

# **INDIAN CLAIMS COMMISSION**

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## **COWESSESS FIRST NATION 1907 SURRENDER PHASE II INQUIRY**

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### **PANEL**

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

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### **COUNSEL**

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**Note from the editors: In this document, the unofficial English translation of a French quote is indicated by the use of [T] or [Translation].**

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## SUMMARY

### **COWESSESS FIRST NATION 1907 SURRENDER PHASE II INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Cowessess First Nation: 1907 Surrender Phase II Inquiry* (Ottawa, July 2006).

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

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

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Fiduciary Duty** – Surrender; **Indian Act** – Surrender;  
**Saskatchewan**

#### **THE SPECIFIC CLAIM**

The Cowessess First Nation submitted a specific claim in 1981 alleging that the 1907 surrender of a portion of Indian Reserve (IR) 73 was invalid because it did not meet the surrender requirements of the *Indian Act*. Between 1984 and 1992, the First Nation made further submissions, in which it asserted the right to challenge the surrender on the grounds of fiduciary duty, fraud, and unconscionable conduct. In March 1994, Canada rejected the claim as not having shown a breach of the Crown's lawful obligation to the First Nation. In August 1996, at the request of the First Nation, the ICC agreed to conduct an inquiry into the rejected claim. By agreement of the parties and the Commission, the inquiry was split into two phases.

The ICC's report for phase I of the inquiry is at (2001) 14 ICCP 223. The phase I panel determined that a valid surrender vote had not been obtained and recommended that Canada accept the claim. By letter dated March 27, 2002, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation in phase I: see (2002) 15 ICCP 376. Consequently, in October 2002, the First Nation requested that the ICC proceed with phase II of the inquiry on the grounds that the Crown had breached its fiduciary duty to the Cowessess Band when taking the 1907 surrender. A new panel was struck for phase II. At the First Nation's request, this panel did not conduct a community session. The panel heard the parties' legal arguments, based on written submissions, on September 21, 2004.

#### **BACKGROUND**

The ancestors of the Cowessess First Nation adhered to Treaty 4 at Fort Qu'Appelle in September 1874. Cowessess and his followers settled at Maple Creek in the Cypress Hills, but, in 1880, a reserve was surveyed at Crooked Lake for Headman Louis O'Soup and his followers. Shortly thereafter, Chief Cowessess was persuaded to move with his followers to the Crooked Lake reserve. In 1889, the Cowessess Indian Reserve was confirmed by order in council. Four reserves made up the Crooked Lake Agency – Sakimay IR 74, Cowessess IR 73, Kahkewistahaw IR 72, and Ochapowace IR 71.

The Cowessess Band lived, farmed, and raised livestock in the north of its reserve. The southern portions – the hay lands – were used primarily for cutting wild hay. Beginning in 1886, settlers located near the agency reserves made repeated requests to the federal government to have the southern portion of the reserves at Crooked Lake surrendered for sale and the reserves relocated a distance from the non-Indian settlement. During the 1890s, Indian Agent Allan McDonald opposed a surrender of the Cowessess Band's southern reserve land on the grounds that it would limit the Band's future ability to increase its stock. In 1899, a local MLA unsuccessfully appealed to the responsible Minister, Clifford Sifton, to pursue surrenders

of the southern portion of the Crooked Lake Agency's reserves, and, in 1902, a petition bearing the names of 190 local residents who supported the surrenders was sent to Ottawa.

At the July 1904 annuity payments to the agency's bands, Indian Commissioner David Laird's assistant discussed surrender with the band members as a means of raising funds to fence the reserves to protect them from incursions by neighbouring settlers' cattle. According to Laird, the Cowessess Band appeared to appreciate the suggestion but wanted some time to consider it.

The matter was dropped again, but, in October 1906, Inspector William Graham received approval to propose a surrender of the southern portions of the Ochapowace, Kahkewistahaw, and Cowessess reserves. Graham held two meetings with the Cowessess Band. On January 21, 1907, he explained the proposed surrender to the Band and adjourned the meeting to January 29, at which time the Band voted 15 in favour of the surrender and 14 against. Twenty-two members signed the surrender document. Alexander Gaddie, a band member who had acted as interpreter, voted in favour. At the surrender meetings of the other two agency bands, the Ochapowace Band voted against a surrender of part of its reserve, whereas the Kahkewistahaw Band voted in favour of surrender.

On February 2, 1907, Graham and Gaddie swore the Cowessess surrender affidavit before a Justice of the Peace. The surrender was confirmed by order in council on March 4, and the land was subdivided in May 1907. It was offered for sale by auction in November 1908 and in June 1910.

## ISSUES

With regard to the January 29, 1907, surrender of a portion of IR 73, what was Canada's pre-surrender fiduciary duty? Did Canada breach its pre-surrender fiduciary duty and, if so, does Canada owe an outstanding lawful obligation to the Cowessess First Nation?

## FINDINGS

### Reasons of Commissioner Purdy and Commissioner Dickson-Gilmore

The appropriate test for finding a breach of the Crown's pre-surrender fiduciary duty, based on the *Apsassin* case, is to ask whether the Band's understanding of the proposed surrender was inadequate; whether the Crown's conduct tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention; whether the Band ceded its decision-making authority to the Crown; or whether the surrender was so foolish or improvident as to amount to exploitation.

The Cowessess Band lived at the north end of its reserve near the Qu'Appelle River, on the reserve's best agricultural land. The southern portion was marshy, gravelly, alkaline, and inferior slough land that was used to cut hay. By all accounts, the Cowessess Band was the most progressive band in the Crooked Lake Agency, both in agriculture and in diversifying its economy. One-half of the Band carried on farming and cattle-raising; individuals also earned income by selling produce or working for settlers. The department's annual reports indicate that, because of their Métis ancestry, the Cowessess people had adapted more readily to agriculture than had the other agency bands. The Band had also had prior experience in negotiating the terms of proposed surrenders. When the Band and officials met on January 21, 1907, to discuss the surrender in question, the minutes state that Inspector Graham explained the proposal and that Chief Joseph LeRat confirmed it to have been well explained and understood. The meeting was adjourned to January 29, permitting band members sufficient time to consider the proposal. The Band understood what the surrender entailed, and, as experienced farmers and ranchers, members would have known the advantages and disadvantages of surrendering the hay lands.

The fact that the Crown initiated the surrender discussions in 1904 and favoured a surrender does not establish that the Crown engaged in tainted dealings. No evidence exists that the conduct of officials was driven by personal gain, nor is there any evidence that they employed improper conduct during the surrender meeting. The provision of a cash down payment was not an undue influence in this case, given the Band's

relative health and self-sufficiency. Moreover, it was an agreed-upon condition of the surrender, permitted by the *Indian Act*. The conflicting evidence regarding Alex Gaddie's compensation claim does not permit a finding that the Crown intentionally withheld material information from the Band.

No evidence exists that the Band ceded its decision-making power to the Crown in the 1907 surrender. The Crown would be expected to act with ordinary diligence in explaining the reasonably foreseeable consequences of the surrender, such as the anticipated sale price. Still, there is no evidence that the Crown failed to explain such consequences. At the same time, the Band's demonstrated understanding of its own situation, in particular its use of the hay lands, would have influenced the nature of those discussions. In addition, the Band was not in a vulnerable state and had always had strong leadership; Chief LeRat was a capable leader who, in considering other surrender proposals, had demanded large down payments in return for band consent.

The surrender was not a case of exploitation. The Cowessess reserve contained 49,920 acres, of which 41 per cent was surrendered. The Band kept the best agricultural land and voted to surrender inferior land. The evidence shows that the surrender had no permanent impact on agricultural production, as the Band continued for decades to farm and ranch only a small percentage of the residual reserve. The benefits to the Band included annual payments to band members to purchase farm implements, household articles, food supplies, and fencing to keep out settlers' cattle. The land sales met or exceeded the upset price. From the perspective of the Band – living in the north on good land, close to fresh water and wood – the southern hay lands were not a priority in 1907 or for the foreseeable future. The surrender vote itself indicates that the band members were somewhat divided in respect of their needs. In the years after 1907, the Band complained to the Crown, directly and through its solicitors, about the interest payments, but never about the surrender itself.

### **Reasons of Commissioner Holman**

When the Crown signed Treaty 4 in 1874 with the Saulteaux and Cree, it made an agreement with the First Nations. Part of that agreement was to set aside reserve land for the Cowessess Band. One purpose of setting aside reserves was to protect the bands from encroachment by settlers. For the Crown to take back the land barely 30 years later, for the benefit only of the settlers and in the light of the Crown's own knowledge of why the Cowessess Band needed it, is a breach of the Crown's fiduciary duty to the Cowessess Band.

The Crown owed a fiduciary duty to the Cowessess Band to act in its best interests with regard to the protection and preservation of reserve land. The duties owed by the Crown to the First Nation include loyalty, good faith, and full disclosure. The tests of whether the Band's understanding of the surrender was inadequate, and whether the Crown's conduct so tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention, must be assessed against those duties. The Crown had no duty to act on behalf of the local settler population.

The motives of the Crown in obtaining the surrender must be assessed against its duty to be loyal to the Band with respect to its reserve land and its duty to act only in the Band's best interests. The surrender of the southern 33 sections of land, which contained the Band's hay lands, was not in the Band's best interest, since the surrender left the Band without a good source of hay.

The evidence shows clearly that, before 1904, Crown officials resisted any pressure from the local population to open up reserve land for settlement, on the basis that the Band required the hay lands to feed its cattle. Crown officials were well aware of the value of the land to the Band. After 1906, when a number of new officials and politicians had become involved, there was no consideration of whether a surrender would benefit the Band and no consideration of what would happen to the Band if it no longer had ready access to a reliable source of hay.

Because the panel in phase I of this inquiry determined that the recorded vote in favour of surrender was not a majority of the eligible voters in attendance at the surrender meeting, the analysis of whether the

Crown should have refused to add its consent to the surrender was done only in the hypothetical. Applying the standard of the foolish or improvident bargain to the surrender, had there been a valid vote in favour of surrender, the Crown should have known it was improvident for the Band to surrender land it required for stock-raising.

The surrender vote resulted in more than 41 per cent of the reserve being sold to settlers. Although that was less than half the reserve, the surrender affected the agricultural potential and economic future of the Cowessess Band because it was almost 95 per cent of the Band's slough hay acres and almost 75 per cent of its open arable land. Much of the land on the remaining reserve was covered in trees. The Band was hindered in its use of the remaining reserve for agriculture because of the deep gully and steep slopes of Ekapo Creek.

The surrender must be assessed in terms of the Crown's fiduciary duty to the Band, not the Band's ability to withstand pressure from both the Crown and the local settlers.

#### RECOMMENDATIONS

**Commissioners Purdy and Dickson-Gilmore:** That the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907 not be accepted for negotiation under Canada's Specific Claims Policy on the single issue of fiduciary duty.

**Commissioner Holman:** That Canada accept the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907 and that it negotiate a settlement under Canada's Specific Claims Policy on the single issue of fiduciary duty.

#### 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

*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Chippewas of Kettle and Stony Point v. Canada (Attorney-General)* (1996), 31 OR 3rd 97 (Ont. CA); *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Badger*, [1996] 1 SCR 771; *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 SCR 388; *Hodgkinson v. Simms*, [1994] 3 SCR 393; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA).

#### ICC Reports Referred To

*Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Kahkewistahaw First Nation: 1907 Reserve Land Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53.

#### Treaties and Statutes Referred To

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1886, c. 43, *Indian Act*, RSC 1906, c. 81.



**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; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971).

**COUNSEL, PARTIES, INTERVENORS**

D.J. Maddigan, W.A. Brabant for the Cowessess First Nation; V. Russell for the Government of Canada; J.B. Edmond, K. Webb Johnston to the Indian Claims Commission.



## KEY HISTORICAL NAMES CITED

**Begg, Magnus**, Indian Agent for the Crooked Lake Agency, July 13, 1900–April 20, 1904.

**Cowessess**, Ka-wezauce, also known as “Little Boy” or “Little Child,” Chief at the time of the signing of Treaty 4 on September 15, 1874, and Chief until his death in 1886.

“**Delorme, Nap**,” a name on the list of voters in the 1907 surrender.

**Gaddie, Alexander**, member of the Cowessess Band, farmer on the reserve, and former Headman.

**Graham, William M.**, Inspector for Southern Saskatchewan Agencies, February 1904; became Indian Commissioner in Regina, 1918.

**Laird, David**, Lieutenant Governor of the North-West Territories, 1876–81; Indian Superintendent for the North-West Superintendency, 1877–78; Indian Commissioner, 1879–88 and 1898–1914.

**LeRat, Joseph**, Chief of the Cowessess Band from 1903 and Chief at the time of the 1907 surrender.

**LeRat, Zachary**, member of the Cowessess Band and farmer on the reserve.

**MacDonald, H.W.**, barrister in Broadview, Saskatchewan.

**McDonald, Allan**, Indian Agent for the Crooked Lake Agency, 1877–97.

**McGibbon, Alexander**, Inspector of Indian Agencies and Reserves, North-West Territories, 1889–96.

**McKenna, J.A.J.**, Assistant Indian Commissioner, 1904–6.

**McLean, J.D.**, Secretary for the Department of Indian Affairs; later promoted Assistant Deputy and Secretary for the same department.

**Millar, Matthew**, Indian Agent for the Crooked Lake Agency, 1905–14.

**Neff, G.C.**, barrister in Grenfell, Saskatchewan.

**Oliver, Frank**, Minister of the Interior and Superintendent General of Indian Affairs, 1905–1911.

**O’Soup, Louis**, Headman of the Cowessess Band; elected Chief of the Cowessess Band in 1887, after the death of Cowessess.

**Pedley, Frank**, Deputy Superintendent General of Indian Affairs, November 1902–October 1913.

**Perrault, Father Siméon**, Oblate priest of the Roman Catholic Mission on the Cowessess Reserve.

**Reid, J. Lestock**, Dominion Land Surveyor.

**Sifton, Clifford**, Superintendent General of Indian Affairs and Minister of the Interior, November 1896–February 1905.

**Thorburn, W.C.**, merchant in Broadview, Saskatchewan.

**Wright, John P.**, Indian Agent for the Crooked Lake Agency, 1897–1900.

**PART I**  
**INTRODUCTION**

**BACKGROUND TO THE INQUIRY**

The ancestors of the Cowessess Band, who adhered to Treaty 4 in 1874, settled on Indian Reserve (IR) 73, which lies south of the Qu'Appelle Valley, north of the Canadian Pacific Railway line, and is situated between the Sakimay reserve on the west and the Kahkewistahaw reserve on the east. The Cowessess, Sakimay, Kahkewistahaw, and Ochapowace bands made up the four bands of the Crooked Lake Agency.

In 1907, the Cowessess Band voted to surrender a portion of its reserve. At the same time, the Crown proposed surrenders of portions of the Kahkewistahaw and Ochapowace reserves; the Kahkewistahaw Band voted in favour of a surrender, and the Ochapowace Band voted against surrender.

In 1981, the Cowessess First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the 1907 surrender was invalid in that it did not comply with the surrender requirements of the *Indian Act*. Between 1984 and 1992, the First Nation made further submissions to the Minister, in which, among other things, it asserted the right to challenge the surrender on the additional grounds of fiduciary duty, fraud, and unconscionability.<sup>1</sup>

In March 1994, the First Nation's specific claim was rejected on the basis that it did not reveal a lawful obligation on the part of the Crown to the First Nation.<sup>2</sup> On the request of the First Nation, the Indian Claims Commission (ICC) agreed in August 1996 to conduct an inquiry into the rejected claim.<sup>3</sup> By agreement of the parties and the Commission, the inquiry was split into two phases.

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<sup>1</sup> Submission to the Minister of Indian Affairs and Northern Development, "Report on Research conducted into the Cowessess Reserve #73 Land Surrender, January 1907," Federation of Saskatchewan Indians, Indian Rights and Treaties Research, March 1981 (ICC Exhibit 6, pp. 664–83).

<sup>2</sup> Jack Hughes, Specific Claims West, DIAND, to Chief Terry W. Lavallee, March 25, 1994 (ICC file 2107-33-01).

<sup>3</sup> Band Council Resolution (BCR) 96/97 – 150, August 13, 1996 (ICC file 2107-33-01).

Phase I of the inquiry dealt with the single issue of whether the band members who voted on the surrender met the eligibility requirements of the *Indian Act*. In a report issued in March 2001, the Commission found that a valid majority vote had not been obtained and recommended that the claim be accepted by Canada for negotiation. The Minister of Indian Affairs declined to accept the Commission's recommendation,<sup>4</sup> whereupon the Cowessess First Nation requested in October 2002 that the Commission proceed with phase II of the inquiry – whether the Crown breached its fiduciary duty to the First Nation when it took the 1907 surrender.

### MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.”<sup>5</sup> This Policy, outlined in the Department of Indian Affairs and Northern Development's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.<sup>6</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

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

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

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<sup>4</sup> Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Patricia Sparvier, Cowessess First Nation, March 27, 2002 (ICC file 2107-33-01, vol. 3).

<sup>5</sup> Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to order in Council PC 1991-1329, July 15, 1991.

<sup>6</sup> Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereinafter *Outstanding Business*).

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.<sup>7</sup>

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

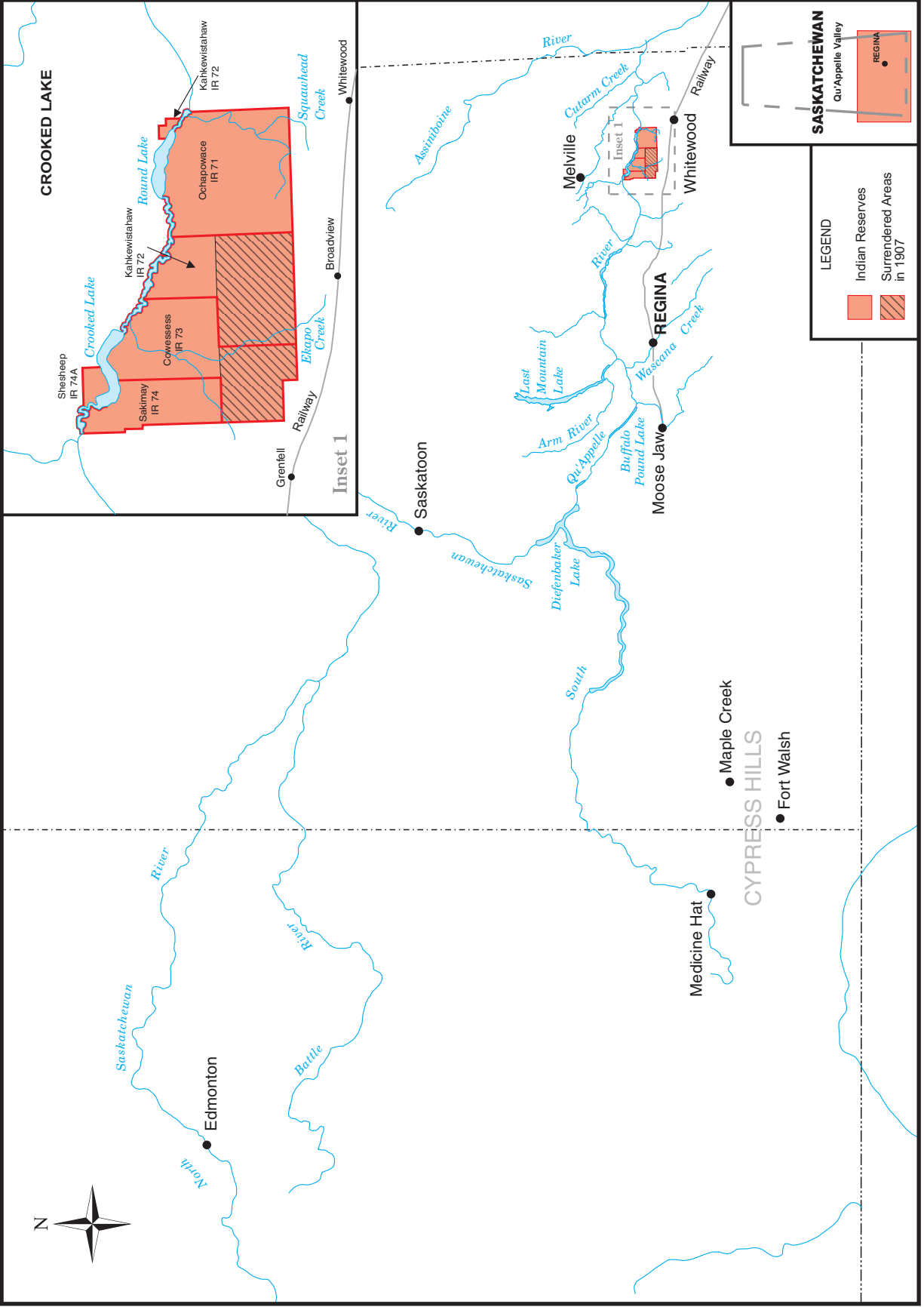
- i. Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
- ii. Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can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

The Commission has now completed its inquiry into phase II of the Cowessess First Nation's specific claim on the single issue of whether the Crown breached its fiduciary duty to the First Nation when it took the 1907 surrender. This report contains both majority and minority findings and recommendations on the merits of phase II of this claim.

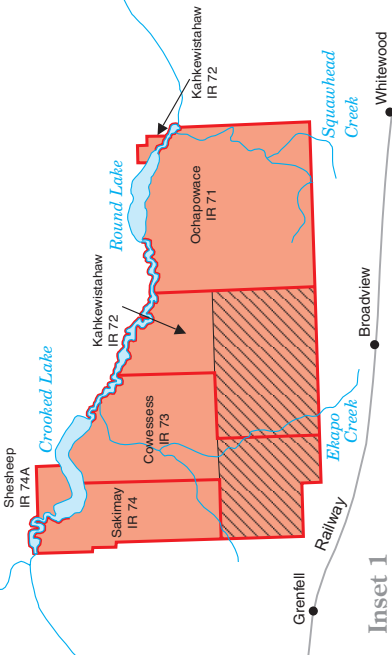
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<sup>7</sup>

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



**CROOKED LAKE**



**Inset 1**

**CYPRESS HILLS**

- Maple Creek
- Fort Walsh

Medicine Hat

Moose Jaw

REGINA

Whitewood

Melville

Saskatoon

Edmonton

Saskatchewan River

North Saskatchewan River

Battle River

Saskatchewan River

South Saskatchewan River

Arm River

Qu'Appelle River

Wascana Creek

Assiniboine River

Cutarm Creek

Railway

Squawhead Creek

Whitewood

Broadview

Grenfell

Shesheep IR 74A

Sakimay IR 74

Cowessess IR 73

Kakkewistahaw IR 72

Ochapowace IR 71

Kakkewistahaw IR 72

Crooked Lake

Round Lake

Whitewood

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**PART II**  
**THE FACTS**

A full historical background to the First Nation's claim is found at Appendix A to this report.

The ancestors of the Cowessess Band adhered to Treaty 4 in 1874 under the leadership of Chief Cowessess. At the time, Cowessess band members were living in two locations: one group led by Chief Cowessess at a camp in the Cypress Hills, and the other under the leadership of Headman Louis O'Soup at Fort Qu'Appelle. The Cowessess reserve, comprising approximately 49,920 acres in the Qu'Appelle Valley, was first surveyed and set aside for O'Soup's group in 1880, but, in 1883, Chief Cowessess and his followers were persuaded to join O'Soup on the reserve. Cowessess IR 73 was confirmed by order in council in 1889.

The Cowessess reserve was one of four adjacent reserves that made up the Crooked Lake Agency.<sup>8</sup> The Sakimay, Cowessess, Kahkewistahaw, and Ochapowace reserves were located between the Canadian Pacific Railway line to the south and the Qu'Appelle River and Crooked Lake to the north. The Indian agent and the farming instructor, as well as the common machinery, such as the gristmill, were located on the Cowessess reserve.

At the time of taking treaty, the followers of Chief Cowessess were primarily Saulteaux, but they included some Cree and Métis. Louis O'Soup, in particular, had strong ties with the Métis and was sympathetic to the 1885 North-West Rebellion. He attempted, without success, to persuade band members to follow him and to join the Métis resistance led by Louis Riel. Although two Broadview magistrates warned the government in 1885 of the danger of an attack by the Crooked Lake Indians, there were no such incidents. Following the death of Chief Cowessess in 1886, O'Soup became chief of the Cowessess Band.

Cowessess band members lived, farmed, and raised livestock on the northern part of IR 73, close to Crooked Lake and the Qu'Appelle River. The southern portion of the reserve in those years was used for cutting wild hay, as the land, according to the first Indian Agent, Allan McDonald, was under water or gravelly in the wet season and full of alkali in the dry season. In the early 1900s, Crown officials reported that the Cowessess Band was more progressive than the other Crooked

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<sup>8</sup> Although frequently referred to as the "Crooked Lakes Agency" or the reserves at Crooked Lakes, the correct name was "Crooked Lake Agency."

Lake bands because Cowessess was made up of mostly “half-breeds.” Officials also cited the fact that the Cowessess reserve occupied a central position among the bands and housed the agency’s buildings. According to the various Indian agents and farming instructors stationed in the agency, Cowessess band members adapted well to farming and stock-raising and were reputed to be the most successful of the four bands at making the transition from the buffalo hunt to agricultural subsistence. Moreover, Indian Agent McDonald did not appear to enforce the department’s peasant farming policy of 1889, which banned the use of machinery by Indians, and this approach may have indirectly assisted the Crooked Lake bands to become able farmers and stock-raisers. The Cowessess band members also earned wages and sold firewood, wheat, hay, senega root, cattle, and tanned hides. Taken together, the private earnings of band members from these pursuits were greater than those of any of the other Crooked Lake Agency bands.

Reports about the ability of the band members varied in the years immediately before the surrender; Indian agents generally described Cowessess band members as the best farmers in the agency and rarely in debt, whereas Inspector William Graham was more critical of all the bands in the agency. Neighbouring farmers and other settlers in the nearby towns of Broadview, Grenfell, and Whitewood began to bring concerns about the Crooked Lake Agency’s reserves to the attention of the government within a few years of Chief Cowessess’s arrival. In 1885, neighbours wanted the Indians of the agency to be moved away from the railway and the land opened up for settlement. Correspondence in the spring of 1886 indicates that the settlers wanted the Indians pushed back six miles from the railway, in exchange for land north of the Qu’Appelle Valley. In response, the department adopted the position of Agent McDonald, who had reported that the six miles the settlers wanted were the Indians’ hay lands and, since the department expected them to have large numbers of cattle before long, the department should protect this land for them.

Pressure on the government to obtain a surrender continued throughout the 1890s. The area farmers and townspeople believed that the Indians were not making use of the land and that it would be best for all concerned if they surrendered unused parts of the reserves. During the 1890s, Indian Agent McDonald maintained his position that money could not compensate the Indians for surrendered land, because their hay lands would be gone. Without hay lands, he did not foresee an increase in their stock or their quick advancement. He also did not believe that the land would attract

any purchasers because of its limited value. In 1896, when the Liberals took power in Ottawa, Clifford Sifton became the Minister of the Interior and Superintendent General of Indian Affairs, while David Laird remained as Commissioner, stationed in Winnipeg. In 1899, the local Member of the Legislative Assembly (MLA) of the North-West Territories, R.S. Lake, wrote to Ottawa, asking that the Indians of the Crooked Lake Agency surrender the unused portions of their lands. Subsequently, Surveyor A.J. Ponton reported to Sifton that settlement of the district south of the railway was being prevented by the lack of market towns in the area, and he recommended that the Indian Agent be instructed to take a surrender of a three-mile-wide strip closest to the railway. He also thought the development of new towns would benefit the Indians. Consultations continued among Sifton, Laird, McDonald, and the latter's successor, Indian Agent John P. Wright, with Sifton concluding that the surrender was not advisable at that time. He responded to Mr Lake, explaining that the Indian Agent was experimenting on the Indians' cultivated land with brome grass as an alternative to wild hay, which, if successful, would make it unnecessary to maintain the southern hay lands. Sifton advised Lake that no action would be taken at that time, concluding that he wanted to meet the needs of the settlers as much as possible while, at the same time, protecting the rights of the Indians.

In 1900, Magnus Begg became the new Agent. In January 1902, he made a proposal to the government that he thought would be beneficial to the bands in the agency. Begg did not specify individual bands or specific members within them, but he stated that the Indians of the Crooked Lake Agency were having problems paying off debts they had incurred in purchasing farm implements and were now being forced to sell off some of their cattle. Begg proposed that money from a surrender of a three-mile strip of land would enable the band members both to pay their debts and to purchase more cattle and other farming equipment. He estimated that the proceeds of sale would generate an annual interest payment of about \$12. Commissioner Laird, however, informed Begg that the land he had proposed for surrender was needed to grow hay.

In March 1902, local residents sent a petition bearing more than 190 signatures to Ottawa, asking for a surrender by the Crooked Lake bands of the three miles of reserve land closest to the railway. This time, J.D. McLean, Secretary of the Department of Indian Affairs, replied that the land

could not be sold without the consent of the Indians, but that the department would do its best to obtain the surrender.

The petition was forwarded to Commissioner Laird in Winnipeg, along with instructions to send the best-qualified person to discuss the question of surrender with the Indians. Laird made the trip to Saskatchewan himself, and, in May 1902, wrote to McLean to say that he had met personally with the band members of Kahkewistahaw and Ochapowace about a surrender of a strip of two or three miles on the southern border of their reserves. Both bands were strongly opposed to a surrender. Laird decided not to go to Cowessess because Agent Begg had told him that the Cowessess hay lands were almost all along the southern part of their reserve, and, further, that the Cowessess reserve was a greater distance than the Kahkewistahaw and Ochapowace reserves from Broadview and Whitewood, where the principal petitioners resided.

It was another two years before the issue of surrender rose again. In response to a settler who wrote, asking to purchase a half-section of reserve land, McLean stated it was not a good idea to ask the Crooked Lake Indians for a surrender at that time. In the same month, March 1904, the Superintendent General of Indian Affairs, Clifford Sifton, reiterated the Broadview settlers' desire for a surrender of portions of the Crooked Lake reserves. Assistant Indian Commissioner James McKenna replied that it would not be good policy to go back to them again to ask for a surrender because it might create the impression that the department was acting for the settlers in the matter. He thought it would be preferable to have the Indian Agent inquire quietly about what the Indians thought and to report back. But Agent Begg died shortly after, leaving no record that he had discussed the possibility of surrender with the Crooked Lake bands, including Cowessess.

Two other events in 1904, however, indicate that Cowessess band members were aware, two years before the actual surrender, of the interest within the nearby communities in purchasing land on their reserve. Kanas-way-we-tung, a Cowessess band member, wrote in June 1904 that he was strongly opposed to selling part of the reserve. Further, in September 1904, Commissioner Laird reported to J.D. McLean in Ottawa that, during the annuity payments in July 1904, Mr Lash of his office had discussed surrender with members of the Crooked Lake bands. At the time, they were complaining about settlers' cattle wandering on the reserve. Mr Lash explained that surrender would enable them to buy fencing to keep animals off the land. According to Laird, the Indians appeared

to appreciate the suggestion but wanted time to think it over. He also reported that Chief Joe LeRat of Cowessess had wanted all the surrender proceeds paid to the Indians, to do with as they saw fit, but that Mr Lash said it could not be done. Laird thought that after the appointment of the new Indian Agent, either he, Laird, or the Assistant Commissioner should be empowered to make a definite proposal to the Indians based on a cash payment of 10 per cent of the proceeds of sale, but he also stressed that it was not a good idea to push the matter too hard, as it was one that required very careful handling. Secretary McLean agreed, and the matter lay dormant for another two years.

In February 1904, Inspector William Graham was appointed to the South Saskatchewan Inspectorate. Later that same year, Prime Minister Wilfrid Laurier's Liberals were re-elected. In 1905, Saskatchewan and Alberta, which had been part of the North-West Territories, became provinces, and Clifford Sifton resigned as Minister of the Interior and Superintendent General of Indian Affairs. His successor was the Edmonton Member of Parliament Frank Oliver.

In March 1906, the local Member of Parliament, J.D. Turiff, forwarded a letter he had received from a constituent to the Department of Indian Affairs. This settler wanted to know whether an Indian could sell reserve land to a non-Indian. In reply, Secretary J.D. McLean wrote that such an arrangement would violate the *Indian Act*, but that the department would soon be taking up the question of surrender with the Indians of the Crooked Lake Agency, and, if the Indians granted a surrender, the land would be sold for their benefit.

In June 1906, Graham wrote to the Deputy Superintendent General, Frank Pedley, that he had just returned from the Crooked Lake Agency, where he had been feeling out the Indians with regard to the surrender of their land. According to Graham, the bands had heard about the surrender of a portion of the Pasqua reserve and the cash payment that the Pasqua Band had received for this land. He thought the bands at Crooked Lake might be willing to surrender a portion of their land on similar terms. Graham also pointed out that the town council, the Board of Trade, and a number of private individuals had been talking to the Indian leaders about surrender and that they now had all kinds of ideas in their heads. With respect to Cowessess in particular, he noted that the band members were approximately 95 per cent Roman Catholic "half-breeds" and were, to a great extent, under the influence of the priest, who was of the opinion that a surrender could be obtained if it was properly handled.

A month later, officials in Ottawa asked Inspector Graham to provide figures for the acreages he proposed be surrendered from each reserve. He responded at the end of September 1906, stating that Cowessess should be asked to surrender 36,480 acres. Although the department knew that several futile attempts had already been made to get the surrender, he thought it could be obtained if it was handled judiciously. He wanted the money for the first payment to be on hand the day of the surrender meeting. In his opinion, Kahkewistahaw and Ochapowace would agree to a surrender, and he hoped that Cowessess would fall into line. He thought the land was little used by the Indians. Officials at the Department of Indian Affairs did not approve Graham's recommended acreage; instead of 36,480 acres, the Chief Surveyor prepared the description for a surrender of approximately 20,704 acres of the Cowessess reserve. On October 3, Secretary McLean sent Graham the departmental authorization, forms of surrender for the three Crooked Lake bands, and a cheque for \$22,046 – which was calculated to be 5 per cent of the estimated sale price of the land on the three reserves. Graham replied that other work prevented him from going immediately to obtain the surrenders, but he did not think that a delay would prejudice the proposition. He also wanted to be authorized to insert the same conditions as were in the Pasqua surrender, and he asked for information about how individual band members would be paid for improvements on their land.

The Cowessess Band had had experience with land surrenders before the January 1907 surrender vote. There is evidence that, prior to 1907, the Band had completed at least one road surrender;<sup>9</sup> moreover, the Band voted in 1908 to surrender land for two other road allowances running north from Grenfell and Broadview, but Chief Joe LeRat and Crown officials had been discussing the terms of that surrender for more than a decade. In 1903, the Band verbally consented to a request by the local priest for a surrender of 40 acres of reserve land for a school and mission. When the priest asked for more land in 1907, again the Band consented verbally, but later rejected the offer because the Crown refused to pay out 100 per cent of the estimated proceeds of sale to the Band. The Band finally voted in favour of this surrender in 1908, after having agreed to accept the maximum allowable down payment of 50 per cent.

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<sup>9</sup> J.D. McLean, Secretary, DIA, to F.J. Robinson, Deputy Commissioner of Public Works for Saskatchewan, March 19, 1907, Library and Archives Canada (LAC), RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 180).

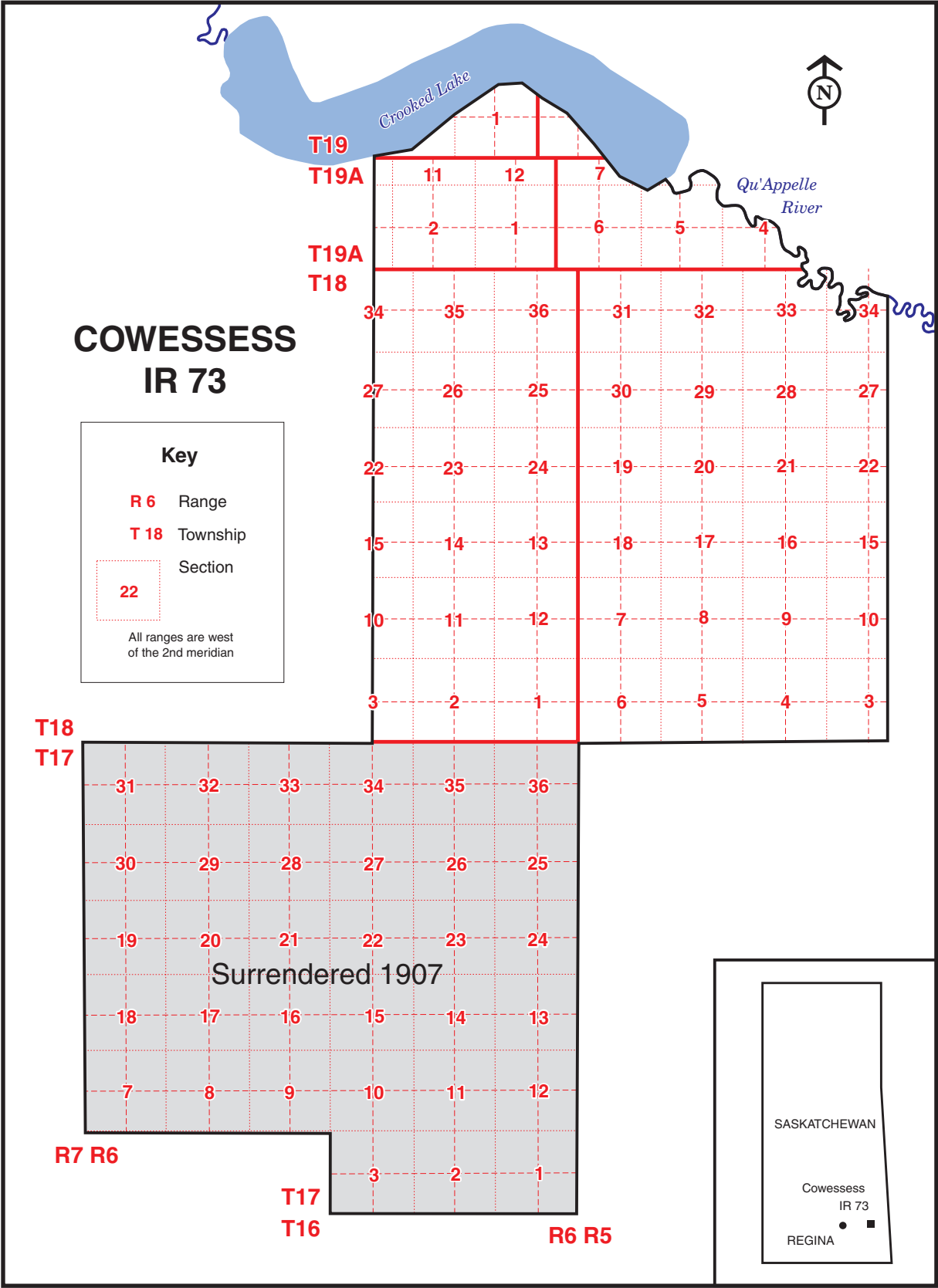
Graham went to three of the four Crooked Lake reserves in January 1907, during a winter that was acknowledged to be unusual because of the intense, continuous cold and the large amount of snow. He met with Cowessess first, on January 21, 1907. Graham was accompanied by Indian Agent Matthew Millar and interpreter Peter Hourie, who, before becoming the farming instructor on Sakimay's reserve in 1898, had worked as an interpreter for 20 years.

The agency's minute book, kept by Agent Millar, records the meeting as having been called for the purpose of considering a proposition for a surrender and that advance notice of the meeting had been given through Chief Joe LeRat and Headman Ambroise Delorme. There is no record of the number or names of band members in attendance.

According to the minute book, Graham addressed the assembled group at length. He explained the terms of the agreement that had been made by the department and that was now being submitted to them to decide on and to vote on, either to accept or reject. Chief LeRat then spoke and said that he thought the terms of the proposition had been well explained and that they understood it. Finally, the minutes state that Inspector Graham told them he would be pleased to answer any questions or make further explanation, and that they should take plenty of time to reach a decision. The meeting was adjourned until Tuesday, January 29. Inspector Graham's subsequent report states that he called the January 21 meeting for the purpose of explaining to them the conditions of surrender, which he wished to submit to them at a further date. No vote was taken at this meeting.

The next day, January 22, Graham, Millar, and six other officials met with the Ochapowace Band, which voted not to surrender land from its reserve. Graham later reported that he was unable to obtain a surrender from the Ochapowace Band, notwithstanding the inducements that were nearly three times as great as those offered to the Cowessess Band. The day after that, January 23, Graham and the same officials met with the Kahkewistahaw Band. Kahkewistahaw also voted not to surrender a portion of its land.

Five days later, on January 28, Graham went again to Kahkewistahaw, at the request of a deputation of the Band, and put the surrender proposal to the members a second time. This time they voted in favour, and, in accordance with the terms of the surrender, Graham paid them 5 per cent of the estimated sale price of the land.





The next day, January 29, Graham went again to the Cowessess reserve. Some of the others who attended on behalf of the government were Agent Matthew Millar; E.D. Sworder, a clerk in Graham's Regina office; and H. Cameron, the department's official interpreter. In spite of the presence of Cameron, band member Alexander Gaddie interpreted. Gaddie had been cited as one of the most progressive farmers in the Cowessess Band and, according to other minute book entries, had acted as interpreter at other meetings.

The minutes state that the adjourned meeting was held for the further consideration of the proposal for surrender of a portion of the Cowessess lands. They also state that the roll was called at 29, although it appears that the original number written was "30." In the vote, 15 Cowessess band members were listed as voting in favour of surrender, including Alex Gaddie; 14 were listed as voting against, including Chief Joe LeRat. Also among those voting in favour was an individual named "Nap Delorme," whose identity has not been confirmed. After the vote, 22 band members signed the surrender document as principal men of the Cowessess Band.

Graham had received approval to pay the Band one-tenth (10 per cent) of the land-sale proceeds, approximately half (5 per cent) to be paid on surrender and the remainder to be paid once the land was sold. The first instalment at Cowessess was \$33 per person, calculated as 5 per cent of the estimated sale price. With respect to the three bands, Graham had also been authorized to make any necessary changes to suit the circumstances in each case.

On the same day that the surrender was signed, January 29, Graham wired a request to Ottawa for permission to double the payment upon surrender to \$66 per person. It is not clear where this request originated, but Graham stated that he strongly advised granting it. This request meant that the full 10 per cent of the estimated sale price would be paid out at the time of surrender, instead of in two instalments of 5 per cent each, one at surrender and one following the sale. On February 1, 1907, Deputy Superintendent Pedley approved the request, which, according to Graham, was based on a low valuation. It appears, however, that band members had already signed the surrender agreement containing a condition that payment of one-tenth of the estimated sale price would be made at the time of the surrender. On February 2, Graham and Gaddie travelled to Moosomin and swore the affidavit of surrender before Justice E.L. Wetmore. Gaddie, who signed as an Indian of the Band and was entitled to vote, swore to the fact that the surrender was assented to by a majority of

male band members of the full age of 21 years and that no Indian voted or was present who was not a habitual resident on the reserve or interested in the land in question.

In his report to headquarters on the Crooked Lake surrenders, Graham stated that the vote was close and that both Chief LeRat and Headman Delorme, whom he described as non-progressive Indians, had voted against surrender. He also reported that 22 men signed the surrender document, and he began immediately to pay out the approximate one-tenth – a payment that continued well into the night and for several days. The department's paysheets show that the payment to the band members was made in two payments of \$33, on January 29 and February 4, 1907, not in a single payment of \$66 immediately following the surrender vote.

In mid-February, the Board of Trade of Broadview thanked the Minister, Frank Oliver, for his assistance in opening up the Crooked Lake reserves for settlement. A year later, in 1908, Oliver echoed the Board of Trade and praised Graham's work in the Inspectorate to the Governor General in Council, remarking that Graham had fairly earned an increase in salary.

The Band had voted to surrender 20,704 acres, or 41 per cent of the reserve. At the time of the surrender, the Band's population was 197, of whom 32 were adult males. Cowessess band members continued to use the land until it was sold at auction, the earliest sales taking place in November 1908. Two months after the surrender, Agent Millar wrote in his annual report that the Cowessess and Kahkewistahaw bands had made little use of the surrendered land and had derived little revenue from it. He also noted that band members were making good use of the money they had received, having bought horses and farm tools as well as food, blankets, bedding, and clothing for personal use. Millar pointed out that future annual payments from the interest on the sale proceeds would be advantageous to the band members, especially the aged and infirm, who had derived little income in the past from their large land holdings. In the same report, referring specifically to Cowessess, he noted that, after this year, wild hay would not be so plentiful and the members might need to keep fewer cattle.

Inspector Graham's report for 1907, filed less than two weeks later, did not address Cowessess separately from the other Crooked Lake bands. His assessment of the agency's hay crop and cattle was more favourable, noting that the cattle had come through a severe winter in good condition and that there was an abundance of hay on all the reserves.

In 1908, Agent Millar noted that the hay crop on Cowessess was not so plentiful as on other reserves; in 1909, he noted that although the Cowessess band members engaged more in farming and stock-raising than the members of other bands, it might be necessary to reduce some of the herds, owing to the scarcity of hay on the reserve. He repeated the same assessment in 1910, 1911, and 1912, but in 1910 he placed less emphasis on cattle-raising than on farming, pointing to the excellent quality of the Cowessess farmland and the abundance of timber. In 1913, Millar's report contained no reference to a lack of hay. That same year, Inspector Graham noted that Indians from all four reserves (Cowessess, Kahkewistahaw, Ochapowace, and Sakimay) sold a great deal of hay and wood in the neighbouring towns. There were no other references in the annual reports to a shortage of hay until 1931, during the prairie drought, nor is there any evidence that band members complained about a shortage of hay in the period following the surrender.

Only two Cowessess band members, Alex Gaddie and Zac LeRat, submitted claims for compensation for improvements to the hay lands. The 1907 Surrender Agreement had provided for the payment of compensation of \$5 per acre to owners for improved land, to be paid at the time of surrender. There is no record of Graham having paid compensation to any band members.

In November 1907, Alex Gaddie submitted a claim for \$700 to Commissioner Laird, asking for compensation for improvements to a hay slough on the surrendered land. Later that month, in his report to Laird, Inspector Graham adamantly opposed granting Gaddie any compensation. Based on Graham's information, Laird wrote to Gaddie that the matter had been brought up at the surrender meeting and that Gaddie had been told it was not fair to ask the band members to pay from their own funds for the work that had benefited Gaddie personally. Laird repeated Graham's account that he had personally informed Gaddie that no compensation would be given and, in spite of that position, Gaddie had voted for surrender.

