INDIAN CLAIMS COMMISSION

PAUL FIRST NATION
KAPASIWIN TOWNSITE INQUIRY

PANEL

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

COUNSEL

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To the Indian Claims Commission
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PAUL FIRST NATION
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Alberta

The report may be cited as Indian Claims Commission, *Paul First Nation: Kapasiwin Townsite Inquiry* (Ottawa, February 2007).

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

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

Treaties – Treaty 6 (1876); **Reserve** – Surrender – Disposition; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender – Post-surrender – Minerals; **Compensation** – Criteria; **Alberta**

THE SPECIFIC CLAIM

The Paul First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of the surrendered lands. This claim was partly validated and accepted for negotiation on July 10, 1998. Negotiations subsequently broke down, and the First Nation asked the Indian Claims Commission (ICC) to hold an inquiry into compensation criteria. The Commission agreed to conduct an inquiry into compensation criteria as well as the rejected aspects of the claim in October 2001.

On June 2, 2000, the First Nation submitted another claim for the same lands, challenging the validity of the 1906 surrender. Canada rejected that claim in July 2003, on the grounds that it did not reveal a lawful obligation on the part of the Crown to the First Nation. At the request of the First Nation, the ICC agreed to incorporate the surrender claim into the ongoing inquiry.

BACKGROUND

The ancestors of the Paul First Nation adhered to Treaty 6 at Edmonton in 1877, when Chief Alexis signed the adhesion. About half his band lived at Wabamun, on the east shores of White Whale Lake, under the leadership of Headman Ironhead. Eventually, the department recognized this group of Stoney people as a separate band, and after Peter Ironhead's death in 1887, Paul assumed leadership and the Band became known as Paul's Band. In 1890, the Sharphead Band surrendered its reserve, and about 70 members of the Sharphead Band went to live with the Paul Band.

Two reserves were surveyed for the Band on the shores of White Whale Lake: Indian Reserve (IR) 133A and IR 133B. IR 133B, which was the much smaller of the two, was the Band's primary fishing station, with access to both the lake and Moonlight Bay. The Band also used a wagon trail through IR 133B, as a way of travelling north to Ste Anne. Chief Paul remained as Chief until 1901, when he was deposed by the department. The Band remained without a Chief until May 1906, when David Bird became Chief.

The reserves were a short distance from Edmonton and had been noted for their fine sand beaches. In addition, there was a marl deposit on IR 133A. On June 20,1906, the band members voted to surrender the marl deposit, to be leased for their benefit.

In late 1905, it became obvious that the Canadian Northern Railway (CNR) was approaching from Edmonton and would likely pass through the Paul Band Reserves. The department advised the railway that it could not enter the reserve until it had received permission and had paid for both the right of way and any other damage that the band members would suffer.

There was also interest in IR 133B from local real estate companies because of the fine sand beaches. Shortly after the marl surrender, the Agent reported that he had been asked by the band members about the advisability of surrendering IR 133B. James Gibbons held a meeting of the band and determined that it was willing to grant the surrender, for the purpose of establishing a railway townsite or a resort community. On September 11, 1906, the Paul Band voted to surrender IR 133B. There are 10 names on the surrender document; it is fairly certain that nine voted in favour of the surrender, with one opposed. Two days later, on September 13, 1906, Chief David Bird and Indian Agent Gibbons swore the Affidavit of Surrender. One of the oral terms of the surrender, as reported by the Surveyor, J.K. McLean, was that the fine sand beach was to be reserved from sale.

A lengthy correspondence between the department and the CNR began, with Crown officials asking repeatedly for assurances from the railway that it would build a railway station on the surrendered lands. The CNR had not yet received permission from the Railway Commission for its right of way, but indicated that as soon as it had permission it would take up the matter of the station. In the meantime, it asked the department to reserve lands from sale, both for the right of way and for a station.

In 1908, the Grand Trunk Pacific Railway (GTPR) received permission for a right of way through the Paul Band's IR 133A and through the surrendered lands. However, the GTPR did not consider building a station on the surrendered lands, sometimes known as the Kapasiwin Townsite, because, it claimed, the grade was too steep. It located a station about a mile west of the surrendered lands, across the narrows that connected Moonlight Bay to White Whale Lake. The GTPR did eventually build a summer station.

The Crown held the first sale of lots in May 1910, after the GTPR had built its rail line. The CNR asked that a block of land be reserved from sale for a possible station. Forty-two lots of a total of 161 sold, all at or slightly above the upset price.

In July 1911, the CNR acknowledged that the Railway Commission had refused permission for its proposed rail line. The CNR line was moved to the north.

The second sale of lots was held in June 1912, at the same time as the Crown was selling lots from the Paul Band's surrender of a portion of land at and near the Duffield townsite on the much larger IR 133A. The Crown put up 357 lots at Wabamun; 49 lots sold, again at or above the upset prices. Several of the sales were later cancelled because the buyers failed to make the required payments.

In 1913, Alberta incorporated the Village of Wabamun Beach, later renamed Kapasiwin. In 1931, the village council wrote to the Department of Indian Affairs and requested that the department transfer the streets and lanes within the village to the Province of Alberta. Included within that transfer, in 1932, was Wapumeg Avenue, which had been surveyed between the beach and the beachfront lots, and the beach itself. The village then applied to the province for the closure of Wapumeg Avenue. The province did as requested, and at the same time granted an easement to each beach owner of all the land between the owner's lot and the water's edge, effectively preventing public access to the beach.

From 1912 to 1936, the Crown did not sell any more of the surrendered lands, and in 1936 returned all the land east of Burntstick Avenue to reserve status. During the 1950s, there were sporadic sales of lots west of Burntstick Avenue; some surrendered lands are still unsold.

The transfer of the road allowances and the subsequent transfer of the beach are part of the accepted claim for negotiation, as is the Crown's management of land sales from 1912 to 1936, and are not a part of this inquiry.

ISSUES

Was the surrender of IR 133B void for not having included an oral term regarding the beach? Did the surrender meet the requirements of the *Indian Act*? Was there a breach of the Crown's fiduciary duty with regard to the surrender, both in failing to meet the requirements and in a failure to follow its own policy? Did the Crown fail to reserve the mines and minerals underlying IR 133B from sale? Did the Crown properly

manage the sales of the lots on IR 133B, particularly with regard to the establishment of a railway station What are the proper compensation criteria?

Findings

The panel finds that the surrender of IR 133B was valid, in that it met the terms of the *Indian Act*. The panel concludes that, although the documentation of the vote was minimal, the circumstances show there was the required majority of a majority of eligible electors, called at a meeting for the purpose of surrender, and that the vote met the test as set out in *Cardinal*. The panel also finds that there was no breach of fiduciary duty on the part of the Crown in the taking of the surrender. With regard to the Band's access to the beach, the panel concludes that the oral term regarding the reservation of the beach was a reservation from sale, not from surrender, and that it had been incorporated into the surrender and respected by the Crown until 1932.

The panel finds that there had been no failure on the part of the Crown to follow its own policy regarding surrenders, as there was no written policy in place at the time.

The panel concludes that the Band had intended to surrender the mines and minerals, and that the surrender met the test set out in *Apsassin*, whereby a surrender includes all interests in land unless there is a specific exclusion.

The panel finds that the Band had been well informed about the potential of the surrendered lands for use either as a resort community or as a railway station, and that, although both the Band and the Crown did what it could to encourage the railway to build a station, the fact that it did not happen was not a breach of fiduciary duty on the part of the Crown.

The panel finds that there was no breach of fiduciary duty by the Crown in its management of the lot sales between 1906 and 1912; that it did what a reasonable, prudent fiduciary would do in the circumstances; and that it acted in what it reasonably concluded were the best interests of the Band in the management of the sale.

With regard to compensation criteria, although the claim was accepted initially on that basis, the parties did not provide sufficient legal argument that would have allowed consideration of this issue in this inquiry.

Recommendation

That the claim of the Paul First Nation regarding the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiation under Canada's Specific Claims Policy.

References

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

Cases Referred To

Chippewas of Sarnia v. Canada (Attorney General), [2000] 51 OR (3d) 641 (CA); *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 25 OR (3d) 654 (CA); *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 SCR 508 (sub nom. *Cardinal)*; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

ICC Reports Referred To

Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Duncan's First Nation Inquiry, 1928 Surrender Claim* (Ottawa, September 1999), reported

(2000) 12 ICCP 53; *Moosomin First Nation: 1909 Reserve Land Surrender* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

Treaties and Statutes Referred To

Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions (Ottawa: Queen's Printer, 1966); *Indian Act,* RSC 1886, c. 43.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171.

COUNSEL, PARTIES, INTERVENORS

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PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

The ancestors of the Paul First Nation adhered to Treaty 6 at Edmonton in 1877, when Chief Alexis signed the adhesion. About half his band lived at Wabamun, on the east shores of White Whale Lake under the leadership of Headman Ironhead. Eventually, the department recognized this group of Stoney people as a separate band, and after Peter Ironhead's death in 1887, Paul assumed leadership and the band became known as Paul's Band. Two reserves were surveyed for them on the shores of White Whale Lake: Indian Reserve (IR) 133A and IR 133B. The latter, IR 133B, which was much smaller, was the Band's primary fishing station.

On September 11, 1906, with the Canadian Northern Railway (CNR) approaching, the Paul Band voted to surrender IR 133B for the purpose of selling lots, either as a resort community or as a railway townsite. A full historical background to the First Nation's claim is found at Appendix A to this report.

The Paul First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND)on June 4, 1996, alleging mismanagement of the sales of the surrendered lands.[1] This claim was partly validated and accepted for negotiation on July 10, 1998.[2] Negotiations subsequently broke down, and the First Nation asked the Indian Claims Commission (ICC) to hold an inquiry into compensation criteria.[3] In October 2001, the Commission agreed to conduct an inquiry into compensation criteria as well as the rejected aspects of the claim.

On June 2, 2000, the First Nation submitted another claim, challenging the validity of the surrender in 1906.[4] Canada rejected that claim in July 2003, on the grounds that it did not reveal a

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[1] Jerome Slavik, Ackroyd, Piasta, Roth and Day, to Michel Roy, Department of Indian Affairs and Northern Development (DIAND), June 4, 1996, submitted to the Minister of Indian Affairs and Northern Development (ICC Exhibit 2b, pp. 1–23).

[2] John Sinclair, Associate Deputy Minister, DIAND, to Chief Wilson Bearhead, Paul Band, July 10, 1998 (ICC Exhibit 4a, pp. 1–2).

[3] Jerome Slavik, Ackroyd, Piasta, Roth and Day, to Jim Prentice and Dan Bellegarde, ICC, March 28, 2001 (ICC file 2108-14-2).

[4] Statement of Claim Respecting the Wrongful Surrender of Paul Band Reserve Lands, prepared by Jerome Slavik, Ackroyd, Piasta, Roth and Day, submitted to the Minister of Indian Affairs and Northern Development, April 2000 (ICC Exhibit 2c, pp. 1–33).

lawful obligation on the part of the Crown to the First Nation.[5] At the request of the First Nation, the ICC agreed to incorporate the surrender claim into the ongoing inquiry. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix B of this report.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal orders in council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[6] 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.[7] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation": i.e. an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.[8]

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[5] Robert D. Nault, Minister of Indian Affairs and Northern Development, to Chief Francis Bull, Paul First Nation, July 16, 2003 (ICC Exhibit 4d, p. 1).

[6] 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.

[7] 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*).

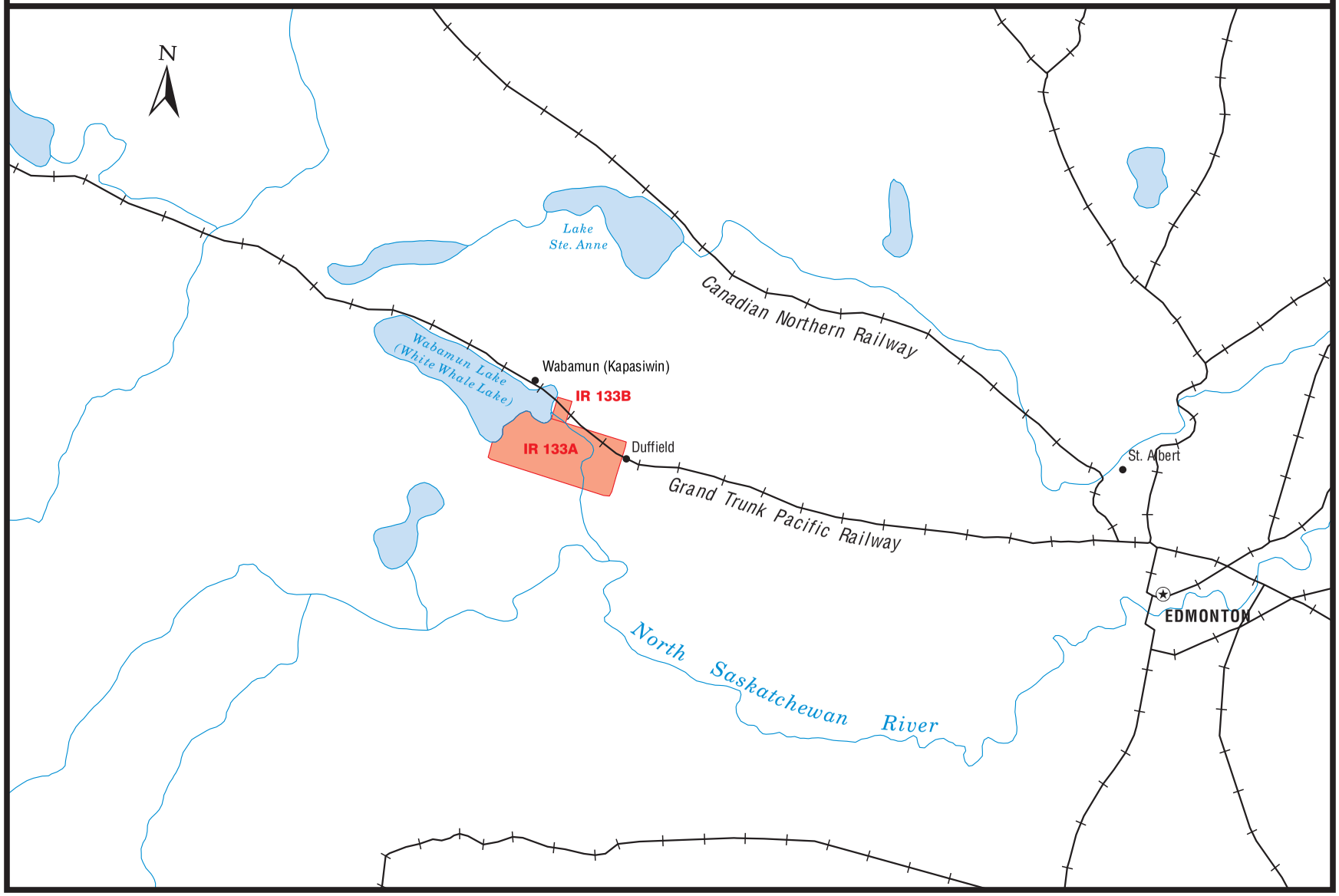
[8] *Outstanding Business,* 20, reprinted in (1994) 1 ICCP 179.

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.[9]

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

Map 1 **Claim Area Map**



PART II

THE FACTS

ADHESION TO TREATY 6 AND FORMATION OF RESERVES

In 1877, the ancestors of the Paul Indian Band, under the leadership of Chief Alexis, adhered to Treaty 6. About half the members of the band, along with one of the headmen, Ironhead, lived on the shores of Wabamun Lake (also known as White Whale Lake). In 1886, under the leadership of Peter Ironhead, they were recognized as a separate band and received their own treaty annuity paylist. After Ironhead's death in 1886, Paul became Chief, and the band was referred to as either Paul's Band or the White Whale Band.

In 1890, about 70 members from the Sharphead Band moved to Wabamun Lake. In 1891, a fishing station and reserve were surveyed for members of both the Paul and Sharphead Bands living at Wabamun. Surveyor John C. Nelson surveyed reserves 133A and 133B adjacent to each other. IR 133A was the Band's main reserve, where most of the band lived, and was approximately 31.7 square miles in size. In comparison, IR 133B, the fishing station, was much smaller – approximately 635 acres, or a little under a square mile.

The band used IR 133B primarily as a fishing station, although the band also used it for camping, and used the wagon trail through IR 133B to travel north to Ste Anne. The band pursued a traditional way of life that included hunting, trapping, and fishing; at the same time, members began to raise stock. Although the reserve was only 30 miles from the growing frontier city of Edmonton, it was considered to be relatively isolated.

Chief Paul remained leader until 1901, when he was deposed by the department because he had slaughtered cattle on the reserve without the approval of the Indian Agent. At that time, the Band had three headmen – Simon, Reindeer, and David Yellowhead (also known as David Bird). The department did not approve of the election of a new Chief until May 1906, although in 1903 the Band attempted to elect Didymus Burntstick as Chief.

EVENTS PRECEDING THE 1906 SURRENDER

Even before the summer of 1906, it became obvious that the railways were steadily pushing their way west, and the Paul Band's reserves, almost due west of Edmonton, were on the most likely

routes. In November 1905, Inspector J.A. Markle of the Edmonton Agency reported that the CNR had begun grading a line between Edmonton and the reserve, and expected that the line would pass near to a marl deposit ("Marl" is a general term for mineral precipitates) on the White Whale Reserve. Seven months later, the Indian Agent, James Gibbons, wrote to his superiors that construction work was progressing rapidly and it was likely the rail line would cross about nine miles of the reserve. In response, Secretary J.D. McLean wrote that the company had not yet filed right of way plans, and the department's policy was that the railway company could not begin construction on a reserve until the right of way had been arranged. The same day, McLean notified the CNR that it should file its plans officially and provide an offer for the right of way and damages. The CNR's response was that it would be done very shortly. Soon afterward, Agent Gibbons wrote to Ottawa to say his estimate of the compensation for the land needed by the railway was $25 per acre, since land values were rising, and he did not think the Indians would settle for less.

On June 20, 1906, after two days of discussion, the Band voted to surrender for lease all the deposits of marl and sand on IR 133A. In his reporting letter to the department about the marl surrender, Inspector Markle stated that some band members had asked him whether or not a surrender of the reserve north of the prospective rail line and a portion of the reserve within Township 53 (IR 133B) would be wise if the railway were located on those parts of the reserve. Markle declined to give an answer, but noted in his letter that the reserve was well adapted for summer residences and that the Indians seemed to be aware of the fact.

A few days later, on June 27, 1906, Markle wrote to the Indian Commissioner that the CNR had projected a line through the reserve, to cross the narrows of the lake. He suggested it might be in the Indians' interest to surrender a portion of the reserve.

Local real estate companies also expressed an interest in the coming rail line and the reserve. Edmonton realtor A.W. Taylor noted that once the rail line was built, the Indians would need to cross the track often and there would be little of the reserve left north of the track. He also wrote to the department that the Chief would consent to a sale of the reserve. Taylor offered to help find a purchaser.

On July 31, 1906, the Secretary of Indian Affairs, J.D. McLean, wrote to Indian Agent Gibbons that an application had been made for a part of the Paul reserve, and he asked him to speak

with the Indians to determine their wishes. Accordingly, Gibbons met with the Band on August 14, 1906. He reported back that the Indians were willing to surrender the land on condition that it be put up for sale as a townsite or resort. He stated that there were only two or three Indians living on IR 133B, in shacks, and he did not think they would ask for compensation. He recommended that if the department thought it was a good idea, it should forward the forms of surrender and ask for Surveyor McLean to make the necessary surveys. J.K. McLean was already on his way to resurvey the reserve boundaries as a result of the earlier marl surrender.

On August 30, 1906, McLean wrote to the department to say that he had almost finished surveying the boundaries. Two days later, the Deputy Superintendent General, Frank Pedley, authorized Indian Agent Gibbons to take a surrender of IR 133B. That same day, September 1, 1906, the Superintendent instructed McLean to begin surveying the reserve into lots; as well, he wrote to the CNR to ask when the department might receive the plans for the right of way. Again, the Canadian Northern Right of Way Agent responded that the plans would be filed as soon as possible.

On September 6, 1906, Surveyor McLean wrote to the department that he was able to do very little until Gibbons arrived, because there was opposition from some of the Indians and he did not want to do more until after the surrender.

SURRENDER OF INDIAN RESERVE 133B

On September 11, 1906, nine members of the Paul Band signed a surrender of IR 133B. The document bears the "X" marks of six male band members, including Chief David Bird, Paul, and Didymus, as well as the signatures of David Peter, Baptiste Peter, and John Rain. The name "Reindeer" also appears on the document, but it is not accompanied by his mark. Indian Agent James Gibbons, Farmer A.E. Pattison, Surveyor J.K. McLean, and his assistant, W.R. White, witnessed the signatures. There is no information about whether an interpreter was present.

There is no record of the vote taken or of a voters list. Seven out of the nine signatories to the surrender received annuities as "men" on the Paul Band's July 20, 1906 paylist. The remaining two, Baptiste Peter and Enoch Bird, were not paid as men until several years later. Baptiste Peter was first paid as a man on his own ticket on the 1908 paylist. Enoch Bird, the son of Chief David Yellowhead, was first paid as a man on his own ticket in 1909.

Chief David Bird and Agent Gibbons swore the Affidavit of Surrender before Justice of the Peace J.B. Butchard on September 13, 1906, in Wabamun, Alberta. Interpreter James Foley witnessed their signatures.

Gibbons did not report to Ottawa about the meeting, and there are no minutes of what transpiredat the surrender meeting. Elders were not able to provide much oral history about the surrender of IR 133B. They do not recall having been told by their parents and grandparents about any meetings or votes to surrender or sell the land. However, some understood that the land was leased or loaned, rather than sold.

Surveyor McLean, however, was able to provide some detail. On September 17, 1906, J.K. McLean wrote to Secretary J.D. McLean, acknowledging the department's previous instructions to subdivide IR 133B and reporting on his progress in the subdivision survey. He also reported that at the surrender meeting, it had been decided that the beach was to be reserved from being sold.

His second letter of the same day reported that during the survey he had discovered a small burying ground, one that he did not think the Indian Agent had known about. He reported that the band members who had used the burying ground had been at the surrender and, with the exception of Reindeer, had signed the surrender document. McLean stated that at the meeting, Reindeer had refused either to speak or to sign. McLean also reported that when he was running survey lines, Reindeer's teepee was on one of the street lines; and before he could assist him in lowering it, Reindeer had run out and cut it on each side, from top to bottom. The graves discovered on IR 133B were relocated at the mission on IR 133A. The Order in Council accepting the surrender of IR 133B is dated September 27, 1906.

Newspaper advertisements appearing in late 1906 show there were a number of townsites being established along the shore of White Whale Lake. They were portrayed as summer resorts, with fine sand beaches. The advertisements also noted that the coming CNR line would make the lake a short journey from Edmonton.

In February 1907, J.K. McLean forwarded his completed survey report, noting that he expected the beach lots to sell well, but that the remainder of the lots depended on the establishment of a railway station on the town plot.

McLean's survey included two rights of way, one for the CNR and one for the Grand Trunk Pacific Railway (GTPR), which had also notified the department of its intent to build through the Paul Band's Reserve. McLean stated that it would be good to come to an agreement with the railway companies about the building of a station before the lots were sold.

CANADIAN NORTHERN RAILWAY

For five years, from shortly before the surrender in September 1906 until the summer of 1911, the Department of Indian Affairs and the CNR corresponded about whether the railway intended to build a station on the surrendered lands of IR 133B. The department's position was that it would be in the best interests of the Paul Band to have a station on the CNR line, since it would raise property values and be the focal point for a townsite; the railway's repeated position was that it did not yet have permission from the Railway Commission for the right of way, but that it would confirm its position with the department as soon as possible. In the meantime, the CNR asked that the department reserve certain lands from sale on its behalf and contested the price the department had put on the land it required from the Paul Band's reserve.

The CNR applied for a right of way through the Wabamun Reserves on October 13, 1906. Assistant Secretary S. Stewart informed the company that the lands for the right of way were valued at $25 per acre, which the company stated was too high.

Almost a month later, on November 7, 1906, Stewart first broached the subject of placing a station with the CNR on the newly subdivided Wabamun town plot . Stewart informed the CNR's Right of Way Agent, C.R. Stovel, that the Indian Agent was looking into the matter of the valuation, and that it was desirable to locate the station on the reserve.

From that point, the department and the CNR began corresponding about the placement of a station on the townsite. On November 10, 1906, Agent Gibbons wired the department with information that contractors for the CNR were ready to begin construction on the reserve. Immediately, the department informed the railway company that it required a deposit of $5 per acre from the CNR for the right of way. The CNR paid the deposit on November 13, 1906.

On December 1, Secretary McLean wrote to C.R. Stovel, stating that the department might be prepared to accept a lower price for the right of way and implying that the lower price was

connected to the CNR's locating a station on the reserve. Stovel replied on December 12, 1906, that he was taking the matter up with the company's engineering department.

On December 31, 1906, agents for the CNR submitted a proposal to Frank Pedley, the Deputy Superintendent General for Indian Affairs. The CNR requested that the department place 320 acres of land, half the amount of land surrendered, in its hands; in return, the company would arrange for the survey and sale of the lots. The company would retain $5,000 for its services and expenses and proposed that once this sum had been paid, the gross proceeds of sales would be divided equally between the department and the company. The department rejected the proposition.

In June 1907, the department again brought up the subject of the station with the CNR. That year, Stovel replied that the railway could not arrive at a decision until it had its plans approved by the Railway Commission. In fact, the CNR's right of way plans were not approved until two years later, in June 1909. However, by the time the Canadian Northern's plans were approved, the company reported to the department that construction was halted because the location of the GTPR interfered with the CNR line through the reserves. Nothing would be decided that year about the establishment of a station ground.

As a result, Chief Surveyor Bray recommended that the department notify the CNR that the department could no longer hold the right of way through IR 133B, and that the department advise the CNR that it intended to sell the town lots without referring to the proposed station. In response, the CNR wrote on November 4, 1909. It requested that the land for the right of way be reserved from sale and inquired about the price for the land. Superintendent McLean wrote back and asked again about the company's plans for a railway station.

The CNR replied on January 26, 1910, that the lands requested by the company included station grounds, but that nothing definite had been decided. Although the department requested "definite assurance" regarding the company's intentions before agreeing to reserve the lots from the upcoming sale (held in May 1910), it agreed to reserve Block 23 from sale without any definite statement from the company about its plans for a station on the surrendered lands.

The CNR's plans for the company's main line west of Edmonton were not approved by the Minister of Railways until November 1910, after the first sale of lots at Wabamun, and then it was with a stipulation that the CNR lines could not pass between GTPR lines and townsite.

The next summer, in July 1911, Surveyor J.K. McLean informed the Department of Indian Affairs that the CNR had abandoned its plans for a railway through the Paul Band's former reserve and instead was building farther north. The department immediately wrote to the CNR and, in August 1911, C.R. Stovel of the CNR confirmed that the railway was no longer planning to build a rail line through Wabamun. Stovel regretted there had been a delay in notifying the Department of Indian Affairs.

GRAND TRUNK PACIFIC RAILWAY

During this same period, the Canadian Northern's main competitor, the GTPR, did receive permission from the Railway Commission to build a rail line through the Wabamun reserves. The GTPR officially applied for its right of way on December 21, 1906, and the company's plans were approved on May 20, 1907. Eight months later, in January 1908, the department consented to the railway's right of way through an order in council.

However, shortly after the Order in Council was issued, Surveyor J.K. McLean reported to the department that although the GTPR was running its rail lines through 133B, the railway was not planning to build a station at Wabamun because the grades were too steep. Instead, the railway was planning to build a station about a mile farther west, across the narrows of Moonlight Bay, on land that was not part of IR 133B.

The Paul Band continued to work toward the establishment of a railway townsite. In July 1908, Inspector Markle reported to the Indian Commissioner that the Band was willing to grant the GTPR a quarter interest in the Wabamun townsite if the railway company would build a station on the southeast side of Moonlight Bay, on the surrendered lands of IR 133B. The GTPR's response to the department was that this was not possible, owing to the steep grades.

The GTPR line became operational sometime before 1912; the exact date is uncertain. It appears that although the railway company did not build a fully functional station, it did build a summer platform.

Sale of Lots at the Kapasiwin Townsite, 1910

Finally, in the fall of 1909, after much correspondence with the railway companies, the department decided to move toward selling the Wabamun town plot and instructed Surveyor J.K. McLean to reopen any lines that had grown over and to replace any missing survey posts. In February 1910, McLean wrote to the department that the sale should be delayed until after the CNR had decided whether it was planning to locate a station on the surrendered lands; however, in the spring of 1910, Deputy Superintendent Frank Pedley decided to proceed with the sale.

