INDIAN CLAIMS COMMISSION

COWESSESS FIRST NATION INQUIRY
1907 SURRENDER CLAIM

PANEL

Commissioner Roger J. Augustine

COUNSEL

For the Cowessess First Nation
Daniel J. Maddigan / W. Allan Brabant

For the Government of Canada
Jeffery A. Hutchinson / Richard Wex

To the Indian Claims Commission
Kathleen N. Lickers

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DEDICATION

Commissioner Carole T. Corcoran committed herself tirelessly to the body of work produced by the Commission since its inception in 1991. We greatly regret her sudden passing.

This report represents Commissioner Corcoran's final deliberations and contribution before her untimely death. As a tribute to her many efforts on behalf of the Commission, we dedicate this report to her memory.

CONTENTS

PART I
INTRODUCTION

BACKGROUND TO THE INQUIRY

This report addresses a specific claim submitted by the Cowessess First Nation[1] to the Minister of Indian Affairs in March 1981. That claim alleged that a 1907 surrender of 20,704 acres from Indian Reserve (IR) 73, near Broadview, Saskatchewan, was invalid because it did not comply with procedures mandated by the *Indian Act*. In a supplementary claim document, dated March 5, 1984, the First Nation submitted further arguments relating to the alleged non-compliance. The First Nation also reserved its right to challenge the surrender on other grounds, including breach of treaty, breach of fiduciary duty, fraud, and unconscionability.[2] Further submissions were made to the Department of Indian Affairs by counsel for the First Nation on March 6, 1985,[3] and March 26, 1992.[4]

Following a review by the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice, Jack Hughes, Research Manager at Specific Claims West, DIAND, informed Chief Lavallee of the Cowessess First Nation of the federal government's position with respect to each allegation made in the claim documents.[5] According to Mr Hughes's letter, dated March 25, 1994, the Government of Canada was of the view that the facts of the claim did not reveal a lawful obligation on the part of the Crown.

Two years after Canada's rejection of the claim, the Cowessess First Nation formally requested that the Indian Claims Commission (ICC) conduct an inquiry into the 1907 surrender

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1 Referred to as the "Cowessess Band," the "First Nation," or the "Band," depending on the historical context.

2 "Submission to the Minister of Indian and Northern Affairs on the Claim by the Cowessess Band #73 with Respect to a Purported Surrender of Land Alleged to have been Taken on January 29, 1907," March 5, 1984 (ICC file 2107-33-01).

3 T.J. Waller to Department of Indian Affairs and Northern Development, March 6, 1985 (ICC file 2107-33-01).

4 David C. Knoll to Specific Claims Branch, March 26, 1992 (ICC file 2107-33-01).

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

claim.[6] Commission Counsel Ron Maurice informed Canada of the Commissioners' decision to conduct the inquiry in late August 1996.[7] By subsequent agreement of the parties, one legal issue, concerning the interpretation of section 49(1) of the *Indian Act*, and two factual issues, concerning the number of eligible voters in attendance at the surrender meeting and the number of valid votes cast in favour of the surrender, were placed before the panel.

MANDATE OF THE COMMISSION

The mandate of this 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."[8] This Policy, outlined in the department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept and negotiate claims that disclose an outstanding "lawful obligation" on the part of the federal government.[9] 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.

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

7 Ron Maurice, Indian Claims Commission, to Michel Roy and W. Elliott, August 21, 1996 (ICC file 2107-33-01).

8 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.

9 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994), 1 ICCP 171 (hereafter *Outstanding Business*).

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

iv) An illegal disposition of Indian land.

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 fraud can be clearly demonstrated.[10]

This report contains the Commission's findings and recommendations on the issues agreed upon by the parties.

[10] *Outstanding Business*, 20; reprinted in (1994), 1 ICCP 179, 180.