In June 1908, Broadview merchant W.C. Thorburn wrote to Laird in Gaddie's defence, reporting on the considerable amount of work Gaddie had done to make the meadow suitable for working with a hay sweep and disputing the account given to Laird by Graham. The relationship between Gaddie and Thorburn is unknown, but the latter was one of the signatories on the 1902 petition in favour of opening up the southern portions of the Crooked Lake reserves to settlers. He reminded Laird that Gaddie, with the deciding vote, could have blocked the surrender. Gaddie was

the 15th to vote in favour of surrender out of the 29 votes cast. Thorburn also wrote that, if Gaddie had indicated he would vote against surrender, hardly anyone else would have voted for it, and he had reason to believe that Gaddie would not have voted for surrender if he had not thought he would be paid for his work. In addition to Thorburn, E.D. Sworder, the Department of Indian Affairs clerk who had been present at the surrender meeting, and 13 other Cowessess band members supported Gaddie's version of events. The band members stated that part of the agreement arrived at between the Indians and Graham was that all improvements on surrendered land were to be paid, and that no mention had been made that Gaddie would not be paid for his improvements. Graham continued to deny Gaddie's claim, and he added that, had Gaddie demanded compensation in front of band members, and had Graham agreed to it, the Indians would never have consented to the surrender, because they knew his claim was unreasonable. Graham maintained the position that Gaddie had been amply repaid for his work on the slough, but, in the spring of 1909, after Gaddie had acknowledged having personally benefited from the work, officials agreed to pay him \$250 for his improvements. Also, Zac LeRat was paid a small amount for his work on the surrendered land.

In 1911, a delegation of Indians went by rail to Ottawa to present grievances to the government. Representing Cowessess were Alex Gaddie, who acted as interpreter, as well as Louis O'Soup and Loud Voice, neither of whom had been present at the surrender. The Cowessess delegates wanted information on the amount of money that had been paid for the land which had already been sold and on details of the expenses, but they did not question the legitimacy of the surrender. The Superintendent General, Frank Oliver, provided a written statement of the accounts.

Shortly after the delegates returned to their reserves, Barrister H.W. MacDonald of Broadview made inquiries on the Band's behalf in respect of the department's explanation of the land-sale proceeds. Again, no concerns were raised about the surrender itself. In 1921, another barrister, G.C. Neff from Grenfell, wrote to the department on behalf of the Cowessess Band, stating that the Indians were dissatisfied with the interest they were receiving and claiming they had been told at the time of the surrender that each would receive around \$50 per year. The Band's lawyer, however, raised no complaint about the surrender itself. Although there is nothing on the record in response to this inquiry by Neff, there are also no other references to an understanding by band members that they were promised \$50 per person annually.

**PART III**  
**ISSUES**

In this report, the Indian Claims Commission is inquiring into three questions concerning the issue of the Crown's pre-surrender fiduciary duty:

1. Relative to the January 29, 1907, surrender of a portion of IR 73:
  - (a) What was Canada's pre-surrender fiduciary duty?
  - (b) Did Canada breach its pre-surrender fiduciary duty?
  - (c) Does Canada owe an outstanding lawful obligation to the Cowessess First Nation as a result of the answer to questions 1(a) or 1(b) above?



**PART IV**  
**ANALYSIS**

**REASONS OF COMMISSIONER PURDY AND COMMISSIONER DICKSON-GILMORE**

The Indian Claims Commission's inquiry into the 1907 Cowessess First Nation's surrender, commencing in 1996, was divided into two phases by agreement of the parties. The panel for phase I addressed the allegation of a breach of the 1906 *Indian Act*<sup>10</sup> surrender provisions; its 2001 report recommended that the Government of Canada accept the Cowessess First Nation's specific claim for negotiation. When the government declined to accept the ICC's recommendation in 2002, the Commission agreed in October of that year to proceed with phase II of the inquiry, addressing the First Nation's allegation that the Crown breached its fiduciary duty when taking the 1907 surrender.

The present phase II of this inquiry must be distinguished from phase I on a number of points. No members of the panel for phase II were on the panel for phase I. Further, the record for phase II, apart from four recent reports submitted by the First Nation, is the 1999 record produced for phase I. We regret that the record is deficient with regard to several questions relevant to the issue of fiduciary duty. It is entirely possible that no better evidence exists which would have aided our inquiry; nevertheless, it is important to note that our findings are informed by a record that contains serious gaps in information relevant to the Crown's fiduciary duty. The record is also problematic in that some of the Crown's historical documents provide information about the Crooked Lake Agency bands in general, without clearly distinguishing the Cowessess Band from the others, making it difficult to extrapolate evidence material to the Cowessess claim in particular. A final evidentiary concern arises from the First Nation's decision not to hold a second community session, relying instead on the transcript of the March 1998 community session in phase I. This decision was made for valid reasons; nevertheless, it is important to note that this panel did not have an opportunity to hear the community's evidence and to ask questions specifically related to the issue of fiduciary duty.

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<sup>10</sup> It should be noted that although the date of the surrender vote is January 29, 1907, the statute in force at the time was the *Indian Act*, RSC 1886, c. 43, and not the *Indian Act*, RSC 1906, c. 81. The consolidated acts of 1906 were not proclaimed until January 31, 1907. Therefore, the relevant act in force for the date of the surrender is the 1886 Act and the relevant act in force for the required Order in Council to give effect to the surrender is the 1906 Act. The surrender provisions of the 1886 Act are s. 39, as opposed to s. 49 of the 1906 Act. Phase I of this inquiry proceeded under the mistaken impression that the 1906 Act was in force. Although the relevant sections of the 1886 and 1906 Acts are paragraphed differently, the requirements are identical.

Although this report draws upon the transcript of the 1998 community session where possible, the panel's ability to assess the Elders' evidence is constrained by not having been present to hear their testimony.

For the reasons that follow, we find that the Cowessess First Nation has not established that the Crown breached its fiduciary duty to the First Nation when it took a surrender of the southern portion of IR 73 in 1907.

### **Phase I: Did Canada Comply with the *Indian Act***

To assist the reader unfamiliar with phase I of this inquiry, we shall begin with a brief overview of the findings of the previous panel on the question of compliance with the *Indian Act*. Those findings are not disturbed by our findings on the question of the pre-surrender fiduciary duty. In other words, the Commission's recommendation that Canada negotiate the claim of the Cowessess First Nation on the basis of the Crown's breach of the *Indian Act* remains unchanged.

The first phase of the inquiry, which dealt with the question of whether the 1907 surrender met the requirements of the *Indian Act*, is found in the Commission's report *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223. The response of the Minister of Indian Affairs and Northern Development to the ICC's report is at (2002) 15 ICCP 376. The issues in phase I centred on the interpretation of the surrender provisions of the 1906 *Indian Act* – specifically, whether the majority required for a surrender was a majority of eligible voters actually voting or a majority of eligible voters in attendance at a surrender meeting, whether or not they voted. The second and third issues required the Commission to determine how many eligible voters attended the Cowessess surrender meeting of January 29, 1907, and whether a majority of the eligible voting members assented to a surrender within the requirements of the *Indian Act*.

The panel in phase I decided that the required majority was the one that best protected the interests of the entire band with respect to its commonly held land, and it preferred the consent of a larger number of band members over a smaller number. The phase I panel decided that the majority required for a valid surrender under the *Indian Act* was a majority of eligible voters present at a



surrender meeting, not a majority of eligible voters who voted.<sup>11</sup> On the second issue, the phase I panel concluded that at least 30 eligible voters attended the surrender meeting,<sup>12</sup> one more than the 29 who actually voted. On the third issue, it concluded that the surrender failed because a majority was not achieved with a vote of 15 out of 30 in favour of surrender.<sup>13</sup> In other words, the eligible voter who attended but abstained from voting was counted to determine the quorum, the effect of which was to count the abstention as a vote against surrender. Given the finding that 30 eligible voters attended the meeting and only 15 voted in favour, the surrender would have failed regardless of the validity of the vote cast by a person identified in the minutes as “Nap Delorme.” Consequently, it was unnecessary for the phase I panel to make a determination concerning his identity.

### **Phase II: Did Canada Breach Its Pre-surrender Fiduciary Duty?**

The phase II panel is required to consider the nature of Canada’s fiduciary duty to the First Nation prior to the surrender vote; whether that duty was breached; and whether Canada accordingly owes an outstanding lawful obligation to the First Nation. An examination of the Crown’s fiduciary duty in the context of a surrender requires, in addition to reviewing the history of the band and its reserve, a careful look at the period of time from the first discussions on surrendering reserve land – whether these were initiated by the band, the Crown, or a third party – up to and including the surrender meeting, vote, and execution of the surrender documents.

In addition, the “pre-surrender” period for a given surrender necessarily includes not only the period leading up to the surrender vote but also, where the vote favoured surrender, the period between the vote and the subsequent acceptance or refusal of the surrender by the Governor in

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<sup>11</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 263.

<sup>12</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 270, 272.

<sup>13</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 270.

Council, pursuant to the *Indian Act* requirement.<sup>14</sup> We recognize that the previous panel, in its decision in phase I of this inquiry, held that the Band did not vote to surrender the lands in question. However, in 1907, Canada treated the proposed surrender as having been assented to by the Band, and it was subsequently accepted as such by the Governor in Council. In order to address the nature of the duty that would have been owed by Canada to the First Nation over that post-vote period, we are required to make an assumption, for that portion of the analysis, that the Band voted in favour of the surrender.

For the purpose of phase II of this inquiry, the following section of the 1886 *Indian Act*, as amended in 1906, is relevant:

**70.** The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner and by whom, the moneys arising from the disposal of Indian lands, ..... for the benefit of Indians (*with the exception of such sum, not exceeding fifty percent of the proceeds of any lands .... as is agreed at the time of the surrender to be paid to the members of the band interested therein*), shall be invested from time to time, ..... and he may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys .... *and may authorize and direct the expenditure of such moneys for surveys, for compensation to Indians for improvements or any interest they have in lands taken from them ...*<sup>15</sup>

At the oral hearing into phase II, the panel confirmed the parties' earlier agreement that for the purpose of phase II, evidence related to "Nap Delorme" could be used to make arguments on the Crown's fiduciary duty. The panel further confirmed that Canada's previous counsel had reserved the right to object in future should the Commission re-open the inquiry into the identity of "Nap Delorme."<sup>16</sup> Canada's written submissions in phase II also assert that "the number of eligible voters

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<sup>14</sup> *Indian Act*, RSC 1886, c. 43, s. 39

<sup>15</sup> *Indian Act*, RSC 1886, c. 43, s. 70, as am by *An Act to Amend the Indian Act*, S.C. 1906, c. 20, s. 1. Emphasis added.

<sup>16</sup> ICC Transcript, September 21, 2004 (p. 13, Commissioner S. Purdy).

at the 1907 surrender meeting was dealt with in Phase I, including the issue of the identity of a ‘Nap Delorme.’”<sup>17</sup>

The Indian Claims Commission has, many times, considered the question of the Crown’s fiduciary duty to First Nations in the context of reserve land surrenders.<sup>18</sup> We shall, therefore, confine our analysis to the leading court decision on the pre-surrender fiduciary duty, *Blueberry River v. Canada (Department of Indian Affairs and Northern Development)*,<sup>19</sup> which is referred to as *Apsassin*. Both parties acknowledge the *Apsassin* case in their arguments; the First Nation, however, takes a more expansive view than Canada of the Crown’s pre-surrender fiduciary duty by also relying on the Supreme Court of Canada decision, *Wewaykum Indian Band v. Canada*.<sup>20</sup> Accordingly, we shall also comment on the relevance of this decision to the claim. Our colleague discusses the *Haida Nation*<sup>21</sup> and *Mikisew Cree First Nation*<sup>22</sup> decisions in his reasons. However, as both judgments of the Supreme Court of Canada were released following the parties’ arguments in this inquiry, we will refrain from commenting on their relevance, if any, to a claim concerning pre-surrender fiduciary duty.

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<sup>17</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 5.

<sup>18</sup> The pertinent ICC reports are *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Duncan’s First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281; and *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263.

<sup>19</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

<sup>20</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

<sup>21</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

<sup>22</sup> *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 SCR 388.

***Pre-Surrender Fiduciary Duty: Apsassin***

In *Apsassin*, the Beaver Band in 1940 surrendered the mineral rights to IR 172 in trust “to lease” for its benefit. In 1945, the Band surrendered all of IR 172 “to sell for sale or lease.” Three years later, the Department of Indian Affairs (DIA) transferred the surrendered land to the Director of the *Veterans’ Land Act* (DVLA) to be used for the settlement of veterans returning from World War II. In what the Supreme Court of Canada described as “inadvertence,” the DIA also transferred the mineral rights; however, the lands were later found to contain deposits of oil and gas. The Beaver Band sought a declaration that the surrender was invalid on the grounds that the Crown had, among other things, breached its fiduciary duty to the Band. With respect to the Crown’s pre-surrender fiduciary duty, the two judges who wrote opinions differed in their approaches but agreed that, with regard to the surrender itself, the Crown had discharged its duties. Both Gonthier and McLachlin JJ saw the *Indian Act*’s purpose in requiring valid band consent and Crown consent to a surrender as achieving a balance between a First Nation’s autonomy and the Crown’s role as protector.

In the circumstances of a band’s reserve land and a proposal to surrender the land, Madam Justice McLachlin analyzed the Crown’s pre-surrender fiduciary duties from two perspectives: first, whether the *Indian Act* imposed a duty on the Crown to prevent the surrender of the reserve; and, second, whether the circumstances of the case gave rise to a fiduciary duty on the Crown with respect to the surrender. On the first question, she expressed the view that

the *Indian Act*’s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band’s consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band’s decision was foolish or improvident – a decision that constituted exploitation

– the Crown could refuse to consent. In short, the Crown’s obligation was limited to preventing exploitative bargains.<sup>23</sup>

Madam Justice McLachlin limited the Crown’s duty in a pre-surrender context to withholding the consent required by the *Indian Act* where the surrender was exploitative. In the circumstances of *Apsassin*, she found that the surrender of the reserve, when viewed from the perspective of the Band, made good sense.<sup>24</sup>

She then went on to consider the second question, “whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*.”<sup>25</sup> On the facts of *Apsassin*, McLachlin J decided that there was no need to superimpose a fiduciary obligation on the Crown leading up to the surrender. Although the Band “trusted the Crown to provide it with information as to its options and their foreseeable consequences”<sup>26</sup> in relation to both the surrender of the reserve and the acquisition of new reserves better suited to its chosen way of life of hunting and trapping, the evidence did “not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown.”<sup>27</sup>

Mr Justice Gonthier in *Apsassin* preferred an intention-based approach, which meant examining the understanding and intention of the band members at the time, “in order to give effect to the true purpose of the dealings”:

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<sup>23</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370–71 (sub nom. *Apsassin*), McLachlin J.

<sup>24</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*), McLachlin J.

<sup>25</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*), McLachlin J.

<sup>26</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372 (sub nom. *Apsassin*), McLachlin J.

<sup>27</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372 (sub nom. *Apsassin*), McLachlin J.

As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. *It is therefore preferable to rely on the understanding and intention of the Band members ...* In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, *in order to give effect to the true purpose of the dealings.*<sup>28</sup>

Gonthier J emphasized that the Beaver Band understood that, by agreeing to the surrender, the Band would be transferring all its rights in the reserve to the Crown in trust, that the Crown would sell or lease the land for the benefit of the Band, and that the money would be used to purchase better reserve sites, which had already been identified by the Band. He also pointed to the Band's intention, as evidenced by the terms of the 1945 surrender instrument, stating:

I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention.<sup>29</sup>

Mr Justice Gonthier did not elaborate on what he meant by "tainted dealings" and, to date, there has been little judicial interpretation of the term. In *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, Mr Justice Laskin of the Ontario Court of Appeal found that the presence of the prospective purchaser at the surrender meeting, bearing cash and offering to pay a bonus to each voting member, did not affect the validity of the surrender. In applying *Apsassin*, Mr Justice Laskin concluded that there was no evidence in this case that the cash payments, "in the words of McLachlin J, vitiated the 'true intent' or the 'free and informed consent' of the Band or, in the words of Gonthier J, 'made it unsafe to rely on the Band's understanding and intention.'"<sup>30</sup>

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<sup>28</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 358–59 (sub nom. *Apsassin*), Gonthier J. Emphasis added.

<sup>29</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362 (sub nom. *Apsassin*), Gonthier J.

<sup>30</sup> *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR 3rd 97 at 106 (Ont. CA).

The decision, however, did not deal with the plaintiff's further claim that the Crown breached its fiduciary duty by permitting a third-party purchaser to offer a bonus that was tantamount to a bribe, resulting in exploitation or tainted dealings. Mr Justice Laskin commented that, at trial, such circumstances "may afford grounds for the Band to make out a case of breach of fiduciary duty,"<sup>31</sup> but he did not elaborate further.

Although McLachlin and Gonthier JJ differed in approach, they were of the same mind on one important principle – that bands are assumed to be competent and capable decision-makers whose decisions are to be respected and honoured, except where there are circumstances indicating that this assumption is incorrect.

The Commission has been guided in previous inquiries by the four criteria established in *Apsassin* for determining whether the Crown breached its pre-surrender fiduciary duty:

where a Band's understanding of the terms of the surrender is inadequate; where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the Band's understanding and intention; where the Band has abnegated its decision-making authority in favour of the Crown; and where the surrender is so foolish or improvident that it must be considered to be exploitative.<sup>32</sup>

More recently, the Supreme Court considered the general nature of the fiduciary duty owed to Aboriginal peoples in *Wewaykum Indian Band v. Canada*.<sup>33</sup> In *Wewaykum*, two non-treaty bands in British Columbia claimed each other's reserve land, both asserting that they would have held the two reserves to the exclusion of the other had it not been for breaches of fiduciary duty by the Crown. Mr Justice Binnie described the issue in *Wewaykum* as defining the scope of the Crown's fiduciary duty in respect of "a government program to *create reserves* in what was not part of the

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<sup>31</sup> *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR 3rd 97 at 106 (Ont. CA).

<sup>32</sup> ICC: *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 95.

<sup>33</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

‘traditional tribal lands.’”<sup>34</sup> In other words, the case concerned the Crown’s fiduciary duty during the pre-reserve period when the Crown was in the process of creating reserves.

The *Wewaykum* decision moves beyond the facts before the court – pre-reserve creation – and sets out some general propositions on the Crown’s fiduciary duty related to reserve land.<sup>35</sup> Mr Justice Binnie first looks at the Crown’s fiduciary duty after a reserve is created, when “the content of the Crown’s fiduciary duty expands to include the protection and preservation of the band’s quasi-proprietary interest in the reserve from exploitation.”<sup>36</sup> A proposal to expropriate reserve land for a hydroelectric project, for example, would trigger this duty. The band alone would have no authority to withhold its consent and would have to rely completely on the Crown to protect its legal interests from exploitation by the expropriating authority.<sup>37</sup>

The second scenario described by Binnie J occurs at the time of reserve disposition, when “the content of the fiduciary duty may change (e.g. to include the implementation of the wishes of the band members).”<sup>38</sup> Of particular interest to the claim before us is the fact that Mr Justice Binnie quotes with approval Madam Justice McLachlin’s statement in *Apsassin* that the band has a right to decide whether to surrender its reserve, that its decision is to be respected, and that only if the decision were “foolish or improvident – a decision that constituted exploitation,”<sup>39</sup> should the Crown refuse to consent. Mr Justice Binnie also finds Madam Justice Wilson’s statements on the fiduciary duty in the 1984 surrender case, *Guerin v. The Queen*,<sup>40</sup> to be consistent with McLachlin J’s conclusion that, in a pre-surrender context, the Crown’s duty is limited to preventing exploitative bargains:

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<sup>34</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 284. Emphasis in the original.

<sup>35</sup> Such comments not directly related to the facts of a case are “*obiter dicta*.”

<sup>36</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 290.

<sup>37</sup> The fiduciary duty in the context of expropriation of reserve land is examined in *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746. See also ICC, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21.

<sup>38</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295.

<sup>39</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 295–96.

<sup>40</sup> *Guerin v. The Queen*, [1984] 2 SCR 335.



Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.<sup>41</sup>

Mr Justice Binnie declines to comment on the post-surrender fiduciary duty of the Crown; however, the surrender instruments in use in the early 1900s are clear that the Crown assumes decision-making authority to dispose of the land and must, as a fiduciary with the unilateral power to conduct the sale or lease, exercise that power or discretion solely for the benefit of the band.

We agree with Canada that the leading case on the Crown's pre-surrender fiduciary duty remains *Apsassin*, and it is this case that will be applied to the facts of the Cowessess claim. *Wewaykum*, although not inconsistent with *Apsassin*, dealt with different facts – namely, the nature of the Crown's fiduciary duty in the period before reserves were created. What is instructive, however, is that Mr Justice Binnie in *Wewaykum* approves of Madam Justice McLachlin's approach in *Apsassin*.

### ***The Test to Be Applied***

Canada submits that, based on *Apsassin*, the “guiding principle” is established “that aboriginal peoples are independent actors and their decisions with respect to the surrender of their lands are to be respected and honoured.”<sup>42</sup> Canada further argues that its pre-surrender fiduciary duty was limited to

(a) not consenting to an exploitative bargain, (b) not engaging in tainted dealings so as to subvert the Band's understanding and intention regarding the surrender, and (c) if the Band had ceded its decision-making authority to the Crown, Canada could have an additional duty to exercise the ceded power with loyalty, care, and solely for the benefit of the Band.<sup>43</sup>

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<sup>41</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 296.

<sup>42</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 6.

<sup>43</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 1.

The First Nation submits that, in accordance with *Apsassin* and *Wewaykum*, in a surrender situation, the Crown had to

(1) act in the best interests of the Band and place the Band's interest in the subject reserve ahead of all others; (2) provide the Band with full disclosure of the terms and foreseeable consequences of the proposed surrender in order that the voting members of the Band have an adequate understanding thereof and can make an informed decision on the surrender question; (3) subject to paragraph 4 below, respect the decision-making authority of the Band concerning the surrender question and not seek to undermine, circumvent or overpower that authority; (4) consider whether the foreseeable consequences of the proposed surrender would be foolish and improvident of the Band's interests (i.e. exploitative), and if so, withhold the required consent of the Crown to the proposed surrender.<sup>44</sup>

Although the parties' descriptions of the fiduciary duty of the Crown in a pre-surrender situation overlap, the First Nation casts a wider net than Canada. It focuses almost exclusively on the conduct of the Crown, while minimizing both the knowledge and understanding of the band members. As we have stated, the appropriate test for the Crown's pre-surrender fiduciary duty remains the *Apsassin* test. As such, we shall address the following four major areas of inquiry undertaken in the *Apsassin* case to determine if the Crown breached its fiduciary duty:

- 1 whether the Cowessess Band's understanding of the proposed surrender was inadequate;
- 2 whether the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the Band's understanding and intention;
- 3 whether the Band abnegated its decision-making authority in favour of the Crown; and
- 4 on the assumption that the Band voted in favour of surrender,<sup>45</sup> whether the Band's surrender was so foolish or improvident that it must be considered to be exploitative.

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<sup>44</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, pp. 6–7.

<sup>45</sup> As stated earlier, for the portion of the analysis covering the period between the vote and the subsequent acceptance or refusal of the surrender by the Governor in Council, we must assume that the Band voted in favour of the surrender.

### **The Band's Understanding of the Proposed Surrender**

In *Apsassin*, Gonthier J focused on the question of whether the Beaver Band understood that it was giving up forever its claim to IR 172. In the circumstances of this inquiry, the question which must be considered is whether the Cowessess Band understood that, in consenting to the surrender, it would be giving up forever all claim it had to the 33 southernmost sections of land in IR 73, which included most of its hay lands. If the Band understood the transaction as well as its permanency and then voted in favour of surrender, the Crown would have a corresponding duty, as affirmed by *Apsassin* and *Wewaykum*, to respect the intention and wishes of the Band.

### ***The Surrender Itself***

We have little on the record from the perspective of the Cowessess Band, including Elders' testimony, to assist us in knowing whether their ancestors in 1907 understood the meaning and outcome of the surrender.

We do have, however, a written record of the meetings at which the surrender was discussed. Inspector William Graham met with the Cowessess Band twice, the first time on January 21, 1907, and then eight days later on January 29, 1907.

At the first meeting, on January 21, both Inspector Graham and Indian Agent Matthew Millar were present, as well as interpreter Peter Hourie. The minutes as recorded by Agent Millar state:

The meeting was called for the purpose of considering a proposition for the surrender of a portion of their lands being on the south side of the Reserve – notice of which had been given through the Chief Joe LeRat and Headman Ambrose Delorme.

Roll being called the following being present answered to their names.

Mr. Inspector Graham then addressed all present at length explaining the terms of the agreement which had been made by the Department and which was now submitted to them to decide and vote either for acceptance of the proposition or rejection as they may determine by their votes.

[Illegible word.] Chief Joe LeRat then spoke and said that he thought the terms of the proposition had been well explained and that they understood it. Mr. Graham told them that he would be pleased to answer any question or make any further explanation [sic] they could suggest – and wanted them to take plenty of time before

reaching a decision. Meeting adjourned till Tuesday January 29th to meet again at the same place.<sup>46</sup>

There is no evidence of a vote taken at the January 21 meeting, and, although there is disagreement about the illegible word, it is impossible to say what it is. The First Nation submits that the faint marking is probably the word “Refused.”<sup>47</sup> Canada disagrees and, in its written submissions, states that the word “is not clear on the document, and certainly does not logically follow given the content of the next paragraph.”<sup>48</sup> Counsel for Canada goes on to state that “[t]he recorded instruction to take plenty of time to reach a decision, and the use of the word ‘adjourned’, coupled with the Chief’s comments regarding their understanding of the proposition, leads to the conclusion that the surrender was proposed and explained, and the meeting adjourned for further discussion amongst Band members.”<sup>49</sup> We note that, even if the illegible word was “Refused,” another possible explanation is that the band members were asked but refused to take a vote at that meeting. The minute books of Cowessess Band indicate that the Indian agents, from Allan McDonald through to Matthew Millar, were conscientious in recording votes, always by name and often by number. The record also indicates that Inspector Graham did take votes at the initial meetings with the Ochapowace and Kahkewistahaw bands and did record their results, although they rejected surrender. Thus, it would seem logical, in the absence of any evidence pressing an alternative explanation, that had Graham taken a vote on January 21, he would have recorded the outcome. We agree with Canada’s counsel, therefore, that no vote was taken at the meeting of January 21. Instead, officials discussed the surrender proposal with the Band and agreed to return for a second meeting on January 29.

In any event, the record of Chief LeRat’s statements at the meeting indicates that the band members did in fact understand the procedure and the surrender proposal. The minutes of the

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<sup>46</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

<sup>47</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 27.

<sup>48</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 29.

<sup>49</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 29.

surrender meeting eight days later also refer to the “Adjourned meeting,” adding that the second meeting on January 29 was held “for the further consideration of an agreement for the surrender,” and that “Mr. Graham again carefully made further explanation of the matter under consideration.”<sup>50</sup>

### ***The Band’s Knowledge of the Importance of the Land***

The next question to be considered is whether the Cowessess Band understood the importance of the reserve land proposed for surrender. There is considerable evidence in the written record that attests to the success of the Cowessess band members as farmers relative to the other Crooked Lake Agency bands.<sup>51</sup> This evidence points to a Band that was capable of appreciating its circumstances and making decisions in its own best interests. The Cowessess Band was considered by Crown officials to be more progressive than other bands; as early as 1891, Inspector of Indian Agencies T.P. Wadsworth wrote that the Cowessess Band

differs somewhat from other bands from the fact that within it are found the opposite sides of life, riches and poverty (both viewed from an Indian standpoint). The former state is unique in Indian life now-a-days, while the latter is generally chronic.<sup>52</sup>

Cowessess was chosen to house the Agency’s buildings, including the gristmill, farm instructor’s house, horse stable, implement shed, warehouse, and carpenter shop, blacksmith shop, and cow stable.<sup>53</sup> By 1896, Inspector A. McGibbon was able to report that the Cowessess reserve, “owing to

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<sup>50</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 55).

<sup>51</sup> A note here about the record assembled for this inquiry and about references within the documents to the Crooked Lake reserves, Crooked Lake Band, or the Crooked Lake Agency. The Cowessess Band was one reserve among four that made up the Crooked Lake Agency, the other three being Sakimay, Kahkewistahaw, and Ochapowace. Some of the documents from the field by the agents, inspectors, and superintendents refer to the agency as a whole and not only to Cowessess; in other documents, the agents note the particulars of the ancestry, population, social development, and economic progress of each band or state if one band is an exception to the others. Where possible and appropriate to the subject, we have relied on references to the Cowessess Band alone.

<sup>52</sup> T.P. Wadsworth, Inspector of Indian Agencies, to the Superintendent General of Indian Affairs (SGIA), September 26, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 142 (ICC Exhibit 5, p. 102).

<sup>53</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 224–26 (ICC Exhibit 5, p. 203).

its central position, the agency buildings being on it, has made greater advancement than any of the others, especially in farming.”<sup>54</sup>

From the beginning of its settlement on the reserve, the Cowessess Band kept stock, both cattle and horses, in addition to farming. Stock-raising was encouraged by the Crown, as it was felt that some of the reserve was well suited to it, particularly because the southern portion was largely wild hay surrounding sloughs. By 1892, Agent McDonald had noted the band members’ progress and that, as a result of their agricultural pursuits, they would be able to pay off their debts and build better homes for themselves.<sup>55</sup>

Indian Agent McDonald paid particular attention to the need for all the Crooked Lake Agency bands to learn how to gather and store hay for the winter – an essential practice if stock was to be overwintered in good condition. The year 1893 was a bad one, with McDonald noting that the bands had lost 80 head of cattle owing to an exceptionally severe winter, with snow so deep the Indians could not bring the hay home from the prairies.<sup>56</sup> He was able to report that, by the next year, they had made advancements in the care of their stock, which he would be careful to promote.<sup>57</sup> In 1895, the Band needed to go to the Leech Lake reserve to cut hay, because a prairie fire during the summer had destroyed the wild hay in the southern part of the reserve.<sup>58</sup>

In August 1899, the Cowessess Band was described as being the “banner band of the agency.”<sup>59</sup> All the agents on record up to the time of the surrender – Allan McDonald, John P.

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<sup>54</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 224–26 (ICC Exhibit 5, p. 203).

<sup>55</sup> A. McDonald, Indian Agent, to the SGIA, July 30, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 158 (ICC Exhibit 5, p. 132).

<sup>56</sup> A. McDonald, Indian Agent, to the SGIA, July 31, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1893*, 64 (ICC Exhibit 5, p. 148).

<sup>57</sup> A. McDonald, Indian Agent, to the SGIA, July 20, 1894, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1894*, 63 (ICC Exhibit 5, p. 166).

<sup>58</sup> A. McDonald, Indian Agent, to the SGIA, July 20, 1895, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1895*, 96 (ICC Exhibit 5, p. 190).

<sup>59</sup> Alex McGibbon, Inspector of Indian Agencies, to the SGIA, August 18, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 197 (ICC Exhibit 5, p. 274).

Wright, Magnus Begg, and Matthew Millar – noted the progress made by the Cowessess Band in its ability to become self-sufficient through agriculture. Band members would also have known difficult years when there were crop failures. In addition, after losing most of their hay lands once again to fire in June 1900,<sup>60</sup> the Band knew the consequences of not having ready access to hay from the south.

One of the few negative observations about the Crooked Lake Agency comes from William Graham, the newly appointed Inspector at Balcarres. In his 1905 annual report about the agency to Frank Pedley, Deputy Superintendent General of Indian Affairs, Graham reported that “the losses of cattle during the winter 1903–04 were heavy, and I cannot attribute part of this heavy loss to anything but shortage of hay and poor feeding by the Indians. During the winter of 1904–05 these Indians had ample provision in the way of hay for their stock, and the loss amounted to practically nothing.”<sup>61</sup> After describing the poor condition of the houses on Kahkewistahaw and Ochapowace compared to Cowessess and Sakimay, Graham concluded:

Speaking generally, the Indians of this agency are not doing as well as they should. There are a great many able-bodied men on the reserves who are leading a hand-to-mouth existence by selling wood and hay and who could, if they desired[,] have the best farms in the territories. The land is lying idle. *Cowessess band has one of the best farming reserves in the country.* The Indians are not making use of the horses and machinery they have.<sup>62</sup>

Graham’s remarks do not indicate that he was singling out the Cowessess Band for criticism. Although he mentioned the high quality of the Cowessess farm land, his statements about “the Indians” appear to reflect his opinion of the progress of all four agency bands.

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<sup>60</sup> John P. Wright, Indian Agent, to the SGIA, July 27, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 150 (ICC Exhibit 5, p. 308).

<sup>61</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA), October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 185 (ICC Exhibit 5, p. 439).

<sup>62</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 185–86 (ICC Exhibit 5, pp. 439–40). Emphasis added.

In his first annual report after becoming Indian Agent, Matthew Millar reported in 1905 that “about one half [of] the Indians in [the Cowessess] band carry on farming and cattle-raising more or less systematically; some of these have from two to four good work horses each, and the machinery requisite for farm work. They add to their incomes by the sale of wood and hay.”<sup>63</sup>

Why the Cowessess Band was more progressive and successful than any of the other Crooked Lake Agency bands is uncertain. What we do know from the record is that, at the end of the 1800s, the majority of the Indians of the Ochapowace and Kahkewistahaw bands were described as being Cree, and the majority of the Sakimay Band, Saulteaux. In comparison, the majority of the Indians of the Cowessess Band were described as “French half-breeds with a few Saulteaux and Cree.”<sup>64</sup> The influence of Chief O’Soup and his alliance with the Métis during the North-West Rebellion would appear to be one factor in understanding why the Cowessess Band had a different population base than the other Crooked Lake Agency bands. Successive Indian agents noted these differences in their annual reports; Agent Magnus Begg observed in 1902 that “the members of this [the Cowessess] band being mostly half-breeds, their way of farming more closely approaches the ways of the white man.”<sup>65</sup> In 1903, Begg reported that the fact that they were primarily “half-breeds” explained their ability to get ahead:

The Indians on this reserve are in better circumstances than others in this agency, being mostly half-breeds and looking further ahead. They make a good living by farming, stock-raising and selling fire-wood and hay ... In all they are comfortable and do not require much assistance when crops are good.<sup>66</sup>

This Band, unlike the other agency bands, was also predominantly Roman Catholic. Begg wrote that “[t]he majority of this band, who are half-breeds, are members of the Roman Catholic Church, and

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<sup>63</sup> Matthew Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1905, Canada, *Annual Report of the Department of Indian Affairs, for the Year Ending June 30, 1905*, 122 (ICC Exhibit 6, p. 495).

<sup>64</sup> J.P. Wright, Indian Agent, to the Superintendent General of Indian Affairs, August 25, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 136 (ICC Exhibit 5, p. 240).

<sup>65</sup> Magnus Begg, Indian Agent, to the SGIA, August 12, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 140 (ICC Exhibit 5, p. 373).

<sup>66</sup> Magnus Begg, Indian Agent, to the SGIA, August 17, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 159 (ICC Exhibit 5, p. 396).



attend the services at the Roman Catholic mission, which is on the reserve, in charge of Rev. S. Perrault.”<sup>67</sup> William Graham also wrote in 1906 that

Coweses [*sic*] Band are largely Roman Catholic half-breeds, about 95% I should say, and the people are to a great extent, under the influence of the Priest, and in speaking to that gentleman on the matter, he is of the opinion that a surrender could be obtained, if properly handled.<sup>68</sup>

Although the record does not adequately explain all the reasons for the Cowessess Band’s success, there is no question that the Cowessess Band in the early 1900s was seen as a model for other bands in its work ethic, its ability to adapt successfully to farming and stock-raising, and its ability both to live off the land and to diversify its economy. In addition to selling surplus farm produce, band members sold senega root, firewood, and tanned hides; some also worked off reserve for settlers.<sup>69</sup>

Further evidence that the members of the Cowessess Band engaged in trade with their neighbours can be found in the 1900 annual report of Indian Agent Wright, in which he states:

Two or three [of the band members] have farm teams of heavy Canadian horses. One Indian sold a team of young heavy horses for \$325, another Indian had \$150 offered for his team of working horses ... They sell the grain that they have over and above their own requirements; sell firewood and hay in the towns, and along with the other bands furnish all the beef cattle required by the department, some fourteen thousand pounds in the year.<sup>70</sup>

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<sup>67</sup> Magnus Begg, Indian Agent, to the SGIA, August 17, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 159 (ICC Exhibit 5, p. 396).

<sup>68</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–15).

<sup>69</sup> K.J. Tyler describes some of this paid work in greater detail in “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 75, 79, 83–84 (ICC Exhibit 4, pp. 75, 79, 83–84).

<sup>70</sup> J.P. Wright, Indian Agent, to the SGIA, July 27, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 148 (ICC Exhibit 5, p. 307).

In respect of the agency in general, Indian Agent Millar wrote in his 1906 annual report, the last before the surrender was taken, that “it can be fairly claimed as one of marked progress all along the line. Measured from the white man’s standard, the progress may not seem great, but for Indians I think it is substantial.”<sup>71</sup> In his annual report of 1907, Inspector Graham noted that the Indians of the Crooked Lake Agency “were more fortunate than those of most of the other agencies in finding market for their grain. The Canadian Pacific railway was able to supply Broadview with cars.”<sup>72</sup>

Evidence of the importance of the railway to the Cowessess Band is thin; however, the Band was familiar with the Canadian Pacific Railway and would have understood the advantages of being close to the nearest railway town in order to move surplus hay from the south end of the reserve to market. Band members travelled by rail and worked on its construction. As early as 1883, Chief Cowessess and 112 of his followers took the train when they moved from Cypress Hills to the Cowessess reserve.<sup>73</sup> O’Soup himself travelled by rail from Broadview to Oak Lake in 1885, and, in 1886, he and a group of chiefs were invited to Ottawa, most certainly travelling by train.<sup>74</sup> Members of the Cowessess Band had also worked on the construction of the railway and train station at Broadview.<sup>75</sup>

Of particular significance to this claim is the observation by Indian Agent McDonald in 1892 that “[o]ne Indian, Nepahpeness, Cowessess’ Band, No. 73, sold and filled one carload of wheat, six hundred and eighty-seven bushels.”<sup>76</sup> Other band members also sold produce in Broadview, some

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<sup>71</sup> Matthew Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 128 (ICC Exhibit 5, p. 472).

<sup>72</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, April 11, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 154 (ICC Exhibit 5, p. 508).

<sup>73</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 21 (ICC Exhibit 4, p. 21).

<sup>74</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 38, 41–42 (ICC Exhibit 4, pp. 38, 41–42).

<sup>75</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 84 (ICC Exhibit 4, p. 84).

<sup>76</sup> A. McDonald, Indian Agent, to the SGIA, July 30, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 158 (ICC Exhibit 5, p. 132).

of which would have been shipped elsewhere by rail. It is apparent that the Band used roads connecting the north end of the reserve to Broadview and possibly to Grenfell, south of the reserve, in order to transport produce. Band members lived in the north, grew most of their produce in the north, and were already using the north and south roads to bring surplus produce to the railway towns. The record shows that, in 1889, the Band was willing to consent to a road allowance through the reserve from Broadview to the Qu'Appelle River.<sup>77</sup> Inspector of Indian Agencies McGibbon reported in 1896 that two double wagons belonging to band member Alex Gaddie passed the office one day "loaded with wheat to sell in Broadview."<sup>78</sup> Although we do not know the precise locations of the roads, at least two roads leading from the northern portion of the reserve to Broadview and Grenfell had become provincial road allowances (with band consent) by 1908.<sup>79</sup> Had the surrender of the southern portion not taken place, it is obvious that the proximity of the southern hay lands to the railway would have been advantageous for shipping surplus hay to markets. However, it is probable that band members knew that the surrender would make no difference to the distance they had to travel to bring excess produce from the north of the reserve to Broadview.

It would be unreasonable and would ignore the Band's perspective in 1907 to conclude that it did not know and appreciate the importance of the land considered for surrender. On the one hand, the evidence is clear that band members used the southern portion to obtain hay for their livestock and horses. On the other hand, the majority of the Band's population lived in the north part of IR 73, close to Crooked Lake and the Qu'Appelle River,<sup>80</sup> on the reserve's best agricultural land, in our view. The southern portion, in comparison, was largely unbroken, uncultivated hay lands comprising

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<sup>77</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, March 29, 1889 (ICC Exhibit 1, p. 5).

<sup>78</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 226 (ICC Exhibit 5, p. 204).

<sup>79</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, May 13, 1908 (ICC Exhibit 1, pp. 71–72).

<sup>80</sup> ICC Transcript, September 21, 2004 (ICC Exhibit 12, p. 19, Harold Lerat).

prairies and sloughs. Few people lived in the southern part,<sup>81</sup> and only two band members requested compensation for improvements they had made on the surrendered portion. One was Alex Gaddie, a prosperous farmer living in the north part of the reserve, who drained water from part of the southern hay lands, dug out rocks, and cut hay for his personal benefit; the other was Zac LeRat, also living in the north, who made improvements on the southern portion of the reserve.

Indian Agent Millar observed in 1906 that, on the Cowessess reserve, “hay is generally abundant, although not so convenient to the Indians’ homes as on the other reserves mentioned in this report.”<sup>82</sup> The Hoffman report in 1998 on the quality of the land concludes that the surrendered portion was “arable land” and that the “arable soil quality ... on Cowessess and the surrendered area is very similar between the two land bases,”<sup>83</sup> but in 1907 the southern portion was not being cultivated because the Band had prime farm land in the north, irrigated by rivers, that could be cultivated more easily. With a population in 1907 of 197 people<sup>84</sup> and a capacity to farm only a small percentage of the northern portion of the reserve, there was no need to expand the Band’s farming operations into the southern part. There is also evidence to indicate that no such need existed even as late as 1946; photos from that year show that only 5,093 of 28,372 acres, or 18 per cent of the residual reserve, were identified as “cultivated or cultivated grasslands.”<sup>85</sup>

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<sup>81</sup> Inspector Graham, in providing his opinion on taking surrenders at Cowessess, Ochapowace, and Kahkewistahaw, stated that surrenders at all three reserves would “not cut off more than four or five families, so you will see how little the land is used by the Indians.” W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 123).

<sup>82</sup> Matthew Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 126 (ICC Exhibit 5, p. 471).

<sup>83</sup> Hoffman & Associates Ltd., “Soil Comparison Study, 1907 Surrendered Area and Current Cowessess Reserve,” prepared for Cowessess First Nation, August 1998, p. 35 (ICC Exhibit 3, p. 35).

<sup>84</sup> Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, Part II, 83 (ICC Exhibit 5, p. 516).

<sup>85</sup> Mattila Appraisals Ltd., “Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve,” prepared for Cowessess First Nation [2004], p. 15 (ICC Exhibit 9a, p. 15). There is some disagreement about exactly how much land was included in the surrender. The description of the surrender provided by Chief Surveyor S. Bray in October 1906 stated that the surrender was 20,704 acres: S. Bray, “Description for Surrender,” October 2, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Documents, Exhibit 6, p. 129). Almost 100 years later, Mattila Appraisals stated that 21,041 acres were within the surrendered area: Mattila Appraisals Ltd., “Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve,” prepared for Cowessess First Nation, [2004], p. 2 (ICC Exhibit 9a, p. 2). Thirty-three sections amount to 21,120 acres if all sections are square and complete.

On the basis of the extant documentary record, which is neither confirmed nor refuted by oral or other evidence in this inquiry, we conclude that the Cowessess Band was comprised of able and experienced farmers who may reasonably be expected to have appreciated the nature and quality of the lands they worked. This knowledge would most certainly have extended to the surrendered portion of the reserve. It is also, in our view, reasonable to conclude that the Band's own experience in farming and ranching would have acquainted its members intimately with the extent to which they used the hay from the southern portion, as well as any advantages arising from the proximity of the southern reserve boundary to Broadview, Grenfell, and the railway that ran through these towns.

It is also apparent from the record that members of the Cowessess Band were aware of, and had considerable experience with, the benefits and advantages of the railway in their lives and for their agricultural pursuits. It may reasonably be inferred from the combined factors of the limited value of the surrendered portion in 1907, the limited use made of this land by the Band, the advantages of the railway for the Band's prosperity and mobility, and its own knowledge of all these things that the Cowessess Band knew the potential gains and losses offered by a surrender and took the action that best benefited its interests at the time.

### ***The Band's Experience with Other Surrenders***

The Cowessess Band had some experience with land surrenders before 1907 and would have had an understanding of the meaning and consequences of the 1907 surrender proposal. There is evidence that, prior to 1907, the Band had completed at least one road surrender.<sup>86</sup> In addition, as early as 1889, the Band considered a surrender for a road allowance, but, although it expressed a willingness at that time,<sup>87</sup> the surrender itself does not appear to have been discussed again until 1906. What is most instructive about that surrender meeting is that Chief Joe LeRat, on behalf of the Band, rejected the surrender proposal for the road allowance because "they were told that the road would be surveyed where the most benefit to Indians ... If the Department will have the survey so changed, ...

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<sup>86</sup> J.D. McLean, Secretary, DIA, to F.J. Robinson, Deputy Commissioner of Public Works for Saskatchewan, March 19, 1907, LAC, RG 10, vol. 3732, file 26623, (ICC Exhibit 6, p. 180).

<sup>87</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, March 29, 1889 (ICC Exhibit 1, p. 5).

the Indians will all, or would nearly all sign a release. They will not sign a release for the present survey, as it is not as they were promised.”<sup>88</sup> This refusal to consent to a surrender, less than a year before the January 1907 surrender, illustrates that the Chief and the band members knew they could refuse to consent to a surrender if they thought it was not to their benefit.

In 1903, Father Perrault asked the Band to surrender approximately 40 acres of land for the use of the Roman Catholic mission and school. According to the minutes of the April 3, 1903, Cowessess band council meeting, unanimous agreement was reached to surrender to the Crown the 40 acres as long as it was used for school and mission purposes.<sup>89</sup> In February 1907, just after the surrender of the southern portion of IR 73, Father Perrault convinced a majority to agree to surrender not 40 acres but 350 acres of land, albeit at a good price. But when the surrender was presented for a vote, the Band rejected it unanimously because the officials refused to pay out 100 per cent of the proceeds to the Band, as requested by Chief LeRat. The Cowessess Band ultimately voted on the surrender in November 1908, unanimously agreeing to surrender the 350 acres on the basis of a 50 per cent payout of the proceeds, the maximum permitted by the *Indian Act*. The idea of surrendering reserve land was not new to the Cowessess Band, and its previous experience with surrender proposals would have informed its knowledge and understanding of the surrender at issue.