By that time, the GTPR had laid its track across the surrendered lands. The only lots put up for sale in May 1910 were those south of the GTPR's line and west of the surveyed Burntstick Avenue. The lands north of the already built rail line and east of Burntstick – including Lot 23, which was reserved for the CNR – were not offered for sale.

On April 4, 1910, the department instructed the King's Printer to run the sale advertisements in eight Western newspapers. As well, the agency made extra efforts to publicize the auction on the day before and the day of the sale. Inspector Markle submitted vouchers to the department for the posting of 200 notices on May 10 and the distribution of 1000 handbills on the day of sale. Large advertisements were also placed in the *Edmonton Journal* and *Edmonton Daily Bulletin* on the morning of the sale.

The sale did not go as well as the department had hoped. The Record of Sale shows that of the 161 parcels put up for auction, only 42 parcels were sold. Of the 42 sale transactions, 32 were made at the upset prices, with the remaining 10 sales slightly above those prices. Almost all the sales were for the beachfront property south of the railway. Afterward, there was some concern that one of the conditions of sale might have restricted the number of lots sold. The department had stipulated that within one year, each purchaser had to erect a building worth at least $300.

Interim Period between Auctions, May 1910 – June 1912

Following the auction in May 1910, inquiries regarding the unsold Wabamun townsite lots continued to trickle in. The majority of those asking were informed that the lands were not on the market at the present time.

In 1911, Block 13 of the town plot (south of the railway) was sold to the Alberta Sunday School Association. The department sold the block for $293, or $100 per acre (less than half the upset price of $625). The sale followed a letter that the General Secretary of the association had written to Inspector Markle, in which he stated that he had been speaking about the land with the Superintendent of Indian Affairs, Frank Oliver. The next day, the band council passed a resolution offering to sell the land to the association for $100 per acre, on condition that the department use the money to buy one hundred sacks of flour – to be distributed equally among the members of the Band.

SECOND SALE OF LOTS, JUNE 1912

In the summer of 1911, Surveyor J.K. McLean visited IR 133A to conduct surveys in connection with the Duffield Townsite and the surrounding farmlands on the eastern side of the reserve. McLean asked Pedley about what was to be done of the lands at IR 133B surrendered in 1906. In a memorandum to the department, Surveyor McLean noted the scheduled auction for the Duffield townsite lands and suggested it would be a good idea to sell the Wabamun townsite plots at the same time, since they were on the same reserve.

McLean's correspondence indicates that Crown officials no longer considered there to be any reasonable prospect of a railway station, but noted that some very nice cottages had been built on the beach and that the area had become popular with Edmonton day trippers. It was also noted that a summer station had been built by the GTPR. McLean expected that the rest of the beach lots would sell, as would some of the lots farther away from the lake, because the beach had been reserved for the use of all.

The department offered 357 lots for sale at Wabamun on the same terms as the lots sold in 1910, except that the purchaser was not required to erect a building worth at least $300 within a year of purchase.

The Record of Sale shows that 49 parcels were sold at the 1912 auction, for a total of $5352.00. Thirty-one of the sales were for most of the remaining beach lots. All but four of these lots sold above their upset prices – some lots selling for as much as four times the upset price. In addition, 18 inland lots were sold, mostly at or slightly above their upset prices. Many of the 1912

sales, especially those for the beach lots north of the railway, were later cancelled because the buyers failed to fulfill their purchase contracts, some paying nothing after the initial deposit.

Incorporation of Village of Wabamun Beach (Kapasiwin), 1913

On October 25, 1913, the Alberta legislature passed an act to incorporate the Village of Wabamun Beach on part of the Wabamun town plot. The village included the land south of the Grand Trunk Pacific right of way and west of Burntstick Avenue, and also included the road allowances, the streets, and the beach fronting Wabamun Lake. Later, the village was renamed the Village of Kapasiwin Beach. (Although the legislation stated specifically that the village included the roads, road allowances and the beach "as far as it had been granted by the Crown," these were not transferred until 1932, when the federal government transferred them to the Province of Alberta.)

Transfer of Streets and Lanes to Alberta, 1932

On December 9, 1931, the village council of Kapasiwin wrote to the Secretary of Indian Affairs and requested the transfer of the streets and lanes within the village to the Province of Alberta. As requested, the streets and lanes south of the railway and west of Burntstick Avenue were transferred to the Province of Alberta by Order in Council PC 278 on February 5, 1932. The transferred streets and lanes included the beach and Wapumeg Avenue – the road allowance J.K. McLean had surveyed between the beachfront lots and the beach.

The village then applied to the province for the closure of Wapumeg Avenue, along the beach. The province did as requested and closed the road allowance, at the same time granting an easement to each beach lot owner of all the land between the owner's lot and the water's edge. The Sunday School Association later reported that in 1932 a fence had been erected by the beach lot owners at the rear of all the beach lots, running the full length of Gibbons Avenue – from the railway to the southern boundary of Block 1. The combined effect of the fence and the easement was to grant a private beach to the owners along the waterfront. This action also closed off access to the beach for all inland lot owners, except for a small public area at the north end of the village.

In 1936, the Crown returned all the unsold surrendered lands east of Burntstick Avenue to reserve status – a total of 420 acres, or almost two-thirds of the lands that had been surrendered 30 years earlier.

In 1996, the Paul First Nation submitted a claim to the Minister of Indian Affairs alleging mismanagement of the sales of the surrendered lands. This claim was partly validated and accepted for negotiation on July 10, 1998. Among the parts of the claim that had been accepted were the failure of the Crown to sell lots between 1912 and 1936, and the transfer of the beach and the road allowances to Alberta in 1932.

PART III

ISSUES

2000 CLAIM – PAUL INDIAN BAND CLAIM – 1906 SURRENDER OF THE KAPASIWIN TOWNSITE LANDS

Issue 1 Was the surrender of the Kapasawin Townsite, in 1906, void because the Crown did not include in the surrender a term that 150 feet of beach and a street would be reserved from the surrender or the sale?

Issue 2 Did the Department fail to follow the *Indian Act* and its own Departmental policies?

(a) Did they fail to comply with s. 49 of the *Indian Act*?
  (i) Was the surrender meeting properly called?
  (ii) Did the majority of male members take part in the surrender meeting?
  (iii) Was the surrender assented to by a majority of eligible voters?
  (iv) Was the affidavit valid?

(b) Did the Department fail to follow its own policy?

(c) If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?

Issue 3 Did the Crown breach its fiduciary duty to the Band by failing to reserve the minerals and any mines from the surrendered lands?

Issue 4 Did the Crown breach any pre-surrender fiduciary duty, as follows:

(a) Did the Crown ensure that the Band adequately understood the surrender?

(b) Did the Crown engage in tainted dealings to influence the surrender vote?

(c) Did the Crown fail to protect the Band from a "foolish, improvident and exploitative" surrender?

(d) Did the Crown take extra caution in light of the Band having ceded or abnegated its decision-making powers?

(e) A result of any of the allegations set out in Issue 2?

1996 CLAIM – PAUL INDIAN BAND – MISMANAGEMENT CLAIM

Issue 1 Did the Crown wait four years after the surrender before selling the land and did this result in lower value being received because of lost speculative value?

Issue 2 Did the Crown proceed with the sale despite knowing that a railway station would not be built and that this was one of the original purposes of the surrender, i.e., to have a railway community, and did the Crown fail to consult with the Band with respect to this?

Issue 3 Did the Crown fail to properly advertise the sale?

Issue 4 Did the Crown unilaterally change the terms of the sale by adding a term that a residence would have to be constructed within 1 year, contrary to the surrender agreement and without Band consent?

Issue 5 Did the Crown hold a second sale in 1912 without consent of the First Nation at the same time as the sale of the Duffield townsite?

Issue 6 If any of Issues 1–5 is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the First Nation?

Issue 7 Which compensation criteria should apply in the determination of the Mismanagement Claim? (In respect of this issue, Canada notes content of July 10, 1998, letter of acceptance.)

PART IV

ANALYSIS

SURRENDER OF THE KAPASIWIN TOWNSITE, 1906

The first two issues in this inquiry require the panel to consider the legal regime imposed by the *Indian Act* for the surrender of reserve land.

Issue 1 Validity of Surrender

1 Was the surrender of the Kapasiwin Townsite, in 1906, void because the Crown did not include in the surrender a term that 150 feet of beach and a street would be reserved from the surrender or the sale?

For the panel to make a finding on this issue, a number of points must be assessed. First: was reserving the beach an oral term of the surrender? And if so, was it to have been reserved from the surrender or was it to have been reserved from the sale? Second, what did happen with the beach? If the record sets out that the beachfront was either surrendered or sold, was that a breach of the surrender, and when did it occur? Third, if the panel finds that reserving the beach from either surrender or sale was an oral term of the surrender and that the Crown failed to reserve the beach, either from surrender or sale, was the breach so fundamental that the entire surrender should be voided.

There is very little on the written record that deals with any discussions that might have taken place either at the surrender meeting or during the months leading up to the surrender. There was no mention of the beach in a report sent by Indian Agent Gibbons to headquarters, in which he stated that "the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite or resort should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them."[10]

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[10] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

The surrender document itself does not mention that the beach was to be reserved, either from surrender or sale,[11] nor is there anything about the beach in the Surrender Affidavit.[12] The only written information we have comes from the Surveyor, J.K. McLean. In a letter dated six days after the surrender document, he wrote that during the surrender meeting "it was decided ... to reserve the Beach from being sold, a width of about 150 feet along the Lake including a street to be reserved from sale by the Department...."[13] McLean's survey documents setting out the townsite show that the beachfront lots do not extend to the water's edge, reserving the beach for common use.[14]

The sales of the beachfront lots in 1910 did not include the foreshore. McLean wrote of the beachfront being "reserved in common"[15] when he wrote to the Deputy Minister in 1912.

The beach was part of the road allowance acreage transferred to the province in 1932.[16] At that time, the village of Wabamun Lake applied to Alberta for the closure of Wapumeg Avenue (the street running along the beachfront) as well as the closure of several of the road allowances leading to the beach.[17] The province issued the order in 1935 and granted an easement to each beachfront owner, granting each owner exclusive access.[18]

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[11] Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229–30).

[12] Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 250).

[13] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).

[14] J.K. McLean, Plan of the Townplot of Wabamun on Indian Reserve No. 133B (ICC Exhibit 7i).

[15] J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

[16] Order in Council PC 278, February 5, 1932, DIAND, Indian Lands Registry, Reg. No. 11627 (ICC Exhibit 1a, p. 626).

[17] Abbott and McLaughlin, Barristers and Solicitors, to T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, January 9, 1932, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 624).

[18] Order 7486, Board of Public Utility Commissioners for the Province of Alberta, February 28, 1935, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 645–46).

Positions of the Parties

The First Nation has argued both the law of fiduciary duties and contract law – the "meeting of the minds" that is required for a contract to form – and has taken two positions with regard to the beach:

- first, that the beach was to have been reserved from the surrender itself, and
- second, that if not from the surrender, it was to have been reserved from the sale of the lands.

Counsel for the Paul First Nation argued that as a result of the transfer of the beachfront to Alberta, the "Band lost the use of a significant portion of its own fishing station, as access to the entire beach was now restricted,"[19] and that this would not have happened if the department had respected the oral term and included it in the surrender. Counsel described the Crown's omission as no "mere technical breach,"[20] and argued that the result was a surrender that did not incorporate the intentions of the Band.

The First Nation argues that the reservation of the beach was an oral term that was not incorporated into the surrender document, and as such was a fundamental condition to the surrender, such that the Band would not have voted to surrender had the Crown not agreed to the condition.[21] As a result of the failure of the Crown to incorporate the term into the written surrender agreement, the First Nation argues that the surrender should be voided "because there was no meeting of the minds in the surrender document."[22] The First Nation also argues that the failure to incorporate the oral term into the written surrender is a breach of fiduciary duty on the part of the Crown, and that because the standard of conduct expected from a fiduciary is very high, "to the extent that this is not done, the transaction is void."[23] The First Nation has also argued that it does not matter whether the

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19 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 16.

20 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 16.

21 ICC Transcript, May 12, 2005, p. 130 (Ranji Jeerakathil).

22 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 19.

23 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 19.

reservation was from the surrender or from the sale, "because we are not sure whether the native people would have appreciated the difference."[24]

Canada argues that the beach was to be reserved from sale, but not from the surrender, since the beachfront "was a significant feature in improving the value of adjoining town lots"[25] and that reserving the beach for the Band's "continued use as a fishing station ...would have been totally incompatible with their desire to sell the lots for profit."[26] Canada argues that the breach occurred in the post-surrender management of the lots, not at the time of surrender.

Panel's Findings

The first part of this issue that must be decided is whether the beach was to have been reserved from the surrender and retained only for the use of the First Nation; or whether it was to have been surrendered, but reserved from sale.

There is little on the written record that answers the question unequivocally. In Agent Gibbons' letter following the August meeting, he makes no reference to the beach, but does state clearly that the purpose of the surrender was to provide lots "for a townsite or resort."[27] Only Surveyor McLean's letter mentions the beach, and he is specific that the decision was "to reserve the Beach from being sold."[28]

Had the beach been reserved from the surrender, the First Nation could have continued to use it as a fishing station. However, Canada's argument that such a reservation would have defeated the purpose of the surrender makes sense. Allowing the beach to be surrendered but not sold would preserve access for the First Nation so that, for instance, the Band could launch small boats; and it

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[24] ICC Transcript, May 12, 2005, p. 124 (Ranji Jeerakathil).

[25] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 22.

[26] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 22.

[27] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

[28] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41). See also J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

would have provided a common area for all to use. Had the Band retained the beach solely for its own use, it is doubtful that there would be many buyers, or that they would pay the upset prices. The Crown would have known this; and if the goal of the surrender were to provide lots for either a townsite or a resort, as Gibbons stated in his August letter, then it does not make sense that the Crown would have managed the surrender in a way that would have made it more difficult to sell the beach lots and almost impossible to sell any of the back lots to buyers attracted to the beach.

Therefore, J.K. McLean's statement that the beach was to have been reserved from sale makes sense, and it is doubtful that a surveyor of McLean's experience would have confused the concepts of surrender and sale. We find then that the reservation of the beach was an oral term of the surrender and that the Band's intention was to reserve the beach from sale.

The next part of this issue to be decided is whether the Crown's failure to incorporate the term into the written surrender was sufficient to render the surrender void.

The First Nation has argued that since the document did not reflect the Band's intention, there was no "meeting of the minds," and therefore the surrender was void. However, the record shows that Canada did reserve the beach from sale until 1932. In 1931, the Village of Wabamun wrote asking for the transfer of the streets and lanes so that it could make improvements.[29] Canada responded to the request with Order in Council PC 278 in 1932.[30] Although the Order in Council did not specify that the beach was to be transferred, on the map attached to it is a notation that "Wapumeg Avenue includes all the land and beach to the edge of the water."[31] The result was that Canada transferred the beach and the road allowances to the province without a reservation that the beach remain public property and therefore accessible to First Nation people as well as the

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[29] Abbott and McLaughlin, Barristers and Solicitors, Edmonton, to Secretary, DIA, December 9, 1931, LAC, RG 10, vol. 3371, file 11A-7-1, pt 1 (ICC Exhibit 1a, pp. 620–21). There is nothing in the letter to indicate why this was taking place in 1931, but it is probable that the Village was aware that until the Natural Resources Transfer Agreement (NRTA), 1930, most Crown lands in Alberta were under the control of the federal government. After passage of the NRTA, only the "streets and lanes" of villages on surrendered reserve land remained under the control of the Dominion and had to be transferred separately.

[30] DIAND, Indian Lands Registry, Reg. No. 11627 (ICC Exhibit 1a, p. 626).

[31] Land Titles Office, North Alberta Land Registration District, Plan 4722AQ, "Plan of the Townplot of Wabamun on Indian Reserve No. 133B at the East End of Wabamun (White Whale) Lake," surveyed by J.K. McLean, Dominion Land Surveyor, 1906 (ICC Exhibit 7k).

immediate cottage owners and the general public. We find that until 1932, Canada was acting in accord with what must have been the Band's intention for the surrender to have made any sense for them. Accordingly, we find that in spite of the fact the oral term was not incorporated into the written surrender, the Crown abided by the term for 26 years until the transfer of the beachfront and the rights of way to the province of Alberta. We will not comment on the transfer, because it is part of the accepted claim between Canada and the First Nation.

The Crown's failure to insert into the surrender document the oral term reserving the beach from sale, was not a fundamental breach of the surrender since the intentions of the Band were met at that time and continued to be met for decades. The First Nation did receive many of the benefits that both it and the Crown foresaw as the result of the surrender, including the right to use the beach until 1932.

Accordingly, we conclude that the Paul Band's surrender of the Kapasiwin Townsite in 1906 was not void, because the Crown did observe the oral term of the surrender and, until 1932, reserved the beach from sale.

Issue 2 Department's Adherence to *Indian Act* and Departmental Policies

2 Did the Department fail to follow the *Indian Act* and its own Departmental policies?

(a) Did they fail to comply with s. 49 of the *Indian Act*?
- **(i) Was the surrender meeting properly called?**
- **(ii) Did the majority of male members take part in the surrender meeting?**
- **(iii) Was the surrender assented to by a majority of eligible voters?**
- **(iv) Was the affidavit valid?**

(b) Did the Department fail to follow its own policy?

(c) If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?

Adherence to Indian Act

Taken as a whole, this issue asks the panel to determine whether the statutory regime set out in the *Indian Act* was followed, and if not, the consequences of the Crown's failure to abide by the requirements set out in the *Indian Act*.

Section 39 of the 1886[32] *Indian Act* prohibits the direct sale of land to third parties and sets out the statutory requirements of surrender. It is reproduced below in its entirety:

> 39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions: —
>
> (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;
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> (b) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; before some judge or a superior, county or district court, stipendiary magistrate or justice of the peace, or in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or in either case, before some other person or officer specially thereunto authorized by the Governor in Council; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[33]

Although the Act is specific about the requirement for an affidavit to be signed by both the Crown and the First Nation, there is nothing in the Act that specifies the nature or the form of the

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[32] Although the parties agreed during the oral hearing that the *Indian Act* in effect at the time of the surrender was the *Indian Act*, RSC 1906, c. 81, it was not proclaimed into law until January 31, 1907. Accordingly, the Act in effect is the *Indian Act*, 1886, c. 43, as amended. The surrender provisions of the two Acts are numbered differently, but do not differ in substance.

[33] *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1898, c. 34, s. 3.

surrender agreement itself. There is also nothing in the Act that requires the Crown to keep records of either the proceedings of the surrender meeting, a voters list, or a statement of the recorded vote.

The purpose of the requirements is to ensure that the surrender is a "voluntary, informed, communal decision."[34]

The first observation we must make is that there is very little written documentation of this surrender. There are no minutes of the surrender meeting, no record of who attended – either on behalf of the First Nation or the Crown – no evidence of an interpreter, and no recorded vote. We have a surrender document with its nine signatures or marks, and a sworn Affidavit of Surrender. We can be reasonably certain that the Surveyor, J.K. McLean, attended the meeting because of his statement regarding the condition that the beach be reserved from sale,[35] as well as his later memorandum confirming the reservation.[36] It is also likely that each of the 10 band members, listed by name on the surrender itself, attended the meeting, as did Indian Agent James Gibbons.

We shall consider each of the requirements set out in the statute in turn.

Was the Surrender Meeting Properly Called?

The First Nation argues that it is not clear when the surrender meeting took place. It cites the August 15th correspondence from Agent Gibbons in support of the proposition that the meeting actually took place on August 14th. In his letter, Gibbons wrote:

> ... I held a conference with the Indians of Paul's Band on the 14th instant with the object of ascertaining whether of not they were favourable to surrendering the Broken Sections 1,6, and 12, forming the North West corner of their Reserve.
>
> I found that the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite

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[34] *Chippewas of Sarnia v. Canada (Attorney General),* [2000] 51 OR (3d) 641 (CA) at para. 20.

[35] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).

[36] J.K. McLean, Dominion Land Surveyor, to Deputy Minister, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

> or resort should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them.[37]

Other evidence the First Nation cites is a Band Council Resolution passed almost two years later, on July 28, 1908, which cites the date of the surrender meeting as August 14, 1906.[38] The First Nation has also argued that whether the band members had sufficient notice of the meeting is more important than the form of the notice. Sufficient notice, it has stated, can be inferred from the number of members who attended; that "if most of the eligible voters attended, notice can, in essence, be presumed sufficient."[39]

Canada has argued the same presumption: that voter turnout is a measure of sufficiency of notice,[40] but that "[i]t is impossible to determine from the available records the precise number of eligible adult male voters in the Band, or how many of them attended the surrender meeting."[41] Canada has also argued that the evidence is clear that the surrender meeting took place in September, not August, relying on the Agent's report of the meeting held in August and the correspondence between Surveyor McLean and the department.

We find that the evidence is clear that the surrender meeting took place on September 11, 1906. Agent Gibbons' report of August 15, 1906, said nothing about whether a vote had been taken – only that he had held a conference with the band members and they were "willing to surrender."[42] He also asked the department to forward the Form of Surrender and to instruct McLean to make the necessary surveys. The Deputy Superintendent General, Frank Pedley, sent the required surrender document to Gibbons on September 1, 1906. The same day, J.D. McLean, Secretary of Indian

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[37] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

[38] DIAND, Indian Lands Registry, Reg. No. 11629, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 349).

[39] Written Submission on Behalf of the Paul First Nation, February 7, 2005, p. 22.

[40] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

[41] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

[42] James Gibbons, Indian Agent, to Secretary, DIA, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-Y-1, pt 1 (ICC Exhibit 1a, p. 216).

Affairs, sent a telegram to J.K. McLean, the Surveyor, instructing him to subdivide a portion of the reserve. This correspondence indicates that the surrender had been contemplated, but also had not yet been taken. Confirming the intention of that correspondence are two letters in August. The first is from Surveyor McLean to Secretary McLean, in which the Surveyor stated, "Mr. Gibbons the Agent informs me, that there is some prospect of a further surrender at that Reserve."[43] The second is from the Secretary to David Laird, the Indian Commissioner, in which he wrote "that there is a proposal to be made to have a portion of the White Whale Lake Indian reserve surrendered."[44] Both these letters suggest very strongly that in August 1906 the surrender was still only a proposal. What is most convincing to us, however, is the Surveyor's letter of September 6, 1906.

In that letter, McLean stated that he "completed the resurvey of the outlines of the White Whale Lake Indian Reserve"[45]; but with regard to the subdivision he had been asked to plot, he could not complete the survey "until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed."[46] McLean was an experienced surveyor and would have been well aware of the legal status of the land he was surveying. If the surrender meeting had been held before September 6, when McLean wrote his letter, it is highly probable that he would have known that status.

Further, there is no requirement in the *Indian Act* that the surrender document be signed on the same date as the vote. The First Nation stated that if, in fact, that had happened, it would have been "fatal to the surrender as the surrender document itself was not assented to by a majority of the Indians, at a meeting called for that purpose as required by section 49 of the *Indian Act*."[47] The *Indian Act* does not require that the band members assent to the surrender document; it requires that

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[43] J.K. McLean, Dominion Land Surveyor, Edmonton, to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 218).

[44] Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, August 26, 1916, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 219).

[45] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 226).

[46] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

[47] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 24.

they assent to the surrender itself.[48] Had the band members voted on a day earlier than September 11, 1906, but signed the surrender on that day, it would have been valid. Nevertheless, the correspondence indicates that the vote had not taken place by September 6, 1906, and that, on the balance of the evidence, it took place on September 11, 1906.

Unfortunately, the Elders who testified at the community session could not offer any information about a meeting. Robert Rain, for instance, when questioned by Commissioner Holman, was very clear that his grandmother had never said anything to him about a meeting.[49] Nevertheless, the correspondence indicates that a meeting took place and the surrender document was signed on September 11, 1906; and the Affidavit of Surrender of two days later, September 13, states clearly that the surrender was taken at a meeting called for that purpose.[50]

After considering all the evidence available to us, we conclude that a properly called surrender meeting, for the purpose of deciding upon a surrender, was held on September 11, 1906.

Did the Required Number of People Agree to the Surrender?

To establish whether the required number of people agreed to the surrender we must consider two questions:

- Did the majority of male members take part in the meeting?
- Was the surrender assented to by a majority of eligible voters?

Both Canada and the First Nation have argued that the sufficiency of notice of the surrender meeting can be inferred from its attendance; if a majority of members attended, then, presumably, notice was sufficient. It is not difficult to see how this argument can quickly become circular, so it is necessary to consider the evidence that exists.

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

49 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 18, Robert Rain).

50 Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 238).

Unfortunately, there is almost no documentary evidence within the written historical record and nothing from the community session that would aid the panel in determining whether a majority of the male members of the Band did, in fact, attend the surrender meeting, and if they did, whether a majority of those attending voted in favour of surrender. The historical documents do not contain minutes of the surrender meeting, a voters list, or a tabulation of the actual vote taken at the meeting.

Nine band members signed the surrender document, with one space left blank for Reindeer, who was known to be opposed to the surrender.[51] Two of the names, those of Baptiste Peter and Enoch Bird, do not appear on the most recent paylist for the Band, that of July 1906.[52]

The First Nation has argued that "the band list is the best evidence of eligible voters,"[53] and that the reason the two named men did not appear on the paylist was because they were too young and, therefore, ineligible to vote.[54] The First Nation also stated there was clear evidence from the community session "that provides [there] was evidence of the hunting practices of this nation,"[55]and that at the time of year, many of the male members of the Band "were, in fact, gone from the reserve in the fall."[56]

Canada takes the position that the paylist "is clearly not conclusive"[57] in that it does not provide the information which the *Indian Act* requires: that of being 21 and habitually resident and interested in the reserve.[58] Canada also disputes the First Nation's contention that both Enoch Bird and Baptiste Peter were too young to vote and has taken the position that both were eligible but, for

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51 J.K. McLean, Dominion Land Surveyor, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 242).

52 Paul Band Treaty Annuity Paylists, July 20, 1906, LAC, RG 10, vol. 9439, pp. 692–99 (ICC Exhibit 1b, pp. 27–34).

53 ICC Transcript, May 12, 2005, p. 142 (Ranji Jeerkathil).

54 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 27.

55 ICC Transcript, May 12, 2005, p. 150 (Ranji Jeerakathil).

56 ICC Transcript, May 12, 2005, p. 150 (Ranji Jeerakathil).

57 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 26.

58 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 27.

some reason, were still paid as members of their fathers' families. The only evidence Canada has with regard to Peter is his appearance on the 1908 paylist in his own name, with the notation "M. from No. 10"[59]; at that time, he was listed on his ticket with his wife, who came from No. 43.[60] Canada says the evidence for Enoch Bird is better: he appears in his own name on the 1909 paylist, with the notation beside his father's name, "boy as man No. 71."[61] Canada argued that further research uncovered a copy of the Indian Record, which showed Bird had been born in 1879 and was therefore 27 at the time of the surrender. Canada also stated that although there were deficiencies in the record, it was apparent "that both Peter and Bird were at the meeting; that they were accepted by the Chief and other Headmen as being eligible to vote; that the Indian Agent present would have no interest in having such a vote set aside because a valid objection could be made concerning the eligibility of individuals whom he had permitted to vote,"[62] and that the circumstances made it more likely both men were eligible than not.

Canada asserted that the First Nation has failed to prove that the majority of male members had not attended the meeting, or "that a majority of those present failed to vote in favour of the surrender, or that any improper voters signed the surrender document".[63]

The First Nation has taken the position that with the historical record as deficient as it is, the Crown must prove that its officials complied with the surrender requirements set out in the *Indian Act*.[64] When questioned during the oral hearing about the lack of records, counsel for Canada stated

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[59] Paul Band Treaty Annuity Paylists, July 11, 1908, LAC, RG 10, vol. 9441, pp.700–7 (ICC Exhibit 1b, pp. 39–42). The expression "M from No. 10" means that his father was #10, Peter, although by 1908, Peter had died, because #10 was noted as "Peter's widow, Emma." Before 1908, he would have received his payment as a member of Peter's family and would have been listed on the paylist as a Boy. The listing as a Boy says nothing about his age, only that he was a son in the family and had not yet established his own family.

[60] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 28. Similarly to Baptiste Peter, the reference to #43 is an indication that Baptiste Peter's wife was a daughter of #43.

[61] Paul Band Treaty Annuity Paylists, July 11, 1908, LAC, RG 10, vol. 9442, pp. 704–11 (ICC Exhibit 1b, pp. 43–46).

