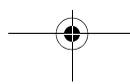
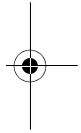
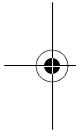
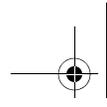
- 4 Oral legal submissions Williams Lake, May 9, 2007

- 5 Content of formal record

The formal record of the Esketemc First Nation Wright’s Meadow Pre-emption Inquiry consists of the following materials:

- Exhibits 1–10 tendered during the inquiry
- transcripts of community session (1 volume) (Exhibit 5a)
- transcript of oral session (1 volume)

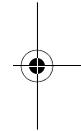
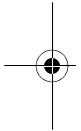
The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.





RESPONSE

Response of the Minister of Indian Affairs and Northern Development to the
Roseau River Anishinabe First Nation 1903 Surrender Inquiry Report
574



RESPONSE

Ministre des Affaires indiennes et
du Nord canadien et interlocuteur fédéral
auprès des Métis et des Indiens non inscrits



Minister of Indian Affairs and
Northern Development and Federal Interlocutor
for Métis and Non-Status Indians

Ottawa, Canada K1A 0H4

WITHOUT PREJUDICE

APR 3 2008

Ms. Renée Dupuis
Chief Commissioner
Indian Claims Commission
PO Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Ms. Dupuis:

I am writing to you concerning the Indian Claims Commission's report entitled *Rouseau River Anishinabe First Nation – Inquiry on the 1903 surrender*, released December 6, 2007. As you know, the Commission in this report recommended that the specific claim be accepted for negotiation.

I would like to inform you that after further studies, the Government of Canada has decided to accept this specific claim.

I appreciate the Commission's consideration of the issues related to the specific claim of the Roseau River Anishinabe First Nation, and I wish to thank you for the work of the Commission.

Sincerely,

Chuck Strahl

c.c.: Mr. Terry Nelson
Mr. Daniel Bellegarde
Mr. Alan Holman
Ms. Sheila Purdy

Canada

The Commissioners



Chief Commissioner Renée Dupuis has had a private law practice in Quebec City since 1973 where she specializes in the areas of Aboriginal peoples, human rights, and administrative law. Since 1972, she has served as legal advisor to a number of First Nations and Aboriginal groups in her home province, including the Indians of Quebec Association, the Assembly of First Nations for Quebec and Labrador, and the Attikamek and the Innu-Montagnais First Nations, representing them in their land claims negotiations with the federal, Quebec, and Newfoundland governments and in constitutional negotiations. From 1989 to 1995, Madame Dupuis served two terms as commissioner of the Canadian Human Rights Commission, and she is chair of the Barreau du Québec's committee on law relating to Aboriginal peoples. She has served as consultant to various federal and provincial government agencies, authored numerous books and articles, and lectured extensively on administrative law, human rights, and Aboriginal rights. She is the recipient of the 2001 Award of the Fondation du Barreau du Québec for her book *Le statut juridique des peuples autochtones en droit canadien* (Carswell), the 2001 Governor General's Literary Award for Non-fiction for her book *Quel Canada pour les Autochtones?* (published in English by James Lorimer & Company Publishers under the title *Justice for Canada's Aboriginal Peoples*), and the YWCA's Women of Excellence Award 2002 for her contribution to the advancement of women's issues. In June 2004, the Barreau du Québec bestowed on her the Christine Tourigny Merit Award for her contribution to the promotion of legal knowledge, particularly in the field of Aboriginal rights. She was appointed a Member of the Order of Canada in 2005. She was one of the first recipients of the *Advocatus emeritus* award, created by the Quebec Bar in 2007. Madame Dupuis is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique. She was appointed Commissioner of the Indian Claims Commission on March 28, 2001, and Chief Commissioner on June 10, 2003.