The record also reveals that, by June 1904, the idea of surrendering the south portion of the reserve was already being discussed at the band level. Band member Kanas-way-we-tung wrote a letter to government officials in which he strongly opposed a surrender and requested a location ticket for the southwest corner of the reserve.<sup>90</sup> One month later, Commissioner Laird attended the annuity payments of the Crooked Lake bands, where he broached the subject of surrendering a strip of their reserves to enable the bands to get money to fence their land, as they were complaining about settlers’ animals straying onto their reserves. In his reporting letter to the Secretary of Indian Affairs,

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<sup>88</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, June 6, 1906 (ICC Exhibit 1, pp. 52–53).

<sup>89</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, April 3, 1903 (ICC Exhibit 1, p. 47).

<sup>90</sup> J.A. Sutherland, in charge, Crooked Lake Agency, to J.A.J. McKenna, Assistant Commissioner, Winnipeg, June 14, 1904, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 106).

Commissioner Laird stated that “Mr. Lash, of this office ... fully explained to the Indians the benefit they would derive by surrendering a strip of the reserve and a portion of the proceeds received from the sale being used to fence the reserve. The Indians appeared to appreciate the suggestion, but wanted time to think it over.”<sup>91</sup> Commissioner Laird also noted that the Cowessess Band, headed by “Chief Joe LeRat, wanted the full proceeds of the land surrendered handed over to the Indians to do with as they saw fit.”<sup>92</sup>

Moreover, it appears that, in 1906, the Crooked Lake Agency bands knew of the surrender given by the Pasqua Band that year and were favourably influenced by the terms. Having just returned from a visit to the agency, Inspector Graham wrote:

I found that the word had already reached the Indians that Pasquah’s Band had surrendered, and received a good cash payment down. I am satisfied that if this matter were handled promptly and on about the same lines as the Pasquah’s surrender was obtained, these Indians would consent to sell.<sup>93</sup>

It is clear from the evidence that the Cowessess Band had experience in accepting surrenders and in turning them down. It is also apparent that, in surrender discussions with the Crown, Chief Joe LeRat was a shrewd negotiator for whom a large down payment was a prerequisite to obtaining his consent.

The Band itself was knowledgeable and progressive, and it understood very well the meaning of a surrender vote, the consequences of surrendering its hay lands, and the advantages of securing funds for the other priorities of its members. The Band knew that a surrender was being contemplated when Commissioner Laird and Mr Nash discussed it at the 1904 treaty annuity payment, at least two years before the surrender vote. Further, given the opposition of Chief LeRat, Kanas-way-we-tung, and some other band members to the proposal to surrender the southern portion

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<sup>91</sup> David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 110).

<sup>92</sup> David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 111).

<sup>93</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 114).

of IR 73, there is no doubt that they would have discussed the issue among themselves. The record of the January 21 meeting and the January 29 surrender meeting is evidence that the surrender was explained twice, that the Chief indicated that it was understood, and that the band members were asked to take their time to consider their vote. This evidence is uncontroverted in the record. Although it is reasonable to suggest that the Crown desired a surrender, as we shall discuss below, it is equally reasonable to suggest that, by 1907, some of the band members also favoured a surrender.

### **Did the Crown's Conduct Amount to Tainted Dealings?**

In *Apsassin*, Mr Justice Gonthier stated that he “would be reluctant to give effect to this surrender variation if [he] thought that the Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention.”<sup>94</sup> *Apsassin* requires us, therefore, first to assess whether the Crown’s conduct tainted the dealings, and, if so, whether it was in a manner that made it unsafe to rely on the band’s understanding and intention. We are also mindful that the principle affirmed by the Supreme Court of Canada in *R. v. Badger*, that “the honour of the Crown is always at stake in its dealing with Indian people,”<sup>95</sup> applies equally to the Crown’s conduct in a surrender situation.

The First Nation argues that the conduct and motives of government officials, Inspector Graham’s conduct and motives in particular, and the result of the surrender vote – a one-vote majority in favour of surrender that included on the voters list the name of an unknown person, “Nap Delorme” – prove that the Crown was engaged in tainted dealings in order to secure the surrender.<sup>96</sup> In this respect, the First Nation relies on the ICC’s reports in *Kahkewistahaw* and *Moosomin*.<sup>97</sup>

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<sup>94</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362 (sub nom. *Apsassin*), Gonthier J.

<sup>95</sup> *R. v. Badger*, [1996] 1 SCR 771 at 794, Cory J.

<sup>96</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, pp. 8–35; rRebuttal Submission on Behalf of the Cowessess First Nation, August 18, 2004, pp. 15–17.

<sup>97</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101.



Canada denies these allegations and concludes, based on the *Apsassin* test, that the First Nation has not discharged the burden of proving that the Crown's activities were such that it would be unsafe to rely on the Band's understanding and intention.<sup>98</sup>

Further, it is unlikely, Canada points out, that the courts could devise "a rigid test or exhaustive list of factors"<sup>99</sup> to define tainted dealings. We agree, and, given the importance of analyzing each claim on its own facts, we consider that "tainted dealings" is best defined by example, not by rule.

In other inquiries, the Indian Claims Commission has considered the question of tainted dealings. In the 1998 *Moosomin* report, the Commission stated that Canada's failure to "*properly manage competing interests* (which was stressed by the Federal Court of Appeal in *Apsassin*)"<sup>100</sup> and Canada's use of its position of authority "to apply *undue influence* on a band to effect a particular result"<sup>101</sup> could contribute to a finding of tainted dealings by the Crown. For the purposes of this inquiry, we must examine whether the Crown properly managed the competing interests of the Band (in preserving reserve land) and the public good (in making agricultural land on the prairies available for settlers).

The First Nation cites three instances of tainted dealings on the part of the Crown. They can be classified as follows: first, the Crown initiated and promoted the surrender; second, high-ranking officials and Inspector Graham were driven by their own motives for personal gain; and third, Crown officials unduly influenced the vote.

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<sup>98</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, pp. 34–35.

<sup>99</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 34.

<sup>100</sup> ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 184. Emphasis added.

<sup>101</sup> ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 184. Emphasis added.

### *The Crown's Support for Surrender*

The First Nation submits that the Crown breached its fiduciary duty when it acted on behalf of the settlers and local townspeople in pursuing a surrender, and, therefore, it was not acting in the best interests of the people of Cowessess. It also submits that the Cowessess surrender was part of a series of repeated efforts by settlers to have large portions of reserve land surrendered for the purpose of settlement.<sup>102</sup> Canada argues that it is incorrect to state “that initiating a surrender which serves the interests of any party other than the First Nation amounts to a breach of a fiduciary obligation.”<sup>103</sup> Canada’s counsel states that a surrender “may be of benefit to, and serve the interests of many parties ... [and that it] does not mean that there were tainted dealings simply because the impetus for a surrender does not come from a Band.”<sup>104</sup> Although the case law is silent as to whether it is consistent with the Crown’s fiduciary duty to take a surrender proposal to a band for consideration and to seek its consent, the Commission has previously dealt with this issue.

In the *Canupawakpa Dakota First Nation* inquiry into the surrender of Turtle Mountain reserve, the Commission considered whether the Crown had breached its lawful obligation to the First Nation when it took a surrender in 1909. In the wake of the hostilities between the United States’ government and the Dakota in the late 1800s, the Canadian government believed

that the location of the Dakota reserve at Turtle Mountain was too near the U.S. border and too far from the supervision of the Indian Agent to make it a stable reserve. Over the next 20 years, the department encouraged Turtle Mountain band members to relocate to other reserves. By 1909, the department had determined that only three families remained at Turtle Mountain and it persuaded these band members to have a surrender vote. The vote to surrender the entire reserve was put before the five eligible voters identified by the department on August 6, 1909, and resulted in a 3 to 2 count in favour of the surrender.<sup>105</sup>

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<sup>102</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 14.

<sup>103</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 28.

<sup>104</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 28.

<sup>105</sup> ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263 at 267–68.

The Commission concluded that

the Crown wanted a surrender from the beginning of its relationship with the group. But Canada's motivation for a surrender is not enough. We agree with Canada's counsel that there must also be a "consideration about what the interests of the bands are." [B]ecause of its location (a distance of some 100 miles from the Agency), the reserve was subject to the influx of American Indians; there existed at least a perception of lawlessness and drunkenness; the reserve lacked a school, police and a missionary; and the best arable lands were kept by Chief Hdamani. The department took all these factors into consideration in assessing the best interests of the Band.<sup>106</sup>

The panel in the *Canupawakpa* inquiry found that the Crown had legitimate reasons for pursuing a surrender and conducted itself with the required diligence; the surrender process was in accordance with the law; the understanding of the five voting members was adequate; and the surrender was in their best interests. With a small voting population and a one-vote majority in favour, much of the evidence centred on the needs and interests of the individual voters.

With respect to Cowessess and the other Crooked Lake bands, the pressure between 1886 and 1907 to open up portions of their reserves for settlement is well documented in the Historical Background to this report (Appendix A) and in the ICC's *Kahkewistahaw* report.<sup>107</sup> Settlers and villagers used petitions and politicians to lobby the federal Crown to propose surrenders of what they believed to be underutilized agricultural land. In response, departmental officials were advised to resist the pressure for a surrender. Although there is no evidence on the record of settlers directly lobbying the Cowessess Band, in 1906 Inspector Graham reported:

The trouble in the past has been due to the fact that too many people have been dabbling in the matter. The people in the adjacent towns are keen for the surrender, and as a result, the Town Council, the Board of Trade and Individuals have been talking to the leading Indians, and they now have all kinds of ideas of [*sic*] their heads. In my opinion, the matter should be handled by our own people, without the

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<sup>106</sup> ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263 at 342–43.

<sup>107</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 34–44.

knowledge of the outside public, as was done at Pasqua's, the people at Fort Qu'Appelle did not know anything until the matter was settled.<sup>108</sup> It is apparent that the Crooked Lake bands were the subject of much speculation and of indirect if not direct pressure by the surrounding communities. In the circumstances, the Crown was required to "properly manage competing interests"<sup>109</sup> of the settlers and the Cowessess Band. It is not a breach of duty for the Crown to seek a surrender in order to fulfill a valid public policy, as long as the Crown does not breach the other duties associated with the surrender process. The decision to increase dramatically the population of western Canada, and by extension to open up more agricultural land for farmers, was arguably a valid public policy. Without evidence that the Crown acted improperly, seeking to implement such policy was not in and of itself a breach of the Crown's fiduciary duty.

If we find that the Crown supports a surrender, we must then ask whether the Crown is under a positive duty to a First Nation to present it with a surrender proposal when there is a third party willing to buy or lease the land. In its inquiry into the 1928 surrender taken at the Duncan reserve, the Commission found that, in certain circumstances, the Crown is obliged to go to the First Nation if there is such a proposal.<sup>110</sup> The Commission concluded that there was no evidence that an offer to purchase was ever presented to the Band, notwithstanding the purchaser's statement that he had already received the agreement of the Band to rent out the land. The Commission went on to state:

In the Commission's view, Canada was under a positive duty to present the offer to the Band so that band members might weigh and choose between the alternatives before them. Canada failed to fulfil that duty.<sup>111</sup>

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<sup>108</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 115).

<sup>109</sup> ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 184.

<sup>110</sup> ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53.

<sup>111</sup> ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 263.

In the case before us today, the Crown's decision to initiate surrender discussions with the Cowessess Band and its support of the surrender of part of its reserve was justified, and, without more evidence, the Crown's actions are not proof of tainted dealings.

Before leaving the subject of the Crown's support for the surrender, we note that a Roman Catholic priest, Father Perrault, lived on the Cowessess reserve, was very influential in the community, and once gave advice to Graham on the possibility of securing a surrender. We also know that the reserve land was of great interest to Father Perrault himself, and that he convinced the Band to surrender 350 acres of it for a school and farm at his mission on the reserve. Whether Father Perrault influenced the Band's decision on the 1907 surrender will likely never be known. We remain mindful, however, that a person not associated with the Crown lived on the reserve and occupied a position of authority and influence with the people.

### ***Motives of Crown Officials***

Was there evidence of improper motives or personal gain by Crown officials that tainted the surrender process? The First Nation argues at length that the Cowessess surrender must be analyzed against the backdrop of activities by the Superintendent General of Indian Affairs, Frank Oliver; his Deputy Superintendent General, Frank Pedley; and Inspector William Graham. In particular, it must be considered in light of their role in advancing a policy that "represented a major shift from the pre-Oliver era."<sup>112</sup> One year after the Cowessess surrender, Deputy Superintendent General Pedley elaborated on the shift in departmental policy as a result of the large influx of settlers:

So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for

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<sup>112</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 13.

the benefit of the Indians and relieve *pro tanto* the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.<sup>113</sup>

The First Nation also suggests, while acknowledging a lack of evidence, that Oliver and Pedley may have personally benefited from the Crooked Lake surrenders. The only evidence that the First Nation cites to buttress its argument of improper motives is contained in a report prepared for this claim by Public History Inc., which concludes that 86 out of the original 125 surrendered quarter sections were purchased by land speculators. The First Nation adds that these land speculators, “including some with connections to the governing party of the time, did benefit or at least were given the opportunity to benefit from one or more of these surrenders.”<sup>114</sup> This evidence is inconclusive, however; the report also states that none of the quarter sections sold at the November 1908 auction sold for less than the upset price.<sup>115</sup> Without any direct evidence to support the position that the conduct of the Crown’s officials in taking the surrender in question was driven by personal gain or other improper motives, this argument must fail.

The First Nation cites several examples to support its argument that the conduct of Inspector Graham in taking the Cowessess surrender was tantamount to tainted dealings. As we have stated, the Crooked Lake bands were informed of the interest in a surrender of their southern reserve lands over two years before the surrender vote. At that time, the bands told Commissioner Laird that they wanted time to consider the idea. When Inspector Graham was instructed to submit surrender proposals to the Cowessess, Ochapowace, and Kahkewistahaw bands two years later, in October 1906, he replied that other commitments prevented him from going immediately to Crooked Lake to submit the surrenders.<sup>116</sup> The delay of three months, which resulted in Graham attending the surrender meetings in the winter, appears to be legitimate and not a result of Crown officials orchestrating the surrenders to coincide with what turned out to be a very harsh winter. Moreover,

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<sup>113</sup> Frank Pedley, DSGIA, to Frank Oliver, SGIA, September 1, 1908, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Exhibit 5, p. 538).

<sup>114</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 21.

<sup>115</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 21.

<sup>116</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 131).

Graham did not take a vote at the first meeting with the Cowessess Band on January 21, 1907. When he took a vote at the initial meetings with Kahkewistahaw and Ochapowace, he spelled out the results in his reports. In both cases the majority voted against surrender.<sup>117</sup> Although his records and those of Indian Agent Millar lack detail that would assist us in examining the surrender almost 100 years later, there is simply no evidence before us of improper conduct in the taking of the surrender itself.

### ***Monetary Inducement***

The *Indian Act*, amended in 1906, permitted the parties to agree, as part of the terms of the surrender, that a sum, not to exceed 50 per cent of the proceeds of sale of the land, would be paid out to the band members.<sup>118</sup> The 1886 Act had limited the payment that could be made at the time of the surrender to a maximum of 10 per cent of the proceeds of sale, but this restriction was lifted in 1906.<sup>119</sup>

In the case of the three Crooked Lake reserves, Graham received approval in October 1906 to make a cash payment to the bands of 10 per cent of the land sale proceeds. The first instalment of 5 per cent of the estimated sale price would be paid at the time of the surrender. The second instalment, to be paid following the actual land sales, would equal 10 per cent of the sale proceeds minus the first instalment. Graham was also authorized shortly thereafter to insert the same conditions as were contained in the Pasqua surrender taken in 1906, “making any necessary changes to suit the circumstances in each case.”<sup>120</sup> Although the Pasqua surrender document is not part of the

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<sup>117</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 801–02).

<sup>118</sup> *An Act to Amend the Indian Act*, SC 1906, c 20, s. 1, amending RSC 1886, c. 43, s. 70

<sup>119</sup> *Indian Act*, RSC 1886, c. 43, s. 70; an Act to Amend the *Indian Act*, SC 1906, c. 20, s. 1.

<sup>120</sup> J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 133).

record, Graham reported in June 1906 that the Crooked Lake bands had learned about the “good cash payment down” received by the Pasqua Band.<sup>121</sup>

In the case of the Cowessess surrender, the surrender document dated January 29, 1907, names five “Additional Conditions,” only one of which is germane to this inquiry:

That payment shall be made at time of taking Surrender of *one-tenth* of the purchase price, estimated at the rate of Six dollars per acre, and the balance of one-tenth of actual purchase price at completion of sale.<sup>122</sup>

On the same day, Graham wired the Secretary of Indian Affairs, Frank Pedley, relaying what appears to be a request from the Cowessess Band to increase the cash payment at the time of surrender from one-twentieth (or 5 per cent) to the full 10 per cent based on the estimated purchase price.<sup>123</sup> Graham supported this request. The telegram states that

reserve number seventy three ask for a cash payment of [illegible] nth instead of one twentieth, this would mean sixty [illegible] each. Strongly advise doing this, have sufficient [illegible].<sup>124</sup>

Graham confirmed two days later that a 10 per cent payment would be equivalent to \$66 for each band member, based on a very low valuation, with the difference to be paid after sale.<sup>125</sup> Approval of this amount was sent by wire on February 1, three days after the vote.<sup>126</sup>

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<sup>121</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 114).

<sup>122</sup> Cowessess Band, Surrender Agreement, January 29, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 139). Emphasis added.

<sup>123</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 29, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 872). See also response from Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, January 30, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 873).

<sup>124</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 29, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 872).

<sup>125</sup> W.M. Graham, Inspector of Indian Agencies, to the DSGIA, January 31, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 874).

<sup>126</sup> Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, February 1, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 875).



The question before us is whether Graham's unauthorized decision to increase the cash payment to the Cowessess Band upon surrender from 5 to 10 per cent of the estimated purchase price, or even the presence of a monetary inducement at all, constituted a bribe, and, if so, whether it made it unsafe to rely on the Band's understanding. As we stated earlier, there is little law on this point, and the court in *Chippewas of Kettle and Stoney Point*, dealing with the presence at the surrender meeting of a third-party purchaser offering a bonus, was not asked to address the question of the Crown's fiduciary duty.

Witnesses at the phase I community session of this inquiry were asked what effect the public display of money at the surrender meeting would have had on their ancestors. Harold Lerat replied:

The Elders said that satchels of money were brought into the meeting and placed on the table, and they were told they would get all this green money if they surrendered, so the money had a big impact on the surrender. But some of the people like the chief and headmen weren't – didn't fall for that, and that's why they voted against.<sup>127</sup>

George Delorme stated that his father told him that "the Indian agent or the Commissioner used to come there with piles of money ... They more or less bribed, you know, to surrender the land."<sup>128</sup> Mr Delorme also referred to wheelbarrows of money,<sup>129</sup> and other witnesses made similar statements. Theresa Stevenson explained that, in such circumstances, "naturally some people would – would wish for that money because we were very poor people those days, and especially some families were not as fortunate as others."<sup>130</sup> We do not doubt the testimony that some families were poor and would be influenced by the presence of a large sum of money at the surrender meeting. At the same time, the surrender was negotiated on the basis that the band members would receive an immediate down payment if the surrender went through.

Providing a cash down payment at a surrender meeting was governed by the *Indian Act* and was common practice. Nevertheless, it could be construed as bribery, undue influence, or even

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<sup>127</sup> ICC Transcript, March 11, 1998 (ICC Exhibit 12, p. 21, Harold Lerat).

<sup>128</sup> ICC Transcript, March 11, 1998 (ICC Exhibit 12, p. 43, George Delorme).

<sup>129</sup> ICC Transcript, March 11, 1998 (ICC Exhibit 12, p. 47, George Delorme).

<sup>130</sup> ICC Transcript, March 11, 1998 (ICC Exhibit 12, p. 65, Theresa Stevenson).

tainted dealings if people were starving or otherwise desperate to obtain funds for their very survival. Much depends on the facts. The presence of cash for the advance payment could also be construed as the Crown acting responsibly by having the promised money ready and visible to band members before they voted. In this case, the Cowessess leadership had tried on other surrender occasions to bargain for a cash payment of 100 per cent of the estimated proceeds of sale. In addition, the evidence indicates that the three Crooked Lake bands knew about the cash payment to the Pasqua Band and would have expected to receive similar treatment. Finally, although the winter of 1907 was unusually harsh, this Band was not in desperate straits. While some would have needed the money more than others, the Band as a whole was virtually debt-free by 1901<sup>131</sup> and required “[v]ery little destitute assistance” in 1906.<sup>132</sup> Tyler explained the self-sufficiency of the Cowessess Band in 1906 by the fact that it had other means of earning a livelihood. In addition to farming, ranching, hunting, and fishing, those means included selling senega root and firewood, tanning hides, freighting government supplies, and working for nearby settlers:

The effect of all these different activities on the part of the Cowessess Band was to render almost all of its members self-supporting by the time the surrender of the southern portion of their reserve occurred.<sup>133</sup>

Although Inspector Graham did not have formal authority to amend the cash payment from 5 to 10 per cent, he was not in breach of the *Indian Act* provisions, which permitted the parties to a surrender to agree to a down payment of up to 50 per cent of the estimated proceeds. Further, the evidence shows that the proposal to increase the immediate payment from 5 to 10 per cent may have been initiated by the Band. The two payment schemes differed in only one respect: a 10 per cent payment meant that band members would receive one payment equal to 10 per cent of the estimated proceeds of sale, based on a low valuation, with any difference between the estimated proceeds and

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<sup>131</sup> T.P. Wadsworth, Inspector of Indian Agencies, to the SGIA, July 31, 1901, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1901*, 143 (ICC Exhibit 5, p. 342).

<sup>132</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 127 (ICC Exhibit 5, p. 471).

<sup>133</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 84 (ICC Exhibit 4, p. 84).

the actual proceeds to be paid out after the land sale, instead of two instalments of 5 per cent each, one upon surrender and one after sale. The final amount of the down payment did not change. Although the presence of a large amount of cash, whether 5 per cent or 10 per cent of the estimated proceeds, may have influenced some voters, it was an agreed-upon condition of the surrender. Some Elders hold a sincere belief that the voters in 1907 must have been bribed, but there is insufficient evidence, given the relative health and prosperity of this Band, to conclude that its members were unduly influenced by seeing the money at the surrender meeting.

### ***Full Disclosure Appropriate to the Subject Matter***

The First Nation takes the position that the Crown failed to provide full disclosure to the Band before the surrender vote. In *Wewaykum*, Mr Justice Binnie described one of the Crown's duties in a pre-reserve-creation situation as making "full disclosure appropriate to the subject matter."<sup>134</sup> In *Apsassin*, which was a surrender situation, Madam Justice McLachlin found that "the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences."<sup>135</sup>

As we discussed earlier, the minutes of the surrender meeting show that Inspector Graham discussed the surrender with the Band on both occasions when he met with it, and, although no detail is provided, the minutes of the first meeting on January 21 state that Chief Joe LeRat was satisfied with the explanation provided.<sup>136</sup> The band members also had the opportunity to discuss the matter among themselves during the intervening eight days and, if questions had remained, would have asked them at the second meeting on January 29. There is no evidence to suggest that the Crown failed, intentionally or otherwise, to provide the Cowessess Band with sufficient information to permit it to decide whether to surrender the hay lands. The decision of the Band would have been further informed by the knowledge gained from its other surrenders and its awareness, since the 1904 annuity payment, of the possibility of a future surrender proposal.

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<sup>134</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at 290.

<sup>135</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372 (sub nom. *Apsassin*).

<sup>136</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

Nevertheless, states the First Nation, Graham failed to disclose information about Alex Gaddie to the Band which could have affected the way band members voted. In particular, argues the First Nation's counsel, Graham failed to reveal that he had promised Alex Gaddie compensation for improvements Gaddie had made on the surrendered land. Alex Gaddie had been a headman of the Band and was one of its most prosperous farmers. He was an interpreter for the Band and acted as interpreter at the surrender meeting. Gaddie voted in favour of the surrender and he, not the Chief, travelled with Graham to the town of Moosomin to sign the surrender affidavit before Judge Wetmore. Since both Chief LeRat and Headman Ambroise Delorme voted against the surrender, however, it is not surprising that neither man made the trip to Moosomin.

In November 1907, 10 months after the surrender, Gaddie wrote to Commissioner Laird asking to be paid for the improvements he had made on the surrendered land; one reason for his request, he said, was the total crop failure he had had that summer. Gaddie claimed that Graham had promised him he would be paid, a claim Graham denied. Gaddie's belief that he would be paid for his improvements may have influenced how he voted; his letters<sup>137</sup> and letters written on his behalf<sup>138</sup> show that he expected to receive an additional sum, later identified as \$700. The first of those letters in support of Gaddie's claim was from W.C. Thorburn, whose name also appears on the 1902 petition of Broadview and Whitewood residents requesting that the southern part of the Crooked Lake reserves be opened up to settlers.<sup>139</sup> Unfortunately, we have no further information on the relationship between Thorburn and Gaddie. Inspector Graham's responses to Laird,<sup>140</sup> meanwhile, indicate that Gaddie had not been promised what he alleged. The evidence is therefore contradictory.

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<sup>137</sup> Alexander Gaddie to David Laird, Indian Commissioner, November 9, 1907, and July 13, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 202, 226).

<sup>138</sup> W.C. Thorburn to David Laird, Indian Commissioner, June 24, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 221–22); Zac LeRat to David Laird, Indian Commissioner, July 15, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 228).

<sup>139</sup> Residents of the village of Broadview and town of Whitewood, and surrounding districts, to the Minister of the Interior, c. March 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 77–83).

<sup>140</sup> W.M. Graham to David Laird, Indian Commissioner, November 20, 1907; July 27, 1908; and December 9, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 204, 230–31, 252–53).

What is known is that Gaddie had cut and sold hay from the hay lands for his personal benefit. Laird advised Gaddie by letter that he had been told before the surrender that “it was not fair to ask the Indians to pay *from their own funds* for the work you had done on the slough for your personal benefit.”<sup>141</sup> Graham himself stated that if he had agreed to pay Gaddie compensation, the Band would have found it to be an unreasonable demand and would have refused the surrender.<sup>142</sup> There is no doubt that some band members would have questioned their vote had they believed that Gaddie would receive an additional \$700 or other sizeable sum payable from the Band’s money, when the others would be receiving only their pro rata share of \$66.

Given the polarized versions of what Gaddie was told, three possibilities present themselves: first, Gaddie was dishonest; second, there was a misunderstanding between Gaddie and Graham regarding the improvements that were eligible for compensation; or third, Graham manipulated Gaddie into supporting the surrender with a quiet promise of additional money for improvements. We reject the first possibility because there is no suggestion in the record that Alex Gaddie was dishonest; we also note that he continued to be a respected leader of the Cowessess Band following the surrender. If it were a case of a misunderstanding between Gaddie and Graham about eligible improvements, which is possible, such misunderstanding would not constitute tainted dealings. Finally, given the conflicting stories, we are unable to conclude that Graham manipulated Gaddie into supporting the surrender with a promise of compensation. The practice, as reflected in the surrender document itself, was for individual band members to be compensated for improved land. Gaddie eventually proved that he was entitled to some compensation, and, after offering to take \$400 because he had personally benefited from the work, he was paid \$250 for his improvements.

We are, therefore, unable to agree with the First Nation that “it was unconscionable for Canada to rely and act upon a positive surrender vote which it knew or ought to have known was generated by contradictory assumptions among those Band Members supporting it.”<sup>143</sup> The

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<sup>141</sup> David Laird, Indian Commissioner, to Alex Gaddie, November 22, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 205). Emphasis added.

<sup>142</sup> W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 9, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 252).

<sup>143</sup> Rebuttal Submission on Behalf of the Cowessess First Nation, August 18, 2004, p. 18.

conflicting evidence does not permit a finding that the Crown failed to disclose material information to the Band – in this case Gaddie’s belief that he was to be compensated for improvements.

***Was Nap Delorme a Ringer?***

Was the name “Nap Delorme” on the voters list as a result of the Crown’s dishonesty? The question of Nap Delorme’s identity is not before us. The panel in phase I was in a better position than we are to evaluate the evidence on this question and chose not to answer it:

[S]ince only 15 members voted for the surrender, given our determination that Francis Delorme was present at the meeting, we find that the surrender cannot be valid, notwithstanding the identity of the voter identified in the minutes as “Nap Delorme.” We have concluded that, even if “Nap Delorme” were in fact Norbert Delorme, a valid majority vote could not have been obtained, because of the need to count Francis Delorme as part of the quorum. Therefore, it is not necessary for us to make any determination concerning the identity of “Nap Delorme,” as the surrender would fail in either case.<sup>144</sup>

The allegation in phase II is that the Crown engaged in tainted dealings by employing a “runner” or “ringer” (a fraudulent voter for hire) by the name of Nap Delorme to influence the vote. Although possible, it seems highly unlikely that the Inspector of Indian Agencies and the Indian Agent, in the presence of Messrs E.D. Sworder, H. Nichol, J.A. Sutherland, and H. Cameron, would conspire to fabricate the results of the vote, thereby committing a fraud on the Band. It would also be unusual if an unknown person by the name of “Nap Delorme” could attend the surrender meeting without at least one band member questioning his presence. Moreover, the record includes an affidavit sworn by band member Alex Gaddie in which he affirms that “no Indian was present or voted at such council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender.”<sup>145</sup> There was, however, a person by the name of Norbert Delorme, who was a band member, eligible to vote,

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<sup>144</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 272.

<sup>145</sup> Surrender affidavit, February 2, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 145).

present for the surrender, and whose name appeared on the Agreement for surrender but not on the list of persons who voted. In these circumstances, it would be unreasonable for us to conclude that Crown officials orchestrated a one-vote majority by employing a ringer to attend the surrender meeting.

In the *Apsassin* case, Mr Justice Gonthier stated that he would be reluctant to give effect to the surrender if “the conduct of the Crown had somehow tainted the dealings *in a manner which made it unsafe to rely on the Band’s understanding and intention.*”<sup>146</sup> In the present inquiry, we have concluded that there is insufficient evidence to show that the Crown’s conduct tainted the dealings in the surrender process. This finding, when added to the finding that the Band was knowledgeable about the surrender and its consequences, removes the question of whether it would be unsafe to rely on the Band’s understanding.

### **Cession or Abnegation of Decision-Making Power**

Cession or abnegation of the beneficiary’s decision-making power may or may not be present in a fiduciary relationship. In *Apsassin*, Madam Justice McLachlin canvassed the relevant aspects of the fiduciary duty in general, one of which was the degree to which the fiduciary made decisions on behalf of the beneficiary:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.<sup>147</sup>

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<sup>146</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 362 (sub nom. *Apsassin*). Emphasis added.

<sup>147</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371–72 (sub nom. *Apsassin*). Emphasis in original.

The most obvious case of a band having its decision-making power ceded for it is when land on the reserve is expropriated, because the band has no power to say no. Similarly, a band cedes its decision-making power to the Crown when it gives the Crown written authority in a surrender document to deal with surrendered land for the band's benefit. In each case, the Crown will have a duty to exercise the band's ceded power solely for the benefit of that band. By comparison, in a surrender vote, it is the band that makes the decision whether or not to consent; thus, it does not cede its decision-making power to the Crown, and the Crown is not required to act solely for the benefit of the band.

Nevertheless, the circumstances of a surrender could lead to a finding that the band in fact ceded its power to make a free and informed decision. In *Apsassin*, Madam Justice McLachlin agreed with the trial judge's conclusion that the Band trusted the Crown to provide it with information regarding the surrender, and she also agreed with the trial judge's assessment that, on the facts of the matter, the Crown had done exactly that.<sup>148</sup> The question to be asked then is whether, on the facts, the Cowessess Band ceded its decision-making power to the Crown in the 1907 surrender.

In response to this query, the first step is to examine the character and composition of the Cowessess Band itself. In previous inquiries, the Commission has examined the relative strengths and weaknesses of a band – whether it was vulnerable or able to be convinced to make a decision that would not be in its best interests. In addition to their ability as farmers, there is evidence that the character and background of the Cowessess band members enhanced their abilities to make decisions. As we have set out in detail in the discussion of the Band's understanding regarding the surrender, the Band was noted by observers to be different from the other bands in the Crooked Lake Agency in its Métis ancestry and its reputation as the most progressive and successful band in the entire region.

Second, the First Nation submits that the Crown had a legal duty, which it breached, to provide the Cowessess Band with the foreseeable consequences of a decision to surrender part of its reserve. Canada argues that, although Madam Justice McLachlin found that the Beaver Band in *Apsassin* trusted the Crown to provide it with information as to its options and their foreseeable

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<sup>148</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 372 (sub nom. *Apsassin*).



consequences, “she did not find that there existed a general duty upon the Crown to advise of foreseeable consequences, and this is particularly relevant where those consequences were known to the First Nation or were otherwise apparent.”<sup>149</sup>

Whether or not the Crown had a legal duty to explain the foreseeable consequences to the Band, we would expect the Crown to act prudently and with ordinary diligence in explaining the reasonably foreseeable events following surrender – for example, the expected sale price of the land and other matters related to the sale that could be predicted. The Crown would also be expected to assess the level of detail or explanation required to ensure that the Band fully appreciated the consequences of the surrender. Although we do not have the contents of the discussions between officials and the Cowessess Band, to some extent the Band’s demonstrated understanding of its own situation could be expected to influence the nature of the discussions. With respect to the use of the hay lands in the future, the band members could be expected to have as much knowledge of their needs as any Indian agent, since they had successfully farmed and ranched on the reserve for many years, had lived through drought conditions, and had even lived without the hay lands when they were destroyed by fire. It would be patronizing to suggest that the band members, as successful and relatively prosperous farmers and ranchers, needed to be told that, if they wanted to greatly increase their livestock holdings, they would require more hay or other cattle feed. There is simply no evidence that the Crown failed to act prudently in discussing the foreseeable consequences of surrender with the Band.

Third, the First Nation argues that Inspector Graham “conducted the proceedings in a manner calculated to circumvent or undermine the leadership of the First Nation who were opposed to the proposed surrender.”<sup>150</sup> If this were the case, it would be an instance of the Band having its decision-making power ceded for it by the Crown. In particular, counsel argues that Graham’s characterization of both Chief LeRat and Headman Ambroise Delorme as “non-progressive” was indicative of his contempt for them. Both Chief LeRat and Mr Delorme voted against the surrender. The Cowessess Band, however, had a history of strong leadership, notably in Chief Cowessess and Chief O’Soup,

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<sup>149</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 9.

<sup>150</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 32.

before Chief LeRat. All three leaders were very capable of representing the Band's interests. Chief LeRat had participated in previous surrender meetings, pressing for a high down payment for his Band in return for consent; there is no reason to doubt that he was an equally active participant in the meetings of January 21 and 29. Although the record is short on detail, the surrender document states that Inspector Graham explained the surrender clearly to the Band at both meetings and inquired of the band members whether they needed more information. The minutes record Chief LeRat as agreeing that the matter had been satisfactorily explained.<sup>151</sup> The fact that roughly one-half of the eligible voters voted against their Chief says more about the interests of the individual voters than it does about the Chief's leadership being undermined by Inspector Graham.

Fourth, the First Nation argues that Alex Gaddie was brought to the second meeting by William Graham as a counterweight to Chief LeRat and as a vote in favour of surrender if the second meeting resulted in a tied vote.<sup>152</sup> But the evidence about whether Graham used Gaddie to influence the surrender, as we have found, is contradictory and inconclusive. On the basis of the documentary record, we are unable to agree with the First Nation that Inspector Graham worked to undermine the Band's leadership by bringing Alex Gaddie, a voting band member, to the meeting to somehow skew the vote.

We find that the Crown provided the necessary information to make an informed decision about the proposed surrender. In addition to the Band's own knowledge of the use of the hay lands, its ability to foresee the consequences of surrender, both positive and negative, leads us to conclude that the Band did not cede its decision-making power to the Crown. None of the indicia of vulnerability that would lead to a finding that the Band had ceded its decision-making power appears to be present within this Band. Although the winter of 1907 was harsh, this Band was not in desperate conditions, as was the Kahkewistahaw Band, possessing neither food nor a Chief when its surrender was taken. We find on the evidence that this Band was able to make its own decisions – and that it did so in this case.

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<sup>151</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

<sup>152</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 32.

## Was the Surrender an Exploitative Bargain?

### *Exploitation and Crown Consent*

If a band consents to a surrender of reserve land, the *Indian Act* requires that the Crown consider whether to consent to the surrender. As Madam Justice McLachlin explained in *Apsassin*, “[t]he purpose of the requirement of Crown consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation.”<sup>153</sup> McLachlin J further emphasized that a band’s decision was to be respected; however, if it was a decision that was so foolish or improvident as to constitute exploitation, the Crown could refuse its consent. “In short,” stated McLachlin J, “the Crown’s obligation was limited to preventing exploitative bargains.”<sup>154</sup> In assessing whether an exploitative bargain existed in *Apsassin*, McLachlin J looked at the evidence from the perspective of the Band at the time.<sup>155</sup>

As stated earlier, for this portion of the analysis, we must assume that the Band voted in favour of the surrender. The question then becomes whether the Cowessess Band’s decision to surrender the southern portion of its reserve was so foolish or improvident that it constituted exploitation. If so, the Crown could have refused to permit the surrender.

### *What the Band Surrendered*

As originally surveyed, the Cowessess reserve contained 49,920 acres of land. In 1907, the Cowessess Band surrendered 20,704 acres,<sup>156</sup> or approximately 41 per cent of the original reserve,

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<sup>153</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 370–71 (sub nom. *Apsassin*).

<sup>154</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*).

<sup>155</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371 (sub nom. *Apsassin*).

<sup>156</sup> As noted earlier, there is some disagreement about exactly how much land was included in the surrender. The description of the surrender provided by Chief Surveyor S. Bray in October 1906 stated that the surrender was 20,704 acres: S. Bray, “Description for Surrender,” October 2, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Documents, Exhibit 6, p. 129). Almost 100 years later, Mattila Appraisals stated that 21,041 acres were within the surrendered area: Mattila Appraisals Ltd., “Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve,” prepared for Cowessess First Nation, [2004], p. 2 (ICC Exhibit 9a, p. 2). Thirty-three sections amount to 21,120 acres if all sections are square and complete.

in the southernmost part of the reserve, including all the land within six miles of the railway. After the surrender, the Band retained 29,216 acres, or 59 per cent of its reserve. Most significant in terms of what the Band was giving up were the hay lands, which were relied on for raising livestock. In March 1907, Indian Agent Millar noted that “hay will not be so plentiful, as most of the wild hay land is comprised in the surrendered portion.”<sup>157</sup>

Counsel for the First Nation argues that the Crown knew from the time of the first survey of the reserve how valuable the hay lands would be to the Indians if they chose to raise stock as part of their agricultural pursuits. By 1906, the Band had more than 500 acres under cultivation. With the exception of a few elderly band members, the Band was self-supporting and, in many years, had been able to sell surplus produce and stock.<sup>158</sup> The First Nation’s position is that, by failing to prevent a surrender of most of its hay lands, the Crown permitted a surrender to take place that was foolish and improvident enough to amount to exploitation.<sup>159</sup> According to the First Nation, the Crown either failed to consider the impact of the surrender on the Band or knew what the impact would be, but did not think it important enough to override the Band’s decision.

As evidence, the First Nation points to the advice regarding the Crooked Lake Agency bands given by government officials in 1886, when, in response to a request from local settlers to move the Indians back from the railway line, Indian Agent McDonald responded that, unless the Indians could have replacement hay lands “in close proximity to their Reserve, it would be unjust to entertain the proposition.”<sup>160</sup> McDonald expected that the Indians of the Crooked Lake Agency would soon have a “large number of cattle requiring several thousand tons of Hay each, and we should in every way possible protect it for them.”<sup>161</sup> Sixteen years later, in 1902, Commissioner Laird maintained the

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<sup>157</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs, for the Year Ended March 31, 1907*, 121 (ICC Exhibit 5, p. 504).

<sup>158</sup> J.P. Wright, Indian Agent, to the SGIA, July 27, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 148 (ICC Exhibit 5, p. 307).

<sup>159</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 44.

<sup>160</sup> A. McDonald, Indian Agent, to the Indian Commissioner, March 22, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 41).

<sup>161</sup> A. McDonald, Indian Agent, to the Indian Commissioner, March 22, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 41).

same position, that “it would never do for the Indians to be short of hay,”<sup>162</sup> but, soon after that, in response to a petition signed by 190 people from the towns of Broadview and Whitewood, the Minister’s office responded “that no Indian lands can be sold without the consent of the Indians: that the Department will do its best to procure the consent of the Indians:...”<sup>163</sup> However, in his visit to the Crooked Lake Agency, Commissioner Laird did not put the idea of surrender to the people of Cowessess, as he did to both Ochapowace and Kahkewistahaw, because he had determined that the Cowessess hay lands were almost completely within the southern part of the reserve and because Cowessess reserve, unlike Ochapowace and Kahkewistahaw, was farther away from Whitewood and Broadview, where the principal petitioners lived.<sup>164</sup>

The First Nation’s counsel submitted that the statistics alone show the exploitation. Counsel relies on a report prepared for the First Nation; the report concludes that, with the surrender, the Band “lost approximately 94.7% of their slough (marsh) based hay and 87.7% of their cow carrying capacity.”<sup>165</sup> In the same report, authors R.A. Shoney and M.H. Shoney describe a farmer’s need for hay in the early part of the century:

Hayland was essential in order to provide winter feed and to offset pasture shortfalls during droughts. ...

Natural hay marshes were invaluable as they provided a source of hay that required only harvesting and avoided the expensive seed and cultivation costs associated with alfalfa and other legumes. These low lying areas were more naturally

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<sup>162</sup> David Laird, Indian Commissioner, to Indian Agent, Crooked Lake Agency, January 22, 1902, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 76).

<sup>163</sup> Office of the Minister of the Interior to J.D. McLean, Secretary, DIA, March 31, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 84).

<sup>164</sup> D. Laird, Indian Commissioner, to the Secretary, DIA, May 6, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 87–89).

<sup>165</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 42, quoting R.A. Schoney and M.H. Schoney, “An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation,” prepared for Cowessess First Nation, April 20, 2004, p. i (ICC Exhibit 11a, p. i).

drought tolerant and could provide better than average supplies of feed when it was needed most.<sup>166</sup>

According to the Schoney report, the Band lost 72.1 per cent of its open arable land and all of its land within reasonable transport distance to the railway line.<sup>167</sup> The report further points out that, compared to hay, cultivated land for a wheat-based economy required land cleared at considerable cost.<sup>168</sup> The First Nation's counsel argues that the land surrendered in 1907 was its "most valuable arable land"<sup>169</sup> and points out that only 104 slough hay acres and 1,175 short-grass acres remained in the unsurrendered portion.<sup>170</sup>

With respect to the First Nation's arguments based on the Schoney report, there are some points with which we disagree. First, the Schoney report states that the Band lost all its land within "reasonable transport distance to the rail line."<sup>171</sup> Yet the report also points out that settlement development patterns largely occurred within 10 miles of a railway line, a distance that "allowed grain to be hauled by horse and wagon to the elevator and still be able to return the same day."<sup>172</sup> It could be argued, as we stated earlier, that the surrender of the six-mile strip did not increase the distance that the Band had to travel to the railway line, as the band members lived in the north and would have travelled more than six miles to the railway towns in any event to sell their excess

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<sup>166</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," prepared for Cowessess First Nation, April 20, 2004, p. 12 (ICC Exhibit 11a, p. 12).

<sup>167</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," prepared for Cowessess First Nation, April 20, 2004, p. i (ICC Documents: Exhibit 11a, p. i).

<sup>168</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," prepared for Cowessess First Nation, April 20, 2004, p. i (ICC Exhibit 11a, p. i).

<sup>169</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 42.

<sup>170</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 42.

<sup>171</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," prepared for Cowessess First Nation, April 20, 2004, p. i (ICC Exhibit 11a, p. i).

<sup>172</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," prepared for Cowessess First Nation, April 20, 2004, p. 8 (ICC Exhibit 11a, p. 8).

produce. Second, the First Nation concludes that the Band lost the most valuable arable land in the surrender; we disagree and shall address that argument in more detail below. Third, the Schoney report compares the cost of developing types of cultivated hay to replace wild hay, which required only harvesting. Schoney also points out the greater vulnerability of some cultivated varieties to drought and insect infestation.<sup>173</sup> But it must be noted that, as early as 1899, the government was experimenting with brome grass on the Crooked Lake Agency reserves as a replacement for wild hay, in order to relieve the Indians from “hauling hay from the South of their reserves to the north of them where they reside on the Qu’Appelle river.”<sup>174</sup> Moreover, according to Tyler, the hay sloughs on the Cowessess reserve were slowly drying up.<sup>175</sup>

Counsel for Canada takes a different approach to the question of an exploitative bargain, arguing that there is no “cogent or compelling evidence that any interests of the Crown in obtaining the surrender were antithetical to the interests of the Band, nor were the Band’s interests ignored.”<sup>176</sup> Canada’s arguments are founded on McLachlin J’s approach of viewing the benefit or detriment of a surrender from the perspective of the band itself at the time, and by understanding the circumstances known to exist at the time of the surrender.<sup>177</sup> Canada’s counsel states that Crown officials considered the Band’s situation over the years, stating as early as 1902 that a surrender would be beneficial to the Band, and at the same time cautioning that reserve land could not be sold without the consent of the Indians. Canada’s counsel also refers to the types of goods that the band members spent their first cash payment on, citing Indian Agent Miller’s March 1907 report:

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<sup>173</sup> R.A. Schoney and M.H. Schoney, “An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation,” prepared for Cowessess First Nation, April 20, 2004, pp. 12–13 (ICC Exhibit 11a, pp. 12–13).

<sup>174</sup> D. Laird, Indian Commissioner, to the SGIA, April 22, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 69).

<sup>175</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 76 (ICC Exhibit 4, p. 76).

<sup>176</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 11.

<sup>177</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, pp. 11, 23.

[A] considerable number of useful horses were purchased, besides sleighs, wagons, ploughs, and other articles which should be of permanent use in carrying on work; in addition to these, purchases were made of food-supplies, blankets, bedding, and some furniture, also much warm and serviceable winter clothing. Another distribution will probably be made this coming autumn, and in future an annual distribution of interest money will be made. *These annual payments should be of great advantage to the Indians*, especially to the aged and infirm, who have derived in the past very little income from their large land holdings.<sup>178</sup>

In addition, before the surrender, the Cowessess Band was concerned that settlers' cattle were straying onto the reserve and considered the possibility of using money from the surrender to fence the reserve.

