

INDIAN CLAIMS COMMISSION

STURGEON LAKE FIRST NATION 1913 SURRENDER INQUIRY

PANEL

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

COUNSEL

For the Sturgeon Lake First Nation
David Knoll

For the Government of Canada
Douglas Faulkner

To the Indian Claims Commission
Valerie Richer

December 2008

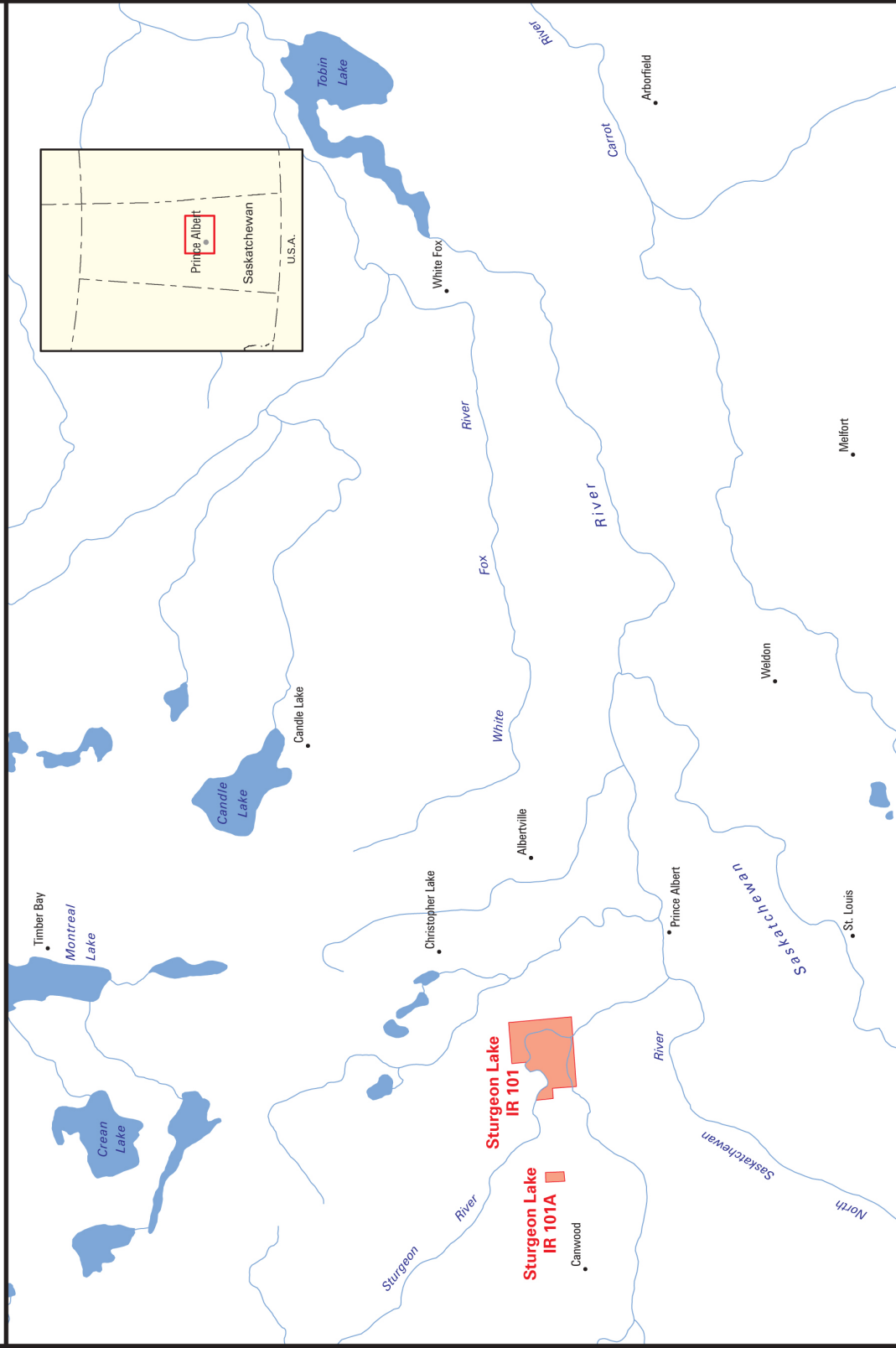
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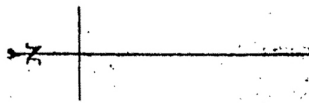
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Map 1

Claim Area Map





TREATY N°6, N.W.T.

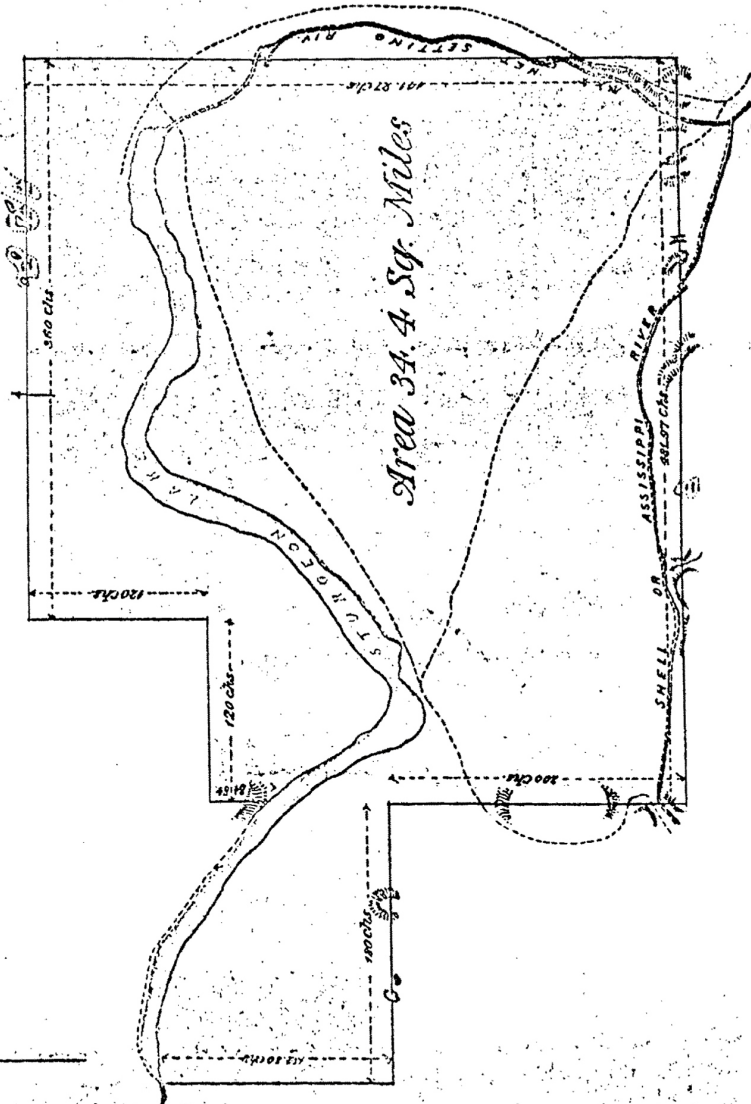
INDIAN RESERVE

N° 101

at Sturgeon Lake.

CHIEF W^m TWATT

Scale: 100 Chs. to an Inch.



Surveyed by

E. Stewart D.I.S.

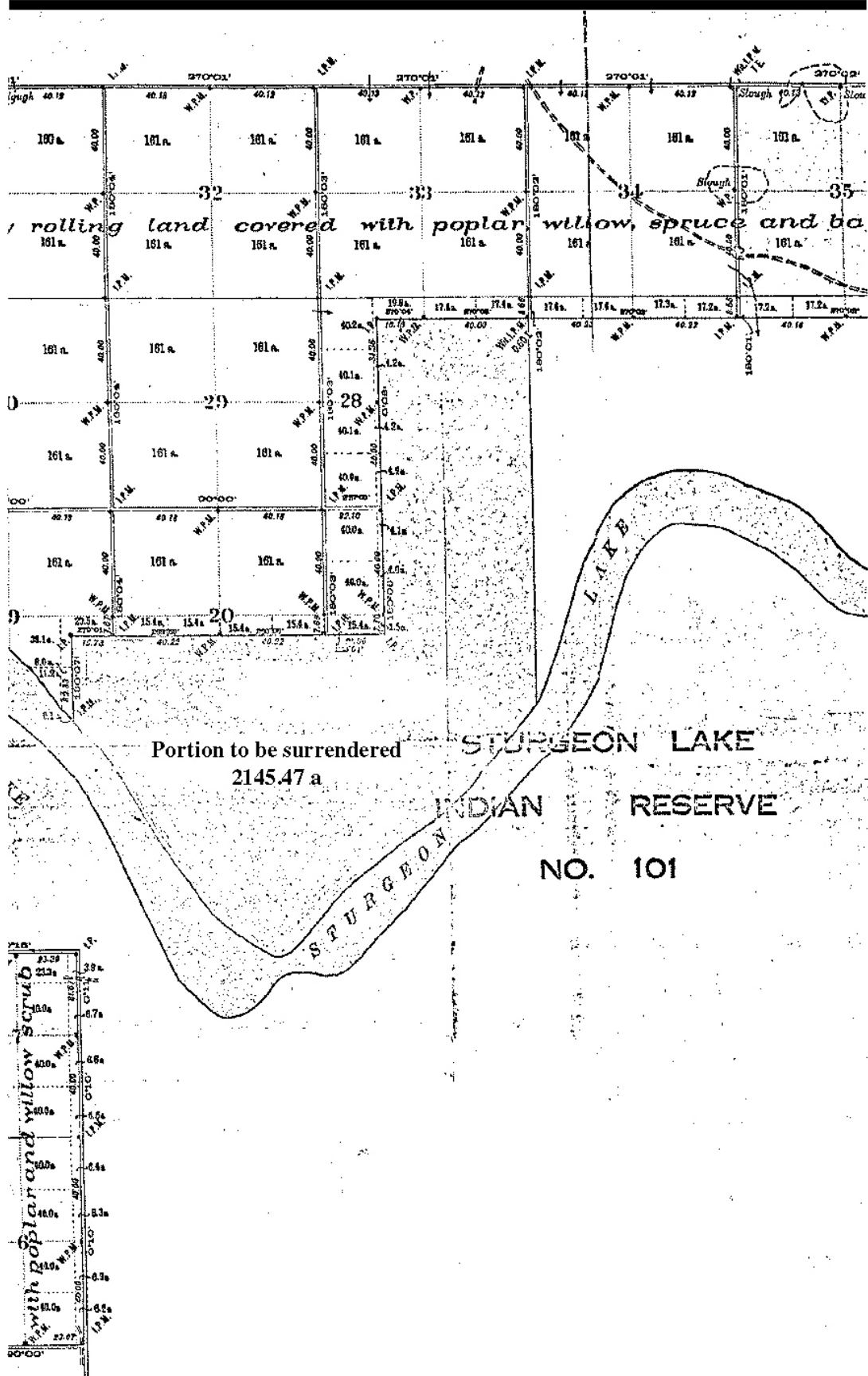
Aug. & Sept. 1878

Approved

Edw. Nelson

In charge Indian Reserve Surveys

Ottawa 23rd Jan 1889



SUMMARY

STURGEON LAKE 1913 SURRENDER INQUIRY Saskatchewan

The report may be cited as Indian Claims Commission, *Sturgeon Lake First Nation: 1913 Surrender Inquiry* (Ottawa, December 2008).

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

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

Treaties – Treaty 6 (1896); **Reserve** – Surrender – Surrender for Exchange; **Indian Act** – Surrender;
Evidence – Oral History; **Contract** – Mistake; **Saskatchewan**

THE SPECIFIC CLAIM

In December 1913, the Sturgeon Lake Band surrendered a portion of Indian Reserve (IR) 101 in exchange for an equivalent amount of haylands. The First Nation submitted a specific claim to the Department of Indian and Northern Affairs in 1993, contesting the validity of the surrender on the basis that a majority of the eligible voters had not been present at the 1913 surrender meeting. In June 1995, the government rejected the First Nation's specific claim, whereupon it requested in August 1996 that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim on the issues of voter eligibility and irregularities in the surrender process. At the First Nation's request, the inquiry was placed in abeyance pending completion of additional research. After Canada rejected the claim for a second time, in May 1998, the ICC held a planning conference with the parties. Subsequently, the inquiry was again placed in abeyance pending completion of Elder interviews.

After resumption of the inquiry in December 2002, the ICC conducted a second planning conference. The First Nation brought forth an additional issue based on contract law principles and submitted a supplementary submission on this issue to the government in April 2004. Following extensive discussions and a third planning conference in June 2005, Canada agreed that the Elders could give evidence regarding the new issue in order to preserve their knowledge, despite the fact that Canada had not formally responded to it. The community session and site tour took place on December 6 and 7, 2006. Canada rejected the First Nation's supplementary submission based on contract law principles in May 2007. The parties filed their written submissions in April and May, 2008, and presented their legal arguments on May 13, 2008 in Saskatoon.

BACKGROUND

Chief William Twatt signed Treaty 6 near Fort Carlton in August 1876, on behalf of the William Twatt's Band, currently Sturgeon Lake First Nation. Indian Reserve (IR) 101, which is traversed by Sturgeon Lake, was surveyed for the Band in 1878, and confirmed by Order in Council in 1889.

The Sturgeon Lake Band was reputed to be skilled and successful in raising cattle and horses, which led to increasing herds and a corresponding shortage of hay on the reserve. Band members were also expert woodsmen, who earned money in the lumber industry and by selling timber. In 1906, the Band surrendered all the spruce on the reserve ten inches and over at the stump in return for money to pay for a thresher.

As early as 1895, the Band and various Indian Agents recognized the Band's need for more hayland to feed their animals. The Band also advised officials that the Marquis of Lorne had promised in 1881 to give

the Band four sections of hayland, should it be required. The department, however, found no record of this promise, although it did recognize the Band's need for more hay.

In 1907, Indian Agent Jackson submitted a report and map to the department identifying land north of Sturgeon Lake that the Band was willing to exchange for four sections of hayland. In 1912, Indian Agent Borthwick renewed discussions with the Band on the option of exchanging a portion of the reserve for an equal amount of hayland. In July 1912, the Band held two meetings, at which time it decided to surrender two sections at the southwest corner, and two sections at the southeast corner of the reserve in exchange for the same four sections of hayland. In May 1913, Borthwick asked the Band to confirm the land it wished to give up. As a result, the Band decided to inspect the land again, after which it decided instead to give up the land north of the lake. Indian Agent Borthwick reported that a surrender meeting and vote took place on December 22, 1913. His report stated that there were 28 eligible voters in the Band, 16 of whom attended the meeting, and that all 16 voted in favour. A voters list and results of the vote were attached to his report.

ISSUES

With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under the 1906 *Indian Act*? Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote? If the answer to either question is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender? Do contract principles apply in determining the First Nation's understanding and intentions in the 1913 surrender, and if so, did their understanding and intention result in the invalidity of the 1913 surrender?

FINDINGS

The irregularities surrounding the 1913 surrender process include, first, Indian Agent Borthwick's reporting letter following the surrender. He states that the surrender was obtained at a general meeting of the Band, instead of indicating that the meeting was summoned for the purpose of a surrender vote. Second, Agent Borthwick inserted December 17, 1913 on the Surrender Document, whereas his reporting letter states that the surrender took place on December 22. Third, the First Nation claims that discrepancies between the original and copies of the surrender documents raise serious questions about the surrender, and, in particular, the signatures of two band members are indicative of forgery. Fourth, the First Nation questions the legitimacy of the second Affidavit of Surrender because of conflicting evidence regarding the signatories' eligibility and presence at the surrender meeting. The panel finds that, individually or collectively, these irregularities do not call into question the validity of the 1913 surrender. They may have been the result of carelessness or human error, but they were not the result of deception, fraud, or conduct designed to manipulate the results of the surrender vote. Thus, the relevant surrender provisions of the 1906 *Indian Act* were met.

On the question of the total number of eligible voters at the time of the 1913 surrender vote, and the number of those voters who attended the surrender meeting, the panel finds that there were 33 eligible voters. Seventeen of those attended the meeting, thereby complying with the requirement in the *Cardinal* case that a majority of eligible voters must attend the surrender meeting. Sixteen out of the seventeen who attended voted in favour of the surrender, with one abstention. No one was recorded as voting against the surrender. Thus, in accordance with the *Indian Act* requirements, a majority of male members of the Band of the full age of 21 years, habitually resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender.

With respect to the applicability of contract law principles to surrenders of Indian reserve land, the panel concludes that in a small minority of claims within the Specific Claims Policy, most likely where insufficient evidence exists to prove a breach of the Crown's fiduciary duty, reliance on contract law principles may be the preferred or only option available to a First Nation to prove its true intention when it

surrendered reserve land. Here, the First Nation has chosen to advance its claim based on the law of mistake in contract, and should not be barred from doing so. In such cases, however, the Crown may avail itself of defences based on contract law, unless they are prohibited by the Specific Claims Policy.

The panel concludes that the Sturgeon Lake voters in 1913 were not confused with a previous timber surrender and did not misunderstand the nature and consequences of the surrender when they cast their votes for the surrender. The Elder evidence stands in stark contrast to a very detailed written record of the events leading up to the surrender. This record reveals consistent leadership in the Band at the time; band members' knowledge of the timber industry; a long-standing need to add more haylands to the reserve; and, the considerable time the Band took to make a final decision on the land it wished to give up in exchange for the haylands. The panel finds that the voters themselves fully intended to exchange land for land, not timber for land.

RECOMMENDATION

That the claim of the Sturgeon Lake First Nation regarding the 1913 surrender of a portion of Indian Reserve 101 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

St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 AC 46; *Guerin v. The Queen*, [1984] 2 SCR 335; *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Cardinal et al. v. The Queen*, [1982] 1 SCR 508; *St. Mary's Indian Band v. Cranbrook (City)*, [1977] 2 SCR 657.

ICC Reports Referred To

ICC, *James Smith Cree Nation: Chakastaypasin IR 98 Inquiry* (Ottawa, March 2005), reported (2008) 20 ICCP 335; ICC, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263; ICC, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

Treaties and Statutes Referred To

Royal Proclamation of October 7, 1763, RSC 1970, App. 2; Treaty No. 6, in Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991); *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868; *Indian Act*, RSC 1906; *An Act to amend the Indian Act (designated lands)*, 1988.

Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003)

COUNSEL, PARTIES, INTERVENORS

D. Knoll for the Sturgeon Lake First Nation; D. Faulkner for the Government of Canada; V. Richer to the Indian Claims Commission.

KEY HISTORICAL NAMES CITED

Ah-yah-tus-kum-ik-im-um (also Ayahtuscumicamin, William Twatt), Chief, Sturgeon Lake First Nation in 1876.

Borthwick, Thomas, Indian Agent, Carlton Agency, 1906 - 1907 and 1908 - 1914.

Christie, W.J., Treaty Commissioner, Treaty 6, 1876.

Chisholm, W.J., Inspector of Indian Agencies, Battleford Inspectorate, 1904 - 1906.

Coombs, J.S., Timber Inspector, Department of the Interior in 1912.

Coté, N.O., Controller, Land Patents Branch, Department of the Interior, in 1908 - 1916.

Coté, J.A., unknown position, Department of the Interior in 1913.

Cory, W.W., Deputy Minister, Department of the Interior in 1913.

Deville, Edouard, Surveyor General, Department of the Interior, 1885 - 1992; Director General, Bureau of Surveys, 1922 - 1924.

Fisher, Charles, Indian Agent, Carlton Agency, in 1905.

Forget, A.E., Assistant Indian Commissioner, August 1888 - October 1895; Indian Commissioner, October 1895 - October 1898.

Goodfellow, W.B., Indian Agent, Carlton Agency, 1898 - 1902.

Jackson, T. Eastwood, Acting Indian Agent, Carlton Agency, in 1907; formerly a clerk in the Carlton Agency, 1900 - 1907.

Keith, Hilton, Indian Agent, Touchwood Agency 1887 - 1892; Carlton Agency, 1893 - 1898.

Keyes, P.G., Secretary, Department of the Interior in 1907.

Laird, David, Lieutenant Governor of the North-West Territories, 1876 - 1881; Indian Superintendent for the North-West Superintendency, 1877 - 1878; Indian Commissioner, 1879 - 1888 and 1898 - 1914.

Loo-sou-am-ce-kwakn, Headman, Sturgeon Lake First Nation in 1876.

MacArthur, James, Indian Agent, Carlton Agency, 1902 - 1903; Duck Lake Agency, 1904 - 1910.

McKay, James, Treaty Commissioner, Treaty 6, 1876.

McKechnie, W.S., Dominion Lands Agent, Department of the Interior in 1912.

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

Milligan, Silas, Indian Agent, Carlton Agency, 1914 - 1915.

Morris, Alexander, Lieutenant Governor of Manitoba, 1872 - 1876; Treaty Commissioner, Treaty 6, 1876.

Nees-way-yak-ee-nah-koos, Headman, Sturgeon Lake First Nation, 1876.

Oo-sahn-us-koo-nee-kik, Headman, Sturgeon Lake First Nation, 1876.

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

Pereira, Lyndwode, Assistant Secretary, Department of the Interior in 1912.

Ponton, A.W., Dominion Lands Surveyor, surveyed IR 106A for the Montreal Lake and Lac La Ronge Bands in 1897. Provided feedback on Agent Keith's request for additional hayland for the Sturgeon Lake First Nation.

Scott, Duncan Campbell (D.C.S.), Chief Accountant, Department of Indian Affairs, in 1913.

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

Stewart, Elihu, Dominion Land Surveyor, surveyed IR 101 for the Sturgeon Lake First Nation in 1878.

Stewart, Samuel, Assistant Secretary, Department of Indian Affairs in 1907.

Yay-yah-too-way, Headman, Sturgeon Lake First Nation in 1876.

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

In August 1876, Chief William Twatt and three headmen signed Treaty 6 near Fort Carlton on behalf of the members of William Twatt's Band, currently the Sturgeon Lake First Nation. Indian Reserve (IR) 101, containing 22,042 acres, or 34.4 square miles, was surveyed for William Twatt's Band two years later and was confirmed by Order in Council in 1889.

Early in the history of the Sturgeon Lake Band, it was recognized by the Band and Indian Agents that the Band required more haylands on the reserve to accommodate their growing herds of cattle and horses. Band members were also known to be expert woodsmen, who earned money by cutting and selling timber. On January 30, 1906 the Band agreed to a surrender for sale of all the spruce on the reserve over ten inches at the stump.

The Band and Crown officials discussed over several years the option of exchanging some reserve land for an equivalent amount of hayland. In December 1913, the Band surrendered a portion of its reserve north of Sturgeon Lake in exchange for two sections of land adjacent to the northeast corner and two sections approximately seven miles west of the reserve.

On October 22, 1993, the Sturgeon Lake First Nation submitted a specific claim to the Department of Indian and Northern Affairs, alleging that a majority of the eligible voters had not been present at the 1913 surrender meeting. On June 17, 1995, Canada advised the First Nation of its position that the surrender requirements of the 1906 *Indian Act* had been met with respect to the 1913 surrender of a portion of Indian Reserve (IR) 101, and that the surrender was therefore valid.

In August 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim, based on voter eligibility and irregularities in the surrender process. The ICC agreed to the request. The First Nation submitted further research on voter eligibility and Canada began conducting confirming research. In December 1996, the First Nation requested that the inquiry be placed in abeyance pending the completion of the research. On May 26, 1998, Canada again rejected the First Nation's claim and the inquiry was resumed the following month.