[62] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 30.

[63] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 29. Note that Canada uses the expression "Form of Surrender." We have chosen to use the term "surrender document" throughout the report.

[64] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 29.

that the Crown was obligated only to follow the law. Counsel conceded that Canada did not know how many people were at the meeting or how many voted against it, but argued that the men who signed the surrender swore it was assented to by a majority of the Band.[65]

In our experience, it is not unusual for the documentation of early surrenders to be inadequate to prove definitively that a majority of the voting band members attended a surrender meeting and that a majority of that number voted in favour of the surrender. Our approach to this problem is informed by the mandate of this Commission. The Indian Claims Commission is mandated to review specific claims that have been rejected by the government, on the basis of Canada's Specific Claims Policy, which puts the burden of proof on the claimant band to establish a breach of the Crown's lawful obligations. *Outstanding Business* states that the amount of compensation offered in an accepted claim "will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant."[66] It is necessary in this claim, therefore, to examine the available evidence, much of it circumstantial, in order to decide whether the Paul Band has established that the surrender was invalid for lack of the required majority vote.

We are also mindful that at the Indian Claims Commission we encourage the parties to work as collaboratively as possible. For instance, the issues are set down only after there is agreement from both Canada and the First Nation that they cover the claims which are in dispute before the parties, and that the issues set the parameters of the inquiry. As a result, we expect both parties to bring forward the best evidence available to aid the panel in making determinations about the issues they have set together. Where there are gaps in our understanding of the historical facts, we look to both parties, not only the First Nation, to present their best arguments in the circumstances and to aid us in our understanding of what happened.

The 1886 *Indian Act* does not require documentation setting out the names of the voters attending the surrender meeting or a record of the vote for and against a surrender. The requirement is that a majority of the male band members who assent to the surrender be the full age of 21, habitually reside on or near the reserve, and are interested in the reserve. This requirement is a

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65 ICC Transcript, May 12, 2005, pp. 187–89 (Douglas Faulkner).

66 *Outstanding Business,* 31, reprinted in (1994) 1 ICCP 171 at 185.

mandatory precondition for the validity of a surrender. As Justice Killeen stated in *Chippewas of Kettle and Stony Point*:

> Section 49(1) lays down, in my view, in explicit terms a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.
>
> Bearing in mind the prophylactic principle at stake in the *Royal Proclamation* ... it is simply impossible to argue that s. 49(1) does not lay down a mandatory precondition for the validity of any surrender.[67]

The Commission has relied on this statement of law in previous inquiries when discussing the mandatory and directory surrender requirements of the *Indian Act*.[68]

Moreover, the statutory preconditions for a valid surrender vote have been interpreted as requiring what has been termed the "double majority." This requirement was stated for the first time by the Supreme Court in the case commonly known as *Cardinal.*

The issue in *Cardinal* was whether the 1908 surrender of the Enoch Band's Reserve No. 135 was valid. A majority of the male members of the band eligible to vote had attended the meeting, and a majority of those attending the meeting had voted in favour of surrender. That number, however, did not amount to a majority of all male members of the band. Both at trial and at appeal, the Federal Court upheld the surrender as being valid. The Enoch Band appealed to the Supreme Court of Canada. Writing for the Court, Justice Estey stated that the surrender was valid and that the proper way to construe s. 49 of the 1906 *Indian Act*[69] was as requiring a relative double majority:

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[67] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 25 OR (3d) 654 at 685 (Ont. Ct. Gen. Div.), addendum (1996) 31 OR (3d) 97 (CA). For our purposes, s. 49(1) of the 1936 *Indian Act* referred to here is the equivalent of s. 39(1) of the 1886 Act.

[68] ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 69; ICC, *Duncan's First Nation Inquiry, 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 194.

[69] It has been noted before, but it should be stated again at this point, that the 1906 surrender of IR 133B of the Paul Band in September 1906 took place under the 1886 *Indian Act*, since the 1906 consolidation had not yet been proclaimed into law. Since the wording of s. 39 of the 1886 Act is almost identical to that of the 1906 Act, differing only in the list of men who might swear the affidavit, where the Court refers to s. 49, it is equally applicable to s. 39 of the Act in force during this surrender.

> Thus, when read together, the requirement is that there be a meeting of eligible members of the band and that in attendance at that meeting, there must be a majority of male members of the full age of twenty-one.
>
> ... the common law expresses again the ordinary sense of our language that the group viewpoint is that which is expressed by the majority of those declaring or voting on the issue in question. Thus, by this rather simple line of reasoning, the section is construed as meaning that an assent, to be valid, must be given by a majority of a majority of eligible band members in attendance at a meeting called for the purpose of giving or withholding assent.[70]

In the circumstances of this claim, where the documentary evidence of a valid majority vote is found in the Affidavit of Surrender, it is instructive to examine the language of the affidavit and confirm, at least, that the affiants were in a position to swear to the truth of their statements. Chief David Bird attested that "the annexed Release or Surrender was assented to by him and a majority of the male members of the said Band of Indians of the full age of twenty-one years then present."[71] In the same affidavit, Indian Agent James Gibbons declared that a majority of male band members of 21 years of age assented to the surrender. Both signatures were witnessed by John Foley, and both declarations were sworn before a Justice of the Peace. Given Chief Bird's long tenure as Chief of the Paul Band, we have no reason to question his knowledge of the voters' ages or their other circumstances, such as habitual residence and interest in the reserve.

The relevant paylists for the Paul Band are unreliable for determining whether Baptiste Peter and Enoch Bird were old enough to vote. The lists were designed to track annual treaty payments made to band members. They list each head of household by name and number, spouses (if any), and genders of any children. The ages of children are not listed. Since it was not common for single people, other than widows or widowers, to live alone, most men took their own ticket numbers at the time they established families. They may have been older or younger than 21 at the time, and the paylist does not tell us that. The first records of Baptiste Peter and Enoch Bird on the paylists of 1908 and 1909, respectively, coincide with notations that each had taken a spouse and that each had been

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[70] *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 SCR 508 at 516–17.

[71] Affidavit of Surrender, Paul's Band, September 13, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 238).

listed previously as a member of his father's household, identified by its ticket number. Because of the additional research showing that Mr Bird was 27 in 1906, we are satisfied that he was an eligible voter. As for Mr Peter, we rely on Chief Bird's sworn statement that all the men who voted were of the required age, and we conclude that Mr Peter, too, was likely of age.

We conclude that the consent of the Paul Band to the surrender was valid and that the First Nation has not established its claim that a majority of band members eligible to vote did not attend the surrender meeting, or that a majority of those who attended did not vote in favour of the surrender.

Was the Affidavit Valid?

The Affidavit of Surrender is one of the requirements set out in the *Indian Act*. During this period in Canadian history, the Crown had written a standard form affidavit, to which the Agent would add the particulars of the surrender.

The First Nation argues that the affidavit is so sparse that it cannot save its own irregularities, much less any other inconsistencies, such as the requirement for the double majority we have already discussed.[72] Among the deficiencies, counsel for the First Nation listed the lack of a stated date for the meeting, the lack of an identified official present for the taking of the surrender vote, and the lack of correct commissioning of the surrender document. It was sworn before a Justice of the Peace, J.B. Butchard, whereas, according to the First Nation, it should have been sworn before one of the officials listed in s. 39(b) eligible to swear the affidavits in Manitoba or the North-West Territories. The First Nation also states that the affidavit swears to information that Chief David Bird would have known to be incorrect: that all the persons assenting to the surrender were over the age of 21. As discussed above, the First Nation has taken the position that both Baptiste Peter and Enoch Bird were not old enough to vote.

Canada disputes the First Nation's contention about both Baptiste Peter and Enoch Bird, and regards the deficiencies with respect to the date and the name of the official taking the surrender vote

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[72] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 30.

to be "irrelevant omissions."[73] Canada states that both Bird and Peter were at the meeting and they were accepted by the Chief and the other headmen as being eligible to vote. Canada also submits that swearing the affidavit before a Justice of the Peace was perfectly acceptable.

We must agree with Canada on this question in all respects, first, because the sworn Affidavit of Surrender is only a reflection of the agreement set out in the surrender document. We have found earlier that it is probable that Enoch Bird and Baptiste Peter were old enough to vote. Certainly, since they signed the surrender document, there can be no disagreement that the Chief and other signatories to the document accepted both men as Principal Men, having a rightful place in the gathering. The date of the vote is not required on the Affidavit of Surrender. As for the failure of the Indian Agent or other official to place his name on the document, again this is a minor, technical breach that cannot overturn what is an otherwise valid surrender. The Affidavit of Surrender is completely in agreement with the surrender document and the events that had transpired to date.

There is also no question that a Justice of the Peace was one of the individuals able to swear the affidavit. At this point it is worth repeating that section of the *Indian Act*:

> 39. (b) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, before some judge or a superior, county or district court, stipendiary magistrate or justice of the peace, or in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or in either case, before some other person or officer specially thereunto authorized by the Governor in Council; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[74]

One of the rules of statutory interpretation is that statutes are not to be given a meaning that would result in an absurdity. In this case, we understand that the specific officials listed for Manitoba

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[73] Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 30.

[74] *Indian Act*, RSC 1886, c. 43, s. 39, as amended by SC 1898, c. 34, s. 3.

and the North-west Territories are in addition to those already enumerated. Omitting those officials would result in an absurdity, because it would mean that the affidavits could be sworn before only one person, and that person would have been in Winnipeg. It makes no sense to interpret the section to mean that in more populated areas of Canada, more people would have been available; and in less populated areas, fewer. Surely the objective was to make it easier, not more difficult, to get the affidavit sworn in the less populated areas of the country.

We conclude, then, that Chief Bird and Agent Gibbons' swearing of the Affidavit of Surrender before a Justice of the Peace met the requirements set out in the *Indian Act* and that the affidavit itself is valid.

Did the Department Follow Its Own Policy?

The argument that the department failed to follow its own policy was brought forth by the First Nation and deals with a policy set out in 1914 by Duncan Campbell Scott, Deputy Superintendent General of Indian Affairs. It is entitled "Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves."[75]

It sets out in some detail how surrenders are to be taken and includes requirements to keep voters lists and a record of those who vote on a surrender. The memorandum is very clear about how to call the surrender meeting and how much notice should be given. It requires that an interpreter be present. It requires the official taking the surrender to report to Ottawa in some detail about how, when, and by whom the surrender was granted.

It can be seen immediately that the memorandum is a restatement of the requirements of the *Indian Act*, but with additional instructions to the agents to ensure documentation of the assent to surrender.

The First Nation has argued that Duncan Campbell Scott's interpretation of the *Indian Act* requirements, as set out in his memorandum, are reasonable.[76] The First Nation also argued that, given the Commission's previous statements about the interpretation to be given to Scott's

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[75] Duncan C. Scott, *Instructions for the guidance of Indian Agents in connection with the surrender of Indian Reserves*, Ottawa, May 15, 1914, LAC, RG 10, vol. 7995, file 1/34-1.0 (ICC Exhibit 1a, p. 552).

[76] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 31.

memorandum, the events of the Kapasiwin Townsite surrender show "a marked departure from the terms of the Memorandum."[77] The First Nation recited a number of failures of the Crown to abide by these guidelines, leading to a conclusion that the circumstances of the surrender "are so severely inadequate that there is no way a fiduciary can be said to have discharged any duty whatsoever to the Paul Band."[78]

Canada's position is straightforward: the date of the surrender is 1906; the date on the memorandum is 1914. "The Band's submissions do not disclose how local Indian Agents were supposed to have foreseen the details set out in the memo."[79]

The argument can probably be made that Scott wrote his instructions because of departmental concern over surrenders for which documentation was lacking. Nevertheless, we must agree with Canada that this issue can be determined solely by looking at the dates of the transactions. The guidelines were not in place in 1906. Officials of 1906 cannot be held to a standard set out eight years later. The Commission has used these guidelines before and has found them useful, but that was with regard to a surrender taken from the Duncan's First Nation in 1928, 14 years after the publication of the guidelines.[80]

As a result, we must conclude that there was no failure of the Crown to follow a policy that was not in effect in 1906 or for several years to come.

Did the Crown Breach Any Legal or Equitable Duty?

If any question in Issue 2(a) or (b) is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the claimant and with what consequences?

We have answered none of the questions in either Issue 2(a) or Issue 2(b) in the affirmative. As a result, we find that the Crown met the statutory requirements of the *Indian Act* in the taking of the

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77 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 33.

78 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 34.

79 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 31.

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

surrender of IR 133B in 1906. As a consequence, we do not find there has been any breach of either a legal or an equitable duty owed by Canada to the First Nation.

Issue 3 Crown's Fiduciary Duty to the Band

3 Did the Crown breach its fiduciary duty to the Band by failing to reserve the minerals and any mines from the surrendered lands?

Both Canada and the First Nation agreed that, during the 1906 discussions about IR 133B, there was no discussion of either minerals or mineral rights. Earlier that year, in June, the First Nation had surrendered marl deposits on 133A to the Crown, for lease. "Marl" is a general term for mineral precipitates, which in the case of the Paul Reserve were largely calcium carbonate and would have been useful in the building and brick-making industries of a century ago. It does not appear from the record before us that there were any marl deposits on 133B, the surrendered lands.

This, then, is primarily a legal question. Without knowing whether the mineral rights to the reserve land had any value, were they surrendered along with the rights to the surface in 1906? And if they were, should the Crown have reserved them from sale?

The First Nation cites the marl surrender of 1906 on 133A as evidence that the Crown knew there were potentially valuable minerals in the area and that it was a breach of the Crown's fiduciary duty to fail to reserve the rights.[81] Canada argues that, based on *Apsassin*, it was not a breach of the Crown's duty for the minerals to have been surrendered along with the surface rights in 1906. Both parties relied on *Apsassin* in support of their positions.

In *Apsassin*, the surrender of mineral rights was central to the dispute between the Beaver Band and the Crown in 1945. When the Band surrendered IR 172 for sale to the Director of the *Veterans' Land Act* (DVLA), nothing specifically had been said about mineral rights, even though mineral rights had been the subject of a surrender for lease five years earlier. When the DVLA subsequently sold the former reserve land to returning veterans, it transferred the mineral rights to them as well. When oil and gas was later found in that area, the veterans and their families owned the rights and were paid royalties. The Blueberry River and Doig River sued the Crown, arguing that

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[81] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 39.

the mineral rights should not have been part of the surrender or, at the least, that they should have been retained by the Crown and either sold or leased separately for the benefit of the Band.

The majority and minority opinions given by Justices Gonthier and McLachlin respectively, disagree on the first issue: whether the mineral rights were included in the surrender. Justice McLachlin, writing for the minority (which on this issue is in dissent), agreed with the First Nations that the mineral rights could not have been surrendered for sale in 1945 because previously, in 1940, they had been surrendered for lease. Justice Gonthier, however, decided that the mineral rights had been surrendered for sale in 1945, regardless of the earlier lease in 1940. He stated that although both the Crown and the First Nations had relied on common law property principles, he preferred to work from what he stated as his principle of the intention-based surrender:

> In my view, principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band, in relation to their dealings with I.R. 172. For this reason, the legal character of the 1945 surrender, and its impact on the 1940 surrender, should be determined by reference to the intention of the Band. Unless some statutory bar exists ... then the Band members' intention should be given legal effect.[82]

Justice Gonthier then turned to the wording of the 1945 surrender agreement, which had been signed by some band councillors, as well as the Chief, and concluded:

> Since this instrument effected the surrender of certain land forming a "reserve", it is reasonable to conclude that the term "Reserve", as used in the surrender instrument, was intended to have the same meaning as the term "reserve" in the *Indian Act*. ... s. 2(j) of the Act defines "reserve" as an unsurrendered tract of land including the "minerals ... thereon or therein". Therefore, the 1945 surrender included the tract of land forming I.R. 172, the minerals in that tract of land, and the right to exploit those minerals. On this basis, I must respectfully disagree with McLachlin J.'s assertion that the surrender document was silent concerning the mineral rights.[83]

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[82] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at para 6, (sub nom. *Apsassin*), Gonthier J.

[83] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at para 10, (sub nom. *Apsassin*), Gonthier J.

In *Apsassin*, the 1945 surrender being contested had been taken pursuant to the 1927 *Indian Act*, whereas the Paul Band surrender was taken under the 1886 Act. The wording of the two sections is slightly different, but does not differ in the iteration of what is included within the meaning of the word "reserve." In 1906, at the time of the Paul surrender, the reserve included "all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon and therein."[84]

Following Justice Gonthier's reasoning, then, the surrender of the Kapasiwin Townsite in 1906 by the Paul Band included the mineral rights to the 635 surrendered acres.

For the minerals to have been reserved, we would need evidence that the reservation was either a written or an oral term of the surrender. Unlike the oral term reserving the beach from sale, there is nothing in the record to indicate an intention on the part of the Paul Band to reserve any mineral interests on 133B from surrender. We must conclude, then, that the Band intended to surrender its entire interest in 133B, without any reservation.

Accordingly, we find that there is no breach of fiduciary duty on the part of the Crown for having failed to reserve the minerals from the 1906 surrender of IR 133B.

Issue 4 Crown's Pre-Surrender Fiduciary Duty

4 Did the Crown breach any pre-surrender fiduciary duty, as follows:

- **(a) Did the Crown ensure that the Band adequately understood the surrender?**
- **(b) Did the Crown engage in tainted dealings to influence the surrender vote?**
- **(c) Did the Crown fail to protect the Band from a "foolish, improvident and exploitative surrender?"**
- **(d) Did the Crown take extra caution in light of the Band having ceded or abnegated its decision-making powers?**
- **(e) As a result of any of the allegations set out in Issue 2?**

The listed sub-issues are the benchmarks suggested by the majority and minority judgments in *Apsassin* and, together with the nature of the fiduciary duty, have been used by the Indian Claims Commission many times as a reliable method of measuring whether the conduct of the Crown in the period leading up to a surrender of reserve land met the standard of a prudent fiduciary. They

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Indian Act, RSC 1886, c. 43, s. 2(k).

measure whether the assent given by the band to a surrender was voluntary, to use Justice Gonthier's words, "full and informed,"[85] expressing the band's intention; or whether it was only an expression of the Crown's desire for surrender.

Did the Crown Ensure that the Band Adequately Understood the Surrender?

The First Nation's position is that it is Canada's responsibility to show that it did not breach its fiduciary duties to the Paul Band at the time of surrender, particularly because, it alleges, in the early part of the 20th century Canada had a policy of encouraging surrenders from Indian reserves for the purpose of settlement.

As support for its proposition that the Crown failed to ensure the Band adequately understood the surrender, the First Nation has cited the short period of time between when the surrender was first discussed by the department, in a July 31, 1906, letter from Secretary McLean to the Indian Agent, until the surrender itself, a period of about only six weeks. The First Nation argued the "time frame could not have been sufficient to inform the Band about a complicated surrender, of land and *minerals*, for sale in town plots and based on the approaching railway."[86] The First Nation cited Agent Gibbons' letter of August 15, 1906, as being "suspect" because although he reported that the majority of the Band was willing to grant the surrender, he neglected to add that there was opposition.

The First Nation bases much of its contention that the Band did not understand the details of the surrender on two letters written early in September by the Surveyor J.K. McLean. Both are repeated here. On September 6, five days before the surrender meeting, J.K. McLean wrote to J.D. McLean in Ottawa:

> I have to state that I have completed the re-survey of the outlines of the White Whale Lake Indian Reserve.
>
> With regard to the subdivision into Town Lots of 133 B about to be surrendered, I am only able to re-run the roads laid out on the outside by the Dept. of

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

[86] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 41(emphasis in the submissions).

> Interior and run the line between the two ranges until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed. I also wish to consult him regarding the size of the Lots and other matters.
>
> If he does not reach here this evening I will go to the Agency and see him tomorrow and then to Edmonton for provisions, iron-posts, money and anything else needful on the survey returning with him Monday.[87]

Then, six days after the surrender, McLean wrote again, stating:

> In subdividing Indian Reserve 133B into town Lots I find that a small Indian Burying Ground occupies a prominent position on one or two of the most valuable Lots. Its existence was not mentioned at the meeting when the surrender was taken, nor do I think it was known to Mr. Agent Gibbons. It appears that the Indians who lives on 133B always refused to use the regular Burying Ground at the Mission, which is on 133A.
>
> Those who had used the small ground were present at the meeting and signed the surrender excepting one named Reindeer. The latter is a Headman very old and feeble and refused to sign or speak. I think however he feels aggrieved, as a few days ago his tepee was on one of the street lines and before we could offer to assist in lowering it he rushed out and cut it on each side from top to bottom.
>
> The bodies will have to be moved as their remaining where they are will be a prominent eyesore in the Town Plot and greatly depreciate the value of a number of Lots.[88]

The First Nation says these letters are important because they demonstrate the short period of time in which the Agent had time to inform the Band of the consequences of surrender – time when, it appears, he was not physically on the reserve. The Band argues the resurvey of the reserve is important because it shows that the band members were not fully informed of the boundaries of their reserve and stated that "[A]t a time when a surrender of that very same reserve was

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[87] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, Vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 226).

[88] J.K. McLean, Dominion Land Surveyor, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279,393-2 (ICC Exhibit 1a, p. 243).

contemplated, this is a disturbing proposition, as the Band did not know exactly what it was giving up."[89]

The First Nation cites McLean's second letter as evidence that there was not a full discussion at the surrender meeting since, had there been, presumably both McLean and Gibbons would have known that there was a burial ground on the site.

In oral argument, counsel for the First Nation argued that the historical documents also show that the impetus for the surrender did not come from the Band but from Edmonton real estate agents; and that in response to inquiries made to the department in Ottawa about the beach on the Paul Reserve, "the Crown simply took this as another opportunity to advance settlement policy and moved ahead with surrender as opposed to ... really evaluating it."[90] The First Nation discounts Inspector Markle's letter of June 26, 1906, in which Markle reports that he had been asked by some band members for his opinion about whether it was wise for the Band to surrender land that would have been adjacent to the projected railway. The First Nation says that it was "simply a question for advice."[91]

The First Nation also cited the evidence of several Elders at the community session who stated that the land was only leased or loaned, but not sold.[92]

Canada cites several of the same documents but, understandably, from a different point of view. In particular, Canada cites the letter from Inspector Markle, in which he states that the band members asked him about the advisability of surrender, and in which he reports "that the Indians seemed very aware that the fishing station area would be valuable once the railway arrived,"[93] as evidence that the surrender was "a proposal of the band itself."[94] Canada also cites the Band's

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89 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 43.

90 ICC Transcript, May 12, 2005, p. 164 (Ranji Jeerakathil).

91 ICC Transcript, May 12, 2005, p. 166 (Ranji Jeerakathil).

92 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 44. The Elders cited were Mary Rain, Louise Bird, Violet Poitras, Lloyd Saulteaux, and Mike Rain.

93 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 37.

94 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 39.

involvement in the marl surrender in June and argues that, given the marl surrender, the re-marking of the reserve boundaries, and the examination of the lands proposed to be surrendered, there was a considerable Crown presence discussing the Kapasiwin Townsite surrender with band members.[95] Canada refutes the position that there was much opposition within the Band to the surrender, citing McLean's letter of September 6, 1906, which stated that "some of the Indians are opposed"[96] and arguing that "differences of opinion among Band members is commonplace as it is in any other community."[97] Where the First Nation argued that the surrender had been rushed, Canada stated it had been talked about by band members over a period of three months, not six weeks.

Before beginning any discussion of whether there had been a breach of Canada's duty to the First Nation at the time of the 1906 surrender, it is a good idea to set out some of the parameters of the Crown's fiduciary duty to First Nation peoples with regard to the surrender of their reserves. The Indian Claims Commission has dealt with the issue of fiduciary duty in many previous inquiries, and it is not necessary to review the established case law in detail. In the first of the Aboriginal fiduciary duty cases, *Guerin*,[98] Justice Dickson (as he was at the time) described the fiduciary duty as being "that of utmost loyalty to his principal."[99] It was also in *Guerin* that Justice Wilson first articulated the duty to preserve and protect a band's interest in its reserve, when she stated "that while the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction."[100]

Apsassin, discussed earlier in relation to the requirements for surrender under the *Indian Act*, remains the only case in which the Supreme Court has specifically considered the Crown's pre-

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95 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 37.

96 J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

97 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 38.

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

99 *Guerin v. The Queen,* [1984], 2 SCR 335 at 389, per Dickson J.

100 *Guerin v. The Queen*, [1984] 2 SCR 335 at 349–50, per Wilson J. Justices Dickson and Wilson wrote concurring judgments, in which Dickson J wrote for a majority of four and Wilson J wrote for a minority of three.

surrender fiduciary duty to First Nation peoples. In *Apsassin*, Justice Gonthier stated that the Band had given its full and informed consent to the 1945 surrender of IR 172, but went on to say:

> ... 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.[101]

In Justice McLachlin's minority decision, she stated that "[g]enerally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second 'peculiarly vulnerable' person"[102] and went on to say:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable person" .... The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. ... The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[103]

Justice McLachlin also confirmed that there is a "duty to prevent an exploitative bargain" in taking a surrender. When she considered the regime for surrender of an Indian reserve, she held that it struck a balance between "two extremes of autonomy and protection"[104] because the *Indian Act*

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[101] *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at para. 14, (sub nom. *Apsassin*), Gonthier J.

[102] *Blueberry River Indian Band v. Canada,* [1995] 4 SCR 344 at para. 38, (sub nom. *Apsassin*), McLachlin J.

[103] *Blueberry River Indian Band v. Canada,* [1995] 4 SCR 344 at para. 38, (sub nom. *Apsassin*), McLachlin J.

[104] *Blueberry River Indian Band v. Canada,* [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

required both the band and the Crown to consent to a surrender. The Crown's "consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation."[105]

> ... 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.[106]

Nevertheless, in the case of the Beaver Band in *Apsassin*, according to Justice McLachlin, the evidence in that case did not support the Band's claim that it had abnegated its decision-making power to the Crown.

Thus, it is critical in assessing the Crown's pre-surrender fiduciary duty to determine whether the band was the true decision-maker. If not, then the Crown would be required to take considerable caution in exercising the power ceded to it by the band.

In considering whether the members of the Paul Band were fully informed about the surrender and were aware they were giving up IR 133B, it does appear from the written historical record that the band members who met with Agent Gibbons and Inspector Markle were aware of two important facts: first, that the railway was coming westward and was approaching the boundaries of the Paul Reserve; and second, that the reserve was the site of a very fine sand beach that would make IR 133B marketable either for a townsite or for a resort site. At the time of the marl surrender, in June 1906, Inspector Markle reported that the band members had spoken to him about whether it would be wise to surrender the land, and he had not given them a definite answer. It is clear, however, that there was discussion about the surrender, because he reported that the Indians were aware they had one of the best spots on the lake. It is also clear that outsiders were visiting the reserve and discussing the value of the land for sale to third parties. Edmonton real estate agent A.W. Taylor wrote to the department in early July 1906, describing how the approaching railway would

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[105] *Blueberry River Indian Band v. Canada,* [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

[106] *Blueberry River Indian Band v. Canada,* [1995] 4 SCR 344 at para. 35, (sub nom. *Apsassin*), McLachlin J.

bisect the reserve and how the Indians would have to travel across the track, "which to them is objectionable."[107] In that letter, Taylor also stated that "Bird the Chief would consent in a sale of the portion we have mentioned,"[108] and that he had met with some band members recently.

From J.K. McLean's letter of September 17, 1906, following the surrender meeting, it is clear there had been an earlier discussion of the impact of surrendering the beach, since it is likely that at the surrender meeting the band members and the Agent agreed to reserve the beach from sale. The only way in which that term of surrender makes sense is if there had been a discussion of the band members' desire to retain access to the beach while at the same time making the beachfront lots attractive to prospective owners.

We are aware that several of the Elders questioned the intention of the Band in 1906. For instance, Robert Rain stated that his grandmother, Emily Rain, "hadn't heard of anybody giving up or surrendering that land."[109] Mary Rain, Robert's sister, confirmed what their grandmother had said, that the land had been stolen.[110] Florence Bird, daughter-in-law of Chief David Bird, who had been present at the surrender, stated that the land had only been leased.[111] However, it is clear from the documentary record that the Paul Band knew of the value of this part of their reserve and that it had value for them if it was developed into town or resort lots.

We also know from the historical record that the Band was actively involved in making decisions about various lots. For instance, in July 1908, shortly after the GTPR's application to cross the reserve had been approved, the band council passed a resolution that "by vote of the majority of its voting members"[112] it authorized the Superintendent General to enter into an agreement with the

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[107] A.W. Taylor, Edmonton, to Superintendent General, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).