PART II

HISTORICAL BACKGROUND

TREATY 4 (1874)

The ancestors of the Cowessess First Nation were primarily Saulteaux, but some Cree and Métis were among them when they adhered to Treaty 4 at Fort Qu'Appelle on September 15, 1874.[11] Chief Cowessess ("Ka-wezauce," also known as "Little Boy" or "Little Child") signed the treaty for himself and his followers. The signatories to the treaty ceded to the Crown an area of 194,000 square kilometres (75,000 square miles[12]) in what is now southern Saskatchewan, and in exchange were promised perpetual cash annuities, schools, agricultural assistance, and reserves upon which to settle when they ceased their traditional nomadic way of life. These reserves were to be selected by government officials, in consultation with the bands, and the area set aside was to equal one square mile for each family of five (or 128 acres per person). Treaty 4 also stipulated that the government, and only the government, could dispose of reserve land, after obtaining the consent of the Indians entitled to the land:

> the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained; but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[13]

Precise procedures for the alienation of reserve land were set down in the *Indian Act*.

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11 K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, p. 1 (ICC Exhibit 4).

12 Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 77.

13 "The Qu'Appelle Treaty Number Four," in Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles reprint, 1971), 332.

RESERVE SURVEYED FOR THE COWESSESS BAND

At the time of the treaty, the Cowessess people were nomadic buffalo hunters and did not immediately select a site for a reserve. In 1874 and 1875, the Band was paid annuities at Fort Qu'Appelle, but by 1876 it had moved to the Cypress Hills to be nearer to the dwindling buffalo herds. At the treaty annuity distribution in 1876, members of the Band were paid at two locations: Chief Cowessess and 191 of his followers took payment at their camp in the Cypress Hills, while 50 others were paid with headman Kaykahchegun, at Fort Qu'Appelle. By 1877, about one-quarter of the band members were paid at Qu'Appelle under headman Louis O'Soup, and the rest were paid in the Cypress Hills with Chief Cowessess. Comparable numbers were paid with the two respective leaders at Cypress Hills and Qu'Appelle for the next four years.[14]

In 1878 and 1879, the government promised Cowessess a reserve, first at a site north of Fort Walsh and then at Maple Creek in the Cypress Hills. No reserve was surveyed, however, even though Cowessess's followers had commenced farming at the location that they had chosen near Maple Creek.[15] In 1880, a reserve was surveyed at Crooked Lake near Fort Qu'Appelle for O'Soup and his followers. In the spring of 1883, Chief Cowessess and his followers were persuaded to leave the Cypress Hills and join O'Soup's group at Crooked Lake, and the boundary of the reserve was adjusted to reflect the reconstituted Band's total membership. According to the annuity paylists for 1883, 345 persons were paid with Chief Cowessess.[16] Six years later, in 1889, Cowessess Indian Reserve 73 was confirmed by order in council. It comprised 78 square miles[17] (49,920 acres), a calculated treaty land entitlement for 390 band members (49,920 ÷ 128 = 390).

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[14] All statistics derived from Cowessess Band paylists, as cited in K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 4–5 (ICC Exhibit 4).

[15] K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 6–7 (ICC Exhibit 4).

[16] All statistics derived from Cowessess Band paylists, as cited in K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975, pp. 21–22 (ICC Exhibit 4).

[17] Order in Council PC 1151, May 17, 1889, Indian Reserve No. 73, in National Archives of Canada (hereafter NA), RG 2, series 1 (ICC Documents, pp. 700–1).

PRESSURE FOR SURRENDER OF THE CROOKED LAKE RESERVES

Departmental Response, 1886 to 1903

The Cowessess IR 73 had been laid out at Crooked Lake, along with Sakimay IR 74, Kahkewistahaw IR 72, and Kakeesheway (later Ochapowace) IR 71. In departmental correspondence, they are often referred to collectively as the "Crooked Lake Reserve."