A planning conference with the parties was held in September 1998; however, in December 1999, the inquiry was placed in abeyance a second time, at the request of the First Nation, so that it could complete interviews with the Elders.

The inquiry resumed in December 2002, and in March 2003, the ICC conducted a second planning conference with the parties. At that time, the First Nation indicated that it planned to rely on documents containing the Elder interviews rather than hold a community session to receive the Elders' testimony. The First Nation also raised the question of whether the voters understood that they were surrendering land in 1913. Although Canada did not formally object, it expressed serious reservations that a new issue was being introduced into the inquiry. On April 16, 2004, the First Nation filed a revised supplementary submission claiming that the 1913 surrender could be challenged on the basis of contractual principles, in particular, the law of mistake. In June 2005, the Commission conducted a third planning conference. Subsequently, the First Nation decided to hold a community session. Canada ultimately agreed that the Elders could give evidence in relation to the 2004 supplementary submission in order to preserve their testimony, despite the fact that Canada had not yet formally responded to this issue.

The community session and site tour took place on December 6 and 7, 2006. On May 18, 2007, Canada rejected the First Nation's supplementary submission based on contract law principles.

The written legal submission of the First Nation was filed on February 29, 2008; Canada filed its submission on April 11, 2008, and the First Nation filed a Reply on April 26, 2008. The parties presented their arguments at an oral hearing on May 13, 2008 in Saskatoon, Saskatchewan. A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is detailed in Appendix B.

MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal orders in council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where

the claim was already rejected by the Minister.”¹ The 1973 Specific Claims 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.² The term “lawful obligation” is defined in *Outstanding Business* as follows:

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

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

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.³

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

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

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

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

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

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

PART II
THE FACTS

In August 1876, Chief William Twatt and three headmen signed Treaty 6 near Fort Carlton on behalf of the members of what was known as William Twatt's Band, currently the Sturgeon Lake First Nation. Treaty 6 included a provision for reserves of one square mile (or 640 acres) for each family of five, or in that proportion for larger or smaller families. Indian Reserve (IR) 101, containing 22,042 acres, or 34.4 square miles, and traversed by Sturgeon Lake, was surveyed for William Twatt's Band two years later. Surveyor E. Stewart commented at the time that the location of the reserve was well-chosen, with an abundance of timber on the north side of Sturgeon Lake, sufficient haylands in the valleys, and excellent whitefish and ducks on the reserve. IR 101 was confirmed by Order in Council in May 1889, and was withdrawn from the operation of the *Dominion Lands Act* in 1893.

In 1881 the Governor General, the Marquis of Lorne, conducted a tour of western Canada, at which time he held councils with the Indians. The Marquis' representative reported that Chief Twatt requested some amenities such as thread, and also asked for an agent who could speak his language in order to assist in the sale of wood from the Sturgeon Lake reserve. There is no record of a request for additional haylands at that meeting.

Several years later, in 1895, the Indian Agent for the Carlton Agency, H. Keith, requested more haylands for the Sturgeon Lake Band, but was advised by the Dominion Land Surveyor, A.W. Ponton, that nothing could be done until a survey of the area was completed. Ponton reported in 1898 that the lands requested by Keith were found to be within the area surveyed for other bands, namely, the Montreal Lake and Lac La Ronge Bands. Ponton suggested, as an alternative, that the Sturgeon Lake Band consider exchanging an equal amount of its reserve land for land at the northeast corner of the reserve comprising 14 square miles of haylands, located in township 51, range 27 and fractional range 28, west of 2nd meridian. He recommended this exchange, observing that the existing reserve was, for the greater part, sandy and wooded with jack pine, hampering the Band's attempts to engage in stock-raising and agriculture, whereas the land he suggested contained good soil and plentiful hay meadows.

In the early 1900s, there appears to have been two distinct groups of band members, one living at the east end of the lake and another to the west at a place called the Narrows. The latter group was considered to be more prosperous, but officials reported that the group from the east was preparing to move to the Narrows, which would bring them closer to the school and the center of the reserve.

In the years leading up to 1906, when the Band surrendered timber on the reserve for monetary compensation, band members were reputed to be expert woodsmen, who earned money by working in lumber camps. In those years, the Band entered into several agreements to sell timber and railway ties, sometimes insisting that band members be hired to do the work. In 1905, it was reported that the Band was anxious to sell some of its timber to pay for a thresher, and on January 30, 1906, the Band agreed to a surrender for sale of all the spruce on the reserve over ten inches at the stump. Headmen Ayatawayo and Kayaykeemat (Moosehunter), and principal members Kawechemaytawaymat (Big Head), Kaisiwanayo, Nehtowkapow, Meyohnahtowakew, Thomas, Willie Duck, and Jumbo signed the Surrender Document. Ayatawayo also swore the accompanying Affidavit of Surrender.

The Sturgeon Lake Band was also reputed to be skilled and successful in raising cattle and horses, which in turn created ongoing pressure to obtain more hayland for the reserve. Indian Agent T.E. Jackson reported in late 1907 that the Band claimed to be entitled to four additional sections of haylands should they be required. He supported their request for more haylands, confirming that the hay supply on the existing reserve continued to be insufficient. Jackson wrote a letter identifying sections 35 and 36, in township 51, range 1, and sections 10 and 15, in township 51, range 3, all west of 3rd meridian, as being potential haylands for the Band that could yield up to 200 tons of hay. Jackson also attached a map of the reserve highlighting land north of Sturgeon Lake that, according to Jackson, the Band was willing to exchange for the four new sections. In response, although the department supported the Band's need for more hay, it denied any entitlement to additional land, stating that the Band had already received 3,226 acres more reserve land than its entitlement under Treaty 6.

When Jackson's replacement, Indian Agent Thomas Borthwick, approached the department on behalf of the Band in early 1908, repeating the request for additional haylands, he explained that

band members told him the Marquis of Lorne had promised during their interview with him in 1881 to grant their request for four sections of hayland. The department responded that it had no record on file of the Marquis' promise and suggested the notion of a land exchange such as the one proposed in 1898.

In 1912, following a request from a timber company to harvest timber on land, some of which had been identified as available in future to the Sturgeon Lake Band, the Department of the Interior responded that the Band had not yet indicated which reserve land it wanted to exchange for the haylands. The Department of Indian Affairs then followed up with Agent Borthwick, asking if the Band still desired to obtain sections 35, 36, 10, and 15, described above, and if so, to indicate the land it was prepared to give up.

Agent Borthwick reported that on July 10 and 18, 1912, the Band held two meetings to discuss the matter and advised him that the majority wished to proceed. In particular, the Band stated that, instead of giving up reserve land north of Sturgeon Lake, it had decided to surrender two sections at the southwest corner of the reserve and two sections at the southeast corner, in exchange for the four sections of land previously identified. After much discussion between the departments of Indian Affairs and the Interior, by December 1912 sections 10 and 15 were confirmed as available for exchange once they were removed from a third party's timber berth. The Department of the Interior expressed some reluctance to add sections 10 and 15 to the reserve because they were almost seven miles from the reserve's western border, but Superintendent General of Indian Affairs D.C. Scott responded in August 1913 that it was a serious matter that the Band obtain more hay for its herd of 400 head of cattle. He reasoned that Indian Agent Borthwick, whom he called a man of good judgement, was probably not able to get any decent hay meadows closer to the reserve.

In his annual report for 1912-13, Indian Agent Borthwick described the northern portion of the Sturgeon Lake reserve as heavily timbered, compared to the land south of Sturgeon Lake where long and excellent areas of farm land existed, offering great opportunities to the Indians who were engaged in farming and stock raising. Borthwick also commented that the long and narrow lake was bounded by high, wooded banks, especially to the west of the reserve. He noted that the Band's herds of cattle and horses, numbering 492 animals, had increased dramatically in the previous five years.

In March 1913, after the Secretary of the Department of Indian Affairs asked Indian Agent Borthwick to confirm that the southwest and southeast corners of the reserve were to be cut off the reserve, Borthwick met with the Band to discuss the matter. He reported on June 5, 1913, that the meeting did not take place until May 28, as the majority were away rat hunting and log driving. At the May 28 meeting, however, band members were not ready to confirm their decision. They wanted to make another inspection of the reserve land they wanted to exchange before finally coming to an agreement. When Borthwick received the Band's final decision, he wrote to the Secretary on June 16 that the Band had changed its mind; it no longer wished to exchange the southwest and southeast corners of the reserve, but rather the portion lying directly northwest of the lake. Borthwick confirmed that this area was approximately equal in size to the haylands the Band wanted. According to Borthwick, the land northwest of the lake was still heavily brushed, adding that although the soil was good, it would be years before any settlers would use this land.

Consequently, on September 24, 1913, 2,217.40 acres – comprising sections 35 and 36 and portions of sections 25 and 26, all in township 51, range 1, W of 3rd meridian, as well as sections 10 and 15 in township 51, range 3, W of 3rd meridian – were withdrawn by Order in Council from the *Dominion Lands Act*. The Order in Council stated that insufficiency of hay for the reserve's 400 cattle was the reason for exchanging a portion of reserve land for the described lands.

Once the haylands were available to be added to the reserve, the department gave Indian Agent Borthwick instructions for taking a surrender. Borthwick was provided with the details of the land the Band desired to exchange, a surrender form in duplicate, and authorization to submit the surrender to the Sturgeon Lake Band in accordance with the provisions of the *Indian Act*. In addition to instructing Borthwick on the requirements of the documents, the department also told him that he should report back on the number of eligible voters, the number voting for the surrender, and the number voting against it.

Borthwick advised the department on November 21, 1913 that he had been unable to hold a surrender meeting because the majority of male band members were on rat hunting expeditions. On December 24, 1913, Borthwick wrote to the department advising that the surrender form was submitted to the Sturgeon Lake Indians on December 22 at a general meeting of the band, in accordance with the provisions of the *Indian Act*. He enclosed with his letter the completed form of

surrender in duplicate and a report giving the names of the 28 eligible voters, and stating that 16 of them attended the meeting and that they all voted in favour of the exchange of land. In early January 1914, the department returned the documents to Borthwick, complaining that he had failed to have the Affidavit of Surrender of Ayatawayo, Kaisiwanayo, and Borthwick sworn before a stipendiary magistrate or justice of the peace. He had erred by using a commissioner of oaths. On January 31, 1914, a second Affidavit was sworn, this time by Big Head and Moosehunter, before a justice of the peace.

At the time of the 1913 surrender the Band did not have a Chief. William Twatt had been Chief of the Band from 1876 until his death in 1895. In the twenty years between 1895 and 1915, when Thomas Charles was elected Chief, the leadership was maintained by two or three experienced headmen at a time.

The Governor General in Council approved the surrender on February 20, 1914, by Order in Council, which included the Minister's statement that the surrender was taken with a view to the proposed exchange being effected, as well as his recommendation that the original be returned to Indian Affairs and the duplicate be kept in the Privy Council Office. The Order in Council referred to the date on the Surrender Document as December 13, 1913; the Surrender Document itself stated December 17, 1913; and, Indian Agent Borthwick's letter reporting the surrender meeting stated that he took the surrender on December 22.

In April 1914, the Chief and principal members of the Sturgeon Lake Band told the new Indian Agent, S. Milligan, that the Band believed that they would be receiving section 36, township 51, fractional range 28, W of 2nd meridian, not section 35 in township 51, range 1, W of 3rd meridian. Although the Band stated that the error was theirs, the department reasoned that it was probably caused by the land surveyor having given the same section number to two adjoining sections. On November 27, 1915, an Order in Council authorized the amendment of the February 20, 1914, Order in Council, substituting section 36 and part of section 25, both in township 51, fractional range 28, W of 2nd meridian, for section 35 and a portion of section 26, both in township 51, range 1, W of 3rd meridian. As a result, 712.90 acres were exchanged for 528.20 acres. Once the amendment was finalized, the Band did not raise any further complaints about the surrender itself.

PART III
THE ISSUES

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

- 1 With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under s. 49 of the *Indian Act*, RSC 1906, c. 81?
- 2 Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote?
- 3 If the answer to either question 1 or 2 is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender of 2145.47 acres of the Sturgeon Lake Indian Reserve (IR)101?
- 4 Do contract principles apply in determining the First Nation's understanding and intentions in the 1913 surrender? If so, did their understanding and intention result in the invalidity of the 1913 surrender?

PART IV
ANALYSIS

ISSUE 1 IRREGULARITIES IN THE SURRENDER PROCESS

1 With regard to the circumstances and alleged irregularities surrounding the surrender proceedings, were the requirements for a surrender of reserve land met under s. 49 of the *Indian Act*, RSC 1906, c. 81?

Issue 1 concerns compliance with certain provisions of the 1906 *Indian Act* for taking a surrender of Indian reserve land. The First Nation alleges numerous irregularities in the documentary record of the surrender, arguing that the number and nature of the irregularities in the surrender process call into question the validity of the surrender. The panel will address the following alleged irregularities: the purpose for summoning the meeting; conflicting evidence on the date of the surrender meeting; the veracity of the signatures of Cardinal and Ballendine on the Surrender Document; and, the propriety of the second Affidavit of Surrender, sworn by Big Head and Moosehunter.

The Law

The earliest law on the surrender of Indian reserves is found in the *Royal Proclamation of 1763*. The proclamation required, among other things, that Indian nations wishing to sell reserve land to private interests first surrender the land to the Crown, which would then sell it for the Indians' benefit. This provision was intended to protect Indian bands from being seriously disadvantaged in direct negotiations with purchasers:

We have thought proper to allow Settlement: but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie.⁵

⁵ *Royal Proclamation of October 7, 1763*, RSC 1970, App. 2, pp. 4-5.

Treaty 6, signed by Chief William Twatt and other chiefs and headmen in 1876, also provided that bands' reserves could:

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;⁶

The rules on who could vote and how the surrender process was to be conducted were codified in 1868 in federal legislation that became the precursor to successive Indian Acts.⁷ Numerous amendments to this Act over the years resulted in the 1906 *Indian Act*, which governed the process in taking the 1913 surrender. The relevant portions of section 49 are set out here:

49. Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless 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, ...

2. 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.

3. 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 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, ...

4. 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.⁸

The principle that the Crown has a duty to interpose itself as a safeguard between Indians and prospective purchasers of reserve land has survived to the present day in the legislation and has been

⁶ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 351-57 (ICC Exhibit 1a, p. 8).

⁷ *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, (31 Vict.), c. 42.

⁸ *Indian Act*, RSC 1906, c. 81, s. 49.

reinforced through court judgements, notably, the 1888 Privy Council decision in *St. Catherine's Milling and Lumber Co.*,⁹ and the 1984 judgement of the Supreme Court of Canada, *Guerin v. The Queen*.¹⁰

In addition, two Supreme Court of Canada cases have interpreted the surrender requirements in the *Indian Act*. The leading case on surrender remains the 1995 judgement in *Blueberry River Indian Band v. Canada*, referred to as *Apsassin*. In this case, the Court dealt with a number of subjects, including the fact that the Crown did not comply with section 49(3) when the Affidavit of Surrender was executed. That is, instead of personally certifying the surrender on oath, the Chiefs told the commissioner they wished to proceed with the surrender, which the commissioner then certified on oath. In concluding that section 49(3) was not a mandatory requirement, Justice McLachlin reasoned that sections 49(3) and (4) are intended to ensure that the surrender was validly assented to:

to read the provisions as mandatory would work serious inconvenience, not only where the surrender is later challenged, but in any case where the provision was not fulfilled ... I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with section 51 [section 49 in the 1906 Act] of the *Indian Act* therefore does not defeat the surrender.¹¹

Justice McLachlin agreed with the findings at the trial and court of appeal levels:

Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed.

This Court has since held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory:¹²

⁹ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 AC 46.

¹⁰ *Guerin v. The Queen*, [1984] 2 SCR 335.

¹¹ *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344, para. 43 (sub nom. *Apsassin*).

¹² *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344, para. 42 (sub nom. *Apsassin*).

In separate reasons, Justice Gonthier emphasized the importance of giving legal effect to the intention of the band members rather than relying on technicalities.¹³

The second Supreme Court judgement interpreted the voting requirements of a surrender, found in section 49(1) of the *Indian Act*. In *Cardinal et al. v. The Queen*, the Court held that section 49(1) means:

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.¹⁴

The rule in *Cardinal* has become known as the “double-majority rule”: for a surrender to be valid, a majority of the eligible voters must attend the surrender meeting and a majority of those in attendance must vote in favour.

Both parties are in agreement that section 49(1) is mandatory. Further, Canada divides the surrender requirements of section 49 into five mandatory and four directory steps, the latter representing, according to Canada, administrative procedures to confirm that the first five conditions were met.¹⁵ The five mandatory requirements are: a majority of the male band members, twenty-one years of age or older, must assent to the surrender; they must be habitually resident on or near and interested in the reserve; the meeting must be summoned according to the rules of the Band; and, the meeting must be conducted in the presence of the Superintendent General, or his authorized officer. In response to a question by Commissioner Holman at the oral hearing, counsel for Canada confirmed Canada’s position: “The first five steps of 49 are mandatory, a majority must attend, a majority must vote in favour. If the determination of the Commission is that a majority did not vote in favour, it’s not valid.”¹⁶

¹³ *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344, para 7 (sub nom. *Apsassin*).

¹⁴ *Cardinal et al. v. The Queen*, [1982] 1 SCR 508 at 517.

¹⁵ ICC Transcript, May 13, 2008, pp. 85-86 (Douglas Faulkner); Written Submission on Behalf of the Government of Canada, April 11, 2008, paras. 105-09.

¹⁶ ICC Transcript, May 13, 2008, p. 112 (Douglas Faulkner).

Both parties acknowledge the courts' assessment that section 49(3) dealing with the Affidavit of Surrender is directory only, such that failure to comply with the provision does not render the surrender invalid.¹⁷ The First Nation's view is qualified, however, by its position that "where serious questions are raised not only about compliance with the mandatory provisions but to the affidavit attesting to the validity of the surrender meeting, ... this throws into question the whole transaction."¹⁸

Panel's Reasons

Surrender Meeting

The First Nation alleges that the surrender was improperly obtained in that the meeting took place at a general meeting of the Band, not, as section 49(1) of the *Indian Act* requires, at "a meeting or council ... summoned for that purpose ..."¹⁹ The evidence supporting the First Nation's position is found in Indian Agent Borthwick's reporting letter following the surrender meeting, in which he stated:

I have the honor to return herewith the form of surrender in duplicate which was duly submitted to the Indians of the Sturgeon Lake, Band 101. on the 22 inst, at a general meeting of the band, in accordance with the provisions of the Indian act.²⁰

Canada takes the position that to conclude that the Indian Agent did not follow the prescribed surrender process, on the basis of his description of the meeting as a "general meeting," is speculative and not supported by the evidence.²¹

¹⁷ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 40; Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 109.

¹⁸ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 40.

¹⁹ *Indian Act*, RSC 1906, c. 81, s. 49. See Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, paras. 26(f), 110.

²⁰ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).

²¹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 120.

The First Nation's claim that Indian Agent Borthwick's wording proves that the meeting was not called specifically to deal with a surrender, is without merit. The relevant wording requires that the surrender be assented to "at a meeting or council thereof summoned for that purpose;" but, notwithstanding Borthwick's wording in the reporting letter, sufficient evidence exists to prove that the meeting was called for the purpose of considering a surrender. In addition to the words "at a general meeting of the band," Borthwick's letter contains a reference to the meeting being in accordance with the provisions of the Act, a list of the eligible voters, the number in attendance, and the results of the vote.²²

The panel concludes that Indian Agent Borthwick called the meeting for the express purpose of holding a surrender vote. As such, he did not breach that provision in section 49(1) of the Act.

Date of Surrender

The First Nation points out that the Surrender Document is dated December 17, 1913, whereas Indian Agent Borthwick's reporting letter to the department states that the surrender took place on December 22nd. The difference of five days, argues the First Nation, is a further reason to question the validity of the surrender.²³

Canada suggests a possible explanation for the discrepancy in dates: in early October, the department sent Borthwick the printed surrender form in duplicate covering the portion to be surrendered. According to Canada, Borthwick likely started to fill in information on the form, including the date of the surrender meeting, anticipating that he would call the meeting for December 17. He had to delay it for several days, however, as many of the voters were away hunting. Further, states Canada, numerous documents support the conclusion that the surrender meeting was actually held on December 22.

The panel notes, as do the parties, that Indian Agent Borthwick committed more than one error in taking the 1913 surrender, but we can find no evidence that he had any reason to intentionally misrepresent the fact that he held the surrender meeting on December 22 when he wrote

²² Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).

²³ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, paras. 26(a), 110.

December 17 on the form. Borthwick had been specifically instructed by the department, when it sent the surrender forms on October 3, to report on the number of male members over the age of twenty-one, resident on the reserve and entitled to vote on the surrender.²⁴ It is plausible that Borthwick believed the majority of eligible voters would be available on the 17th, changed his plans when he realized most were away, and failed to amend the date. Regardless of whether it is the correct scenario, nothing turns on a finding that the meeting happened on the 17 or the 22. Not one of the extant documents in the years following the surrender raises a suspicion regarding the date of the surrender meeting, or the fact that it took place.

The panel concludes that the discrepancy between the date given in the reporting letter and the date written on the Surrender Document is an example of an error that, while evidence of carelessness on Borthwick's part, is a minor irregularity. In accordance with *Apsassin*, such a technical error would not call into doubt the validity of the surrender.

Signatures of Cardinal and Ballendine

The First Nation raises a serious allegation with respect to the signatures of Charles Campbell Cardinal and Frederick Ballendine on the Surrender Document. Three sets of documents relating to the 1913 surrender exist in the records of the Department of Indian Affairs, and in the National Archives, two of which the First Nation points to as containing serious discrepancies.

The first set of documents, referred to as the DIAND documents, contains a Surrender Document with the word "Original" typed at the top of the page. Of the sixteen band members who signed the document, fourteen signed with the designation "his X mark", whereas Cardinal and Ballendine signed with their signatures. The first seven signatures on the document also have seals adjacent to their marks. On the other set of documents, referred to as the RG 10 documents, the Surrender Document does not contain the word "Original" or seals, and all the signatories, including Cardinal and Ballendine, appear to be written by the same person with the designation "his X mark" adjacent to all of the names. The First Nation considers the Surrender Document in RG 10 to be the original, and claims that the discrepancy in the two sets of documents suggests "that the signatures

²⁴ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243).

of Cardinal and Ballendine were forged since they were capable of signing their own names.”²⁵ Canada responds that this irregularity is also speculative in nature and is not supported by persuasive evidence.²⁶

We do not agree with the First Nation’s interpretation of the documents and the allegation of forgery. First, we are at a loss to understand why the First Nation assumes the Surrender Document in RG 10 to be the first or original document, when it is the DIAND version that contains the word “Original” and the seals. Further, in comparing the DIAND and RG 10 versions, but without the benefit of a handwriting and document expert, we find it most probable that the RG 10 version was typed later, likely by a departmental employee who wrote in the names of all the signatories, including Cardinal and Ballendine, and who erred by writing “his X mark” beside all sixteen names. Other errors also support our interpretation that the RG 10 version was not the original document, but rather a typed-out copy: in the RG 10 version the word “Original” is missing; “Sturgeon” is misspelled as “Strugeon;” errors exist in the description of the lands; it appears that only one person wrote in all the names, including the names of witnesses; and, this person’s handwriting is clearly different from the handwriting on the DIAND version.