[108] A.W. Taylor, Edmonton, to Superintendent General, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).

[109] ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 12, Robert Rain).

[110] ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 24, Mary Rain).

[111] ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 37, p. 40, Florence Bird).

[112] Paul Indian Band, Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Reg. No. 11629, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 349).

railway to place and operate a station within the surrendered lands. Similarly, in 1911, the Paul Band resolved that the Sabbath School Association could buy several lots for a sum equal to one hundred dollars per acre, and further, that the Band wished that part of the proceeds would be used to buy flour.[113] Notwithstanding the fact that once the land had been surrendered to the Crown, the Band Council Resolutions were legally ineffective in disposing of the land, the fact that the Band was aware of and eager to participate in the disposition of the land is evidence that they had intended to surrender IR 133B for sale. It is also obvious that the surrender and disposition of the land were discussed several times by the band members in the presence of Crown agents. There is no evidence that at any time the Band questioned the validity of the surrender.

The Band's understanding of a proposed surrender can also be gleaned from past experiences with surrenders of reserve land. In the case of the leadership of the Paul Band, there were two previous surrenders that involved some of the same band members. In 1897, the Sharphead reserve was surrendered unanimously by band members who were moving to Wabamun Lake. Nine names appear on the Sharphead voters list – Simon, John Sharphead, Onisemass, David Yellowhead (also known as David Bird), Isaac Sharphead, Mr John, John Paul, and John and Alexis Rain.[114] In the June 1906 marl surrender for lease, six names appear on the surrender document – Chief David Bird, Paul, Didymus, Luke, Thomas James, and Peter Ironhead.[115] The surrender document for the September 1906 surrender of IR 133B contains nine signatories – David Bird, Paul, Didymus, Isaac Sharphead, Thomas James, David Peter, Baptiste Peter, John Rain, and Enoch Bird.[116]

It would appear then that David Bird voted for the 1897 Sharphead surrender and was most certainly present and voting at the other two surrenders. Isaac Sharphead voted for the 1897

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[113] Paul Indian Band, Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386,155 (ICC Exhibit 1a, p. 462).

[114] List entitled members still living of Sharphead's Band, transferred from Wolf Creek to White Whale Lake, attached to letter from A.E. Forget, Indian Commissioner, to Secretary, Department of Indian Affairs, December 9, 1897, LAC, RG 10, vol. 3912, file 111,777-1 (ICC Exhibit 1a, pp. 112-5).

[115] Surrender Document, June 20, 1906, DIAND, Indian Lands Registry, Reg. No. 14133 (ICC Exhibit 1a, pp. 191–96).

[116] Surrender Document, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229–35).

surrender and was most likely present and voting at the September 1906 surrender. Paul, Didymus, and Thomas James were most likely present and voting at the June and September 1906 surrenders. The core leadership of the Paul Band in 1906 included Chief Bird, former Chief Paul, Didymus, Thomas James, and Isaac Sharphead, all of whom had previous experience with surrenders and would have understood the process and the consequences of surrendering reserve land.

Taken together, the evidence favours a finding that the band members understood what they were doing and that the department informed them that the lots would be sold and would no longer be part of the reserve. The surrender happened relatively quickly, but it must be remembered that the community was small and it would not have been difficult for the Agent or any of the other Crown officials to have discussed the surrender with most or all of the band members who were eligible to vote. We know from the historical record that the surrender was discussed for at least three months, from mid June until mid September, and, we presume, not only by the band members when the Agent was present, but also among themselves. Our conclusion, therefore, is that the Band adequately understood the terms and consequences of the surrender and that the Crown officials ensured they did.

Did the Crown Engage in Tainted Dealings to Influence the Surrender Vote?

In many ways, the heart of the fiduciary duty analysis is determining whether or not the Crown engaged in tainted dealings to influence the surrender vote. Almost by definition, a fiduciary cannot be loyal and faithful to the interests of its beneficiary if it is acting to undermine the beneficiary's decision-making authority, with the result that it would be unsafe to rely on the Band's understanding and intention.

The First Nation cited the haste with which the surrender was taken as evidence of tainted dealings. Since we have found that the band members had adequate time to consider the surrender, we do not find this to constitute tainted dealings.

The First Nation has also alleged that the manner in which three of the band members "signed" the surrender document is evidence of tainted dealings. Counsel argued that Baptiste Peter, Enoch Bird, and John Rain "were not able to sign their own names, but were portrayed as doing so

in order to add validity to a suspect surrender."[117] In particular, the First Nation cited the fact that at other times (the Duffield Townsite surrender, the disposition of lands to the Sabbath School Association) these members "signed" with their mark, an X, meaning they were illiterate. In written submission, the First Nation went so far as to describe this as "fraudulent activity"[118]; but in oral argument, it stated that by fraud, the First Nation really meant tainted dealings.[119] The First Nation also cited the fact that outsiders, such as the Edmonton real estate agents and the provincial government, appeared to know about the surrender and to treat it as a "done deal" before the surrender meeting was actually held.

Canada's position is quite straightforward: that the written record does not support any of the First Nation's arguments, and that with regard to the allegations of fraud, these are pure speculation.[120]

We have little judicial authority guiding us to determine what Justice Gonthier meant when he stated that "tainted dealings" would have made him reluctant to approve the surrender in *Apsassin* if he thought that, because of them, it was unsafe to rely on the Band's understanding and intention. However, the Commission has frequently considered the question of what constitutes tainted dealings. This analysis from the *Moosomin Inquiry* sets out what that panel thought Justice Gonthier meant:

> At the heart of Justice Gonthier's reasons is the notion that '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.' In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or there were tainted dealings involving the Crown which made

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117 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 46.

118 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 28.

119 ICC Transcript, May 12, 2005, p. 173 (Ranji Jeerakathil).

120 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 39.

> it unsafe to rely on the band's decision as an expression of its true understanding and intention.
>
> Where there are "tainted dealings" involving the Crown, caution must be exercised in considering whether or not the band's apparently autonomous decision to surrender the land should be given effect. In *Chippewas of Kettle and Stony Point*, for example, Laskin J.A. considered that the alleged bribe provided to the Band members by the prospective purchaser of the reserve lands might constitute 'tainted dealings'. Although he recognized that it was a question for trial which could not be dealt with in Canada's preliminary application for summary judgment, he nevertheless forged the explicit link between 'tainted dealings' and (the) fiduciary obligation that Gonthier J was not required to make in the context of *Apsassin*. In our view Canada's failure both to properly manage competing interests (which was stressed by the Federal Court of Appeal in *Apsassin*) and to use its position of authority to apply undue influence on a band to effect a particular result can contribute to a finding of 'tainted dealings,' involving the Crown. Such a finding may cast doubt on a surrender as the true expression of a band's intention. Both of these elements are relevant to the question of 'tainted dealings' because they have the potential to undermine the band's decision-making autonomy with respect to a proposed surrender of reserve land.[121]

From this passage, we can see that there are a number of factors which the Commission has considered in determining whether there are tainted dealings in the relationship between the Crown and the Paul Band. Did Canada fail to properly manage competing interests? Did Canada apply undue influence? Did it undermine the Band's decision-making autonomy? If so, is there a finding of tainted dealings that undermine the Band's understanding and casts doubt on its intention? Or, on the other hand, did Crown officials such as Indian Agent Gibbons act conscientiously?

One of the factors that we consider to be important, but which neither party argued, is the role of the approaching railway in this surrender. Months before the surrender, it was apparent to everyone, including the Paul band members, that the railway would soon come to the edge of the Paul Reserve, and it was assumed that the railway would cross the reserve.

Under the 1886 *Indian Act*, railways had a privileged position within the ranks of private companies, since they were accorded the right to take land for railway purposes, subject to Crown

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[121] ICC, *Moosomin First Nation: 1909 Reserve Land Surrender* (Ottawa, March 1997) reported (1998) ICCP 8, 183, citing *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

consent.[122] In that way, there was no risk that either private individuals or Indian reserves would stand in the way of what was at that time one of the pre-eminent exercises in nation building. In order for the railway to gain access to reserve lands, the affected band members could surrender land; or, under s. 35 of the Act, the railway could apply to take the land, with the obligation to pay compensation. The *Indian Act*, as amended, states:

> s. 35: No portion of any reserve shall be taken for the purposes of any railway, road or public work without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements thereon.[123]

When railway companies "took" or, in effect, expropriated land, they took only what was necessary for the right of way and sometimes a station or siding. During this period, the Department of Indian Affairs often encouraged surrenders of reserve land to accommodate townsites, thinking that the economic benefits of the nearby town would be beneficial to the nearby reserve.[124] As well, as the Edmonton real estate agent A.W. Taylor noted, a railway that crossed a reserve often meant hardship to the band – not only because the Indians themselves had to find a way to cross the railway, but also it because if it wasn't fenced, their cattle could easily be killed by trains. We do not know whether the possibility of expropriation was discussed with the Paul band members before the

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[122] The relevant statutes are the *Railway Act,* SC 1903, c. 58, and the *Indian Act*, RSC 1886, c. 43, s. 35 (as amended by SC 1887, c. 33, s. 5).

[123] *Indian Act*, RSC 1886, c. 43. s. 35 (as amended by SC 1887, c. 33, s. 5). Note that if a 99-foot-wide strip had been "taken" or expropriated by the railway, it would revert to reserve status once it was no longer being used for railway purposes, which over the long run is the significant difference between railway takings and surrenders for railway purposes.

[124] Frank Oliver, Canada, House of Commons, Debates, March 30, 1906 (ICC Exhibit 1a, 179–82).

surrender; but it is inconceivable that the departmental officials of the era did not know that if the Band did not surrender, the railway could take reserve land, subject to Crown consent. Knowing that, it must have seemed at the time that a surrender for a townsite on what was accepted by everyone as a prime piece of real estate was a better idea than a 99-foot-wide strip taken down the middle of IR 133B.

What appears to us is that the Crown saw an opportunity that would benefit the Paul Band: by surrendering a relatively small portion of the reserve, the Band could gain income, retain access to Moonlight Bay, and potentially gain an economic benefit both from access to the railway itself and from the presence of the settlers in the townsite. Departmental officials knew there was growing interest in Wabumun Lake among the people of Edmonton because newspapers were beginning to print stories about successful developments such as Silver Beach, near the Paul Reserve.

Nothing that the First Nation has cited in the record – the knowledge by outside parties of the potential surrender,[125] uncertainty about the date of the surrender meeting arising from Agent Gibbons' statement in August 1906 that he had held a conference with the Indians,[126] and the Band Council Resolution passed by the Band in July 1908, which states the date of the surrender was August 14, 1906[127] – strikes us as being evidence of tainted dealings. Further, there is no explanation of why the three men would sign their names themselves in one situation and make a mark in another. Both methods of assent are valid; questions regarding the method used arise when other evidence exists to support an allegation of fraud.

There is nothing in the record to show that the Crown agents applied pressure or undue influence on the Band. When Surveyor J.K. McLean attended at the reserve at the beginning of September to survey the townsite, he reported that he had only done part of the work because he

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[125] A.W. Taylor, W.S. Weeks Company to Superintendent, Department of Indian Affairs, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1 (ICC Exhibit 1a, pp. 203–4).

[126] James Gibbons, Indian Agent, Edmonton Agency to Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1 (ICC Exhibit 1a, p. 216).

[127] Consent of Band, Paul's Indian Band, July 28, 1908, DIAND, Indian Lands Registry, Reg. No. 17325 (ICC Exhibit 1a, p. 349).

knew there was some opposition.[128] Although it is clear McLean expected the band members to grant the surrender, he did not continue his survey work until the surrender had been taken. The correspondence indicates that the band members were the first to propose a surrender and that Crown officials discussed it with them. Earlier that year, when Agent Gibbons wrote to headquarters of the imminent arrival of the railway, the departmental response was to ensure that no work could begin on the reserve "until the right of way has been arranged for."[129]

There is also no evidence that the Crown was acting on behalf of others, such as the railways or prospective purchasers of the land. In short, the Crown acted as a good fiduciary should have under the circumstances; with the railway coming, the Crown sought to get as good a deal as it could for the Band, knowing that regardless of what it did, the railway could almost certainly take the land it needed.

Our conclusion that the Crown did not engage in tainted dealings to influence the surrender vote means that the Band's intention, as evidenced by the surrender document, was to grant the surrender.

Did the Crown Fail to Prevent the Band from a "Foolish, Improvident and Exploitative" Surrender?

The First Nation focused on the Band's use of the Kapasiwin beach as a fishing station and argued that the surrender "should not have been attempted unless very clear benefits were apparent."[130] Counsel for the First Nation stated that what really happened was that the Band gave up the fishing station, but "received almost nothing in return" because the surrender was "based on pure speculation of the railway coming through and a station being built."[131]

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[128] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

[129] J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, CNR, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, C.N., (ICC Exhibit 1a, p. 188).

[130] Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 47.

[131] ICC Transcript, May 12, 2005, p. 174 (Ranji Jeerakathil).

Canada argued that, on the contrary – with the coming of the railway, access to markets, the arrival of settlers, and the interest by Edmontonians in the beach areas – the members could and did perceive the "very probable benefit" of the surrender. Canada also stated that given the *caveat* in *Apsassin*, the surrender should "be viewed from the perspective of the Band at the time."[132] As well, Canada argued, rather than speculation, it was a reasonable expectation that the CNR would pass near the beachfront at Kapasiwin and that a station would be located on the townsite.

We agree with Canada. This is not a case in which the Crown knew or ought to have known that the long-term interests of the First Nation were best served by retaining the land, particularly since the band members had expressed interest in surrender. The band members appear to have been well aware that they had possession of a property that was potentially valuable to others, not only to themselves. They did not lose land access to Moonlight Bay for several years, until they lost access to the beach; and they always retained access to the bay by water, through the narrows – although it can fairly be said that travel by water would have been a greater distance and would have taken more time.

It is clear from the evidence presented by the Elders at the community session that giving up exclusive rights to the beach once it was transferred to the province in 1932, and to IR 133B, made it more difficult to travel north. Several Elders, among them Mary Rain[133] and Louise Bird,[134]said the beach was an important trail to Ste Anne, and it is likely that this was another reason the band members wanted to retain access to the beach and negotiated that the beach be reserved from sale as a condition of the surrender in 1906.

Although the outcome of the railway building was not what had been anticipated by either party, it must not be forgotten that the CNR first approached the reserve and the GTPR actually built the line (only to be swallowed up by the CNR several years later). It is a fact that a railway was coming and did come; and although it did not build a permanent station, the GTPR did build a summer station so that beachgoers from Edmonton could have easy access to the public beach. The

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132 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

133 ICC Transcript, October 13, 2004 (Exhibit 5a, p. 25, Mary Rain).

134 ICC Transcript, October 13, 2004 (Exhibit 5a, p. 48, Louise Bird).

townsite did not emerge as had been anticipated, but the beachfront lots did sell – and at the upset prices that had been established. All surrenders entail some amount of uncertainty, given that only hindsight is 20-20, but at the time, knowing what they knew, Crown officials did a good job of reading what was likely to happen and turning the foreseeable future into a benefit for the First Nation. The First Nation has argued there was "clear evidence" that no station would be established, but the record shows the Canadian Northern did not admit this to the department until July 1911, when it abandoned its plans to run a rail line through what had been IR 133B. By that time the Railway Commission had approved the plans of Canadian Northern's main competitor, the GTPR, and Canadian Northern was forced to move north.

We agree with Canada "that from the perspective of the Band members at the time, as required by *Apsassin*, it is submitted that the surrender of the fishing station did not appear to be 'foolish, improvident or exploitative'"[135]:

> It is submitted that it is a reasonable conclusion ... with the coming of the railroad, the opening up of the land to settlers and Edmontonians, the access to markets for their agricultural products, and the apparent high value of the fishing station as a resort, that it appeared to the members that it was of very probable benefit to the Band to take advantage of the set of circumstances and get as much money as possible for 133B. The value of the land as a resort town appeared to the Band to exceed its value as a fishing sation, in the circumstances as they knew them at the time of the surrender.[136]

We conclude that the surrender of IR 133B was neither foolish, improvident, nor exploitative; and as a result, there was no duty upon the Crown to refuse to consent to it.

Did the Crown Take Extra Caution in Light of the Band Having Ceded or Abnegated Its Decision-making Powers?

We have taken the liberty of restating this issue somewhat, because the threshold question that must be answered is whether the Band ceded or abnegated its decision-making power. Accordingly, the

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135 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

136 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 43.

issue we are addressing would best be stated as: Did the Band cede or abnegate its decision-making powers, and if so, did the Crown take extra caution in exercising its discretion?

Again, the First Nation and Canada have taken opposing positions, the First Nation arguing that in 1906 the leadership of the Paul Band was uncertain; Canada taking the position that the Band had strong leadership, both in its Chief, David Bird, and in its headmen, and therefore did not cede power to the Crown.

The First Nation cited two facts: first, that Chief Paul himself had been deposed in 1901 after a conflict with the farming instructor over the unapproved slaughter of a heifer; and second, that the Band did not have its full complement of headmen.

Canada's position is that although the department was slow to recognize the Band's wishes for its own leadership, and although it agrees that not all the approved positions for headmen had been officially filled, it does not mean the Band was without leadership. Canada cites the active correspondence between the Agent on site and headquarters about individuals selected for leadership positions, and, perhaps more importantly, the ongoing, if unofficial, role played by former Chief Paul.

This aspect of the fiduciary relationship is not as simple as determining whether a band has leadership, since it is quite possible that in the absence of formal leadership a band remains capable of exercising decision-making authority. Although bands had little autonomy under the *Indian Act*, on the question of a surrender of reserve lands they were required under the Act to make the final decision by means of a majority vote. However, a band could be incapacitated at the time of exercising decision-making power on such an important question if that band, for example, lacked effective leadership. As the panel stated in the Kahkewistahaw surrender:

> 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.[137]

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[137] ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 87.

In such a case, where the band lacks decision-making capability, the Crown's actions will be scrutinized closely because it is now subject to the highest standard of a fiduciary. As was stated in *Apsassin*, the Crown exercising decision-making power or discretion in the surrender process must do so with "loyalty and care" and "solely for the benefit of the vulnerable party."[138]

It is also possible that in the absence of leadership, a fiduciary can (and often does) make the correct decision and act in the best interests of the beneficiary. It is not whether a beneficiary has ceded power that determines if a breach has occurred, but whether the fiduciary acts properly in the exercise of the ceded power.

In this case, as in *Apsassin*, we find that the decision to surrender was not one that was made by the Crown and ratified by the Band. It should not be forgotten that the Band broached the subject of surrender to the Crown. It does not appear that undue influence was applied to band members to ensure a surrender vote, and there is no evidence that the Crown was considering the interests of others ahead of those of the Band.

What we see from the record, including the evidence provided by the Elders at the community session, is a competent and capable band, with good leadership and an appreciation of the value of a unique piece of property. As a result, we find there was no need for Crown officials to have used extra caution in the taking of the surrender of IR 133B.

Did the Crown Breach Any Pre-surrender Fiduciary Duty as a Result of Any of the Allegations Set Out in Issue 2?

We find that throughout the surrender process, both in the months preceding the surrender and in the taking of the surrender itself, the Crown acted as a prudent, reasonable fiduciary. As a result, we find there has been no breach of the Crown's pre-surrender fiduciary duty.

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[138] *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.

MISMANAGEMENT CLAIM

Issues numbered one through six of the Mismanagement Claim are essentially findings of fact from which the panel is to draw conclusions about whether the Crown breached its post-surrender fiduciary duty to the Paul First Nation.

These issues centre on the conduct of the Crown in the years immediately following the surrender and whether the Crown acted in the best interests of the Band in its conduct of the sales of the land. As they have been framed, the first five issues essentially require findings of fact by the panel; Issue 6 requires a conclusion by the panel about whether any of the findings of fact create a lawful obligation on the part of Canada.

Paul First Nation's Position

The Paul First Nation starts from the position that the Band's intention in 1906 was to surrender land for the purpose of providing a railway townsite. The First Nation also argues that the department's plans were contingent upon the establishment of both the rail line and a station[139] – and from there it follows that, before selling any of the lots, the Crown ought to have waited until either of the railways had given a commitment to building a station. Alternatively, it argues, if the Crown had intended to sell the lots regardless of whether a railway station was built, it ought to have sold them immediately after taking the surrender, in order to capture whatever speculative value might have existed at that time.[140] According to the First Nation, the Crown flip-flopped[141] in adopting a strategy for selling the townsite lots: first deciding to wait for the railway to confirm its intentions, and then deciding to sell the lots without that confirmation. It says that once the Grand Trunk Railway had stated it did not want to build a station at Kapasiwin (because of the grade), and once the CNR had stated it had not received permission from the Railway Commission for a rail line through Kapasiwin, the Crown should have returned all unsold land to the Paul Band.

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139 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 54.

140 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, pp. 59–60.

141 ICC Transcript, May 12, 2005, p. 242 (Ranji Jeerakathil).

The First Nation states that the Crown mismanaged the sales of the lots in two ways. First, it did not advertise the sales widely enough. And second, in the advertisements Canada referred to the lots as being "specially adapted for the building of summer residences."[142] According to the First Nation, neither of these advertising methods was in accordance with the Band's intent at the time of the surrender.

When the lots were sold in 1910, one of the terms of sale was a requirement that within a year the purchaser build a residence worth at least $300.[143] According to the First Nation, this is evidence of the Crown's mixed strategy: the condition was "arguably consistent" with the strategy of selling the lots for a townsite, but was "inappropriate in the context of a forced sale by the Department without confirmation that a station would be built."[144] As evidence of the failure of the strategy, the First Nation cites the facts that the condition was waived for several of the purchasers of the lots bought in 1910, and dropped for the sales in 1912.

The First Nation also cites the timing of the 1912 sales as further evidence of the Crown's breach of fiduciary duty. The Crown sold some of the Kapasiwin lots at the same time it was selling lots in Duffield, a townsite that had been surrendered by the First Nation from the much larger IR 133A. Duffield was not on the lake. Much of the land in that surrender was agricultural land, meant to be sold to farmer settlers. By holding the 1912 sales of the Kapasiwin Townsite lots at the same time as the sales of approximately 600 lots in Duffield, the First Nation says, the prices for the Kapasiwin lots were depressed.

Canada's Position

Canada's position is that at all times during the years between the surrender and the sales of the lots in 1912, the Crown acted with the "'ordinary diligence' of a fiduciary, seeking the best monetary

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142 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 62, citing Edmonton *Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

143 Edmonton *Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

144 Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 64.

recovery for its beneficiary,"[145] and that the duty of the Crown in transactions of this kind is "not a standard of perfection."[146]

Canada argued that the almost four-year period between the date of surrender and the date of the first sales of the land was not a breach of fiduciary duty, but was instead "the time required for the railways to conclude and construct their plans, a matter beyond the control of the Crown"[147]; and that the Crown had been persistent in seeking railway commitments toward building a station. Canada also argued that after the surrender, the Crown continued to have reasonable grounds to believe that a railway station would be built on the surrendered lands: the CNR before the 1910 sales, and the GTPR before the 1912 sales.

In response to the First Nation's contention that the Crown had a duty to consult with the First Nation after the surrender, Canada's position is that the words of the surrender "did not reserve unto the Band any entitlement to consultation or veto over the actions of the Crown."[148] Canada also argued that the terms and conditions of the sale, as well as the means to advertise the sale, were solely within Canada's discretion, so long as Canada used the ordinary diligence of a fiduciary in exercising its duties to the Band. In short, Canada has argued that from 1906 to 1912 "the Crown acted with ordinary, if not greater, diligence in seeking to obtain the best return on the First Nation's surrendered land sales."[149]

Post-Surrender Fiduciary Duties

The duty the Crown owes to First Nations that have surrendered reserve land to Canada, either for sale or for lease, can be found in *Guerin v. The Queen*,[150] the first case in which the Supreme Court of Canada declared that the Crown owed fiduciary duties to First Nations.

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145 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 65.

146 ICC Transcript, May 12, 2005, p. 252 (Douglas Faulkner).

147 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 66.

148 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 67.

149 Written Submissions on Behalf of the Government of Canada, April 8, 2005, p. 70.

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

In this part of the inquiry we are being asked to consider the Crown's post-surrender fiduciary duty, and *Guerin* remains the most authoritative case to date. It is important to remember that in the post-surrender context, a band generally does not retain control over the disposition of the interests it has surrendered. At that point only the Crown holds the decision-making power, according to the discretion granted to it in the surrender document – whether it be to lease on specific terms, as was the case in *Guerin*, or to sell, as was the case for the Paul Band.

The essential facts of *Guerin* are that the Musqueam Band surrendered 162 acres of land to Canada, on the understanding that they would be leased for use as a golf club under the terms and conditions that had been presented to the band council and discussed at the surrender meeting. The surrender document stated that the Crown took the land "in trust to lease the same" on the terms and conditions that it deemed most conducive to the welfare of the Band. More than a decade later, the Band learned that the terms and conditions of the lease were different from and inferior to the agreed-upon terms.

In writing about the fiduciary duty of the Crown to the bands and the *sui generis* nature of the Indian interest in reserve land, Justice Dickson (as he then was) wrote several passages that are particularly appropriate to the situation of any band that has surrendered land to the Crown – either for lease or for sale, and in the particular circumstances where there were oral terms that had not been incorporated into the written document. He stated:

> When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf.[151]

Justice Dickson also stated that although the fiduciary obligation was not a trust, it was "trust-like in character"[152] so that, "as would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band."[153] In the case of a surrender, the

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151 *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, Dickson J.

152 *Guerin v. The Queen*, [1984] 2 SCR 335 at 386, Dickson J.

153 *Guerin v. The Queen,* [1984] 2 SCR 335 at 387, Dickson J.

Crown must do whatever is set out in the surrender document. In the surrender of IR 133B, the "trust-like" obligations of the Crown can be found in the wording of the surrender document:

> ... in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.[154]

Later in his judgment, Justice Dickson expanded on the relationship between what the Band had understood to be the oral terms of the agreement and the written terms of the surrender. In Musqueam's case, there had been several meetings at which surrender terms were discussed. Two decades later, several members of the band council were able to give *vive voce* evidence of those terms at trial. Justice Dickson stated that the trial judge had "found that the Crown's agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms. The lease obtained was much less valuable."[155] Justice Dickson also noted that the surrender did not make reference to the oral terms, but he went on to say:

> Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.[156]

The standard of care of the Crown in its fiduciary relationship with the band has been described by the Supreme Court of Canada several times. In *Wewaykum Indian Band v. Canada*, Justice Binnie described the standard as that of "ordinary prudence,"[157] also as "reasonably and with

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[154] Surrender Document, IR 133B, Paul Indian Band, DIAND, Indian Lands Registry, Reg. No. 11633, (ICC Exhibit 1a, pp. 229–35).

[155] *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J.

[156] *Guerin v. The Queen*, [1984] 2 SCR 335 at 388, Dickson J.

[157] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 93.

diligence,"[158] and cited Justice McLachlin's statement in *Apsassin* that "the duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs.'"[159] From these descriptions, we know that the standard of care expected from the Crown in its dealings with the Paul Band are those of a diligent, reasonable, prudent "ordinary" man. Perhaps the most important part of the description is that of the "ordinary" man managing his own affairs – so that the Crown must not do less for the Paul Band than it would attempt to do for itself.

Once a surrender for sale has been taken, the signatories have agreed that the land is surrendered in trust to the Crown, to sell upon terms that the Crown deems to be best for the band. The surrender document also spells out how the proceeds are to be distributed.

At this point, the band is trusting implicitly that the Crown will do what it has agreed to do. As a result, the fiduciary duty of the Crown is enhanced because the Crown has been granted absolute discretion and must act only in the band's interest. The Crown is held to a high standard of the fiduciary duty. Once the land is surrendered, the band no longer has any ability to make decisions about the property unless the Crown wants to change the terms of the sale or lease agreed to by the Crown and the First Nation, in which case it must come back to the band for permission to do so.

We have stated that the Crown is held to a high standard of duty, but it should not be characterized as an impossibly high standard. As fiduciary, the Crown is expected to be diligent, reasonable, and prudent in acting in the best interests of the fiduciary, but not perfect. The Crown may make mistakes, or may even exercise bad judgment, as long as, at the time, it was attempting, in good faith, to act in the best interests of its beneficiary, which in this case was the Paul Band. This is the standard the Crown had to meet during the post-surrender period from 1906 to 1912.[160]

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

159 *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 at para 94, citing *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 104, (sub nom. *Apsassin*), McLachlin J.