Canada's counsel sets out seven factors relevant to assessing the surrender from the Band's perspective in 1907.<sup>179</sup> We consider three of them to be of particular significance: the small percentage of reserve land used for agriculture; the needs and interests of the Band; and the sale prices of the surrendered land.

Canada's counsel argues that the Band had the capacity to farm only a very small percentage of the land available, pointing out that, in 1907, the Band had a small population, with only 32 adult men living on the reserve. Further, the evidence in the years following 1907, says Canada, does not substantiate the First Nation's position that the surrender of the hay lands had a permanent impact on the Band's agricultural production. Canada cites two sources as support: the statement by Inspector William Graham in 1913 that the Cowessess people "are in about the same condition as they have been for years, from a farming standpoint";<sup>180</sup> and a report by Public History Inc. that

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<sup>178</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 13, quoting M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 121 (ICC Exhibit 5, p. 503). Agent Millar was speaking of both the Cowessess and Kahkewistahaw bands in that report. Canada's emphasis.

<sup>179</sup> The seven factors cited by Canada are as follows: "(a) [the] decline in the population of the Band; (b) the relatively high proportion of Reserve land on a per capita basis; (c) the Reserve lands remaining after the surrender would be in excess of Treaty allotment on a per capita basis; (d) the relatively small portion of the Reserve lands used for agriculture; (e) the needs and interests of the Band; (f) the terms and conditions of the surrender; and (g) the Band received more than the expected prices for the Reserve lands." Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 14.

<sup>180</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 16.



found a general increase in crop production in the Agency between 1907 and 1918, with only a slight decrease in livestock production that was reversed by 1910.<sup>181</sup>

Another important factor in assessing exploitation, according to Canada's counsel, is the needs and interests of the Band in 1907. Canada relies primarily on evidence showing that, in the early 1900s, the Cowessess Band was already diversifying its economy by selling wood and senega root, tanning hides, and working for settlers. Thus, says Canada, although half the Band relied on mixed farming, many members were working at different occupations. The uses to which the first cash advance from the surrender was put, argues Canada, met very valid needs of the people.

The third factor that we determine to be important to this claim is the evidence of the sale prices, because, if the Band had received an unreasonably low amount for the sale of its land and the Crown had known or ought to have known that this result would occur, there would be grounds for investigating whether the surrender was so improvident as to constitute exploitation. In this regard, Canada looks to the evidence, based on the surveyor's evaluation of the land at between \$4.50 and \$9.00 per acre, with an average upset price of \$6.85, that 21 of the 97 quarter sections that sold in November 1908 were sold for more than the upset price and none for less. Similarly, at the June 1910 auction, all the remaining 28 quarter sections sold for more than the upset price – some at double the price. Based on this evidence, states Canada's counsel, the price at which the lands were sold was not unreasonable.<sup>182</sup>

Both the First Nation and Canada have relied on different evidence to make their arguments that this surrender was or was not exploitation of the Band. We shall summarize the facts that, in our view, lead us to the conclusion that this surrender was not a case of exploitation. In so doing, we shall use the guiding principle from *Apsassin* that this question must be looked at from the perspective of the Band at the time.

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<sup>181</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 17.

<sup>182</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, pp. 21–23.

### *The Surrender from the Band's Perspective*

The band members, with one or two possible exceptions, did not live in the south. They chose to live on prime agricultural land in the north of the reserve, close to fresh water and wood. The slough lands in the south, while possible to cultivate and suitable for grazing, were not a priority of the Band for agricultural purposes in 1907 and would not have been for many decades, as farming was done on a small scale, primarily for subsistence. Although the railroad would become increasingly vital for large-scale farming in the West, its use by the Band would have been limited. The record does not indicate that the railway was discussed in the pre-surrender discussions, but, according to the First Nation's counsel, "in the case of the Crooked Lake Agency, the rail line was there by 1886."<sup>183</sup> The evidence also reveals that the Band had used the train for travel and to send produce to markets. The north-south road allowances would have continued to provide access to grain elevators and rail lines. Bearing in mind that the Band lived in the north and its members already had to travel more than six miles to reach the railway towns, the loss of the southern portion close to the line would not have significantly changed their pattern of moving excess produce to market.

With respect to the type of the land surrendered, the record is clear that, at that time, the slough lands were marshy, gravelly, alkaline, and generally inferior to the reserve land where the band members resided. Much of the evidence put forward by the First Nation on the quality, cow-carrying capacity, and potential uses of the surrendered land would be relevant to compensation negotiations but is not central to an understanding of the circumstances at play in 1907 – or even 10 years later. This conclusion would not be true if the Band had given up land that was greatly superior to the residual reserve or had given up land in exchange for land that turned out to be unsuitable for its needs. Those facts are not present here.

Nevertheless, some band members did rely on the southern portion for the majority of their wild hay, and, before 1902, government officials took the position that the Cowessess Band should not be deprived of its hay. By 1906, however, the Crown was being pressured to make land available for the growing number of settlers, and Crown policy dictated that underutilized or unused reserve lands should be considered for surrender, but only in accordance with the law. In this same period,

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<sup>183</sup>

ICC Transcript, September 21, 2004 (p. 82, Dan Maddigan).

half of the Cowessess band members were engaged in mixed farming,<sup>184</sup> thus, it follows that half were not. Unfortunately, the record does not provide enough detail to know if there is a correlation between the voters who rejected surrender and their reliance on hay to use or sell. Following the surrender vote, there was a temporary decline in livestock production,<sup>185</sup> but, overall, the impact of the loss of the hay lands was not significant.

The Band was self-sufficient, but it also needed money for certain necessities and possibly to fence the reserve. We cannot agree with the First Nation's statement that it is untenable to suggest "that it was in the best interests of the Band to surrender the southern six miles of IR 73 in return for cash or other non-reserve commodities."<sup>186</sup> No one knows what was in the minds of the voters when they made their decision, but it is a fact that the vote was almost evenly divided. When asked by the Commission's counsel why at least 14 band members voted for the proposal if it was so obviously foolish and improvident, the First Nation's counsel replied that it was irrelevant how many people voted in favour because of the Crown's continuing duty to assess whether the surrender was in their best interests.<sup>187</sup> We do not agree that a close vote was irrelevant. In accordance with the pre-surrender fiduciary duty of the Crown expressed in *Apsassin*, band intention and understanding are relevant, as are the perspectives of the band members and the circumstances of the times. The result of the vote is an indication, on the facts of this claim, that band members were somewhat divided in respect of their needs and interests in 1907.

### ***The 1911 Delegation***

Although the record in this claim is inadequate in some areas, we consider the evidence of the 1911 delegation to Ottawa to be significant in finding that the Band itself did not believe it had entered

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<sup>184</sup> Matthew Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 126 (ICC Exhibit 5, p. 471).

<sup>185</sup> Public History Inc., "Cowessess First Nation Specific Claim Concerning the 1907 Surrender of a Portion of IR No. 73: Historical Report," prepared for INAC, Specific Claims Branch, May 31, 2004, pp. 32, 74 (ICC Exhibit 10a, pp. 32, 74).

<sup>186</sup> Rebuttal Submissions on Behalf of the Cowessess First Nation, August 18, 2004, p. 7.

<sup>187</sup> ICC Transcript, September 21, 2004 (pp. 130–31, Karen Webb, Dan Maddigan).

into an exploitative bargain. Four years after the 1907 surrender, a delegation of Indians went to Ottawa to present a number of grievances to the government. Cowessess band members helped to organize and actively participated in the meeting with officials. The Band sent Alex Gaddie, Louis O'Soup, and Loud Voice. The Cowessess delegation spoke to the issue of the payments owed to the Band and to a number of grievances related to Treaty 4 promises, but it did not once raise the legitimacy of the surrender. In contrast, the Kahkewistahaw Band's representative complained that its members were having great difficulty making a living on the remaining reserve land, even though Inspector Graham had told them they would have no such difficulty. After the Cowessess delegation returned to its reserve, Barrister H.W. MacDonald followed up with inquiries on behalf of the Cowessess Band with regard to the land sale proceeds. In September 1911, Agent Millar held a meeting at the Agency to explain to the Cowessess Band the financial statements regarding the 1907 surrender. There is no evidence, however, that the propriety of the surrender was raised either by Mr MacDonald on behalf of the Band or by the band members in their meeting with Agent Millar. Nor can we find any other complaint regarding the surrender decision for 30 years following 1907.

We agree with Canada that there is no "authority cited to suggest that a non-exploitative bargain must be the best possible outcome viewed with the benefit of hindsight. An improvident, foolish, or exploitative bargain is, by definition, not merely an imperfect bargain."<sup>188</sup> It may have been unwise in retrospect to have surrendered the hay lands, given modern agricultural methods that permit large-scale farming, ranching, and the export of produce, but the totality of the evidence does not convince us that the surrender in 1907 was so foolish or improvident as to constitute exploitation, such that the Governor in Council should have withheld its consent.

### ***Comparison with Other Crooked Lake Bands***

Before leaving the issue of exploitation, we note the First Nation's argument that the Cowessess surrender was equivalent to the 1907 Kahkewistahaw and 1909 Moosomin surrenders, both of which Canada accepted to negotiate after the Indian Claims Commission had conducted inquiries: "[T]his Commission itself in two other hearings on facts very similar to these, have [sic] already concluded

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<sup>188</sup>

Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 10.

that those surrenders were foolish and improvident.”<sup>189</sup> In our view, the most reliable comparisons are the Kahkewistahaw and Ochapowace surrender proposals, as they took place at the same time and involved the same Crown officials. The Commission has very little information in the record on the Ochapowace surrender vote in January 1907 except that the Band voted against surrender twice, after which the Crown’s officials did not propose surrender again for 10 years. Where we disagree with the First Nation, however, is in the statement that the facts in Kahkewistahaw are very similar. What resonates instead are some of the major differences between the Kahkewistahaw and Cowessess bands and their reserves.<sup>190</sup> Kahkewistahaw had no leader at the time of the surrender; the Band was suffering from disease and starvation; it gave up not only 70 per cent of its reserve but its best agricultural land, a fact that the Commission described as a material consideration in finding the surrender transaction to be tainted; the residual reserve land was significantly inferior land, and such differences would have been obvious to officials; most of the Band had holdings within the surrendered area; the impact of the surrender was devastating to the Band’s economy; and the Kahkewistahaw delegation in 1911 complained that Inspector Graham’s promises had resulted in their losing their livelihood. The Kahkewistahaw Band was extremely vulnerable in January 1907, as the Commission found. These facts were not present in the Cowessess surrender.

The facts of the Moosomin surrender are even less similar to the Cowessess surrender because, as William Graham himself acknowledged in 1930, the Moosomin Band had surrendered a splendid reserve in exchange for a stony reserve in the frost belt which was almost useless for farming.<sup>191</sup> The promise of good fishing at the new reserve also proved to be futile because commercial fishing interests had depleted the catch.

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<sup>189</sup> ICC Transcript, September 21, 2004 (p. 232, Dan Maddigan); see also Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, pp. 16–19.

<sup>190</sup> The ICC commenced an inquiry into the Kahkewistahaw surrender in 1994. See ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

<sup>191</sup> W.M. Graham, Indian Commissioner, to D.C. Scott, DSGIA, April 24, 1930, LAC, RG 10, vol. 4095, file 600324, quoted in ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 173.

**Conclusion**

The Cowessess Band knew about a possible surrender proposal for at least two years before the surrender; officials had discussed it with them in advance of the first surrender meeting, and it is reasonable to believe that band members discussed it among themselves. As able and successful farmers and ranchers, the Cowessess band members knew what the consequences of the surrender would be, voted in a manner that reflected their various priorities, and received the deal they had bargained for. Although we agree with the First Nation that the Crown had a continuing duty to assess whether the surrender was in the best interests of the Band, in the face of the divergent interests of the band members, the Crown did not act in a way that was antithetical to those interests. Crown officials did not deceive or unduly influence the Band before or during the vote. They explained the consequences of the surrender, they were careful to give the band members time to consider their decision, and they acted in accordance with the law. In short, they properly managed the competing interests with respect to the Band's reserve.

We regret that the records of the day do not provide the parties with a comprehensive report of the discussions that took place between Crown officials and the Band. Nevertheless, the record establishes that the Cowessess voters were "autonomous actors" with respect to the 1907 surrender. In the absence of exploitation or tainted dealings on the part of the Crown, and given the compelling evidence that this Band was progressive, knowledgeable about its lands, and understood the consequences of the surrender, we are unable to conclude that the Crown breached its fiduciary duty to the Band.

**REASONS OF COMMISSIONER HOLMAN**

I have read the reasons of my colleagues. I think the essential difference between my analysis and theirs is the understanding and conception of the duty of loyalty and the standard of conduct expected of the Crown as a fiduciary. Consistently, the courts demand a high standard of conduct from a prudent fiduciary. After an examination of the facts, I must conclude that Crown officials were more responsive to the concerns of the settlers, to whom they owed no duty, than to the interests of the Band, to which they did. At the time, Crown officials failed even to consider whether a surrender was in the best interests of the Cowessess Band. This attitude was in stark contrast to the position taken by officials before 1904.

**Phase I: Validity of the Surrender Pursuant to the *Indian Act***

This inquiry marks the second phase of a two-phase inquiry.<sup>192</sup> The first stage of analysis for any surrender is consideration of whether the surrender meets the requirements of the *Indian Act*. This question was the subject of the first phase of this inquiry, and the report on the panel's findings has been published.<sup>193</sup> The issues in phase 1 included, first, the interpretation of section 49<sup>194</sup> of the *Indian Act* – specifically, whether the majority required for a surrender was a majority of eligible voters actually voting or a majority of eligible voters in attendance at a surrender meeting. The second issue required the panel to determine how many eligible voters attended the Cowessess surrender meeting of January 29, 1907. Finally, the third issue was whether a majority of the eligible voting members assented to a surrender within the requirements of the *Indian Act*.

On the first issue, the panel decided that the required majority was one that best protected the interests of the entire band with respect to its commonly held land, and it preferred the consent of a larger number of band members over a smaller number. The panel decided that the majority

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<sup>192</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 263.

<sup>193</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223.

<sup>194</sup> The reader is reminded that where reference is made to the findings of the panel in Phase I to s. 49 of the 1906 *Indian Act* at the time of the surrender vote, in all cases, it should be read as s. 39 of the 1886 Act.

required for a valid surrender under section 49 of the *Indian Act* was a majority of eligible voters present at a surrender meeting, not a majority of eligible voters who voted.<sup>195</sup> On the second issue, the panel decided, based on the evidence in the documentary record, that 30 Cowessess band members attended the surrender meeting.<sup>196</sup>

On the third issue, the panel concluded that the surrender failed because a majority was not achieved with a vote of 15 out of 30 in favour of surrender, and, therefore, the Band did not consent to a surrender of part of its reserve.<sup>197</sup> The panel recommended that the claim be accepted for negotiation, but Canada decided not to accept this recommendation.<sup>198</sup> On that basis, the First Nation returned to the Commission and asked for further inquiry into the issue of whether Canada had breached its fiduciary duties to the First Nation.

The findings in phase I of this inquiry circumscribe the work of this panel in phase II. In phase I, the panel reviewed the *Royal Proclamation of 1763* and the surrender requirements of section 49 of the 1906 *Indian Act*,<sup>199</sup> which are derived from the *Royal Proclamation*. It concluded that the purpose of section 49 was *protective* in nature<sup>200</sup> and “that section 49(1) must be interpreted in a way that takes into account the policy of protecting the interests of the entire band with respect to its land base.”<sup>201</sup> The policy of protecting the reserve land interests of a First Nation as set out in

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<sup>195</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 263.

<sup>196</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 270.

<sup>197</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 270.

<sup>198</sup> Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Patricia Sparvier, Cowessess First Nation, March 27, 2002 (ICC file 2107-33-01, vol. 3).

<sup>200</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 262.

<sup>201</sup> ICC, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223 at 263.



the *Indian Act* can be seen as a statutory echo of the Crown's fiduciary duty to protect and preserve reserve land.

The Phase I panel determined that there was no majority vote for surrender of a portion of the Cowessess reserve, notwithstanding that both parties acted as if there was. The Band did not give valid consent to the surrender, and nothing can be inferred from the vote about the Band's intent or understanding. In a similar vein, any information we have about the Band's ability to make decisions or about band members' understanding of the surrender terms and provisions does not help us in an understanding of the Crown's fiduciary duty. One of two interpretations is possible from a tied vote: either the Band did not intend to surrender its land or the Band had no expressed intention. Without a majority vote, what cannot be said is that the Band intended to surrender land. The only behaviour to be considered is that of the Crown, since it is the Crown which has a duty to the Band. The only questions to be answered are whether the Crown carried out its required duties of loyalty and good faith, acted in the best interests of the Band, and preserved and protected the Band's interest in its reserve. In order to provide a full report, it is first necessary to analyze whether the Crown should have refused to consent to the surrender, on the basis that it was an exploitative bargain. It must be clearly understood, however, that this analysis is strictly in the hypothetical, and no attempt should be made to override the fact that this surrender, because it did not meet the mandatory statutory requirements of the *Indian Act*, was not valid.

### **Phase II : The Crown's Fiduciary Duty to the Cowessess Band**

The issues in this second phase of the inquiry focus on the Crown's fiduciary duty: whether one is owed to the Cowessess Band in the pre-surrender period; whether the Crown breached its duties; and whether the Crown has a lawful obligation to the First Nation as a result of the breach.

In this inquiry, the pre-surrender period dates from the time the reserve was surveyed and the Band moved onto the land to begin farming. Almost from the beginning, local area farmers and townspeople, as well as their elected officials, began to lobby for a surrender of the reserve. The pre-surrender period ends with Crown consent, which is required after a valid surrender vote has been taken.

Not everything the Crown does in the decades leading up to a surrender is relevant to the question of whether the Crown breached its duty with regard to a particular surrender. In this inquiry, there are many instances in the early years when the Crown acted as a good fiduciary for the Cowessess Band. Those instances stand in contrast to the behaviour of Crown officials in the relatively short period from 1904 to 1907.

### ***Issue 1: The Fiduciary Duty Owed by the Crown to the First Nation***

#### *Signing of Treaty 4*

Treaty 4 was signed on September 15, 1874. Chief Cowessess was among the Cree and Saulteaux chiefs in attendance, and he signed on behalf of his followers. Six days of negotiations preceded the signing. On the fourth day, Lieutenant Governor Alexander Morris stated: “[W]e come here to tell you openly, without hiding anything, just what the Queen will do for you, just what she thinks is good for you, and I want you to look me in the face, eye to eye, and open your hearts to me as children would to a father, as children ought to do to a father, and as you ought to the servants of the great mother of us all.”<sup>202</sup> Later the same day, he said, “we ask you to speak out to us, to open your minds to us, and believe that we are your true and best friends, who will never advise you badly, who will never whisper bad words in your ears, who only care for your good and that of your children.”<sup>203</sup> These words provide an excellent description of the fiduciary relationship and the duties of loyalty and good faith. The statements can also be seen as the express promise that judges, decades later, will refer to in their discussions of the law of fiduciary duty – the undertaking on the part of the fiduciary to look after the affairs of another.

It must be remembered that, in signing the treaty, the various bands gave up their rights to huge tracts of land, along with the way of life they had known for centuries. They did so in exchange for reserve lands; very limited rights to hunt, trap, and fish; and assistance from the Crown to establish themselves in a sustaining agricultural economy. Treaty bands paid a significant price for

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<sup>202</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 95–96.

<sup>203</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 97.

their reserves. The concept of a band “purchasing” its interest in reserve land at the time of treaty is addressed in the Supreme Court’s *Mikisew Cree First Nation v. Canada (Minister of Heritage)*. This case dealt with the honour of the Crown and the Mikisew Cree’s rights under Treaty 8. Writing for the Court, Mr Justice Binnie states: “[I]t is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.”<sup>204</sup> Whether the area surrendered to the Crown under Treaty 4 is larger or smaller than France is not important; its size was considerable. It would be just as easy to write: It is not as though the Treaty 4 First Nations did not pay dearly for their entitlement to reserves and the benefits set out in the treaty; surrender of the Aboriginal interest in what is most of southeastern Saskatchewan is a hefty purchase price.

The manner in which the Supreme Court has dealt with the fiduciary duty makes it possible to conclude that a treaty band’s interest in its reserve may be different from that of a band which has not taken treaty. It may also be different from that of a band which has neither Aboriginal nor treaty rights to a particular parcel of land.<sup>205</sup>

In this case, the Crown had invited Chief Cowessess to sign the treaty. It made promises to him fewer than 30 years before it returned to his Band and asked to take back some of this land. If anything, given how much the Indians had to give up in order to “pay” for their reserves, the Crown should have protected Indian land much more diligently than it did.

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<sup>204</sup> *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 SCR 388 at para. 52. This judgment was handed down from the Supreme Court of Canada after oral argument had been made in this inquiry, and, as a result, the parties have not had the opportunity to argue its application. The case is included here to illustrate approval of a concept, and it does not play any further role in the analysis of the Crown’s fiduciary duty.

<sup>205</sup> As an example of a band that was noted by the Supreme Court as not having an Aboriginal right to its reserve land, see *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245. In *Wewaykum*, Mr Justice Binnie noted at para. 12: “It appears the first members of the Laich-kwil-tach First Nation to take up residence in the disputed area was Captain John Quacksister (or Kwaksistal) and his family, in or about 1875.” At para. 91, he states: “The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an existing Indian interest in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.”

*Fiduciary Duty Law*

The Indian Claims Commission has considered the question of the Crown's fiduciary duty many times<sup>206</sup> and has often provided a short precis of the leading cases, on the assumption that many readers are conversant with, if not knowledgeable about, the state of the fiduciary duty law in Canada. Because Canada and the First Nation took very different approaches to this issue in the present inquiry, a difference reflected in these majority and minority reports, it is necessary here to provide more legal background than has usually been done.

At the outset, it is important to state that the duty attaches to the fiduciary, not the beneficiary. In the context of a surrender, that means it is the Crown's duty to be loyal to the interests of the First Nation. It is never the beneficiary's job to keep the fiduciary honest. As an example, it is the Crown's duty to make full disclosure of all the facts necessary for the band to make a voluntary and informed decision. It is not up to the band to find out what the Crown knows.

*Guerin v. The Queen*

*Guerin*<sup>207</sup> marked the first time that the Supreme Court of Canada had applied the equitable doctrine of fiduciary duty in an Aboriginal context. The claim before the courts in *Guerin* involved the surrender of valuable reserve land for lease to a golf club. The lease terms were less favourable to the Band than the terms it had approved at the surrender meeting. Seven of the eight justices of the Supreme Court who took part in the judgment agreed that the Crown was in a fiduciary relationship with the Musqueam Indian Band. In his judgment, Mr Justice Dickson (as he then was) cited the *Royal Proclamation of 1763* as a source of the Crown's fiduciary duty to Indian people. He reviewed the *Royal Proclamation's* requirement that Indian lands could be sold only to the Crown and stated:

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<sup>206</sup> Among the surrenders are *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281; *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263, and, since oral argument in this inquiry, *James Smith Cree Nation: Chakastaypassin Indian Reserve 98 Inquiry* (Ottawa, March 2005).

<sup>207</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 385.

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.<sup>208</sup>

In Justice Dickson’s analysis, the Crown had undertaken a historic responsibility “to act on behalf of the Indians so as to protect their interests in transactions with third parties.”<sup>209</sup> Moreover, through the *Indian Act*, “Parliament has conferred upon the Crown a discretion to decide for itself where the Indian’s best interests really lie.”<sup>210</sup> “This discretion,” he stated, “has the effect of transforming the Crown’s obligation into a fiduciary one.”<sup>211</sup> He also stated

that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary’s strict standard of conduct.<sup>212</sup>

When Treaty 4 was signed in 1879, the Crown made exactly those kinds of promises to the Cree and Saulteaux chiefs, one of whom was Chief Cowessess. Lieutenant Governor Morris was very clear that the Queen would never advise the chiefs badly and would keep the best interests of both them and their children at heart. There can be no question that the Crown made the kind of unilateral undertaking that Mr Justice Dickson had in mind when he first wrote about the fiduciary duty.

It is also worth noting two other points that Mr Justice Dickson made in *Guerin*. He stated that fiduciary duties typically arise only in a private law context, and that “[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary

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<sup>208</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 383.

<sup>209</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84.

<sup>210</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 383–84.

<sup>211</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

<sup>212</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 384.

relationship.”<sup>213</sup> He categorized the fiduciary duty owed to the Musqueam Band as being “in the nature of a private law duty.”<sup>214</sup>

What is instructive and relevant to the Cowessess Band of 1907 is that the Court is clear that public law duties are not fiduciary duties. Whatever obligation<sup>215</sup> the Crown thought it had to the settlers near the Cowessess reserve, it was not a fiduciary duty. The Crown was a fiduciary only to the Band, where its “duty is that of utmost loyalty to his principal.”<sup>216</sup>

*Blueberry River Indian Band v. Canada (sub nom. Apsassin)*<sup>217</sup>

In *Apsassin*, the Supreme Court dealt with the specific issue of the pre-surrender fiduciary duty owed by the Crown to the Beaver Band.<sup>218</sup>

Two surrenders were at issue in *Apsassin*, in 1940 and 1945. In 1940, the Beaver Band surrendered the mineral rights to IR 172, in trust, which the Crown was “to lease” for its benefit. In 1945, the Band surrendered all of IR 172 “to sell or lease.” In 1948, the Department of Indian Affairs transferred the surrendered land to the Director of the *Veterans’ Land Act* (DVLA) for \$78,000, to be used for settlement of veterans returning from World War II. In what the Supreme Court of Canada described as “inadvertence,” the DIA also transferred the mineral rights. Following the sale,

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<sup>213</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 385.

<sup>214</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 385.

<sup>215</sup> The Crown’s duties to ordinary citizens encompass matters such as treating citizens in equal circumstances equally and applying legislation fairly to all. A fiduciary duty requires that the fiduciary act in the best interests of the beneficiary. Almost by definition, the Crown cannot do that with regard to the average citizen. If the Crown had fiduciary duties to the public, for instance, it could not tax one class of people higher than another or give benefits to one class of people and not to another, yet that is what it does routinely in making public policy. Easily demonstrated examples can be seen in the application of the *Income Tax Act*: higher-income Canadians pay tax at higher rates and receive fewer benefits than lower-income Canadians. In applying the principle to Cowessess, the settlers could expect the Crown to treat them fairly vis-à-vis each other, without favouritism as to who would be allowed to homestead and who not, but they could not expect that the Crown would act in their best interests in priority to other interests.

<sup>216</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 389

<sup>217</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

<sup>218</sup> The Beaver Band has been named many ways, including the Fort St John Band and the Fort St John Band of Beaver Indians. The Supreme Court called it the “Beaver Band,” so that name will be used for the purpose of discussing the case.

the lands were found to contain deposits of oil and gas. The Beaver Band sought a declaration that the surrender was invalid on the grounds that the Crown had breached its fiduciary duties to the Band and had committed several acts and omissions that constituted negligence.

The Supreme Court of Canada decided that the “inadvertent” transfer of the mineral rights to the DVLA in 1948, coupled with the Crown’s failure to use its statutory power to cancel the sale of the mineral rights once the error was discovered, constituted a breach of its post-surrender fiduciary duty to the Beaver Band.

With respect to the Crown’s pre-surrender fiduciary duties, the two judges who wrote opinions differed in their analyses, but agreed that, with regard to the surrender itself, the Crown had discharged its duties. Both Mr Justice Gonthier and Madam Justice McLachlin (as she then was) saw the *Indian Act*’s requirements for valid band consent and Crown consent to a surrender as a balancing between a First Nation’s autonomy and the Crown’s role as protector.

Madam Justice McLachlin analyzed the Crown’s pre-surrender fiduciary duties from two perspectives: first, whether the *Indian Act* imposed a duty on the Crown to prevent the surrender of IR 172, and, second, whether the circumstances of the case gave rise to a fiduciary duty on the Crown. In the Moosomin inquiry, that panel reviewed *Apsassin* and described the dual analysis as those obligations that pertain to the result of a surrender and those that pertain to the context or process leading up to a surrender.

In this inquiry, the question of whether the Crown should have withheld its consent to the surrender can be answered only from the hypothetical, since the Phase I panel found there was no valid consent on the part of the Cowessess Band. In her analysis, Madam Justice McLachlin dealt with the result of the surrender requirements of the *Indian Act* and the fiduciary duty imposed on the Crown:

My view is that the *Indian Act*’s provisions for surrender of band reserves strikes [sic] a balance between the two extremes of autonomy and protection. The band’s consent was required to surrender its reserve. Without that consent, the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):

The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.<sup>219</sup>

What this decision means in the context of this surrender is that, had the Cowessess Band consented to the surrender in 1907, and had the consent been freely given, both informed and voluntary, the Crown would have had a duty to evaluate the result of surrender for the purpose of determining whether it was exploitative.

In *Apsassin*, Madam Justice McLachlin also considered the context of a surrender, whether “a fiduciary relationship was superimposed on the regime for alienation of lands contemplated by the *Indian Act*.”<sup>220</sup> In writing about the fiduciary relationship in general, McLachlin J stated:

[A] fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: see *Frame v. Smith*, [1984] 2 SCR 99; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377.<sup>[221]</sup> The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.<sup>222</sup>

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<sup>219</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 35 (sub nom. *Apsassin*), McLachlin J.

<sup>220</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 37 (sub nom. *Apsassin*), McLachlin J.

<sup>221</sup> The concept of the “peculiarly vulnerable” person was developed earlier by the Court in *Frame v. Smith*, [1984] 2 SCR 99; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377. It will be discussed in more detail later.

<sup>222</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 38 (sub nom. *Apsassin*), McLachlin J. Emphasis in original.



On the facts of *Apsassin*, Madam Justice McLachlin decided there was no need to superimpose a fiduciary obligation on the Crown leading up to the surrender because, although the Band “trusted the Crown to provide it with information as to its options and their foreseeable consequences”<sup>223</sup> in relation to both the surrender of IR 172 and the acquisition of new reserves better suited to its chosen lifestyle of hunting and trapping, the evidence did “not support the contention that the Band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown, ...”<sup>224</sup>

Mr Justice Gonthier’s approach to the pre-surrender fiduciary duty was complementary. He preferred “an intention-based approach,”<sup>225</sup> which required an analysis of the “understanding and intention of the Band members”<sup>226</sup> in order “to give effect to the true purpose of the dealings.”<sup>227</sup>

Both justices paid particular attention to the findings of the trial judge, Mr Justice Addy. Gonthier J did so to determine the Band’s intention at the time of the surrender, and McLachlin J, to determine whether the Band had ceded its decision-making power to the Crown. In his judgment, Mr Justice Addy considered the issue of whether the Beaver Band had made informed and voluntary consent to the proposed surrender. Lack of consent would have invalidated the surrender and could have come about in a number of ways.<sup>228</sup> He was clear that the Crown had been diligent about

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<sup>223</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*), McLachlin J.

<sup>224</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*), McLachlin J.

<sup>225</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 7 (sub nom. *Apsassin*), Gonthier J.

<sup>226</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 7 (sub nom. *Apsassin*), Gonthier J.

<sup>227</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 7 (sub nom. *Apsassin*), Gonthier J.

<sup>228</sup> Those ways could include the common law remedies of lack of understanding of the meaning of the contract, lack of knowledge of the terms of a contract, failure *ad idem* (in which two parties think a contract means different things), and lack of capacity to sign a contract. There are also the equitable remedies that the Court imposes on what are otherwise voluntary agreements, usually between two parties with a significant power imbalance. The equitable remedies include duress, which requires an analysis of the economic circumstances of the weaker party; undue influence of the stronger party over the weaker; and the unconscionable bargain, in which the Court has the jurisdiction to overturn what would otherwise be a valid contract. Because these contract remedies were pleaded by First Nations

providing information to the Beaver Band, helping it to consider and weigh options, and providing time for both questioning by the band members and open discussion.

Madam Justice McLachlin listed the following eight findings of Mr Justice Addy to demonstrate that the Band had not ceded its decision-making power to the Crown, or, as she characterized it, had its decision-making power ceded for it. Mr Justice Gonthier cited points 1, 6, and 7 as evidence to support the Band's intention.

1. That the plaintiffs [the Band] had known for some considerable time that an absolute surrender of I.R. 172 was being contemplated;
2. That they had discussed the matter previously on at least three formal meetings where representatives of the Department were present;
3. That, contrary to what has been claimed by the plaintiffs, it would be nothing short of ludicrous to conclude that the Indians would not also have discussed it between themselves on many occasions in an informal manner, in their various family and hunting groups;
4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meetings but that, on the contrary, the matter appears to have been dealt with most conscientiously by the departmental representatives concerned;
6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender;
7. That, although they would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being

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before the application of fiduciary duty law to Aboriginal interests, they appear in judgments before *Apsassin*. However, in contract law, the parties are presumed to be competent equals, and one party has no duty to act on behalf of the other. That is one of the hallmarks of the law of fiduciaries; in an Aboriginal context, it is the Crown that must act on behalf of the First Nation. An application of contract law principles, and, in particular, the equitable remedies, might have the same result as the application of the law of fiduciaries, given the power imbalance between the Crown and the First Nations.

furnished with alternate sites near their trapping lines to be purchased from the proceeds;

8. That the said alternate sites had already been chosen by them, after mature consideration.<sup>229</sup>

A comparison of what the trial judge found to be facts in *Apsassin* and the facts in this inquiry reveal a very different set of circumstances.

In *Apsassin*, Mr Justice Gonthier emphasized that the Band understood that the sale or lease of IR 172 would provide the money necessary for the purchase of better reserve sites, which had already been identified by the Beaver Band. He went on to state that he “would be reluctant to give effect to this surrender variation if I thought that the Band’s understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band’s understanding and intention.”<sup>230</sup> Mr Justice Gonthier did not elaborate on what he meant by “tainted dealings,” but, from his reliance on Addy J’s findings at trial and his determination that there was “nothing in the negotiations prior to the 1945 surrender or in the terms of the surrender instrument, which would make it inappropriate to give effect to the Band’s intention to surrender all their rights in I.R. 172,”<sup>231</sup> it is possible to infer his understanding of what might constitute tainted dealings. Mr Justice Gonthier specifically approved Addy J’s sixth finding – that the Indian Agent had fully explained the consequences of the surrender.

There has been little judicial interpretation of “tainted dealings.” In *Chippewas of Kettle and Stony Point v. Canada (Attorney-General)*, Mr Justice Laskin of the Ontario Court of Appeal applied the Supreme Court’s analysis in *Apsassin* and stated that the existence of cash at the surrender meeting and the immediate cash payments made to the Band by the third-party purchaser of the land at the surrender meeting did not vitiate the “‘true intent’ or the ‘free and informed consent’ of the

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<sup>229</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paras. 39 and 7 (sub nom. *Apsassin*), Gonthier J. The explanatory words in brackets in point 1 have been added by the ICC.

<sup>230</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 14 (sub nom. *Apsassin*), Gonthier J.

<sup>231</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 14 (sub nom. *Apsassin*), Gonthier J.

Band or, in the words of Gonthier J., ‘made it unsafe to rely on the Band’s understanding and intention.’” Mr Justice Laskin also recognized and did not disapprove of the motion judge’s description of the cash and the promise of immediate cash payment as “having the odour of moral failure.” Indeed, he went on to say that “the cash payments or alleged ‘bribe’ and consequent exploitation or ‘tainted dealings’ may afford grounds for the Band to make out a case of breach of fiduciary duty.”<sup>232</sup>

The eight points set out by the trial judge in *Apsassin* do not establish a checklist by which a First Nation or the Crown can compare any given behaviour to an expected standard. The Commission has stated, however, that the decision is “instructive.”<sup>233</sup>

It must be remembered that *Apsassin* dealt with a surrender in which the Supreme Court found there was valid consent: the Beaver Band knew what it was doing, and it had a plan to replace the surrendered land with other land. In *Apsassin*, the Crown prudently advised the Band, worked with it to develop the plan to replace the land, and assessed whether the surrender was in the best interests of the Band.

In the present inquiry, we do not start from the point of having valid consent. Without valid consent, there is no band intention and understanding to be respected. That vacuum makes any application of the benchmarks in *Apsassin* extremely difficult.

### *Hodgkinson v. Simms*

At the same time that the Supreme Court was considering the duty of loyalty in an Aboriginal context, it was also dealing with non-Aboriginal cases, one of which is instructive in assessing the position of the Cowessess Band in 1907. *Hodgkinson v. Simms*<sup>234</sup> deals with the meaning of legal vulnerability as well as the issue of the beneficiary that is empowered or required to make certain decisions within a fiduciary relationship.

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<sup>232</sup> *Chippewas of Kettle and Stony Point v. Canada (Attorney-General)* (1996), 31 OR 3rd, 97 (Ont. CA) at 106.

<sup>233</sup> ICC, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 187.

<sup>234</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377.

In *Guerin*, once the Band had surrendered the land for lease, it had no ability to deal with the surrendered land; only the Crown could do so. However, in a surrender, the Band itself must make the decision to sell the land. The *Indian Act* requires a vote by band members. If the Band itself is making the decision, how, then, would the Crown have a duty with regard to that decision?

*Hodgkinson* dealt with the claim by an investor that his financial adviser had not fully disclosed a personal interest in investments that he recommended to the investor. The investor was a stockbroker and admitted he was financially knowledgeable. Like a band which must decide whether to surrender its land, he made the actual decision to invest. The specific question the Court was asked to determine was whether the adviser was in a fiduciary relationship with the investor, notwithstanding the lack of a unilateral undertaking and the question of *per se* vulnerability.

First, Mr Justice La Forest considered what he called a “power-dependency”<sup>235</sup> relationship and set it in context with the situation of unilateral discretion as set out in *Guerin*:

More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply a species of a broader family of relationships that may be termed “power-dependency” relationships. I employed this notion, developed in an article by Professor Coleman, to capture the dynamic of abuse in *Norberg v. Wynrib, supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and the patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a “power-dependency” relationship was there applied to an instance of sexual assault, in my view the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party.<sup>236</sup>

The majority of the court held that a relationship between a client and a financial adviser is not necessarily fiduciary, but there were circumstances in which it was. What was important to La

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<sup>235</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 411.

<sup>236</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 411.

Forest J were the reasonable expectations of the parties and the degree to which one party relied on the advice of the other:

[I]t is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow “unilateral”. ... *Ipsa facto*, persons in a “power-dependency relationship” are vulnerable to harm. Further, the relative “degree of vulnerability”, if it can be put that way, does not depend on some hypothetical ability to protect one’s self from harm, but rather on the nature of the parties’ reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former’s best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures. J.C. Shepherd, *supra*, puts the matter in the following way, at p. 102:

Where a weaker or reliant party trusts the stronger party not to use his power and influence against the weaker party, and the stronger party, if acting *reasonably*, would have known or ought to have known of this reliance, we can say that the stronger party had notice of the encumbrance, and therefore, in using the power has accepted the duty. [Emphasis in the original.]<sup>237</sup>

He went on to state:

... To imply that one is not vulnerable to an abuse of power because one could have protected, but did not protect one’s self is to focus on one narrow class of “power-dependency relationship” at the expense of the general principle that transcends it.<sup>238</sup>

The decision to surrender land was one of the few decisions (if not the only one) that Indian bands could make in the early years of the twentieth century. All other aspects of their lives were tightly controlled by the Crown. They could not sell produce without permission; they could not leave the reserve without permission; they could not buy land; they could not vote; they could not hire lawyers to enforce their rights. The Crown could and did depose chiefs; the Crown could and did regulate the manner in which bands chose their leadership. The only decision a band could make was perhaps the most important – it could sell its land. It was the one area where the Crown did not have a “unilateral power or discretion” over the band.

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<sup>237</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 412–13.

<sup>238</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 413.

In the case of the Cowessess Band, it “ceded” power in 1879 as a signatory to Treaty 4. At that time, the Crown gained the power to manage both the Band and its interests. Simultaneously, it became obliged to do so “for the benefit” of the Cowessess Band. The Crown had promised to advise the First Nation as to its best interests, and the Cowessess Band trusted the Crown to exercise its powers with loyalty and care. It had every right to trust that the Crown would advise it loyally and carefully when the question of surrender arose.

The term “peculiarly vulnerable” as used by Justice McLachlin in *Apsassin* to describe the condition of the beneficiary does not mean vulnerable in the ordinary sense, but in the legal sense.<sup>239</sup> The Cowessess Band was in a “power-dependency” relationship with the Crown, particularly in the matter of selling land. Not only had the Crown promised it would advise the Band as to its best interests at the time of treaty, but the Crown effectively prevented anyone else from doing so.<sup>240</sup> Inspector William Graham wrote to his superior in Ottawa, Superintendent General of Indians Affairs, Frank Oliver, that he was aware that the “Town Council, the Board of Trade and Individuals

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<sup>239</sup> It is clear that Madam Justice McLachlin’s choice of wording comes from an earlier case, in which Madam Justice Wilson set out both vulnerability and the unilateral exercise of power as indicia of the presence of a fiduciary relationship. In *Frame v. Smith*, [1987] 2 SCR 99, Wilson J wrote in dissent as to the outcome of the case, but her reasoning has subsequently been adopted by the Court. She proposed a three-step test for the finding of a fiduciary relationship: (1) there had to be scope for the exercise of some discretion or power; (2) the power or discretion could be used unilaterally so as to affect the beneficiary’s legal or practical interests; and (3) a peculiar vulnerability existed on the part of the beneficiary to the exercise of the discretion or power.

<sup>240</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 467–68. It is worth noting at this point that Madam Justice McLachlin concurred in what became the minority decision. She and Mr Justice Sopinka wrote for three judges and, on the facts of the case, did not find there was a fiduciary relationship. Nevertheless, at p. 467, they stated: “Vulnerability does not mean merely ‘weak’ or ‘weaker’. It connotes a relationship of dependency, an ‘implicit dependency’ by the beneficiary on the fiduciary.” Both she and Justice Sopinka, at pp. 467–68, stated that to find the fiduciary relationship, it was necessary to have a

total reliance and dependence on the fiduciary by the beneficiary. ... To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.

This is in accordance with the concepts of trust and loyalty which lie at the heart of the fiduciary obligation. The word “trust” connotes a state of complete reliance, of putting oneself or one’s affairs in the power of the other. The correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person’s affairs placing the latter at the mercy of the former’s discretion.

have been talking to the leading Indians, and they now have all kinds of ideas of [*sic*] their heads.”<sup>241</sup> In that same letter, he suggested that “it would be necessary to have the matter thoroughly understood and the terms of surrender should be thoroughly decided upon before the proposition is put to the Indians, because it would have a bad effect if the Department had to go back to them with a second proposition. Outsiders would interfere in the interval as in the past.”<sup>242</sup> Graham did not say in what way outsiders had interfered, but the most reasonable inference is that the local people would encourage the Indians to get a better deal than the Crown was offering. He also stated that he had consulted with the Roman Catholic priest, Siméon Perreault, because of what Graham believed was his influence over the people of Cowessess. The priest, he explained, was “of the opinion that a surrender could be obtained, if properly handled.”<sup>243</sup>

*Wewaykum Indian Band v. Canada*

More recently, the Supreme Court considered the general nature of the fiduciary duty owed to Aboriginal peoples in *Wewaykum Indian Band v. Canada*.<sup>244</sup> In *Wewaykum*, two bands claimed each other’s reserve land, and each asserted it would hold both reserves to the exclusion of the other because of breaches of fiduciary duty by the Crown.

In determining the outcome of the matter and whether, in these circumstances, the Crown owed fiduciary duties to either or both of the two bands, Mr Justice Binnie examined the nature and scope of the fiduciary duty and its application to reserve land.

In writing for a unanimous Court, he began by stating that “[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.”<sup>245</sup> In addition, the

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<sup>241</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

<sup>242</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

<sup>243</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

<sup>244</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

<sup>245</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 81.



creation of a fiduciary relationship depends on “identification of a cognizable Indian interest” and the Crown’s undertaking of discretionary control in a way that invokes responsibility “in the nature of a private duty.”<sup>246</sup> Justice Binnie set out the following general principles:

1. The content of the Crown’s fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
2. Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown’s duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
3. Once a reserve is created, the content of the Crown’s fiduciary duty expands to include the protection and preservation of the Band’s quasi-proprietary interest in the reserve from exploitation.<sup>247</sup>

Mr Justice Binnie distinguished between the Crown’s fiduciary duty to Aboriginal peoples and the “exercising of ordinary government powers in matters involving disputes between Indians and non-Indians.”<sup>248</sup> In this situation, he stated that, before reserve creation, the Crown is no ordinary fiduciary and “wears many hats and represents many interests.”<sup>249</sup>

At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in *Guerin, supra*, at p. 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion,

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<sup>246</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 85

<sup>247</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

<sup>248</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 96.

<sup>249</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 96.

do not typically give rise to a fiduciary relationship. [Emphasis added.]<sup>250</sup>

In his survey of the nature and scope of the fiduciary duty, Mr Justice Binnie appears to set up a hierarchy of the fiduciary duties owed to bands in relation to reserve land. Once land has been set aside for a band, the basic fiduciary duties of loyalty, full disclosure, and acting in the best interests of the beneficiary are at stake. Once the reserve is created, the Crown's duty expands to include preservation and protection of the reserve land.

He went on to explain the "exploitative bargain" by referring to the source of the expression, Madam Justice Wilson in *Guerin*, in which she stated that, before any disposition, the Crown has "a fiduciary obligation to protect and preserve the Band's interest from invasion or destruction."<sup>251</sup>

Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself.<sup>252</sup>

Mr Justice Binnie has reinforced the process of analyzing surrenders through a two-step process. In the first step, the Crown's conduct in the context of the surrender must be evaluated against the fiduciary duties of loyalty, good faith, full disclosure, and the preservation and protection of reserve land. In the second step, assuming that the Crown has acted as it should, the band has made full and informed consent, and the Crown has also been involved at disposition to prevent an exploitative bargain, the substance of a surrender must be evaluated.

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<sup>250</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 96. Emphasis in original.

<sup>251</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 350.

<sup>252</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 100.