The existence of two or more sets of documents relating to important events was the usual practice for federal government records; the original and copies were kept at the head office, the Privy Council Office, and possibly a regional office. The many discrepancies between originals and copies of historical documents exemplifies not forgery, in our view, but human error in typing copies of originals in the days before the advent of photocopying.

In this case, there exists no evidence on the record to support an allegation of fraud, or dishonesty by the Indian Agent, or any other Crown official in the taking of the surrender.

Second Affidavit by Big Head and Moosehunter

Indian Agent Borthwick made an error in having the Affidavit of Surrender sworn before a commissioner of oaths instead of a stipendiary magistrate or justice of the peace, as instructed by the

²⁵ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 26(b).

²⁶ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 120.

department and as required by the *Indian Act*.²⁷ As a result, the department sent back the surrender documents to Borthwick on January 7, 1914, instructing him to have the Affidavit retaken in accordance with the Act. This Borthwick did on January 31, 1914, but the band members swearing the second Affidavit were Big Head and Moosehunter, not Ayatawayo and Kaisiwonayo, who had sworn the first Affidavit. The First Nation points out that the voters list prepared by Indian Agent Borthwick shows that Big Head was marked as absent at the surrender meeting; further, Moosehunter was not included in Borthwick's voters list and was therefore not eligible to vote and not present at the meeting.

Canada argues that Moosehunter, whose Cree name was Kayaykeemat, was one of the original members of the Sturgeon Lake Band and was the second signatory on the Surrender Document. Canada explains the Agent's omission of Moosehunter's name on the voters list as a simple oversight, as Moosehunter's son John Moosehunter was listed as an eligible voter and marked as present. The elder Moosehunter, states Canada, was clearly an eligible voter, who was probably present at the meeting with his son John, and was thus a proper signatory to the second Affidavit of Surrender.

In Issue 2, the panel concludes that Moosehunter, a headman, was an eligible voter who was present at the surrender meeting. As such, it was proper for him to sign the second Affidavit attesting to the fact that he was entitled to vote at the meeting, that the vote took place in his presence, and the surrender was assented to by a majority of eligible voters.

There is no dispute over the voter eligibility of Big Head, whose Cree name was Kawechemaytahwaymat, as he was also a leader of the Band, having been a headman for five years. Further, Canada does not provide any evidence to counter the claim that Big Head may have been absent, as was shown on the voters list. Nevertheless, an affidavit is a statement in writing on oath, which is sworn before someone who has the authority to administer it, such as a justice of the peace. Although some Elders interviewed in 1973 recounted that Moosehunter and Big Head could not

²⁷ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243); *Indian Act*, RSC 1906, c. 81, s. 49(3).

speak English,²⁸ a notation near the signature of the justice of the peace on the second Affidavit states that it was “read over and explained to the said Big Head and Moose Hunter in the Cree language and they seemed perfectly to understand the same and made their marks thereto in my presence.”²⁹

The 1906 *Indian Act* provides that the Affidavit of Surrender shall be certified by the officer authorized to attend the surrender meeting, in this case Indian Agent Borthwick, and “by some of the chiefs or principal men present thereat and entitled to vote ...”³⁰ If Big Head was not present, his sworn statement is not accurate; however, the case law is clear that section 49(3) of the Act is directory, not mandatory. Absent persuasive evidence that would raise serious doubts about the surrender meeting and the results of the vote, irregularities in the technical requirements of section 49, such as the Affidavit of Surrender, do not nullify the surrender.

In addition, the panel’s finding in Issue 2 that Moosehunter was eligible and present at the surrender meeting leads to the further conclusion that if the second Affidavit was sworn correctly by only one principal man, it would still meet the requirements of the 1906 Act. As this Commission concluded in the *Canupawakpa Dakota First Nation* inquiry report, the wording “‘some’ principal men can, by definition, mean ‘one’ principal man.”³¹

Conclusion

The panel has examined the following irregularities in the surrender process alleged by the First Nation as invalidating the surrender: the purpose for summoning the surrender meeting; conflicting evidence on the date of the meeting; the veracity of the signatures of Cardinal and Ballendine; and, the propriety of the second Affidavit of Surrender.

²⁸ Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, pp. 356-357); interview with John Naytowhow, January 26, 1973 (ICC Exhibit 1a, p. 375).

²⁹ Affidavit of Surrender, January 31, 1914, LAC, RG 2, vol. 1082, P.C. 510/1914, 20 February 1914, and DIAND, file 672/30-9, vol 1 (ICC Exhibit 1a, pp. 265, 266).

³⁰ *Indian Act*, RSC 1906, c. 81, s. 49(3).

³¹ ICC, *Canupawakpa Dakota First Nation Inquiry: Turtle Mountain Surrender Claim* (Ottawa, July 2003), reported (2004) 17 ICCP 263 at 327.

We find that, individually or collectively, these irregularities do not call into question the validity of the 1913 surrender. They may have resulted from carelessness or human error by the Indian Agent or other officials in the department, but they were not the result of deception, fraud, or other conduct designed to manipulate the results of the surrender vote. Consequently, we conclude that, in spite of the irregularities in the documents and the surrender process, the requirements of section 49 of the *Indian Act* for the 1913 surrender of reserve land were met.

ISSUE 2 DID A MAJORITY OF ELIGIBLE VOTERS ASSENT TO THE SURRENDER?

- 2 Did a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assent to the surrender at a meeting summoned for the purpose of a surrender vote?

The process of surrendering reserve land is governed by the *Indian Act*, which sets out a number of requirements to ensure that a surrender is properly taken by the Crown. The *Indian Act* provisions and the common law interpreting the surrender process have been canvassed in Issue 1 and will not be repeated here.

Issue 2 deals with the requirement in the Act that a majority of the eligible voters must have attended the surrender meeting and a majority of those must have voted in favour of the surrender.

Positions of the Parties

There are two questions inherent in Issue 2: what was the true number of eligible voters; and, how many of them attended the 1913 surrender meeting? In order to answer these questions, we turn to the facts concerning the individual band members whose eligibility or attendance is disputed by the parties. If a majority of male band members of the full age of twenty-one, habitually resident on or near the reserve and interested in the reserve, did not attend the surrender meeting, the 1913 surrender would be invalid.

The parties agree that there were 29 eligible voters in the Band in December 1913, when the surrender vote was taken. The First Nation claims, however, that Indian Agent Borthwick omitted from the voters list the names of seven band members who should have been eligible to vote, either by age or residency. The First Nation also argues that one band member (Charles Campbell

Cardinal), whose name appeared on the list of eligible voters, was in fact ineligible. As a result, says the First Nation, the true number of eligible voters was 36, not 27, as appears on the voters list. Further, it argues that only 12 or 13 of those on the list were actually present at the meeting. The result, according to the First Nation, is that fewer than a majority of the eligible voters attended the surrender meeting.

Canada takes the position that there were 30 eligible voters, including Mr. Cardinal, whom the First Nation claims is ineligible, and that 17 of the eligible voters were present at the surrender meeting.

Panel's Reasons on Eligibility of Voters

Indian Agent Borthwick listed 27 names of band members who were eligible to vote on the 1913 surrender. His report following the surrender contains an error, in that he counted 28 names on his list of eligible voters.³²

Today, the parties have agreed on the names of 29 persons who were eligible voters in 1913. The First Nation argues, however, that seven additional names should have been on that list, either because they were habitually resident on the reserve and interested in it, or because they were 21 at the time of the surrender meeting. In one case only, that of Charles Campbell Cardinal, whose name did appear on the voters list, the First Nation argues that he was in fact ineligible to vote.

Canada disagrees with the First Nation's assessment of the eligibility of seven additional persons, and maintains that Charles Campbell Cardinal was eligible and that Borthwick was correct in placing his name on the voters list.

The names of persons in dispute concerning their eligibility to vote are represented in Table 1, followed by the facts pertinent to each of them:

³² Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).

TABLE 1
Eligibility to Vote by Residency or Age

Names in Dispute	First Nation	Canada
The Mink, #49	Eligible by residency	Ineligible by residency
Charles Twatt, #122	Eligible by residency	Ineligible by residency
Charles Campbell Cardinal, #130	Ineligible by residency	Eligible by residency
Napoleon Charles, #132	Eligible by age	Ineligible by age
Solomon Naytowonhow, #133	Eligible by age	Ineligible by age
Simon (Simon Peter), #136	Eligible by age	Ineligible by age
William Charles, #138	Eligible by age	Ineligible by age
George Charles, #139	Eligible by age	Ineligible by age
Names to add to voters list (FN)/retain on voters list (Can)	7	1
Names agreed on by parties	Plus 29	Plus 29
Total number of eligible voters	36	30

Eligibility by Residency

The Mink, #49

According to the First Nation, The Mink, who was in his seventies in 1913, ought to have been on Borthwick's list of eligible voters on the basis that he was habitually resident on or near the reserve and had an interest in it. The Mink, states the First Nation, was admitted to the Sturgeon Lake Band in 1896, was on the annuity paylists for 1913 and 1914, and remained at Sturgeon Lake until his death in 1922. Further, Elder James Settee signed a statutory declaration in 1996 that The Mink lived on the reserve, while Elder Sandra Long John declared that The Mink's family died out on the reserve.³³

³³ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 71; Jayme Benson and Harold Kingfisher, "Report on Elders Evidence Gathered at Sturgeon Lake on the 1913 Exchange," in letter from David Knoll, Davis & Company, to Kim Kobayashi, Counsel, Specific Claims West, Department of Indian Affairs, September 3, 1996, (ICC Exhibit 2b, pp. 20, 28).

Canada relies on the fact that Borthwick did not consider The Mink to be an eligible voter, that it is unclear whether he lived on the reserve, and that even if he was a resident, he was not engaged or “interested in” the reserve.³⁴ Canada’s counsel also points out in oral argument that the Elders who gave evidence in 1973 had no knowledge of The Mink, and although he had a cabin on the reserve, he was likely leading a nomadic life.³⁵

The panel considers the 1997 research report of Dorothy Lockhart concerning certain individuals in relation to the 1913 surrender to be particularly helpful in establishing that The Mink did have a connection and an interest in the reserve. Lockhart’s research shows that The Mink was living at Sturgeon Lake reserve in 1901. It is unknown how he lived or whether he travelled a lot, but although he may have died at Duck Lake, there is no evidence that he lived there. The panel also finds it significant that, according to Lockhart, The Mink’s wife remained at Sturgeon Lake until her death, and that one of their two daughters continued to live on the reserve.³⁶ Finally, we are able to draw from the Commission’s 2005 *James Smith Cree Nation: Chakastaypasin IR 98 Inquiry* report, which recounted evidence from Elders that The Mink was a medicine man who travelled among the different reserves. There exists some conflicting evidence suggesting that in the late 1890s he lived either at Muskoday or Sturgeon Lake.³⁷

The panel concludes that The Mink was habitually resident on or near the Sturgeon Lake reserve in 1913, and also had an interest in it. We think it quite likely that he did travel around the reserves in his role as medicine man, which may explain why he was not well-known as a Sturgeon Lake band member. Nevertheless, he transferred into the Band 17 years before the surrender, took his treaty payments at Sturgeon, and had a wife, daughter, and a cabin on the reserve. The Commission previously considered the meaning of “habitually resident on or near” the reserve in the *Duncan’s First Nation* and *Canupawakpa Dakota First Nation* inquiry reports. The panel in

³⁴ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(i).

³⁵ ICC Transcript, May 13, 2008, pp. 97-98 (Douglas Faulkner).

³⁶ Dorothy A. Lockhart, “Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913,” prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 2).

³⁷ ICC, *James Smith Cree Nation: Chakastaypasin IR 98 Inquiry*, (Ottawa, March 2005), reported (2008) 20 ICCP 335 at 407.

Duncan's stated:

[W]e take from these authorities [*Canard, Adderson*] that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences." Although such residence entails "a regular physical presence which must endure for some time," there is no fixed minimum period of time and the duration of residence, past or prospective, is only one of a number of relevant factors, the quality of residence being the overriding concern.³⁸

Sturgeon Lake was most likely the place he would return to when he was not moving around, either as medicine man or hunter. Similarly, we would be reluctant to disqualify a band member on the basis that he did not have an interest in the reserve, when there is undisputed evidence of the long-term connection of his family to the reserve.

The Mink, therefore, was eligible by reason of residency and interest in the reserve, and should have been included in the list of eligible voters.

Charles Twatt, #122

The First Nation claims that Charles Twatt's name should have been on the voters list: he was on the 1913 and 1914 annuity paylists; he had a residence on the reserve, according to some Elders; he married a woman with three children from Big River (Kinemetayo); and, he did not transfer to Big River until 1922.

Canada argues that Charles Twatt was left off the voters list because he was likely not living on the Sturgeon Lake reserve at the time of the surrender. According to Lockhart's research, he asked to move to Big River in 1921 because he had already been a resident there for seven or eight years and had never moved his family to Sturgeon Lake.³⁹

The evidence relating to Charles Twatt is inconclusive. Although he was on the Sturgeon Lake payroll in 1913 and up to 1920, Lockhart suggests the possibility that Charles had moved to Big

³⁸ ICC, *Duncan's First Nation Inquiry: 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53 at 172-73; ICC, *Canupawakpa Dakota First Nation Inquiry: Turtle Mountain Surrender Claim* (Ottawa, July 2003), reported (2004) 17 ICCP 263 at 308.

³⁹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(ii).

River before the surrender took place. For one thing, Charles' younger brother, Four Dollars, was listed on the voters list, whereas Charles was not. The fact that Charles married in 1913 but did not move his family to Sturgeon Lake is further evidence that he may have moved to Big River in that year.⁴⁰

The panel is not persuaded that Charles Twatt was habitually resident on the Sturgeon Lake reserve and an eligible voter.

Charles Campbell Cardinal, #130

Charles Campbell Cardinal's name appeared on the voters list, but the First Nation claims that he was ineligible by reason of band membership and residency. Although Cardinal was on the 1913 and 1914 paylists, the First Nation relies on the testimony of the Sturgeon Lake Elders that Cardinal was from Mistawasis and further, that they were unable to locate his residence on a map of the Sturgeon Lake reserve.⁴¹

Canada points to three relevant facts: Cardinal's name did appear on the voters list; he was marked as having voted in favour of the surrender; and, he also signed the Surrender Document.⁴² On the balance of probabilities, states Canada, Cardinal was an eligible voter.

The panel notes that, in addition to the evidence proffered by the parties, the Cardinal family was originally from the Ahtahkakoop Band, but by 1909, Charles' mother was a widow and married into the William Twatt Band, where she transferred with Charles and her three daughters. Charles was first paid on his own ticket in 1912⁴³ and he continued to be paid with the Sturgeon Lake Band until his death in 1922. In 1927, his widow remarried and transferred from Sturgeon Lake to Mistawasis.⁴⁴

⁴⁰ Dorothy A. Lockhart, "Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913," prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 8).

⁴¹ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 78.

⁴² Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 113.

⁴³ Dorothy A. Lockhart, "Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913," prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, pp. 4, 44-47).

⁴⁴ Treaty Annuity Paylists for the years 1876 to 1955: Sturgeon Lake First Nation (ICC Exhibit 1b, pp. 140, 164).

The panel concludes that Cardinal was probably present at the surrender meeting, where the evidence shows that he voted and also signed the Surrender Document. Had he been ineligible by reason that he was not a member of the Sturgeon Lake Band, it is likely that his presence at the meeting would have been challenged by the Sturgeon Lake voters. We are satisfied on the basis of the extant evidence that Charles Campbell Cardinal was an eligible voter, being both a band member of Sturgeon Lake and habitually resident on the reserve.

Eligibility by Age

The First Nation claims that five band members omitted from Indian Agent Borthwick's list of eligible voters were in fact eligible because they had reached the age of 21 prior to the December 1913 surrender meeting. To be eligible to vote on the basis of age, male band members had to be born before December 1892. Canada contests all five names, arguing that they were under 21 and correctly omitted from the list of eligible voters.

Napoleon Charles, #132

Napoleon Charles was listed on the 1913 and 1914 paylists and the Elders identified him as a resident of the reserve. The First Nation also interprets Lockhart's report as concluding that, based on the 1950 payroll that records his birth date as September 15, 1892, Napoleon was probably 21 in 1913.⁴⁵

Canada points out that Napoleon Charles' name was not on the voters list, and also refers to Lockhart, who attempts to sort out which of the four sons of Thomas Charles, #44, was in fact Napoleon. Lockhart suggests that Napoleon was probably the son born in 1894 and as such was not 21 years of age at the time of the surrender.⁴⁶

The panel notes that on the July 17, 1906 census, Napoleon was listed as age 12, which would indicate that in December 1913, he was either 19 or 20, but not 21.⁴⁷ We also understand

⁴⁵ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 73.

⁴⁶ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(iii).

⁴⁷ Census of the Northwest Provinces, 1906, Saskatchewan District, District Number 16, Sub-district 42, Prince Albert Reserve 101, RG 31, Reel T-18361 (ICC Exhibit 1d, p. 1).

Lockhart's report to have concluded that it was Napoleon's brother, William, who was probably born in 1892, making him 21 in 1913, and that Napoleon was born in 1894: "If Napoleon was, as it appears, the son born in 1894, he would not have been 21 at the time of the surrender and would not have been eligible to vote, on the occasion of the surrender."⁴⁸

The panel concludes that the evidence points to Napoleon Charles' age as 19 or 20 on the date of the surrender vote, thus making him ineligible to vote.

Solomon Naytowonhow, #133

The First Nation claims that Solomon Naytowonhow was 21 at the time of the surrender. He was recorded on the annuity paylists of 1913 and 1914; the 1952 annuity record and the 1949 membership list of the Montreal Band, where he transferred in 1938, show his date of birth as 1891; and, the Registered Indian Record shows his date of birth to be 1892. In either case, says the First Nation, he was born before December 1892 and was therefore eligible to vote.

Canada relies on the Lockhart report to conclude that although Naytowonhow took his own ticket in 1913 when he married, the census records indicate that he was born in 1893 or 1894, making him less than 21 on the date of the surrender.⁴⁹

The panel notes that Solomon's father, Naytowhow, #27, married twice, the second time after his first wife died in 1892. His second wife, also widowed, transferred into the Sturgeon Lake Band with four daughters, according to the 1893 Sturgeon Lake payroll. By 1894, the family consisted of 3 boys and 2 girls. The 1896 payroll, however, noted that one of the girls was a boy, so the family actually had 4 boys and 1 girl. By 1900, only 2 boys and 2 girls were listed under Naytowhow's name. The 1901 census records the boy Waykeemowquanapew, or Solomon, as age 7. By 1904, 3 boys remained with the family, one of whom was born in 1903. The 1906 payroll shows that one boy, Alex, took his own ticket that year, and the 1906 census shows that another boy, Solomon or Waysiskoweequay, was 13, and a third boy, Oosawyass, was age 5.

⁴⁸ Dorothy A. Lockhart, "Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913," prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 10).

⁴⁹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(iv).

In tracing the paylists of Naytowhow's second wife's family, Wawakahwaynew, #31, and the paylists of Naytowhow's family, #27, it appears that the boy who was incorrectly identified as a girl was Solomon Naytowonhow, who is recorded as being born a girl in 1889. If the panel is correct in this analysis, it would mean that the census of 1901 and 1906 are incorrect and that Solomon was actually 24 years old in 1913.

We find that the evidence put forward by the First Nation as to Solomon's age, together with the paylist evidence showing that he may have been born in 1889, is sufficient on the balance of probabilities to conclude that he was over 21 in December 1913 and therefore eligible to vote.

Simon (Simon Peter), #136

Simon Peter and James Peter were two of five sons of Thomas Peter, #83. The First Nation claims that Lockhart's research concludes that it is unclear whether Simon was the older or the younger of the two brothers. Although Lockhart states that the eldest son was born some time between October 1892 and March 1893, and the second son between November 1894 and October 1895, the First Nation argues that if Simon was the eldest and if he was born between October and December of 1892, he would have been 21 at the time of the surrender. The First Nation argues that since there is uncertainty in the documents whether Simon was the eldest or second son, such ambiguity should be resolved in favour of the First Nation, such that the panel should find Simon to be the older brother, born between October and December 1892, and therefore eligible to vote.⁵⁰

Canada acknowledges that it is unclear whether Simon was the older brother, but relies on the 1901 census that indicates the two sons were 8 and 6 at the time. Consequently, states Canada, both sons would have been under 21 at the time of the surrender.⁵¹

The panel observes that the 1906 census referred to "Simeon," a name similar to Simon, as being age 11 and an older son age 13.⁵² We also note that Lockhart's research into the Anglican Church records indicate that Simon was baptised on October 15, 1913, the same day he was married,

⁵⁰ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 75.

⁵¹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(v).

⁵² Census of the Northwest Provinces, 1906, Saskatchewan District, District Number 16, Sub-district 42, Prince Albert Reserve 101, RG 31, Reel T-18361 (ICC Exhibit 1d, p. 2).

and that his age was recorded as 18 on that day. With respect to James, the church records state that he was baptised the day before his second marriage on June 3, 1918, and that he was 25 at that time. These records, according to Lockhart, suggest that James was two years older than Simon; thus, Simon would have been too young to vote in December 1913.

We do not agree with the First Nation that the evidence in Simon Peter's case is ambiguous. It is strongly weighted toward a finding that Simon was the younger brother of James. Simon was most probably born between November 1894 and October 1895, was 6 years old at the time of the 1901 census, and was 18 in October 1913, the year of the surrender. We are satisfied that Simon was ineligible to vote.

William Charles, #138

William Charles was the son of Thomas Charles, #44, who was the eldest son of headman Ayatawayo.⁵³ The First Nation claims that William was 21 at the time of the surrender; the Registered Indian Record lists his date of birth as September 9, 1892, and the 1949 Indian Affairs Band Membership list records him as 57, which supports a birth date of 1892.⁵⁴

Canada relies on the 1915 payroll, which indicates that William took his own ticket that year. In the information in the 1915 payroll under William's own name and under his father's name, William is described as "now of age." This evidence, states Canada, is an indication that he was not an eligible voter in 1913.⁵⁵

Contrary to Canada's position, the panel is of the view that sufficient evidence exists to indicate that William was likely 21 in December 1913. One boy is shown to have been born as of the 1893 payroll, but since births were only recorded at the time of the annuity payments, this boy, who it appears turns out to be William, could have been born any time between the dates when the 1892 and 1893 paylists were created. The 1901 census shows this same boy, who is called Bertie, as age 9, and the 1906 census shows Bertie as age 14. Further, as the First Nation points out, the

⁵³ The First Nation mistakenly identifies William Charles as the son of James Charles, Thomas Charles' brother.

⁵⁴ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 76.

⁵⁵ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(vi).

Registered Indian Record lists William's date of birth as September 1892, and the 1949 Band Membership list confirms his birth year as 1892.

The panel concludes, on the balance of probabilities, that William Charles was 21 in December 1913 and was therefore eligible to vote on the surrender.