Beginning in 1886, settlers located near the reserves began to lobby to have the southern portion of these reserves surrendered for sale. In the spring of that year, for example, settlers in the vicinity of Moosomin, Saskatchewan, asked the Minister of the Interior to move the reserves away from the settlement, a suggestion with which the Minister seems to have agreed:

> During his [Minister of the Interior's] recent visit to the North West, the settlers in the neighbourhood of Moosomin brought to the Minister's attention, the fact that the Indian Reserve in question [the Crooked Lakes Agency Reserves] lies immediately alongside of the Canadian Pacific Railway, that it would be desirable in the public interest and in the interest of the Indians themselves that they should be moved back six miles from the Railway....
>
> To this proposition, it was represented to the Minister, the Indians would be perfectly willingly to agree, and as he [is] confident that the public interest and the advantage [to] the Indians would be equally served by some such arrangement.
>
> I am to ask whether you do not agree with him in thinking it expedient to open negotiations with the Indians for the purpose of ascertaining their views.[18]

The Indian Agent in charge of the Crooked Lake Agency, Alan McDonald, was asked his views of the proposal. He replied that the proposed surrender was not advantageous to the Indians and, if it proceeded, care should be taken to acquire adequate haylands in close proximity to the reserve:

> The hay on Little Child's [Cowessess] Reserve is within the six miles asked for, I do not think there were forty tons cut out of it last year, and unless these Indians got the same area of hay lands as they would surrender and in close proximity to their Reserve, it would be unjust to entertain the proposition.
>
> Loud Voice and Kah-Ke-wis-ta-haw bands would be also giving up the best of their hay, but not to the same extent as "Little Childs". [sic]

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[18] A.M. Burgess, Deputy Minister of the Interior, to L. Vankoughnet, DSGIA, March 4, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 34–36).

> These bands should in a few years possess [a] large number of Cattle requiring several thousand tons of Hay each, and we should in every way possible protect it for them.
>
> If the land immediately north of the Reserves extending from Sakemays (North of Long Lake) to Loud Voices [sic] eastern boundary extending six miles north was given in exchange I think the area of hay lands could be got, the Indians would be justly dealt with, and the parties who are looking with envious eyes at the lands the Indians at present hold will be made contented....
>
> We should not overlook the fact that should the proposition be carried out, the Indians will be giving up far more valuable lands than they will be receiving.[19]

As a result of this report, the Department of Indian Affairs informed the Department of the Interior that "it would not be prudent nor expedient to disturb the Indians in the possession of these lands."[20] The matter then lay dormant for a period of years.

In the spring of 1891, a proposed surrender of the southern portion of the Crooked Lake Reserves, including Cowessess IR 73, was again presented to the department by interested parties in the area. When asked to report on this issue, Agent McDonald repeated his view that these haylands were needed, and noted his regret that the issue had not been resolved as he had suggested in 1886. Once again, McDonald noted that the value of the lands proposed for exchange was unequal:

> If these lands are surrendered by the Indians no reasonable money value can recompense them, as their Hay lands would be completely gone, and this would necessitate no further increase of Stock, which would of course be fatal to their further quick advancement, and would be deplorable, and the only alternative that I can see is to give them Hay lands of equal quantity and value immediately adjacent to the Reserve interested, which I do not think is possible now.
>
> That part of Township 17 [the area requested for surrender] immediately north of Broadview is of very little use for agricultural purposes a great portion being under water in wet seasons, and the rest is gravelly and in dry seasons it is all more or less impregnated with Alkali, and were it open to Settlers tomorrow, I do not think

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[19] Indian Agent McDonald, to the Indian Commissioner, March 22, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 40–42).

[20] Draft [DSGIA], to A.M. Burgess, Deputy Minister of the Interior, April 7, 1886, and Draft [DSGIA], to A.M. Burgess, Deputy Minister of the Interior, May 6, 1886, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 43, 47–51).

> there would be six settlers on it in as many years. Its only value is for the purpose it is being used by the Indians, viz. putting up hay.[21]

As in 1886, the department refused the proposal based on the concerns expressed by Indian Agent McDonald.