*Haida Nation v. British Columbia (Minister of Forests)*

The Court's most recent statement about the fiduciary duty can be found in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>253</sup> in which Madam Justice McLachlin, writing for a unanimous Court, cites *Wewaykum* with approval both in finding that "where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79,"<sup>254</sup> and, "while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests."<sup>255</sup>

It is clear that the Supreme Court recognizes what might be called a hierarchy of duties owed by the Crown to Aboriginal peoples. The most onerous are at the top: the fiduciary duties of loyalty and good faith, and the duty to act in the best interests of the First Nation. Less onerous are the duties to consult and accommodate, in which the Crown is required to act, but is not required to act in the best interests of the First Nation to the exclusion of other interests. Below the duty to consult and accommodate would be the public law duties that the Crown owes to all. These public law duties are not enforceable except through statute, and they do not create justiciable rights.

The fiduciary duty can best be summarized by the following principles:

- In the context of surrender discussions, the Crown owes the First Nation a duty of loyalty and full disclosure. At all times, it must act in the best interests of the band. With regard to the band's interest in the reserve, it must act to protect and preserve the band's interest in the reserve.
- If there is valid consent to a surrender, the Crown has a duty to prevent an exploitative bargain.

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<sup>253</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.

<sup>254</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para. 18. This case was handed down from the Supreme Court after oral argument was made in this inquiry and, as a result, the parties have not had the opportunity to argue its application. It is included to show the development of fiduciary duty law in Canada and has not been applied to the facts of the inquiry.

<sup>255</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para. 54.

- On surrender, the Crown must implement the wishes of the band and deal with the land in the best interests of the band.

At all times, the honour of the Crown is at stake.

#### *Nature of the Pre-surrender Fiduciary Duty*

The First Nation has argued a more expansive fiduciary duty than has the Crown.

During the oral hearing in this inquiry, counsel for the First Nation quoted Mr Justice Lambert of the British Columbia Court of Appeal in *Haida Nation*:

The fiduciary duty of the Crown ... is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that in cases of conflicting rights the interests of the Indian people to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty owed.<sup>256</sup>

Counsel for the First Nation cited *Wewaykum* approvingly, as well as the duties set out by Mr Justice Binnie of loyalty, good faith, full disclosure, and the duty to protect and preserve reserve land. The First Nation argued that Canada's duty is to act in the best interests of the Band, putting the Band's interests ahead of all others;<sup>257</sup> to provide the Band with full disclosure of the terms and foreseeable consequences of the surrender, so that the voting members have an adequate understanding and can make an informed decision;<sup>258</sup> to respect the decision-making authority of the Band concerning the surrender and not to seek to undermine, circumvent, or overpower that authority;<sup>259</sup> to consider whether the foreseeable consequences of the proposed surrender would be

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<sup>256</sup> ICC Transcript, September 21, 2004 (p. 40, Daniel J. Maddigan). Mr Justice Lambert had found that the duty to consult and accommodate was fiduciary in nature. The Supreme Court disagreed as to whether the duties were fiduciary, but it did not comment on Lambert's conceptualization of the Crown's fiduciary duties.

<sup>257</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 47.

<sup>258</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 47.

<sup>259</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 47.

foolish or improvident of the Band's interests;<sup>260</sup> and, if the surrender is exploitative, to withhold the required consent of the Crown.<sup>261</sup>

Counsel for Canada argued a much narrower view of the fiduciary duty. Canada's position on the fiduciary duty begins with the premise that there was a majority vote by the Band in 1907 and, consequently, a valid surrender. In its response to the panel's recommendation that Canada accept this claim for negotiation following phase I of the inquiry, Canada rejected the panel's finding that the recorded vote was not a majority vote. In the oral hearing in this inquiry, Canada submitted that, "in a surrender case a band can surrender as little or as much land as it chooses and that decision, subject to the test that's set out in *Apsassin*, is to be respected."<sup>262</sup> Counsel submitted that the "Crown's obligation was limited to preventing exploitative bargains."<sup>263</sup> Canada went on to say that, with regard to whether the Crown had a duty to act in the best interests of the Band, "that factor only arises where the band has given up its decision-making authority to the Crown. And I would submit that in our view the evidence fails to disclose that Cowessess Band ceded its decision-making authority to Canada in the context of the 1907 surrender and, therefore, the requirement to act solely in the benefit of the band doesn't arise."<sup>264</sup>

The Crown summarized the test this way: "Refusing to consent to an exploitative bargain; not engaging in tainted dealings so as to subvert the band's understanding and intention regarding the surrender; and if the band had ceded its decision-making authority to the Crown Canada could have an additional duty to exercise the ceded power with loyalty, care and solely for the benefit of the band."<sup>265</sup>

The First Nation has characterized the fiduciary duty as a positive duty – the duties to be loyal, to make full disclosure, to preserve and protect reserve land, and, if necessary, to prevent the

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<sup>260</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 49.

<sup>261</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 49.

<sup>262</sup> ICC Transcript, September 21, 2004 (pp. 145–46, Vivian Russell).

<sup>263</sup> ICC Transcript, September 21, 2004 (p. 156, Vivian Russell).

<sup>264</sup> ICC Transcript, September 21, 2004 (p. 158, Vivian Russell).

<sup>265</sup> ICC Transcript, September 21, 2004 (pp. 160–61, Vivian Russell).

exploitative bargain. With the exception of the positive duty to prevent the exploitative bargain, the Crown has characterized the fiduciary duty in the negative – not to engage in tainted dealings, not to subvert the Band’s understanding and intention.

It must never be forgotten that, regardless of whether the duty is argued expansively or restrictively, the fiduciary duty is the duty of loyalty and good faith, the duty of one to act in the best interests of another. The issue the courts must decide most often is whether it attaches in any given situation. In *Wewaykum*, Mr Justice Binnie provided the road map, as it were, to the duty itself, setting out its elements, the requirement of a “cognizable Indian interest,” and the way the duties expand depending on the nature of the interest.

In this case, the “cognizable Indian interest” is the Band’s interest in the reserve itself, one it received as a result of an exchange of Aboriginal title. During the period of time leading up to the surrender, the Crown, as fiduciary, has a duty to advise the Band as to its best interests; it has a duty to put the Band’s interests before the interests of others, such as the settlers; and it has a duty to make full disclosure of all the facts known to the Crown at the time. Those facts included the Crown’s knowledge of the value of the hay lands to the Band, one that was well known to Crown officials.

My colleagues will say that *Apsassin* is the only case relevant to this inquiry, because only *Apsassin* deals specifically with the pre-surrender duties of the Crown. *Apsassin* is instructive in that it sets out some of the tests to be considered in the pre-surrender situation. The standard to be met by Crown officials dealing with the Cowessess reserve in 1907, for instance, can be seen by examining the findings of the trial judge in *Apsassin*.

The duties, as distinct from the tests for breach of those duties, remain those iterated first in *Guerin* and repeated in *Wewaykum*. The difficulty in applying only *Apsassin* is that it ignores the developments in the law of fiduciary duties as they apply to Aboriginal peoples. When clear writing by the Supreme Court exists about the fiduciary duty of the Crown with respect to reserve land, it is both instructive and authoritative. Accordingly, this analysis of the facts in this inquiry will refer to all three of these cases.

***Issue 2: Did the Crown Breach Its Pre-surrender Fiduciary Duty to the Cowessess Band?***

This analysis of the Crown's possible breach of its pre-surrender fiduciary duty begins by framing the question in four different ways: In seeking a surrender of 33 sections the Cowessess Band's reserve, was the Crown acting in the best interests of the Band? Did the Crown provide full disclosure to the Band? Did the Crown advise the Band as to its best interests? And did the Crown seek to influence the vote? Regardless of the outcome of the vote, the Crown's activities in that regard can be evaluated. It must be emphasized that it is the Crown's conduct that is at issue, not the Band's understanding of what was happening.

*What the Crown Knew about the Hay Lands*

Two facts are critical to an understanding of what happened in 1907. The first is that the Cowessess Band relied on the hay grown on the southern portion of the reserve. The second is that the Crown knew of this dependence and was well aware of the Band's requirement for hay if it was going to become self-sufficient.

We know from the documentary record that there was pressure from the neighbouring settlers almost from the time the reserve was first surveyed in 1884 either to move the Band or to obtain reserve land. In March 1886, the settlers asked that the boundary of the reserve be moved back six miles so that it would not front onto the Canadian Pacific Railway line.<sup>266</sup> Pressure continued throughout the 1890s and included letters to the Minister of the Interior, Clifford Sifton, from the local MLA, Mr R.S. Lake.<sup>267</sup> In general, the settlers believed that the Indians had too much land and were not making good use of the land they had. Then, in 1902, a petition was sent to Ottawa containing the signatures of almost 200 people, including local politicians and Mr Lake.<sup>268</sup>

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<sup>266</sup> A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, March 4, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 34–36).

<sup>267</sup> Clifford Sifton, Minister of the Interior, to J.A.J. McKenna, January 19, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 62).

<sup>268</sup> Residents of the village of Broadview and town of Whitewood and surrounding districts to the Minister of the Interior and the Department of the Interior, Ottawa, undated (c. March 1902), LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 77–83).

The First Nation has argued that the value of the hay lands was well known to the Crown and that the impact of the surrender on the Band's cattle industry was foreseeable. Counsel for the First Nation cited the repeated warnings provided by Indian Agent Allan McDonald, Indian Commissioner David Laird, and Assistant Indian Commissioner J.A.J. McKenna in response to earlier calls for surrender in the period from 1885 to 1904. The First Nation has also argued that the nature of the potential problems was equally apparent in the years that followed, even though Inspector Graham did not refer to them.<sup>269</sup>

Canada submits that the Indians were farming only a small percentage of the reserve land available for agriculture. It also takes the position that there was no direct correlation between the amount of hay harvested and the number of cattle the Band owned between the years 1890 and 1899,<sup>270</sup> that few of the Cowessess band members were farming on the surrendered land,<sup>271</sup> and that the funds received were put to good use.<sup>272</sup>

In the early years of the reserve, the Crown was conscientious about protecting the Cowessess Band's interest in the land. In 1886, in response to the residents' request to have the reserve boundaries moved away from the railway, Indian Agent Allan McDonald responded by saying that the southern six miles of the reserve were the Indians' hay lands and, unless they got the same area in hay, "it would be unjust to entertain the proposition" of a surrender.<sup>273</sup> He expected that the people of Cowessess would soon have large numbers of stock and, therefore, it was necessary to protect their source of hay. Agent McDonald's position in favour of protecting the reserve did not vary, and he consistently recommended against surrender. At one point, in 1891, he stated that, from his position as Indian Agent, and in the interests of the Indians, if there was a surrender of the

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<sup>269</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 44.

<sup>270</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 16.

<sup>271</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 20.

<sup>272</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 20.

<sup>273</sup> A. McDonald, Indian Agent, to the Indian Commissioner, March 22, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 40–42).



southernmost portion of the reserve, money could not compensate them for the loss because all their hay lands would be gone.<sup>274</sup>

It is clear that, during these years, whenever there was a suggestion that some of the reserve should be surrendered, the Crown's response was that a surrender would not be in the best interests of the Cowessess band members because it would deprive them of their hay. When one of McDonald's successors, Magnus Begg, suggested that a surrender would benefit the Indians because it would provide them with money to pay their debts,<sup>275</sup> Commissioner Laird responded that "it would never do to have the Indians short of hay."<sup>276</sup>

These events provide examples of the Crown being a good fiduciary, mindful of its duty to protect Indian reserve land and to act in the best interests of the Band. The Crown knew what was necessary for the band members of Cowessess to prosper. It is obvious that, up to 1902 at least, Crown officials recognized their duty to the Indians and were willing to abide by it, even as they acknowledged that it would be good to have more land for settlement. As late as 1902, Commissioner Laird reported back to Ottawa that he did not take the time to meet with the Cowessess Band, as he had with both Ochapowace and Kahkewistahaw, because the Agent had told him that all the Indians' hay lands were in the part the settlers wanted.<sup>277</sup>

The pressure did not ease up, however, and in 1904, noting the strong desire of the people of Broadview to have the southern half of the reserve surrendered, Deputy Superintendent General Frank Pedley wrote to Commissioner Laird and asked him, first, to find out if it was desirable from an "Indian point of view" to have that portion of the reserve surrendered, and, second, whether they

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<sup>274</sup> A. McDonald, Indian Agent, Crooked Lake, to the SGIA, March 10, 1891, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 53–55).

<sup>275</sup> Magnus Begg, Indian Agent, to David Laird, Indian Commissioner, January 13, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 73–74).

<sup>276</sup> David Laird, Indian Commissioner, to Indian Agent, Crooked Lake Agency, January 22, 1902, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 76).

<sup>277</sup> David Laird, Indian Commissioner, Winnipeg, to the Secretary, DIA, May 6, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 87–89).

were “likely to go along with it.”<sup>278</sup> Laird’s response is worth noting, because he states it is “bad policy” to have him convene the Indians for surrender, “for it might create the impression that the Department is acting for the settlers in the matter.”<sup>279</sup>

The government officials were, as has been acknowledged, in a difficult position. The Superintendent General of Indian Affairs was also the Minister of the Interior. On the one hand, he wanted to continue opening up the West, if only to provide goods for the railway, and, on the other, he had a duty to take care of Indians on their reserves. This dual role created a classic conflict of interest, even more so than the one described by Madam Justice McLachlin in *Apsassin*, where different government departments were involved in the surrender.<sup>280</sup> In this case, the one government department that wanted to fulfill a public policy also had the tools at its disposal to obtain more land. And, in the early twentieth century, these officials did not have the benefit of the Supreme Court’s writing on the fiduciary duty owed to Indian bands with respect to their reserves.

Nevertheless, it is obvious that, from the end of the nineteenth century until the very earliest years of the twentieth century, Crown officials knew they had to look after the interests of the Indians, including the Cowessess Band. Barely 20 years earlier, at the time of treaty, Lieutenant Governor Morris had promised the Cree and Saulteaux chiefs that the Queen would help them when they settled down to farming. The documentary record in this inquiry shows clearly that Crown officials were aware that the Cowessess Band had settled well into farming and stock-raising and that they encouraged the Band to continue in these pursuits.

By the end of 1904, however, the attitude of the Crown changed. From March 1904 to January 1907, there was no discussion of whether the Cowessess band members needed the hay or whether a surrender was in their best interests. The only discussion was how to go about obtaining a surrender.

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<sup>278</sup> Frank Pedley, DSGIA, to David Laird, Indian Commissioner, March 15, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 99).

<sup>279</sup> J.A.J. McKenna, Assistant Indian Commissioner, to the Secretary, DIA, March 19, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 1030–42).

<sup>280</sup> The Department of Indian Affairs and the Department of Veterans’ Affairs.

*Duty of Loyalty in Light of the Crown's Acting on Behalf of the Settlers*

The end of the nineteenth century and the beginning of the twentieth brought great changes to the Canadian prairies. Saskatchewan and Alberta became provinces; and settlers from Europe, the United States, and the eastern provinces of Canada poured into the prairies, seeking land and opportunities.

The Commission has dealt with this period of history on the prairies several times. This description, taken from *The Key First Nation: 1909 Surrender Inquiry*, provides the context surrounding the Cowessess surrender:

The ascension of the Laurier government to power in 1896 ushered in a new era of immigration and western expansion in Canada. Under the direction of Clifford Sifton, Minister of the Interior from 1896 to 1905, the new government implemented an aggressive immigration policy aimed at attracting agrarian settlers from around the globe. Thousands of immigrants arrived in Canada to take advantage of the free dominion lands that the government was willing to offer homesteaders. Many of these immigrants joined migrants from the rest of Canada, where farm lands had become increasingly difficult to acquire. Together, these groups relocated within the vast, fertile stretches of western Canada, especially the souther portions of present-day Manitoba, Saskatchewan, and Alberta.<sup>281</sup> Since western expansion was one of the major concerns of the era, it is not entirely surprising that the second portfolio held by the Minister of the Interior – Superintendent General of Indian Affairs – received less attention. Under Sifton and his predecessors, “Indians were viewed always in the context of western development: their interests, while not ignored, only rarely commanded the full attention of the responsible minister.”<sup>282</sup> This would change under Sifton’s successor, Frank Oliver, who, from 1905 to 1911, took a more aggressive approach to Indian Affairs.

Historian Sarah Carter has argued that the major preoccupation of Indian Affairs administrators during the Laurier era “was to induce Indians to surrender substantial portions of their reserves, a policy which ran counter to efforts to create

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<sup>281</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing: for an overview of dominion lands policy, see D.J. Hall, “Clifford Sifton: Immigration and Settlement Policy, 1896–1905,” in Howard Palmer, ed., *The Settlement of the West* (Calgary: University of Calgary Press, 1977); Gerald Friesen, *The Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 242–74; and Chester Martin, *‘Dominion Lands’ Policy* (Toronto: McClelland & Stewart, 1973).

<sup>282</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing D.J. Hall, “Clifford Sifton and Canadian Indian Administration, 1896–1905,” *Prairie Forum* 2, 2 (1977): 128.

a more stable agricultural economy on reserves.”<sup>283</sup> Likewise, Professor Brian Titley has argued that the Laurier government – especially Oliver – followed a policy of “acceding to the demands of those who coveted Indian land.”<sup>284</sup> Most bureaucrats of the day believed that the policy of having First Nations divest themselves of “unused” or “unnecessary” areas of their reserves was justified in the face of continued immigration to the western provinces. ...

...

According to Oliver, “the interests of the people must come first, and if it become a question between the Indians and the whites, the interests of the whites will have to be provided for.”<sup>285</sup> It appears that this policy was implemented in an active way. On December 1, 1909, Oliver announced in the House of Commons that 725,517 acres of surrendered Indian lands had been sold by the Department of Indian Affairs between July 1, 1896, and March 31, 1909.<sup>286</sup>

One procedural tool developed by Oliver to assist in freeing up land for immigrant settlers was designed to give departmental officials greater latitude in offering cash advances during surrender negotiations. With the approval of the Minister, the surrender provisions of the *Indian Act* were amended to increase the permitted payment that could be made to bands on surrender, from the former ceiling of 10 per cent to a new maximum of 50 per cent of the total sale proceeds. The amendment also enabled the department to negotiate exactly how the increased amount could be provided to the band. As a result, the details of a surrender agreement could include expenditures for items such as agricultural provisions, fencing, or support for the elderly. These expenditures were to be included within the 50 per cent advance, thereby affording the department considerable flexibility in negotiating surrenders. When introducing the amendment in the House of Commons, Oliver outlined his intentions as follows:

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<sup>283</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1991), 244.

<sup>284</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 21. The first amendment, passed in 1906, allowed for 50 per cent of the purchase price to be distributed to the First Nation at the time of sale. The former allowance had been 10 per cent. The increase acted as a powerful incentive for negotiating surrender because First Nations were short of accessible capital. The second amendment, passed in 1911, enabled the removal of Indians from any reserve that was located within or beside a town of 8,000 or more residents. See *The Historical Development of the Indian Act* (Ottawa: DIAND, 1978), 103–4, 108–9.

<sup>285</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing Canada, House of Commons, *Debates* (March 30, 1906), cols. 948–50.

<sup>286</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing Canada, House of Commons, *Debates* (December 1, 1909), col. 784.

This Bill contains only one section and has only one object. It is simply to change the amount of the immediate and direct payment that may be made to Indians upon the surrender of their reserve. At the present time, Indians on surrendering their lands are only entitled to receive ten percent of the purchase price, either in cash or other value. This we find, in practice, is very little inducement to them to deal for their lands and we find that there is a very considerable difficulty in securing their assent to any surrender... . It was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country. Several suggestions were made with the view of facilitating the object which seemed to be generally acceptable to the House and it seemed to me, in considering the matter, that one step that might be taken would be to provide for increasing this first payment to the Indians from ten percent to as high as fifty percent according to the judgement of the government in the matter and according to the case ... <sup>287</sup>

Combined, the new policy and procedural directives developed by the department had an immediate effect on the quantity of Indian land surrendered on the prairies, where agricultural land was deemed to be in great demand.<sup>288</sup>

It should also be noted that 1905, the year Frank Oliver was appointed Superintendent General of Indian Affairs, was also the year that Saskatchewan and Alberta became provinces. The creation of the two new provinces resulted in a dramatic increase in the number of Members of Parliament sent from the region to the House of Commons. In the election of 1908, a year after the surrender at Cowessess was taken, Saskatchewan elected 10 MPs, compared to the five that had previously represented the same area of the North-West Territories. Both the settlers and politicians such as Oliver would have been well aware of the increased power of the voters in the region.

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<sup>287</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55, citing Canada, House of Commons, *Debates* (June 15, 1906), 5421–22 (Frank Oliver, Superintendent General of Indian Affairs), quoted in ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 (ICC Documents, p. 423).

<sup>288</sup> ICC, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3 at 52–55.

Indians, of course, did not have the vote. Only the settlers, many of whom were demanding increased access to Indian reserves, could vote.

It is trite to say that a fiduciary is supposed to act only on behalf of the beneficiary. From the point of view of the Cowessess Band, with regard to the reserve, that means that the Crown was not supposed to act on behalf of the settlers.

Other than its public law duties to all Canadians, the Crown owed no duty to the settlers. Had the reserve land not been surrendered, the settlers would not have had recourse against the Crown. As Mr Justice Dickson stated in *Guerin*, “the existence of an equitable obligation is the *sine qua non* for liability.”<sup>289</sup> The Crown owed an equitable obligation to the Cowessess Band – the duty of a fiduciary to act in the best interests of the Band, an obligation that created liability for the Crown. The same cannot be said of the settlers’ relationship with the Crown. There was no equitable obligation and no liability for the Crown. The existence of a public policy does not create justiciable rights. They were simply settlers who wanted to get land; and what they saw was land they thought they could use better than the Cowessess band members did. The settlers did nothing wrong; they simply did what settlers always do – acquire land. The *Royal Proclamation* cited exactly this situation – the “great frauds and abuses” – as the reason why Indian people could sell land only to the Crown.

It must be remembered that the purpose for interposing the Crown between Indians and those who want to buy Indian land is to protect the Indians. The Crown was in a position of having competing interests for reserve land. Canada wished to open up as much of the newly formed provinces of Alberta and Saskatchewan for settlement as possible. The various petitions sent by the nearby townspeople vividly illustrate their concern that having the reserves on the border of the railway was a hindrance to the development of the towns. At the same time, the Crown had made promises to the Cree and Saulteaux bands at the time of treaty that, if they were to sign the treaty and move onto reserves, the government would assist them in developing an on-reserve agricultural economy.

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<sup>289</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 375.

The First Nation's position is that the Crown's "purpose in preparing and proposing these surrenders was, if not wholly at least substantially, to advance the interests of third parties in the subject lands. Third parties who desired to have these lands surrendered in order that they be made available for settlement."<sup>290</sup> The First Nation has also argued that, before Frank Oliver became the Superintendent General of Indian Affairs, the Crown had sought to comply with its fiduciary responsibilities to the Cowessess Band and that, even during the Oliver years, the department officials understood the nature of their duty. Counsel for the First Nation cited as evidence Deputy Superintendent General Frank Pedley's Annual Report for 1908:

The law renders it impossible to dispossess Indians of their lands without their full consent and surrender, and the department exercises all possible care to only allow such sales as are clearly for the benefit of the owners and then under conditions to ensure to them the greatest obtainable advantage.<sup>291</sup>

According to the First Nation, this statement was mere lip service to the department's responsibility and that a more accurate reflection of its true attitude can be found elsewhere in the this annual report:

The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with regard to the sale of Indians' lands.

So long as no particular harm or inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing, seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for

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<sup>290</sup> ICC Transcript, September 21, 2004 (pp. 27–28, Dan Maddigan).

<sup>291</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 16, quoting Frank Pedley, DSGIA, to Frank Oliver, SGIA, September 1, 1908, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Exhibit 5, p. 538).

the benefit of the Indians and relieve pro tanto the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.<sup>292</sup>

Canada has argued that “in exercising its public law duties the Crown wears many hats as a fiduciary, that it can represent and it does represent the Canadian public to a larger extent, as well as the interests of the Indians,...”<sup>293</sup> There is no question that the Crown must often balance competing interests, and it was doing so in Saskatchewan during the first decade of the century. The question is not whether it must balance these interests, but whether it resolved the competition in a way that reflected its fiduciary duty to the Band.

This position, first taken in *Guerin*, was restated in *Wewaykum*. Mr Justice Binnie made it clear that the Crown’s ability to deal even-handedly with both Indian and non-Indian interests exists only during the pre-reserve-creation period. Once a reserve was created, however, the Crown’s fiduciary duty to a band trumped any other consideration – including the settlers’ requests for the surrender of a portion of the Cowessess reserve.

Even before we had the benefit of the Supreme Court’s thinking in *Wewaykum*, the Indian Claims Commission considered the issue of competing interests in other claims it investigated, such as the Kahkewistahaw inquiry. One day before the Cowessess surrender, band members at Kahkewistahaw had voted to surrender an even greater percentage of their reserve. Kahkewistahaw borders Cowessess immediately to the east, and the Crown officials were the same. In the Kahkewistahaw report, the panel recognized that the Crown is often in a position of conflict of interest:

We recognize 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* the Crown has conflicting duties in a given case does not necessarily mean that the Crown breached its fiduciary obligations to the First Nation involved. Rather, it is the manner in which the Crown

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<sup>292</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, pp. 12–13, quoting Frank Pedley, DSGIA, to Frank Oliver, SGIA, September 1, 1908, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Exhibit 5, p. 538).

<sup>293</sup> ICC Transcript, September 21, 2004 (p. 195, Vivian Russell).



*manages* that conflict that determines whether the Crown has fulfilled its fiduciary obligations. As McLachlin J stated in *Apsassin*:

The trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary powers: J.C. Shepherd, *The Law of Fiduciaries* (1981), at pp. 157–59; and A.H. Oosterhoff, *Text, Cases and Commentary on the Law of Trusts* (4th ed. 1992). The Crown facing conflicting political pressures in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other, may be argued to have been in a position of conflict of interest.<sup>294</sup>

In a footnote to the citation in the Kahkewistahaw report, the panel stated:

This excerpt from the *Apsassin* case raises the question of which party bears the burden of proof in the event that the evidence is inconclusive on any of the issues before the Commission. The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. In our view, the facts in this case are so clear that the result does not turn on the question of which party bears the burden of proof. Even if the onus does rest with the First Nation, we are satisfied that, on a balance of probabilities, that burden has been met. The First Nation having made out its case on a *prima facie* basis, Canada has not refuted the claim by tendering cogent evidence to the contrary. This is particularly so in those instances in which we have noted that Canada, as a fiduciary in a position of self-dealing or conflict of interest, must demonstrate that it did not benefit from its beneficiary powers.<sup>295</sup>

The word “beneficiary” in the last sentence of the quotation is almost certainly supposed to be “fiduciary,” as the Crown has only fiduciary powers in the Crown/Aboriginal relationship and is not the beneficiary. This statement of the Crown’s burden to refute the claim of breach of fiduciary duty is equally applicable to the Cowessess Band in 1907.

In *Apsassin*, Mr Justice McLachlin characterized the situation of the Crown as being “conflicting political pressures in favour of preserving the land for the Band on the one hand, and

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<sup>294</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 83 (emphasis in original), quoting *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 53 (sub nom. *Apsassin*).

<sup>295</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 83.

making it available for distribution to veterans on the other.”<sup>296</sup> In the Kahkewistahaw inquiry, the panel found that the Crown faced “identical conflicting political pressures” and that the Crown “has failed ... to demonstrate that it did not benefit – at least politically, if not financially – from inducing the 1907 surrender.”<sup>297</sup> The surrender in Kahkewistahaw differs from the surrender in Cowessess in that, in Kahkewistahaw, there was a valid surrender vote which met the requirements of the *Indian Act*. In this inquiry, there is no such valid vote. Nevertheless, had there been a valid vote at the Cowessess surrender, the views of the Kahkewistahaw panel would have been applied wholeheartedly to Cowessess:

It is, in our view, nonsense to suggest that the Kahkewistahaw Band acted autonomously with respect to this surrender or that the decision represented its true intention. The vote that took place on January 28, 1907, was timed and staged to obtain a technical approval, and it represented the culmination of attempts by the surrounding non-aboriginal interests, aided and abetted by the government of Canada, to procure a surrender.<sup>298</sup>

The surrender of Cowessess was the same. Only the Crown and the settlers benefited. Apart from a short-term infusion of cash, the Cowessess Band did not.

A month after the surrender, in February 1907, in a reporting letter to Secretary J.D. McLean, Inspector William Graham wrote that the people of Grenfell and Broadview were “delighted” because the land that had been “lying idle” was “a great drawback to these towns.”<sup>299</sup> There is no mention of any benefit from the surrender that might have accrued to the members of Cowessess.

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<sup>296</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 53 (sub nom. *Apsassin*).

<sup>297</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 83.

<sup>298</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 83.

<sup>299</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 804).

*The Crown's Pursuit of Surrender*

A reading of the arguments by both the Crown and the First Nation leads to the conclusion that there is no disagreement that the Cowessess Band had never approached officials and asked to surrender land. The disagreement arises from whether the Crown's seeking the surrender was in itself a breach of fiduciary duty. This question is inextricably linked to that of whether the Crown was acting on behalf of third parties.

The fact that the impetus for surrender first rose with the Crown does not, by itself, mean that the Crown breached its duty. There are situations where a surrender would be in the best interests of a band – where, for instance, after reserve creation, the Crown had discovered that the land was totally unsuitable for agriculture. The real question that must be answered is whether the Crown submitted the surrender to the Cowessess Band in pursuit of the Band's interest or whether it submitted the surrender in pursuit of the interests either of third parties or of the Crown itself.

The First Nation argued that the Crown was acting for third parties and for the political advancement of Crown officials seeking the surrender. Canada, in contrast, characterized the First Nation's argument as implying that "initiating a surrender which serves the interests of any party other than the First Nation amounts to a breach of fiduciary obligation." It concluded: "This is plainly incorrect, since a surrender may be of benefit to and serve the interests of, many parties."<sup>300</sup>

This argument is true, of course, but beside the point. It does not matter if the surrender benefits parties other than the First Nation; presumably it would. The only thing that matters is whether the surrender benefits the First Nation, since the Crown has a fiduciary duty only to the First Nation and not to the settlers or the public at large.

The benefits available to Crown officials were intangible but very real. As Minister, Frank Oliver was seeking the political benefits of responding favourably to the demands of voters; Inspector William Graham was seeking what benefit might accrue from pleasing his political masters. It is interesting to note that most of the departmental correspondence concerning the Crooked Lake surrenders flowed directly from Ottawa to Inspector Graham, bypassing the normal bureaucratic channel of going through the Indian Commissioner's office in Winnipeg. The Indian

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Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 28.

Commissioner, David Laird, was, of course, all too aware of the significance of the land to the Crooked Lake bands.

One of Inspector Graham's letters is particularly interesting. On October 6, having recently received his instructions to take a surrender of parts of the reserves, including Cowessess, Inspector Graham wrote to Deputy Superintendent Pedley that he had received his instructions and would proceed, but, owing to other commitments, he could not go immediately. He added, "I do not consider that a delay will have an prejudicial effect on the proposition; in fact, I think it will have a contrary effect."<sup>301</sup> We do not know whether Graham was referring to the fact that the Cowessess Band (and the other Crooked Lake bands) might be more amenable to selling land if asked in December or January, when, presumably, the weather would be poorer, than in October. What we do know is that the winter of 1907 was particularly harsh, and harsh on the prairies is harsh indeed.

We also know that, of all the seasons, farmers are most vulnerable in winter. In the spring, there is the activity of readying the land, seeding the crop, and the perennial promise of a good harvest to come. In the summer, there is the work of looking after the crop and the promise of its benefits. In a good autumn, farmers are flush, satisfied with themselves, because they have reaped the benefits of their annual exertions. But even after a good harvest, the dark and dead of winter is hard to bear. When the weather limits human activity and provisions are dwindling, life looks bleaker. Any infusion of cash is a temptation that only a strong will and foresight can resist.

Graham did not elaborate when he wrote the words "I think it will have a contrary effect."<sup>302</sup> What we do know, however, is that, as the fiduciary, the Crown was not supposed to have a stake in the proposition put to the Band, either for or against. The only reasonable inference from Graham's letter is that the wait would make it better for the Crown.

Again, in *Guerin*, the first of the fiduciary duty cases dealing with Aboriginal interests, Mr Justice Dickson characterised the duty as being of "utmost loyalty."<sup>303</sup> There appeared to be little if

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<sup>301</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 131).

<sup>302</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 131).

<sup>303</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 389.

any loyalty to the Cowessess Band in the year before the surrender. Instead, there was manipulation to an end that hardly took into account the interests of the Band.

It should not be forgotten that the second surrender meeting at Cowessess took place a day after the Kahkewistahaw Band reversed its initial rejection of Inspector Graham's surrender proposal and voted to surrender 70 per cent of its reserve. In the Kahkewistahaw inquiry, the panel stated this conclusion about Graham's activity:

[I]t is our view that, unlike Indian Agent Grew in *Apsassin*, Graham did *not* act conscientiously and that he clearly intended to influence the outcome of the surrender vote. Rather than assisting the Crooked Lake Bands in choosing courses of action best suited to their needs, Graham expressed the goal of securing surrenders to "free up" land for settlement and appease the growing pressure from adjoining communities. He expressly stated that bringing cash inducements would assist him greatly in achieving his goal, and he arrived in the middle of the harsh prairie winter with cash in hand.<sup>304</sup>

It is incomprehensible that Graham would act against the interests of the Kahkewistahaw Band one day and act in the interest of the Cowessess Band the next. As has been stated before, the bands themselves were different, but the duties of the fiduciary Crown were the same – to act in the best interests of the bands. That Cowessess band members were better farmers or had leadership does not relieve the Crown of its fiduciary duty.

The Commission has considered the question of whether the Crown's pursuit of a surrender in and of itself constitutes a breach of fiduciary duty. In the *Canupawakpa Dakota First Nation Inquiry*<sup>305</sup> the panel stated:

[T]he Crown wanted a surrender from the beginning of its relationship with the group. But Canada's motivation for a surrender is not enough. We agree with Canada's counsel that there must also be a "consideration about what the interests of the bands are." Indian Agent Hollies' correspondence with Indian Commissioner Laird in January 1908 provides much insight into the thinking of the department

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<sup>304</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 82. Emphasis in original.

<sup>305</sup> ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263.

about the problems on the reserve: because of its location (a distance of some 100 miles from the Agency), the reserve was subject to the influx of American Indians; there existed at least a perception of lawlessness and drunkenness; the reserve lacked a school, police and a missionary; and the best arable lands were kept by Chief Hdamani. The department took all these factors into consideration in assessing the best interests of the Band.<sup>306</sup>

The *Canupawakpa* report does not make the proposition that Crown support for a surrender is consistent with the Crown's fiduciary duty. What it states is that, in the particular circumstances of that inquiry, seeking a surrender was in the best interests of the Canupawakpa Dakota Band. There are, however, significant differences between the circumstances of the Cowessess and Canupawakpa bands. The fact that, in both inquiries, it was the Crown that was seeking the surrender is not the issue. As was evident in Canupawakpa, what was important was whether, in doing so, the Crown was considering the best interests of the Indians. The Canupawakpa Dakota were 100 miles from the agent; the purpose of the surrender was to provide them with money and to resettle them on reserves where they could be helped; the Crown provided them with full disclosure, both with regard to the consequences of giving up the land forever, but also with the benefits of being closer to services. It is also important that, from the beginning, when the Canupawakpa Dakota sought refuge in Canada, the Crown made it clear that it did not want a reserve so close to the border. In seeking the surrender, the Crown was seeking to benefit the Band and no other. The benefits the Crown sought were well documented in the historical record.

That was not the situation faced by the Cowessess Band in 1907; the Crown did not seek the surrender to benefit the Band. Whatever "benefit" it may have obtained from receiving the payment was considered only in hindsight.

#### *Duty to Advise*

In *Wewaykum*, Mr Justice Binnie lists one of the fiduciary's duties as being "full disclosure, appropriate to the subject matter."<sup>307</sup> In *Apsassin*, Madam Justice McLachlin refers to the Beaver

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<sup>306</sup> ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 236 at 342–43.

<sup>307</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para. 86.

Band's trusting the Crown "to provide it with information as to its options and their foreseeable consequences."<sup>308</sup> This duty requires the Crown to provide all the information it has to a band to enable it to make an informed decision. The fiduciary holds an obligation to advise the beneficiary as to the consequences of an action, regardless of whether the beneficiary asks for advice. It is a positive duty on the fiduciary to make the disclosure.

The Crown itself promised, at the time of treaty taking, that it would never advise a band badly. From the Cowessess Band's point of view, that treaty promise would lead band members to believe that the Crown would not advise them to do anything that was not in their best interests.

The only extant evidence in this regard comes from the documentary record, written by Crown officials, of what transpired in the months and years before the surrender. At the first meeting, called on January 21, 1907, Agent Matthew Millar's minutes state that Inspector William Graham "addressed all present at length, explaining the terms of the agreement which had been made by the Department,"<sup>309</sup> and that Chief Joe LeRat thought the terms had been well explained.<sup>310</sup> The phrase "terms of the agreement" suggests the details of what money would be paid, when it would be paid, and any other similar conditions. It does not lead one to think there was a full and frank discussion of all the implications of what the Band was being asked to do. At the next surrender meeting, eight days later, the minutes again state that the proposition was explained.<sup>311</sup> There is no detail other than that of what was explained, to what level of detail and from what perspective.

It is the fiduciary's duty to keep records and, presumably, had Agent Millar known in 1907 that we would be perusing his writings almost a century later for the truth of what had happened that day, he would have provided more detail. As it stands, all we can know is that the Crown stated that the terms of the agreement were well explained and that the Chief agreed. If the Chief was depending

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<sup>308</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 39 (sub nom. *Apsassin*).

<sup>309</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

<sup>310</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

<sup>311</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

on the officials to tell him and the other band members what they needed to know, however, how would they be aware of what they were not told?

Because it is the Crown's duty to keep records, in those instances where the records are silent or inconclusive, the onus to prove their meaning shifts to the Crown.<sup>312</sup> In the present case, the validity of the surrender is no longer an issue, owing to the findings of the panel in phase I of this inquiry, and the only issue in this phase II is breach of fiduciary duty. If the principle of holding the fiduciary accountable for its records is applied to the Crown, the listing of a "Nap Delorme" as a voting member, when both parties agree no such person exists,<sup>313</sup> is in itself a breach of fiduciary duty.

#### *Alexander Gaddie*

The correspondence between Alexander Gaddie and the relevant officials in the months after the surrender agreement sheds some light on the nature of the disclosure made by the Crown officials at the meeting on January 29, 1907. After the fact, Gaddie, a band member who had voted in favour of the surrender, wrote to say that he had not yet received what he had been promised at the time of the vote.

Alex Gaddie attended the surrender meeting and is recorded as being the 15th vote in favour of surrender.<sup>314</sup> He also acted as interpreter for Crown officials and travelled to Moosomin with Inspector Graham to sign the required surrender affidavit. Gaddie, a respected member of the Cowessess Band, had long been recognized as a good and prosperous farmer. He took hay from the southern part of the reserve which was included in the surrender.

In November 1907, Gaddie wrote to Laird, requesting \$700 as payment for improvements he had made to the hay lands. He stated that his crop had failed and that he had been the only one

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<sup>312</sup> Where a fiduciary has a duty to keep records, and where those records are ambiguous, silent, or unclear, the meaning most favourable to the beneficiary is adopted. This interpretation is similar to the doctrine of *contra proferentem* in contract law and is meant to protect a weaker party to a transaction.

<sup>313</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 32.

<sup>314</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 55–56).



not to be compensated at the time of the surrender.<sup>315</sup> Commissioner David Laird turned down Gaddie's request, stating that "it was not fair for the Indians to pay from their own funds for the work you had done on the slough for your own personal benefit. You have been cutting hay for years on that slough and it is thought that you have been amply repaid for your work."<sup>316</sup>

In June 1908, a local lumber merchant, W.C. Thorburn, wrote to Laird on Gaddie's behalf, stating that Gaddie would not have sold the land if he had not been assured he would be paid for his improvements.<sup>317</sup> In July, Gaddie himself wrote again to Laird, stating that Graham's statement that he told Gaddie before the meeting that he would not be paid for improvements was "absolutely false."<sup>318</sup> He also stated that, if Graham had told him before the meeting he would not be paid, he would not have voted in favour of surrender. Also in July, a number of band members sent in a petition in which they stated they had been told they would be paid for improvements. No one remembered Gaddie being told he would not be paid for his.

Graham, in response, denied ever having told Gaddie he would be compensated. "My firm belief is that if I had mentioned the fact to the Indians that he would be paid compensation for the work on the Hay Slough, the surrender would never have gone through."<sup>319</sup>

From this vantage point, it is not possible to know who is telling the truth – Gaddie that he would be paid or Graham that he would not. The logical inference, however, is that the officials did not make full disclosure to the Band during the meeting about the proposal. Gaddie's letters indicate that Graham told him before the meeting he would be compensated. They also state that if he had

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<sup>315</sup> Alex Gaddie to David Laird, Indian Commissioner, November 9, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 202).

<sup>316</sup> David Laird, Indian Commissioner, to Alex Gaddie, November 22, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 205).

<sup>317</sup> W.C. Thorburn to David Laird, Indian Commissioner, June 24, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 221–22).

<sup>318</sup> Alex Gaddie to David Laird, Indian Commissioner, July 13, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 226).

<sup>319</sup> W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, July 27, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 230–31).

known he would not be paid, he would not have “helped him [Graham], as I did.”<sup>320</sup> One can only wonder whether Graham was trying to ensure that Gaddie would vote in a particular way. Graham’s own words – that if the band members present had known Gaddie would be paid, the surrender would not have gone through – certainly raises the possibility that Graham withheld information from the Band during the surrender meeting or, at the least, allowed the members to consider the surrender when there was considerable confusion about what improvements were to be paid.

### *An Apsassin Analysis*

My Commission colleagues have placed a great deal of reliance on *Apsassin*. In my view, the need to move beyond *Apsassin* arises from one of the particular facts in this inquiry – the lack of consent. Mr Justice Gonthier’s decision in *Apsassin* follows from the premise that a band’s choice or decision should be respected. In the present case, however, there is no decision to respect. *Apsassin* then moves to considerations of whether there is reason to doubt the consent and whether that doubt has been created by “tainted dealings” on behalf of the Crown.

Madam Justice McLachlin’s decision in *Apsassin* deals with the balance between respect for the band’s autonomy and the Crown’s role as protector. Both justices found that, on the facts of the case, as set out in the trial judgment, the Crown had acted in such a way that there was no need to superimpose a fiduciary duty on the surrender proceedings (to use Madam Justice McLachlin’s construction) or to consider the meaning of “tainted dealings” (to use Mr Justice Gonthier’s). Citing the trial judge’s findings of fact, both justices had approved the conduct of the Crown in the context of the surrender.

If only *Apsassin* were available for consideration, this analysis would come to the same conclusions. However, any application of *Apsassin* includes a consideration of three elements: whether the band’s knowledge or understanding of the transaction was adequate, including an assessment of whether there has been an abnegation of power; whether the conduct of the Crown or its agent tainted the process, making it unsafe to rely on the Band’s understanding and intention; and

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<sup>320</sup> Alex Gaddie to David Laird, Indian Commissioner, July 13, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 226).

whether the transaction itself was foolish or improvident, making it an exploitative bargain. We will now turn to these considerations.

### *Band's Knowledge and Understanding*

Consideration of this element involves the sufficiency of the consent given by the band. Was it informed? Was it voluntary? Did the band understand the nature and consequences of the transaction? There are two aspects to this analysis: what the band itself knew and wanted from a surrender, and what the Crown disclosed to the band and the advice it offered about the band's options and the foreseeable consequences of surrender.

In the present case, because there is no valid vote and, therefore, no intention to surrender, it is not necessary to reiterate what the Cowessess Band knew about the value of the hay. Certainly it would have been aware that it needed hay for its cattle. Whether the Band had any knowledge of how much it would need a reliable source of hay in the future, either to expand its livestock operations or to stay at the level already attained, is not known, since the documentary record does not indicate it one way or the other and the subject was not addressed at the community session. This Band had been recognized for its ability to farm and raise stock – the best among the Crooked Lake reserves. Yet, even as Inspector Graham and the various Indian agents were praising the Cowessess Band, they sometimes despaired of the progress the Band was making.<sup>321</sup> The record shows, however, that they had sold hay and cattle off the reserve<sup>322</sup> and that they had taken prizes at the agricultural fairs in Regina.<sup>323</sup>

There is no evidence about whether the Band itself was particularly skillful or whether the presence of the agent and the farming instructor on the Cowessess reserve contributed to its greater success. It is possible that the Cowessess Band simply received more attention than any of the other

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<sup>321</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1905*, 185–86 (ICC Exhibit 5, pp. 439–40).

<sup>322</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 229 (ICC Exhibit 5, p. 205).

<sup>323</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 224 (ICC Exhibit 5, p. 203).

bands in the Crooked Lake Agency or that it was observed more closely. It is also impossible to know whether the reported difference among the bands of the agency was due to the ability of one or two farmers who were much better than the others or to the fact that all or most of the farmers of Cowessess were better than all or most of the farmers of the other bands. What is known, however, is that Alexander Gaddie was considered to be an exceptional farmer.

The Cowessess Band was not yet 30 years away from the buffalo hunt. The record shows that, even though band members were willing to take up agriculture and learn how to farm, they had needed farming instructors to guide them. In addition, Crown officials had kept them as isolated as possible from the world beyond the reserve, partly to avoid any further disruption such as had happened during the North-West Rebellion, and partly to keep them from going into towns and displaying bad behaviour.

It is clear that band members had some experience with marketing produce, but the documentary record does not disclose whether they took part in that marketing or whether they provided the produce and Crown officials made arrangements on their behalf. Cowessess band members were largely illiterate, with only a few, such as Gaddie, able to read and write. In the present case, however, none of this information, or lack of it, makes a difference, because the Band did not vote to surrender any part of its reserve.

Given that without any breach of duty on the part of the Crown it is possible for a band not to understand the nature and consequences of a surrender,<sup>324</sup> an analysis of what the Band did understand or what it intended is meaningless without an analysis of what information the Crown provided to the Band to ensure it had a full understanding and could form voluntary consent. Madam Justice McLachlin stated that the Beaver Band had trusted Crown officials to provide information about options and foreseeable consequences.

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<sup>324</sup> A beneficiary who is empowered to make a decision, including an Indian Band considering surrender, could be presented with all the information by the fiduciary, and in a disinterested manner, so that the only issue is whether a decision was in the best interests of the beneficiary. Yet the beneficiary could still make a decision which showed that it did not understand the nature and meaning of the transaction. In those circumstances, a court might overturn the transaction because of the lack of understanding, but this decision would have nothing to do with the conduct of the fiduciary. In the context of the surrender, it would then require the Crown to determine whether the surrender was exploitative.