George Charles, #139

George Charles was the son of James Charles, #87, who was the son of Ayatawayo. George and William Charles were therefore cousins.⁵⁶ The First Nation argues that the 1951 payroll records George's date of birth as May 1892, and the 1949 Band Membership list shows him as 57, thereby corroborating a birth date of 1892 and thus making him eligible to vote on the surrender.⁵⁷

Canada relies on the evidence that George Charles was entered on the 1915 payroll under his own ticket because of marriage, not because he was now of age, as was the case with his cousin William. Canada also states that the paylists indicate that George was born between October 10, 1892 and October 5, 1893, the dates of the respective paylists, but since he was not paid under his mother's or grandmother's entry on the 1892 payroll, he was likely born in 1893. The National Registration Records, showing George having been born May 18, 1893, corroborates Canada's view that he was probably 20 in 1913.⁵⁸

The panel looks to Lockhart's report to further explain the conflicts in the evidence:

James Charles [George' father] had taken his own ticket in 1893 and was recorded as having married and as having had a son born (year of birth 1892-'93). This paysheet was dated October 5th, 1893. The payroll in 1892 was dated October 10th, which would indicate that the child was born after October 10th, 1892. The census records of 1901 record that James and his wife, Nancy, had a son George who was 8 years old at that time. This would indicate a year of birth of 1892-'93. The 1951 payroll records George's birthdate as May of 1892. This would mean that there was an error in the year of his birth, as listed in 1951, or that the family did not claim payment for George in 1892 when he was 6 months old. He was not paid in 1892

⁵⁶ The First Nation mistakenly identifies George Charles as the brother of William Charles.

⁵⁷ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 77.

⁵⁸ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 112(vii)

with his mother and grandmother under ticket #40 either. It is unclear whether Charles was 20 or 21 at the time of the 1913 surrender.⁵⁹

The extant evidence on George Charles' date of birth is unclear, as Lockhart concludes; however, the fact that the evidence is ambiguous does not mandate a finding that such ambiguity should be resolved in favour of the First Nation. It is for the First Nation to make a case, on the balance of probabilities, that Indian Agent Borthwick erred in omitting George Charles' name from the voters list. If he was born after October 1892, as Lockhart suggests, there existed only a very short time frame in which Charles could have turned 21 and been eligible to vote on the surrender. We find it more probable that George was born in 1893, making him ineligible to vote in December 1913.

Conclusion

The panel finds that the total number of eligible voters was 33, comprising the 29 names agreed to by the parties, plus The Mink, Charles Campbell Cardinal, Solomon Naytowonhow, and William Charles.

Panel's Reasons on Number of Voters Present

Of the eligible voters who attended the surrender meeting, the parties agree on 13 names. Prior to the parties' written and oral submissions, they were in disagreement over five other persons but now appear to agree on the fifth person in dispute. The five names are set out in Table 2:

⁵⁹ Dorothy A. Lockhart, "Information concerning certain individuals with regard to the Sturgeon Lake Surrender in 1913," prepared for Specific Claims Branch, May 26, 1997 (ICC Exhibit 3c, p. 5).

TABLE 2
Eligible Voters Present at Surrender Meeting

Disputed Names Listed as Present	First Nation	Canada
Charles Campbell Cardinal, #130	Absent	Present
Moosehunter (Kayaykeemat), #26	Absent	Present
Fred Ballendine, #114	Absent	Present
Daniel, #80	Absent	Present
Albert McDougall, #110	Absent	Probably Absent ⁶⁰
Names to add	0	4
Names agreed on re attendance	13	13
Total number in attendance	13	17
Total number of eligible voters	36	30
Total number of eligible voters in attendance	13/36	17/30
Result	Majority did not attend	Majority attended

Charles Campbell Cardinal, #130

The panel has found that Cardinal was an eligible voter on the basis of his residency and band membership. The question remains whether he was present at the surrender meeting.

The First Nation relies on a discrepancy between the DIAND and the RG 10 versions of the voters list. The former shows Cardinal present and voting in favour; the latter shows him present but

⁶⁰ Albert McDougall's presence at the surrender meeting was originally disputed by the parties, but Canada concluded in argument that he was probably absent.

abstaining.⁶¹ The First Nation also points out a discrepancy between the DIAND and RG 10 versions of the Surrender Document, whereby the former shows Cardinal's signature and the latter shows that he signed with an X mark.⁶²

Canada relies on the fact that Cardinal signed the Surrender Document, and that one version of the voters list shows him voting in favour. Thus, says Canada, on the balance of probabilities, Cardinal was present and voted in favour of the surrender.⁶³

The panel acknowledges the several discrepancies between the DIAND and RG 10 versions of the voters list. We discussed these irregularities more fully under Issue 1, and need only state here that it is not surprising that differences exist between the original documents and copies of same, given that copies were created by hand in that era and were thus subject to human error.

Although Cardinal's signature on the Surrender Document is not conclusive proof that he was present and voted, in a case in which the vote was virtually unanimous, with sixteen band members having signed the Surrender Document, we are satisfied on the balance of probabilities that Cardinal was one of those present at the meeting and voted in favour of the surrender.

Moosehunter, #26

The First Nation claims that Moosehunter, or Kayaykeemat, did not appear on either version of the voters list and did not sign the Surrender Document. Even though Moosehunter did swear the second Affidavit of Surrender, attesting to the fact that he was present at the surrender meeting, the First Nation concludes that it is highly unlikely that Moosehunter was present.⁶⁴

Canada points out that Moosehunter's name does appear on the Surrender Document as the second signatory. This evidence, coupled with the fact that he was one of the original members of

⁶¹ The First Nation stated that the RG 10 version listed Cardinal as neither absent nor for the surrender but the document indicates that he was present but did not vote.

⁶² Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 83.

⁶³ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 113.

⁶⁴ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 84.

Sturgeon Lake Band, leads to the conclusion that the omission of his name on the voters list was an oversight. He was probably present with his son John Moosehunter, states Canada, but only one of them was listed.⁶⁵

Although the evidence is contradictory, Moosehunter's status in the Band, his sworn statement before a justice of the peace that he was present at the surrender meeting, and his name, "Kayaykeemat, H.M." on the Surrender Document, indicating that he was Kayaykeemat, the Headman, persuades us that the older Moosehunter attended the meeting in addition to his son.

Fred Ballendine, #114

The First Nation argues that it is an open question whether Fred Ballendine was present at the surrender meeting. He is marked on both versions of the voters list as being both absent and voting in favour. Clearly, one is wrong. The fact that the DIAND version of the Surrender Document, with the notation "Original" at the top of the page, includes the signature of Fred Ballendine, whereas the RG 10 version is different in that his name is written as having signed with an X mark, also raises a question whether he was present.⁶⁶

Canada points to Ballendine's signature on the Surrender Document, as well as the mark on the voters list that he voted in favour, to conclude that showing him as absent on the list was likely a result of an inaccuracy in recording attendance.⁶⁷

The panel is of the view that the First Nation has not made a convincing argument that Fred Ballendine was absent from the meeting. It is an equally plausible scenario that he was marked absent but arrived later, in time to vote on the surrender. It is also significant that Ballendine signed the Surrender Document. We conclude, on balance, that Fred Ballendine was present at the surrender meeting.

⁶⁵ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 116.

⁶⁶ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 85.

⁶⁷ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 116.

Daniel, #80

The First Nation assumes that both voters lists show Daniel as absent and not voting for or against the surrender. Also, Daniel did not sign the Surrender Document.⁶⁸

Canada points out that Daniel was likely present but possibly abstained on the vote, as there is no mark indicating that he voted one way or the other.⁶⁹

The panel pointed out to the First Nation at the oral hearing that both voters lists indicate that Daniel was in fact present. There is no reason not to accept this evidence, especially when both lists are consistent. Likewise, both lists show that he did not vote. Thus, we are driven to the conclusion that Daniel was present at the surrender meeting but likely abstained on the vote.

Albert McDougall, #110

Albert McDougall, like Fred Ballendine, is shown on both the DIAND and RG 10 versions of the voters list as being both absent and voting in favour. The First Nation argues that, unlike Ballendine but like Daniel, McDougall did not sign the Surrender Document, meaning that he was probably absent.⁷⁰

Given the confusing information about Daniel and Albert McDougall, whose names were listed one after the other on the voters list, Canada agrees with the First Nation that Albert McDougall was likely absent from the meeting.⁷¹

In comparing McDougall and Ballendine, both of whom were listed on the DIAND and RG 10 versions of the voters list as absent but voting in favour of the surrender, we conclude that because Ballendine signed the Surrender Document, he was most likely present at the meeting. McDougall, however, did not sign the Surrender Document, and for that reason, we conclude that the preponderance of the evidence supports the parties' assessment that McDougall was probably absent from the surrender meeting.

⁶⁸ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 86.

⁶⁹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 117.

⁷⁰ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 86.

⁷¹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 117.

Conclusion

The panel finds that out of 33 eligible voters, 17 were in attendance at the surrender meeting, comprising the 13 names agreed to by the parties plus Charles Campbell Cardinal, Moosehunter, Fred Ballendine, and Daniel. Albert McDougall, however, was probably absent from the meeting. Consequently, a majority of the eligible voters, 17 out of 33, were in attendance, thereby meeting the “first majority” requirement of the *Cardinal* case. Since we have found that Daniel likely abstained from voting, we conclude that 16 out of 17 voted in favour of the surrender, thereby meeting the “second majority” requirement in *Cardinal*.

In answer to Issue 2, we find that a majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender at a meeting summoned for the purpose of a surrender vote.

ISSUE 3: CANADA’S LAWFUL OBLIGATION IN TAKING THE SURRENDER

3 If the answer to either issue 1 or 2 is negative, did Canada breach its lawful obligation in obtaining the 1913 surrender of 2145.47 acres of the Sturgeon Lake Indian Reserve (IR)101?

In answer to Issues 1 and 2, the panel has concluded that the surrender requirements of section 49 of the *Indian Act* for the 1913 surrender of reserve land were met. Therefore, Canada did not breach its lawful obligation when it took the surrender.

ISSUE 4 CONTRACT LAW

4 Do contract principles apply in determining the First Nation’s understanding and intentions in the 1913 surrender? If so, did their understanding and intention result in the invalidity of the 1913 surrender?

Application of Contract Principles to Surrenders

The first question, whether contract law principles can be used to determine if a surrender of Indian reserve land to the Crown was valid, is a question of law. To our knowledge, the courts have not dealt with a reserve land claim in which the First Nation, not the Crown, pleads the right to rely on

contract law to resolve a dispute involving the surrender of reserve land; nevertheless, the Supreme Court of Canada has considered generally the applicability of contract law principles to *Indian Act* surrenders in three judgements: *Guerin v. The Queen* in 1984, *St. Mary's Indian Band v. Cranbrook* in 1997; and, the 1995 case of *Blueberry River Indian Band v. Canada*, also known as *Apsassin*.

The Law

The 1984 *Guerin* judgement of the Supreme Court of Canada examines in detail the Indians' interest in their land and the Crown's obligations to a band once that interest is surrendered. This decision marked a milestone in the jurisprudence concerning the Crown's fiduciary duty when dealing with surrendered land on the band's behalf. Dickson J. describes the Indian interest in land as *sui generis*, and defines the Crown's obligation while holding the surrendered land as similar, but not identical to, the law of trusts and the law of agency:

But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians is *sui generis*.⁷²

The 1997 judgement of the Supreme Court in *St. Mary's Indian Band v. Cranbrook (City)* deals squarely with the question of whether contract law can be applied to a surrender of Indian reserve land. In 1966, the St. Mary's Band surrendered for sale a portion of its reserve to the Crown, which leased it to the City of Cranbrook for a municipal airport. The Band received fair market value for the land, plus a condition in the Surrender Document that the land would revert to the Band free of charge if it was no longer used for public purposes. The *Indian Act* limits a band's property tax power to reserve land, but the Act was amended in 1988 to provide that lands surrendered "otherwise

⁷² *Guerin v. The Queen*, [1984] 2 SCR 335 at 387.

than absolutely” would still be reserve land.⁷³ The Band started to levy property taxes against the City in 1992, claiming that its reversionary interest made the transfer other than absolute.⁷⁴

The city refused to pay on the grounds that the surrendered land was no longer reserve land. The central question for the Court was whether the surrender was made “otherwise than absolutely;” if so, it would mean that the land remained reserve land subject to taxation by the Band. The Court found that the Band had intended to surrender the land absolutely; in arriving at this decision, the Court considered whether the *sui generis* nature of Indian land rights means that common law real property principles do not apply to reserve surrenders. It held that, in principle, a court must go beyond the common law and examine the intentions of both the band and the Crown in a reserve surrender. The Court also stated that its paramount concern in rejecting the application of property law was the protection of the Indian interest in its land:

The reason the Court has said that common law real property concepts do not apply to Native lands is to prevent Native intentions from being frustrated by an application of formalistic and arguably alien common law rules.⁷⁵

The Court went on to reflect on the principles espoused in its 1995 judgement in *Blueberry River Indian Band*, known as *Apsassin*:

All of the members of the Court that sat on *Blueberry River* acknowledged the need to pierce the veil of real property law in adjudicating Native land rights disputes. As Gonthier J. asserted ... the Court must look to the “true purpose of the dealings”. McLachlin J. similarly proclaimed ...:

The basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves is honoured.

What then, was the true intention of the St. Mary’s Indian Band when it surrendered the airport lands to the Crown in 1966?⁷⁶

⁷³ *St. Mary’s Indian Band v. Cranbrook (City)*, [1977] 2 SCR 657 at 661, para. 5. See the definition of “designated lands” in *Indian Act*, SC 1988, c. 23, s. 1, now RSC, 1985, c. 17, s. 2. (4th Supp.). The 1988 amendment became known as the “Kamloops Amendments.”

⁷⁴ *An Act to amend the Indian Act (designated lands)*, 1988, c. 17 (4th Supp), s. 1(2).

⁷⁵ *St. Mary’s Indian Band v. Cranbrook (City)*, [1977] 2 SCR 657 at 668, para. 16.

⁷⁶ *St. Mary’s Indian Band v. Cranbrook (City)*, [1977] 2 SCR 657 at 668, para. 17.

Taken together, *Guerin*, *St. Mary's Indian Band*, and *Apsassin* confirm the principle that First Nation land rights are *sui generis*, and an intention-based approach to a band's decision to surrender reserve land is to be preferred to the application of common law rules.

Positions of the Parties

The First Nation argues that, notwithstanding the Supreme Court of Canada's view that real property principles do not apply to surrenders of reserve land, the Sturgeon Lake surrender claim can be distinguished from the prevailing case law. In *St. Mary's* and *Apsassin*, there was no question that the Bands intended to surrender their reserve land, but technical arguments were raised to frustrate their clear intention, whereas here, the First Nation is raising serious questions about the Sturgeon Lake Band's true intentions.⁷⁷ In short, says the First Nation, the Supreme Court refused to apply contract law because to do so would have been unfair and prejudicial to the First Nation claimants. In the case of Sturgeon Lake, however, it is the First Nation that wishes to rely on the principles of contract law in order to make the case that it was mistaken in 1913 when it surrendered a portion of its reserve. The First Nation explains that to suggest that a First Nation cannot use real property concepts to challenge a surrender:

would mean the First Nation, who has a *sui generis* interest in its lands, could never question in law whether it legitimately intended to surrender its interest in those lands. It would appear inconsistent with a principle just articulated by the Supreme Court to suggest that the Court, while trying to protect the special interest First Nations have in their lands from challenges based on real property principles, would deny the First Nation the legal ability to protect its special interest in those very lands when its intent to surrender is thrown into question.⁷⁸

The First Nation argues that to deny it the ability to use common law real property principles means that it is denied the right to challenge a transaction based on a misunderstanding between the parties.

Canada argues that the surrender of reserve land by a Band to the Crown is not a contractual transaction. In the context of *sui generis* land transactions, such as the surrender of reserve land,

⁷⁷ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 102.

⁷⁸ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 101.

traditional real property concepts and contract law doctrine are of limited application and not appropriate, in particular, where a clear factual record surrounding the surrender exists.⁷⁹ Canada relies on *St. Mary's Indian Band* in support of its argument that real property and contract principles do not apply to surrenders. As counsel for Canada explained at the oral hearing:

I think the case law is fairly clear that bringing in 16, 17, 18th century British real property law, which is what exists in all of Canada's provinces, except Quebec, with its arcane and complex rules, it's simply not appropriate in terms of trying to understand First Nation land surrenders.⁸⁰

Accordingly, in Canada's opinion, the arguments advanced by the First Nation, grounded in the law of contract, do not disclose an outstanding lawful obligation.

Canada's counsel adds that a misunderstanding could be the result of a breach of the Crown's fiduciary duty if the Crown failed to disclose or inform the band of the terms of the surrender; counsel suggests that there are "other ways and means where that misunderstanding could be the subject of a proper finding that the surrender was invalid without going to contract law principles."⁸¹

Panel's Reasons

The case law to date has dealt with factual situations in which the application of "formalistic and arguably alien common law rules," as the Court stated in *St. Mary's Indian Band*, would have frustrated the band's true intention underlying its decision to surrender reserve land. The Supreme Court of Canada has, thus, protected First Nations from the complex rules of contract law that could be used to defeat their land claim at common law.

Neither party has located any case law similar to the situation here, in which it is the First Nation, not the Crown, that is relying on contract law principles to prove a surrender invalid. Still, the panel is persuaded that to deny a First Nation the right to plead common law principles would be unjust and not what the Supreme Court intended in *St. Mary's Indian Band*. At the same time, we

⁷⁹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 127.

⁸⁰ ICC Transcript, May 13, 2008, pp. 118-19 (Douglas Faulkner).

⁸¹ ICC Transcript, May 13, 2008, p. 120 (Douglas Faulkner).

recognize that in the vast majority of surrender cases, questions of disclosure, informed consent, innate incapacity, inducement, illiteracy, trickery, and other contract-like issues are properly subsumed within the law of the Crown's fiduciary obligation to a band in a surrender process. Because the law of fiduciary obligation acknowledges the *sui generis* nature of the Indian interest in land, the Crown's duty goes well beyond the duties of a party to a contract.

Consequently, if a First Nation claims it did not intend to surrender its reserve land, we would look first to the conduct of the Crown to determine if it failed to adequately disclose essential information to the First Nation or, in other respects, breached a fiduciary duty, resulting in the voters' lack of understanding and intention to approve a surrender. If, however, there is little or no evidence of a breach of the Crown's fiduciary duty, and the First Nation chooses to argue that it simply made a mistake when it surrendered the land, the First Nation should be able to avail itself of contract law principles to prove its case. In other words, it would appear that contract law principles might be brought to bear to determine the matter, based on a state of affairs in which the First Nation's true intentions were not carried out, but the Crown nevertheless exercised reasonable diligence to determine those intentions.

Conclusion

We conclude that in a small minority of claims within the specific claims policy, reliance on contract law principles may be the preferred or only option available to a First Nation in asserting its true intention in a surrender, but we emphasize that such cases are most likely to be found where insufficient evidence exists to prove a breach of the Crown's fiduciary duty to the First Nation. Further, a First Nation that alleges a breach of contract in a surrender is open to Crown defences based in contract law, unless such defences are not permitted by the policy.⁸² In the circumstances

⁸² The Specific Claims Policy, *Outstanding Business*, prohibits the federal government from relying on the statutes of limitation and the doctrine of laches in specific claims' negotiations. The policy states that "the government is not going to refrain from negotiating specific claims with Native people on the basis of [the statutes of limitation or under the doctrine of laches]": Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171 at 180.

surrounding the 1913 surrender, the Sturgeon Lake First Nation has chosen to advance its claim based on the law of mistake in contract, and we see no reason why it should be barred from doing so.

Did the Band's Understanding and Intention Invalidate the 1913 Surrender?

Having found that the First Nation has the right to argue that contract principles apply in determining the Band's true intention in 1913, we now turn to the parties' arguments regarding the facts underpinning the First Nation's claim, and the application of the law of mistake in contract.

Positions of the Parties

The First Nation relies on the law of mistake by one party to a contract. In particular, the First Nation claims that the Sturgeon Lake voters were mistaken in surrendering a portion of their reserve in 1913 in exchange for an equivalent area of hayland.⁸³

The First Nation asks the panel to apply one of the following three principles defining the law of mistake in contract in order to nullify or negative the surrender: no *consensus ad idem*, or no "meeting of the minds" as to the terms of the contract; mistake by one party regarding the terms of the contract; and *non est factum*, meaning "this is not my deed," in which a party to the contract did not understand what he or she was signing and is therefore not bound by the transaction.⁸⁴ The First Nation argues that the Elders' testimony alone raises the distinct possibility that the voters were simply mistaken by reason of one or more of these principles.

The basis for the First Nation's claim that it made a mistake when it voted in favour of a surrender in 1913 is the oral history that has been passed down from generation to generation. Counsel for the First Nation acknowledged at the oral hearing that "there's no documentary record that there was any mistake on the part of the First Nation as to what this transaction was all about."⁸⁵ Nevertheless, many Sturgeon Lake Elders gave evidence at the community session of this inquiry, or made statements in 1973 and 1996 to the effect that the voters believed that they were only

⁸³ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 90.

⁸⁴ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 90.

⁸⁵ ICC Transcript, May 13, 2008, p. 47 (David Knoll).

surrendering the timber on the sections of reserve land north of Sturgeon Lake, not the land itself, in exchange for hayland.⁸⁶

Canada alleges that present day oral evidence is contrary to the documentary evidence of years of overt action by the Band to obtain haylands and the process whereby the Band finally chose the land it wished to surrender, indicating they fully understood the nature of the transaction.⁸⁷ Canada points to an extensive documentary record evidencing the following: numerous requests for additional haylands by the Band over an 18-year period; several instances when the Band changed its mind about the land to be surrendered in exchange; the Band's previous experience with timber sales and a timber surrender; the absence of any written record suggesting that the Band confused a surrender of land in exchange for land with a surrender of timber for land; and, the fact that a surrender of the timber, already harvested pursuant to the 1906 timber surrender, would have been of limited value, compared to 2000 acres of haylands.⁸⁸ Canada also points out that the record discloses no support for a mistake regarding the subject matter of the surrender for approximately 80 years.⁸⁹

In response to the First Nation's reliance on the Elders' testimony, Canada takes the position that the:

oral history is not sufficiently cogent, persuasive or demonstrates the required validity to, on the balance of probabilities, meet the legal test to set aside the *prima facie* documentary evidence that the Sturgeon Lake First Nation knew it was exchanging land for land, not trees for land.⁹⁰

⁸⁶ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 106; see also Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, pp. 3-5.

⁸⁷ Written Submission on Behalf of the Government of Canada, April 11, 2008, paras. 122, 126.

⁸⁸ Written Submission on Behalf of the Government of Canada, April 11, 2008, paras. 122, 125.

⁸⁹ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 126.

⁹⁰ Written Submission on Behalf of the Government of Canada, April 11, 2008, para. 122.

Panel's Reasons

Oral History Evidence

Given the reliance of the First Nation on the Elders' testimony that the band members who voted for the surrender in 1913 believed they were surrendering timber only, the panel's first task is to review that testimony.

Joe Daniels, born in 1922, made a written statement during interviews conducted by A. Turner with Elders of Sturgeon Lake Indian Band in 1973:

only "Timber" was sold on that portion of land which was at one time part of the reserve. - That that portion of land was never sold. - That I never heard the elder of our reserve make mention of the signing of a document or the existence of a document to the effect that the land was surrender [sic] for sale. - That the Indians were promised additional hay fields and were led to believe they would get these hay fields. - That through a misunderstanding the Indians were induced to trade a portion of the reserve for hay fields.⁹¹

George Ermine, born in 1906, also stated in 1973 that "only the Timber was sold, not the land, - That [he] was present at a meeting where they discussed the sale of Timber but not the land and no papers or documents were signed on that day,"⁹² John Naytowhow provided similar evidence at the 1973 interviews, adding that "the Indians did not use documents, all transactions were verbal as they could not read nor write, nor did they know how to speak english, ..."⁹³

In 1996, Hannah Kingfisher, who was 91 at the time, made the following statutory declaration:

The people had no haylands for their cattle. They had lots of cattle and horses. They agreed to exchange some timber for haylands. There was no land surrender; just an exchange of timber for haylands. There was no Chief when the timber exchange took

⁹¹ Statement by Joe Daniels, Sturgeon Lake Indian Band, January 11, 1973 (ICC Exhibit 1a, pp. 361-62).