THE COMMISSIONERS



Daniel J. Bellegarde is a member of the Little Black Bear First Nation in southern Saskatchewan. Educated at the Qu'Appelle Indian Residential School and the University of Regina's Faculty of Administration, he has also received specialty training at various universities and professional development institutions. Mr Bellegarde has held several senior positions with First Nations organizations, including socio-economic planner for the Meadow Lake Tribal Council and president of the Saskatchewan Indian Institute of Technologies. He was first Vice-Chief of the

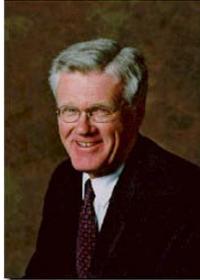
Federation of Saskatchewan Indian Nations, holding the treaty land entitlement and specific claims portfolio, as well as the gaming, justice, international affairs and self-government portfolios. He is currently the president and senior governance coordinator of the Treaty 4 Governance Institute, an organization mandated to work with Treaty 4 First Nations to develop and implement appropriate governance processes and structures. He has served on various boards and committees at the community, provincial, and national levels, including the Canadian Executive Service Organization. Mr Bellegarde was appointed Commissioner of the Indian Claims Commission on July 27, 1992, and continues to serve in this capacity. He also served as Co-Chair of the Commission from 1994 to 2000.



Jane Dickson-Gilmore is an associate professor in the Law Department at Carleton University, where she teaches such subjects as Aboriginal community and restorative justice, as well as conflict resolution. Active in First Nations communities, she serves as an advisor for the Oujé-Bougoumou Cree First Nation Community Justice Project and makes presentations to schools on Aboriginal culture, history, and politics. In the past, she provided expert advice to the Smithsonian Institution –

National Museum of the American Indian on Kahnawake Mohawks. Ms Dickson-Gilmore has also been called upon to present before the Standing Committee of Justice and Human Rights and has been an expert witness in proceedings before the Federal Court and the Canadian Human Rights Commission. A published author and winner of numerous academic awards, she graduated from the London School of Economics with a PhD in law and holds a BA and MA in criminology from Simon Fraser University. Ms Dickson-Gilmore was appointed Commissioner of the Indian Claims Commission on October 31, 2002.

THE COMMISSIONERS



Alan C. Holman is a writer and broadcaster who grew up on Prince Edward Island. In his long journalistic career, he has been an instructor at Holland College in Charlottetown, PEI; editor-publisher of a weekly newspaper in rural PEI; a radio reporter with CBC in Inuvik, NWT; and a reporter for the *Charlottetown Guardian*, *Windsor Star*, and *Ottawa Citizen*. From 1980 to 1986, he was Atlantic parliamentary correspondent for CBC-TV news in Ottawa. In 1987, he was appointed parliamentary bureau chief for CBC radio news, a position he held until 1994. That same year, he left national news reporting to become principal secretary to then-PEI Premier Catherine Callbeck. He left the premier's office in 1995 to head public sector development for the PEI Department of Development. Since the fall of 2000, Mr Holman has worked as a freelance writer and broadcaster. He was educated at King's College School in Windsor, Nova Scotia, and Prince of Wales College in Charlottetown, where he makes his home. He was appointed Commissioner of the Indian Claims Commission on March 28, 2001.



Sheila G. Purdy was born and raised in Ottawa. Between 1996 and 1999, she worked as an advisor to the government of the Northwest Territories on the creation of the Nunavut territory. Between 1993 and 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on matters related to the Criminal Code and Aboriginal affairs. In the early 1990s, Ms Purdy was also special advisor on Aboriginal affairs to the Leader of the Opposition. Previously, she provided legal services on environmental matters and worked as a legal aid lawyer representing victims of elder abuse. After graduating with a law degree from the University of Ottawa in 1980, Ms Purdy worked as a litigation lawyer in private practice until 1985. Her undergraduate degree is from Carleton University, Ottawa. Ms Purdy is on the executive of the Canadian Biodiversity Institute, the Advisory Council of Canadian Arctic Resources Committee, and the Women's Legal Education and Action Fund (LEAF). She was appointed Commissioner of the Indian Claims Commission on May 4, 1999.