160 It would also be the measure of the post-surrender conduct of the Crown from 1912 onward, but since Canada has already accepted that it has breached its post-surrender duties to the Paul Band for the years 1912 to 1938, this analysis is confined to the time frame and events leading up to the second sale of town lots.

Issue 1 Sale of Land and Value Received

1 Did the Crown wait four years after the surrender before selling the land and did this result in lower value being received because of lost speculative value?

The first part of this question can be answered with a simple yes. It is obvious from the events that it was almost five years from the surrender in September 1906 to the date of the first sales of the lots, in May 1911.

There is no way of knowing whether the length of time between the surrender and the first sales resulted in a "loss of speculative value." Canada has argued that the First Nation has not presented any evidence on the presence of speculators in the area or of whether they would have purchased land for a higher price in 1906 than in 1911. The First Nation was not clear in exactly what it meant by the term "loss in speculative value." Presumably, the Crown ought to have adopted one of two strategies in dealing with the surrendered lands: either the Crown should have sold the land immediately to capture speculative value; or the Crown should have waited until it had an absolute commitment from one of the railway companies to build a station on the Kapasiwin lands.

One of the concerns we have with this argument is that because these two strategies are not alternatives that can be adopted as events unfold, it would require the Crown to know beforehand which of the two would be the more successful. Another significant problem is that the argument assumes that the Crown, as a prudent fiduciary, should engage in speculative land sales on behalf of the beneficiary. It is difficult to meld the concepts of speculation and the standard of care of a prudent, reasonable fiduciary.

The idea also presumes that buyers would have paid more for the lots immediately after the surrender than they would have four years later. Although not as many of the lots sold as perhaps both the Crown and the Band would have preferred, those that did sell sold for the upset price, indicating that the appraisal of their value had been reasonable. The First Nation did not bring forth evidence that there was a speculative market in 1906, or evidence of buyers who were willing to pay a premium price for lots on the assumption that the building of a railway station would increase the value of those lots. In fact, had there been speculative buyers willing to do just that, surely a prudent fiduciary would have held on to the lots so that the First Nation would benefit from any increase in

value that occurred as a result of the railway. We find that this latter strategy is the one the Crown adopted, and that it was not until after the second sale that it became known that there would be no permanent railway station.

As a result, we conclude that although the Crown did wait four years until selling the first of the lots at the Kapasiwin Townsite, there was no evidence that the Band lost any speculative value as a result of the four-year gap between surrender and sale.

Issue 2 Sale of Land and Railway Station

2 Did the Crown proceed with the sale despite knowing that a railway station would not be built and that this was one of the original purposes of the surrender, i.e., to have a railway community, and did the Crown fail to consult with the Band with respect to this?

Until 1911, the CNR stated repeatedly that it intended to build a station on the surrendered land. It is also clear that some of the delay was due to the railway's preference for getting land as cheaply as possible. As an example, in November 1906, only two months after the surrender, when the CNR was attempting to negotiate a lower price than had been specified, the Agent wrote forcefully about why the price was not excessive, stating that "in fixing a price to be asked for the right of way our concern is solely for the Indians' interest."[161] When the department wrote several days later to the CNR, stating it would accept a lower price, it was in relation to the establishment of a siding.[162]

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[161] William Black (for the Indian Agent, absent on duty) to Secretary, Department of Indian Affairs, November 20, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, pp. 274–75).

[162] J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railways, December 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 280).

Repeatedly, the CNR assured the department that it was taking up the matter of the siding.[163] By early 1908, the department had been promised several times that the decision about a station was forthcoming – and its correspondence with the railway indicated a growing level of frustration.[164] That February, the CNR told the department it was its intention to "extend our line through the Indian Reserve early in the Spring."[165]

The department continued to receive inquiries from the public about when the lots would be put up for sale. Finally, in 1910, the Crown informed the CNR that the townsite lots would be put up for auction and that some would be reserved from sale if the CNR gave its commitment that it would build a station.[166] In return, the CNR stated, it was not possible to give a commitment as the department wished, but would prefer that some lots be reserved.[167] The department did so.

At the same time, the GTPR had received permission to build a line through the reserve. Departmental officials were concerned that two lines and two stations would not be in the best interests of the Paul Band, since this prospect had the potential to slice up the town lots into small, unsaleable areas, particularly those that would end up bounded on two sides by the railway. The

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[163] C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, December 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 281); Davidson and McRae, General Agents, Canadian Northern Railway, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, December 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 283–84); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, January 17, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 288); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, June 27, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 310); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, July 13, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 311); C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, July 13, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 325).

[164] Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to MacKenzie & Mann, Canadian Northern Railway, January 17, 1908, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 328).

[165] D.D. Mann, Office of the Vice President, Canadian Northern Railway, to J. D. McLean, Secretary, Department of Indian Affairs, February 13, 1908, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 331).

[166] Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway, February 1, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 391).

[167] C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, February 16, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 394).

department was aware that the GTPR was planning to build its station a mile west of the surrendered lands and continued to negotiate with the CNR.

It is not necessary to detail every piece of correspondence between the railways and the Crown during the four years after the surrender. The story the communications tell is clear. The Crown was doing its best to secure agreement from the CNR that a station would be built. The CNR stalled and was less than forthcoming about its situation. It is possible – hindsight being as good as it always is – that the Crown ought to have negotiated with the GTPR for a station and perhaps even played one railway off against the other. However, that did not happen.

It wasn't until the summer of 1911, and only because the department wrote to the CNR stating that it had been informed of the refusal,[168] that the CNR acknowledged it had abandoned the prospective line through the surrendered lands.[169] In response to the department's inquiry, the CNR told the Department of Indian Affairs that its routing had been refused.

There remained the possibility that with the CNR no longer able to run a rail line through the reserve, the GTPR might build a station since it already had a summer platform, even though the GTPR had stated earlier that the grade was too steep for a station. Indeed, the Alberta Sunday School Association offered to lobby GTPR officials, since it was believed there would be sufficient traffic through the area to warrant the station.[170]

What must also be remembered is that the purpose of the surrender was not only to provide lots for a townsite. From the beginning, one of the stated purposes of the surrender was for resort lots. The Indians were aware they had valuable lakefront property with a good beach. Most of the beachfront lots sold in the first auction. The value of the beachfront lots did not depend entirely on a station, as long as there was a rail line and at least a whistle stop.

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[168] J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway, August 9, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 492)

[169] C.R. Stovel, Right of Way Agent, Canadian Northern Railway, to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 496).

[170] J.A. Markle, Inspector, to J.D. McLean, Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, pp. 463–64).

We find that the Crown was not aware that the railway station was not going to be built. At all times leading up to the first sale in 1910, the CNR continued to assure departmental officials that the plan was being actively pursued. We also find that although a railway townsite was one of the original reasons for surrender, it was not the only reason and may not have been the most important reason for surrender. Both the department and the Band were aware that people from Edmonton were interested in the lots for resort and pleasure purposes.

The question of consultation, then, did not arise, since at all times the department was acting according to the intention of the Band at the time of surrender. The Band intended to surrender IR 133B for two purposes: for both a railway townsite and a resort community. There was no change in circumstances that would have given the Crown any reason to go back to the Band to say that plans had changed. This is not a situation like that faced by the Musqueam Indian Band in *Guerin*, where lease terms were discussed and approved by the Band and then ignored by the Crown. In the case of the Paul Band, the Crown appeared to be doing its best to sell the land for the benefit of the Band, for the best price possible, and under the best circumstances. It must be remembered that there was correspondence from members of the public to the department asking when the lots would be put on the market. We can therefore presume the department had every reason to believe that the lots would sell.

After considering the joint purpose of the surrender, both for a townsite and for a resort, and after evaluating the correspondence between the Crown and the CNR, we conclude that the Crown acted to fulfill the purpose of the surrender.

Issue 3 Advertising of Sale

3 Did the Crown fail to properly advertise the sale?

The historical record shows that the efforts made by departmental officials were the same as those made for other surrendered reserve lands. A comparison of the newspaper notices for the IR 133B

lands[171] and those for the Moosomin, Thunderchild, Grizzly Bear, and Lean Man reserves,[172] for instance, show virtually the same text and the same prominence on the page. The advertisements were placed in major Western newspapers during the weeks leading up to the sale and were supplemented with handbills and flyers.[173] When the department learned that the 1910 sale was not widely known, it took the reasonable steps of placing an advertisement – one containing very large type – on the morning of the sale.[174] Inspector Markle's statement three days after the sale – that "although it was regularly advertised I soon learned that many did not know of the sale"[175] – indicates that there might have been a problem, but we cannot infer that the fault was the Crown's. Nor is there evidence before us to indicate that the Crown fell short of ordinary diligence in advertising the sale. As a result, we must conclude that the Crown properly advertised the sale.

Issue 4 Terms of Sale

4 Did the Crown unilaterally change the terms of the sale by adding a term that a residence would have to be constructed within 1 year, contrary to the surrender agreement and without Band consent?

On this issue, we find that there was no evidence to indicate whether the Crown ever discussed with the Band the requirement that a residence be constructed within one year of sale. We cannot say that the requirement for a building was contrary to the surrender agreement, because the agreement stipulated only that the Crown was to "sell ... upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare ..."[176] There is no indication that the building

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171 Edmonton *Daily Bulletin*, April 25, 1910 (ICC Exhibit 1a, p. 420).

172 Edmonton *Daily Bulletin*, May 2, 1910, (ICC Exhibit 1a, p. 426).

173 Handbill, "Auction Sale of Wabamun Town Lots," May 11, 1910, LAC, RG 10, vol. 6670, file 110A7-2 (ICC Exhibit 1a, p. 448).

174 Edmonton *Daily Bulletin*, May 11, 1910 (ICC Exhibit 1a, p. 441).

175 J.A. Markle, Inspector, Alberta Inspectorate to Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 444–45).

176 Surrender Agreement, IR 133B, Paul Indian Band, Indian Lands Registry, Reg. No. 11633, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 229–30).

restriction was for any purpose other than to deter speculators who would do nothing but hold the land and then sell it later for a higher price.

It is also true that Inspector Markle remarked three days after the first sale that the restriction had been a hindrance,[177] and that the Crown dropped the condition for the second sale in 1912. We find that is evidence not that the Crown had breached its fiduciary duty; but that once advised there was a problem, it had moved to resolve that problem. We find the dropping of the restriction is evidence that the Crown was mindful of its duty to the Band and took steps to fulfill it. We also note that when the condition was dropped for the 1912 sale, there was no pickup in sales, although that might also have been due to the certainty then that neither railway would build a full station.

It must be remembered that the standard is that of an ordinary, prudent, reasonable person, who is acting in the best interests of the beneficiary. It does not require the Crown to have made perfect decisions, all the time.

Again, we find there was no need to seek the consent of the Band, because there is simply no evidence to suggest that this term was in any way a material change from what might have been discussed at the surrender meeting. On the contrary, the restriction on the sale appears to have been a reasonable term of sale for vacant land, one which officials determined was conducive to the Band's welfare, given that one of the stated purposes of the surrender was the development of a resort town.

The surrender document agreed to by the Band is clear that the Crown was given the authority over the sale and the dispersion of the proceeds on behalf of the Band. Consultation with the Band was not warranted, because the Crown did not intend to alter any of the terms of the surrender document. As a result, we must conclude that the Crown did not unilaterally change a term of the surrender.

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[177] J.A. Markle, Inspector, Alberta Inspectorate to Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 444–45).

Issue 5 Second Sale, 1912

5 Did the Crown hold a second sale in 1912 without consent of the First Nation at the same time as the sale of the Duffield Townsite?

The simple answer to the question posed is yes, since the sale took place at the same time as the Duffield sale, and since there is no evidence that the Crown consulted the Band before the1912 sale. As we have stated earlier, however, there was no reason for departmental officials to have consulted the Band about the second sale of the lots.

Issue 6 Breach of Legal or Equitable Duty

6 If any of the issues 1–5 is answered in the affirmative, did the Crown thereby breach any legal or equitable duty to the First Nation?

At this point it is useful to summarize our findings on the issues as they were presented to us.

In Issue 1, we were asked two questions: first, did the Crown wait four years after the surrender before selling the land? Second, did this result in a lower value being received by lost speculative value? We answered yes to the first question, and no to the second.

In Issue 2, we were asked two questions. First, did the Crown proceed with the sale despite knowing a railway station would not be built? Second, did the Crown fail to consult with the Band as a result of this knowledge? We answered no to the first: that the Crown did not know a railway station would not be built. For the second, we found that under the conditions of sale in the surrender document, the Crown was not obligated to go back to the Band, because the surrender had a dual purpose of providing land for both a townsite and a resort.

On Issue 3, we were asked whether the Crown failed to advertise the sale properly. We said no.

On Issue 4, we were asked whether the Crown unilaterally changed the terms of the sale by adding a condition that the purchaser of the lot build within a year of purchase, contrary to the surrender and without consent. We found that there was nothing in the surrender document that precluded such a condition of sale, nor was it a material change; therefore, there was no obligation on the part of the Crown to return to the Band.

On Issue 5, we were asked whether the Crown held the second sale in 1912 at the same time as the Duffield sale, without the consent of the Band. Again, we found that there was nothing in the surrender document that precluded holding the sale at that time, and therefore there was no obligation on the part of the Crown to return to the Band to seek permission. We have found no evidence in the post-surrender period, from 1906 to 1912, that at any time the Crown acted except in the best interests of the Paul Band. The Crown may not have succeeded as both parties anticipated, but that does not mean there was a breach of duty. As we have said before, the ordinary, reasonable, prudent fiduciary does not have to be perfect.

Issue 7 Compensation Criteria

7 Which compensation criteria should apply in the determination of the Mismanagement Claim? (In respect of this issue, Canada notes the content of the July 10, 1998, letter of acceptance.)

With respect, we decline to answer this question or deal with this issue. This aspect of the inquiry deals with those aspects of the claim that were accepted for negotiation by Canada. Those negotiations are in abeyance, pending completion of this inquiry. Although this inquiry was initially accepted in part as an inquiry into compensation criteria, the subsequent rejected claim into the surrender of IR 133B became the focus of the parties' efforts and of the inquiry. Apart from making brief arguments about the legal principles applying to compensation generally, the parties did not support their arguments by showing us the evidence in the record that would have been required in an inquiry into compensation criteria.

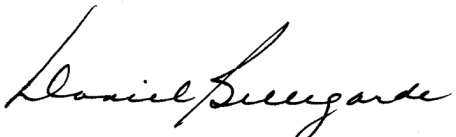
PART V

CONCLUSIONS AND RECOMMENDATION

We therefore recommend to the parties:

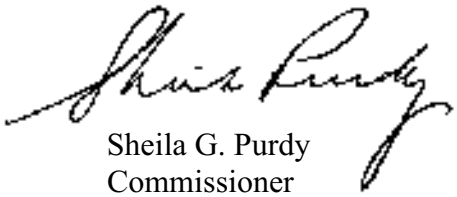
> **That the claim of the Paul First Nation regarding the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION



Daniel J. Bellegarde
Commissioner (Chair)

Alan C. Holman
Commissioner



Sheila G. Purdy
Commissioner

Dated this 21st day of February, 2007

APPENDIX A
HISTORICAL BACKGROUND

PAUL FIRST NATION
KAPASIWIN TOWNSITE INQUIRY

Indian Claims Commission

CONTENTS

INTRODUCTION

The Paul First Nation[1] submitted a Specific Claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of Wabamun Indian Reserve (IR) 133B, surrendered by the Paul First Nation on September 11, 1906. This reserve is located west of Edmonton, on the shores of Wabamun Lake (also known as White Whale Lake), in central Alberta. This claim was partially validated and accepted for negotiation on the basis of an outstanding lawful obligation with respect to the transfer of the streets and lanes in 1932[2]. The First Nation and Canada entered into negotiations, which subsequently broke down over compensation criteria and other issues. The Indian Claims Commission (ICC) agreed to conduct an inquiry into compensation criteria, as well as the rejected aspects of the claim, in October 2001.

On June 2, 2000, the Paul First Nation submitted a further claim challenging the validity of the surrender of IR 133B. This claim was rejected in July 2003, and the Commission subsequently agreed to conduct an inquiry into the rejected surrender claim as well.

For clarity, it should be noted that the First Nation surrendered land at the eastern end of the adjacent reserve, Wabamun IR133A, for the Duffield townsite and surrounding farmlands in 1911. A specific claim arising out of those events has already been settled and does not form part of this inquiry.

BACKGROUND

On August 23 and 28, 1876, the Government of Canada, represented by Treaty Commissioner Alexander Morris, signed Treaty 6 with "the Plain and Wood Cree and the other Tribes of Indians" living in what are now the central portions of Saskatchewan and Alberta.[3] Treaty 6 promised to "lay

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[1] The Paul First Nation is referred to in the historical documentation by a number of designations, including Ironhead's Band, White Whale Lake Band, Wabamun Band, Paul's Band, the Paul Band, and Paul Indian Band.

[2] John Sinclair, Assistant Deputy Minister, Claims and Indian Government, to Chief Wilson Bearhead, Paul Band, July 19, 1998 (ICC Exhibit 4a).

[3] *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen's Printer, 1964), 1–2 (ICC Exhibit 1a, pp. 2–3).

aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians."[4] Furthermore, the treaty states that these "reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."[5]

The ancestors of the Paul First Nation entered into Treaty 6 through an adhesion to that treaty signed by Chief Alexis at Edmonton on August 21, 1877.[6] Alexis's band of Stoney people lived at Lac Ste Anne, north of Edmonton, though it appears that one of Alexis's headmen, Ironhead, actually resided at Wabamun Lake along with "about one half" of the Alexis Band.[7] Ironhead's group was initially treated by the Department of Indian Affairs as part of the Alexis Band, but they eventually won recognition as a separate band and received their own paylist under Peter Ironhead in 1886.[8] After Ironhead's death in 1887, Paul assumed leadership of the Band.[9] Thereafter, it was often referred to in departmental correspondence as Paul's Band or the White Whale Lake Band. Beginning in 1890, the Band's membership was substantially increased by the movement of approximately 70 Sharphead band members to Wabamun Lake.

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4 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen's Printer, 1964), 3 (ICC Exhibit 1a, p. 4).

5 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen's Printer, 1964), 3 (ICC Exhibit 1a, p. 4).

6 *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, August 23, 1876 (Ottawa: Queen's Printer, 1964), 10–11 (ICC Exhibit 1a, pp. 11–12).

7 George A. Simpson, Indian Reserve Survey, to Superintendent General of Indian Affairs (SGIA), December 1, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 110 (ICC Exhibit 1a, p. 16).

8 Donna Gordon, "Paul's Band: A History of Its Land," prepared for Treaty and Aboriginal Rights Research of the Indian Association of Alberta (TARR/IAA), May 1981, p. 3 (Exhibit 2a, p. 3).

9 Extract from report of Charles de Cazes, Indian Agent, March 31, [1890], Library and Archives Canada (LAC), RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 74); Donna Gordon, "Paul's Band: A History of Its Land," prepared for Treaty and Aboriginal Rights Research of the Indian Association of Alberta (TARR/IAA), May 1981, p. 3 (Exhibit 2a, p. 3).

Survey of IR 133A and 133B

The Department of Indian Affairs knew that fishing was very important to the livelihood of the Paul First Nation.[10] When discussing a future reserve for the First Nation, Indian Commissioner Hayter Reed emphasized the importance of securing a fishing station for its use. In a letter to the Deputy Superintendent General of Indian Affairs (DSGIA), dated December 29, 1890, he noted, in reference to an attached sketch, that

> [a]t point B in [Township] 52, [Range] 4, W. 5th I.M. there is a spot particularly well adapted to form a fishing station, and as I regard its possession as of great importance to secure what will form no small proportion of the Indians food supply, I would request authority, in the event of the survey failing to include it in the Reserve proper, to have it surveyed, with a view to its being set apart as a fishing station for the Band.[11]

The department authorized the Commissioner on January 12, 1891, to have a fishing station "at the point 'B' marked in the sketch enclosed in your letter" set apart for Paul First Nation.[12] This sketch has not been located, and it is unclear whether the particular spot recommended by Reed was actually in township 52 as he stated (on the western portion of the future IR 133A) or further north in township 53, where a fishing station known as IR 133B was later surveyed.

In late 1891, surveyor John C. Nelson arrived at Wabamun Lake to "make a survey of the reserve and fishing station for the members of Chief Alexis' band, to whom a reserve had not yet been allotted."[13] Indian Reserves 133A and 133B (directly adjacent to one another) contained 32.7 square miles in townships 52 and 53, ranges 3 and 4, west of the 5th meridian, both with a significant

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[10] See, for example, George A. Simpson, Indian Reserve Survey, to SGIA, December 1, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1880*, 110 (ICC Exhibit 1a, p. 16); T.P. Wadsworth, Inspector of Indian Agencies, to Edgar Dewdney, Indian Commissioner, October 26, 1885, LAC, RG 10, vol. 3717, file 22550-2 (ICC Exhibit 1a, p. 54).

[11] Hayter Reed, Indian Commissioner, to DSGIA, December 29, [1890], LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 78–79).

[12] Unidentified author and recipient, January 12, 1891, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 81–82).

[13] John C. Nelson, In Charge, Indian Reserve Surveys, to SGIA, December 16, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 206 (ICC Exhibit 1a, p. 93).

frontage along the eastern shore of the lake. IR 133B was set aside as a fishing station for the Band, and it is located adjacent to the northwest corner of IR133A, in township 53, ranges 3 and 4,[14] along the southeastern portion of Moonlight Bay.[15] Surveyor Nelson's survey report of IR 133A noted that "the Indians are settled near the centre of the easterly half of the Reserve."[16]

IR 133A and 133B were set aside "for Indian purposes" and withdrawn from the operation of the *Dominion Lands Act* by Order in Council 1633 on June 16, 1892.[17] These lands are usually referred to as the Wabamun reserves, although departmental correspondence also refers to them as the White Whale Lake reserves. Indian Commissioner A.E. Forget later referred to the reserve at Wabamun Lake as a "joint reserve" set apart for both Paul's and Sharphead's bands, and he noted that "about one half of the Reserve, or say 16 square miles" was set aside "on account of Sharphead's Band."[18]

Land Use

Although the First Nation lived all along the shoreline of the lake, Elder Mary Rain explained the particular importance of the IR133B and Moonlight Bay area to the First Nation for fishing:

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[14] Natural Resources Canada, Plan 294 CLSR AB, "Survey of the Boundaries of Indian Reserves (Stony) Nos. 133a & 133b at White Whale or Mirror (Wabamun) Lake for the band of Chief Alexis," surveyed by John C. Nelson, DLS, 1891 (ICC Exhibit 7a).

[15] Department of Environment, Parks and Protected Areas Division, Province of Alberta, "Plan showing Wabamun Lake Provincial Park," October 19, 1999, in Written Submissions on Behalf of the Paul First Nation, February 7, 2005, p. 6; see also Natural Resources Canada, Plan 294 CLSR AB, "Survey of the Boundaries of Indian Reserves (Stony) Nos. 133a & 133b at White Whale or Mirror (Wabamun) Lake for the band of Chief Alexis," surveyed by John C. Nelson, DLS, 1891 (ICC Exhibit 7a).

[16] John C. Nelson, In Charge, Indian Reserve Surveys, to SGIA, December 16, 1891, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1891*, 207 (ICC Exhibit 1a, p. 94).

[17] Order in Council PC 1633, June 16, 1892, Department of Indian Affairs and Northern Development (DIAND), Indian Lands Registry, Instrument no. L10979 (ICC Exhibit 1a, pp. 101–2).

[18] A.E. Forget, Indian Commissioner, to the Secretary, Department of Indian Affairs, December 9, 1897, LAC, RG 10, vol. 3912, file 111777-1 (ICC Exhibit 1a, p. 113).

> Yes. I think that's the easiest place they fish, when it's windy, when it's stormy. It's not – not like the big lake. The big lake, there's a lot of waves in there. But that's a small little area lake. So they fish more around there, around that Moonlight Bay.[19]

In addition to its importance as a fishing station, IR 133B was also used for a number of other activities. Elder Violet Poitras explained:

> And Moonlight Bay was one of the important places, like, that's how come it got the name – she was saying Kapasiwin, like a camping spot. They camped there, and that's how it got that name Kapasiwin. We used to camp there. And then they settle there. They had cabins there. They lived there, and they fished in the lake there. They hunted. They trapped. They did – they lived off the lake there by Moonlight Bay before the railway track and before the railway track was built.[20]

A wagon trail, which Elder Mike Rain described as their "main road," also ran through IR 133B to Lac Ste Anne and the Alexis reserve, and the area was an important camping spot along this trail.[21]

The oral history suggests that the reserve was used at different times throughout the year for a variety of traditional activities. During the community session, Elder Louise Bird explained the First Nation's seasonal fishing patterns and use of the reserve:

> MS. PURDY: And you were talking about how people fished all winter, I think you said. They would fish in the summertime. Did they also fish in the fall season as well?
> MRS. BIRD: In the fall season was the best because that's when the fish spawn. And in the wintertime they fish out ice fishing. And in the summertime, the – they were hard to catch. They weren't spawning. They were way out in the deep. My dad used to say that. So if you – if they did go out fishing, it was just like three, four fish. That's enough for the family to eat. In the fall time, that's when the fish spawned and they caught a lot of fish. Then they dried them up. They cut them up and, like, they smoked them up and they dry them and just like dry meat. And they just put them

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19 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 26, Mary Rain).

20 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 78, Violet Poitras).

21 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 12–13, William Rain).

> away for the winter. And then the springtime too, there was – in the springtime they trapped muskrats, beavers, everything.[22]

Other oral and documentary evidence suggests that some band members would have been absent from the reserves in the fall for hunting, although the evidence is conflicting and inconclusive.[23] The only contemporary document that mentions the absence of band members from their reserve is a letter to the department written in 1910 by Surveyor J.K. McLean, referring to the remaining Wabamun reserve, IR 133A. He explained that "the band is made up of Stonies and Crees, most of them being part of the old Wolf Creek Band. The Stonies are hunters and usually go in the fall to the [mountains] to hunt, while some of the Crees do a little farming."[24]

Members of the Paul First Nation continued to rely mainly on their traditional pursuits of hunting and fishing for their livelihood, although they also planted gardens and began to take up cattle raising and some agriculture, beginning around 1900.[25] In his annual report for 1902, Indian Agent James Gibbons reported that they were "hunters, at which they make a fair living, besides they live on the banks of White Whale Lake, which is teeming with pike and whitefish and wild-fowl."[26] In July 1904, Gibbons reported that "[h]unting and fishing are the main sources of their livelihood, cattle-raising comes next, and farming follows quite a bit behind and in a small way." He explained

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[22] ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 60, Louise Bird).

[23] ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 28, Mary Rain; p. 39, Florence Bird; pp. 47, 50, 60–61, Louise Bird; p. 84, Violet Poitras; pp. 94–95, Mike Rain); see also Diary, A.E. Pattison [farm instructor], December 1920, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 577–81); H.S. Woollard, Farm Instructor, to unidentified recipient, November 1921, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 584–85); H.S. Woollard, Farm Instructor, to unidentified recipient, December 1921, LAC, RG 10, vol. 10408, file Shannon Box 28, pt A (ICC Exhibit 1a, pp. 586–87); James Kerr, Farm Instructor, to unidentified recipient, September 1934, LAC, RG 10, vol. 10409, file Shannon Box 30, pt B (ICC Exhibit 1a, pp. 642–43).

[24] J.K. McLean to Mr Scott, November 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 458).

[25] James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 12, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 158 (ICC Exhibit 1a, p. 118).

[26] James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 8, 1902, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 147 (ICC Exhibit 1a, p. 139).

that they were too far from markets to sell their crops, and that in any case, "[w]ith whitefish at their doors and fur-bearing animals at hand, they are prosperous."[27]

Leadership

As stated before, Paul assumed leadership of the First Nation after the death of Ironhead in 1887 and retained that official role until 1901, when he was deposed from office. An Order in Council, dated September 12, 1901, states:

> On a report dated 4th September, 1901 from the Superintendent General of Indian Affairs, stating that it has been represented to him by the Indian Commissioner for Manitoba and the North West Territories that Chief Paul, of the White Whale Lake Band, Edmonton Agency, North West Territories, is incompetent to hold the position of Chief for the reason that he has killed cattle on the reserve without authority and endeavoured to get his Indians to act in a like manner. He also used abusive language to the Agent for punishing a trader who sold liquor to the Indians and encouraged the trader to return to the Reserve during the absence of the Agent. At the beginning of haying he left the reserve on a visit to Morley, taking a number of young men with him.
>
> The Minister recommends as such conduct must have a very bad effect upon the Indians of the band and thus retard their progress, that under Section 75 of the Indian Act ... Chief Paul be deposed and that he be declared ineligible to hold office for three years.[28]

On the recommendations of farmer W.G. Blewett and Indian Agent James Gibbons, Indian Commissioner David Laird recommended to the department that no new chief be elected to take Paul's place.[29] At the time, there were three recognized headmen: Simon, Reindeer, and David

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[27] James Gibbons, Indian Agent, Edmonton Agency, to SGIA, July 27, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 157 (ICC Exhibit 1a, p. 159).