⁹² Statement by George Ermine, Sturgeon Lake Indian Band, January 11, 1973 (ICC Exhibit 1a, p. 363).

⁹³ Statement by John Naytowhow, Sturgeon Lake Indian Band, January 11, 1973 (ICC Exhibit 1a, p. 366).

place. There was two headmen Ayatawayo and Soosawaymekwan. The people understood that they were exchanging timber for hayland. They never agreed to give up the land.⁹⁴

Other Elders and band members, including John Daniels, Baptiste Turner, Lloyd Moosehunter, Gordon Bighead, and Sidney Naytowhow, gave similar evidence in 1996. Sandra Long John also attested to the fact that the people did not understand what was going on at the time, and that her grandfather and mother did not believe there was a land surrender.⁹⁵

At the community session of this inquiry in December 2006, the testimony of the Elders confirmed for the most part the statements made in 1973 and 1996. Elder Baptiste Turner, who was 94 in 2006, testified through an interpreter that “there was a big misunderstanding – well not a big – there was a misunderstanding (Speaks in Cree) literally translated, it was a misunderstanding that this land was given up. But that was not the case.”⁹⁶ Elder Wesley Daniels, who was 60, also gave evidence that George Charles, who hunted with him and his father, said that the land “was not traded, it was not given, it was not released, it was a trade for timber for hay lands. He said because we had so many cattle we had no hay lands.”⁹⁷ When asked by Commissioner Holman whether they exchanged the timber for hay or the timber for other land, Mr. Daniels replied: “The way he [George Charles] said it, it was timber, timber for hay lands.”⁹⁸

The Elders who gave evidence at the community session and those who earlier gave statements on the subject were firm in their convictions. There is no reason to question the sincerity of their beliefs or the fact that, as counsel for the First Nation stated, they have been troubled by the 1913 surrender for many years:

⁹⁴ J. Benson and H. Kingfisher, “Report on Elders Evidence Gathered at Sturgeon Lake on the 1913 Exchange,” in David C. Knoll, Davis & Company, Barristers & Solicitors to Kim Kobayashi, Specific Claims West, Treaty Land Entitlement, Indian and Northern Affairs Canada, September 3, 1996 (ICC Exhibit 2b, p. 17).

⁹⁵ J. Benson and H. Kingfisher, “Report on Elders Evidence Gathered at Sturgeon Lake on the 1913 Exchange,” in David C. Knoll, Davis & Company, Barristers & Solicitors to Kim Kobayashi, Specific Claims West, Treaty Land Entitlement, Indian and Northern Affairs Canada, September 3, 1996 (ICC Exhibit 2b, p. 28).

⁹⁶ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 63, Baptiste Turner).

⁹⁷ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 45, Wesley Daniels).

⁹⁸ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 46, Wesley Daniels).

I might say within the community there's been a lot of discussion about it, but there's nothing in the written record. As the Chief mentioned, the Elders were after them for years and years about this and then finally decided to file the claim.⁹⁹

Canada points out that the quotations from Elders relied on by the First Nation illustrate that the Elders were not unanimous in their recollections: Robert Ermine believed from his father and other Elders that they exchanged lands; and Howard Bighead suggested that it was land given up for Sucker Lake.¹⁰⁰

The Elders' testimony stands in stark opposition to the documentary history, which reveals no confusion by either party over whether land or timber was being surrendered. The First Nation asks the question, "how can this be reconciled with the overwhelming evidence from the Elders that their understanding of the transaction was that this was an exchange of timber for haylands?"¹⁰¹

In order to answer this question, the facts at the time of the surrender must be examined, in particular, the Band's requests for more haylands; band leadership, the experience of band members in timber sales and surrender; and, the evidence that the Band changed its mind regarding the land it wished to surrender before making a final decision.

Requests for Haylands

The Sturgeon Lake Band had good reason to ask for more haylands. Beginning in 1895, several requests were made by Indian Agents on behalf of the Band, or by the Band itself for more land where they could cut hay to feed their increasing numbers of cattle and horses. By 1907, discussions were taking place between the Band and the Indian Agent regarding the precise lands to be exchanged. Indian Agent Jackson's letter to the department in September 1907 identified the haylands requested by the Band as sections 35 and 36 at the northeast corner of the reserve, and sections 10 and 15 about seven miles west of the reserve. In the same letter, Jackson attached a map indicating land north of Sturgeon Lake that the Band was willing to exchange for these four

⁹⁹ ICC Transcript, May 13, 2008, p. 57 (David Knoll).

¹⁰⁰ ICC Transcript, May 13, 2008, p. 113 (Douglas Faulkner); Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 106.

¹⁰¹ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 107.

sections.¹⁰² The land identified on Agent Jackson's map appears to be roughly the same as the land surrendered in 1913.

Band leaders had originally believed that they were entitled to receive four additional sections of hayland, owing to a promise they said was made to them by the Marquis of Lorne in 1881. The department denied the Band's request, however, claiming that it could find no record of the Marquis' promise, and further, that the Band's treaty land entitlement had already been met. Still, Indian Agents Jackson, his replacement, Thomas Borthwick, and other officials agreed that the Band required more hayland if it was to prosper in ranching and farming. Eventually, the Band decided to discuss another option that would give them this badly needed land – an exchange of a portion of existing reserve land for an equal amount of hayland.

Indian Agent Borthwick reported that the Band met twice in July 1912, after which he was told that the majority was ready to proceed. They still wanted the four sections identified in 1907 – sections 35, 36, 10 and 15; however, according to Borthwick, instead of surrendering the land north of Sturgeon Lake, they decided to give up two sections at the southwest corner and two sections at the southeast corner. A year later, the Band revisited this decision and advised Borthwick that they wished to inspect the land before making it final. Borthwick reported to the department in June 1913 that the Band had changed its mind and instead of the southwest and southeast corners, they would exchange the portion lying directly northwest of Sturgeon Lake. This was the land they had first identified in 1907 as land they were prepared to exchange for haylands, and this is the portion of the reserve that was eventually surrendered.

The record is clear that the Sturgeon Lake Band needed more hayland, considered and discussed the option of a land exchange well in advance of a surrender meeting, and changed its mind twice before settling on the portion of reserve land it would surrender. Yet, the testimony of the Elders reveals that they were told that only the timber on that land was exchanged for the four sections of hayland, not the land itself. According to the First Nation, it is possible that the voters made a mistake, having confused the terms of the 1913 surrender with the 1906 surrender for the sale of timber on the same portion of land:

¹⁰² T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 106-107).

The almost universal understanding of the Elders is that what transpired was inconsistent with what was intended, namely, to surrender the timber and not the land in exchange for hay lands. Perhaps, coupled with the questionable activities surrounding the 1913 surrender, this perception is understandable given the fact that timber was available and the First Nation had just been through [a] timber transaction in 1906.¹⁰³

We are, therefore, required to assess the likelihood that the voters intended to surrender only the timber on the land in 1913, but as a result of misunderstanding or mistake, surrendered the land instead.

Band Leadership during the 1906 and 1913 Surrenders

Following the death of Chief William Twatt in 1895, the Sturgeon Lake Band did not have a chief until 1915, but leadership was maintained by headmen, usually two or three at a time. In 1897, Shooshoyahmegook, Ayatawayo, and Neeshooyahnagoot were appointed headmen; Painpak-lay-weet-kanapew was elected as headman in 1885. One of the Band's leaders at the time of the 1913 surrender, Kayaykeemat (Moosehunter), was elected as headman in 1901 to replace Neeshooyahnagoot, who had died. Another leader at the time of the 1913 surrender was Kawechemaytahwaymat (Big Head), who became headman in 1908 after the death of Shooshoyahmegook. Between 1908 and 1915, when Chief Thomas Charles was elected, three experienced headmen – Ayatawayo, Kawechemaytahwaymat (Big Head), and Kayaykeemat (Moosehunter) – led the Sturgeon Lake Band. Two of the three were instrumental in the 1906 timber surrender and all three were involved in the 1913 surrender of land in exchange for hayland.

Even though the record illustrates strong leadership in the Band before and after the 1913 surrender, the First Nation argues that many of the Elders referred to the fact that:

they didn't understand what was going on, were illiterate, didn't understand English, couldn't read the documents, didn't have a Chief at the time, didn't have an interpreter and that the Indian Agent controlled everything and they did what he said or be punished.¹⁰⁴

¹⁰³ Written Submission on Behalf of the Sturgeon Lake First Nation, February 29, 2008, para. 112.

¹⁰⁴ Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 13.

The Elders who remarked on the absence of a Chief included Hanna Kingfisher, John Daniels, and Victor Daniels, who were interviewed in 1996.¹⁰⁵ Two Elders in particular, Earl Ermine and Barry Kingfisher, gave detailed testimony at the 2006 community session on the absence of a Chief at the time of the 1913 surrender. The panel also questioned the witnesses on the role of headmen. In response to Commissioner Dickson-Gilmore's question to Earl Ermine whether headmen could offer leadership in the absence of a Chief, Mr. Ermine replied:

not understanding the dynamics of the old system, I think that they certainly would be looked up to by the community, you know, because they are, in effect, in a leadership role.¹⁰⁶

In our view, the absence of a Chief when the band is in the process of making important decisions, such as the decision to surrender reserve land, does not necessarily signal an absence of strong leadership. It depend on the facts of the claim. In the Commission's inquiry into the Kahkewistahaw First Nation's 1907 surrender, the panel there found that there existed a leadership vacuum in the Band after the deaths shortly before the surrender of Chief Kahkewistahaw – a powerful leader who had repeatedly rejected a surrender – and two headmen.¹⁰⁷ The Sturgeon Lake Band, in comparison, exhibited strong leadership throughout 20 years without a Chief. Headmen Ayatawayo and Kayaykeemat (Moosehunter) provided continuous leadership for most of that period, while Kawechemaytahwaymat (Big Head) joined them as headman in 1908. It appears that Nehtowkapow was also a leader, who spoke for the group of band members living in the east of the reserve. The Sturgeon Lake Band was not left vulnerable by a sudden lack of leadership, as was the case with the Kahkewistahaw Band. We conclude that the headmen at Sturgeon Lake provided the necessary leadership to band members during the years when the timber surrender and land exchange surrender were being considered.

¹⁰⁵ Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 3.

¹⁰⁶ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 36, Earl Ermine).

¹⁰⁷ ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 88-89.

Sturgeon Lake headmen were instrumental in both the 1906 timber surrender and the 1913 land surrender. We shall examine their role in these surrenders in order to assess the level of understanding that they had about surrenders, and in particular, their knowledge of the differences between the 1906 timber surrender and the 1913 land surrender.

Band Experience in Timber Sales and Timber Surrender

The 1906 timber surrender is not in issue in this inquiry. It is canvassed, however, for two reasons. This was a Band whose members had expertise in timber sales and had gone through a surrender process in 1906 when it surrendered timber for monetary compensation. Second, since the First Nation claims that the voting band members possibly confused the 1913 land exchange surrender with the 1906 timber surrender, it is important to know which leaders were instrumental in one or both surrenders.

The Sturgeon Lake Band's reserve was well situated for forestry operations, as it contained an abundance of timber on the north side of Sturgeon Lake. It is undisputed that band members were highly successful entrepreneurs who used their expertise as woodsmen to earn money; they worked as lumbermen and sold timber on numerous occasions. When it was reported in 1905 that the Band wanted to surrender all the spruce timber on the reserve in order to buy a thresher, Indian Agent Charles Fisher met twice with the Band to determine the conditions for a surrender of the timber.

The meeting to vote on a timber surrender took place on January 30, 1906, at which time the voters agreed to surrender all the spruce on the reserve measuring 10 inches and over at the stump.¹⁰⁸ Later that year, however, the Band complained to the new Indian Agent, Thomas Borthwick, that they had understood the surrender to cover only the timber north of Sturgeon Lake.¹⁰⁹ In response to Borthwick's complaint on behalf of the Band to the department in August, the department responded that the Band had discussed the option of reserving some of the timber from the surrender, but in the end, passed a resolution that all the spruce timber on the reserve except trees less than 10

¹⁰⁸ John McGee, Clerk, Privy Council Office to Superintendent General of Indian Affairs, March 8, 1906, INAC, First Nations Land Registry, Instrument No. X16416 (ICC Exhibit 1a, pp. 79-85); see also "Sturgeon Lake First Nation: 1906 Timber Surrender Documents" (ICC Exhibit 1n, pp. 12-19).

¹⁰⁹ Thomas Borthwick, Indian Agent to Secretary, August 10, 1906, LAC, RG10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 21-22).

inches at the stump, would be sold.¹¹⁰ The department, having already called for tenders for the whole quantity of timber, refused to amend the terms of the surrender.

In the case of the band resolution preceding the 1906 timber surrender, the signatories included Ayatawayo, Kayaykeemat (Moosehunter), Nehtowkapow, Thomas, Jumbo, Alex Badger, and Squealing John (Kaisiwanayo). The subsequent 1906 timber surrender was negotiated by headmen Ayatawayo and Kayaykeemat (Moosehunter), who signed the Surrender Document. Nehtowkapow, who reportedly was a leader of the group living at the east end of the reserve, was also a signatory, as were Kawechemaytawaymat (Big Head), Kaisiwanayo, Thomas, Willie Duck, and Jumbo.¹¹¹ Ayatawayo also signed the accompanying Affidavit of Surrender.¹¹² Some of these same individuals were also signatories of the 1913 Surrender Document, including Ayatawayo, Kayakeemat, Kaisiwanayo, and Nehtowkapow.¹¹³ Ayatawayo and Kaisiwanayo swore the first Affidavit, whilst Kawechemaytawaymat (Big Head) and Kayaykeemat (Moosehunter) swore the second Affidavit.

The core leadership during the 1906 and 1913 surrenders was represented by Ayatawayo and Kayaykeemat in the western group on the reserve and Nehtowkapow, who was said to be the leader of the eastern group. Kaisiwanayo and Kawechemaytawaymat (Big Head) were also involved in the discussions around the surrender for timber and the land surrender seven years later.

The involvement of the same headmen and band members in both events makes it more likely than not that they understood the nature of granting a surrender to the Crown, as well as the difference between a surrender of timber for compensation and a surrender of one parcel of land in exchange for another. The evidence of the Band's expertise in timber cutting and sales reinforces the likelihood that the voters understood the nature and consequences of their decision in 1913.

¹¹⁰ Geo. Chitty, Timber Inspector to Acting Deputy Minister, August [18], 1906, LAC RG10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 23-24).

¹¹¹ Chief and Principal men of Twatt's Band of Indians (Sturgeon Lake, No. 101) to His Majesty The King, January 30, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 12-14).

¹¹² Affidavit of Surrender, February 1, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 15).

¹¹³ Some names of signatories were spelled differently on the three documents.

Band's Decision to Change the Lands to be Surrendered

Over a year before the 1913 surrender, the department asked Indian Agent Borthwick to find out if the Band was still interested in obtaining haylands in exchange for the surrender of an equal area of reserve land. As we have mentioned, Indian Agent Borthwick reported that the Sturgeon Lake Indians held two meetings in July 1912, at which time the majority decided to surrender two sections at the southeast corner and two sections at the southwest corner of the reserve, in exchange for the four sections the Band had selected. When Borthwick was asked a year later to confirm again the reserve lands that the Band was willing to give up, the Band told him that they wanted to inspect the lands one more time. According to Borthwick, the Band decided in June 1913 not to surrender the southwest and southeast corners, but instead, the portion of reserve land north of Sturgeon Lake.

The Band's decision to change its mind regarding the lands it wished to surrender is important in understanding the Band's true intention. The Band took its time to make a final decision by inspecting the options it had already identified and, presumably, by discussing the options amongst themselves. Even more significant is the fact that the Band had initially selected sections of the reserve in the south that were not heavily timbered, a fact that suggests the Band was looking at land to exchange, not timber. When asked at the oral hearing to explain why, if the Band's intention was to surrender timber only, it was considering surrendering the sections at the southwest and southeast corners, counsel for the First Nation acknowledged that the southern sections did not contain much spruce timber compared to the northern part of the reserve. Counsel also confirmed that the record contains scant information on the timber that may have grown on the southern sections; however, he suggested that the Band may have realized that there was insufficient timber on the southern sections, which is why they turned their focus to the timber to the north.¹¹⁴

With respect, the evidence does not support this interpretation of the facts. The Band had several meetings with the Indian Agent over a lengthy period to confirm its willingness to proceed and to define the conditions of an exchange acceptable to the Band. The record indicates that the subject of these meetings was to finalize the Band's choice of reserve land to be surrendered and its choice of land that it wanted in exchange. Other than the Elders' testimony, there is nothing on the

¹¹⁴ ICC Transcript, May 13, 2008, pp. 52-54 (David Knoll).

record to suggest that during this period the band members even contemplated a plan of exchanging timber for the desired haylands.

It seems highly unlikely that band members were considering a surrender of timber only on the southern corner sections of the reserve. Although the record does not describe in detail these sections, the south of the reserve was described in 1913 as containing “long and excellent stretches of farm-lands,”¹¹⁵ compared to the heavily timbered lands in the north of the reserve.

The clear and undisputed evidence that the Band initially decided to surrender the southern corners of the reserve, then changed its mind, adds considerable weight to Canada’s argument that the Band in 1913 knew it was a land-for-land exchange.

Mistake in Contract

The documentary evidence strongly points to a conclusion that the voters themselves were not mistaken when they agreed to the surrender. The First Nation, however, asks the panel to consider whether one or more of the principles of mistake in contract law could apply in these circumstances. We thus make these observations.

First, the plea that there was no meeting of the minds (*consensus ad idem*) is based on a rule that if the offer and acceptance do not correspond, no contract arises in the first place.¹¹⁶ The preponderance of the evidence in this inquiry, however, confirms that there was a meeting of the minds that land would be surrendered in exchange for other land. There is no basis on which to conclude that a surrender agreement did not come into existence.

Second, it would appear that contract law dictates that a mistake by one party only, in this case the Band, would not void the surrender unless the other party had been at fault in inducing the mistake in the mind of the Band. The First Nation suggests a similar approach, when it states that if a mistake is unilateral, a contract will be void if the other party knew or ought to have known

¹¹⁵ Thomas Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General, April 1, 1913, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 136 (ICC Exhibit 1a, p. 205).

¹¹⁶ G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003), 309.

about the mistake.¹¹⁷ Here, even if the Band had made a mistake, we find no evidence that the conduct of the Crown intentionally or inadvertently caused a misunderstanding in the minds of the voters as to what was being surrendered. Nor was the Crown apprised of the alleged mistake for almost 80 years.

Third, the principle of *non est factum* in contract law applies primarily to those who are unable, through no fault of their own, to understand the meaning of a particular document, whether it be from lack of education, illness, innate incapacity, or from having been tricked into signing the document.¹¹⁸ We do not dispute the Elders' testimony that many band members in 1913 were illiterate and did not understand English. Although no evidence exists confirming or denying the presence of an interpreter at the surrender meeting, there is evidence that Indian Agent Borthwick used interpreters when meeting with the Sturgeon Lake Band. We note that the second Affidavit of Surrender states that the document was read over and explained to Big Head and Moose Hunter in the Cree language, who "seemed perfectly to understand the same ..."¹¹⁹ Further, one Elder at the community session recalled his father saying that there was an interpreter present when they were talking about a land exchange.¹²⁰ Even though some Elders testified that the voters who spoke only Cree failed to understand the meaning of the surrender, and the particular document they were agreeing to, we think it highly unlikely that Indian Agent Borthwick would conduct the surrender meeting without an interpreter.

The totality of the evidence persuades us that the voters, regardless of their knowledge of the English language, understood the terms and consequences of the surrender. Contrary to the oral testimony that Indian Agent Borthwick actively deceived the Band, the panel finds no evidence that he engaged in trickery or took advantage of the language barrier to obtain a surrender. Nor had he any motivation to do so. Consequently, the plea of "*non est factum*" cannot succeed.

¹¹⁷ Sturgeon Lake 1913 Surrender Claim (Revised Supplementary Submission), April 16, 2004, p. 11.

¹¹⁸ G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003), 327-28, citing *Gallie v. Lee*, [1971] AC 1004 at 1016, 1025.

¹¹⁹ Affidavit of Surrender, January 31, 1914, LAC, RG 2, vol. 1082, P.C. 510/1914, 20 February 1914, and DIAND, file 672/30-9, vol 1 (ICC Exhibit 1a, pp. 265, 266).

¹²⁰ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 91, R. Ermine).

Given the majority of the evidence in this inquiry, the panel is unable to apply any of the principles of the law of mistake in contract – *consensus ad idem*, unilateral mistake, or *non est factum* – to the band members who voted in 1913.

Conclusion

The Elders' evidence from the community session and earlier interviews contradicts in every respect a very detailed record of the events leading up to the 1913 surrender. The oral evidence illustrates an almost unanimous belief held by the Elders and their ancestors that the Band did not intend to surrender land in 1913. Yet, when the written record of the Band's involvement in the decision to grant a surrender in 1913 is examined, it is evident that the voters themselves understood the difference between a surrender of timber for monetary compensation and a surrender of land in exchange for other land. The written record demonstrates that the Band fully intended to proceed with a surrender of the portion of reserve land north of the lake in order to obtain the desired haylands. Moreover, nothing in the record leads the panel to suspect that the Crown exercised any pressure on the Band to surrender the land or in any respect manipulated the surrender process to achieve this result.

In an inquiry in which the oral evidence is in stark contradiction to a detailed written record, the panel must decide which evidence carries more weight given all the circumstances of the claim. We are not convinced on a balance of probabilities that the voters misunderstood the nature and consequences of their decision when they voted in 1913 to surrender land in exchange for other land. The Band had consistent leadership during this period and many of the voters were knowledgeable and experienced in these matters. The panel is not in a position to explain how it came to pass that the Elders hold a sincere belief that their ancestors in 1913 were mistaken about the nature of the transaction. Nevertheless, if the voters had made such a fundamental mistake, it is likely that they would have complained to the Indian Agent. This is so because the Band did complain within two years of the surrender, when band leaders realized that they had made a mistake in wrongly identifying one section of hayland they had chosen. As a result, the government amended the Order in Council to correct the error.

The question before the panel was the understanding and intention of the voters themselves in 1913, and in that regard, we are satisfied that the voting band members understood the basis of

the surrender. They intended that a portion of the Band's reserve land would be surrendered in exchange for an equivalent amount of hayland. The voters were not mistaken or confused, and in accordance with *Apsassin*, their decision must be respected.

PART V
CONCLUSIONS AND RECOMMENDATION

The irregularities surrounding the 1913 surrender documents do not call into question the validity of the surrender. They illustrate carelessness or human error, but were not the result of deception, fraud, or other conduct designed to manipulate the results of the surrender vote. In spite of irregularities in the surrender process, the relevant provisions of the *Indian Act* governing the surrender of reserve land were met.

A majority of male members of the Band of the full age of twenty-one years, habitually resident on or near the reserve and with an interest in the reserve, assented to the 1913 surrender at a meeting summoned for the purpose of a surrender vote. There was a total of 33 eligible voters. In addition to the 13 persons whose attendance was agreed to by the parties, four others were present and one was probably absent from the meeting. Thus 17 out of 33 eligible voters were in attendance at the surrender meeting, thereby meeting the “first majority” requirement of the *Cardinal* case. With one abstention, 16 out of the 17 voted in favour of the surrender, thereby meeting the “second majority” requirement in *Cardinal*.