When the issue was resurrected in January 1899, it was a local MLA who made the proposal to Clifford Sifton, the Minister of the Interior and Superintendent General of Indian Affairs:

> Mr. R.S. Lake, Member of the Legislative Assembly of the North West Territories, has called on me in regard to getting a certain portion of the Indian Reserve north of the railway track at Broadview and Grenfell open for settlement. There is a rough sketch and memorandum attached. Please look into it and let me know what chance there is of being able to meet his views. I explained to Mr. Lake that it depended altogether upon the consent of the Indians.[22]

Before discussing this matter with the Indian Commissioner or the local Indian Agent, Sifton's private secretary, J.A.J. McKenna, first asked Surveyor A.W. Ponton to report on the matter. Ponton supported the proposal:

> I would strongly advocate the adoption of Mr. Lake's suggestion, for the reason that the Indians are not benefited by the land, and while it remains tied up, settlement of the large agricultural district lying south of the Railway is prevented owing to the lack of market towns between Whitewood, and Grenfell ...
>
> I would suggest that the Agent be instructed to obtain a surrender of the land from the bands interested.[23]

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[21] A. McDonald, Indian Agent, Crooked Lake, to the Superintendent General of Indian Affairs, March 10, 1891, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 53–55).

[22] Clifford Sifton, Minister of the Interior, to J.A.J. McKenna, January 19,1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 62).

[23] A.W. Ponton, Surveyor, to J.A.J. McKenna, February 17, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 64–66).

Upon receiving Ponton's endorsement, Superintendent General Sifton requested additional information from Commissioner David Laird and the local Indian Agent.[24] Laird convened a meeting with J.P. Wright, the Indian Agent at Crooked Lake, and Alan McDonald, the former Agent. Both opposed the proposal, and Commissioner Laird reported to Sifton that it would be unwise to pursue a surrender of the lands in question because "the Indians of three of the bands cut most of their hay off the southern portion of these reserves."[25]

In turn, Superintendent General Sifton informed Mr Lake that the department would not, at that time, consider approaching the Indians for a surrender of the southern portions of their reserves. In concluding this correspondence, however, Sifton noted the following possibility:

> The Commissioner, however, says that the Agent is making an experiment this year of raising Brome grass on the cultivated lands of these Indians, and if this experiment should prove a success it would remove the necessity at present existing of holding the Southern portion of the Reserve for hay land and it would then be, it is thought, an easy matter to obtain the desired surrender.[26]

For the third time in less than 15 years, the Department of Indian Affairs refused to entertain the interests of the local settler community by entering into discussions with the Cowessess Band for its surrender of the southern portion of its reserve.

In September 1900, Magnus Begg became the Indian Agent for the Crooked Lake Agency. Sixteen months later, in January1902, Agent Begg submitted a "proposition" to the department that he thought would be of great benefit to the Indians of his Agency. According to Begg, the Indians within his jurisdiction (he did not specify any particular group and his Agency encompassed Cowessess, Kahkewistahaw, Ochapowace, and Sakimay Bands) were having a difficult time paying debts incurred purchasing items such as wagons, farm implements, and harnesses for their agricultural operations. In order to pay these debts, the Indians were continually forced to sell off

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[24] Clifford Sifton, SGIA, to D. Laird, Indian Commissioner, February 23, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 67).

[25] D. Laird, Indian Commissioner, Winnipeg, to Clifford Sifton, SGIA, April 22,1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 69).