There is no information about what options, if any, were presented to the Cowessess Band. Information gained from other inquiries the Indian Claims Commission has completed shows clearly that, in some other surrenders, certain Crown officials, notably William Graham, had a pattern of holding successive meetings until they were able to obtain a surrender. Graham did that with Kahkewistahaw, for example, and, eventually, the Crown got its surrender from Ochapowace.

All the Crown correspondence from 1904 on is directed at only one option – that of the surrender of reserve land. Graham wrote that he hoped the Indians would be influenced by the surrender at Pasqua<sup>325</sup> and that the Cowessess Band would “fall in line.”<sup>326</sup> On no occasion after 1904 did the Crown treat a vote not to surrender as an option to be respected, nor did it ever consider a vote not to surrender as an option that might benefit the Band. The only options considered were *when* and *how* to effect the surrender, never *if*.

### *Tainted Dealings*

The First Nation has argued that the Crown engaged in tainted dealings, and it cited the following evidence in support of that conclusion. Senior representatives in Ottawa, it claimed, particularly Frank Oliver and Frank Pedley, as well as William Graham in Saskatchewan, had promoted and advocated the proposed surrender for their own political and/or economic benefit as well as that of settlers and land speculators, without regard to the interests of the Band and the foreseeable harm the proposed surrender would do to those interests.<sup>327</sup> Counsel for the First Nation also cited Graham’s lack of disclosure, his failure to respect a decision taken at the first meeting on January 21, 1907, and his seeking to undermine and circumvent the authority and influence of the Band’s Chief, Joe LeRat, and Headman, Ambroise Delorme, both of whom opposed the surrender.<sup>328</sup>

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<sup>325</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

<sup>326</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 122).

<sup>327</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 48.

<sup>328</sup> Written Submission on Behalf of the Cowessess First Nation, June 30, 2004, p. 48.

In its submissions, the Crown responded to the First Nation's position and stated that "[t]he burden of proof on the First Nation is to provide evidence that the Crown's activities were such that it would be unsafe to rely upon the First Nation's understanding and intention with respect to the surrender."<sup>329</sup> The Crown also argued that it "does not mean there are tainted dealings simply because the impetus for a surrender did not come from a band."<sup>330</sup>

One of the events that suggests tainted dealings comes from Graham's own actions both leading up to the surrender meeting and at the meeting itself. In October, DSGIA Frank Pedley authorized Inspector Graham to obtain a surrender from the Cowessess Band. The terms were to be the same as had been previously authorized at Pasqua.<sup>331</sup> The band members would receive 1/20th (5 per cent) of the anticipated purchase price of the land at the time of voting to surrender, and, once the land was sold, a further payment up to 1/10th (10 per cent) of the actual purchase price.

The surrender documents, however, call for a greater payment at the time of the surrender meeting, twice as much as Graham had been authorized to pay. That day he wired Ottawa to ask for authority to pay out 10 per cent of the anticipated purchase price of the land.<sup>332</sup> He received the authority three days later,<sup>333</sup> and he then returned to the Band to pay out the remaining money.

Two logical inferences can be drawn from the record. The first inference is that the band members were shrewd bargainers. However, the record contains no reference to any bargaining, and nothing emerged in the community session held during phase 1 of this inquiry to suggest that the Band had been bargaining. Presumably, if there had been bargaining, Chief Joe LeRat would have

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<sup>329</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, pp. 34–35.

<sup>330</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 28.

<sup>331</sup> J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 133).

<sup>332</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 29, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 872).

<sup>333</sup> Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, January 30, 1907, Graham to Pedley, January 31, 1907, and Pedley to Graham, February 1, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 873–75).

done so on behalf of his Band. His descendant, Harriet Lerat, stated that he went home ill before the surrender vote was finished and that he did not learn of the outcome until the next day.<sup>334</sup>

Regardless, it is not possible to align the fiduciary duty with the notion that a fiduciary and a beneficiary would bargain. The fiduciary is charged with the duty of acting in the best interests of the beneficiary. True, this duty lies within the *sui generis* relationship. The band must be considered to be a competent decision-maker unless there is reason to doubt its capacity to make a decision. However, in making any decision, particularly one as significant as surrendering part of its reserve, the band had a right to be able to rely on its fiduciary to advise it in a manner that took into account only the interests of the band, not any interests the fiduciary itself might have. This issue is not a contract analysis, where the parties are presumed to be willing bargainers, each acting in its own best interests. Rather, it is a fiduciary duty analysis, in which the only interests supposed to be at stake are those of the First Nation. In the present case, had the bargaining been between the Cowessess Band and third parties, with the Crown intervening as fiduciary to ensure that the Band's interests were protected (as often happened in Ontario surrenders), then evidence of the First Nation's ability to bargain would have been material to the issue. That is not the situation here; in this case, the Crown had an interest in obtaining the surrender of the Cowessess Band.

The second inference is more logical – that the Band was reluctant to surrender, so the Crown upped the ante and put more money on the table to induce a surrender. Since it is clear that this surrender was not pursued in the Band's best interests, the only other conclusion is that the Crown induced the surrender to benefit others, and that it was bargaining to that end.

We certainly know that Inspector Graham was aware he had stepped outside the bounds of his authority when he did not pay out the 10 per cent of the anticipated purchase price to band members until he had written authorization from Ottawa. He may have been certain he would receive authorization, but it is clear he did not want to take a chance that the authority might be withheld.

In the *Chippewas of Kettle and Stony Point*, one issue focused on the presence of cash at the surrender vote. Mr Justice Laskin stated that the presence at the surrender meeting of the third party who wished to buy the land, and the fact that this party had the cash at hand, did not invalidate the

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ICC Transcript, March 11, 1998 (ICC Exhibit 12, pp. 12–15, Harriet Lerat).

surrender. He went on to state, however, that such presence might be tainted dealings and a breach of fiduciary duty by the Crown, and that it should be left to trial.<sup>335</sup>

That situation is obviously different from one in which the Crown itself, as fiduciary, takes money to a surrender meeting, but it is not necessary to go to the point of deciding whether that, in itself, constitutes “tainted dealings.” It is also possible to conclude that the only meaning is that the Crown was willing and able to pay immediately if the Band decided to surrender the land. However, the combination of a significant amount of money available for payout in the depth of a cold winter does create the impression that the Crown was far more interested in obtaining the surrender than it was in considering whether a surrender was in the best interests of the Cowessess Band.

In other inquiries, the Indian Claims Commission has considered the question of what constitutes tainted dealings. In the *Moosomin* inquiry it stated:

[W]hen one looks beyond the question of technical compliance with the *Indian Act*, the weight of the evidence leads us to conclude that the Crown’s officials applied coercion, improper influence, and pressure on the Band to surrender its land. Taken together, these actions constituted tainted dealings on the part of the Crown agents who sought to “remove” the Indians from their treaty entitlement so that these lands could be “opened up” for settlers. Rather than making an earnest attempt to reconcile the competing interests<sup>[336]</sup> of settlers and the Crown with those of the Moosomin Band, Crown officials like Indian Agent Day, Secretary McLean, Deputy Superintendent Pedley, and Minister Oliver deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians who had long sought the removal of the Indians and the sale of their lands.<sup>337</sup>

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<sup>335</sup> ICC, *Chippewas of Kettle and Stoney Point v. Canada (Attorney General)* (1996), 31 OR 3rd 97 (CA) at 106.

<sup>336</sup> The *Moosomin* report was issued before the Supreme Court’s decision in *Wewaykum*; nevertheless, the panel’s use of the phrase “competing interests” is congruent with Mr Justice Binnie’s. He saw competing interest as those of the Indians’ right to the interest in their reserve versus others who wished to dislodge them, either Aboriginal (as in the case of *Wewaykum*) or non-Aboriginal. That is the situation that was faced by both the Moosomin and the Cowessess bands in the early part of the twentieth century.

<sup>337</sup> ICC, *Moosomin First Nation: 1909 Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP, 101 at 184–85.



Like the Cowessess Band, the Moosomin Band had been successful farmers, so successful that the local settler population began to lobby Indian Affairs to move the Band (and, as well, the Thunderchild Band) so the land could be surrendered and sold to settlers. In 1909, after repeated attempts to achieve a surrender, the department was able to take a surrender of all of IR 112 as well as the Moosomin Band's share of the hay lands in IR 112A. The Band was then moved to a different reserve site, IR 112B, one that did not have the agricultural potential of the surrendered reserve. From the time that surrender was first proposed, the Band had resisted, but, in 1909, it was without a chief. The Department of Indian Affairs did not recognize a new chief until after the surrender had taken place.

In assessing the question of whether there were tainted dealings, the panel cited the fact that no evidence was shown that the option of *not* surrendering the reserve was ever presented to the Band,<sup>338</sup> even though the Band had repeatedly expressed its intention to retain its lands. The panel noted that the surrender was seen by the department as “opening up” the land for settlement,<sup>339</sup> and

the fact that it would simultaneously destroy the Band's agricultural economy was never mentioned or considered. This is not a case in which the Band had surplus land in its reserve holdings of which it was not making any use, and which it sought to dispose of in a mutually advantageous exchange. It is also not a case in which the Crown's wish to secure the reserve land for other purposes was coincident with the Band's desire to secure other land for its own purposes, as in *Apsassin*. On the contrary, this is a case in which the Band's interests conflicted directly with those of prospective settlers, since all concerned sought the land for precisely the same purpose – its excellent agricultural potential. The Moosomin Band was asked to surrender the entirety of its reserve lands solely for the benefit of others, and the instigating parties did not much concern themselves with where the Band ended up, as long as it was “removed.”<sup>340</sup>

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<sup>338</sup> ICC, *Moosomin First Nation: 1909 Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 185.

<sup>339</sup> ICC, *Moosomin First Nation: 1909 Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 185.

<sup>340</sup> ICC, *Moosomin First Nation: 1909 Surrender Inquiry Report* (Ottawa, March 1997), reported (1998) 8 ICCP 101 at 185–86.

From this report, then, we can see that the Commission has considered five factors, all derived from *Apsassin*, in determining whether the conduct of the Crown amounted to tainted dealings:

- Did the Crown present the option of *not* surrendering the land?
- Did the Crown consider the impact of surrender on the economy of the First Nation at the time?
- Was this a case in which there was surplus land available on the reserve, and the First Nation was not making use of it?
- Did the Crown's desire to secure the surrender coincide with the Band's desire to obtain other land for its own purposes?
- Was the Band asked to surrender its land solely for the benefit of others?

The panel found that in the Moosomin surrender, the Crown had breached its fiduciary duty to the Band because it had not taken into account any of the factors listed.

If I apply these same factors to the situation in Cowessess, I come to the same conclusion. The Crown did not present the option of not surrendering the land; the Crown did not consider the impact of surrender on the economy of the First Nation at the time of surrender; there was no surplus land on the reserve which the First Nation was not using – on the contrary, the Cowessess Band was making good use of its hay lands and the Crown knew and approved of that use; the Crown's desire to secure the surrender did not coincide with the Band's desire to obtain land for its own purposes; and the Band was asked to surrender land solely for the benefit of others.

#### *Cession or Abnegation of Decision-Making Power*

Cession or abnegation of the beneficiary's decision-making power may or may not be present in a fiduciary relationship, and it does not, of itself, speak to the issue of breach of duty. A band may have ceded power entirely, but if the fiduciary Crown has acted in its best interests in making a decision, there is no breach of duty. Surrenders require valid band consent, and, where there is a vote in favour of surrender, the question must be asked whether the band was expressing its own intent or merely ratifying the Crown's decision to seek the surrender.

In *Apsassin*, Madam Justice McLachlin’s analysis of the pre-surrender fiduciary duty dealt with several aspects of the fiduciary obligation in a private law context, one of which was the degree to which the fiduciary made decisions on behalf of the beneficiary:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person: see *Frame v. Smith*, [1987] 2 S.C.R. 99, *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.<sup>341</sup>

The question must then be asked, Did the Cowessess Band cede its decision-making power to the Crown in the 1907 surrender? In *Apsassin*, Madam Justice McLachlin agreed with the trial judge’s conclusions that the Band trusted the Crown to provide it with information regarding the surrender, and she also agreed with the trial judge’s assessment that, on the facts of the matter, the Crown had done exactly that.<sup>342</sup>

The First Nation has argued that Inspector Graham conducted the proceedings in a manner calculated to circumvent or undermine the leadership of the First Nation, both of whom were opposed to the surrender and voted against it.<sup>343</sup> In particular, counsel argued that Graham’s characterization of Chief LeRat and Headman Ambroise Delorme as “non-progressive” was indicative of his contempt for them. The First Nation also argued that Alex Gaddie had been brought

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<sup>341</sup> *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 38 (sub nom. *Apsassin*). Emphasis in original.

<sup>342</sup> *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 36 (sub nom. *Apsassin*).

<sup>343</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 32.

to the second meeting by Graham as a counterweight to Chief LeRat – and as a vote in favour of surrender if the second meeting resulted in another tie vote.<sup>344</sup>

In this inquiry, where there is no valid majority vote, the question as to whether the Band had ceded power is, at best, an intellectual exercise. Since it is a factor that should be considered with regard to the analysis of possible breach of fiduciary duty in the application of *Apsassin*, it is useful to review what the panel stated in the Kahkewistahaw inquiry:

[W]e cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.

We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown.<sup>345</sup>

In the case of the surrender at Cowessess, had there been a valid majority vote, the vote would have been characterized the same way – as a decision that was, in reality, made by the Crown.

The scenario that more aptly describes the position of the Cowessess Band in 1907 is more like that in *Hodgkinson v. Simms*, where Mr Justice La Forest outlined his analysis of the power-dependency relationship and stated: "[I]t is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow 'unilateral'."<sup>346</sup> A century ago, the Cowessess Band trusted government officials not to use their power and influence against it. Mr Justice La Forest's

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<sup>344</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, pp. 28, 32. There is little evidence, and certainly no conclusive evidence, that there was a vote at the first meeting or that, if there was, it ended in a tie. The First Nation adopted the position that there had been a vote, that the vote had ended in a tie, and that Graham chose to ignore the vote.

<sup>345</sup> ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) ICCP 3 at 87.

<sup>346</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 412, La Forest J.

words are particularly apt, that “[t]o imply that one is not vulnerable to an abuse of power because one could have, but did not[,] protect one’s self is to focus on one narrow class of ‘power-dependency’ relationship at the expense of the general principle that transcends it.”<sup>347</sup> The general principle is that, where the fiduciary relationship has been established and the fiduciary duty has been attached, the fiduciary must act in the best interests of the beneficiary.

### *The Eight Conditions*

The eight conditions approved by Madam Justice McLachlin (three of which were also cited by Mr Justice Gonthier) in *Apsassin* to be instructive in understanding what might be construed as tainted dealings may be described as follows.

First, in *Apsassin*, the Band had known for some time that an absolute surrender was being contemplated. In *Cowessess*, we know that the Band was aware that its neighbours wanted a surrender, and, in 1904, there had been a meeting between Commissioner Laird and Chief LeRat. There is also evidence of a letter from a band member who opposed the surrender and who wished to move onto the southern part of the reserve – a request that was denied by Crown officials. It is safe to say, then, that *Cowessess* band members were aware that an absolute surrender was being contemplated.

Second, in *Apsassin*, the Band had discussed the surrender previously during a minimum of three formal meetings where departmental representatives were present. According to the trial judge, these meetings took place over the course of one year.<sup>348</sup> In *Cowessess*, we know of only two meetings that were called for the purpose of discussing the surrender – the meetings of January 21 and 28, 1907, eight days apart.

Third, in *Apsassin*, the trial judge found it would be nothing short of ludicrous to conclude that the Indians would not also have discussed the proposed surrender between themselves on many occasions in an informal manner. The same must be said of the *Cowessess* Band.

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<sup>347</sup> *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 413, La Forest J.

<sup>348</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20, [1987] FCJ 1005 (sub nom. *Apsassin*).

Fourth, in *Apsassin*, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives before the signing of the actual surrender. In *Cowessess*, we do not know how complete the discussion was. We have Agent Matthew Millar's written assertions that the terms of the surrender were fully explained, and his recording of Chief Joe LeRat agreeing that the terms were explained. Unlike *Apsassin*, we have no recorded minutes of the meetings or *vive voce* evidence of what went on at the meetings.

Fifth, in *Apsassin*, the trial judge found that Crown representatives had not attempted to influence the plaintiffs, either previously or during the surrender meeting, but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned. It is clear that in *Cowessess*, Crown officials did try to influence the Band, both before the surrender meetings and during the course of the meeting on January 29, and that they dealt with the *Cowessess* Band far less than conscientiously. The evidence includes Graham's delay in going to see the Band until January, when he had a reasonable expectation that the winter would be taking its toll on the band members; the increased payment at the surrender meeting, which can be construed only as an inducement; and the fact that, before 1904, Crown officials were aware that the *Cowessess* Band was not predisposed to surrender. There is nothing on record to indicate that, at any time, the *Cowessess* Band approached the Crown and asked about surrender, or that the Band discussed a surrender without the Crown having brought the matter up first.

Sixth, the trial judge in *Apsassin* found that Mr Grew, the Indian Agent, had fully explained the consequences of the surrender to the Band. Mr Justice Addy, the trial judge in *Apsassin*, also approved of Grew's going with band members to see the new site they had chosen, after reviewing a number of sites for their suitability as replacement reserve land for the Band. The situation in *Cowessess* is in stark contrast. Agent Miller wrote that Inspector Graham explained the terms of the surrender, but there is nothing about whether he explained the consequences. There is no information about whether Crown officials told the Band that, without their hay lands, they would have more difficulty raising cattle. There is nothing to indicate whether Crown officials explained to the band members that, without the southern sections of land, they might have fewer options in the future. There is nothing in the record in 1907 that suggests that Crown agents were at all mindful of what the implications and consequences were for the Band.

Seventh, in *Apsassin*, the trial judge found that, although the band members would not have understood (and probably would have been incapable of understanding) the precise nature of the legal interest they were giving up, they did in fact understand that, by the surrender, they were giving up forever all rights to IR 172. In return, they understood that money would be deposited to their credit once the reserve was sold and that, with the proceeds, they would be furnished with alternative sites near their trapping lines. It is instructive to compare this situation to the one in Cowessess. It is certain the Cowessess band members understood that the vote meant selling land for money and that they would receive a portion of the money immediately and an interest payment into the future. They were not certain, however, how much the total would be. In both 1911 and 1921, the Band contacted a lawyer in the nearby town of Grenfell, and, both times, the lawyer wrote to the department stating that the Indians did not think they had received what they had been promised.<sup>349</sup> In 1921, the lawyer writing on the band members' behalf stated they had been told they would receive \$50 per year in interest. Since the record is incomplete about what was said at the surrender meeting, there is no way of knowing whether that claim was true. What the record does show is that, on both occasions when the Band asked for legal help in approaching the Crown, officials refused to deal with the solicitor.

Eighth, in *Apsassin*, the alternative sites had already been chosen by the Band, after mature consideration. The Beaver Band was not using IR 172 and had identified other land that would support its traditional way of life better. The agent had helped band members assess and identify their needs. The Beaver Band swapped land for land; the Cowessess Band swapped land for money. Unlike the Beaver Band, the Cowessess Band was losing land forever.

This comparison of the Beaver Band to the Cowessess Band at the time they each surrendered their land shows clearly the differences in the way Crown officials acted in the two instances. The sixth point is the most important: Crown officials advised the Beaver Band conscientiously; they helped band officials assess and identify their needs; and they went with band officials to look at alternative sites to determine whether these lands would fulfill the Band's identified needs. In

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<sup>349</sup> Transcript, April 22, 1921, G.C. Neff, barrister to DIA, with extract from memorandum, LAC, RG 10, vol. 6810, file 470-2-3, vol. 12, part 8 (ICC Exhibit 6, p. 320).

contrast, Crown officials advised the Cowessess Band with only one end in mind: to obtain a surrender.

### *The Exploitative Bargain*

The *Indian Act* requires that both the band and the Crown consent to a surrender. As Madam Justice McLachlin explained in *Apsassin*, “[t]he purpose of the requirement of Crown consent was not to substitute the Crown’s decision for that of the band, but to prevent exploitation.”<sup>350</sup> She defined exploitation as being either “foolish or improvident”<sup>351</sup> and emphasized that “the Crown’s obligation was limited to preventing exploitative bargains.”<sup>352</sup>

Since the Cowessess Band did not provide valid consent to the surrender, this part of the analysis is only in the hypothetical. Madam Justice McLachlin’s statements about the exploitative bargain come within her analysis of the fiduciary duty imposed by the *Indian Act*, not in her analysis of whether a fiduciary duty is imposed upon the context of the surrender. The question could just as easily be framed as, Had the Cowessess Band consented to the surrender, should the Crown have refused to consent to the surrender on the grounds that it was an exploitative bargain?

The First Nation has argued that the Crown breached its fiduciary duty to the Band by consenting to a surrender that was both foolish and improvident. It also argued that this duty includes consideration of the foreseeable consequences of surrender from the perspective of the Band at the time in question.<sup>353</sup> The First Nation stated that the surrender must be considered in light of the Band’s pre-surrender agricultural activity, the significance of agriculture to First Nations at the time of the surrender, and the impact of the surrender on the capacity of IR 73 to support agricultural activities. From the perspective of the First Nation, the following facts are important:

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<sup>350</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 35 (sub nom. *Apsassin*).

<sup>351</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 35 (sub nom. *Apsassin*).

<sup>352</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 35 (sub nom. *Apsassin*).

<sup>353</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, p. 36.



- the Band lost 42.6 per cent of its total land base,<sup>354</sup>
- the Band lost 94.7 per cent of its slough hay acres,<sup>355</sup>
- the Band lost 72.1 per cent of its open arable acres;<sup>356</sup> and
- the Band lost 100 per cent of its acres within six miles of the rail line.<sup>357</sup>

The First Nation also considered the land the Band still possessed after the surrender. Almost two-thirds of the remaining acres were covered in trees, which would have required considerable expense to clear and break, and, in addition, the land in the remaining northern sections was broken by steep river banks and ravines. Most important, the First Nation argued, was the impact of the loss of the hay lands on the Band's ability to raise cattle and feed them through the long winter months.<sup>358</sup>

Canada's position is that there is no cogent or compelling evidence that any of the interests of the Crown were antithetical to the interests of the Band, nor were the Band's interests ignored.<sup>359</sup> Canada argued that to determine whether a surrender should be considered exploitative, a number of factors must be considered. Among them are the quantity and quality of the remaining land in light of the Band's interests and perceived needs, the Band's existing and contemplated ways of life and its use of the land before the surrender, the terms of the surrender, and the potential benefits associated with the surrender.

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<sup>354</sup> Geordie McKay, Mattila Appraisals Ltd, "Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve," prepared for Cowessess First Nation, [2004], p. 30 (ICC Exhibit 9a, p. 30). This report noted the discrepancy between the stated area of the Cowessess Reserve being 49,920 acres, Surveyor Bray's statement that the surrendered area was 20,704 acres, and Mattila Appraisal's calculations. Mattila Appraisals calculated its percentages on the basis of an original reserve area of 49,413 acres and a surrendered area of 21,041 acres. However, in an analysis of the Crown's fiduciary duty, the discrepancy is minor and does not affect the conclusions.

<sup>355</sup> Geordie McKay, Mattila Appraisals Ltd, "Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve," prepared for Cowessess First Nation, [2004], p. 30 (ICC Exhibit 9a, p. 30).

<sup>356</sup> Geordie McKay, Mattila Appraisals Ltd, "Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve," prepared for Cowessess First Nation, [2004], p. 30 (ICC Exhibit 9a, p. 30).

<sup>357</sup> Geordie McKay, Mattila Appraisals Ltd, "Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve," prepared for Cowessess First Nation, [2004], p. 30 (ICC Exhibit 9a, p. 30).

<sup>358</sup> Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004, pp. 41–42.

<sup>359</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 12.

The evidence cited by Canada includes the annual payments of interest to be made to the band members, money that could be used by them to help young people and the infirm. Canada cited Agent Miller's recital of what the Band had purchased with the money advanced to it in January: useful horses, sleighs, wagons, ploughs, and other articles that should be of permanent use in carrying on work; food supplies, blankets, bedding, and furniture; and "much warm and serviceable winter clothing."<sup>360</sup> Canada also argued that the following facts must be considered:

- (a) the decline in the population of the Band;
- (b) the relatively high proportion of Reserve land on a per capita basis;
- (c) the Reserve lands remaining after the surrender would be in excess of treaty allotment on a per capita basis;
- (d) the relatively small portion of the Reserve lands used for agriculture;
- (e) the needs and interests of the Band;
- (f) the terms and conditions of the surrender; and
- (g) the Band received more than the expected prices for the Reserve lands.<sup>361</sup>

Considering all the factors in this case, the key objective question can be framed as follows: Given the Band's needs, and given what the Crown knew about the value of the land to the economic development of the Band, was the surrender either foolish or improvident? To frame the Crown's duty as being that of merely stepping into the Band's shoes and asking it to see out of the Band's eyes is negating the Crown's duty as fiduciary. In assessing what is best for the Cowessess Band at the time of surrender, the eyes the Crown must use are those of the fiduciary, not the beneficiary.

It is not a question of looking backwards and assessing that a surrender did not work out well. The real question is whether the Crown knew that keeping stock required a source of hay; whether the Crown knew that for the Cowessess Band to continue to progress in its agricultural economy, it required the land it was being asked to surrender. The evidence shows the Crown knew all those things.

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<sup>360</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 13, quoting M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 121 (ICC Exhibit 5, p. 503).

<sup>361</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 14

The fact that much of what the band members purchased with the money they received falls into the category of necessities, such as food supplies, blankets, and bedding, indicates that the Cowessess band members may not have been as well off as the agents were portraying them to be in their reports to Ottawa. It must not be forgotten that this Band was regularly described as being better off and more able than its fellow bands in the Crooked Lake Agency. However, given that we know that Kahkewistahaw was starving at the time, this comparison may well have been faint praise. Much of the remaining purchases were farm implements – an indication, perhaps, that the Cowessess band members were not farming as well as they would have liked.

Whether the Band was using the land is irrelevant. No one would have argued against non-Aboriginal farmers' rights to use or not use land as they saw fit. The fact that the Band was not yet using all its land did not mean it would not have used it in the future.

The statistics that stand out above all others are that the Band lost 94.7 per cent of its slough hay acres<sup>362</sup> and 87.7 per cent of its cow-carrying capacity. In effect, it lost a significant part of its economic engine. Until 1904, Crown officials were certainly aware of the value of the hay lands to the Band; that is why Agent McDonald and Commissioner Laird advised against surrender several times. The Schoney report identified the requirement for hay lands at the time in this way:

Hayland was essential in order to provide winter feed and to offset pasture shortfalls during droughts. ...

Natural hay marshes were invaluable as they provided a source of hay that required only harvesting and avoided the expensive seed and cultivation costs associated with alfalfa and other legumes. These low lying areas were more naturally drought tolerant and could provide better than average supplies of feed when it was needed most.<sup>363</sup>

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<sup>362</sup> Mattila Appraisals Ltd, "Historical Land Use Review: 1907 Surrendered Area and Current Cowessess Reserve," prepared for the Cowessess First Nation [2004], p. 30 (ICC Exhibit 9a, p. 30).

<sup>363</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," April 20, 2004, p. 12 (ICC Exhibit 11a, p. 12).

The Band did not have an alternative to natural hay. Although there had been experiments with brome grass and alfalfa, they were less drought tolerant and more susceptible to insect damage.<sup>364</sup>

Canada has argued that the number of stock kept by the Band did not drop in the years immediately following the surrender, as would have been expected if the hay lands had been crucial to the Band's success.<sup>365</sup> However, it appears that, until the land was sold in 1908, the Band continued to use the land and, presumably, take the hay from it.

An analysis that focuses on what happened after the surrender is merely importing hindsight into the question of what the Crown ought to have done in 1907. It is not a question of whether the surrender worked out well for all concerned; rather, it is a question of whether the surrender ought to have happened at all.

A comparative soil analysis of the surrendered portion of the reserve to the remaining (current) reserve indicated that the cultivatable and bush arable soils on the remaining reserve were somewhat better than those on the surrendered sections.<sup>366</sup> However, the current Cowessess reserve also contains more poorer-quality soils than the surrendered areas.<sup>367</sup> In addition, it is important to note the topography of the area. The same soil analysis also indicates that the non-surrendered area contained geographic features that would have hindered agricultural development.<sup>368</sup> Of particular relevance were "Ekapo Creek and its tributaries which effectively severs the reserve into two areas, one on the east and one on the west. ... The part of Ekapo creek on Cowessess is so steep that the transportation across of materials such as hay or grain would have been extremely hard or even impossible. However, on the surrendered lands Ekapo creek only runs across the north portion but

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<sup>364</sup> R.A. Schoney and M.H. Schoney, "An Economic Analysis of the Impact of the Surrendered Reserve Land on the Cowessess First Nation," April 20, 2004, p. 13 (ICC Exhibit 11a, p. 13).

<sup>365</sup> Written Submissions on Behalf of the Government of Canada, August 6, 2004, p. 16.

<sup>366</sup> Dave Hoffman, "Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve," August 20, 1998, p. 32 (ICC Exhibit 3, p. 36).

<sup>367</sup> Dave Hoffman, "Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve," August 20, 1998, p. 32 (ICC Exhibit 3, p. 36).

<sup>368</sup> Dave Hoffman, "Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve," August 20, 1998, p. 33 (ICC Exhibit 3, p. 37).

is shallow so that crossing would not have been as difficult.”<sup>369</sup> Even today, there are only two roads that run east/west across the current reserve, and band members have only limited access to the southwestern areas of the reserve that lie between the tributaries of Ekapo Creek.<sup>370</sup> In contrast, without such topographical constraints, the surrendered land is put to use according to the quality of its soils, with the best soils being used for crop production, and the lesser-quality soils to graze cattle.<sup>371</sup>

Access to the railway line was also important. One of the reasons settlers wanted the land was because it was close to the Canadian Pacific Railway. Had the Cowessess Band retained the land and been able to develop it, the proximity of the railway to the land on which produce was grown would have meant far shorter distances to travel than the minimum of six miles they were left with after the surrender.

It is important to note that, at the time, the Crown did not even consider what the impact of the surrender on the Band would be. The only question Inspector Graham seems to have considered is how much land the Indians should be asked to give up. It was never any consideration of whether it was a good idea to give up land at all.

In *Semiahmoo Indian Band v. Canada*,<sup>372</sup> the Federal Court of Appeal considered what was required for the Crown to discharge its fiduciary duty with regard to withholding consent to an exploitative bargain. The Semiahmoo Band had surrendered land to the Crown in 1951 for the purpose of building an expanded crossing at the Douglas Border Crossing in British Columbia. Canada retained the land but did not use it for new customs facilities or for any other public purpose. At trial, Canada argued that the Band had given full and informed consent to the surrender. Both the trial and the appeal court judges found that, under the circumstances, where the Crown also had the

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<sup>369</sup> Dave Hoffman, “Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve,” August 20, 1998, p. 33 (ICC Exhibit 3, p. 37).

<sup>370</sup> Dave Hoffman, “Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve,” August 20, 1998, p. 33 (ICC Exhibit 3, p. 37).

<sup>371</sup> Dave Hoffman, “Soil Comparison Study: 1907 Surrendered Area and Current Cowessess Reserve,” August 20, 1998, p. 33 (ICC Exhibit 3, p. 37).

<sup>372</sup> *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA).

right to expropriate the reserve for a public purpose, the Band felt it was powerless to stop the surrender. Mr Justice Isaac of the Federal Court of Appeal went on to state:

I should emphasize that the Crown's fiduciary obligation is to *withhold its own consent* to surrender where the transaction is exploitative. In order to fulfil this obligation, the Crown itself is obliged to scrutinize the proposed transaction to ensure that it is not an exploitative bargain. As a fiduciary, the Crown must be held to a strict standard of conduct. Even if the land at issue is required for a public purpose, the Crown cannot discharge its fiduciary obligation simply by convincing the Band to accept the surrender, and then using this consent to relieve itself of the responsibility to scrutinize the transaction.<sup>373</sup>

There is no evidence in the Cowessess record that the Crown scrutinized the surrender to ensure that it was not an exploitative bargain, either before the vote or after.

## Conclusion

The First Nation has summarized its position in this inquiry by stating that there were clear breaches by the Crown of its fiduciary duty to the Cowessess Band in 1907 and that, as a consequence of the breach, the Crown owes a lawful obligation to the Cowessess First Nation.<sup>374</sup> Canada's position is that Canada is not in breach of any fiduciary obligation, that there is no outstanding lawful obligation,<sup>375</sup> and that the claim was properly rejected.

While Crown officials of the early 1900s would not have had the benefit of the opinions and wisdom of Justices Dickson, McLachlin, Addy, Laskin, La Forest, et al., they would have and did know of the duties and responsibilities imposed on them by the *Indian Act* and, in particular, by the terms of Treaty 4.

When William Graham came to take the surrender in 1907, it was a scant 32 years since 1874, when the treaty had been signed. Even less time had passed since the land for the Cowessess Band's reserve had been selected and surveyed. It was during this period, between the signing of the

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<sup>373</sup> *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA) at para. 45; 148 DLR (4th) 523 at 538. Emphasis in original.

<sup>374</sup> Written Submission on Behalf of the Cowessess Indian Band, June 30, 2004, p. 50.

<sup>375</sup> Written Submission on Behalf of the Government of Canada, August 6, 2004, p. 36.

treaty and the creation of the reserve, that the Crown had an obligation to balance the competing interests of the First Nations and the European settlers. Once the reserve was surveyed and set aside, the Crown owed no duties to the settlers with regard to that land. Its fiduciary responsibilities lay entirely with the people of the Cowessess Band.

In my view, Canada has a lawful obligation to the Cowessess Band, based on breach of fiduciary duty. Canada should accept this claim and negotiate a settlement.





**PART V**  
**CONCLUSIONS AND RECOMMENDATIONS**

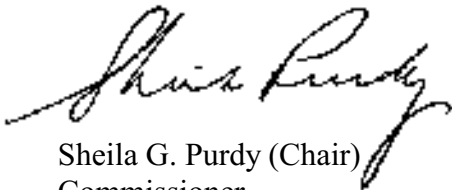
Commissioners Purdy and Dickson-Gilmore jointly recommend:

**That the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907 not be accepted for negotiation under Canada's Specific Claims Policy on the single issue of fiduciary duty.**

Commissioner Holman recommends:

**That Canada accept the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907, and that it negotiate a settlement under Canada's Specific Claims Policy on the single issue of fiduciary duty.**

**FOR THE INDIAN CLAIMS COMMISSION**



Sheila G. Purdy (Chair)  
Commissioner



Jane Dickson-Gilmore  
Commissioner



Alan C. Holman  
Commissioner

Dated this 13<sup>th</sup> day of July 2006



**APPENDIX A**  
**HISTORICAL BACKGROUND**

**COWESSESS FIRST NATION**  
**1907 SURRENDER PHASE II INQUIRY**

**Indian Claims Commission**



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#### **TREATY 4, 1874**

This is the full historical background to the First Nation's claim. Because this is the second phase of this inquiry, the Historical Background from *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223, has been expanded where necessary to provide the factual background for the issues unique to this phase of the inquiry. In addition, some minor errors have been corrected. Each correction will be footnoted.

The ancestors of the Cowessess First Nation were “primarily Saulteaux but includ[ed] some Cree and Metis” when they adhered to Treaty 4 at Fort Qu’Appelle on September 15, 1874.<sup>1</sup> Chief Cowessess (“Ka-wezauce,” also known as “Little Boy” or “Little Child”) signed the treaty for himself and his followers. The signatories to the treaty ceded to the Crown an area of 194,000 square kilometres (75,000 square miles<sup>2</sup>) in what is now southern Saskatchewan and, in exchange, were promised perpetual cash annuities, schools, agricultural assistance, and reserves on which to settle when they ceased their traditional nomadic way of life. These reserves were to be selected by government officials, in consultation with the bands, and the area set aside was to equal one square mile for each family of five (or 128 acres per person). Treaty 4 also stipulated that the government, and only the government, could dispose of reserve land, after obtaining the consent of the Indians entitled to the land:

[T]he 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,

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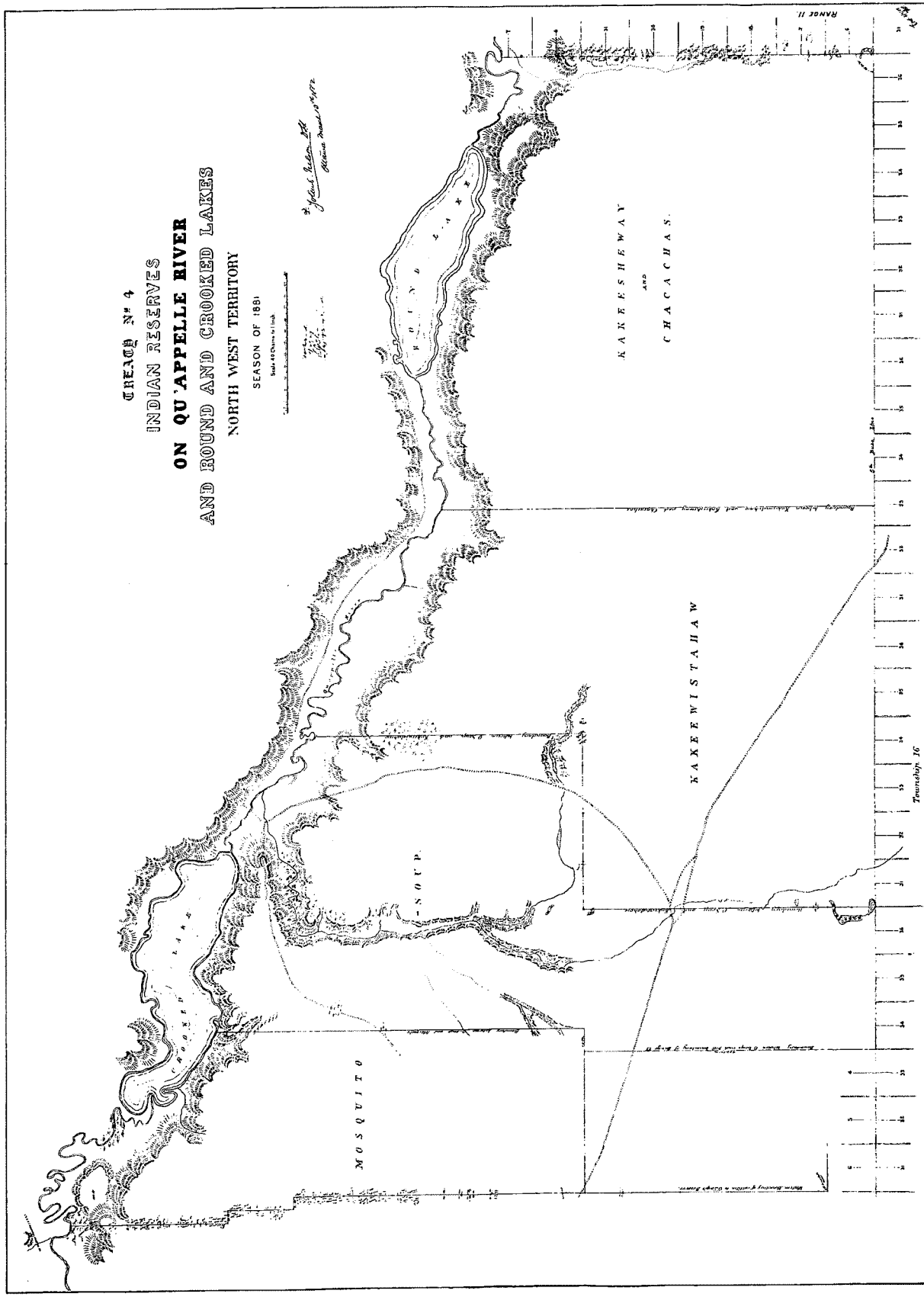
<sup>1</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 1 (ICC Exhibit 4, p. 1). See also John P. Wright, Indian Agent, to the Superintendent General of Indian Affairs (SGIA), August 25, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 136 (ICC Exhibit 5, p. 240). J.A. Sutherland, Acting Indian Agent, to the Superintendent General of Indian Affairs (SGIA), August 1, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 149 (ICC Exhibit 6, p. 492).

<sup>2</sup> Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 77.

CREACH N° 4  
 INDIAN RESERVES  
**ON QU'APPELLE RIVER**  
 AND ROUND AND CROOKED LAKES  
 NORTH WEST TERRITORY  
 SEASON OF 1881

Scale of Miles to Inch

*By Alfred Russel Wallace  
 Ottawa November 1881*





or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.<sup>3</sup>

Precise procedures for the alienation of reserve land were set down in the *Indian Act*.

### **RESERVE SURVEYED FOR THE COWESSESS BAND, 1880 AND 1883**

At the time of the treaty, the Cowessess people were nomadic buffalo hunters, and they did not immediately select a site for a reserve. In 1874 and 1875, the Band was paid annuities at Fort Qu'Appelle, but by 1876 it had moved to the Cypress Hills to be nearer to the dwindling buffalo herds. At the treaty annuity distribution in 1876, band members were paid at two locations: Chief Cowessess and 191 of his followers took payment at their camp in the Cypress Hills, while 50 others were paid with Headman Kaykahchegun at Fort Qu'Appelle. By 1877, about one-quarter of the band members were paid at Qu'Appelle under Headman Louis O'Soup, and the rest were paid in the Cypress Hills with Chief Cowessess. Comparable numbers were paid with the two respective leaders at Cypress Hills and Qu'Appelle for the next four years.<sup>4</sup>

In 1878 and 1879, the government promised Cowessess a reserve, first at a site north of Fort Walsh and then at Maple Creek in the Cypress Hills. No reserve was surveyed, however, even though Cowessess' followers had commenced farming at the location they had chosen near Maple Creek.<sup>5</sup> In 1880, a reserve was surveyed at Crooked Lake near Fort Qu'Appelle for O'Soup and his followers. In the spring of 1883, Chief Cowessess and his followers were persuaded to leave the Cypress Hills and join O'Soup's group at Crooked Lake, and the boundary of the reserve was adjusted to reflect the reunited Band's total membership. According to the annuity paylists for 1883,

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<sup>3</sup> "The Qu'Appelle Treaty Number Four," in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 332.

<sup>4</sup> All statistics derived from Cowessess Band paylists, as cited in K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 4–5 (ICC Exhibit 4, pp. 4–5).

<sup>5</sup> K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 6–7 (ICC Exhibit 4, pp. 6–7).

345 people were paid with Chief Cowessess.<sup>6</sup> Six years later, in 1889, Cowessess Indian Reserve (IR) 73 was confirmed by order in council. It comprised 78 square miles<sup>7</sup> (49,920 acres), which was sufficient area under the land entitlement provisions of Treaty 4 for 390 band members ( $49,920 \div 128 = 390$ ). The same order in council also confirmed three other reserves laid out next to Cowessess IR 73 at Crooked Lake: Sakimay IR 74, Kahkewistahaw IR 72, and Kakeesheway (later Ochapowace) IR 71. In departmental correspondence, the four reserves are often referred to collectively as the “Crooked Lake Reserve.”

## **ADAPTATION TO AGRICULTURE AND RESERVE LIFE**

### **Before the 1885 North-West Rebellion**

After much suffering and difficulty in the 1870s and 1880s – foreign diseases took a heavy toll on the Band’s population<sup>8</sup> – the Cowessess Band progressed fairly well in the transition from the buffalo hunt to agricultural subsistence on its new reserve. Although this success was neither quick nor complete, it was nevertheless a credit to the band members, their leaders, and Allan McDonald, the Crooked Lake Indian Agent during most of the period. Before reuniting on IR 73 in 1883, both Cowessess (in 1878) and O’Soup (in 1881) had presented strong cases to the department officials and the visiting Governor General in support of the Indians’ need for instruction and further material assistance in farming. In his address to the Governor General, O’Soup also outlined a lengthy list of grievances.<sup>9</sup>

In 1883, however, the federal government and the Department of Indian Affairs implemented severe spending cutbacks. Despite the hard times and the previous entreaties of Cowessess, O’Soup,

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<sup>6</sup> All statistics derived from Cowessess Band paylists, as cited in K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 21–22 (ICC Exhibit 4, pp. 21–22).

<sup>7</sup> Order in Council PC 1151, May 17, 1889, Indian Reserve No. 73, in Library and Archives Canada (LAC), RG 2, series 1 (ICC Exhibit 6, pp. 700–1).

<sup>8</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 52–55 (ICC Exhibit 4, pp. 52–55).

<sup>9</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 5–6, 9–11 (ICC Exhibit 4, pp. 5–6, 9–11).

and other Indian leaders, the “Farm Instruction Program was one of the first to suffer.”<sup>10</sup> Indian Agent McDonald strongly objected to this, but to no avail; Farming Instructor James Setter at the Crooked Lake Agency lost his assistants and labourers at the end of the year. Two weeks later, accused of being too liberal with rations, Setter was also fired and replaced by Hilton Keith.<sup>11</sup>

As a result of the restrictive rations policy instituted by Assistant Indian Commissioner Hayter Reed, the situation grew so desperate in the winter of 1884 that O’Soup’s son Big Ben Kitchie – after leading other young men of the agency in a dance lasting five days – approached Keith to request provisions. When Keith refused, the men obtained provisions by force. Further violence was avoided only when the North-West Mounted Police intervened. The government temporarily eased its restrictive rations policy following the incident.<sup>12</sup>

The Indians’ grievances were not fully resolved, however. When the uprising led by Louis Riel began, O’Soup called the young men of the reserve to a dance at his house and tried to convince them to follow him and to join Riel. According to Agent McDonald, if Alex Gaddie and other band members had not intervened, O’Soup would have succeeded.<sup>13</sup> Although he was not one of them, O’Soup appears to have had close ties to the Métis, since he had previously argued in favour of allowing a number of them to enter into treaty. Moreover, when many of the Métis fled to the United States following suppression of the uprising, O’Soup was asked to accompany their leaders to Washington to support their request for reserve land and treaty status. The Métis needed O’Soup’s presence to “convince the U.S. authorities that they were really Indians.”<sup>14</sup>

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<sup>10</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 26–27 (ICC Exhibit 4, pp. 26–27).

<sup>11</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 27 (ICC Exhibit 4, p. 27).

<sup>12</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 28–33 (ICC Exhibit 4, pp. 28–33).

<sup>13</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 26–27 (ICC Exhibit 4, pp. 26–27).