With respect to the applicability of contract law principles to reserve land surrenders, in a small minority of cases within the Specific Claims Policy, reliance on contract principles may be the preferred or only option available to a First Nation in asserting its true intention in a surrender. Such cases, however, are most likely to be found where insufficient evidence exists to prove a breach of the Crown’s fiduciary duty to the First Nation. Given the stark contradiction between the Elders’ evidence and the written record, the Sturgeon Lake First Nation has chosen to advance its claim based on the law of mistake in contract, and we see no reason why it should be barred from doing so.

Although the First Nation is entitled to claim that the voters made a mistake in 1913, when believing that they were surrendering timber in exchange for land, not land for land, the panel concludes that the voters were not confused or mistaken. In spite of an almost unanimous belief held by the Elders that the Band did not intend to surrender land in 1913, an examination of the written record demonstrates that the Band fully intended to proceed with a surrender of a portion of reserve land north of Sturgeon Lake in order to obtain the desired haylands. Nothing in the record leads the

panel to suspect that the Crown exercised pressure on the Band to surrender the land, or in any respect manipulated the surrender process to achieve this result.

In light of the Elders' testimony, the central question is whether the voters misunderstood the nature and consequences of their decision when they voted in 1913 to surrender land in exchange for other land. The totality of the evidence, however, is persuasive that the voting band members did not err. They understood the basis of the surrender and they intended to surrender land, not timber, in exchange for haylands. As such, their decision must be respected.

We therefore recommend to the parties:

That the claim of the Sturgeon Lake First Nation regarding the 1913 surrender of a portion of Indian Reserve 101 not be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION



Sheila G. Purdy
Commissioner (Panel Chair)



Jane Dickson-Gilmore
Commissioner



Alan C. Holman
Commissioner

Dated this 31st day of December, 2008

APPENDIX A
HISTORICAL BACKGROUND

STURGEON LAKE FIRST NATION
1913 SURRENDER INQUIRY

Indian Claims Commission

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INTRODUCTION

The Sturgeon Lake First Nation occupies the Sturgeon Lake Indian Reserve No. 101 (IR 101), located approximately 180 km north of Saskatoon, Saskatchewan. The nearest city is Prince Albert, Saskatchewan, which is about 45 km southeast of IR 101. This report will focus on the 1913 surrender of a portion of IR 101. Historically, the affairs of the Sturgeon Lake First Nation were administered under the Carlton Agency of the Department of Indian Affairs. Although often referred to by its previous name, William Twatt's Band, the First Nation will be referred to herein as the Sturgeon Lake First Nation, except in direct quotes.

Treaty 6 -1876

Treaty 6 was concluded between Canada and the Plains and Wood Cree at a series of conferences on August 23 and 28, 1876, in the vicinity of Fort Carlton, and on September 9, 1876, near Fort Pitt. Lieutenant Governor Alexander Morris, together with fellow treaty commissioners James McKay and W.J. Christie, negotiated the treaty on Canada's behalf.¹²¹ Chief Ah-yah-tus-kum-ik-im-um (also known as William Twatt) and his headmen, Oo-sahn-asku-nukip, Yay-yah-too-way, Loo-sou-am-ee-kwakn, and Nees-wah-yak-ee-nah-koos, signed Treaty 6 on behalf of the members of what was then called William Twatt's Band, currently known as the Sturgeon Lake First Nation. In return for the cession of title to their traditional lands, Treaty 6 provided that reserves would be set apart by the Crown for each signatory band, with the area of those reserves not to exceed "one square mile for each family of five, or in that proportion for larger or smaller families."¹²²

¹²¹ Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 351 - 357 (ICC Exhibit 1a, pp. 1-4).

¹²² Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991), 352 - 353 (ICC Exhibit 1a, p. 2).

Survey of Indian Reserve (IR) 101 (Sturgeon Lake)

In August and September of 1878, Dominion Lands Surveyor Elihu Stewart surveyed Indian Reserve No. 101 (hereafter IR 101) at Sturgeon Lake for Chief William Twatt.¹²³ IR 101 originally contained 22,042 acres, or 34.4 square miles, which was sufficient land for a population of 172 under the provisions of Treaty 6.¹²⁴

Stewart's report on the survey reveals that there had been difficulties in laying out the boundaries of the reserve. Writing to the Minister of the Interior, Surveyor Stewart reported:

the Indians were not satisfied with the way I was instructed to lay it off; and it was not till they had interviewed His Honor Lieut Governor Laird and had succeeded in getting the Reserve extended farther West on the South side of the Lake than was originally intended that I was enabled to meet their views in the matter.¹²⁵

Stewart indicated that all the First Nation's improvements had been included in the reserve, and he considered the location "exceedingly well chosen for an Indian Settlement."¹²⁶ Stewart continued to say:

[t]he land around the Lake is generally good but the soil between it and the Saskatchewan so far as I saw was almost worthless; so that in all probability their hunting grounds will not be encroached upon by the Whites for many years to come. They have abundance of timber on the north side of the Lake and sufficient hay land in the valleys of the Shell and Net-setting Rivers. The Lake also abounds with excellent whitefish, and ducks are found in great numbers in the numerous

¹²³ Order in Council, PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 19-21); Natural Resources Canada, Plan 1032 CLSR SK, Plan of the Sturgeon Lake Indian Reserve, North of the Prince Albert Settlement in Treaty No. 6, North West Territory, surveyed by E. Stewart, August and September 1878 (ICC Exhibit 7c).

¹²⁴ Order in Council, PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 19-21); Natural Resources Canada, Plan 1032 CLSR SK, Plan of the Sturgeon Lake Indian Reserve, North of the Prince Albert Settlement in Treaty No. 6, North West Territory, surveyed by E. Stewart, August and September 1878 (ICC Exhibit 7c).

¹²⁵ Natural Resources Canada. Field Book 434. Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory. Surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, pp. 32-33).

¹²⁶ Natural Resources Canada, Field Book 434, Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory, surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, p. 33).

ponds scattered over the Reserve. These people are commencing to till the soil and to devote considerable attention to the care of the cattle and horses supplied them by the Government.

They nearly all live in houses but so far have learnt only a few of the comforts of civilized life.¹²⁷

During a 1973 interview, Sturgeon Lake Elder George Charles remembered the wealth of resources at Sturgeon Lake. According to Elder Charles, members of the First Nation were able to draw sustenance from trapping, hunting and fishing in years when the crops failed.¹²⁸ He said, “[s]ometime we use to make a cage in the river and then we would pour oil up the river. Boy we used to kill a lot of fish, 100 to 150 in one catch.”¹²⁹ Hannah Kingfisher recalled her grandfather, Ayatawayo, speaking about the selection of the reserve site:

... we were told to choose which reserve lands to take. That is what he said. I choose Sturgeon Lake so my grandchildren and future grandchildren would not go hungry, because there were a lot of fish in the lake, is what he said. This will be their plate. And there were trees there too, ...

...

... This was a good, great choice because there was a lot of wood, to live off of ...¹³⁰

IR 101 was confirmed by Order in Council P.C. 1151 on May 17, 1889.¹³¹ The Order in Council described the reserve as follows:

[i]n the south-eastern part the surface is chiefly rolling and covered with poplar, most of which is small and scrubby, and jack-pine. There is little open ground, some tamarac muskegs occur. The soil is a sandy loam containing much

¹²⁷ Natural Resources Canada, Field Book 434, Field Notes of Sturgeon Lake and Chacastapasin Indian Reserves, Treaty No. 6, North West Territory, surveyed by E. Stewart, D.L.S. August, September, October 1878 (ICC Exhibit 7a, p. 33).

¹²⁸ Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, p. 353).

¹²⁹ Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, p. 354).

¹³⁰ Transcript of Hannah Kingfisher Interview, March 2007, pp. 22, 26 (ICC Exhibit 2d, pp. 26, 30).

¹³¹ Order in Council PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, pp.19-21).

vegetable fibre. North of the lake there are stretches of open land well adapted for farming. The western extremity is heavily timbered with spruce of superior quality. Sturgeon Lake is a long narrow expansion of Sturgeon or Net-Setting River, and runs easterly, across the reserve. This stretch of water has high bold shores, and abounds in fish and fowl. It is used by lumbermen to get out timber.¹³²

IR 101 was withdrawn from the operation of the *Dominion Lands Act* by Order in Council PC 1694, dated June 12, 1893.¹³³

Departmental reports written before 1913 generally extolled the virtues of IR 101. In 1900, Indian Agent W.B. Goodfellow reported that “the north side is well wooded, chiefly of spruce of a size valuable for building and lumbering purposes, while the south side is largely prairie, interspersed with poplar bluffs.”¹³⁴ In September 1905, Indian Agent Charles Fisher wrote, “it is traversed by the Sturgeon lake, which provides excellent fish and in sufficient quantity for the use of the band; its northern limits contain splendid timber, spruce and poplar, while the remainder of the land is more or less suitable for agricultural purposes.”¹³⁵

Economic Endeavours of the Sturgeon Lake First Nation

Between 1900 and 1913, the population of the Sturgeon Lake First Nation increased from 149 to 164 people,¹³⁶ the majority of whom lived at two locations on IR 101: one group living at the east

¹³² Order in Council PC 1151/1889, May 17, 1889, DIAND file 672/30-9, vol. 2 (ICC Exhibit 1a, p. 20).

¹³³ Order in Council PC 1694/1893, June 12, 1893, no file reference available (ICC Exhibit 1a, p. 22).

¹³⁴ W.B. Goodfellow, Indian Agent, to Superintendent General of Indian Affairs, September 12, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 140 (ICC Exhibit 1a, p. 44).

¹³⁵ Charles Fisher, Indian Agent, to Deputy Superintendent General, September 2, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 116 (ICC Exhibit 1a, p. 73).

¹³⁶ Thomas Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General, April 1, 1913, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 136 (ICC Exhibit 1a, p. 205); and W.B. Goodfellow, Indian Agent, to Superintendent General of Indian Affairs, September 12, 1900, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1900*, 140 (ICC Exhibit 1a, p. 44).

end of the lake, and another at the “Narrows” on the west side.¹³⁷ Indian Agent Charles Fisher and Inspector of Indian Agencies W.J. Chisholm both remarked on the relative prosperity of the group living at the Narrows. In particular, Chisholm reported in 1904 that the group at the Narrows was “more advanced and prosperous ... occupying... more comfortable houses.”¹³⁸ Those living to the east were negatively affected by their proximity to the main road leading to the lumber camps, which increased their contact with lumbermen and alcohol.¹³⁹ In 1906, Inspector Chisholm reported that a group from the east was preparing to move to the Narrows, closer to the school and the centre of the reserve. Chisholm remarked that “[t]he movement, even though limited to a few, will have a beneficial effect.”¹⁴⁰

To support themselves and their families, members of the First Nation continued to hunt and fish after they settled on IR 101. In addition, they were encouraged to farm, and they worked in local lumber camps, which provided an important source of income. Some members were employed as log drivers and earned as much as \$1.50 to \$2.00 a day.¹⁴¹ The lumber camps were also an important

¹³⁷ W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 90 (ICC Exhibit 1a, p. 62).

¹³⁸ W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 190 (ICC Exhibit 1a, p. 62); and Charles Fisher, Indian Agent, to Deputy Superintendent General of Indian Affairs, September 2, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 116-117 (ICC Exhibit 1a, pp. 73-74).

¹³⁹ W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 190 (ICC Exhibit 1a, p. 62).

¹⁴⁰ W.J. Chisholm, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 27, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 154 (ICC Exhibit 1a, p. 91).

¹⁴¹ W.J. Chisholm, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 27, 1906, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906*, 154 (ICC Exhibit 1a, p. 91).

market for produce grown on the reserve.¹⁴² In 1904, Inspector Chisholm reported a “[l]arge and ready demand throughout fall and winter for all their surplus farm products, hay, grain, and roots.”¹⁴³ In 1913, Indian Agent Thomas Borthwick reported that 26 people were engaged in farming and had threshed almost 8000 bushels of oats, wheat and barley in the last season.¹⁴⁴

In addition to cultivating grain, Sturgeon Lake members were also involved in raising cattle and horses. In 1905, their stock consisted of 264 cattle and 70 horses; by 1913, there was a total of 492 animals, including both horses and cattle, on the reserve.¹⁴⁵ Elder Robert Ermine said “every household had cattle, maybe 30, 40 head, maybe even more. Some people even had 80 head.”¹⁴⁶

Elders at the 2006 community session provided testimony about stock-raising and requirements for hay.¹⁴⁷ In particular, the growth of the Sturgeon Lake First Nation’s livestock operations depended in large part on the ability of its members to feed the animals over the winter.¹⁴⁸ Their success at ranching, however, meant that there was often a shortage of hay.¹⁴⁹ Some members

¹⁴² J. MacArthur, Indian Agent, to Superintendent General of Indian Affairs, September 10, 1903, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1903*, 152 (ICC Exhibit 1a, p. 53); W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 191 (ICC Exhibit 1a, p. 63).

¹⁴³ W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, p. 191 (ICC Exhibit 1a, p. 63).

¹⁴⁴ T. Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 1, 1913, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 136 (ICC Exhibit 1a, p. 205).

¹⁴⁵ T. Borthwick, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 1, 1913, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1913*, 137 (ICC Exhibit 1a, p. 206); and Charles Fisher, Indian Agent, to Deputy Superintendent General of Indian Affairs, September 2, 1905, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905*, 117 (ICC Exhibit 1a, p. 74).

¹⁴⁶ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 88, R. Ermine).

¹⁴⁷ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 15, 17, E. Ermine); ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 101, B. Kingfisher);

¹⁴⁸ W.J. Chisholm, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, April 30, 1909, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1909*, 168 (ICC Exhibit 1a, p. 136).

¹⁴⁹ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 17-19, Earl Ermine; pp. 45-46, W. Daniels; p. 115, H. Bighead).

obtained hay from fields in the northeast corner and south-central area of the reserve,¹⁵⁰ but the growing number of cattle and horses put pressure on the reserve's available resources, and there was often not enough hay to go around.¹⁵¹ Members of the First Nation stated that they could raise and breed cattle, but were not permitted to sell or slaughter them without the approval of the Indian Agent.¹⁵² The Agent also issued permits to leave the reserve.¹⁵³ One Elder recounted that he was told by his father that Thomas Borthwick, who was Indian Agent at the time of the surrender, was "very strict and he followed the *Indian Act*, I guess, to a "T" and he followed the permit system very carefully."¹⁵⁴

Leadership at Sturgeon Lake, 1895-1915

Elders spoke of the period of about 20 years when there were no elected chiefs at Sturgeon Lake.¹⁵⁵ Elder Earl Ermine associated the events of the 1885 Rebellion and the circumstances that followed with the tightening of departmental control over Sturgeon Lake, saying:

[d]uring the latter part of the 1880s there was an absence of a chief in our community until the early 1920s, so in the span of maybe 20-25 years, the community didn't have a chief.

...

My understanding of the situation was that people, Indian Affairs, discouraged the elections. My understanding from what I've heard is that Indian Affairs officials or Indian agents or farm instructors, as they were known as well, had total control of what happened in our communities.¹⁵⁶

¹⁵⁰ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 17-19, E. Ermine)

¹⁵¹ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 89, R. Ermine; pp. 101-102, B. Kingfisher; pp. 17-18, E. Ermine); Transcript of Hannah Kingfisher Interview, March 2007 (ICC Exhibit 2d, p. 30).

¹⁵² ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 47-48, W. Daniels; p. 62, B. Turner; p. 82, S. Naytowhow).

¹⁵³ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 118-119, H. Bighead).

¹⁵⁴ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 90, R. Ermine).

¹⁵⁵ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 28, E. Ermine; p. 65-66, B. Turner; p. 102, B. Kingfisher).

¹⁵⁶ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 15-17, E. Ermine).

In the wake of the 1885 Rebellion, the department implemented, at the suggestion of Assistant Indian Commissioner Hayter Reed, several new policies intended to avoid problems with Indian leadership in the future. Among these, Reed suggested that “[t]he tribal system should be abolished in so far as rebel Indians are concerned by doing away with Chiefs or Councillors.”¹⁵⁷ It appears that the Superintendent General of Indian Affairs agreed with Reed’s proposal.¹⁵⁸ It is important to recognize, however, that there is no evidence on the record to indicate that this policy was applied to Sturgeon Lake First Nation. The annual report of the Department of Indian Affairs for 1885 indicates that the Sturgeon Lake First Nation had been “loyal” during the rebellion.¹⁵⁹

In addition, although the record indicates that after Chief William Twatt died in 1895,¹⁶⁰ and a new chief was not elected until 1915, consistent leadership in the Band was maintained by several headmen at a time. For example, in 1897, Indian Agent Hilton Keith advised the department that three persons—Shooshoyahmegook, Ayatawayo and Neeshooyahnagoot—had been appointed headmen at William Twatt’s Band at the signing of the Treaty, and that a fourth, Painpak-lay-wee-kanapew, had been elected headman in 1885.¹⁶¹ The term of service for all four headmen was “[d]uring good behaviour, life.”¹⁶² Thus, between 1895 and 1898, leadership was maintained by

¹⁵⁷ Hayter Reed, Assistant Indian Commissioner, to Indian Commissioner, July 13, 1885, LAC, RG10, vol. 3584, file 1130 (ICC Exhibit 1m, p. 5).

¹⁵⁸ L. Vankoughnet, Deputy of the Superintendent General of Indian Affairs, to E. Dewdney, Indian Commissioner, October 28, 1885, LAC, RG10, vol. 3584, file 1130, part 1B (ICC Exhibit 1m, p. 13).

¹⁵⁹ John A. MacDonald, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885*, xxviii (ICC Exhibit 1m, p. 2).

¹⁶⁰ See treaty annuity payroll, William Twatt’s Band paid at Sturgeon Lake, October 23, 1895, LAC, RG 10, vol.9428 (ICC Exhibit 1b, p. 35).

¹⁶¹ H. Keith, Indian Agent, to Deputy Superintendent General, August 11, 1897, LAC, RG10, vol. 7937, file 32107 (ICC Exhibit 1a, pp. 31-32).

¹⁶² H. Keith, Indian Agent, to Deputy Superintendent General, August 11, 1897, LAC, RG10, vol. 7937, file 32107 (ICC Exhibit 1a, pp. 31-32).

headmen Shooshoyahmegook (Ticket No. 3), Neeshooyahnagoot (No. 4) and Ayatawayo (No. 5).¹⁶³

In 1901, the department granted permission to hold an election to replace Neeshooyahnagoot, who had died in 1899;¹⁶⁴ as a result, Kayaykeemat (known as Moosehunter, No. 26) was elected headman.¹⁶⁵ Kawechemaytahwaymat (known as Big Head, No. 41) became a headman in 1908, two years after Shooshoyahmegook died.¹⁶⁶

Thus, from 1908 until 1915, when Chief Thomas Charles was elected,¹⁶⁷ the First Nation's leadership consisted of headmen Ayatawayo, Kawechemaytahwaymat (Big Head) and Kayaykeemat (Moosehunter).¹⁶⁸

1895 REQUEST FOR HAYLANDS

Correspondence between Indian Agent Keith and the Indian Commissioner suggests that the Department of Indian Affairs was considering additional haylands for the Sturgeon Lake First Nation as early as 1895. On August 28 of that year, Indian Agent Keith wrote:

the township which includes the haylands under consideration has not yet been surveyed.

¹⁶³ See treaty annuity paylists, William Twatt's Band paid at Sturgeon Lake, 1895-1898, LAC, RG 10, vol. 9428, vol. 9429, vol. 9430 and vol. 9431 (ICC Exhibit 1b, pp. 35-43).

Several variations for the spelling of "Ayatawayo" are evident in the documentary record. "Ayatawayo" will be used in this history except where quoted. There are also several variations for the spelling of "Kayaykeemat." "Kayaykeemat" will be used in this history except where quoted.

¹⁶⁴ See D. Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, March 22, 1899, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, p. 33); J.D. McLean, Secretary, to David Laird, Indian Commissioner, April 24, 1899, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, pp. 34-35); and J.B. Lash, Secretary to the Indian Commissioner, to Secretary, Department of Indian Affairs, September 30, 1901, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1m, p. 36).

¹⁶⁵ See treaty annuity paylists, William Twatt's Band paid at Sturgeon Lake, 1899-1901, LAC, RG 10, vol. 9432, vol. 9433, vol. 9434 (ICC Exhibit 1b, pp. 44-51).

¹⁶⁶ See treaty annuity paylists, William Twatt's Band paid at Sturgeon Lake, 1906-1908, no file reference available (ICC Exhibit 1b, pp. 61-73).

¹⁶⁷ S.A. Milligan, Indian Agent, to Secretary, Department of Indian Affairs, April 20, 1915, LAC, RG 10, vol. 7937, file 32-107 (ICC Exhibit 1a, p. 287).

¹⁶⁸ See treaty annuity paylists, William Twatt's Band paid at Sturgeon Lake, 1908-1915, no file reference available (ICC Exhibit 1b, pp. 70-106).

These could however be easily located by a surveyor as they are not far from the 3rd. P.M., being situated in Twp. 52, R 27, while the intervening Range (28) is, in that Twp., only one mile wide.¹⁶⁹

In May 1897, Keith wrote again to the Indian Commissioner, suggesting that the presence of a departmental surveyor in the vicinity of the Sturgeon Lake Reserve presented a “favourable opportunity for the survey of some swamp-land for them.”¹⁷⁰ In turn, Indian Commissioner Forget directed that Surveyor A. Ponton should look into the matter of additional haylands for the Sturgeon Lake First Nation when he was in the area and to “take such action as he may deem advisable and time will admit of.”¹⁷¹

Ponton advised the department in April 1898 that the lands Indian Agent Keith desired for the Sturgeon Lake First Nation were found to be within the area surveyed for the Montreal Lake and Lac La Ronge Bands.¹⁷² Ponton suggested, however:

that an effort should be made to obtain the following Sections, coloured yellow, on which hay abounds, in exchange for an equal area to be surrendered, and cut off the original Sturgeon Lake Reserve -

Viz:- Sections 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 in Township 51 Range 27.-

The portion of Section 25 outside of Reserve No. 101, and Section 36 in Township 51, Fractional Range 28- all West of the 2nd Initial Meridian and

The portion of Section 25 outside of Reserve No. 101., and Section 36 in Township 51, Range 1 West of the 3rd Initial Meridian-

Containing in all 14 square miles-¹⁷³

¹⁶⁹ H. Keith, Indian Agent, to Recipient not Identified, August 28, 1895, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 25).

¹⁷⁰ H. Keith, Indian Agent, to Indian Commissioner, May 7, 1897, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 28).

¹⁷¹ A.E. Forget, Indian Commissioner, to unknown recipient, May 15, 1897, DIAND file 672/30-9, vol.1 (ICC Exhibit 1a, p. 29).

¹⁷² A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30/9, vol. 1 (ICC Exhibit 1a, p. 35).

¹⁷³ A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30/9, vol. 1 (ICC Exhibit 1a, pp. 35-36).