[28] Order in Council PC 1762, September 12, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 134).

[29] W.G. Blewett, Farmer, Edmonton Agency, to the Indian Agent, Edmonton Agency, August 5, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 130); James Gibbons, Indian Agent, Edmonton Agency, to unidentified recipient, August 12, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 131); David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 19, 1901, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 132).

Yellowhead (also known as David Bird).[30] Following Paul's removal from office, the First Nation pushed for the appointment of a new chief.

On July 15, 1903, Assistant Indian Commissioner J.A. McKenna informed the department: "I am advised by the Agent at Edmonton that the Indians of Paul's band at a meeting held in his presence elected Didymus Burntstick as Chief in succession to the deposed Paul."[31] McKenna advised that unless the Indian Agent had received authority for the election, Burntstick "cannot be recognized as Chief."[32] In response, DSGIA Frank Pedley confirmed that "the Department did not authorize Agent Gibbons to hold the election referred to."[33] The First Nation had asked that the department appoint the same man as headman a few years earlier, but the request seems not to have been approved, as Didymus Burntstick was not designated as a headman on the paylists and never received the extra annuity associated with that position.[34]

At the end of 1903, the First Nation asked the Secretary, through Indian Agent Gibbons, "if it is the intention of the Department to authorize them to elect a Chief to succeed Paul, deposed."[35] The Indian Agent was instructed to direct his communication to the Indian Commissioner instead, but there is no record of any further reply to this question.[36] Paul apparently complained to the

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[30] Treaty annuity paylist, "Paul's Band paid at White Whale Lake," July 25, 1901, LAC, RG 10, vol. 9434 (ICC Exhibit 1b, pp. 8–9). See tickets no. 25 (Simon), no. 28 (David Yellowhead), and no. 41 (Reindeer).

[31] J.A. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, July 15, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 143).

[32] J.A. McKenna, Assistant Indian Commissioner, to the Secretary, Department of Indian Affairs, July 15, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 143).

[33] Frank Pedley, DSGIA, to the Indian Commissioner, July 21, 1903, LAC, RG 10, vol. 3940, file121698-10, Reel C-10165 (ICC Exhibit 1a, p. 145).

[34] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, November 23, 1900, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 121); Treaty annuity paylists, Paul's Band, 1901–1910, LAC, RG 10, vols. 9434–43 (ICC Exhibit 1b). See ticket no. 22 (Didymus Burntstick).

[35] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, December 3, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 151).

[36] Frank Pedley, DSGIA, to James Gibbons, Indian Agent, Edmonton Agency, December 14, 1903, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 152).

department in 1905 "of some interference with or disregard of his rights as chief or headman."[37] In response, Indian Commissioner David Laird informed the Secretary that there were two headmen in the band, David Yellowhead and Reindeer (Simon having died in 1904). No further response to Paul's complaint is on record.[38]

Commissioner David Laird reported to the Secretary in May 1906 that

> since the deposal of Chief Paul, White Whale Lake Band, Edmonton Agency, the Indians have repeatedly requested that another Chief be appointed in his place. The matter was brought to my attention by Mr. Inspector Markle after his last inspection of the Agency, and also by the Agent, and they recommend that David Bird be now appointed Chief of that Band. They say that they can testify to his sobriety and honesty, and that in their opinion if he is appointed, he will have a good influence over the Band.[39]

Laird concluded that "[u]nder the circumstances I would recommend that Bird be appointed Chief of the above Band for an indefinite period."[40] This recommendation was approved, and David Yellowhead (also known as David Bird) signed the declaration of office with his "X" on May 25, 1906, and was appointed Chief of the Band.[41] The form, witnessed by agency interpreter John Foley, includes the Indian Agent's statement that the declaration was "interpreted to him in my presence in the Cree language, which he understood."[42] Following Bird's appointment, the recognized leadership of the Paul First Nation included Chief David Bird and Headman Reindeer.

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[37] Frank Pedley, DSGIA, to the Indian Commissioner, August 31, 1905, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 173).

[38] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, September 12, 1905, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 175).

[39] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 2, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 183).

[40] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, May 2, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 183).

[41] J.D. McLean, Secretary, Department of Indian Affairs, to the Indian Commissioner, May 10, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 184); Declaration of "David Yellowhead, called also David Bird," May 25, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 248).

[42] Declaration of "David Yellowhead, called also David Bird," May 25, 1906, LAC, RG 10, vol. 3940, file 121698-10 (ICC Exhibit 1a, p. 248).

At a meeting with the Band in June 1906, J.A. Markle, the Inspector of Indian Agencies, was pressed to appoint "Ex-Chief" Paul and David Peter as "minor chiefs" or councillors. Inspector Markle noted:

> Mr. Farmer Pattison stated that he would like to see both of these Indians holding these positions, because Paul had a great deal of influence with a section of the band and David Peter because he not only had a good deal of influence with a section, too, but he spoke and understood English and would be of considerable use as an interpreter, if given the position referred to.[43]

There is no record of the department's response to this request.

Lead-up to Surrender of IR 133B

On November 4, 1905, Inspector J.A. Markle reported that "[t]he Canadian Northern Railway Co. are now grading a line between the reserve and Edmonton" and would likely pass very close to a rich deposit of marl[44] on the Wabamun reserve.[45] Seven months later, on June 3, 1906, Indian Agent James Gibbons reported that "construction work is rapidly approaching Paul's reserve on the line of the Canadian Northern railway," and that the railway would cross approximately nine miles of the reserve.[46] Secretary J.D. McLean replied on June 13, 1906, that right of way plans had not yet been filed by the company and that "[t]he Department has made it a rule that no work of construction is

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[43] J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, pp. 201–2); see also J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, pp. 199–200).

[44] Marl is a "white to gray accumulation on lake bottoms caused by precipitation of calcium carbonate (CaCO3) in hard water lakes. ... While it gradually fills in lakes, marl also precipitates phosphorus, resulting in low algae populations and good water clarity. In the past, marl was recovered and used to lime agricultural fields." See online: www.dnr.state.wi.us/org/water/ fhp/lakes/under/glossary.htm (accessed September 15, 2004).

[45] Extract of letter from J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, November 4, 1905, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 177).

[46] James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, June 3, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 185).

to be commenced in any Indian Reserve, until the right of way has been arranged for."[47] The same day, Secretary McLean notified C.R. Stovel, the Right of Way Agent for the CNR, that "[i]n order to prevent any possible delay in your work of construction, it would be well to file the usual plan, duly certified by the Chief Engineer of Railways and Canals, together with your offer of the sum you are willing to pay for the right of way and damages."[48] Stovel replied that the plans would be forwarded "very shortly."[49] On June 16, 1906, Agent Gibbons reported that he valued the lands needed for the CNR right of way at $25 per acre, up from his initial valuation of $15 per acre, explaining that local land values were increasing and that "[t]he Indians would not be satisfied with less."[50] There is no record of any discussions between the Crown and the First Nation with regard to this right of way.

Four days later, on June 20, 1906, the Paul First Nation signed a surrender for lease of "all those mines, deposits, beds, veins and seams of marl and sand lying under or on the surface of the Paul's Indian Reserve."[51] The surrender was confirmed by Order in Council on July 19, 1906.[52] (This surrender is not at issue in this inquiry.) On June 26, 1906, Inspector Markle reported that "about two days were taken up to secure this surrender," during which a number of issues were discussed, including a resurvey of the reserve boundaries that season.[53] Markle explained that he promised to

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47 [J.D. McLean], Department of Indian Affairs, to James Gibbons, Indian Agent, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 186).

48 J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, June 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 188).

49 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, June 16, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 189).

50 James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, June 16, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 190).

51 Surrender for Lease, June 20, 1906, DIAND, Indian Lands Registry, Reg. No. X14133 (ICC Exhibit 1a, p. 191).

52 Order in Council, July 19, 1906, DIAND, Indian Lands Registry, Instrument no. X14133 (ICC Exhibit 1a, pp. 207–8).

53 J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, pp. 198–99).

have the survey made because "neither Mr. Pattison [the farming instructor] or the Indians were sure as to where the boundary line is at various points."[54] Within the same report, he noted:

> I was asked for an opinion as to whether it would be wise for the band to surrender that portion of the reserve that lies north of the projected line of railway together with that portion of the reserve within township No. 53, providing the railway company build on the projected survey. I did not give the Indians a definite answer to the question for several reasons. Should the railway locate on the projected line and you think it advisable to secure this surrender[,] it is my opinion that it can be secured. That portion within township 53 is well adapted for summer residences, one of the best spots on the lake[,] and the Indians seem to be aware that it is valuable for this reason.[55]

On June 27, 1906, Markle reported to the Indian Commissioner that the CNR had surveyed a line through the Wabamun reserve, and "it is thought that it will be graded, if not ironed, this season to the northern shore of the Lake."[56] The line was projected to run through the northern part of the reserve (IR133A) and then turn northwards through IR133B before crossing the narrows of the lake. In this regard, he noted that "one of the Indians stated that it might be in their interests to surrender that portion of the reserve which will lie north of the railway and the portions of sections within townships No. 53."[57]

Shortly thereafter, on July 5, 1906, Edmonton realtor A.W. Taylor wrote to the Superintendent General of Indian Affairs, Frank Oliver, regarding the proposed CNR line through "Powell's" reserve. He explained:

> The railway divides the reservation leaving a strip upon the East side of ½ mile on the North, which means that the Indians will constantly have to travel across the

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[54] J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 199).

[55] J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, June 26, 1906, LAC, RG 10, vol. 7461, file 18110-7, pt 1 (ICC Exhibit 1a, p. 200).

[56] J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 201).

[57] J.A. Markle, Inspector, Alberta Inspectorate, to the Indian Commissioner, June 27, 1906, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 201).

> track, which to them is objectionable, and especially so as the land to the North will contain only a small acreage.
>
> Bird the Chief would consent to a sale of the portion we have mentioned and they are anxious to find out if such an arrangement would meet with the approval of your department.
>
> We came across some members of this band a few days ago, and as the writer for many years was associated with the Indian Department, he undertook to lay this matter before you. We would point out that if your Inspector would place a value upon the land in question, we would be in a position to find you and the Indians a purchaser.[58]

J.D. McLean replied to Taylor on July 16, 1906, stating that, "as the Canadian Northern Railway has not yet filed its plan, showing the proposed right of way across the Reserve, the Department is not, at present, in a position to deal with the matter."[59]

On July 31, 1906, Secretary McLean informed Indian Agent Gibbons that "an application has been made to the Department for a portion of Indian Reserve 133A and B." He explained that the application was for the "Broken Sections 1, 6 and 12, forming the North West corner of Indian Reserve on Lake Wabamun, containing about 550 acres," a description that corresponds to the location of IR 133B. McLean instructed Gibbons to "report, as early as possible whether this land is occupied by the Indians and whether there are any improvements thereon, and if not would the Band be willing to surrender the land to be sold for their benefit."[60]

As instructed, Agent Gibbons held a meeting with members of the Band to ascertain their views on the proposed surrender. He reported on August 15, 1906:

> I have the honor to inform you that in compliance with the request conveyed in your letter above referred to I held a conference with the Indians of Paul's Band on the 14th instant with the object of ascertaining whether or not they were favorable to

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[58] A.W. Taylor, W.S. Weeks Company, Edmonton, to SGIA, July 5, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 203–4).

[59] J.D. McLean, Secretary, Department of Indian Affairs, to W.S. Weeks Company, July 16, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 206).

[60] J.D. McLean, Secretary, Department of Indian Affairs, to James Gibbons, Indian Agent, July 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 210).

> surrendering the Broken Sections 1, 6 and 12, forming the North West corner of their Reserve.
>
> I found that the majority were willing to surrender the land in question on condition that so much thereof as borders on the Lake and is suitable for a townsite or resort should be plotted and put up for sale in, say, 1 acre lots, and the remainder disposed of to the best advantage for them.
>
> The location may be considered unoccupied and unimproved as the two or three living in shacks on it make no claim for compensation.
>
> If it be decided by the Department to accede to this proposition, and I would strongly recommend it should, it might be well to send the Form of Surrender as soon as convenient, and to instruct Mr. McLean, who is about due there, to make the necessary surveys.[61]

News of the proposed surrender travelled quickly. C.W. Cross, Attorney General for Alberta, wrote to the Deputy Minister of the Interior three days after the meeting, asking how the sale of "the Indian Section at White Whale Lake, which I understand the Indians are prepared to sell[,] is to be handled."[62] Dominion Land Surveyor J.K. McLean, who was on his way to Paul's reserve to resurvey the reserve boundaries, wrote to the Secretary on August 18, 1906, saying that "Mr. Gibbons the Agent informs me that there is some prospect of a further surrender at that Reserve," and he asked that additional survey posts be put at his disposal.[63] He wrote to the department again on August 30, 1906, stating that the Wabamun reserve boundary survey was almost completed, and that he planned to leave for Edmonton on September 9 or 10 "unless otherwise instructed."[64]

On September 1, 1906, DSGIA Frank Pedley authorized Indian Agent Gibbons to take a surrender of IR 133B.[65] On the same date, Surveyor McLean was instructed to "[s]ubdivide portion

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[61] James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

[62] C.W. Cross to W.W. Cory, Deputy Minister of the Interior, August 17, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 217).

[63] J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, August 18, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 218).

[64] J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, August 30, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 221).

[65] Frank Pedley, DSGIA, to James Gibbons, Indian Agent, September 1, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 222).

of White Whale Lake reserve proposed to be surrendered, 133 B."[66] Also on that date, the Secretary wrote to the CNR Right of Way Agent, C.R. Stovel, to inquire "when we may expect a copy" of the right of way plans.[67] Stovel replied that the plans would be filed "at the earliest date possible."[68]

On September 6, 1906, Surveyor McLean reported that "[w]ith regard to the subdivision into Town Lots of 133 B about to be surrendered, I am only able to re-run the roads laid out on the outside by the Dept. of Interior and run the line between the two ranges until Mr. Agent Gibbons arrives and gets the surrender. I do not like to do much until the surrender, as I understand some of the Indians are opposed."[69]

Surrender of IR 133B

Nine members of Paul's band signed a surrender document for the surrender of IR 133B. This document is undated, although the surrender affidavit was dated September 13, 1906. The surrender document reads as follows:

> Know all Men by these Presents, THAT WE, the undersigned Chief and Principal men of Paul's Band Number 133A resident on our Reserve at White Whale Lake, known as 133A and B, in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto OUR SOVEREIGN LORD THE KING, his Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in the White Whale Lake Indian Reserve in the Province of Alberta containing by admeasurement Six Hundred and Thirty-Five acres be the same more or less and being composed of all that portion of land situate at the northwest corner of the White Whale Lake Indian Reserve aforesaid, known as Indian Reserve No. 133B, being composed of a part of projected Section Six, Township Fifty-Three, Range Three, and parts of

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[66] J.D. McLean, Secretary, Department of Indian Affairs, to J.K. McLean, Dominion Land Surveyor, September 1, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 223).

[67] Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, September 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 224).

[68] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, September 4, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 225).

[69] J.K. McLean [Dominion Land Surveyor] to J.D. McLean, Secretary, Department of Indian Affairs, September 6, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 226).

> projected Sections One and Twelve, Township Fifty-Three, Range Four, All west of the Fifth Meridian.
>
> TO HAVE AND TO HOLD the same unto His said Majesty THE KING, his Heirs and Successors forever, in trust to sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people.
>
> AND upon the further condition that all moneys received from the sale thereof, shall, after deducting the usual proportion for expenses of management, be placed to our credit and the interest thereon paid to us and our descendants annually or semi-annually as to the Department of Indian Affairs may seem best in our interests.[70]

The document bears the X marks of six male band members, including Chief David Bird, Paul, and Didymus, as well as the signatures of David Peter, Baptiste Peter, and John Rain. The name "Reindeer" also appears on the document but is not accompanied by his mark. The document is witnessed by Indian Agent James Gibbons, A.E. Pattison, Surveyor J.K. McLean, and his assistant W.R. White.[71] No information is available to indicate whether an interpreter was present.

Seven of the nine signatories to the surrender received annuities as "men" on the Paul Band's July 20, 1906, paylist. The remaining two, Baptiste Peter and Enoch Bird, were not paid as men until later years. Baptiste Peter was first paid as a man on his own ticket on the 1908 paylist, along with one woman.[72] The note beside his mother's ticket, where he was previously paid, states "B[oy] now M[an]."[73] No further information is available regarding Baptiste Peter's age at the time of the 1906 surrender. Enoch Bird, the son of Chief David Yellowhead, was first paid as a man on his own ticket

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[70] Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, pp. 229–30).

[71] Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Reg. No. 11633 (ICC Exhibit 1a, p. 231).

[72] Treaty annuity paylist, Paul's Band, July 11, 1908, LAC, RG 10, vol. 9441 (ICC Exhibit 1b, p. 42). See ticket no. 70 (Baptiste Peter).

[73] Treaty annuity paylist, Paul's Band, July 11, 1908, LAC, RG 10, vol. 9441 (ICC Exhibit 1b, p. 39). See ticket no. 10 (Peter's widow, Emma).

in 1909, along with one woman.[74] The note beside his father's name states, "Boy as man No. 71."[75] The Registered Indian Record for Enoch Bird notes that he was born in 1879, which would make him 26 or 27 years of age at the time of the 1906 surrender.[76]

The surrender affidavit, dated September 13, 1906, was signed by Chief David Bird and Indian Agent James Gibbons, and it was sworn before a Justice of the Peace in Wabamun, Alberta. Agency interpreter John Foley witnessed the affidavit.[77]

There is little oral history surrounding the surrender of IR 133B. The Elders do not recall hearing about any meetings or votes to surrender or sell the land.[78] However, some understood that the land was leased or loaned rather than sold.[79] At the community session, Elder Mary Rain repeated the Stoney word that her grandmother used to describe what had happened to the land and explained that it meant "the land was loaned."[80] It is unclear how the idea of a lease originated, although Elder Mary Rain recalls that Indian Agent Bristow gave them this information.[81] Elder Lloyd Saulteaux recalled that his grandfather, Joe House, told him about the lease while fishing. "And he started telling us, you know, he said that in my time I wouldn't be able to see this land, he told me. I was young. He said, But you will if you look after yourself. You'll see that day, he said. When the lease

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74 Treaty annuity paylist, Paul's Band, July 10, 1909, LAC, RG 10, vol. 9442 (ICC Exhibit 1b, p. 46). See ticket no. 71 (Enoch Bird).

75 Treaty annuity paylist, Paul's Band, July 10, 1909, LAC, RG 10, vol. 9442 (ICC Exhibit 1b, p. 44). See ticket no. 28 (David Yellowhead).

76 Registered Indian Record for Enoch Bird, DIAND, Genealogical Unit, Indian Register, Paul Band (ICC Exhibit 1f).

77 Surrender Affidavit, September 13, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 238).

78 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 11, 16–18, William Rain; p. 24, Mary Rain; pp. 50, 65–67, Louise Bird; p. 89, Violet Poitras; p. 96, Mike Rain).

79 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 25, 32, 35, Mary Rain; p. 40, Florence Bird; p. 82, Violet Poitras; p. 94, Mike Rain; p. 103, Lloyd Saulteaux).

80 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 35, Mary Rain; p. 36, Francis Bull).

81 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 25, Mary Rain).

ends, he told me. And I said, What lease? It was new to me. And he started telling me, Well Kapasiwin is leased for 99 years."[82]

Violet Poitras, the great-granddaughter of Didymus Burntstick, heard from her father that Moonlight Bay was where the Burntsticks lived and that, one day, Didymus Burntstick was told to "get out of that land."[83] She explained:

> He just said the – they had to move from there when they were living there. When my grandpa and them were living there – this is probably before the time my dad was born, my grandpa – that would be Didymus Burntstick – when they were living there, they had to move from there. So that must have been before the railroad track went through there. Maybe that's why they were told to move. I don't know. They didn't say anything about why they had to move. They just said KA OTE AN A MOKE (Phonetic) they took the land back. We have to go. That's all he said. I wish he would have said more.[84]

When asked who told Didymus Burntstick to leave, Ms Poitras explained: "Well, the only thing my dad used to say was ... the white people came there and told them to get out."[85] She did not recall her father telling her anything about her grandfather, Didymus Burntstick, or the Band signing a surrender document.[86]

Reports on the Surrender

On September 13, 1906, Agent Gibbons returned the signed surrender document to the department, with no further account of the surrender meeting.[87] The documentary record contains no indication of any voters list or any record of the surrender vote. In a letter to Inspector Markle, dated October

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82 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 102–3, Lloyd Saulteaux).

83 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, pp. 76–77, 79, Violet Poitras).

84 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 82, Violet Poitras).

85 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 88, Violet Poitras).

86 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 89, Violet Poitras).

87 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, September 13, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 239).

24, 1906, Agent Gibbons commented with regard to the surrendered land: "This is in respect to beach, scenery and situation the most desirable site on the Lake and should[,] and I think will, net the Indians a pot of money. So you see we are embarked in the real estate business, and will have the red flag out for some time."[88]

Surveyor J.K. McLean wrote two letters to the department on September 17, 1906, which offer more detail about the meeting and what was discussed. The first letter, addressed to Secretary McLean, acknowledged the department's previous instructions to subdivide IR133B and reported on his progress in the subdivision survey.

> I beg to acknowledge receipt of telegram instructing me to subdivide Indian Reserve 133 B into town Lots. The surrender was not completed until the 11 Inst[ant] and in the meantime I ran the outside streets. I have commenced the subdivision into town lots of about one half the Reserve[,] leaving the balance of 320 acres as Blocks, with the streets located.
>
> The whole of that portion to be subdivided into town lots is covered with a thick growth of poplar about 3 inches in diameter or with a heavy growth of willow. ... The most of the Lots are good, specially those along the Lake which are very fine. I may say from a fairly intimate knowledge of the Lake that this is by far the finest town plot site to be found. Some 1/4 sections outside the Reserve have been subdivided, but on none of them are the Lots as fine as on 133 B.
>
> It was decided at the meeting with the Indians when the surrender was given to reserve the Beach from being sold, a width of about 150 feet along the Lake including a street to be reserved from sale by the Department, such width or widths to be decided by myself when making the survey.[89]

The second letter, addressed to DSGIA Frank Pedley, reported the discovery of a burial ground within the surrendered plot and the reaction of Headman Reindeer to the surrender:

> In subdividing Indian Reserve 133 B into town lots I find that a small Indian Burying Ground occupies a prominent position on one or two of the most valuable lots. Its existence was not mentioned at the meeting when the surrender was taken, nor do I think it was known to Mr. Agent Gibbons. It appears that the Indians who lived on

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[88] James Gibbons, Indian Agent, to Mr. Markle, October 24, 1906, LAC, RG 10, vol. 10416, Shannon Box 56(a) (ICC Exhibit 1a, p. 259).

[89] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, pp. 240–41).

> 133 B always refused to use the regular Burying Ground at the Mission which is on 133 A.
>
> Those who had used the small ground were present at the meeting and signed the surrender excepting one named Reindeer. The latter is a Headman very old and feeble and refused to sign or speak. I think however he feels aggrieved, as a few days ago his tepee was on one of the street lines and before we could offer to assist in lowering it he rushed out and cut it on each side from top to bottom.[90]

The graves were eventually relocated to the mission property on IR133A.[91]

Order in Council PC 1931, September 27, 1906

On September 20, 1906, Prime Minister Wilfrid Laurier, on behalf of the Superintendent General of Indian Affairs, submitted the surrender of IR133B to the Governor in Council for approval.[92] The confirming Order in Council, dated September 27, 1906, reads as follows:

> On a memorandum, dated 20th September, 1906, from the Superintendent General of Indian Affairs, submitting a surrender, in duplicate, made on the 11th day of September, 1906, by Paul's Band of Indians, No. 133a, of a parcel of land (described in the surrender) comprising an area of six hundred and thirty-five acres of their reserve, known as the White Whale Lake Reserve, numbered 133a and 133b, near Edmonton, in the Province of Alberta, the said surrender having been made with a view to the land covered thereby being sold for the benefit of the band.
>
> The Minister recommends, the surrender having been duly authorized, executed and attested in the manner required by the 39th section of the Indian Act, that the same be accepted by the Governor in Council, under the provisions of the said section ...[93]

Section 39 of the 1886 *Indian Act* sets out the following statutory requirements for a valid surrender:

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[90] J.K. McLean, Dominion Land Surveyor, to Frank Pedley, DSGIA, September 17, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 242).

[91] Voucher, March 14, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 294).

[92] Wilfrid Laurier, for SGIA, to Governor General in Council, September 20, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 295).

[93] Order in Council PC 1931, September 27, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 250).

> 39. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:-
>
> (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question.
>
> (b) The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior, county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in Manitoba or the North-west Territories, before the Indian Commissioner for Manitoba and the North-west Territories, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[94]

Report on the Subdivision Survey

Surveyor J.K. McLean completed the subdivision survey of IR 133B on October 12, 1906,[95] and made his report of the season's surveys to the department on October 27, 1906. With regard to surveys carried out at the "White Whale Lake Reserves," he stated:

> The boundaries of these reserves having become obliterated were re-newed and will prevent encroachments by settlers who are becoming numerous in the neighbourhood.
>
> Reserve No. 133 B was surrendered by the Indians while I was there, and was subdivided into townlots according to the desire of the Indians.
>
> These lots are situated at the east end of White Whale or Wabamun Lake with a fine view of the lake. There is also a fine sand beach along the front. It is expected that these lots will sell quickly to parties who desire to visit the lake during the

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[94] *Indian Act*, RSC 1886, c. 43, s. 39 (amended by SC 1898, c. 34, s. 3) (ICC Exhibit 6a, pp. 20–21).

[95] J.K. McLean, Dominion Land Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, October 12, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 255).

> summer. By railway, they are about forty miles from Edmonton. The Canadian Northern Railway will run through both these reserves, and is now graded to within about three miles of the east boundary of 133 A.[96]

Newspaper advertisements appearing in late 1906 show that a number of townsites were being established along the shore of White Whale Lake. These townsites were portrayed as summer resorts, and advertisements emphasized the "glorious beach of fine sand" and the coming CNR line, which would make the lake a short two-hour journey from Edmonton.[97]

Surveyor McLean forwarded the official plan of the "Townplot of Wabamun" to the department on February 26, 1907, along with valuations. He again noted that the lots fronting on the lake "would sell readily foruse [sic] as a summer resort," but the sale of the remainder of the lots "depends entirely upon a Railway station being located on the town plot."[98] By this time, the Grand Trunk Pacific Railway had also notified the department of its intent to build through the Paul Band's reserve (discussed in more detail below), and both rights of way appear on the plan prepared by Surveyor McLean.[99] He recommended that the lots be sold by auction in Edmonton, stating, "it would be well if possible to come to some arrangement with the Railway Companies regarding a station or siding before the Lots are sold."[100]

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[96] J.K. McLean, Dominion Land Surveyor, to SGIA, October 27, 1906, LAC, RG 10, vol. 4019, file 279393-2 (ICC Exhibit 1a, p. 261).

[97] "Silver Beach, New Summer Resort on White Whale Lake – Glorious Beach and Glorious Park," *Edmonton Bulletin*, September 7, 1906, p. 4 (ICC Exhibit 1a, p. 227); see also advertisement, "'Silver Beach,' White Whale Lake," *Edmonton Bulletin*, September 10, 1906, p. 6 (ICC Exhibit 1a, p. 228); advertisement, "Whitewood Sands Summer Resort Lots," *Edmonton Bulletin*, September 11, 1906, p. 8 (ICC Exhibit 1a, p. 236); advertisement, "'Silver Beach': The Best Beach on White Whale Lake," *Edmonton Bulletin*, October 2, 1906, p. 3 (ICC Exhibit 1a, p. 253); Advertisement, "White Whale Beach," *Edmonton Bulletin*, October 2, 1906, p. 2 (ICC Exhibit 1a, p. 254); copy of advertisement for "Wabamun Beach," in *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 5 (ICC Exhibit 8a, p. 5).

[98] J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 290).