<sup>14</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 38–39 (ICC Exhibit 4, pp. 38–39).

In 1886, Cowessess passed away. Soon after, O'Soup was elected Chief, but not without the Band having to assert its right to elect its own Chief. Although the government watched O'Soup closely because of his ties to the Métis, he was invited to tour Ottawa and Eastern Canada with other Indian Chiefs,<sup>15</sup> and his relationship with the department seems to have improved somewhat thereafter.

### **Following the 1885 North-West Rebellion**

In the wake of the failed Métis resistance led by Riel, the government implemented several policies that severely hampered the development of Indian agriculture. A pass system controlling the movement of Indians was established in 1885, a permit system tightened government control over the sale of Indian goods, and Deputy Superintendent General Hayter Reed's "peasant farming policy," instituted in 1889, banned the use of machinery in an attempt to restrict the Indians to subsistence farming.<sup>16</sup>

In spite of these restrictive policies, a number of the Cowessess band members managed to progress in their farming. In 1891, Inspector of Indian Agencies T.P. Wadsworth reported that the Cowessess Band

differs somewhat from other bands from the fact that within it are found the opposite sides of life, riches and poverty (both viewed from an Indian standpoint). The former state is unique in Indian life now-a-days, while the latter is generally chronic. O'Soup, Gaddie, Ne-pa-pa-ness, and Andrew Delorme represent the former class. In this generation of Indians few of them will ever be any better off than the above-named men now are, but their riches are of a fleeting and casual nature, consisting as they do of horses and cattle, agricultural implements and annual crops, for they have no improvements on their land of a very permanent character, the timber on the reserve not being very good for building purposes, consequently their buildings are not very good, O'Soup's being somewhat better than any of the others.<sup>17</sup>

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<sup>15</sup> K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 42–44 (ICC Exhibit 4, pp. 42–44).

<sup>16</sup> K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 64–70 (ICC Exhibit 4, pp. 64–70).

<sup>17</sup> T.P. Wadsworth, Inspector of Indian Agencies, to the SGIA, September 26, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 142 (ICC Exhibit 5, p. 102).

One of the factors in this progress was Indian Agent McDonald's restricted approach to implementing these policies. His 1892 report to the Superintendent General reveals the manner in which he implemented the permit system:

I keep an accurate account of all money earned by the sale of wheat and other grain, each Indian raising such grain having a pass-book of his own, and whenever permission to sell any is given this book is referred to; and by that means I am also able to check and keep a close account of what is done with the money received (although the Indian is a perfectly free agent and receives and expends all the money himself); and I am bound to say the discretion shown in the expenditure is, in nearly every case, very creditable and judicious, and great honesty (with very few exceptions) is shown, by a desire to liquidate any debt for advances that are sometimes made by them.

One Indian, Nepahpeness, Cowesess' Band, No. 73, sold and filled one carload of wheat, six hundred eighty-seven bushels.<sup>18</sup>

McDonald's 1893 report reveals his use of the pass system:

I am regulating the issue of passes more strictly than formerly, and have been working steadily in this direction for a long time, so as to retain Indians who are farming more closely to the reserve, thereby trying to make them see the necessity of not absenting themselves, unless it is absolutely necessary, to procure money for provisions, instead of being obliged arbitrarily to refuse them passes, and I can report much success in my policy.<sup>19</sup>

McDonald appears to have employed the pass system exclusively in an attempt to encourage better farming, and it seems he was successful. In September 1896, Inspector A. McGibbon reported much progress on the Cowessess Reserve which, "owing to its central position, the agency buildings being on it, has made greater advancement than any of the others, especially in farming."<sup>20</sup> As the

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<sup>18</sup> A. McDonald, Indian Agent, to the SGIA, July 30, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 158 (ICC Exhibit 5, p. 132).

<sup>19</sup> A. McDonald, Indian Agent, to the SGIA, July 31, 1893, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1893*, 63 (ICC Exhibit 5, p. 147).

<sup>20</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 224–26 (ICC Exhibit 5, p. 203).

case of Nepahpeness (cited above) exemplifies,<sup>21</sup> the Band no doubt also benefited from its close proximity to the Canadian Pacific Railway, by which means Cowessess and his followers had originally arrived at the reserve in 1883.<sup>22</sup>

The apparent success of the Band, however, was also due to the fact that McDonald was clearly not following Reed's "peasant farming policy":

J.A. Sutherland farmer, miller and general mechanic. ... The mill is close to the house, and it was carefully examined and a statement of the working of it for three seasons was made out and forwarded to the Commissioner. The engine was in good order and condition, is as good as when purchased. There is a circular saw which cost \$20, paid for by the staff, and all the wood for the mill and houses cut with little trouble and saves time. The horse stable had been sided with lumber, room for five horses; loft for hay and oats, and a spout for the oats to come down when feeding; lots of hay and straw on hand; implement shed with all implements; a warehouse, with ice-house underneath. ... The separator was in a shed. There is also a blacksmith-shop, a neat and well kept place, where Mr. Sutherland makes many repairs. I noticed as many as fifteen ploughs brought by Indians for one repair or another. A cow stable has been built since last inspection. Some very good specimens of fancy-work, done by Indian women under instructions of Mrs. Sutherland, were to be seen. A number of prizes were obtained at the Regina exhibition; over one hundred exhibits were shown from this agency; seventy of these were women's work – cheese, soap, &c.; also the largest exhibit from any one Indian, but who did not get a prize however, owing to an omission in making the entry. The best sample of flour was from this mill. The Indians got first and second prizes for wheat, first and second for oats, first for pease, first and second for bread, first for butter, first and second for fancy sewing, women's clothing and men's suits, and second prize for best collection of vegetables. Mrs. Sutherland takes great interest in teaching the women in the various departments of useful as well as ornamental housework.<sup>23</sup>

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<sup>21</sup> A. McDonald, Indian Agent, to the SGIA, July 30, 1892, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1892*, 158 (ICC Exhibit 5, p. 132).

<sup>22</sup> A. McDonald, Indian Agent, to the SGIA, July 6, 1883, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883*, 73 (ICC Exhibit 6, p. 337).

<sup>23</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the for the Year Ended 30th June 1896*, 224 (ICC Exhibit 5, p. 203).

McGibbon reported on the prosperity of individual band members, such as Alex Gaddie:

Granary was well filled with wheat and oats for seed and for sale. Two double wagons passed the office one day loaded with wheat to sell in Broadview. Two splendid teams of horses, good harness and wagons, the whole showing a lively picture of an industrious Indian. ... Has twenty-three head of private cattle, looking well; they had the run of the straw-stacks in day time all winter.<sup>24</sup>

McGibbon also noted that the “private earnings of the band ... 1893, \$2,522.17; 1894, \$2,177.37; 1895, to 31st March, 1896, \$2,086.95 – total, \$6,516.49,”<sup>25</sup> were “[d]erived from the sale of firewood, wheat, hay, senega root, cattle, wages and tanning hides” and that the “amounts were expended on wagons, binders, mowers, lumber for houses, stoves, provisions and clothing.” The total earnings of the Cowessess Band were greater than the earnings of any other individual Crooked Lake Agency band.<sup>26</sup>

This progress would continue during the years leading up to the 1907 surrender. In 1903, for example, the local Indian Agent said of Cowessess that the “Indians on this reserve are in better circumstances than others in this agency, being mostly half-breeds and looking further ahead. They make a good living by farming, stock-raising and selling fire-wood and hay. ... In all they are comfortable and do not require much assistance when crops are good.”<sup>27</sup>

In 1905, however, Inspector W.M. Graham reported critically of the agency’s Indians, including Cowessess Band:

Speaking generally the Indians of this agency are not doing as well as they should. There are a great many able-bodied men on the reserves who are leading a hand-to-mouth existence by selling wood and hay and who could, if they desired,

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<sup>24</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 226 (ICC Exhibit 5, p. 204).

<sup>25</sup> Note that McGibbon’s math is incorrect. The annual earnings add to a total of \$6,786.40. There is no explanation for the inaccuracy, and the totals for the earnings for the other Crooked Lake Bands are correct.

<sup>26</sup> A. McGibbon, Inspector of Indian Agencies, to the SGIA, September 21, 1896, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1896*, 229 (ICC Exhibit 5, p. 205).

<sup>27</sup> Magnus Begg, Indian Agent, Crooked Lake Agency, to the SGIA, August 17, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 159 (ICC Exhibit 5, p. 396).

have the best farms in the territories. The land is lying idle. Cowessess band has one of the best farming reserves in the country. The Indians are not making use of the horses and machinery they have.<sup>28</sup>

By comparison, the following year, Indian Agent Matthew Millar reported that “[m]any of these Indians have good horses, also small bunches of cattle. Very little destitute assistance is required in this band [Cowessess].”<sup>29</sup> The differences in these reports may simply reflect the differences between the perspective of the agent – wanting to show progress among his charges – and that of the inspector, wanting to point out what could be improved.

## **PRESSURE FOR SURRENDER OF THE CROOKED LAKE RESERVES**

### **Departmental Response, 1885 to 1903**

In March 1885, before the Métis uprising had turned violent, Indian Commissioner Edgar Dewdney received a telegram from two magistrates in Broadview warning that their town was in danger of attack from the Crooked Lake Indians, whose reserves bordered 25 miles of the Canadian Pacific railway line. Dewdney had 100 men rushed from Winnipeg to be sure no trouble would break out so near the railroad; however, the rumour of attack proved to be without foundation.<sup>30</sup> Around this time, or perhaps even earlier, settlers located near the Crooked Lake reserves began lobbying the government to have at least the southern portion, if not the whole, of the Crooked Lake reserves surrendered for sale.<sup>31</sup> If security concerns were a factor, they were not made explicit in contemporary correspondence from the settler population. The main objective stated was the opening up of the reserve land for development by non-Aboriginal settlers.

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<sup>28</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs (DSGIA), October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 185–86 (ICC Exhibit 5, pp. 439–40).

<sup>29</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, June 30, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 127 (ICC Exhibit 6, p. 502).

<sup>30</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 36–37 (ICC Exhibit 4, pp. 36–37).

<sup>31</sup> Thomas Evans to David Macpherson, Minister of the Interior, May 26, 1885, LAC, RG 10, vol. 7542, file 29108-1 (ICC Exhibit 6, p. 28).



On May 26, 1885, Thomas Evans of Broadview, Saskatchewan, wrote to Prime Minister John A. Macdonald and the Minister of the Interior, David Macpherson: “[T]he constant theme of every resident has been that the Indian reserve ought to be removed as soon and as speedily as the government can affect it ... and so open up a large and fine tract of country for settlement that is at present worse than useless.”<sup>32</sup> Although Evans noted that the “government were petitioned some time ago, and ... promise was given ... that the matter should receive official attention,”<sup>33</sup> the government’s reply, through Indian Commissioner Edgar Dewdney, was that it had no record of such a petition but, nevertheless, that “enquiry will be made into the subject.”<sup>34</sup>

In the spring of 1886, settlers in the vicinity of Moosomin, Saskatchewan, echoed Evans’s request, asking the Minister of the Interior to move the reserves away from the railway – a suggestion with which the Minister seems to have agreed:

During his [Minister of the Interior’s] recent visit to the North West, the settlers in the neighborhood of Moosomin brought to the Minister’s attention, the fact that the Indian Reserve in question [the Crooked Lake Agency Reserves] lies immediately alongside of the Canadian Pacific Railway, that it would be desirable in the public interest and in the interest of the Indians themselves that they should be moved back six miles from the Railway ...

To this proposition, it was represented to the Minister, the Indians would be perfectly willing to agree, and as he [is] confident that the public [in]terest and the advantage [to] the Indians would be equal[ly] served by some such arrangement.

I am to ask whether you do not agree with him in thinking it expedient to open negotiations with the Indians for the purpose of ascertaining their views.<sup>35</sup>

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<sup>32</sup> Thomas Evans to John A. Macdonald, Prime Minister, May 26, 1885, and Evans to David Macpherson, Minister of the Interior, May 26, 1885, LAC, RG 10, vol. 7542, file 29108-1 (ICC Exhibit 6, pp. 26–29).

<sup>33</sup> Thomas Evans to David Macpherson, Minister of the Interior, May 26, 1885, LAC, RG 10, vol. 7542, file 29108-1 (ICC Exhibit 6, p. 28).

<sup>34</sup> Draft, Edgar Dewdney, Indian Commissioner, to Thomas Evans, June 5, 1885, LAC, RG 10, vol. 7542, file 29108-1 (ICC Exhibit 6, pp. 30–31).

<sup>35</sup> A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, March 4, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 34–36).

The Indian Agent in charge of the Crooked Lake Agency, Allan McDonald, was asked his views of the proposal. He replied that the proposed surrender was not advantageous to the Indians and, if it proceeded, care should be taken to acquire adequate hay lands in close proximity to the reserve:

The hay on Little Child's [Cowessess] Reserve is within the six miles asked for, I do not think there were forty tons cut out of it last year, and unless these Indians got the same area of hay lands as they would surrender and in close proximity to their Reserve, it would be unjust to entertain the proposition.

Loud Voice [Ochapowace] and Kah-Ke-wis-ta-haw bands would be also giving up the best of their hay, but not to the same extent as "Little Childs." [sic]

These bands should in a few years possess [a] large number of Cattle requiring several thousand tons of Hay each, and we should in every way possible protect it for them.

If the land immediately north of the Reserves extending from Sakeways [sic] (North of Long Lake) to Loud Voices [sic] eastern boundary extending six miles north was given in exchange I think the area of hay lands could be got, the Indians would be justly dealt with, and the parties who are looking with envious eyes at the lands the Indians at present hold will be made contented ...

We should not overlook the fact that should the proposition be carried out, the Indians will be giving up far more valuable lands than they will be receiving.<sup>36</sup>

As a result of this report, the Department of Indian Affairs informed the Department of the Interior that "it would not be prudent nor expedient to disturb the Indians in the possession of these lands."<sup>37</sup>

The matter then lay dormant for a period of years.

On February 26, 1891, a Broadview resident named Mr Thorburn presented to the Minister of the Interior<sup>38</sup> a resolution adopted by settlers in the vicinity of Crooked Lake suggesting that "[n]ow, when by the friendly, generous, wise and consistent treatment of the Indians by the Government, the Indians are fully convinced that every action of the Government regarding them is dictated by a sincere desire for their welfare, it would be a most opportune time to carry out this

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<sup>36</sup> Indian Agent McDonald, to the Indian Commissioner, March 22, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 40–42).

<sup>37</sup> Draft [DSGIA], to A.M. Burgess, Deputy Minister of the Interior, April 7, 1886, and Draft [DSGIA], to A.M. Burgess, Deputy Minister of the Interior, May 6, 1886, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 43, 47–51).

<sup>38</sup> [Author unknown] Department of Indian Affairs (DIA) to [G.] Thorburn, April [14], 1891, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 56–59).

desirable project” (a surrender of the southern portion of the Crooked Lake Reserves, including Cowessess IR 73).<sup>39</sup> When asked to report, Agent McDonald expressed regret that the issue had not been resolved as he had suggested in 1886. He asserted that his primary duty was to the interests of the Indians, who needed the hay lands that were proposed to be surrendered:

[A]lthough I am most anxious that the views of the people of Broadview should be met, still from my position as Indian Agent, I am bound in the interests of the Indians to point out the difficulties in the way which are tersely these.

If these lands are surrendered by the Indians no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of Stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserves interested, which I do not think is possible now.

That part of Township 17 [the area requested for surrender] immediately north of Broadview is of very little use for Agricultural purposes[,] a great portion being under water in wet seasons, and the rest is gravelly and in dry Seasons it is all more or less impregnated with Alkali, and were it open to Settlers tomorrow, I do not think there would be six Settlers on it in as many years. Its only value is for the purpose it is being used by the Indians, viz. putting up hay.

... the only result of an appeal to the Indians, would be an indefinite unsettling of their minds ... or, as is very likely, a prompt refusal to entertain the idea now or in the future, which all things being considered is perhaps the best solution of the matter.<sup>40</sup>

As in 1886, the department rejected the proposal because of the concerns expressed by Indian Agent McDonald.

When the issue was resurrected in January 1899, it was a local politician who made the proposal to Clifford Sifton, the Minister of the Interior and, *ex officio*, Superintendent General of Indian Affairs:

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<sup>39</sup> Resolution submitted to the Minister of the Interior, 1891, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 728–29).

<sup>40</sup> A. McDonald, Indian Agent, Crooked Lake, to the SGIA, March 10, 1891, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 53–55).

Mr. R.S. Lake, Member of the Legislative Assembly of the North West Territories, has called on me in regard to getting a certain portion of the Indian Reserve north of the railway track at Broadview and Grenfell open for settlement. There is a rough sketch and memorandum attached. Please look into it and let me know what chance there is of being able to meet his views. I explained to Mr. Lake that it depended altogether upon the consent of the Indians.<sup>41</sup>

Before discussing this matter with the Indian Commissioner or the local Indian Agent, Sifton's private secretary, J.A.J. McKenna, first asked Surveyor A.W. Ponton to report on the matter. In contrast with Indian Agent McDonald, who had acknowledged the settlers' needs but had given first priority to the "further quick advancement" of the Indians living on the Crooked Lake reserves, Ponton expressed "doubt if the Indians would incur any loss if the whole of Township 17 in the Ranges above mentioned were opened for settlement." Acknowledging that "considerable difficulty may be apprehended" in obtaining the required consent from the Indians concerned, Ponton nonetheless gave his full support to the proposal:

I would strongly advocate the adoption of Mr. Lake's suggestion, for the reason that the Indians are not benefited by the land, and while it remains tied up, settlement of the large agricultural district lying south of the Railway is prevented owing to the lack of market towns between Whitewood, and Grenfell ...

I would suggest that the Agent be instructed to obtain a surrender of the land from the bands interested.<sup>42</sup>

On receiving Ponton's endorsement, Superintendent General Sifton requested additional information from Commissioner David Laird and the local Indian Agent.<sup>43</sup> Laird convened a meeting with Lieutenant Governor A.E. Forget and J.P. Wright, the new Indian Agent at Crooked Lake; he also

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<sup>41</sup> Clifford Sifton, Minister of the Interior, to J.A.J. McKenna, January 19, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 62).

<sup>42</sup> A.W. Ponton, Surveyor, to J.A.J. McKenna, February 17, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 64–66).

<sup>43</sup> Clifford Sifton, SGIA, to D. Laird, Indian Commissioner, February 23, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 67).

later consulted Allan McDonald, the former agent.<sup>44</sup> Both the current and the former Agent opposed the proposal for the reason that “the Indians of three of the bands cut most of their hay off the southern portion of these reserves.”<sup>45</sup> Commissioner Laird reported this information to Sifton and concurred that it would be unwise to pursue a surrender of the lands in question, at least for the present, pending the result of an experiment in cultivating brome grass as a substitute for wild hay.<sup>46</sup> Since the hay sloughs on the Cowessess reserve were slowly drying up, the previous Indian Agent, McDonald, had started an experiment to grow alternative forage crops, such as brome grass.<sup>47</sup>

In turn, Superintendent General Sifton conveyed this reply to Mr Lake, explaining that the department would consider approaching the Indians for a surrender of the southern portions of their reserves only if the brome-grass experiment proved successful:

The Commissioner, however, says that the Agent is making an experiment this year of raising Brome grass on the cultivated lands of these Indians, and if this experiment should prove a success it would remove the necessity at present existing of holding the Southern portion of the Reserve for hay land and it would then be, it is thought, an easy matter to obtain the desired surrender.

I am disposed to agree with the Commissioner that it is best to do nothing at present; but the representations which you have made will be kept in view as I am desirous of meeting as far as possible the wishes of the settlers, while at the same time protecting the rights of the Indians.<sup>48</sup>

For the third time in less than 15 years, the Department of Indian Affairs rejected requests of the local settler community that the Cowessess Band surrender the southern portion of its reserve.

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<sup>44</sup> D. Laird, Indian Commissioner, Winnipeg, to Clifford Sifton, SGIA, April 22, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 69).

<sup>45</sup> D. Laird, Indian Commissioner, Winnipeg, to Clifford Sifton, SGIA, April 22, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 69).

<sup>46</sup> D. Laird, Indian Commissioner, Winnipeg, to Clifford Sifton, SGIA, April 22, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 69).

<sup>47</sup> K.J. Tyler, “A History of the Cowessess Band, 1874–1907,” paper prepared for the Federation of Saskatchewan Indians, 1975, p. 76 (ICC Exhibit 4, p. 76).

<sup>48</sup> Clifford Sifton, SGIA, to Mr Lake, MLA, Regina, April 29, 1899, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 71–72).

By the late 1880s, according to the new Indian Agent J.P. Wright at Crooked Lake, the Cowessess Band had developed a population mix unlike that of the other Crooked Lake Agency bands. Wright described the majority of the Cowessess Band in 1898 as “French half-breeds with a few Saulteaux and Cree.” By comparison, he described both Ochapowace’s and Kahkewistahaw’s bands as Crees, and most of Sakimay’s band as “Saulteaux with a few Crees.”<sup>49</sup> Ten years later, however, the Roman Catholic priest at the Crooked Lake Mission, Father Siméon Perrault, made no mention of “French half-breeds” when he commented that “the number of Catholic families at the Crooked Lake Mission in 1908 is 65, of whom 6 are French Canadian families and the others Indians. The total number of Catholics is 355, of whom 42 are French Canadians and the others Indians.”<sup>50</sup> The identity of the French Canadian families referred to was not given. Although the Mission was located on the Cowessess reserve because many of the band members were Roman Catholic, it served Catholics beyond the boundaries of the Crooked Lake Agency.<sup>51</sup>

In September 1900, Magnus Begg became the Indian Agent for the Crooked Lake Agency.<sup>52</sup> Sixteen months later, in January 1902, he submitted a “proposition” to the department which he thought would be of great benefit to the Indians of his agency. Although Begg did not specify any particular bands or individuals, he stated that the Indians of the Crooked Lake Agency were having a difficult time paying debts they had incurred purchasing items such as wagons, farm implements, and harnesses for their agricultural operations. In order to pay these debts, he claimed, the Indians were continually forced to sell off portions of their cattle herd, thereby depleting their investment. While acknowledging that the Indians needed the machinery and implements to produce enough feed

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<sup>49</sup> John P. Wright, Indian Agent, to the Superintendent General of Indian Affairs (SGIA), August 25, 1898, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1898*, 136 (ICC Exhibit 5, pp. 239–40).

<sup>50</sup> [Translation] “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, p. 10).

<sup>51</sup> “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, pp. 3, 9, 10).

<sup>52</sup> Alex McGibbon, Inspector of Indian Agencies, to the SGIA, September 16, 1901, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1901*, 191 (ICC Exhibit 5, p. 345).

for their cattle herds, Begg proposed that a surrender of part of their reserve land would provide a means to eliminate the accumulated debts of members of the Crooked Lake Bands:

These Indians have at present about 50,000 acres of land that they do not require, say a strip 3 miles deep above the line of the C.P. Ry, on the southern boundary of the Reserve, also the Leech Lake Reserve (all hay lands) in the Yorkton district[,] most of which could be sold.

The proceeds according to the enclosed rough estimate should bring them each about \$12.00 per annum interest, which amount would pay their debts, furnish them with more young cattle, lumber, &c.

If the Department would sanction this, I will use my best endeavour to have the Indians give a surrender. I see in this way that in a very few years they will be doing business on a solid basis and will prosper accordingly.<sup>53</sup>

Interestingly, Inspector McGibbon had reported, in 1899 (a year before Begg's arrival), that the Cowessess band members were "pretty well free of debt."<sup>54</sup> Even more recently, Inspector of Indian Agencies T.P. Wadsworth had noted, in his July 31, 1901, report, that the Cowessess band members were "very little in debt to any one."<sup>55</sup>

The Indian Commissioner, David Laird, relied on his previous investigations of surrender proposals to inform Begg that the reserve land of the Crooked Lake bands he had proposed to be sold was needed for hay purposes and that any such proposal should await thorough consideration:

I beg to say that the information I have regarding the lands in question is that they are required for hay purposes. Where there are so many cattle (and the number ought to be increased) it would never do to have the Indians short of hay. It may be that owing to the wet season last year sufficient hay was secured outside of these lands, but the

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<sup>53</sup> Magnus Begg, Indian Agent, to David Laird, Indian Commissioner, January 13, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 73–74). The Leech Lake Reserve mentioned belonged to the members of Little Bone's Band, most of whom resided on the Sakimay reserve. On concluding an agreement whereby those interested would be absorbed by the Sakimay Band, 75 per cent of the Leech Lake Reserve was surrendered in 1907 (see ICC Exhibit 6, pp. 513–20). Note the correction of the per annum interest from \$17.00, reported in Phase I, to \$12.00. The figure of \$12.00 is correct.

<sup>54</sup> Alex McGibbon, Inspector of Indian Agencies, to the SGIA, August 18, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 197 (ICC Exhibit 5, p. 274).

<sup>55</sup> T.P. Wadsworth, Inspector of Indian Agencies, to the SGIA, July 31, 1901, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1901*, 143 (ICC Exhibit 5, p. 342).

conditions in the future may not be so favourable and the lands would in that case be again required for hay purposes.

The question is one that cannot be decided offhand, but requires very careful and mature consideration and I think had better stand for the present.<sup>56</sup>

Two months later, a group of farmers and villagers from Broadview, Whitewood, and surrounding districts forwarded a petition to the Minister of the Interior, again requesting that a strip along the southern boundary of the Crooked Lake reserves be opened for settlement purposes. With signatures from over 190 local residents, including R.S. Lake, a farmer and MLA, the petition asked that the “Honourable the Minister of the Interior use his best offices to procure the assent of the Indians to the sale of this land to actual settlers ...”<sup>57</sup> As a result, J.D. McLean, the Secretary of the Department of Indian Affairs, was instructed by the office of the Minister<sup>58</sup> to reply as follows:

I am directed to acknowledge the receipt of Petition from yourself and other residents of the Village of Broadview, the Town of Whitewood and surrounding districts, in East Assiniboia, asking that the assent of the Indians be procured to the sale of the Crooked Lakes Reserves to actual settlers, and to state that the Minister appreciates the desirability of acceding to the prayer of the Petitioners, but, of course, as they are aware that no Indian Reserve can be sold without the consent of the Indians.

I may say, however, that the Department will do its best to procure such consent and an Officer will be detailed for the purpose.<sup>59</sup>

The petition was then forwarded to Indian Commissioner David Laird at Winnipeg, with instructions to send “an Inspector, or Officer of the Department, whoever you think is best qualified to discuss

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<sup>56</sup> David Laird, Indian Commissioner, to the Indian Agent, Crooked Lake Agency, January 22, 1902, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 76).

<sup>57</sup> Residents of the village of Broadview and town of Whitewood and surrounding districts to the Minister of the Interior, c. March 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 77-83).

<sup>58</sup> Office of the Minister of the Interior to J.D. McLean, Secretary, DIA, March 31, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 84).

<sup>59</sup> J.D. McLean, Secretary, DIA, to Rev. J.G. Stephens, Broadview, April 2, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 85).



the question of surrender with the Indians.”<sup>60</sup> Commissioner Laird opted to address the issue in person, but he put the proposal only to the Kahkewistahaw and Ochapowace bands, not to Cowessess:

I have to report that while returning from Varley last month [i.e., April 1902], I myself called at the Agency, and by previous appointment met the Indians in Council on the 16th. I explained to the bands of reserves 71 and 72 [Ochapowace and Kahkewistahaw, respectively], which are nearest the homes of the petitioners, the object of the council, and asked them if they were willing to surrender a strip of two or three miles on the part of their reserves nearest the C.P. Railway. I did not make the same proposal to Coweses [*sic*] band No. 73, as in conversation with Mr. Agent Begg, I ascertained their hay lands are almost wholly along the southern part of the reserve. Moreover, reserve 73 is not so near as reserves 71 and 72 to Whitewood and Broadview where the principal petitioners reside.

I found the Indians strongly opposed to surrendering any portion of their reserves.

... When I put the question whether any member present of the bands represented at the meeting were favourable to a surrender, there was no response whatever.<sup>61</sup>

As in the past, the detailed report from Commissioner Laird brought the issue to a close. Nearly two years passed before the matter was reintroduced.

### **Departmental Response, 1904 to 1907**

In March 1904, the Superintendent General of Indian Affairs, Clifford Sifton, reiterated the Broadview settlers’ desire for a surrender of the Crooked Lake reserves. In writing to his deputy, Frank Pedley, Sifton noted the following:

The people of Broadview and neighbourhood are very anxious that the south half of the Indian Reserve there should be surrendered and sold so as to be open for settlement. I wish you would have the matter referred to the Commissioner’s office

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<sup>60</sup> J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, Winnipeg, April 2, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 86).

<sup>61</sup> David Laird, Indian Commissioner, Winnipeg, to the Secretary, DIA, May 6, 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 87–89).

so that Mr. McKenna can look into it and see whether it would be desirable from an Indian standpoint and whether the Indians would be likely to agree.<sup>62</sup>

Pedley asked Assistant Indian Commissioner J.A.J. McKenna (Sifton's former private secretary) to respond, and the latter reminded Minister Sifton that, when Commissioner Laird had personally investigated the same issue in April 1902, he had reported that the Indians of IR 71 (Ochapowace) and IR 72 (Kahkewistahaw) opposed surrendering any portion of their lands. Based on this information, McKenna determined the following:

From the strong objection then made by the Indians to surrendering any portion of the reserves, it seems to me that it would be bad policy to have me convene the Indians for the purpose of discussing anew a proposal to surrender, for it might create the impression that the Department is acting for the settlers in the matter. It would, I submit, if later information be required, be more advisable to have the Agent who is on the spot inquire quietly as to the mind of the Indians and report.

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I observe that the object of the suggested surrender is stated in the Deputy Superintendent's letter to be to "open the land for settlement." Reading this in connection with the petition transmitted by you on the 2nd of April 1902, I take it to mean the sale of the land to actual settlers. I do not see how we can ask the Indians to throw open any reserve for such purpose. That would be making use of the land in the interest of adjoining towns and settlements, whereas the interest of those for whom reserves are set apart requires that any land which they surrender for sale should be sold at the best price obtainable ...<sup>63</sup>

Officials at headquarters agreed with McKenna's proposal that the local Agent discern the Indians' views and report. On March 28, 1904, Indian Commissioner Laird was instructed to have "the Agent take the matter up with the Indians to see if there is a prospect of the Surrender being obtained."<sup>64</sup>

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<sup>62</sup> Clifford Sifton, Minister of the Interior, to Frank Pedley, DSGIA, March 8, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 96). It is interesting to note that Sifton requested that Mr McKenna be authorized to investigate this issue. McKenna's personal association with the Minister went back to February 1, 1897, when he was appointed private secretary to the Minister of the Interior. See D.H. Hall, "Clifford Sifton and Canadian Indian Administration, 1896-1905" (1977) 2, 2 *Prairie Forum* 127 at 130.

<sup>63</sup> J.A.J. McKenna, Assistant Indian Commissioner, to the Secretary, DIA, March 19, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 100-2).

<sup>64</sup> J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, Winnipeg, March 28, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 104).

Agent Begg wrote to Commissioner Laird on April 11, 1904, that he would “at once ... have a council with the Indians” of the agency, except for the Sakimay band members, whose reserve was “too far away from the C.P. Railway to be of any benefit to white settlers.”<sup>65</sup> Begg, however, died nine days later, on April 20, 1904.<sup>66</sup> J.A. Sutherland, the resident miller and blacksmith, was in charge of the Crooked Lake reserves until the new Agent, Matthew Millar, took up his position the following March.<sup>67</sup>

The historical documents suggest, however, that someone may have raised the issue with the bands before mid-June 1904. On June 14 of that year, Acting Agent Sutherland forwarded to the Commissioner’s office in Winnipeg a letter from Kanas-way-we-tung, No. 7 Cowessess Band, who, the Agent wrote, was “strongly opposed to selling part of the reserve and as a means to stop this he thinks he can by locating on the extreme South west corner of the Reserve.”<sup>68</sup>

At the annuity payments in July 1904, Commissioner Laird proposed to the Crooked Lake bands that they surrender the southern part of their reserves as a means of raising money to fence the reserve. The idea was left for the band members to consider:

At the annuity payments in July [1904] the matter was brought up, as a favourable opportunity occurred in connection with a complaint that settlers’ animals strayed upon the reserve and were left there by owners for grazing purposes. Mr. Lash, of this office, who was in charge of the payments, fully explained to the Indians the benefit they would derive by surrendering a strip of the reserve and a portion of the proceeds received from the sale being used to fence the reserve. The Indians appeared to appreciate the suggestion, but wanted time to think it over. Of course, Mr. Lash was not authorized to make any definite offer; but he explained to the Indians that on other reserves the plan had been adopted and was very satisfactory to the Indians. The Cowesses [*sic*] Band headed by their Chief, Joe LeRat, wanted the full proceeds of

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<sup>65</sup> Magnus Begg, Indian Agent, Crooked Lake Agency, to David Laird, Indian Commissioner, April 11, 1904, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 105).

<sup>66</sup> J.A. Sutherland, Acting Indian Agent, NWT, to the SGIA, August 1, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ending June 30, 1904*, 148 (ICC Exhibit 5, p. 407).

<sup>67</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, October 3, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 185 (ICC Exhibit 5, p. 439).

<sup>68</sup> J.A. Sutherland, in charge, Crooked Lake Agency, to J.A.J. McKenna, Assistant Commissioner, Winnipeg, June 14, 1904, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 106-7).

the land surrendered handed over to the Indians to do with as they saw fit. This suggestion Mr. Lash told them could not be acted upon. Joe LeRat is a nonprogressive Halfbreed and a good talker, so that he is readily listened to by the Indians. I would suggest that shortly after the new Agent has been appointed and the affairs of the agency fully reported upon by the Inspector, that the question of surrender be taken up with the Indians either by myself or the Asst. Commissioner, with full power to make a definite proposal to the Indians of say 10% of the proceeds of sale to be expended for their benefit in farming outfits and in a per capita payment in cash or for liquidation of debts.<sup>69</sup>

Commissioner Laird stressed that “[a]t the present time it would not be well to push the matter too hastily, as it is one that requires very careful handling.”<sup>70</sup> The Secretary of the department advised the Commissioner that his “suggestion to allow the matter to stand until after the new Agent has been appointed meets with approval.”<sup>71</sup> The proposal lay dormant for another two years.

## 1907 SURRENDER OF LAND IN IR 73

### Prelude to Surrender

In March 1906, the local Member of Parliament, J.G. Turiff, forwarded to the Department of Indian Affairs a letter he had received from a constituent in Grayson, Saskatchewan, asking whether an Indian could sell reserve land to a non-Indian. Departmental Secretary J.D. McLean replied that such an arrangement would be a violation of the *Indian Act*, but added that the department would soon be “taking up the question with the Indians of surrender of a portion of their Reserve on Crooked Lake and if the same is granted, the land will be sold for the benefit of the Indians, due notice of the sale being given to all parties.”<sup>72</sup>

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<sup>69</sup> David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 110–11).

<sup>70</sup> David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 111).

<sup>71</sup> J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, October 4, 1904, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 112).

<sup>72</sup> J.D. McLean, Secretary, DIA, to A. Lowes, Grayson, Saskatchewan, March 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 113).

In June 1906, William Morris Graham, the Inspector of Indian Agencies for the Qu'Appelle Inspectorate, wrote to the Superintendent General of Indians Affairs, Frank Oliver, informing him that he had just returned from three days in the Crooked Lake Agency, where he had been "feeling the Indians with regard to the surrender of their land (about 95,000 acres)."<sup>73</sup> According to Graham, the bands had learned about the "good cash payment down" received by the Pasqua Band at its recent surrender, and, he thought, they might be willing to surrender land on similar terms:

I am satisfied that if this matter were handled promptly and on about the same lines as the Pasquah's surrender was obtained, these Indians would consent to sell. In fact, I feel sure that if I had had the papers and money with me when I was there I could have obtained the surrender.

Coweses [*sic*] Band are largely Roman Catholic half-breeds, about 95% I should say, and the people are to a great extent, under the influence of the Priest, and in speaking to that gentleman on the matter, he is of the opinion that a surrender could be obtained, if properly handled. The trouble in the past has been due to the fact that too many people have been dabbling in the matter. The people in the adjacent towns are keen for the surrender, and as a result, the Town Council, the Board of Trade and Individuals have been talking to the leading Indians, and they now have all kinds of ideas of [*sic*] their heads. In my opinion, the matter should be handled by our own people, without the knowledge of the outside public, as was done at Pasqua's, the people at Fort Qu'Appelle did not know anything until the matter was settled.

I drove over the reserve and saw the land again, and I believe that a proper basis on which to pay would be \$3.00 for the Ochapowace reserve, and \$5.00 for Kaka-wistahaw and Cowesses [*sic*] reserves. The difference could be made up when the second twentieth is paid. As this is a large deal it would be necessary to have the matter thoroughly understood and the terms of surrender should be thoroughly decided upon before the proposition is put to the Indians, because it would have a bad effect if the Department had to go back to them with a second proposition. Outsiders would interfere in the interval as in the past. If a little latitude were given to the Officer taking the surrender, he could perhaps meet any small requests, that would come from the Indians at the meeting.

I think the Indians would accept the figures I have given you as a basis of payment, the balance of the one-tenth of proceeds of sale to be paid after the sale.<sup>74</sup>

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<sup>73</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

<sup>74</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 114–16).

On July 6, 1906, headquarters asked Inspector Graham to provide precise acreages for the land that was proposed to be surrendered from each reserve.<sup>75</sup> Graham responded at the end of September with the following report, giving the acreages, estimated value, and his opinions about how the Indians should be approached in this matter:

My opinion is that the Indians should be asked to surrender all of the land lying in Township 17, Ranges 3, 4, 5 and 6, – in all about 90,240 acres. The land in each reserve would be as follows, – Coweses [*sic*], 36,480, Ochapowace, 21,120, Ka Ka wis ta haw, 32,640. The Department are aware that several futile attempts have been made to get this surrender. I am of the opinion, however, that it can be obtained if handled judiciously. The money for the first payment should be on hand the day the meeting asking for the surrender is held, and the whole matter should be handled with dispatch. I am almost certain that Ka Ka wistahaw and Ochapowace Indians will surrender and I am hoping that Coweses Indians will fall in line when they see the other Indians surrendering.<sup>76</sup>

In closing the letter, Graham noted: “The Department will be surprised to know that if the Indians sell this ninety odd thousand acres of land it will not cut off more than four or five families, so that you will see how little the land is used by the Indians.”<sup>77</sup>

W.A. Orr, the Officer in Charge of the Lands and Timber Branch, provided J.D. McLean, the Acting Deputy Minister, with the details of the proposed surrender in a memorandum dated September 28, 1906, at the end of which he asked “whether forms of surrender should be sent to Inspector Graham for submission to the Indians, on terms as above proposed by him.”<sup>78</sup> Overwritten on this memorandum are three notes. The first, dated September 28, is from McLean to the Minister: “Submitted whether Inspector Graham should be authorized to submit a surrender to the Indians on

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<sup>75</sup> W.A. Orr, In Charge of Lands & Timber Branch, to J.D. McLean, Secretary, DIA, July 3, 1906, and J.D. McLean to W.M. Graham, Inspector of Indian Agencies, July 6, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 118–20).

<sup>76</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 122–23).

<sup>77</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 122–23).

<sup>78</sup> W.A. Orr, In Charge of Lands & Timber Branch, to the Acting DSGIA, September 29, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 126).

the lines herein indicated.” A reply initialled FHP (most likely Frederick H. Paget, Chief Clerk), dated September 29, reads: “Approved, go right ahead, B.O.M. [By Order of the Minister].” In the last note, dated October 1, McLean refers the matter “To Mr. Orr for necessary action.”<sup>79</sup>

On October 2, 1906, the Chief Surveyor prepared a description for the surrender of approximately 20,704 acres on the Cowessess reserve.<sup>80</sup> The following day, McLean sent Graham the forms of surrender for the three Crooked Lake bands, “which surrenders you are hereby authorized to submit to the Indians under and in accordance with the provisions of the Indian Act,” along with a cheque for \$22,046, “being one-half of the 10% of the price of land on the different reserves, estimated on the basis referred to in your communication.”<sup>81</sup>

Graham replied that other work prevented him from immediately going to Crooked Lake to submit the surrenders, but he did not “consider that a delay will have any prejudicial effect on the proposition, in fact, I think it will have a contrary effect.”<sup>82</sup> Graham also suggested that he “be authorized to insert the same conditions as were in the Pasqua Surrender,” and asked for information about how the Indian owners would be paid for improvements on the land proposed to be surrendered.<sup>83</sup> On October 16, Secretary J.D. McLean forwarded an amendment to the original instructions:

I beg to inclose, as requested, copy of the conditions in surrender of the Pasqua lands, which may be inserted in surrender of the Crooked Lake Reserves, making any necessary changes to suit the circumstances in each case.

It will be satisfactory if you make an estimate of value of improvements, but you should furnish the Department with full information in regard thereto, giving

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<sup>79</sup> See memorandum from W.A. Orr, In Charge of Lands & Timber Branch, to the Acting DSGIA, September 29, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 126).

<sup>80</sup> S. Bray, Chief Surveyor, Description for Surrender, October 2, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 129).

<sup>81</sup> J.D. McLean, Acting SGIA, to Inspector W.M. Graham, October 3, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 130).

<sup>82</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 131).

<sup>83</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 131).

nature of improvements and value thereof as well as the owner, so that the surveyor may be furnished with a complete statement in regard thereto.<sup>84</sup>

In early December 1906, Graham wrote to headquarters asking for money to complete the down payment to the Pasqua band members for their surrender before he went to the Crooked Lake Agency, “as I think it will have an effect on these Indians if they see how the Pasqua Indians have been dealt with.”<sup>85</sup>

### **Previous Experience with Surrenders**

By this time the Cowessess Band had already had some direct experience with surrenders. There is evidence that prior to 1907 the Band had completed at least one road surrender.<sup>86</sup> Moreover, in 1889, the Band had expressed a willingness to consider surrendering land for a road allowance on the reserve.<sup>87</sup> When a written surrender proposal for a road allowance was finally presented to the Band in June 1906, however, it was rejected on behalf of the Band by Chief Joe LeRat because the location of the proposed road did not conform to what had been agreed upon earlier. Nevertheless, the Band reaffirmed its willingness to surrender the road allowance if it was surveyed in conformity with the Band’s original requirement that the road follow a route that would benefit the Band.<sup>88</sup> It appears that

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<sup>84</sup> J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 133).

<sup>85</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, December 7, 1906, LAC, RG 10, vol. 2389, file 79921 (ICC Exhibit 6, p. 134).

<sup>86</sup> J.D. McLean, Secretary, DIA, to F.J. Robinson, Deputy Commissioner of Public Works for Saskatchewan, March 19, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 180); DIA to the Deputy Commissioner of Public Works for Saskatchewan, July 23, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 198).

<sup>87</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, March 29, 1889 (ICC Exhibit 1, p. 5). Note: A copy of the Broadview Area Minute Book was submitted to the ICC by counsel for the First Nation in March 1998. According to Mr Brabant, the First Nation’s current legal counsel, this copy was made from a copy obtained by Senator Edwin Pelletier while he was Chief of the Cowessess Band. The original cannot be located and was probably destroyed in a fire in DIAND’s district office in Yorkton in the 1970s. The ICC’s Exhibit 1 contains only the portions of that minute book which relate to the Cowessess First Nation.

<sup>88</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, June 6, 1906 (ICC Exhibit 1, pp. 52–53).



a compromise was worked out in January 1908,<sup>89</sup> and in May 1908, after obtaining guarantees of compensation for timber and damaged farm lands, the Band agreed to surrender rights of way for two roads through the reserve, one coming from Grenfell and the other from Broadview.<sup>90</sup>

The record also indicates that, in April 1903, Father Siméon Perreault, the local Oblate priest who was influential with many band members, asked the Band for 40 acres for the use of the Roman Catholic mission and school. The Band “unanimously agreed to surrender to the Crown for the R.C. Mission 40 acres of land from about one hundred yards south of the school building to the river, so long as it is used for school and mission purposes only. If school and mission is taken away ... the land is to revert to the Band.”<sup>91</sup> Although verbal consent had been given, no surrender was actually obtained till several years later – apparently primarily a bureaucratic delay<sup>92</sup> – at which time the priest asked for more land. After Sunday mass on February 25, 1907, Perreault held an assembly with 19 Cowessess band members, 13 of whom agreed to sell about 350 acres of land at \$15 per acre.<sup>93</sup> On May 28, 1907, however, when the surrender agreement was formally submitted to them, the band members unanimously rejected the department’s terms of an immediate payment of 50 per cent of the sale proceeds (they wanted all the proceeds paid out).<sup>94</sup> They later reconsidered and, after the surrender was finally obtained on November 13, 1908, 350 acres were sold for \$15 an acre with 50 per cent of the proceeds, minus management costs, being paid out.<sup>95</sup>

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<sup>89</sup> “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, p. 9).

<sup>90</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, May 13, 1908 (ICC Exhibit 1, pp. 71–72).

<sup>91</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, April 3, 1903 (ICC Exhibit 1, p. 47).

<sup>92</sup> “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, p. 12).

<sup>93</sup> “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, p. 3).

<sup>94</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, May 28, 1907 (ICC Exhibit 1, p. 68).

<sup>95</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, November 13, 1908 (ICC Exhibit 1, pp. 74–76).

**The First Surrender Meeting, January 21, 1907**

“The winter of 1907 was unusual because of the intense, continuous cold and the great quantity of snow. All the veterans [Elders] were unanimous in saying they had never known such a harsh winter.”<sup>96</sup> Graham arrived at Crooked Lake towards the end of January and proceeded to meet separately with the Cowessess, Ochapowace, and Kahkewistahaw Bands. His first meeting was held on Monday, January 21, 1907, with the Cowessess Band at the agency office, located on its reserve. With Graham was Indian Agent Millar and Peter Hourie, acting as interpreter. Hourie had worked for 20 years as an interpreter in the Indian Commissioner’s office in Regina before being posted to Sakimay’s reserve as farming instructor in February 1898.<sup>97</sup>

According to the agency’s minute book entry, this first meeting on January 21 was “called for the purpose of considering a proposition for the surrender of a portion of their reserve lands lying on the south side of the Reserve”; advance notice of the meeting “had been given through the Chief Joe LeRat and Headman Ambrose Delorme.”<sup>98</sup> The meeting started with a roll call but, unlike the subsequent meetings at Ochapowace and Kahkewistahaw, there is no record of the number or names of band members in attendance.