[26] Clifford Sifton, SGIA, to Mr. Lake, MLA, Regina, April 29, 1899, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 71–72).

portions of their cattle herd, thereby depleting their investment. While acknowledging that the Indians needed the machinery and implements in order to produce enough feed for their cattle herds, Begg proposed that a surrender of part of their reserve land would provide a means to eliminate the accumulated debts of members of the Crooked Lake Bands:

> These Indians have at present about 50,000 acres of land that they do not require, say a strip 3 miles deep above the line of the C.P. Ry, on the southern boundary of the Reserve, also the Leech Lake Reserve (all hay lands) in the Yorkton district most of which could be sold.
>
> The proceeds according to the enclosed rough estimate should bring them each about $17.00 per annum interest, which amount would pay their debts, furnish them with more young cattle, lumber, &c.
>
> If the Department would sanction this, I will use my best endeavors to have the Indians give a surrender, I see in this way that in a very few years they will be doing business on a solid basis and will prosper accordingly.[27]

The Indian Commissioner, David Laird, relied on his previous investigations of surrender proposals to inform Begg that the land proposed by him for sale was needed for hay purposes, and any such proposal should await thorough consideration:

> I beg to say that the information I have regarding the lands in question is that they are required for hay purposes. Where there are so many cattle (and the number ought to be increased) it would never do to have the Indians short of hay. It may be that owing to the wet season last year sufficient hay was secured outside of these lands, but the conditions in the future may not be so favourable and the lands would in that case be again required for hay purposes.
>
> The question is one that cannot be decided offhand, but requires very careful and mature consideration and I think had better stand for the present.[28]

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[27] Magnus Begg, Indian Agent, to David Laird, Indian Commissioner, January 13, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 73). The Leech Lake Reserve mentioned belonged to the members of Little Bone's Band, most of whom resided on the Sakimay reserve. Upon concluding an agreement whereby those interested would be absorbed by the Sakimay Band, 75 per cent of the Leech Lake Reserve was surrendered in 1907 (see ICC Documents, pp. 513–20).

[28] David Laird, Indian Commissioner, to Indian Agent, Crooked Lake Agency, January 22, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 76).

Two months later, a group of settlers from the villages of Broadview and Whitewood, Saskatchewan, forwarded a petition to the Minister of the Interior, requesting, once again, that the strip along the southern boundary of the Crooked Lake Reserves be opened for settlement purposes. With signatures from over 190 local residents, including the farmer and MLA, R.S. Lake, the petition asked that the "Honourable the Minister of the Interior use his best offices to procure the assent of the Indians to the sale of this land to actual settlers...."[29] As a result, J.K. McLean, the Secretary of the Department of Indian Affairs, was instructed by the office of the Minister, to reply as follows:

> I am directed to acknowledge the receipt of Petition from yourself and other residents of the Village of Broadview, the Town of Whitewood and surrounding districts, in East Assiniboia, asking that the assent of the Indians be procured to the sale of the Crooked Lakes Reserves to actual settlers, and to state that the Minister appreciates the desirability of acceding to the prayer of the Petitioners, but, of course, as they are aware that no Indian Reserve can be sold without the consent of the Indians.
>
> I may say, however, that the Department will do its best to procure such consent and an Officer will be detailed for the purpose.[30]

The petition was forwarded to Indian Commissioner David Laird at Winnipeg, with instructions to send "an Inspector, or Officer of the Department, whoever you think is best qualified to discuss the question of surrender with the Indians."[31] Commissioner Laird opted to address the issue in person, but put the proposal only to Kahkewistahaw and Ochapowace, not Cowessess:

> I have to report that while returning from Varley last month [i.e., April 1902], I myself called at the Agency, and by previous appointment met the Indians in Council on the 16th. I explained to the bands of reserves 71 and 72 [Ochapowace and Kahkewistahaw, respectively], which are nearest the homes of the petitioners, the object of the council, and asked them if they were willing to surrender a strip of two

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29 Residents of the Village of Broadview and Town of Whitewood, to the Minister of the Interior, (undated, c. March 30, 1902), and Department of the Interior, Ottawa, to Mr McLean [Secretary, DIA], March 31, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 77–84).

30 J.D. McLean, Secretary, DIA, to Rev. J.G. Stephens, Broadview, April 2, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 85).

31 J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, Winnipeg, April 2, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 86).