[99] J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 290); Natural Resources Canada, Plan 767 CLSR AB, "Plan of the Townplot of Wabamun on Indian Reserve No. 133B at the East End of Wabamun (White Whale) Lake," surveyed by J.K. McLean, DLS, 1906 (ICC Exhibit 7i).

[100] J.K. McLean to Frank Pedley, DSGIA, February 26, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 291).

McLean later reported to Frank Pedley that the only "Indian improvements" on the surrendered town plot were "a log shack 20' x 20' with pole and sod roof, floored, and two windows, value $25.00," belonging to Didymus Burntstick.[101] This dwelling was located near the beach, about halfway between the northern and southern boundaries of the old reserve. Elder Violet Poitras recalled hearing that her great-grandfather, Didymus Burntstick, was told that he had to move, without explanation.[102] McLean made no mention of any other dwellings or improvements, although Agent Gibbons had previously reported that there were "two or three living in shacks" there.[103]

Proposed CNR Right of Way through IR 133B, 1906–11

As noted before, the CNR applied for a right of way through the Wabamun reserves on October 13, 1906.[104] At that time, the company's right of way plans had not yet been approved by the Railway Commission. On October 24, 1906, Assistant Secretary S. Stewart informed the company that the lands for the right of way were valued at $25 per acre,[105] a valuation the company found "unreasonably excessive."[106]

In a letter written to the Right of Way Agent, C.R. Stovel, on November 7, 1906, Assistant Secretary Stewart first broached the subject of placing a station on the newly subdivided Wabamun town plot. He informed Stovel that the Indian Agent was looking into the matter of the valuation and continued:

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101 J.K. McLean to Frank Pedley, DSGIA, March 8, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 292). The dwelling was located on Block 4, lot 8.

102 ICC Transcript, October 13, 2004 (ICC Exhibit 5a, p. 82, Violet Poitras).

103 James Gibbons, Indian Agent, Edmonton Agency, to the Secretary, Department of Indian Affairs, August 15, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 216).

104 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, October 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 256).

105 S. Stewart, Assistant Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, October 24, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 258).

106 C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to S. Stewart, Assistant Secretary, Department of Indian Affairs, October 31, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 263).

> I beg to inform you that this Department has laid out a number of lots near the lake, at the northwest end of the reserve. It is of course very desirable that [the] station should be located within the portion subdivided. I shall be obliged if you will ascertain and inform me whether your Company will arrange to place the station as desired by this Department.[107]

On November 10, 1906, Agent Gibbons wired the department to inform it that contractors for the CNR were ready to begin construction on the Wabamun reserves.[108] The company was immediately informed that it could not proceed until a deposit of $5 per acre was made "on account of right of way."[109] The requested deposit was paid by the CNR on November 13, 1906.[110]

On December 1, Secretary McLean wrote to C.R. Stovel stating that the department might be prepared to accept a lower price for the right of way. He continued: "In this connection I beg to refer you to letter ... relating to the location of a station by your Company on that portion of the said Reserves which has been recently sub-divided into town lots. I shall feel obliged if you will consider the matter, and inform me of what the Company is prepared to do."[111] Stovel replied on December 12 that he was "taking this matter up with Our Engineering Department and when in a position to do so, will communicate with you further."[112]

On December 31, 1906, agents for the CNR submitted a proposal to DSGIA Frank Pedley for the "exploitation of a townsite at White Whale Lake, Alberta, on the Indian Reserve at that place." The CNR requested that the Department of Indian Affairs place a 320-acre parcel of land

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[107] S. Stewart, Assistant Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 7, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 265).

[108] James Gibbons, Indian Agent, to the Secretary, Department of Indian Affairs, November 10, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 266).

[109] J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 267).

[110] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, November 13, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 271).

[111] J.D. McLean, Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, December 1, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 280).

[112] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, December 12, 1906, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 281).

(half the block surrendered) under the company's control, in return for which the company would arrange for the survey and sale of lots within the townsite. For their services, the company would retain $5,000 for the expenses of "plotting, surveying and registration of plans," and "[a]fter such reimbursement the gross proceeds of sales shall be divided equally between the department and the company."[113] Chief Surveyor Samuel Bray's review of the proposal noted that the company's costs were significantly more than what the department would likely spend for surveying and selling the entire 635 acres.[114] The proposal was apparently rejected, as there is no further mention of it in the historical record.

Mr Bray's report, dated January 4, 1907, also noted:

> The Canadian Northern Railway Company have applied for a station ground within the said block. It is to be assumed that they intend to establish a station there; I believe, however, that the Company is at liberty to move their station if they find it is in their interest to do so. If the Station should not be established within the block the value of the lots will necessarily be depreciated.[115]

Bray recommended that "[t]he establishment of a station may properly be included in the negotiations for the purchase of the Right of Way."[116] The matter of a station was brought up again with the CNR in June 1907.[117] On July 18, 1907, Stovel replied to inform the department that "[w]e cannot arrive at a decision in this matter until such time as we get our plans approved" by the

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[113] Davidson and McRae, General Agents, Canadian Northern Railway Company, to Frank Pedley, DSGIA, December 31, 1906, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 283–84).

[114] Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 285).

[115] Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 285).

[116] Sam Bray, Chief Surveyor, Department of Indian Affairs, to Deputy Minister, January 4, 1907, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 286).

[117] Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Pacific Railway Company, June 19, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 309).

Railway Commission.[118] In fact, the CNR's right of way plans were not approved until two years later, in June 1909.[119] At that time, although the plans were approved, the company reported to the department that construction was halted "owing to the G.T.P. [Grand Trunk Pacific] location interfering with our line through the reserve," and that nothing would be decided that year regarding the location of a station on the Wabamun reserve.[120]

Chief Surveyor Samuel Bray then recommended that the department notify the CNR that "the Right of way through the said 133B can no longer be held for them and that it is intended to sell the various town lots without reference to their proposed location."[121] Stovel wrote on November 4, 1909, to request that "[p]ortions of Lots and blocks required by this Company for right of way purposes" be reserved from any sale. He also asked what price would be required by the department to "convey title for this right of way to this Company."[122] McLean replied that "before quoting price for this Right of way ... this Department would like to be informed regarding your intention towards establishing a station on the town plot. It is noticed that a number of lots are taken in block 23. It is presumed that they are for that purpose."[123] Stovel replied on January 26, 1910, that the lands requested by the company included station grounds, but that "nothing definite has been decided regarding work west of Edmonton."[124] Although the department requested "definite assurance" regarding the company's intentions before agreeing to reserve the lots from the upcoming sale

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[118] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, July 18, 1907, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 311).

[119] Extract from a letter from J.K. McLean to Frank Pedley, DSGIA, June 12, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 363).

[120] W.H. Moore, Secretary, Canadian Northern Railway Company, to the Assistant Deputy Superintendent, Department of Indian Affairs, August 23, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 370).

[121] S. Bray, Chief Surveyor, Department of Indian Affairs, to the Deputy Minister, October 1, 1909, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 372).

[122] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, November 4, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 380).

[123] Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, November 18, 1909, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 382).

[124] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, January 26, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 388).

(which was held in May 1910), it was eventually agreed to reserve Block 23 from sale without any definite statement from the company.[125]

In November 1910, following the first auction sale of the Wabamun town plot, the CNR's plans for its main line west of Edmonton were approved by the Minister of Railways, "with the stipulation that the line must not pass between the Grand Trunk Pacific line and the townsites of the same company."[126] On July 31, 1911, Surveyor J.K. McLean informed the department that "[t]he Canadian Northern Railway Co. have abandoned that part of their line through the Wabamun Indian Reserve and are now building further north about 12 miles."[127] On August 18, 1911, the CNR Right of Way Agent formally confirmed the company's abandonment of the right of way.[128]

Construction of the Grand Trunk Pacific Railway Line through IR 133B

During this same period, the Grand Trunk Pacific Railway Company (GTPR) established its railway line through the Wabamun reserves. The GTPR officially applied for a right of way on December 21, 1906.[129] The plans were approved by the Railway Commission on May 20, 1907,[130] and the

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[125] Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, February 1, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 391); C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Secretary, Department of Indian Affairs, February 16, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 394); Secretary, Department of Indian Affairs, to C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, April 20, 1910, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 419).

[126] "Approves C.N.R. Line to the Yellowhead," *Edmonton Bulletin*, November 7, 1910, p. 6 (ICC Exhibit 1a, p. 457).

[127] J.K. McLean to J.D. McLean, Secretary, Department of Indian Affairs, July 31, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 485).

[128] C.R. Stovel, Right of Way Agent, Canadian Northern Railway Company, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 18, 1911, LAC, RG 10, vol. 7667, file 22110-7, CN (ICC Exhibit 1a, p. 496).

[129] G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to the Secretary, Department of Indian Affairs, December 21, 1906, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 282).

[130] Board of Railway Commissioners for Canada, Order No. 3040, May 20, 1907, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 303).

department consented to the right of way by Order in Council on January 8, 1908.[131] Surveyor J.K. McLean informed the Deputy Minister on January 14, 1908, that the GTPR had declined to place a station on the Wabamun town plot, stating that doing so was impossible "on account of steep gradients."[132] Instead, the company placed a station about a mile west, across the bay from the reserve. On March 6, 1908, Assistant Secretary Stewart forwarded the right of way valuation to the Grand Trunk Pacific Railway Company. The total valuation for the right of way within IR133B amounted to $1,954 and included only the value of each lot crossed by the railway.[133] The valuation did not include any streets, lanes, or beachfront because the department did not intend "to make any sale of any portion of the streets."[134] The GTPR forwarded payment for its right of way on March 14, 1908,[135] but it is not known when the company began construction on the reserve.

On July 31, 1908, Inspector Markle reported to the Indian Commissioner that "[t]he Paul's Band of Indians expressed a willingness to give the Grand Trunk Pacific Railway Company a quarter interest in their town site on the shore of White Whale Lake providing the railway company will agree to locate and operate a station within the said area of land."[136] A Band Council Resolution dated July 28, 1908, reads as follows:

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[131] Order in Council PC 36, January 8, 1908, DIAND, Indian Lands Registry, Instrument no. 17325 (ICC Exhibit 1a, p. 323).

[132] J.K. McLean, Department of Indian Affairs, to the Deputy Minister, January 14, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, pp. 326–27); also J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, September 1, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 354).

[133] S. Stewart, Assistant Secretary, Department of Indian Affairs, to D'Arcy Tate, Assistant Solicitor, Grand Trunk Pacific Railway Company, March 6, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, pp. 334–36).

[134] J.D. McLean, Secretary, Department of Indian Affairs, to D'Arcy Tate, Assistant Solicitor, Grand Trunk Pacific Railway Company, August 31, 1907, no file reference available (ICC Exhibit 1a, p. 316).

[135] G.U. Ryley, Land Commissioner, Grand Trunk Pacific Railway, to the Secretary, Department of Indian Affairs, March 14, 1908, DIAND file 774/31-2-7-C.N., vol. 1 (ICC Exhibit 1a, p. 339).

[136] J.A. Markle, Inspector, to the Indian Commissioner, July 31, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 350).

> We, the undersigned Chief and Principal Man of the Band of Indians owning the Reserve situated in Treaty No. 6 and known as 'The Paul's Reserve' do by these presents, certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose, according to the rules of the Band, and held in the presence of the Indian Agent for the locality on the 28th day of July, 1908, authorized The Honourable The Superintendent General of Indian Affairs to enter into an agreement with The Grand Trunk Pacific Railway Company for the placement and operation of a Station on its new line of railway and within Sec. 6, T'p. 53, R'ge 3 and West of the 5th.I.M. which portion of section was surrendered by our said Band on or about the 14th day of August, 1906, and on the further condition that if the said Grand Truck Pacific Railway Company agreeing to locate ing [sic] and operating a station on the said Sec. 6 herein described that the Honourable The Superintendent General of Indian Affairs has the full consent of our said Band to give to the Grand Trunk Pacific Railway Company one block of land – about three acres, more or less, for station grounds, and, in addition, every fourth block of the subdivisions as made by Mr. J.K. McLean during the season of 1906 within Sections 6 and 1, T'p 53 and Ranges 3 and 4, and for so doing this shall be The Honourable Superintendent Generals sufficient authority.[137]

The resolution is signed by Chief David Bird and "principal man" Paul with their X marks, and witnessed by Agency interpreter John Foley, Inspector Markle, and Indian Agent Urbain Verreau.[138]

Indian Commissioner David Laird forwarded the Band Council Resolution to the department, commenting, "I do not know what the terms of the surrender are, but I may say that I regard it as a mistake to locate a townsite or railway station on a small surrendered area of an Indian Reserve."[139] Secretary McLean replied to Commissioner Laird that "in reply to an enquiry made some time ago[,] this Department has been informed by the Grand Trunk Pacific Company that it is practically impossible, on account of steep gradients[,] to put a station in the town-plot laid out on the Indian

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[137] Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Instrument no. 11629 (ICC Exhibit 1a, p. 349).

[138] Band Council Resolution, July 28, 1908, DIAND, Indian Lands Registry, Instrument no. 11629 (ICC Exhibit 1a, p. 349).

[139] David Laird, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 14, 1908, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 351).

Reserve No. 133B, otherwise the Company would willingly put a station there."[140] Laird relayed this message to Markle, instructing him to "inform the Indians accordingly."[141]

The Grand Trunk Pacific line became operational sometime before 1912, although the exact timing is uncertain.[142] Although the documentary evidence does not indicate that a fully functioning station was established on the Wabamun townsite, it appears that some kind of platform and station house were eventually placed there. Kapasiwin residents named it "Webster's Crossing," after the Immigration Agent William J. Webster, one of the beach lot purchasers and the first mayor of the village.[143]

Auction Sale, 1910

Beginning in 1908, inquiries were made regarding the purchase of lots in the Wabamun townsite. The department's standard response was that the "subdivision at Lake Wabamun ... is not at present in the market."[144] In the fall of 1909, after much correspondence with the railway companies, the department finally decided to move towards selling the Wabamun town plot. Surveyor J.K. McLean reported to DSGIA Frank Pedley on September 26, 1909, that "the Minister has instructed me to re-open the lines and replant any missing posts on the town plot of Wabamun as he intends selling it this fall or winter."[145] On February 22, 1910, Surveyor McLean again reported to Pedley:

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[140] J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, September 1, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 354).

[141] Indian Commissioner to J.A. Markle, Inspector of Indian Agencies, September 8, 1908, LAC, RG 10, vol. 3563, file 82, pt 14 (ICC Exhibit 1a, p. 355).

[142] J.K. McLean to J.D. McLean, Secretary, Department of Indian Affairs, August 24, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 498).

[143] *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987),71-72, 89, 115 (ICC Exhibit 8a, pp. 71-72, 89, 115); see also Bradley J. Favel, "An Analysis of the Paul Band Specific Claim, Mismanagement of the Sale of Reserve 133B, The Wabamun Townsite Lots," prepared for the Specific Claims Branch, October 31, 1997, 13–15 (ICC Exhibit 3a, pp. 13–15).

[144] See, for example, J.D. McLean, Secretary, Department of Indian Affairs, to P.O. Dwyer, April 27, 1908, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 348).

[145] J.K. McLean to Frank Pedley, DSGIA, September 26, 1909, LAC, RG 10, vol. 4019, file 279393-5 (ICC Exhibit 1a, p. 371).

> Last fall the Minister instructed me to go over the town plot of Wabamun and renew the lines and re-plant any missing posts with a view of putting this town plot on the market. Since then the Minister enquired what shape it was in and I informed him that we were endeavouring to have the Can. Northern Railway Co. locate a station.[146]

Surveyor McLean recommended that the lots requested by the CNR be reserved, that the railway company be required to place a deposit, and that the sale of the town plot "be held over in the meantime until say next fall when the question of the station may be finally decided."[147] However, on March 9, 1910, Frank Pedley instructed W.A. Orr, the Clerk in charge of the Lands Branch of the Department of Indian Affairs, to

> arrange to sell by public auction as early in May as possible the lots indicated on the plan of the townsite of Waubanum, herewith; conditions are that each purchaser must put up a $300.00 building within one year from the date of sale, 25% of the purchase money to be paid in cash, the balance in three annual instalments, with the usual rate of interest.[148]

A sale notice was prepared on April 2, 1910, which stated:

> There will be offered by public auction at an upset price at the City of Edmonton, in the Province of Alberta, on Wednesday, the 11th day of May, at one o'clock P.M., the following lots in the townplot of Wabamun ... Block 1, lots 2-6, incl.; block 2, lots 1-6, incl.; block 3, lots 1-6, incl.; block 4, lots 1-6, incl.; block 5, lots 1-8, incl.; block A lots 1-8, incl.; block 10, lots 1-16, incl.; block 11, lots 1-16, incl.; block 12, lots 1-16, incl.; block 13, lots 1-16, incl.; block 14, lots 1, 2, & 31; block 19, lots 1-16, incl.; block 20, lots 1-16, incl.; block 21, lots 1-16, incl.; block 22, lots 1, 2, 3, 4, 5, 15 and 16.
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> The townplot in question is situate on White Whale or Wabamun Lake, about thirty miles west of Edmonton, and the lots are specially adapted for the building of summer residences.

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146 J.K. McLean to the Deputy Minister, February 22, 1910, LAC, RG 10, vol. 7667, file 22110-7 C.N., pt 1 (ICC Exhibit 1a, p. 395).

147 J.K. McLean to the Deputy Minister, February 22, 1910, LAC, RG 10, vol. 7667, file 22110-7 C.N., pt 1 (ICC Exhibit 1a, p. 395).

148 Frank Pedley, DSGIA, to Mr. Orr, March 29, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 396).

> The terms of sale will be one-quarter cash and the balance in three equal, annual instalments with interest at the rate of five per cent on the unpaid balance of purchase money. A building to cost at least $300 to be erected on each parcel sold, within one year from the date of sale.[149]

The only lots offered for sale were those south of the GTPR right of way and west of Burntstick Avenue. The lands north of the GTPR right of way and east of Burntstick Avenue were not offered for sale in 1910 (including Block 23, reserved for the CNR).

On April 4, 1910, the department instructed the King's Printer to run the sale advertisements in the following eight newspapers, "one insertion each week for four weeks": the *Edmonton Bulletin*, *German Herold* (Edmonton), *Le Courrier de l'Ouest* (Edmonton), *Post* (Wetaskiwin), *Times* (Wetaskiwin), *Reporter* (Fort Saskatchewan), *Plain Dealer* (Strathcona), and *Manitoba Free Press* (Winnipeg).[150] The available advertising invoices show that the notices ran three times in all the papers except the *Edmonton Bulletin* and the *Manitoba Free Press*, which billed for four insertions of the notice.[151]

In addition, extra efforts were made to publicize the auction on the day before and on the day of the sale. Inspector Markle submitted vouchers to the department for posting 200 notices on May 10, and the distribution of 1,000 handbills on the day of sale. Large advertisements were also

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[149] Draft sale advertisement, April 2, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 398).

[150] J.D. McLean, Secretary, Department of Indian Affairs, to the King's Printer, April 4, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 401).

[151] Manitoba Free Press Co. to the Department of Indian Affairs, April 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 410); The Plaindealer Co. to the Department of Indian Affairs, April 16, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 412); Alberta Herold Publishing Co. Ltd. to the Department of Indian Affairs, April 28, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 423); Le Courrier de l'Ouest Publishing Co. Ltd. to the Department of Indian Affairs, April 28, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 424); The Weekly Chronicle to the Department of Indian Affairs, April 29, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 425); Bulletin Co. Limited to the King's Printer (Department of Indian Affairs), May 3, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 427); The Post to the Department of Indian Affairs, May 12, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 442).

placed in the *Edmonton Journal* and *Edmonton Bulletin* on the morning of the sale.[152] In his report to the department, Inspector Markle explained that

> although it was regularly advertised I soon learned that many did not know of the sale. This forced me to the conclusion that it would be prudent to advertise it in larger print and with more space to attract attention and to get hand bills and distribute them on the morning of the sale.[153]

The Record of Sale shows that, of the 161 parcels put up for sale, only 42 were sold, realizing a total of $4,954.[154] Of the 42 sale transactions, 32 were made at the upset prices, with the remaining 10 sales made slightly above the upset prices.[155] Almost all the sales were for the beachfront property south of the railway.

Most of the purchasers were Edmonton residents who each bought between one and four lots. Included among the purchasers were William J. Webster, the Agent for the Edmonton Immigration Agency (and son-in-law of Frank Oliver, the Superintendent General of Indian Affairs), two employees of the Dominion Lands Office, the clerk of the sale, the wife of the auctioneer, and Charles McLeod of the Seton Smith Company (the employer of Robert Smith, the auctioneer of the sale).[156] Inspector Markle commented that the auctioneer, Robert Smith, "assumed the payment of the 25% for several individuals."[157]

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[152] Voucher, May 10, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 428); Voucher, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, pp. 437–39); advertisement, *Edmonton Journal*, May 11, 1910 (ICC Exhibit 1a, pp. 440–41); J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, pp. 446–48).

[153] J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, part 1 (ICC Exhibit 1a, p. 444).

[154] Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

[155] Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

[156] Record of Sale, May 11, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 429–36).

[157] J.A. Markle, Inspector, Alberta Inspectorate, to the Secretary, Department of Indian Affairs, May 14, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 444).

Interim Period between Auctions, May 1910–June 1912

After the auction in May 1910, inquiries regarding the unsold Wabamun townsite lots continued to trickle in. The majority were informed that the lands were "not at present in the market." On August 27, 1910, Edmonton Immigration Agent W.J. Webster reported that "a number of parties have called here asking what lots were still vacant, and the prices." He offered to take applications "from parties who wished to purchase at the upset price"and commented: "I am satisfied that I could dispose of quite a number and you could allow me whatever commission you thought my services were worth."[158] Webster was informed, however, that the lots were "not at present in the market for sale."[159] He inquired again in May 1911, this time directly to Frank Oliver, asking if he could "arrange to have some person instructed to dispose of the lots." He explained that "a great many persons have been coming to me asking if lots can be purchased there" and that "it is the wish of a great many to buy and erect buildings this season, if they can purchase lots at once."[160] A memorandum to the Deputy Minister, dated May 31, 1911, recommended that, "provided it is the intention of the Department to dispose of same[,] they probably could be placed in the hands of our Agent at Edmonton for disposition at the upset price," subject to the original building conditions.[161] Webster was informed on June 19, 1911, that the matter would be brought to the Minister's attention "on his return to the city."[162]

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158 W.J. Webster, Immigration Agent, Edmonton Agency, Department of the Interior, to the Superintendent, Indian Lands Department, August 27, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 454).

159 J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Webster, Immigration Agent, September 7, 1910, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 455).

160 W.J. Webster, Edmonton Agency, Immigration Branch, Department of the Interior, to Frank Oliver, Minister of the Interior, May 25, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 475).

161 Unidentified author, to the Deputy Minister, May 31, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 476).

162 J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.J. Webster, June 19, 1911, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 479).

Sale of Block 13 to the Alberta Sunday School Association

In 1911, Block 13 of the town plot (south of the railway) was sold to the Alberta Sunday School Association. The department sold the block for $293, or $100 per acre (less than half the upset price of $625). In a letter to Inspector Markle dated April 17, 1911, the General Secretary of the Association offered $100 per acre for property in the town plot and noted:

> I have just had a conversation with Hon. Frank Oliver, Minister of the Interior, in which he expressed himself, on behalf of the Government, as being anxious to give our Association the most liberal terms possible on this property, and would agree to anything that would be satisfactory to the Indians themselves.[163]

A Band Council Resolution dated the next day, April 18, 1911, resolved to sell the land to the association for $100 per acre,

> on the condition that The Hon. Superintendent General of Indian Affairs purchases one hundred sacks of flour out of the proceeds of sale of the said land and causes the said lot of flour to be equally distributed to the members of our said band in weekly distributions of ten sacks and that the remaining portion of the money from the sale of the land hereby authorized be funded for our benefit and the benefit of our people.[164]

Fourteen band members signed the resolution with their X marks, including Ex-Chief Paul.[165] It is not certain if there was a recognized chief at this time or if he signed the document. On April 21, 1911, Inspector Markle reported that he had discussed the proposed sale with the Band on a recent visit, during which they resolved to sell the lands to the association. He explained:

> The Indians claimed that they had not heretofore received any portion of the proceeds of sale of land out of this townplot and that they [had] desired a portion. The claim

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[163] H.F. Kenny, General Secretary, Alberta Sunday School Association, to J.A. Markle, Inspector of Indian Agencies, April 17, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 461).

[164] Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 462).

[165] Band Council Resolution, April 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 462). David Peter, Baptiste Peter, and John Rain all signed this BCR with their X marks. The same three individuals had signed the surrender of IR 133B in 1906 with their signatures.

> seemed to me to be a reasonable one and as it would assist them while at work I agreed to it, subject to your approval.[166]
>
> You are aware that the Railway Company declined to stop on the Indians Townplot, claiming the grade was too heavy. While I'm not an expert on such matters I question whether this was the true reason[,] for the grade does not appear to me to be of much account.
>
> I favour this deal chiefly for the reason that if carried out the railway company will now have considerable business offered if it agrees to erect a platform at this point and stop when people desire to get off or on it's [sic] cars. The remaining portion of the plot will then be more saleable.
>
> I may say that I was told that the Association already have the promise of help from the local officers of the railway company to get a platform erected at Wabamun and stops made at that point when business demands it.[167]

On May 16, 1911, W.A. Orr recommended to the Deputy Minister that, although the upset price for the lots was $625, the deal should be approved "[i]n view ... of the resolution of the Indians, and the recommendation of Mr. Inspector Markle."[168] A marginal note on Frank Pedley's report to Frank Oliver states that, if 100 sacks of flour could be delivered to the Indians "at the price stated[,] sell."[169]

Auction Sale, 1912

In the summer of 1911, Surveyor J.K. McLean visited the Wabamun reserve to conduct surveys in connection with the surrender of lands on IR133A (the Duffield townsite and surrounding farm lands). As noted above, that surrender is not at issue in this inquiry. While there, he reported to DSGIA Frank Pedley: "I met the Minister here today and he inquired if anything was being done towards cutting out the streets on the Wabamun Town Plot. ... He said he wished them completed

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[166] J.A. Markle, Inspector, to the Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 463).

[167] J.A. Markle, Inspector, to the Secretary, Department of Indian Affairs, April 21, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 463–64).

[168] W.A. Orr, In Charge, Lands and Timber Branch, Department of Indian Affairs, to the Deputy Minister, May 16, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 473).

[169] Marginal note written by SGIA F[rank] O[liver] on memorandum from Frank Pedley, DSGIA, to Mr Oliver, May 18, 1911, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 474).

and for me to state that he mentioned the matter to me."[170] McLean also discussed the future sales of lots in the Wabamun town plot:

> I also mentioned the selling of the Lots and recommended that they be put in the hands of the Indian Agent for sale to applicants and to this he was favourably inclined.
>
> I may say people usually want summer resort Lots at irregular times, and there have been a number of inquiries about these. People would purchase if they could secure one when inclined. I do not think that at auction they would realize [any] above the upset price. The Town Plot is becoming a favourite picnic ground for Edmonton people, the second since my arrival is being held today.[171]

Some time later, it was decided to place the unsold lands surrendered in 1906 up for auction once again. An undated memo from Surveyor McLean notes the scheduled auction for the sale of the Duffield townsite and farm lands and suggests: "Would it not be well to have Town Plot of Wabamun sold at same time[?] Duffield and Wabamun Town Plots are on same Reserve."[172]

On April 6, 1912, Surveyor McLean made a report to the Deputy Minister regarding the Wabamun townsite:

> The Town Plot was laid out in 1906, chiefly with the expectation that it would become a summer resort as well as of commercial value.
>
> At that time the Canadian Northern Railway was surveyed across the property and had some grading done within the Reserve as well as between Stony Plain town and the Reserve.
>
> It was expected that a station would be placed on the Townplot by the C.N.R. As this Railway was unable to get the proper approval for its plans the G.T. Pacific almost pre-empted the C.N.R. route and is now built across the Town Plot, while the C.N.R. is about 12 miles further north.
>
> The Grand Trunk Pacific Railway located their station about a mile west across a bay of Wabamun Lake and a small village is now there.

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[170] J.K. McLean to Frank Pedley, DSGIA, August 12, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 493).

[171] J.K. McLean to Frank Pedley, DSGIA, August 12, 1911, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 493).

[172] J.K. McLean to unidentified recipient, undated, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 517).