Ponton explained his reasons for proposing this exchange of lands, stating:

the Sturgeon Lake Reserve, as it now stands, is, for the greater part, sandy, and wooded with Jack Pine, which precludes the Indians engaging successfully in either stock raising, or agriculture. The land, which it is proposed to obtain by exchange, is generally wooded with poplar, the soil is good, and hay meadows abound - ¹⁷⁴

J.D. McLean, Secretary of the Department of Indian Affairs, acted on Surveyor Ponton's suggestion later that month, writing to the Department of the Interior to inquire whether the land identified by the surveyor was available to "be transferred to this Department in exchange for an equal area to be surrendered and cut off the Sturgeon Lake Reserve, No. 101."¹⁷⁵ McLean noted that "the proposed exchange is not likely to cause friction with white settlers as none occupy lands within ten miles of the immediate neighbourhood."¹⁷⁶ The Surveys Branch of the Department of the Interior noted shortly thereafter that the lands requested by McLean were not available, as portions were to be included in the reserve for the Montreal Lake and Lac La Ronge Indians.¹⁷⁷ No further action was taken with regard to obtaining the land suggested by Ponton.

Despite not receiving additional haylands, the Sturgeon Lake First Nation was able to continue raising livestock with both the Indian Agent and Farming Instructor carefully monitoring its progress. In 1904, Inspector Chisholm reported that farming instructor Patrick Anderson had prevented the First Nation from "selling themselves short of hay" and that the herd had wintered well as a result.¹⁷⁸

¹⁷⁴ A.W. Ponton to Secretary, [Department of Indian Affairs], April 21, 1898, DIAND, file 672/30/9, vol. 1 (ICC Exhibit 1a, p. 36).

¹⁷⁵ J.D. McLean, Secretary, Department of Indian Affairs, to the Secretary, Department of the Interior, April 25, 1898, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 38).

¹⁷⁶ J.D. McLean, Secretary, Department of Indian Affairs, to the Secretary, Department of the Interior, April 25, 1898, LAC, RG 10, vol. 672/30-9, vol. 1 (ICC Exhibit 1a, p. 39).

¹⁷⁷ Memo, Surveys Branch, Department of the Interior, April 28, 1898, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 41).

¹⁷⁸ W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 190-191 (ICC Exhibit 1a, pp. 62-63).

1906 TIMBER SURRENDER AND SALE¹⁷⁹

In March 1905, Secretary J.D. McLean instructed Indian Commissioner David Laird to investigate a report that the Sturgeon Lake First Nation was “anxious” to sell some of the timber from IR 101 and use the proceeds to purchase a thresher.¹⁸⁰ After determining the amount of timber available (five million feet with stumps greater than 10 inches in diameter),¹⁸¹ Secretary McLean inquired whether the First Nation wanted to surrender all the timber or only the spruce.¹⁸² Members of the First Nation met with Agent Charles Fisher on October 31, 1905, and informed him that they wished to reserve some of the timber for their own use. Since the Agent failed to get a resolution from the First Nation, the department directed Fisher to meet with the members again and determine exactly what their conditions were.¹⁸³

Fisher subsequently advised that he had held another meeting on November 25, with 18 members of the Sturgeon Lake First Nation in attendance. Councillors Ayatawayo and Kayaykeemat stated that some timber should be reserved for the First Nation’s own housing needs. Nehtowkappow, who was referred to as the “Leading man at the East end of Reserve,” recommended keeping five years’ worth of timber; saying, “during the interval all those young trees will have grown to a serviceable size.” He also voiced his concerns about the potential fire hazard created by the dense growth. A resolution was then passed, stating that all the spruce timber over 10 inches at the stump would be sold, “without reserving any.” The resolution was signed by the two headmen,

¹⁷⁹ It should be noted that the 1906 timber surrender by the Sturgeon Lake First Nation is not at issue in this inquiry. Details of the transaction are included to provide context for the 1913 surrender.

¹⁸⁰ Secretary to D. Laird, Indian Commissioner, March 3, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p.1). Although this letter indicates that Inspector Chisholm stated in his 1904 inspection report that the Sturgeon Lake First Nation was “anxious” to sell its timber, no such statement appears in the report on the record. See: W.J. Chisholm, Inspector of Indian Agencies, to Superintendent General of Indian Affairs, August 2, 1904, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1904*, 190-191 (ICC Exhibit 1a, pp. 62-63).

¹⁸¹ J.A.J. McKenna, Assistant Indian Commissioner, to Secretary, September 11, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 3).

¹⁸² Secretary to David Laird, Indian Commissioner, October 6, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 4).

¹⁸³ D. Laird, Indian Commissioner, to Secretary, November 11, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 5).

Ayatawayo and Kayaykeemat, as well as by Nehtowkappow, Kaisikonay, Thomas, Jumbo, Alex Badger and Squeaking John.¹⁸⁴

On January 30, 1906, the Sturgeon Lake First Nation surrendered for sale “the spruce timber on the aforesaid Reserve [IR 101], measuring ten inches and over at the stump.” The surrender document was signed by headmen Ayatawayo and Kayaykeemat and the following “Principal members of the Band”: Kawechemaytawaymat, Kaisikaway, Nehtowkapow, Meyohnahtowakew, Thomas, Willie Duck, and Jumbo.¹⁸⁵ Ayatawayo also signed the accompanying affidavit, dated February 1, 1906.¹⁸⁶ The surrender was approved by Order in Council dated March 8, 1906.¹⁸⁷

Five months later, Sturgeon Lake members complained to the department that they “distinctly understood” that only the timber on the north side of the lake had been surrendered.¹⁸⁸ Secretary J.D. McLean replied that, according to the surrender terms, all spruce measuring over 10 inches at the stump would be sold, and he instructed Agent Borthwick to explain to the First Nation “that the Department was quite justified in calling for Tenders for the whole quantity.”¹⁸⁹

The timber surrender brought the issue of hayland to the attention of the department once again. A week after the timber issue was resolved, Indian Agent Borthwick wrote to Indian Commissioner David Laird, expressing a concern raised by the farming instructor on the Sturgeon Lake Reserve. Borthwick stated:

¹⁸⁴ Author not identified [report], November 25, 1905, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 6-8).

¹⁸⁵ Chief and Principal men of Twatt’s Band of Indians (Sturgeon Lake, No. 101) to His Majesty The King, January 30, 1906, DIAND First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, pp. 12-14).

¹⁸⁶ Affidavit of Surrender, February 1, 1906, DIAND, First Nations Land Registry, [instrument registration number not known] (ICC Exhibit 1n, p. 15).

¹⁸⁷ John McGee, Clerk, Privy Council Office, to Superintendent General of Indian Affairs, March 8, 1906, DIAND, First Nations Land Registry, Instrument No. X16416 (ICC Exhibit 1a, pp. 79-85).

¹⁸⁸ Thomas Borthwick, Indian Agent, to Secretary, August 10, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, pp. 21-22).

¹⁸⁹ J.D. McLean, Secretary, to Thos. Borthwick, Indian Agent, August 21, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1n, p. 26).

Farmer Sanderson reports that the advertized conditions of the sale are expressly stated to be identical with those governing the sales of timber berths by the Department of the Interior. In all such sales by that Department the hay found on those berths becomes the property of the purchaser of the timber. In consequence the sale as it now stands actually conveys to the lumber man who secures the timber the exclusive privilege of cutting the hay on the reserve. This is a serious point as the hay supply on the Sturgeon Lake Reserve is insufficient for the needs of the band; and they are compelled to cut hay on the New Reserve.¹⁹⁰

The “new reserve” refers to Little Red River IR 106A, located northeast of Sturgeon Lake IR 101, which was confirmed as a reserve for the Montreal Lake and Lac La Ronge Indians by Order in Council dated October 16, 1899.¹⁹¹ The farmer’s concerns were relayed to the department by Indian Commissioner David Laird. On September 5, 1906, Department of Indian Affairs Secretary J.D. McLean advised Commissioner Laird that the timber had already been sold, but that the sale did not include the hay, which was reserved for the use of the Indians.¹⁹²

1907 REQUEST FOR HAYLANDS

In September 1907, Acting Indian Agent T. Eastwood Jackson again reported the Sturgeon Lake First Nation’s need for additional haylands. Jackson wrote to the Secretary of the Department of Indian Affairs, stating that “the hay supply on the Sturgeon Lake Reserve has for some years proved insufficient.”¹⁹³ Jackson also revealed that the Sturgeon Lake First Nation claimed “that at the time of the location of their reserve they were entitled to 4 square miles more than was then given them: that area being withheld for the purpose of providing them with additional hay ground should such

¹⁹⁰ Thomas Borthwick, Indian Agent, to David Laird, Indian Commissioner, August 27, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1a, p. 93; ICC Exhibit 1n, p. 28).

¹⁹¹ Clifford Sifton, Minister, Department of the Interior, to the Governor General in Council, October 16, 1899, LAC, RG 15, vol. 619, file 229293 (ICC Exhibit 1a, p. 43).

¹⁹² Secretary to David Laird, Indian Commissioner, September 5, 1906, LAC, RG 10, vol. 7840, file 30107-9 (ICC Exhibit 1a, p. 94; ICC Exhibit 1n, p. 29).

¹⁹³ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 106-107).

prove to be required.”¹⁹⁴ Jackson reported that the First Nation had requested that they be provided with this land, specifically:

that 2 miles of it be the unsurveyed territory lying between the New Reserve (106A) and the Northern part of the Sturgeon Lake Reserve, west of the 3rd principal meridian, which when surveyed will be found to be Sections 35 & 36, Tp. 51, R1, W 3rd; and that for the benefit of those Indians settled at the “End of the Lake” (that part of the Western portion of the reserve lying in Tp 51, R 2, W of 3rd Mer.) to whom the meadows just mentioned are inaccessible —, Sections 10 & 15 in Tp 51, R 3, W of 3rd Meridian be set apart for the remaining 2 miles understood to be coming to them. These sections contain hay meadows from which upwards of 200 tons of hay can be cut, and the Indians to be benefited would undertake any drainage made necessary by wet seasons.¹⁹⁵

Jackson indicated his support of the First Nation’s request, if the claim was just, and suggested that the matter could be arranged before the lands were sought by settlers. Jackson also stated, “[i]t is undoubtedly a most important matter in the interests of the cattle industry of this reserve, and I would beg the most favorable consideration possible of the Indians’ request.”¹⁹⁶

Upon receipt of Jackson’s letter, Department of Indian Affairs Secretary J.D. McLean wrote to P.G. Keyes, Secretary of the Department of the Interior, articulating the desirability of securing more hayland for the Sturgeon Lake First Nation. McLean indicated that “[t]he question as to whether these Indians are entitled as they claim to extra land will be carefully looked into.”¹⁹⁷ McLean also stated that the First Nation might acquire the land “by grant or by exchanging an equal area of their present reserve.”¹⁹⁸

¹⁹⁴ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 106).

¹⁹⁵ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 106).

¹⁹⁶ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, September 4, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 106).

¹⁹⁷ J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 108).

¹⁹⁸ J.D. McLean, Secretary, to P.G. Keyes, Secretary, Department of the Interior, September 25, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 108).

Before receiving any definitive reply from the Department of the Interior, however, the Assistant Secretary of the Department of Indian Affairs, S. Stewart, responded to Acting Indian Agent Jackson's letter on October 10, 1907, saying that the First Nation had received, at the time IR 101 was surveyed, some 3,226 acres more than it was entitled to receive under treaty, "[u]nless there is some other reason unknown to the Department, no step will be taken towards obtaining more land for the band."¹⁹⁹

Acting Indian Agent Jackson responded to the department's rejection by reiterating the importance of the cattle industry to the First Nation. He wrote:

my recent travels over and outside their reserve—measuring their hay stacks—has convinced me of the very great necessity of securing more hay meadows for their use. The cattle industry is of the utmost importance to those Indians; their surplus beef bringing them this season from 7¢ to 9¢ per lb: and I should say that at least one-third of this year's supply has from necessity been cut off the reserve, in meadows which will soon be lost to them through encroaching settlements.²⁰⁰

Jackson inquired if additional land could be secured through a surrender and exchange of an equal area of Sturgeon Lake IR 101 land.²⁰¹

In the meantime, the request of the Department of Indian Affairs for four sections of land for the Sturgeon Lake First Nation received the attention of the Topographical Surveys Branch of the Department of the Interior. In a memorandum to the Secretary of the Department of the Interior, Surveyor-General E. Deville wrote that "[n]o objection is known as far as surveys are concerned to the carrying out of the wishes of the Department of Indian Affairs."²⁰² The Surveyor-General also

¹⁹⁹ S. Stewart, Assistant Secretary, to T.E. Jackson, Acting Indian Agent, October 10, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 111).

²⁰⁰ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, November 5, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 114).

²⁰¹ T. Eastwood Jackson, Acting Indian Agent, to Secretary, Department of Indian Affairs, November 5, 1907, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 114).

²⁰² E. Deville, Surveyor-General, to Secretary, Department of the Interior, October 30, 1907, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 112-113).

asked the Secretary to clarify with the Department of Indian Affairs whether it had any intention of securing the lands requested in April of 1898, as no action had been taken.²⁰³

Sturgeon Lake members continued to raise the issue of additional haylands with the Indian Agent when he visited IR 101. On February 11, 1908, the new Indian Agent, Thomas Borthwick, wrote to the Secretary of Indian Affairs informing him of land allegedly promised to the First Nation in 1881 by the Marquis of Lorne, then Governor General. Borthwick reported that Chief Ayahtuscumicamin and his headmen claimed to have met with the Marquis of Lorne in 1881 to express their grievances, and said that they had specifically requested additional haylands. Borthwick wrote:

[t]hey claim that during the interview they were asked if they had any grievances; that they stated in reply that their reserve had too little hay for their requirements and submitted a request for 4 sections of hay land comprising sections 35 and 36 Tp. 51, R.1 W. 3rd Mer. with others now covered by the New Reserve; that a definite promise was thereupon made by His Excellency that their request would be granted...²⁰⁴

Borthwick emphasized that “[t]he question of the hay supply for this band is a most serious one and I therefore submit this latest plea advanced by them for the consideration of the Department.”²⁰⁵

On February 21, 1908, Department of Indian Affairs Secretary J.D. McLean responded to Borthwick’s letter, informing the Indian Agent that there was no record on file of the promise allegedly made to the Sturgeon Lake First Nation by the Marquis of Lorne. McLean stated that the department would not grant additional lands as it did “not see its way to endeavour to obtain a grant

²⁰³ E. Deville, Surveyor-General, to Secretary, Department of the Interior, October 30, 1907, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 112-113).

²⁰⁴ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, February 11, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, pp. 121-122).

²⁰⁵ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, February 11, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 122).

of extra land.”²⁰⁶ McLean also stated, however, that a surrender of an equal amount of reserve land in exchange for haylands would be considered by the department.²⁰⁷

In March 1908, the Secretary of the Department of the Interior, P.G. Keyes, informed J.D. McLean of his department’s decision regarding the additional land requested for the Sturgeon Lake First Nation. Keyes wrote:

there would appear to be no objection to allowing the Indians of this Reserve to acquire by exchange such sections as adjoin the reserve, but it will not be possible to permit them to take lands elsewhere, for instance in Range 3, which is situated some six or seven miles from the Reserve.²⁰⁸

Keyes also inquired what IR 101 lands might be exchanged in return. Internal correspondence reveals that, although a timber berth license had been granted for lands in range 3 (including sections 10 and 15, township 51), the Department of the Interior expected that the license would be abandoned within two years.²⁰⁹ A timber berth is a parcel of land set aside under the *Dominion Lands Act* for the harvesting of its timber resources. Despite the apparent willingness of both the Department of Indian Affairs and the Department of the Interior to consider an exchange of land, nothing further was done in the matter until 1912.

1912 PROPOSAL FOR A LAND EXCHANGE

In early 1912, the Department of the Interior received an application “for a portable sawmill permit to cut timber on one square mile situated immediately North and adjacent to Sturgeon Lake Indian

²⁰⁶ J.D. McLean, Secretary, to Thomas Borthwick, Indian Agent, February 21, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 123).

²⁰⁷ J.D. McLean, Secretary, to Thomas Borthwick, Indian Agent, February 21, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 123).

²⁰⁸ Secretary, Department of the Interior, to J.D. McLean, Secretary, March 7, 1908, DIAND, file 672/30-9, vol.1 (ICC Exhibit 1a, p. 128).

²⁰⁹ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.W. Greenway, Commissioner of Dominion Lands, January 18, 1908, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 118-120).

Reserve No.101.”²¹⁰ This request included a portion of section 35, township 51, range 1, W of 3rd meridian, which the Department of Indian Affairs had previously requested as additional haylands for the Sturgeon Lake First Nation.²¹¹ An employee of the Department of the Interior, A.A. Pinard, suggested that the Department of Indian Affairs “be asked to take some action in relation to an exchange of lands mentioned in the Departmental letter of the 7th March, 1908.”²¹²

The Assistant Secretary of the Department of the Interior brought the matter to the attention of the Department of Indian Affairs on May 22, 1912.²¹³ The department then instructed the Indian Agent to report whether the Sturgeon Lake First Nation was still interested in obtaining the additional haylands in exchange for the surrender of an equal area of IR 101.²¹⁴ Agent Borthwick responded on August 20, 1912, writing:

the Indians at Sturgeon Lake held two meetings in connection with this matter, one on July 10th and on the 18th. I have now been informed that the majority wish to obtain this concession; and the Band have agreed to surrender two Sections on the S.E. Corner of the reserve and two on the S.W. corner in exchange for the property mentioned, viz., Sections 35 & 36, Township 51, Range 1, and Sections 10 and 15, Township 51, Range 3, W. 3rd M.²¹⁵

On August 27, 1912, the Assistant Deputy and Secretary of the Department of Indian Affairs, J.D. McLean, informed the Secretary of the Department of the Interior of the Sturgeon Lake First

²¹⁰ A.A. Pinard, Department of the Interior, to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146).

²¹¹ A.A. Pinard to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146).

²¹² A.A. Pinard, Department of the Interior, to Mr. York, April 25, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 146); A.A. Pinard, Department of the Interior, to Mr. York, May 1, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 147-148).

²¹³ Lyndwode Pereira, Assistant Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, May 22, 1912, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 149).

²¹⁴ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, May 28, 1912, LAC, RG 10, vol. 1619 (ICC Exhibit 1a, p. 151).

²¹⁵ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, August 20, 1912, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 167). See also map at Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, June 16, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 216).

Nation's desire to proceed, and inquired whether the proposed exchange of lands would be permitted, considering that the Department of the Interior had previously rejected the idea of the First Nation acquiring lands in range 3. McLean asked that the previous decision be reconsidered, saying, "the land[s] in question are especially required for hay purposes and the business of stock raising is an important one for this band."²¹⁶

In October 1912, the Department of the Interior inspected sections 10 and 15, township 51, range 3, W of 3rd meridian, to determine whether the land could be withdrawn from the timber berth held by the Prince Albert Lumber Company.²¹⁷ Timber Inspector J.S. Coombs reported:

I find that all the merchantable timber has been cut off both these sections. Section 15. is principally large hay swamps having very little agricultural lands on it. On Section 10. there is a small quantity of black Poplar. The soil is a rich black loam very suitable for agricultural purposes. There is no one in residence and no improvements on the land. I would recommen [sic] that these two sections be withdrawn from the Timber [berth] and disposed of as the Department sees fit.²¹⁸

On December 21, 1912, a memorandum from an unknown author to the Deputy Minister of the Department of the Interior stated:

there would not appear to be any objection to allowing the Indians of this Reserve to acquire, by exchange, such sections as adjoined the reserve.

... I recommend that the permittees [of the timber berth] be advised of the withdrawal of the sections from their berth. This will place the Patents Branch in a position to deal with the application for exchange received from the Department of Indian Affairs.²¹⁹

²¹⁶ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to Secretary, Department of the Interior, August 27, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 and DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 170-171).

²¹⁷ S. Brough to Deputy Minister, Department of the Interior, October 7, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 177-178).

²¹⁸ J.S. Coombs, Timber Inspector, to W.S. McKechnie, Dominion Lands Agent, October 23, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 182).

²¹⁹ Memorandum to the Deputy Minister, [Department of the Interior], December 21, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 190).

The Prince Albert Lumber Company was informed on December 28, 1912, that sections 10 and 15, township 51, range 3, W of 3rd meridian, had been withdrawn from the company's timber berth.²²⁰

In March 1913, the Department of the Interior contacted the Department of Indian Affairs to clarify the lands involved in the proposed exchange. In a letter dated March 8, 1913, N.O. Coté, the Controller of the Land Patents Branch, Department of the Interior, asked the Assistant Deputy and Secretary of the Department of Indian Affairs, J.D. McLean, to identify the reserve land being offered, and advised that the land applied for in sections 35 and 36, township 51, range 1, W of 3rd meridian, did not adjoin IR 101. Coté noted that a strip of land lay between the northern boundary of IR 101 and those two sections, and asked if the Department of Indian Affairs wanted to acquire that strip as well.²²¹ In a reply dated March 13, 1913, J.D. McLean confirmed that the Department of Indian Affairs wished to acquire the strip of land, as well as the four sections previously discussed, and said the lands to be relinquished by the Sturgeon Lake First Nation would be determined later.²²² On the same day, McLean wrote Indian Agent Borthwick, asking him to identify the land to be exchanged.²²³ McLean also advised Indian Agent Borthwick of the strip of land lying between the northern boundary of IR 101 and sections 35 and 36, township 51, range 1, W of 3rd meridian, indicating it was the intention of the department to acquire this strip.²²⁴ The Indian Agent did not reply to McLean's request until June 5, 1913, at which time Borthwick advised McLean:

²²⁰ Assistant Secretary, Department of the Interior, to Prince Albert Lumber Co. Ltd., December 28, 1912, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 192).

²²¹ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 8, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 198-99).

²²² J.D. McLean, Assistant Deputy and Secretary, to Secretary, Department of the Interior, March 13, 1913, DIAND, File 672/30-9, vol. 1 and LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 201-202).

²²³ J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, March 13, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619, p. 432 (ICC Exhibit 1a, pp. 203-204).

²²⁴ J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, March 13, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619, p. 432 (ICC Exhibit 1a, pp. 203-204).

I attended a meeting of the Sturgeon Lake Indians in connection with the matter referred to on the 28th inst.

The meeting could not be arranged earlier, as the majority were away rat hunting and log driving.

It was stated that nothing definite could be decided upon, until probably two weeks further had elapsed, as the Indians were desirous of making another inspection of the land they wished to exchange, before finally [sic] coming to an agreement.”²²⁵

Eleven days later, Indian Agent Borthwick informed McLean that the First Nation had decided to surrender lands on the north side of Sturgeon Lake in exchange for the proposed additions, rather than the sections at the southeast and southwest corners of IR 101, as had previously been suggested.

Borthwick wrote:

[t]he portion they agree to exchange does not appear to be either of the sections indicated by yellow and green lines as was originally suggested; but the portion which lies directly north west of the lake. This section of land, which on the east is bounded by the north-east of Section 9, Township 51, Range 1 and on the south-east of Section 15, contains approximately the exact amount of land they wish to exchange. The land is bounded on the south by the lake, and on the north and west by the Reserve line.

I believe the greater part of this land is heavily brushed; in fact at one time [it] formed part of the timber limit which extends a great distance north of the Sturgeon Lake; and although the soil is no doubt very heavy and good, yet it is very likely, many years will pass before it can be used to any advantage by settlers.²²⁶

This information was subsequently forwarded to the Land Patents Branch of the Department of the Interior.²²⁷ In a memorandum to W.W. Cory, Deputy Minister of the Department of the Interior, Controller N.O. Coté commented, “[t]he lands which they now desire to exchange are hatched in red on the plan beneath containing an approximate area of 4 square miles, and those

²²⁵ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, June 5, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 213).

²²⁶ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, June 16, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 214-215). See also map at Order in Council P.C. 2379 with attachments, September 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 239).