The minute book entry for this first meeting states:

Mr. Inspector Graham then addressed all present at length explaining the terms of the agreement which had been made by the Department and which was now submitted to them to decide and vote either for acceptance of the proposition or rejection as they may determine by their votes.<sup>99</sup>

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<sup>96</sup> [Translation] “Journal of Rev. Father Siméon Perrault, OMI, 1907–1908,” Deschâtelets Archives, Ottawa, L 1021, m27C, 1 (ICC Exhibit 2, p. 6).

<sup>97</sup> There is no reference in the agency’s minute book or any of the other correspondence on record that Hourie acted as interpreter at the Crooked Lake Agency on any other occasion.

<sup>98</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

<sup>99</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54).

At the beginning of the next paragraph in the minute book, a single word appears to have been written. Although it is not clear, one possibility is that this word originally read “Refused.” The paragraph that follows describes the conclusion of this meeting, without any reference to a vote having been taken:

Chief Joe LeRat then spoke and said that he thought the terms of the proposition had been well explained and that they understood it. Mr. Graham told them that he would be pleased to answer any question or make any further explanation [sic] they could suggest, and wanted them to take plenty of time before reaching a decision – meeting adjourned till Tuesday January 29th to meet again at the same place.<sup>100</sup>

Inspector Graham’s subsequent report states that no vote was taken at this first meeting:

On the 21st of January I called the Indians of Cowesses Band, Reserve 73, together, for the purpose of explaining to them the conditions of surrender that I wished to submit to them for a vote at a later date. At this meeting I arranged for a full meeting of the Band one week later which was Tuesday 29th.<sup>101</sup>

On January 22, Graham, Millar, and Hourie met with the Ochapowace Band. Also attending on behalf of the government were E.D. Sworder, a clerk in Graham’s Regina office; H. Nichol, the clerk for the Crooked Lake Agency; H. Cameron, the department’s official interpreter; and J.A. Sutherland, formerly the farming instructor on Cowessess Reserve and now the miller and blacksmith for the agency. A vote was taken at this meeting, with four voting in favour and 20 in opposition.<sup>102</sup> According to Graham’s subsequent report, he was “unable to obtain a Surrender from

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<sup>100</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21 and 29, 1907 (ICC Exhibit 1, pp. 54–56).

<sup>101</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 802–3).

<sup>102</sup> Broadview Area Minute Book, Reserve No. 71 – Crooked Lake Agency, Minutes of Council, January 22, 1907 (ICC Exhibit 1, p. 58). The document refers to a “George Sutherland,” but this appears to be an error; J.A. Sutherland was a known official at the agency and was referred to elsewhere in the document. Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, p. 55). Additional information about departmental employees is taken from the Department of Indian Affairs Annual Reports. Note that the history in phase I stated that 16 voted in opposition to the surrender, but the number 20 is correct.

Ochapowace Band although the inducements offered the Indians of this reserve were nearly three times as great as those offered Cowesses Band.”<sup>103</sup> On the next day, January 23, the same seven government officials met with the Kahkewistahaw Band. A vote was taken and the surrender was refused with five voting for the surrender and 14 against.<sup>104</sup> Inspector Graham did not explain why he took votes at the initial meeting with Ochapowace and Kahkewistahaw and not with Cowesses, but in earlier correspondence he had stated that he was “almost certain that Ka Ka wistahaw and Ochapowace Indians will surrender and I am hoping that Coweses Indians will fall in line when they see the other Indians surrendering.”<sup>105</sup>

### **The Second Surrender Meeting, January 29, 1907**

Five days later, on January 28, Graham again met with the Kahkewistahaw Band – he subsequently reported that a deputation of the Band had requested this second meeting – and again put the surrender proposition to a vote. On this occasion, the surrender was accepted, with 11 Kahkewistahaw band members voting in favour and six opposed. After the surrender, Inspector Graham “at once began paying the approximate one-twentieth, which was \$94.00 each. This payment lasted well on to mid-night and the day following.”<sup>106</sup>

On the next day, January 29, Graham, Millar, Sworder, Nichol, Sutherland, and Cameron proceeded to the Cowessess Reserve to meet with that Band, as had been proposed at the first meeting. Mr Hourie, who had previously acted as interpreter, apparently did not attend and, despite the presence of the department’s paid interpreter, Harry Cameron, band member Alex Gaddie acted as interpreter. Gaddie, who was often cited in the annual reports of the department as one of the most

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<sup>103</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 801).

<sup>104</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 802–3). For a comprehensive discussion of the Kahkewistahaw surrender, see ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3.

<sup>105</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 122).

<sup>106</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 802).

productive farmers in the Cowessess Band,<sup>107</sup> had acted as interpreter at other meetings, according to other minute-book entries.<sup>108</sup>

The minutes of the meeting state as follows:

Adjourned meeting of Cowessess Band of Indians held this 29th day of January 1907 for the further consideration of an agreement for the surrender of a portion of their Land. Mr. Inspector Graham presiding Mr. M. Millar, Indian Agent with Mr. Sworder Mr H. Nichol, Mr J.A. Sutherland and H. Cameron were also present a member of the Band Alex Gaddie acted as Interpreter. The roll being called[,] 29 [“30” was originally written, but later overwritten by “29”] Voting Indians answered to their names. Mr. Graham again carefully made further explanation [*sic*] of the matter under consideration after which a vote was proceeded with ...<sup>109</sup>

Fifteen Cowessess band members were listed as voting in favour, including Alex Gaddie, and 14 were listed as voting against, including Chief Joe LeRat. Also among those voting in favour was an individual named “Nap Delorme,” whose identity has not been confirmed. Twenty-two band members then signed the surrender document, which was also witnessed by E.D. Sworder, H. Nichol, and Indian Agent M. Millar. A comparison of the voters list with the surrender document reveals that 14 individuals named as voting “yes” are also named on the surrender document (the name “Nap Delorme” is not on the surrender); six named as voting “no” are on the surrender document (Napahpeness, Wapamoose, Ambrose Delorme, William Aisaican, Joseph Peltier, and Ambrose LeRat); and two names appear on the surrender but not on the voters list (Norbert Delorme and Francis Delorme). The 1906 paylist indicates that there were 37 adult males who received annuities with the Cowessess Band in that year.<sup>110</sup> Of these individuals, only two (No. 142 Alex Payasis/Tanner and No. 169 Emmanuel LeRat) were not paid the advance payment of \$33 per capita

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<sup>107</sup> John P. Wright, Indian Agent, to the SGIA, July 25, 1899, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899*, 142 (ICC Exhibit 5, p. 271).

<sup>108</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, March 28, 1898, April 9, 1900, and July 4, 1900 (ICC Exhibit 1, pp. 32, 39, and 41).

<sup>109</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 55–56).

<sup>110</sup> DIAND, Treaty Annuity Paylists, Crooked Lake Agency, Cowessess Band, July 13, 1906 (ICC Exhibit 6, pp. 641–53).

at the time of the surrender. Another band member, Isadore Sparvier (No. 190), was too ill to attend, so his advance money was paid to a relative.<sup>111</sup> These three names do not appear on the voters list or the surrender. The evidence indicates that at least 30 band members were present at the meeting, and – depending on the identity of Nap Delorme – possibly an additional person.

Graham had received approval to make a cash payment to the Band of one-tenth (10 per cent) of the land sale proceeds, approximately half of that to be paid on surrender and the remainder to be paid after the land sale. The first instalment was calculated as 5 per cent of the *estimated* sale price; the second instalment was calculated as the difference between what had already been paid and the full 10 per cent of the *actual* proceeds received from the land sale. Graham had been authorized, however, to make “any necessary changes to suit the circumstances in each case.”<sup>112</sup>

On the same day the surrender agreement was signed, January 29, Graham wired a request to Ottawa for permission to double the payment upon surrender to a full one-tenth of the estimated purchase price, \$66 per person. It is not clear where this request originated, but Graham stated that he strongly advised granting it.<sup>113</sup> On February 1, after obtaining further information from Graham (that the 10 per cent payment was based on a very conservatively estimated land valuation and the difference of one-tenth was to be paid after the sale), Deputy Superintendent General Frank Pedley granted approval for this arrangement.<sup>114</sup> It appears, however, that the Cowessess band members had already signed the surrender agreement stipulating they would receive “at time of taking Surrender ... one-tenth of the purchase price, estimated at the rate of Six dollars per acre,” although it is

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<sup>111</sup> Record of Advance Payments, Cowessess, January 29, 1907, and February 4, 1907, LAC, RG 10, vol. 9849 (ICC Exhibit 6, pp. 147–67). Both Emmanuel LeRat and Alex Tanner, “who were absent at the time the distribution was made to the band,” were paid in April 1908: see J.D. McLean, Secretary, DIA, to M. Millar, Indian Agent, April 6, 1908, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 215).

<sup>112</sup> J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 133); D.C. Scott, Accountant, DIA, memo to the Acting DSGIA, September 28, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 125).

<sup>113</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 29, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 872).

<sup>114</sup> Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, January 30, 1907, Graham to Pedley, January 31, 1907, and Pedley to Graham, February 1, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 873–75). Note that the phase I history incorrectly implied that the approval was received the same day that it was requested, which was not the case.

possible that the “Additional Conditions,” including this 10 per cent cash payment and other matters, were added after the surrender was signed.<sup>115</sup> Once the surrender document was ready, Inspector Graham went to Moosomin with Alexander Gaddie in order to swear the affidavit before Justice E.L. Wetmore, as required under the *Indian Act*. This process was completed on February 2, 1907.<sup>116</sup>

The affidavit stated: “The same having been first read over and explained by me to the said Alexander Gaddie who seemed to perfectly understand the same and made his mark thereto in my presence.” In this affidavit, both Graham and Gaddie attested that the surrender was assented to by a majority of the male members of the Band over the age of 21 years, and “[t]hat no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender.”<sup>117</sup> On the day the affidavit was signed, Graham wired Pedley to inform him that the Kahkewistahaw and Cowessess Bands had surrendered approximately 53,000 acres.<sup>118</sup>

In his more complete report on the surrenders, dated February 12, 1907, Inspector Graham reported on the second Cowessess meeting as follows:

Tuesday [January] 29th. The Band assembled on this date and after a great deal of talking a vote was taken which stood fifteen for selling and fourteen against. Chief Joe LeRat and Headman A. Delorme who are non-progressive Indians voting against the surrender. Although the vote was so close it is interesting to note that twenty-two out of the twenty-nine Indians at the meeting signed. I began paying these Indians their approximate one-tenth which was \$66.00. This payment continued well on into the night and fore [*sic*] several days following.<sup>119</sup>

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<sup>115</sup> Cowessess Band, Surrender Agreement, January 29, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 139).

<sup>116</sup> Surrender affidavit, February 2, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 145).

<sup>117</sup> Surrender affidavit, February 2, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 145).

<sup>118</sup> W.M. Graham, Inspector of Indian Agencies, to the DSGIA, February 2, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 876).

<sup>119</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 803).

Five months later, at the end of June, the departmental Secretary sent a request for the paysheets to Graham, who had not yet provided them.<sup>120</sup> These paysheets reveal that the cash payment was, in fact, made in two instalments of \$33.00 per person, on January 29 and February 4, 1907.<sup>121</sup>

Graham's February report closed with the following words:

[T]he people of Broadview, Grenfel [*sic*] and adjacent country are delighted with the prospect of having this country thrown on the market. As you are aware this land lying idle has been a great drawback to these towns and they have been trying for years to bring about a surrender.<sup>122</sup>

Seven days later, on February 19, 1907, the Board of Trade of the Town of Broadview wrote to Frank Oliver, Minister of the Interior (*ex officio*, also Superintendent General of Indian Affairs), expressing appreciation for his

assistance in opening up a portion of The Crooked Lake Reserve adjacent to this town. We feel satisfied that the surrender of this portion of the reserve has been accomplished by the unceasing efforts of the Indian Department under your able direction.

... we also wish to express our appreciation of the service rendered by Mr. M. Miller [*sic*] the Indian Agent on this Reserve as well as the invaluable services of Inspector Graham of the Indian Department.<sup>123</sup>

On February 26, 1907, Oliver submitted the Cowessess surrender agreement to the Governor General in Council for approval, noting in due form: "[T]he said surrender [of 20,704 acres] having

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<sup>120</sup> Secretary, DIA, to W.M. Graham, Inspector of Indian Agencies, June 24, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 187).

<sup>121</sup> Record of Advance Payments, Cowessess, January 29, 1907, and February 4, 1907, LAC, RG 10, vol. 9849 (ICC Exhibit 6, pp. 147–67).

<sup>122</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 804).

<sup>123</sup> Board of Trade of the Town of Broadview to Frank Oliver, Minister of the Interior, February 19, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 172).



been made in order that the land covered thereby be sold for the benefit of the band.”<sup>124</sup> Within a week, the surrender was accepted by Order in Council PC 409, dated March 4, 1907.<sup>125</sup>

A little more than a year later, in another submission to the Governor General in Council, Oliver echoed the Broadview Board of Trade’s praise for Graham:

[H]e has managed the affairs of the Inspectorate in general with so much success, and has so satisfactorily furthered the wishes of the Department in connection with land matters in the Inspectorate – particularly in having successfully negotiated the Pasquah, Cote, Fishing Lake, Kakewistahaw, and other surrenders – that it is considered that he has fairly earned an increase in salary.<sup>126</sup>

In his 1908 annual report, Deputy Superintendent Frank Pedley elaborated on what Oliver had referred to as “the wishes of the Department in connection with land matters.” He wrote:

The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department’s policy with relation to the sale of Indians’ lands.

So long as no particular harm nor inconvenience accrued from the Indians’ holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.

Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve *pro tanto* the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.<sup>127</sup>

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<sup>124</sup> Frank Oliver, SGIA, submission to the Governor General in Council, February 25, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 174).

<sup>125</sup> Order in Council PC 409, March 4, 1907 (ICC Exhibit 6, p. 176).

<sup>126</sup> SGIA to the Governor General in Council, April 8, 1908, LAC, RG 10, vol. 1122, p. 639 (ICC Exhibit 6, p. 216).

<sup>127</sup> Frank Pedley, DSGIA, to Frank Oliver, SGIA, September 1, 1908, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Exhibit 5, p. 538).

The younger provinces referred to by Oliver were Saskatchewan and Alberta, both of which had been part of the North-West Territories until 1905. Although the remaining Northwest Territories after 1905 lost their four senators and 10 members of parliament, Saskatchewan and Alberta were each given four senators and together gained the 10 electoral seats formerly within the North-West Territories. In 1907, following a 1906 special census, the Prairie provinces' electoral districts were reorganized and increased to 10 for Saskatchewan and seven for Alberta. Between the 1904 and 1908 elections, therefore, the prairie region gained two new provinces, four new senators, and seven new seats in the House of Commons, resulting in a substantial increase in political representation. Manitoba's representation stayed the same during this period, and the remaining Northwest Territories returned to having no representation in either House of Parliament and were governed from a distance by Ottawa, as they had been in the 1870s and early 1880s.<sup>128</sup>

## **FULFILLMENT AND RESULTS OF THE SURRENDER AGREEMENT**

### **Sale and Disposition of Surrendered Land**

In his report of February 12, 1907, Graham suggested that the surrendered land be surveyed in early spring and the sale take place in June.<sup>129</sup> By June, Surveyor J.L. Reid had subdivided and valued the surrendered land.<sup>130</sup> Outstanding issues regarding road allowances<sup>131</sup> caused a delay before the land was advertised and offered for sale, along with the Kahkewistahaw land, by auction in November 1908. It was also discovered that a number of quarter sections in the surrendered portion of Cowessess reserve had previously been patented to the Hudson's Bay Company, unbeknown to the

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<sup>128</sup> *The Saskatchewan Act*, SC 1905, c. 42, ss. 4–5; *The Alberta Act*, SC 1905, c. 3, ss. 4–5; Peter Kulchyski, *Like the Sound of a Drum: Aboriginal Cultural Politics in Denendeh and Nunavut* (Winnipeg: University of Manitoba Press, 2005), 57.

<sup>129</sup> W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 803–4).

<sup>130</sup> Secretary, DIA, to Mathew Millar, Indian Agent, April 2, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 183); Valuation of lands, by J. Lestock Reid, DLS, June 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 191).

<sup>131</sup> DIA to the Deputy Commissioner of Public Works for Saskatchewan, July 23, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 198).

department. The HBC land was reserved from sale until an arrangement was worked out between the department and the company in the 1920s.<sup>132</sup>

At the auction held on November 25, 1908, and supervised by Graham, 97 of the 125 available quarter sections of Cowessess land were sold: 21 for more than the upset price, and none for less.<sup>133</sup> Indian Agent Millar was one of the purchasers. Five months later, Millar asked the department to cancel his purchase and allow him to apply his payment to the purchase of other unsold lands, on the grounds that he had been misled by the surveyor's report about the quality of the lands he had purchased and now found it "to be very rough inferior land and quite unsuitable for to make farming land."<sup>134</sup> The department refused to allow the deposit to be applied to another purchase and cancelled the sale. It was also noted that, although the *Indian Act* appeared to be obscure on the matter, it was unlikely that an Indian Agent "had any right to purchase without permission from the Department."<sup>135</sup>

Although Graham suggested that the upset price of the remaining lands – being of poorer quality – be reduced for the next sale, the department decided to maintain the price and wait until "an improvement in the market" before re-offering it for sale.<sup>136</sup>

On December 17, 1909, Indian Agent Millar wrote to the departmental Secretary, as follows:

Joe Lerat [*sic*], Chief of the Cowessess Band No. 73 reports that their band had an informal meeting[,] at which time the question of the situation in regard to the land

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<sup>132</sup> S. Bray to the Deputy Minister, DIA, February 12, 1908, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 211). Public History Inc., "Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report," prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, p. 9 (ICC Exhibit 7, p. 9).

<sup>133</sup> Public History Inc., "Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report," prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, pp. 4–5 (ICC Exhibit 7, pp. 4–5).

<sup>134</sup> M. Millar, Indian Agent, to the Secretary, DIA, June 4, 1909, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 273).

<sup>135</sup> J.K. McLean to the Deputy Minister, October 20, 1909, LAC, RG 10, vol. 3732, file 25523-1 (Exhibit 6, pp. 283–84); Assistant Secretary, DIA, to M. Millar, Indian Agent, January 25, 1910, LAC, RG 10, vol. 3732, file 26623-1 (Exhibit 6, p. 286).

<sup>136</sup> W.A. Orr, In Charge Lands and Timber Branch, to the Deputy Minister, DIA, March 29, 1909, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 267).

surrendered by them in January 1907 was discussed, and I have been asked to write for them as follows.

The Indians say that they have not had any report from the Department of how much of their land was sold, how much money did the land sell for, how much land is still unsold, when do the Department intend to put the remaining land up for sale, what is the conditions of the interest account, when may the Indians look for a distribution of interest, which they understood was to be annually.<sup>137</sup>

The department responded with a letter indicating that 15,497.57 acres had been sold for a total of \$109,289.88, and that 4,960 acres remained to be sold at the next auction, the timing of which was under consideration.<sup>138</sup> Funds for an interest distribution, amounting to \$5 per person, were also sent.<sup>139</sup>

At a second auction, duly advertised and held on June 15, 1910, all the remaining lands were sold.<sup>140</sup> The lands patented to the HBC were also sold in the 1920s, after other dominion lands were made available to replace them.<sup>141</sup> The department sometimes had difficulty collecting payments on the sold lands, and, in the years following the first two auctions, some sales were cancelled. With the exception of 160 acres that were eventually returned to reserve status in 1977, all the repossessed land was eventually resold.<sup>142</sup>

Although the land sales were to be paid off by the ninth anniversary of the original sale, only 56 of the 128 initial sales were completed within this period. Sixty other sales were completed within

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<sup>137</sup> M. Millar, Indian Agent, to the Secretary, DIA, December 17, 1909, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 285).

<sup>138</sup> Secretary, DIA, to M. Millar, Indian Agent, February 10, 1910, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, pp. 288–89).

<sup>139</sup> M. Millar, Indian Agent, to the Secretary, DIA, February 15, 1910, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 290).

<sup>140</sup> Transcript, W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, June 18, 1910, LAC, RG 10, vol. 6660, file 108B-1-1 (ICC Exhibit 6, p. 293).

<sup>141</sup> Public History Inc., “Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report,” prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, p. 9 (ICC Exhibit 7, p. 9).

<sup>142</sup> Public History Inc., “Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report,” prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, pp. 8–13 (ICC Exhibit 7, pp. 8–13). This report provides a more detailed account of the sale and resale of lands, and the collection of payments. None of these matters have been dealt with at length here since they are not at issue.

a period of 10 to 15 years, six sales took 15 to 20 years to complete, and the last six sales took between 21 and 25 years to complete.<sup>143</sup>

It appears that, in later years, some of the unsold surrendered lands were deemed more valuable to the Band if they were kept in its possession. On September 5, 1931, W. Murison, Inspector of Indian Agencies, reported to W.M. Graham, now Indian Commissioner, that he thought it best to keep some of the lands which had reverted to the department off the market, because the band members now needed them for hay.<sup>144</sup>

### **Post-Surrender Reserve Agriculture: The Hay Lands**

The shortage of hay on the Cowessess Reserve mentioned in Murison's 1931 letter was not a new phenomenon. Although the effect of such a shortage on the reserve's agricultural development is difficult to ascertain, since "Band-specific information is extremely limited in the post-1907 period,"<sup>145</sup> the shortage was noted almost immediately following the surrender.

Just two months after the surrender, on March 31, 1907, Indian Agent Millar referred to the land surrendered by the Cowessess and Kahkewistahaw Bands, "of which they made little use, and from which they derived very little revenue."<sup>146</sup> He also noted that the members of these bands were making very good use of the money they had received: "a considerable number of useful horses were purchased, besides sleighs, wagons, ploughs, and other articles which should be of permanent use in carrying on work ... food-supplies, blankets, bedding, and some furniture, also much warm and serviceable winter clothing."<sup>147</sup> Yet, earlier in the same report Millar also commented – referring

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<sup>143</sup> Public History Inc., "Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report," prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, p. 22 (ICC Exhibit 7, p. 22).

<sup>144</sup> Transcript of extract, W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, September 5, 1931, LAC, RG 10, vol. 6660, file 108B-1-1 (ICC Exhibit 6, p. 321).

<sup>145</sup> Public History Inc., "Cowessess First Nation Specific Claim Concerning the 1907 Surrender of a Portion of IR No. 73, Historical Report," prepared for INAC, Specific Claims Branch, May 31, 2004, p. iii (ICC Exhibit 10a, p. iii).

<sup>146</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 122 (ICC Exhibit 5, p. 503 ).

<sup>147</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 121 (ICC Exhibit 5, p. 503 ).

specifically to Cowessess Band – that “[a]fter this year, wild hay will not be so plentiful, and less cattle may have to be kept.”<sup>148</sup>

Less than two weeks later, W.M. Graham submitted an inspection report. He did not address Cowessess’ situation separately from the other Crooked Lake bands, but his overall assessment of the agency’s hay crop and cattle herds was quite favourable:

Since my last inspection of this agency the Indians have undoubtedly made good progress. They had a record crop as the returns will show. The cattle have substantially increased and the Indians have bettered their conditions generally, and have lived well during the winter that we have just passed through.

Although the winter was a severe one, I was surprised to find the cattle in such good condition in this agency. They had been in two-thirds of the winter at the time of my inspection, and I was really surprised to see how well they looked. I found an abundance of hay on most of the reserves. The calf crop for the four reserves was very satisfactory.<sup>149</sup>

In his May 27, 1908, report, Indian Agent Millar noted that on the “Cowessess Band [reserve] ... hay is not so plentiful as on the other reserves.”<sup>150</sup> The following year, on June 4, Millar noted that the “members of this band [Cowessess] engage more generally in the occupation of farming and cattle-raising than those of the other bands, although it may be necessary to reduce some of the herds of cattle owing to the scarcity of hay on their reserve.”<sup>151</sup> On May 18, 1910, Millar placed less emphasis on cattle-raising than on farming:

Cowessess Band, No. 73. ... land is of excellent quality for grain-growing, there being also an abundant supply of timber for building and fire-wood. Wild hay is not so plentiful as on the other reserves.

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<sup>148</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, March 31, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 121 (ICC Exhibit 5, p. 504).

<sup>149</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, April 11, 1907, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1907*, 154 (ICC Exhibit 5, p. 508).

<sup>150</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, May 27, 1908, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, 130 (ICC Exhibit 5, p. 542).

<sup>151</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, June 4, 1909, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1909*, 137 (ICC Exhibit 5, p. 577).

The occupation of farming is more generally engaged in by these Indians than on the other reserves; some also have nice herds of cattle. Owing to the scarcity of hay, it may be necessary to reduce the herds in some instances.<sup>152</sup>

In his general remarks on the entire agency, Millar also noted: “More oats was grown than has been the custom, which enabled the farming Indians to keep their horses in better condition, besides which many of them had oats for sale.”<sup>153</sup> The Band also continued to use the unsold surrendered hay lands.

In 1911 and 1912, Millar’s reports continued to reiterate that “[w]ild hay is not so plentiful as on the other reserves.”<sup>154</sup> In 1913, however, no references were made to the hay lands being deficient. That same year, on April 28, Graham noted that the “Indians on all four reserves sell a great deal of hay and wood in the neighbouring towns, for which there is always a great demand.”<sup>155</sup>

No further references to hay shortages on the Cowessess Reserve are found in the annual reports on record until 1931, when the shortage of hay was again a problem. On September 5, Inspector of Indian Agencies W. Murison submitted a report to Indian Commissioner W.M. Graham on the apparent dearth of hay on the Crooked Lake reserves, particularly on the Cowessess Reserve:

I beg to report that I proceeded to the Crooked Lake Agency on the evening of the 31st ultimo, for the purpose of making a survey of the situation with regard to the amount of hay obtainable on the reserves included within this agency.

...

Cowessess Reserve: As you know, on the main part of this reserve, [illegible] hay obtainable is secured on the uplands. This year being so dry, ... only about 50 tons have been secured on the main reserve. The hay desired by settlers is on lands which have reverted to the Department. The Indians have to depend for their hay supply from these lands, and I think that it would be a wise provision to take them

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<sup>152</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, May 18, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1910*, 127 (ICC Exhibit 5, p. 610).

<sup>153</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, May 18, 1910, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1910*, 128 (ICC Exhibit 5, p. 611).

<sup>154</sup> M. Millar, Indian Agent, to Frank Pedley, DSGIA, May 18, 1911, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1911*, 136 (ICC Exhibit 5, p. 633); M. Millar, Indian Agent, to Frank Pedley, DSGIA, May 26, 1912, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1912*, 140 (ICC Exhibit 5, p. 653).

<sup>155</sup> W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, DSGIA, April 28, 1913, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 166 (ICC Exhibit 5, p. 675).

out of the market altogether, for a while at least as the benefit accruing to the Indians through the hay they obtain more than offsets the value which they would get from the interest on the proceeds of the land if sold. ... About 15 of the Indians from this reserve have been cutting hay on the Ochapowace reserve. They have not been able to secure sufficient there and while I was at the Agency some of them obtained permission from the Sakimay Indians to cut any small patches which they might be able to find had been omitted on the [uplands] of their reserve. The Cowessess Band will have nearly 200 cattle [illegible words] over 100 work horses.<sup>156</sup>

There is no record of a reply to this letter. In contrast to the nearly 200 cattle in 1931, the Band had possessed a herd numbering 248 head in 1900.<sup>157</sup> Although no band-specific statistics are available for 1906, the number of cattle in the agency had been fairly stable from 1900 to 1906.<sup>158</sup> It is not clear how much of the variation in the size of its herds by 1931 can be attributed to the start of the Great Depression two years earlier, or to what extent that was compounded by the severe drought that began in 1931. There is no evidence on record of band members complaining about the loss of the hay lands in the first 30 years following the surrender, even though other concerns and complaints are on record. Alex Gaddie, however, did submit a claim for compensation for improvements to some of the surrendered hay lands. According to one witness, “the losing of this hay meadow was the question that Gaddie did not like, and the only reason that he gave for not wishing to sell the land.”<sup>159</sup>

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<sup>156</sup> Transcript of extract, W. Murison, Inspector of Indian Agencies, to W.M. Graham, Indian Commissioner, September 5, 1931, LAC, RG 10, vol. 6660, file 108B-1-1 (ICC Exhibit 6, p. 321).

<sup>157</sup> Alex McGibbon, Inspector of Indian Agencies, to the SGIA, August 18, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 220 (ICC Exhibit 5, p. 312).

<sup>158</sup> Public History Inc., “Cowessess First Nation Specific Claim Concerning the 1907 Surrender of a Portion of IR No. 73, Historical Report,” prepared for INAC, Specific Claims Branch, May 31, 2004, pp. 61–63 (ICC Exhibit 10a, pp. 61–63).

<sup>159</sup> W.C. Thorburn to David Laird, Indian Commissioner, June 24, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 221–22).



## **Compensation for Improvements and Remuneration for Surrendered Land**

### ***Alexander Gaddie's Claim***

Alex Gaddie was the first of only two Cowessess band members to submit a claim for compensation for improvements to the surrendered land. Although his November 1907 claim was eventually accepted, it was not until after a lengthy exchange of correspondence with and within the department.

Two of the “Additional Conditions” of the January 1907 surrender agreement related to compensation for improvements to or on surrendered land:

2. Owners of improved land to be compensated therefor at the rate of Five dollars per acre on estimated areas, payment to be made at time of taking surrender and balance, if any, paid after surveyor determines [*sic*] actual areas.
3. Owners of buildings to be compensated therefor at time of taking surrender, at values to be fixed by an officer of the Department at the time, provided that any Indian may, if he sees fit, remove his buildings.<sup>160</sup>

There is nothing on record indicating that Graham paid out any compensation at the time of the Cowessess surrender. Neither is there any record of a response to the secretary's earlier instruction, dated October 16, 1906, that Graham “make an estimate of value of improvements ... [and] furnish the department with full information in regard thereto, giving nature of improvements and value thereof as well as the owner, so that the surveyor may be furnished with a complete statement in regard thereto.”<sup>161</sup> Moreover, when Graham replied on June 24, 1907, to the Secretary's request for paysheets from the two Crooked Lake Agency surrenders, he discussed and provided a “Receipt for money paid out for Improvements, Kahkewistahaws,” but made no reference to compensation for improvements paid to Cowessess band members.<sup>162</sup>

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<sup>160</sup> Cowessess Band, Surrender Agreement, January 29, 1907, DIAND Land Registry, Instrument no. 1127-5 (ICC Exhibit 6, p. 139).

<sup>161</sup> J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 133).

<sup>162</sup> W.M. Graham to J.D. McLean, Secretary, DIA, June 24, 1907, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 188).

On November 9, 1907, Alex Gaddie submitted to Commissioner Laird a claim of \$700 for compensation for loss of improvements to a hay slough on the surrendered reserve land.<sup>163</sup> Inspector Graham, however, in his report to Laird of November 20, adamantly opposed granting Gaddie compensation.<sup>164</sup> Based on Graham's reply, Laird informed Gaddie on November 22 that his claim could not be accepted:

I have to state that I made enquiries in regard to your claim, and I find that you brought this matter up at the time of the surrender and that you were informed that it was not fair to ask the Indians to pay from their own funds for the work you had done on the slough for your personal benefit. You have been cutting hay for years on that slough, and it is thought that you have been amply repaid for your work. Mr. Inspector Graham informs me that he told you in the presence of the Indians at the time of the surrender that no compensation would be allowed, and in the face of all this you voted for the surrender.<sup>165</sup>

The following year, on June 24, 1908, W.C. Thorburn, a Broadview merchant dealing in lumber, grain, and cattle, wrote to Laird about the "considerable amount of work" Gaddie had done "to make the meadow suitable for using a hay sweep on." Thorburn also disputed the veracity of the account (originating with Graham) that Laird had conveyed to Gaddie:

I might also say that Mr. Gaddie was the one man on the reserve who could have blocked the sale; had he said "don't sell", the land would not have been surrendered. We were informed at the time the surrender was made that it was Gaddie's vote that decided for the surrender. Had he said "No sale", hardly a man would have voted for it, and I have reason to believe that had Mr. Gaddie not thought that he would be paid for his work on this meadow, he would have refused to part with his share in the land. I talked to Mr. Gaddie several times while the question of surrender was before the Indians, and the losing of this hay meadow was the question that Gaddie did not like, and the only reason that he gave for not wishing to sell the land. Afterwards, but before the final meeting when the surrender was made, Gaddie

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<sup>163</sup> Alex Gaddie to David Laird, Indian Commissioner, November 9, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 202).

<sup>164</sup> W.M. Graham to David Laird, Indian Commissioner, November 20, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 204).

<sup>165</sup> David Laird, Indian Commissioner, to Alex Gaddie, November 22, 1907, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 205).

told me that everyone who had made improvements on the land was to be paid for the improvements, and said, "If the Government will pay me for the work I did on that hay meadow they can have the land, but I want to be paid for my work if I am not to have the hay."

It was Gaddie that acted as Interpreter for the Indians and the men acting for the Department when the surrender was being made, and I am sure he fully understood the question, also that there is enough of the Scotch in his blood to make him fully alive to whether or not his interests were being guarded and that the promise of compensation for improvements on land applied to him personally.<sup>166</sup>

It is not clear what connection W.C. Thorburn had to the Mr Thorburn, also of Broadview, who had presented a settlers' resolution to the Minister of the Interior in 1891 regarding the opening of part of the Crooked Lake reserves for settlement.<sup>167</sup> It is more certain, however, that he is the same W.C. Thorburn, merchant, who appears to have been the fourth person of almost 190 to sign the 1902 petition to the government requesting a surrender of parts of the Crooked Lake Reserves.<sup>168</sup>

The former farm instructor at Kahkewistahaw Reserve, James Pollock, also wrote to Laird, advising that the "value of the drained land was considerable as a hay meadow, and that without the drain the meadow was a slough and valueless."<sup>169</sup>

In July, E.D. Sworder, the DIA clerk who had been present at the surrender meeting, informed Gaddie that he did not recall any statement being made at the meeting that Gaddie would not be paid compensation for his improvements. According to Sworder, the decision that Gaddie would not be compensated for his improvements had, in fact, been made subsequent to the surrender, in response to a claim made by Gaddie.<sup>170</sup>

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<sup>166</sup> W.C. Thorburn to David Laird, Indian Commissioner, June 24, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 221-22).

<sup>167</sup> [Author unknown] DIA to G. Thorburn, April [14], 1891, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 58-61).

<sup>168</sup> Residents of the village of Broadview and town of Whitewood and surrounding districts to the Minister of the Interior, c. March 1902, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, pp. 77-83).

<sup>169</sup> James Pollock, Late Instructor Reserve No. 72, to David Laird, Indian Commissioner, June 24, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 223).

<sup>170</sup> E.D. Sworder to Alex Gaddie, July 10, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 225).

Gaddie then met with Sworder, from whom he was apparently surprised to learn a fuller account of Graham's version of the events, which he directly disputed in a letter to Laird dated July 13, 1908:

I am indeed surprised at Inspector Graham stating that he had informed me that I was not to receive any compensation for my improvements as he says prior to the surrender, this is absolutely false; as the first intimation I had of not being compensated for my improvements was made to me some three or four days after the surrender by Mr. Nichol, then clerk at this Agency, and I paid no attention to him; thinking that he had no authority for so informing me.

I had, as Mr. Graham knows well, the deciding vote on the surrender of our reserve, and had Mr. Graham told me before the surrender I was to receive nothing for my improvements, I certainly would not have given him my vote or helped him as I did, nor has he to this day told me I was not to receive compensation for my improvements.<sup>171</sup>

Enclosed with Gaddie's letter to Laird was a copy of Sworder's letter and a copy of the following statement signed by 13 other Cowessess band members, also dated July 13:

We the undersigned do hereby vouch and say we were present at the Surrender of Cowessess Reserve on the 29th of January 1907.

Part of the agreement arrived at between the Indians and Inspector Graham was to the effect that all improvements made on land surrendered was to be paid for; And furthermore we bear witness [*sic*] to the fact that no mention was made, at this time, of Mr. Alex Gaddie not receiving any compensation for his improvements.<sup>172</sup>

Two days later, one of the signatories of this statement, Zac LeRat, submitted his own claim to compensation for improvements.<sup>173</sup>

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<sup>171</sup> Alex Gaddie to David Laird, Indian Commissioner, July 13, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 226).

<sup>172</sup> Statement of 13 Cowessess band members, July 13, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 227).

<sup>173</sup> Zac LeRat to David Laird, Indian Commissioner, July 15, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 228).

Laird subsequently forwarded Gaddie's and LeRat's claims, along with their supporting letters, to Graham for an explanation.<sup>174</sup> Despite receiving a lengthy reply from Graham assuring him that "Gaddie has no claim,"<sup>175</sup> Laird wrote to the departmental Secretary, suggesting that an inquiry be made, and stating that, although "Gaddie ... is troublesome in regard to transactions relating to property ... it may be that he has some show of justice in his claims in this case."<sup>176</sup>

Graham again wrote to Laird, stating that he had told Gaddie that he could not allow him compensation. Graham explained that, if Gaddie had demanded the compensation in front of the Indians, and had it been agreed to, the Indians would never have consented to the surrender, "because they knew well his claim was unreasonable, and that he has been repaid over and over for any work he put on the Slough."<sup>177</sup>

Gaddie then wrote to the Secretary in December 1908, repeating his estimate of \$700 for the work he had done, but agreeing that he would accept \$400, having personally benefited from the work.<sup>178</sup> On the recommendation of Indian Agent Millar, in the spring of 1909, Gaddie was eventually paid \$250, and Zac LeRat was paid \$30, for their improvements.<sup>179</sup>

There are no further complaints on record regarding non-payment of compensation for improvements. The Band did have further grievances, however, particularly regarding remuneration expected from the sale of the surrendered lands.

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<sup>174</sup> David Laird, Indian Commissioner, to W.M. Graham, Inspector of Indian Agencies, July 23, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, p. 229).

<sup>175</sup> W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, July 27, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 230–31).

<sup>176</sup> David Laird, Indian Commissioner, to the Secretary, DIA, July 30, 1908, LAC, RG 10, vol. 3732, file 26623 (ICC Exhibit 6, p. 232).

<sup>177</sup> W.M. Graham, Inspector of Indian Agencies, to David Laird, Indian Commissioner, December 9, 1908, LAC, RG 10, vol. 3561, file 82-4 (ICC Exhibit 6, pp. 252–53).

<sup>178</sup> Alex Gaddie to the Secretary, DIA, December 14, 1908, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 255).

<sup>179</sup> W.A. Orr, In Charge Lands & Timber Branch, to the Deputy Minister, DIA, March 24, 1909, LAC, RG 10, vol. 3732, file 26623-1 (ICC Exhibit 6, p. 266).

**1911 Delegation to Ottawa**

In 1911, a delegation of Indians went to Ottawa to present grievances to the government. Cowessess band members not only participated but were apparently at the root of this movement.<sup>180</sup> One of the key delegates was Alex Gaddie, who acted as interpreter. He and other delegates, including Louis O'Soup and Loud Voice, addressed the question of the Cowessess surrender. Their focus, however, was on the issue of remuneration for the surrendered land and not the legitimacy of the surrender, which Gaddie had supported and to which the other two had not been party (O'Soup had been absent from the Band for that period; Loud Voice had never been a Cowessess band member):

Louis O'Soup:

...

There is another thing I was to enquire about. That is, what the land sold for and how much did the Cowessess land sale bring?

Gadie [*sic*]. There was an imitation sale. Our own Agent Millar bought one of the best pieces there. He gave about \$8 for land worth \$16.

...

Loud Voice, for Cowessess. Our reserve was surrendered and sold by auction of course and our party wants to know how much money was got for it, what the expenses have been and what is remaining.<sup>181</sup>

The delegates also brought with them letters and messages from other bands. Of particular interest are complaints by members of Kahkewistahaw's Band and the Leech Lake Band (who were living on Sakimay Reserve). The Kahkewistahaw Band's representatives complained that they were having great difficulty making a living on the remaining reserve land, but that Graham had told them they would have no such difficulty. The Leech Lake band members claimed that they had agreed to surrender their reserve in 1907 only because Graham had told them: "If you don't sell it the Government will take it for nothing."<sup>182</sup>

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<sup>180</sup> K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 132–33 (ICC Exhibit 4, pp. 132–33).

<sup>181</sup> "Notes of representations made by delegation of Indians from the West," DIA, January 24, 1911, LAC, RG 10, vol. 4053, file 379203-2 (ICC Exhibit 6, pp. 298–303).

<sup>182</sup> Leech Lake band members, petition to the Government, January 18, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 6, pp. 596–98). For the context and a transcription of this citation, see K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 134–35 (ICC

In response to the questions regarding the Cowessess surrender, Superintendent General Frank Oliver provided an explanation and written statement of the accounts relating to the Cowessess surrender and land sale.<sup>183</sup>

The delegates returned to their reserves, but, shortly thereafter, Barrister H.W. MacDonald of Broadview made further inquiries on behalf of the Cowessess band members with regard to the department's explanation of the land-sale proceeds.<sup>184</sup> In a letter dated April 26, 1911, Agent Millar pointed out to the department that a clerical error had been made, confusing the accounts for Kahkewistahaw and Cowessess. Assistant Deputy and Secretary J.A. McLean provided Millar with a revised statement on May 16, 1911,<sup>185</sup> but it also proved to be incorrect.<sup>186</sup> Finally, on June 19, the department furnished Millar with a newly corrected statement of the Cowessess surrender, land sale, and account, which noted the following key information:

|   |           |                         |
|---|-----------|-------------------------|
| Acreage sold .....                            | 19,977.57 |                         |
| Amount to be received .....                   |           | \$157,504.78            |
| " now paid .....                              |           | 41,543.04               |
| " still due .....                             |           | 15,961.74               |
| When the purchase price is paid in full       |           |                         |
| the capital will be about .....               |           | 123,000.00              |
| This amount at 3% will produce annually ..... |           | 3,690.00 <sup>187</sup> |

On September 28, 1911, Agent Millar held a meeting at the agency

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Exhibit 4, pp. 134–35).

<sup>183</sup> "Notes of representations made by delegation of Indians from the West," DIA, January 24, 1911, LAC, RG 10, vol. 4053, file 373203-2 (ICC Exhibit 6, pp. 304–5).

<sup>184</sup> M. Millar, Indian Agent, to the Secretary, DIA, April 26, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 6, pp. 306–7).

<sup>185</sup> J.D. McLean, Assistant Deputy and Secretary, DIA, to M. Millar, Indian Agent, May 16, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 6, pp. 310–11).

<sup>186</sup> M. Millar, Indian Agent, to the Secretary, DIA, June 14, 1911, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 6, pp. 313–14).

<sup>187</sup> J.D. McLean, Assistant Deputy and Secretary, DIA, to M. Millar, Indian Agent, June 19, 1911, with attached statement, LAC, RG 10, vol. 4053, file 379203-1 (ICC Exhibit 6, pp. 317–19).

for the purpose of explaining to the Indians of Cowessess Band figures and statements in regard to Cowessess surrender and Band money in compliance to Department's letter dated March 29, 1911, No. 379203 and subsequent correspondence.

...

Mr. Millar on opening the meeting informed the Indians that Mr. McDonald Barrister, of Broadview had written to the Department making inquiries on the Indians behalf with regard to the terms of Cowessess surrender and desiring explanations in connection with the statements of their account as furnished by the Department to the Indians who attended the delegation to Ottawa during the winter of 1910–11.

...

Judging by the attitude of Alex Gaddie, it could be gathered that he was not altogether satisfied with the explanation and that further explanations would be called for.<sup>188</sup>

Millar's suspicion that further explanations would be called for proved correct, although he was no longer Indian Agent when the matter was raised again in 1921.

### ***Further Inquiry into Remuneration for the Surrender***

Although Millar's replacement, E. Taylor, noted on May 12, 1915, that "the Indians knew that the Department would not make an agreement with anyone concerning themselves or their belongings which would be to their disadvantage,"<sup>189</sup> these words may have reflected a recognition of his duty more than the actual level of trust that the Indians had in the department. On April 22, 1921, G.C. Neff, a barrister from Grenfell, Saskatchewan, wrote to the department requesting a further accounting of the Cowessess Band's land sale proceeds:

The writer has been interviewed on behalf of the Indian Council of Cowessess Reserve ... relative to certain matters pertaining to Indian affairs and welfare.

...

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<sup>188</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, September 28, 1911 (ICC Exhibit 1, pp. 87–88).

<sup>189</sup> Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, May 12, 1915 (ICC Exhibit 1, p. 98).



... you will find enclosed in this letter a memorandum setting out the information these Indians require ...<sup>190</sup>

The enclosed memorandum included the following point regarding the land-sale proceeds:

III. What is the amount of the capital account to the credit of the Indians from the sale of land?

(1) A statement showing how all monies received by the Department derived from the sale of lands have been expended.

NOTE: – These Indians are dissatisfied with the amount of interest they are receiving from the sale of land; they claim that at the time they were persuaded to surrender the [*sic*] land, promises were made that they would each receive in the neighborhood of Fifty Dollars per head per year.<sup>191</sup>

There is no further evidence on record with regard to this request. It was made soon after the conclusion of the 10-year period during which all the land-sale payments were to be completed, although fewer than half had actually been paid.<sup>192</sup> Neither is there any other reference on record to the understanding of the band members that they would receive \$50 per person annually.

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<sup>190</sup> Transcript, April 22, 1921, G.C. Neff, barrister, to DIA, with extract from memorandum (ICC Exhibit 6, p. 320).

<sup>191</sup> Transcript, April 22, 1921 G.C. Neff, barrister, to DIA, with extract from memorandum (ICC Exhibit 6, p. 320).

<sup>192</sup> Public History Inc., “Cowessess First Nation Land Sales Claim, 1907 Surrender, Draft Historical Report,” prepared for the Federation of Saskatchewan Indian Nations, October 14, 2000, p. 22 (ICC Exhibit 7, p. 22).



**APPENDIX B**  
**CHRONOLOGY**

**COWESSESS FIRST NATION: 1907 SURRENDER PHASE II INQUIRY**

- 1      Planning conference Regina, January 16, 2003
  
- 2      Written legal submissions
  - Written Submissions on Behalf of the Cowessess First Nation, June 30, 2004
  - Written Submissions on Behalf of the Government of Canada, August 6, 2004
  - Rebuttal Submission on Behalf of the Cowessess First Nation, August 18, 2004
  
- 3      Oral legal submissions Regina, September 21, 2004
  
- 4      Content of formal record
  - Exhibits 1–11 tendered during the inquiry, including the document collection, with annotated index
  - 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.