> The Indian Department town plot is now only of use for summer camping purposes.
>
> ...
>
> Inquiries are made occasionally for the lots on the Lake Shore.
>
> In accordance with the instructions of the Hon. Frank Oliver[,] former Minister[,] some of the streets were cut out last season with a view of improving the appearance of the lots. The streets so cleared extend back to Burntstick Avenue.
>
> On some of the lots sold very nice cottages have been built. I think all the lots fronting on the water will now sell readily, and as the use of the beach has been reserved in common, some of the lots further back should sell.
>
> This Town Plot has also become quite a favorite place for picnics and excursion parties from Edmonton.
>
> Last season the G.T.P. stopped its trains for these parties and a platform for arriving and departing parties was spoken of.[173]

In regard to the remaining unsold lots, McLean recommended that

> all that part of the Town Plot west of Burntstick Avenue be offered for sale at the same time as the sale of Duffield Town Plot and the surrendered sections of this Reserve. ...
>
> ...
>
> I would also only register that part of the plan extending to Burntstick Avenue as I am doubtful if the remainder of the subdivision will sell as lots and it would save withdrawing the plan if we ever wanted to sell remainder as farm land.
>
> The valuation made in expectation of the C.N.R. crossing the property is sufficiently high and need not be changed.[174]

On April 12, 1912, a sale notice for the upcoming auction was prepared, and W.A. Orr recommended that the advertisements be run in 10 newspapers, including two Edmonton papers.[175] The advertisement stated that "357 lots in the townplot of Wabamun, on White Whale Lake" would be

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[173] J.K. McLean to the Deputy Minister, April 6, 1912, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, pp. 521–22).

[174] J.K. McLean to the Deputy Minister, April 6, 1912, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 522).

[175] W.O. Orr, In Charge, Lands and Timber Branch, to the Deputy Minister, April 12, 1912, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 525).

up for sale, although this time there was no mention of the $300 building condition.[176] It appears that these 357 lots correspond to all the unsold lots west of Burntstick Avenue, both north and south of the GTPR right of way.

The Record of Sale shows that 49 parcels were sold at the June 12, 1912, auction, for a total of $5,352. Thirty-one of the sales were for beach lots – the remaining beach lots south of the railway and most of the beach lots to the north. All but four of these lots sold above their upset price, some for as much as four times that price. In addition, 18 inland lots were sold, mostly at or slightly above their upset prices. As in the first sale, most of the purchasers were from Edmonton – although in this case there were only 12 buyers in all, some of whom obtained as many as 13 lots each.[177] Purchasers included the auctioneer, Frank Waddington, and P.O. Dwyer, who also purchased lands at the Alexander sale in 1906.[178] Many of the 1912 sales, especially those for the beach lots north of the railway, were later cancelled.

Incorporation of the Village of Wabamun Beach (Kapasiwin), 1913

On October 25, 1913, the Alberta legislature passed an act to incorporate the Village of Wabamun Beach on part of the Wabamun town plot. The village included the land south of the Grand Trunk Pacific right of way and west of Burntstick Avenue, "together with the road allowances or streets between and adjoining said lands, and together with the beach of Wabamun Lake adjoining the said lands so far as the same has been patented by the Crown."[179] The village was later renamed the Village of Kapasiwin Beach. (Contrary to the wording of the legislation, the road allowances and beach were not actually included in the village, but were transferred to the province in 1932. This issue is discussed in more detail below.)

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176 Sale advertisement, April 12, 1912, LAC, RG 10, vol. 6670, file 110A-7-2 (ICC Exhibit 1a, p. 523).

177 Record of Sale for "Wabamun Lots," June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40).

178 Record of Sale for "Wabamun Lots," June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40); Peggy Martin-McGuire, "First Nation Land Surrenders on the Prairies: 1896–1911," prepared for the Indian Claims Commission, September 1998, pp. 360, 478 (ICC Exhibit 8e, pp. 360, 478).

179 *An Act to Incorporate the Village of Wabamun Beach*, SA 1913, c. 40 (ICC Exhibit 6c, p. 2).

In 1915, the Secretary-Treasurer of the village inquired whether the department would enforce the building condition before issuing patents to lot owners.[180] W.A. Orr replied on October 26, 1915, that "some little time ago it was considered advisable to waive the condition in regard to the erection of buildings on lots sold in this townplot, and the Department will issue patents for lots to parties entitled thereto upon payment in full therefor."[181]

Subsequent Sales, 1912–32

Following the second auction sale, sporadic inquiries were made about the purchase of the unsold lots surrendered in 1906. The documentary record is incomplete with regard to the sales after 1912, but it appears that, as late as 1919, some prospective purchasers were informed that the lots were "not in the market." An exception was made for the Village of Kapasiwin, which began purchasing lots after its incorporation as a village in 1913. Beginning in approximately 1920, the department began selling lots at the upset price to prospective purchasers when applications were made to either the Indian Agent or directly to the department.

In 1922, the Rotary Club of Edmonton applied to purchase or lease a block of beach lots in the Wabamun townsite, north of the railway (Block H).[182] Indian Agent George Race valued the block at $500 per acre and suggested that the club be allowed a 10-year lease at between $125 and $150 per year.[183] Lots 7 and 8 of this block were originally valued by Surveyor J.K. McLean in 1907 at $60 and $70 each.[184] It is not known what the original valuation was for the remaining six lots in Block H. Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, submitted

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180 W.W. Gould, Secretary-Treasurer, to the Secretary, Department of Indian Affairs, October 21, 1915, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 554).

181 W.A. Orr, In Charge, Lands and Timber Branch, Department of Indian Affairs, to W.W. Gould, October 26, 1915, LAC, RG 10, vol. 6670, file 110A-7-1, pt 1 (ICC Exhibit 1a, p. 555).

182 J.W. Mould, Chairman, Boys' Work Committee, Rotary Club of Edmonton, to Chas. Stewart, Minister of the Interior, May 9, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 588–89).

183 [George H.] Race to the Secretary, Department of Indian Affairs, June 11, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 594).

184 Record of Sale for "Wabamun Lots," June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, pp. 537–40).

the proposal to the Minister and recommended that a 10-year lease be granted, at an annual rental of $150.[185] For reasons unknown, the Minister's private secretary replied that "it is desirable that informal permission to use this Indian ground be issued from year to year without rental, and in the event of a sale of this land being under consideration, the Rotary Club should be given first opportunity of purchasing."[186] It does not appear that this arrangement was ever implemented. Indian Commissioner W.M. Graham informed the department on August 4, 1922, that, "after thorough consideration of the matter," the Rotary Club had decided to look for a campsite elsewhere.[187]

Transfer of Streets and Lanes to the Province of Alberta, 1932

On December 9, 1931, the Village Council of Kapasiwin wrote to the Secretary, stating that it wished to make "certain regulations with regard to the use of streets" and requesting the transfer of the streets and lanes within the village to the Province of Alberta by Order in Council.[188] It later clarified that "[t]he municipality of the village of Kapasiwin does not extend to the North and East of the railway, consequently we are interested only in the streets and lanes lying to the South and West of the railway."[189] As requested, the streets and lanes south of the railway and west of Burntstick Avenue were transferred to the province by Order in Council PC 278 on February 5,

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185 D.C. Scott to Mr. Featherston, June 12, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 595).

186 J.E. Featherston, Private Secretary, Minister's Office, Department of Indian Affairs, to D.C. Scott, June 28, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 597).

187 W.M. Graham, Indian Commissioner, to the Secretary, Department of Indian Affairs, August 4, 1922, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 600). The documentary record indicates that a boys' camp was eventually established on the adjacent Block G, but it is not known whether there is any connection to the application by the Rotary Club of Edmonton. (See Exhibit 1a, p. 689.)

188 Abbot and McLaughlin, Barristers and Solicitors, to the Secretary, Department of Indian Affairs, December 9, 1931, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, pp. 620–21).

189 Abbot and McLaughlin, Barristers and Solicitors, to T.R.L. MacInnes, Acting Secretary, Department of Indian Affairs, January 9, 1932, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 624).

1932.[190] The transferred streets and lanes included the beach and Wapumeg Avenue (the road allowance between the beachfront lots and the beach).

Following this Order in Council, the Village Council applied for the closure of Wapumeg Avenue, along the beach. The Alberta Board of Public Utility Commissioners issued an Order dated February 28, 1935, closing Wapumeg Avenue and granting an easement to each beach lot owner of all the land between the lot and the water's edge.[191] The closure of Wapumeg Avenue is not surprising, considering that, as early as 1922, some of the cottagers were reported to have cottages encroaching on the road allowance.[192] It was later reported by the Sunday School Association that a fence had been erected by the beach lot owners at the rear of all the beach lots in 1932, a fence that ran the full length of Gibbons Avenue, from the railway to the southern boundary of Block 1.[193] The effect of this fence and the later easement was, effectively, to grant a private beach to the owners along the waterfront.[194] This action also closed off access to the beach for all inland lot owners, except for a small public area at the north end of the village. In 1953, this arrangement was formalized by a resurvey, which extended all the beach lots to the water's edge and added the road allowances west of Gibbons Avenue to the adjoining lots. The public beach north of Block A was also subdivided into new lots and sold.[195]

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[190] Order in Council PC 278, February 5, 1932, DIAND, Indian Lands Registry, Instrument no. 11627 (ICC Exhibit 1a, p. 626).

[191] Order 7486, Board of Public Utility Commissioners for the Province of Alberta, February 28, 1935, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 645–46).

[192] Annie A. Davies to the Honourable Charles Stewart, October 13, 1922, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, pp. 601–4).

[193] W. Dredge, Secretary, Edmonton United Church Sunday School Association, to the SGIA, July 12, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 649).

[194] *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 3–4, 101, 103, 119 (ICC Exhibit 8a, pp. 3–4, 101, 103, 119). A public beach was apparently reserved at the north end of the Village of Kapasiwin, but it is unknown how many years that area remained open to the public. The public beach was surveyed into lots and sold by the village in 1953. (See Exhibit 8a, pp. 3–4, 83.)

[195] Natural Resources Canada, Plan F4249 CLSR AB, "Re-Plot, Plan of Re-subdivision of Part of the Townsite of Wabamun (Kapasiwin Beach)," surveyed by John H. Holloway, ALS, 1953 (ICC Exhibit 7L).

In 1937, the Edmonton United Church Sunday School Association (the owners of the camp on Block 13) complained to the department regarding the privatization of the beach, to which they no longer had access. In their letter, the association asked for any advice that would enable its members "to regain the privileges that have been taken from them as their camp site is of no use under existing conditions."[196] The department replied that it could not offer any assistance, and the association apparently sold the camp site to the village that same year.[197]

Lands Returned to Reserve Status, 1936

In 1936, all the unsold lands east of Burntstick Avenue in the surrendered IR 133B, totalling 420 acres, were returned to reserve status. Order in Council PC 1248 reads in part:

> And Whereas the Superintendent General of Indian Affairs reports that it has been found that this area of 635 acres will not be required for the Townplot of Wabamun, and that the Indian Reserve as it now stands is not large enough for the Indians; and
>
> That as additional agricultural lands are required, it is considered advisable that a portion of the surrendered area remaining unsold be again added to the reserve;
>
> The following is a description of the portion so desired,
>
> All that parcel of land containing four hundred and twenty acres, more or less ... lying east of the east limit of Burntstick Avenue ... except the right of way of the Grand Trunk Pacific Railway.[198]

Interest Distribution Payments, 1942, 1945, and 1949

According to a 1981 historical report on the Paul First Nation, three interest payments were made to band members in the 1940s.[199] These payments were apparently made to fulfill the terms of

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[196] W. Dredge, Secretary, Edmonton United Church Sunday School Association, to the SGIA, July 12, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, pp. 649–50).

[197] J.C. Caldwell, Chief, Reserves Division, to W. Dredge, July 23, 1937, LAC, RG 10, vol. 4055, file 386155 (ICC Exhibit 1a, p. 652); *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 100 (ICC Exhibit 8a, p. 100).

[198] Order in Council PC 1248, May 29, 1936, DIAND, Indian Lands Registry, Instrument no. L11630 (ICC Exhibit 1a, p. 647).

[199] See Donna Gordon, "Paul's Band: A History of Its Land," prepared for TARR/IAA, May 1981 (ICC Exhibit 2a).

surrender which required that interest on the IR133B sale revenue be "paid to us and our descendants annually or semi-annually as to the Department of Indian Affairs may seem best in our interests."[200]

The first payment of $5,450 was made on August 27, 1942, and represented a $25 payment to each of 218 people. The second payment of $1,095 ($5 to each of 219 people) was made on May 2, 1945. The third and final payment of $610 ($5 to each of 122 people) was made on July 15, 1949. It is not known why the number of people paid at the third payment was so much lower than at the previous payments. The total interest payments made to the Paul band members on account of IR133B sales amounted to $7,155.[201]

Further Sales and Requests for the Return of Surrendered Lands

Up until 1944, lots continued to be sold on an ad hoc basis, at the upset price placed by Surveyor J.K. McLean in 1907. During this period, Kapasiwin residents purchased the remaining lots in the west halves of Blocks 10–12 to ensure privacy for their adjacent beach lots.[202] The department also allowed the village to exchange patented lots in Blocks 12, 20, and 21 (still unsold, surrendered land as of 1981) for other lots within the townsite.[203]

Following an inquiry in September 1944 regarding the purchase of unsold lots north of the railway, the department instructed the Indian Agent to conduct a revaluation of the requested lots

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[200] Surrender for Sale, September 11, 1906, DIAND, Indian Lands Registry, Instrument no. 11633 (ICC Exhibit 1a, p. 230).

[201] Donna Gordon, "Paul's Band: A History of Its Land," prepared for TARR/IAA, May 1981, p. 12 (ICC Exhibit 2a, p. 12). No further documentation is on record pertaining to these interest payments.

[202] Registrar of Indian Lands Patents, Department of Indian Affairs, to the Registrar of Titles, Edmonton, June 7, 1934, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 638); see also H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 715); *Kapasiwin: A History of Alberta's First Incorporated Summer Village*, ([Kapasiwin, Alta], 1987), 3–4 (ICC Exhibit 8a, pp. 3–4).

[203] McCuaig and Parsons, Barristers and Solicitors, to the Superintendent of Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, July 8, 1944, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 654); see also Duplicate Certificate of Title, June 18, 1940, DIAND, Indian Lands Registry, Instrument no. 11628 (ICC Exhibit 1f, p. 18). The lands returned to the department were valued at $180 in total; the lands acquired by the village through the exchange were valued at $150 in total, based on original 1907 valuations.

before a sale would be made.[204] Local Indian agents were again instructed to carry out revaluations of the unsold lots in 1945 and 1946.[205] There is no record of whether these revaluations were completed, although it appears that the department continued to sell lots at the original upset prices.

In July 1947, Indian Agent E.A. Robertson asked the department to inform him whether Blocks 23–27 were still part of the town plot, as they were "fenced in and included in the Band pasture."[206] D.J. Allen, the Superintendent of Reserves and Trusts, replied: "I can find nothing on record to show these blocks as different from the others, despite the fact they are fenced. They are still part of the Townplot regardless of their use as band pasture."[207] However, it was recommended to the Deputy Minister in November 1947 that "Blocks 23 to 27, inclusive, which have for years been enclosed in the Band pasture," be reconstituted as part of IR133B.[208] On December 8, 1947, the Agent was informed that the Minister had approved this recommendation; however, no action was taken in the matter for some time.[209]

In 1951, all of Block E (along the beach, north of the railway) was sold to the Department of National Defence for the sum of $400, reserving all mines and minerals.[210] These lands were valued by Surveyor J.K. McLean in 1907 at $660, and originally sold in 1912 for $1,480, although

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[204] D.J. Allan, Superintendent, Reserves and Trusts, to W.H. Giddy, October 14, 1944, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 657).

[205] D.J. Allan, Superintendent, Reserves and Trusts, to J.T. Faunt, Acting Indian Agent, January 26, 1945, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 662); and D.J. Allan, Superintendent, Reserves and Trusts, to J.T. Faunt, Indian Agent, May 22, 1946, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 667).

[206] E.A. Robertson, Indian Agent, Edmonton Agency, to Indian Affairs Branch, Department of Mines and Resources, July 29, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 668).

[207] D.J. Allan, Superintendent, Reserves and Trusts, to E.A. Robertson, Indian Agent, September 23, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 671).

[208] Director, to the Deputy Minister, November 22, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 674).

[209] D.J. Allan, Superintendent, Reserves and Trusts, to E.A. Robertson, Indian Agent, December 8, 1947, LAC, RG 10, vol. 6670, file 110A-7-1, pt 2 (ICC Exhibit 1a, p. 675).

[210] Order in Council PC 144, January 12, 1951, DIAND, Indian Lands Registry, Instrument no. 11595 (ICC Exhibit 1a, p. 686).

those sales were later cancelled.[211] Also in 1951, Indian Agent E.A. Robertson apparently submitted another revaluation of the unsold lots within the town plot, although this revaluation has not been located.[212]

In July 1952, H.N. Woodsworth, the Edmonton Agency Superintendent, reported that

> on June 27, 1952, during a treaty payment on the Wabamun Indian Reserve, the Chief and Council of the Paul's Band requested that no further land sales be made from lands surrendered for sale and not yet sold. Both [Regional Supervisor of Indian Agencies] Mr. Gooderham and the Council were concerned as to whether mineral rights have been reserved where land sales have been made up to date. Neither Mr. G.H. Gooderham or myself were aware of the facts. ...
>
> It would be appreciated if you would review and advise us of all the land yet not sold in the surrendered portions of the Wabamun Indian Reserve.[213]

Woodsworth also noted that "[i]t is considered, as an alternative to sell, that the band will be willing to lease these [lands] rather than sell them."[214] A marginal note on this letter indicates that mines and minerals were reserved only on sales made since January 1947.[215] That same month, the department instructed Woodsworth to review Robertson's 1951 valuations of all the unsold lots in the town plot, in view of the large number of applications being received to purchase lots.[216]

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[211] Record of Sale for "Wabamun Lots," June 12, 1912, LAC, RG 10, vol. 4054, file 382826 (ICC Exhibit 1a, p. 538).

[212] Acting Superintendent, Reserves and Trusts Division, to H.N. Woodsworth, Indian Superintendent, July 28, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 689).

[213] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687).

[214] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687).

[215] Marginal notation written on letter from H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, July 4, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 687). The available sales documentation suggests that mines and minerals were not reserved on some sales made as late as 1953. (See Exhibit 1f.)

[216] Acting Superintendent, Reserves and Trusts Division, to H.N. Woodsworth, Indian Superintendent, July 28, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 689–90).

On October 1, 1952, the Paul First Nation signed two Band Council Resolutions. The first granted an easement to Calgary Power along the eastern boundary of Pattison Avenue, which extended 25 feet into Blocks 23–27 (the unsold surrendered land used as band pasture).[217] The second resolution requested the cancellation of the sales of Blocks 23–27 and the portion of Block 22 lying north of the railway.[218]

On October 8, 1952, Woodsworth responded to the department's request for valuations of the unsold Wabamun townsite lots and made a number of recommendations for dealing with the unsold lands. He informed the department that "the Indians of the Paul's Band are strongly opposed to the selling of any more of their land" and that the future value of the unsold lots "can reasonably be expected to be very high especially with the advent of Calgary Power into the area."[219] Woodsworth recommended that Blocks 22–27 be returned to the First Nation, "as this area is part of the Indians pasture" and was required for their growing cattle herds. This is the same land that the Minister had agreed should be returned to reserve status in 1947. Woodsworth further recommended that Blocks B, 6–8, and most of Blocks 14–17 "be not sold or leased unless by permission of the Indian Council. It may be the sale of this Block of land should not be entertained."[220] Finally, he recommended that the remaining lots in Blocks H, J, and 18 (at the north end of the Wabamun town plot) be sold, since a summer resort had been established in that area. He noted that "the Indians would of course benefit more from a lease of the land" rather than a sale, although this would impose hardships on "organization[s] of campers" located there.[221]

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[217] Band Council Resolution, October 1, 1952, DIAND, Indian Lands Registry, Instrument no. 11631 (ICC Exhibit 1a, p. 692).

[218] Band Council Resolution, October 1, 1952, DIAND, Indian Lands Registry, Instrument no. 11631 (ICC Exhibit 1a, p. 693).

[219] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 694).

[220] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 694–95).

[221] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, Department of Citizenship and Immigration, October 8, 1952, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 695).

Return of Blocks 22–27 to Reserve Status, 1953

In consideration of the "considerable agitation" of Paul First Nation to have its band pasture (Blocks 23–27 and part of Block 22) returned to the reserve, G.H. Gooderham, the Regional Supervisor of Indian Agencies, recommended the return of Blocks 23–27 to reserve on February 11, 1953.[222] The department informed him:

> On advice received from the Departmental Legal Adviser, it is considered necessary for the incorporation into a Reserve of lands that have been surrendered, that the consent of the membership of the Band concerned be first obtained. In other words, it must be done in the same manner as it was released. Should the Band Council wish to proceed with their plan, arrangements should be made for the convening of a meeting of the membership at some convenient date, and have the membership vote on a Resolution requesting that these five blocks be again taken into the Reserve.[223]

On May 6, 1953, Superintendent Woodsworth reported that

> at an interest payment held on the Wabamun Indian Reserve May 4, 1953, and at the request of the Paul's Band Council, a vote was taken, which is herewith attached, from the band membership voters who voted on a resolution of the Band Council dated October 1, 1952, requesting that Blocks 23 to 27 Lots 9, 10 and 11 and in Block 22 in the Townplot of Wabamun be returned to Wabamun Indian Reserve and the jurisdiction of the Band Council.[224]

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[222] G.H. Gooderham, Regional Supervisor of Indian Agencies, to the Superintendent, Reserves and Trusts, Indian Affairs Branch, February 11, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 696). Although this letter refers only to Blocks 23–27, the lots in Block 22 lying north of the railway were later returned to reserve status as well.

[223] L.L. Brown, Superintendent, Reserves and Trusts, to G.H. Gooderham, Regional Supervisor of Indian Agencies, February 24, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 697).

[224] H.N. Woodsworth, Superintendent, Edmonton Agency, to G.H. Gooderham, Regional Supervisor of Indian Agencies, May 6, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 702).

Woodsworth attached a voters list, which records a vote of 68 in favour out of 69 members present.[225] A note beside the name of Peggy Paul, marked present at the meeting, states: "[D]id not vote[,] refused."[226]

By Order in Council PC 1953-1178, dated August 5, 1953, the department returned 23.6 acres of the Wabamun town plot to the reserve. The transferred land contained Blocks 23–27 and the part of Block 22 north of the railway, "together with the intervening streets and lanes," "subject to an easement for an electric power transmission line granted Calgary Power Limited."[227]

Further Sales and Band Requests for the Return of Lands, 1953–58

On December 17, 1953, L.L. Brown, the Superintendent of Reserves and Trusts, informed Edmonton Agency Superintendent Woodsworth that arrangements had been made for a reappraisal of the remaining unsold lots in the Wabamun town plot. He explained that since Blocks 22–27 had been returned to the reserve, "we now assume that the Band as a whole, would not oppose further sales of other lots at this time."[228]

Woodsworth replied on February 11, 1954, that "[t]he Indians of the Paul's Band desire the return of as much unsold land in the Townplot of Wabamun and other land surrendered by them to their ownership."[229] Therefore, "in the best interests of the Department," he recommended that the east halves of Blocks 10–12, and all of Blocks 19–21 (south of the railway), as well as Blocks B, 6–8 and 14–17 (north of the railway), be returned to the Band's ownership. He also again recommended

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225 Complete List of Voters, May 4, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 703–7). There were 106 eligible voters listed on the voters' list; the remaining 37 voters were marked absent.

226 Complete List of Voters, May 4, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 706).

227 Order in Council PC 1953-1178, August 5, 1953, DIAND, Indian Lands Registry, Instrument no. 11632 (ICC Exhibit 1a, p. 710).

228 L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, December 17, 1953, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 714).

229 H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 715).

the sale of unsold lots in Blocks H J, 9 and 18 (the resort area north of the railway).[230] Woodsworth concluded by noting that "I do not consider it in the interests of the Indians of the Paul's Band that at any time they lose control of any further lands by sale with the exceptions mentioned."[231] These recommendations echo similar suggestions previously made by Woodsworth on October 8, 1952.

L.L. Brown responded on March 4, 1954, requesting that the First Nation submit a Band Council Resolution requesting the withdrawal of unsold lots in Blocks 10–12 and 19–21 from sale. He stated that "we believe as you do that their return to the Reserve would be just as beneficial to the Paul's Band as would any monies that may be received from the sale of these lots."[232] At the same time, he noted that there might be legal complications associated with the return of those lands to band ownership, owing to the incorporation of the lots within the Village of Kapasiwin and the previous transfer of the streets and lanes to the Province of Alberta.[233] Brown's response did not address the matter of other lands referred to in Woodsworth's recommendation. As requested, the First Nation signed a Band Council Resolution on April 5, 1954, requesting that Blocks 10–12 and Blocks19–21 be "returned to the ownership of the Paul's Band and that any road allowances involved in the area also be returned to the ownership of the Paul's Band."[234]

In a letter dated May 7, 1954, Superintendent Woodsworth forwarded the Band Council Resolution to the department and relayed the request of "the Chief and Council of Paul's Band" that Blocks B, 6–8 and 14–17 also be "withdrawn and returned to the Paul's Band ownership."[235] Sales

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[230] H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, pp. 715–16).

[231] H.N. Woodsworth, Superintendent, Edmonton Agency, to Director, Indian Affairs Branch, February 11, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 716).

[232] L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, March 4, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 717).

[233] L.L. Brown, Superintendent, Reserves and Trusts, to H.N. Woodsworth, Superintendent, March 4, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 717).

[234] Band Council Resolution, April 5, 1954, DIAND, Indian Lands Registry, Instrument no. 11632 (ICC Exhibit 1a, p. 718).

[235] H.N. Woodsworth, Superintendent, Edmonton Agency, to the Director, Indian Affairs Branch, May 7, 1954, DIAND file 774/34-7-133B-1, vol. 1 (ICC Exhibit 1a, p. 719).

of lots in the townsite north of the railway continued until at least 1958, including lots from Blocks 8 and 17, which the First Nation had requested be returned to reserve status.

Unsold Lands

On December 10, 1958, the First Nation signed a Band Council Resolution requesting that all unsold lots within the Wabamun town plot be withheld from sale for the following five years.[236] It is not known if there were any further sales during or after this five-year period. In 1961 and 1962, the First Nation granted easements to Calgary Power for a right of way over some of the unsold lots north of the railway, on the condition that the land under the easement could be used for "pasture or agriculture."[237] As of 1981, there were 143 unsold lots within the Wabamun town plot, divided into two clusters:

- The east halves of Blocks 10–12, and all of Blocks 19–21, all south of the railway;
- Blocks B, 6, 7, part of 14, 15, 16, and six lots in Block 17, all north of the railway. [238]

A 1995 Memorandum of Intent between Canada and the First Nation outlines a plan to return these lands to the First Nation, although no final agreement has yet been reached.[239]

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[236] Marginal note written on Loose Leaf Land Sales Ledger, Wabamun Band, Sale 149 (ICC Exhibit 1e, p. 3). A copy of the original Band Council Resolution has not been located.

[237] Band Council Resolution, October 5, 1961, DIAND, Indian Lands Registry, Instrument no. L10984 (ICC Exhibit 1a, p. 747); Band Council Resolution, May 30, 1962, DIAND, Indian Lands Registry, Instrument no. L10985 (ICC Exhibit 1a, p. 748).

[238] Donna Gordon, "Paul's Band: A History of Its Land," prepared for TARR/IAA, May 1981, pp. 12–13 (ICC Exhibit 2a, pp. 12–13).

[239] Working copy, "Memorandum of Intent regarding proposed arrangements to resolve the jurisdictional and administrative problems arising out of the 1906 and 1911 surrenders of Paul Indian Reserve Land," November 23, 1995 (ICC Exhibi3t 3a, pp. 42–50).

APPENDIX B

CHRONOLOGY

PAUL FIRST NATION: KAPASIWIN TOWNSITE INQUIRY

1	Planning conference	Edmonton, October 9, 2001 Edmonton, April 3, 2002
2	Community session	October 13, 2005

The Commission heard evidence from Chief Francis Bull, Elders Mike Rain, Clifford Paul, Lloyd Saulteaux, Robert Rain, Louise Bird and Mary Rain.

3 Written legal submissions

- Submission on Behalf of the Paul First Nation, February 7, 2005
- Submission on Behalf the Government of Canada, April 8, 2005
- Reply Submission on Behalf of the Paul First Nation, April 25, 2005

4 Oral legal submissions — Edmonton, May 12, 2005

5 Content of formal record

The formal record of the Paul First Nation Kapasiwin Townsite Inquiry consists of the following materials:

- Exhibits 1a – 9b tendered during the inquiry
- transcript of oral session (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.