²²⁷ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, June 27, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, pp. 217-219).

which they wish to acquire are coloured pink, are available according to the records of this Department and contain an aggregate area of 2200.2 acres.”²²⁸ J.A. Coté (whose position is unknown, but presumed to be another employee of the Department of the Interior) recommended an exchange for sections 35 and 36, township 51, range 1, W of 3rd meridian, but expressed concern about the distance between IR 101 and sections 10 and 15, township 51, range 3, W of 3rd meridian. In an internal memo dated August 13, 1913, addressed to Mr. Mitchell, Coté wrote:

I would recommend an exchange in so far as the two sections adjoining the Reserve is concerned, but I doubt whether it would [be] advisable to allow the Indians to acquire the two other sections that are situated 7 miles from the Reserve.²²⁹

In addition, Coté stated that one of those parcels, section 10, township 51, was “most suitable for agricultural purposes” and recommended that “the Indians should be required to select other lands, if possible, nearer the Reserve.”²³⁰ The Department of Indian Affairs justified its request for sections 10 and 15 in a letter from Duncan Campbell Scott to Mr. Mitchell. Scott wrote:

We require this land from which to obtain hay for the Indians. The matter is a very serious one for them. We have nearly 400 head of cattle and in the most favorable seasons they can cut only about 240 tons of hay. I presume that the Agent would not select lands any farther from the Reserves than was necessary and he probably could not get good hay meadows closer than the locality which has been chosen. As our Agent there is a man with pretty good judgment, I think we could take this for granted.²³¹

²²⁸ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to W.W. Cory, Deputy Minister, Department of the Interior, August 8, 1913, LAC, RG 15, vol. 747, file 471750 (ICC Exhibit 1a, p. 222).

²²⁹ J.A. Coté to Mr. Mitchell, August 13, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 223).

²³⁰ J.A. Coté to Mr. Mitchell, August 13, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 224).

²³¹ D.C.S., Department of Indian Affairs to Mr. Mitchell, [Department of the Interior], August 15, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 226).

In another memorandum written by an unknown author within the Department of the Interior, dated August 22, 1913, J.A. Coté was instructed that the exchange should proceed by way of an Order in Council.²³²

Order in Council PC 2379 - September 24, 1913

Order in Council PC 2379, dated September 24, 1913, provided for the withdrawal of 2,217.40 acres of land from the operation of the *Dominion Lands Act* in exchange for a proposed surrender of a portion of IR 101 containing 2,145.46 acres by the Indians of the Sturgeon Lake IR 101.

Order in Council PC 2379 describes the proposed exchange of lands as follows:

...the lands applied for shall be and the same are hereby withdrawn from the operation of the said Act and set aside for the use of the Indians of the Sturgeon Lake Indian Reserve No. 101, - such lands being described as follows:-

Firstly; the whole of sections 35 and 36, and those portions of sections 25 and 26, all in township 51, range 1, west of the 3rd meridian, which lie to the North of Sturgeon Lake Indian Reserve No. 101, as shown upon the plan of survey of the said township, containing by admeasurement 1425 acres, more or less, and Secondly; all those portions of sections 10 and 15, in township 51, range 3, west of the 3rd meridian, which are not covered by any of the waters of Lakes numbered 5, 6, 7, and 8 as shown upon the plan of survey of the last mentioned township, containing by admeasurement together 792.40 acres, more or less, the above parcels being shown coloured pink on the plan hereto attached and containing together an area of 2217.40 acres.

The Minister of the Interior states that the lands which are to be surrendered by the Indians of the said Reserve in order that they may be vested in the Department of the Interior in exchange for the lands above mentioned are described as follows: All that portion of Sturgeon Lake Indian Reserve No. 101, as surveyed by E. Stewart, Dominion Land Surveyor, and set apart by Order in Council of the 17th May, 1889, which may be more particularly described as follows:

Commencing at the intersection of the East boundary of Section Twenty-eight, in Township 51, Range 1, West of the 3rd Meridian with the North boundary of the said Indian Reserve; thence Southerly on the production of the said East boundary to its intersection with the North shore of Sturgeon Lake; thence South-Westerly and North-Westerly following the said North Shore to its intersection with the West boundary of the said Indian Reserve; thence Northerly following the said West boundary a distance of Thirty- three chains, more or less, to an iron post at the most

²³² [Unknown author] to J.A. Coté, August 22, 1913, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 227).

Westerly angle of the said Reserve; thence on a bearing of Eighty-nine degrees and Fifty-nine minutes, following a portion of the North boundary of the said Reserve, a distance of One hundred and eighteen chains and thirteen links to an Iron Post at an angle in the North boundary of said Reserve; thence on a bearing of Six minutes following the West boundary of the said Reserve a distance of One hundred and twenty chains and Six links to an Iron post at the North-West angle of the said Reserve; thence Easterly following the said North boundary of the said Reserve a distance of Fifty-eight chains and Eighteen links, more or less, to the place of commencement, containing an area of 2145.47 acres, more or less...²³³

SURRENDER OF IR 101 LANDS

Events Prior to the Surrender

On October 3, 1913, the Deputy Superintendent General of Indian Affairs, Frank Pedley, informed Indian Agent Borthwick that the Order in Council had been passed:

authorizing the exchange desired by the Sturgeon Lake Band, No. 101.

The lands to be received in exchange are the whole of Sections 35 and 36, and those portions of Sections 25 and 26, Range 1, W-3-M, which lie to the North of Sturgeon Lake Indian Reserve and all those portions of Sections 10 and 11, in Township 51, Range 3, W-3-M, which are not covered by the water of certain lakes numbered upon the plan of survey of the Township 5, 6, 7, and 8 containing a total area of 2217.40 acres. You will note that these are the lands indicated on the map which accompanied your said letter, excepting that the small strip consisting of portions of Sections 25 and 26, Township 51, Range 1, are also included. The portion to be surrendered in exchange is the same as that indicated in the said map which accompanied your letter. ...²³⁴

It should be noted that Pedley's letter erroneously describes section 11 instead of section 15, township 51, range 3, W of 3rd meridian, as well as the location of the lakes referred to in Order in Council PC 2379.

²³³ Order in Council PC 2379, September 24, 1913, DIAND, file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 233-235).

²³⁴ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243).

In this same letter, Pedley enclosed duplicate forms of the surrender document and authorized Indian Agent Borthwick to take the surrender of IR 101 lands in accordance with the provisions of the *Indian Act*, stating:

If the Indians assent to surrender, you should fill in the date and have the documents signed by a number of the Indians in your presence, and an affidavit of execution made by yourself and two members of the band, before a stipendiary magistrate or a justice of the peace, and then return both documents to the Department.

You should report the number of male members of the band over twenty-one years of age resident on or near the reserve and entitled to vote, and as also the number of voting members present at the meeting and the number voting for the surrender and the number voting against.²³⁵

On November 21, 1913, Indian Agent Borthwick advised the Secretary that “owing to the absence of the major portion of the male members of the band, apparently on rat hunting expeditions, I have been unable to hold a meeting so that the surrender forms can be completed.”²³⁶ Borthwick said he expected the meeting would be held in early December, when the members of the First Nation “invariably” returned home.

The Surrender Meeting

On December 24, 1913, Agent Borthwick wrote to the Secretary of the Department of Indian Affairs, saying:

I have the honor to return herewith the form of surrender in duplicate which was duly submitted to the Indians of the Sturgeon Lake, Band 101. on the 22 inst, at a general meeting of the band, in accordance with the provisions of the Indian act.

In view of their assent to the surrender I am attaching a report [ie. the voters list; to be discussed in detail later] giving the names of the male members of the band over twenty-one years of age resident on or near the reserve and entitled to vote, 28 names in all, sixteen of these attended the meeting, all of which voted in favor of the

²³⁵ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, October 3, 1913, DIAND, file 672/30-9, vol. 1 and LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 240-243).

²³⁶ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, November 21, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 245).

exchange of the land referred to, their signatures or marks being duly witnessed in conformity with governing regulations.²³⁷

According to the surrender document, dated December 17, 1913, the First Nation members agreed to surrender 2,145.47 acres “to be exchanged for other lands.” The description of the lands being surrendered corresponds with that contained in Order in Council PC 2379. The document does not describe the lands being received in exchange, but includes a sketch on which the subject lands (both the surrendered parcel and those being received in exchange) are outlined. The surrender was signed by headmen Ayatawayo and Kayaykeemat, as well as by Jumbo Turner, Kaisikwayonayo, Charles Ermine, Kayomeetawakew, David Anderson, Alex Badger, Long John, Alex Naytowonhow, Joe Peter, Neetaakepow, Frederick Ballandine, Charles Campbell Cardinal, John Kayaykeemat, and Charles Kingfisher.²³⁸ Indian Agent Borthwick’s letter indicated that he submitted the surrender to the First Nation on December 22, five days after the date on the surrender form.

The Affidavit of Surrender, or Affidavit of Execution, was dated December 22, 1913, and was signed by Agent Borthwick and two members of the Sturgeon Lake First Nation, Kaisiwonayo and Headman Ayatawao.²³⁹ It was sworn before William Godfrey, Commissioner of Oaths for the Province of Saskatchewan. The Affidavit, however, did not meet the standard set out by the *Indian Act*. On January 7, 1914, Secretary McLean wrote to Indian Agent Borthwick, returning the Affidavit to be sworn “before a stipendiary magistrate or a justice of the peace.”²⁴⁰ Borthwick was admonished for failing “to carry out the specific instructions of the Department, thereby entailing unnecessary

²³⁷ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, December 24, 1913, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 259); see also LAC, RG 10, vol. 1619, p. 664 (ICC Exhibit 9b, p. 37).

²³⁸ Chief and Principal men, Sturgeon Lake Band, to His Majesty the King, December 17, 1913, DIAND, file 672/30-9, vol. 2 (ICC Exhibit 1a, pp. 247-252 and 253-255); Chief and Principal men, Sturgeon Lake Band, to His Majesty the King, December 17, 1913, LAC, RG 2, P.C. 510 (ICC Exhibit 9b, pp.6-9); Chief and Principal men, Sturgeon Lake Band, to His Majesty the King, December 17, 1913, LAC, RG 10, vol. 1619, pp. 660-662 (ICC Exhibit 9b, pp. 31-33).

²³⁹ Affidavit of Surrender, December 22, 1913, LAC, RG 10, vol. 1619 (ICC Exhibit 1a, pp. 257-258).

²⁴⁰ J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, January 7, 1914, LAC, RG 10, vol. 1619, p. 666 (ICC Exhibit 1a, p. 262).

correspondence and delay in this matter.”²⁴¹ Indian Agent Borthwick swore another Affidavit before a justice of the peace for the province of Saskatchewan on January 31, 1914.²⁴² The Affidavit attesting to the surrender meeting procedures was also sworn by headmen Big Head (alias Kayweekematahwaymat) and Moose Hunter (alias Kayaykeemat). A notation appearing near the (illegible) signature of the justice of the peace indicates that the document was “read over and explained to the said Big Head and Moose Hunter in the Cree language and they seemed perfectly to understand the same and made their marks thereto in my presence.”²⁴³ The document does not specify the name of the interpreter present at the swearing of the Affidavit. The Surrender Document and Affidavit of Surrender were returned by Agent Borthwick to the department on February 4, 1914.²⁴⁴

Order in Council PC 510 - February 20, 1914

The surrender was accepted by Order in Council PC 510, dated February 20, 1914.²⁴⁵ On March 19, 1914, the Department of the Interior was informed by J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, that the surrender of IR 101 lands had been approved.²⁴⁶

In May 1914, Indian Agent Borthwick reported, “the Indians of the Sturgeon Lake reserve Band 101, desire to know if their recent exchange of land is now complete. That is to say can these Indians consider the haylands which they surrendered a portion of their reserve for, as their own

²⁴¹ J.D. McLean, Assistant Deputy and Secretary, to Thomas Borthwick, Indian Agent, January 7, 1914, LAC, RG 10, vol. 1619, p. 666 (ICC Exhibit 1a, p. 262).

²⁴² Affidavit of Surrender, January 31, 1914, LAC, RG 2, vol. 1082, P.C. 510/1914, February 20, 1914, and DIAND, file 672/30-9, vol 1 (ICC Exhibit 1a, pp. 265, 266).

²⁴³ Affidavit of Surrender, January 31, 1914, LAC, RG 2, vol. 1082, P.C. 510/1914, February 20, 1914, and DIAND, file 672/30-9, vol 1 (ICC Exhibit 1a, pp. 265, 266).

²⁴⁴ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, February 4, 1914, DIAND file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 267).

²⁴⁵ Order in Council PC 510, February 20, 1914, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1, pp. 271-272).

²⁴⁶ J.D. McLean, Assistant Deputy and Secretary, to Secretary, Department of the Interior, March 19, 1914, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 278).

property.”²⁴⁷ Borthwick resigned shortly thereafter. His replacement, Silas Milligan, was informed on June 9, 1914:

the Indians may now consider the lands which they have received in exchange for the surrendered portion of the reserve as being their own property. You may therefore cut and use the hay from them without interference.²⁴⁸

Elders’ Testimony Regarding the Surrender Terms

According to many Sturgeon Lake Elders, the members of the First Nation did not understand, at the time of surrender, that it was intended to be a cession of title to their lands, but thought it was a mutually agreed-upon transaction whereby the First Nation would receive the haylands and outside parties could cut timber on the IR 101 lands north of the lake.²⁴⁹ Referring to the Elders’ knowledge of their ancestors’ belief, Elder Earl Ermine said at the 2006 community session:

they used to talk about timber, they used to call it *mistik soniyas*. ...they always talked about it as being, kind of wondering whatever happened to that land because there was never any giving up of that land.

...

...The English language might interpret it as, you know, money that resulted from an arrangement because of timber that was taken from that lands ... my understanding it was monies that resulted from the exchange of timber for that hay land.²⁵⁰

Elders Baptiste Turner, Howard Bighead and Wesley Daniels all testified at the community session that it was only the timber that was surrendered in exchange for additional haylands, not the land

²⁴⁷ Thomas Borthwick, Indian Agent, to Secretary, Department of Indian Affairs, May 20, 1914, DIAND file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 282).

²⁴⁸ J.D. McLean, Assistant Deputy and Secretary, to Silas Milligan, Acting Indian Agent, June 4, 1914, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 283).

²⁴⁹ See: June 1996 affidavits by Hannah Kingfisher, John James Daniels, Baptiste Turner, Sandra Long John (ICC Exhibit 2b, pp. 17, 24, 26, 28); 1973 interviews with George Charles (ICC Exhibit 1a, pp. 355, 365), John Naytowhow (ICC Exhibit 1a, pp. 372, 378-379), Joe Daniels, George Ermine, John Naytowhow and Jacob Longjohn (ICC Exhibit 1a, pp. 362, 363, 366, 368).

²⁵⁰ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 23-24, E. Ermine).

itself.²⁵¹ Elder Bighead acknowledged that there was a serious need in the community for haylands, but asked “why didn’t Indian affairs go and lease some land instead of ... trading it off ... I can’t see my way clear to how, what the thinking was ... to sell valuable land for land such as Sucker Lake that I’ve seen is useless except for hay at the time.”²⁵² In addition to the timber, the surrendered portion of IR 101 was used by Sturgeon Lake First Nation members for berry picking, as a source of medicinal plants, and for hunting.²⁵³

Elder Hannah Kingfisher described the 1913 surrender somewhat differently: “They had mutually loaned land was what my grandfather said, ...”²⁵⁴ Barry Kingfisher said, “What [my father] indicated to me was we never did sell this land. He always said, ‘*E’kimohta’makowiya*’, he always said that, it was stolen from us.”²⁵⁵ That phrase was echoed by Earl Ermine, whose father told him, “‘*E’kimohta’makowiya askiy*,’ the land that was stolen from us,”²⁵⁶ and, with some variation, by Wesley Daniels, who stated that George Charles told him, “we did not trade the land, only the timber.”²⁵⁷

Elder Hannah Kingfisher also stated that when she asked her grandfather (Ayatawayo) why they gave away the trees, he responded:

We never did, we were deceived into it. And this Sucker Lake, they told us, it was a trade, it was like a loan, it was loaned to them, it wasn’t given away. The farm instructors and Indian Agents wrote it out so that it looked like we were giving up the land.²⁵⁸

²⁵¹ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 63, B. Turner; p. 110, H. Bighead; p. 45, W. Daniels).

²⁵² ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 115-16, H. Bighead).

²⁵³ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 113, H. Bighead; pp. 89-90, R. Ermine; pp. 25-26, 32, E. Ermine; p. 69, B. Turner).

²⁵⁴ Hannah Kingfisher Interview - Revised Transcript, March 2007, pp. 21, 26 (ICC Exhibit 2d, pp. 25, 30).

²⁵⁵ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 96, B. Kingfisher).

²⁵⁶ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 26-27, E. Ermine).

²⁵⁷ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 47, W. Daniels).

²⁵⁸ Hannah Kingfisher Interview - Revised Transcript, March 2007, p. 21 (ICC Exhibit 2d, p. 25).

Elder Baptiste Turner testified at the community session that Chief Thomas Charles told him that “those who had signed the papers, those were the ones that (Speaks in Cree) how would I translate that? Misled, I guess would be the word.”²⁵⁹ When Elder George Charles was asked in 1973 if he knew Moosehunter and Big Head, he responded that “it was him and bighead that trade the land,” that “[t]hey didn’t understand anything,” and that “[t]hey only spoke Cree.”²⁶⁰ When Robert Ermine was asked at the community session whether anyone acted as a translator when discussing a land exchange, he recalled that his father, George Ermine, told him: “There was an interpreter but I don’t know the name, the name of the person. Because I remember him saying that there was an interpreter, ‘*otitwestamakew*’.”²⁶¹

SUBSTITUTION OF LAND EXCHANGED IN 1913

As mentioned earlier, Indian Agent S.A. Milligan wrote to the Secretary of the Department of Indian Affairs on April 22, 1915, advising that it was not the intention of the First Nation to acquire section 35 in township 51, W of 3rd meridian. Milligan wrote:

they admit that the error occurred [sic] through their own fault. Section 35, Township 51, is not made up of any hay land, the major portion of it being high and dry and covered with heavy poplar. It appears that this hay land is Section 36, immediately East of Section 36, Township 51. This is one of the quarters that the Indians thought they were receiving in exchange. Section 36, Township 51, they were under the impression was Section 35, Township 51, as it is most unusual to find two quarter sections adjoining each other with the same number, the cause no doubt being that an error was made when the land was first surveyed, Section 36, East of Section 36, Township 51, above referred to being a correction. However, as the Indians failed to discover this oversight until long after their first application had been received and accepted, it only remains to be said that they now wish to surrender Section 35, Township 51, W 3rd, for Section 36, shown on both diagrams I am enclosing and possibly might be described by saying it is sandwiched between Section 36, Township 51, W 3rd, and Section 31, Township 51, E 3rd.²⁶²

²⁵⁹ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, pp. 72-73, B. Turner).

²⁶⁰ Interview with George Charles, January 11, 1973 (ICC Exhibit 1a, pp. 356-357).

²⁶¹ ICC Transcript, December 6, 2006 (ICC Exhibit 5a, p. 91, R. Ermine).

²⁶² S.A. Milligan, Indian Agent, to Secretary, Department of Indian Affairs, April 22, 1915, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, pp. 288-289).

J.D. McLean wrote to N.O. Coté, Controller, Land Patents Branch of the Department of the Interior, on May 4, 1915, informing him of the error and saying, “it now appears that the Indians, on account of there being two sections numbered 36 adjoining each other, made a mistake in stating the lands they desired.”²⁶³ McLean requested an Order in Council be passed amending the Order in Council of September 24, 1913, by substituting section 36 and a portion of section 25, lying north of IR 101, both in township 51, range 28, W of 2nd meridian, for section 35 and a portion of section 26, both in township 51, range 1, W of 3rd meridian, also lying north of IR 101. McLean concluded by saying, “[i]t is especially desired as the section which was asked for in error by the Indians, appears to be practically useless to them, and the section as above stated, is the one they intended to ask for.”²⁶⁴

Order in Council PC 2771/1915

After reviewing the status of sections 36 and 25, the Department of the Interior sought to amend the original Order in Council. On November 27, 1915, Order in Council PC 2771/1915 was authorized, amending Order in Council PC 2379/1913 of September 24, 1913, by substituting:

for the aforesaid section 35 and portion of Section 26 in Township 51, Range 1, West of the 3rd Meridian, the lands described as follows, that is to say,-

‘All of fractional section 36, and that portion of section 25, lying North of the Sturgeon Lake Indian Reserve, No. 101., and of the production easterly of the Northern Boundary of the said Reserve, containing five hundred and twenty-eight and twenty hundredths acres.’²⁶⁵

It appears, however, that the Department of Indian Affairs was not immediately advised that the Order in Council of November 27, 1915, had been approved. J.D. McLean, Assistant Deputy and Secretary of the Department of Indian Affairs, wrote to the Department of the Interior in January of

²⁶³ J.D. McLean, Assistant Deputy and Secretary, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, May 4, 1915, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 295).

²⁶⁴ J.D. McLean, Assistant Deputy and Secretary, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, May 4, 1915, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 295-298).

²⁶⁵ Order in Council PC 2771, November 27, 1915, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 313).

1916 to inquire whether the amendment and exchange had been made.²⁶⁶ A month later, N.O. Coté responded to McLean, forwarding a copy of the confirmed Order in Council.²⁶⁷ In the meantime, however, Coté wrote to the Dominion Lands Agent in Prince Albert with instructions that section 35 and that portion of section 26 situated outside of IR 101, both in township 51, range 1, W of 3rd meridian, should be opened to homesteaders.²⁶⁸

In March 1916, the Assistant Deputy and Secretary of the Department of Indian Affairs, J.D. McLean, wrote to the Department of the Interior to confirm the description of the land added to IR 101, as the Order in Council of November 27, 1915, was silent in that respect. McLean wrote:

It is noted that the said Order-in Council is not quite definite. No amendment is required if it is perfectly understood in your Department which lands are now constituted a part of the Indian Reserve.

The said lands which now constitute part of the Indian Reserve are fractional section 36 and that portion of section 25, lying North of the Sturgeon Lake Indian Reserve No. 101, in Tp. 51, R. 28, W.2.M and section 36 and fractional section 25, North of the reserve in Tp. 51, R. 1, W.3.M.²⁶⁹

N.O. Coté confirmed on March 24, 1916, that the lands set apart by the November 27, 1915, Order in Council are:

fractional Section 36 and that portion of section 25 lying north of the Sturgeon Lake Indian Reserve No. 101 and of the production easterly of the North boundary of the

²⁶⁶ J.D. McLean, Assistant Deputy and Secretary, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, January 25, 1916, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 324).

²⁶⁷ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, February 25, 1916, DIAND, file 672/30-9 (ICC Exhibit 1a, p. 329).

²⁶⁸ N.O. Coté, Controller, Land Patents Branch, Department of the Interior, to Agent of Dominion Lands, Prince Albert, February 9, 1916, LAC, RG 15, Series D-II-1, vol. 747, file 471750 (ICC Exhibit 1a, p. 328).

²⁶⁹ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to N.O. Coté, Controller, Land Patents Branch, Department of the Interior, March 9, 1916, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 331).

said Reserve, in Township 51 Range 28 West of the 2nd Meridian and section 36 and fractional section 25 lying North of the Reserve, in Township 51-1 West of the 3rd Meridian, and have been so noted in the records of this Department.²⁷⁰

²⁷⁰ N.O. Côté, Controller, Land Patents Branch, Department of the Interior, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 24, 1916, DIAND, file 672/30-9, vol. 1 (ICC Exhibit 1a, p. 333).