> or three miles on the part of their reserves nearest the C.P. Railway. I did not make the same proposal to Coweses [sic] band No. 73, as in conversation with Mr. Agent Begg, I ascertained their hay lands are almost wholly along the southern part of the reserve. Moreover, reserve 73 is not so near as reserves 71 and 72 to Whitewood and Broadview where the principal petitioners reside.
>
> I found the Indians strongly opposed to surrendering any portion of their reserves....
>
> When I put the question whether any member present of the bands represented at the meeting were favourable to a surrender, there was no response whatever.[32]

As had happened in the past, the detailed report from Commissioner Laird brought the issue to a close. Nearly two years passed before the matter was reintroduced.

Departmental Response, 1904 to 1907

In March 1904, the Superintendent General of Indian Affairs, Clifford Sifton, once again brought forward the Broadview settlers' desire for a surrender of the Crooked Lake Reserves. In writing to his deputy, Frank Pedley, Sifton noted the following:

> The people of Broadview and neighbourhood are very anxious that the south half of the Indian Reserve there should be surrendered and sold so as to open for settlement. I wish you would have the matter referred to the Commissioner's office so that Mr. McKenna can look into it and see whether it would be desirable from an Indian standpoint and whether the Indians would be likely to agree.[33]

Pedley asked Assistant Indian Commissioner J.A.J. McKenna to respond, and the latter reminded Minister Sifton that Commissioner Laird had personally investigated the same issue in April 1902 and had reported that the Indians of IR 71 and 72 opposed surrendering any portion of their lands. Based on this information, McKenna determined the following:

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[32] David Laird, Indians Commissioner, Winnipeg, to the Secretary, DIA, May 6, 1902, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 87–89).

[33] Clifford Sifton, Minister of the Interior, to Frank Pedley, DSGIA, March 8, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 96). It is interesting to note that Sifton requested that Mr McKenna be authorized to investigate this issue. McKenna's personal association with the Minister went back to February 1, 1897, when he was appointed private secretary to the Minister of the Interior. See D.H. Hall, "Clifford Sifton and Canadian Indian Administration, 1896–1905" (l977) 2, 2 *Prairie Forum* 127 at 130.

> From the strong objection made by the Indians to surrendering any portion of the reserves, it seems to me that it would be bad policy to have me convene the Indians for the purpose of discussing anew a proposal to surrender, for it might create the impression that the Department is acting for the settlers in the matter. It would, I submit, if later information be required, be more advisable to have the Agent who is on the spot inquire quietly as to the mind of the Indians and report.[34]

Officials at headquarters agreed with this proposal, and on March 28,1904, Indian Commissioner Laird was instructed that "the Agent take the matter up with the Indians to see if there is a prospect of the surrender being obtained."[35] Agent Begg wrote to Commissioner Laird on April 11, 1904, that he would "at once ... have a council with the Indians."[36] Begg, however, died nine days later, on April 20, 1904.[37] J.A. Sutherland, the resident miller and blacksmith, was in charge of the reserve until the new agent, Matthew Millar, arrived on March 3, 1905.[38]

The historical documents imply that someone may have raised the issue with the bands before mid-June 1904, however, for on June 14 of that year, Acting Agent Sutherland forwarded a letter to the Commissioner's office in Winnipeg from Kanas-way-we-tung, No. 7 Cowessess Band, who "is strongly opposed to selling part of the reserve and as a means to stop this he thinks he can by locating on the extreme South west corner of the reserve."[39]

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[34] J.A.J. McKenna, Assistant Indian Commissioner, Winnipeg, to the Secretary, DIA, March 19, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 100–2).

[35] J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, Winnipeg, March 28, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 104).

[36] Magnus Begg, Indian Agent, Crooked Lake Agency, to David Laird, Indian Commissioner, April 11, 1904, NA, RG 10, vol. 3561, file 82-4 (ICC Documents, p. 105).

[37] Alex McGibbon, Inspector of Indian Agencies, NWT, to SGIA, September 16, 1901, Canada, Department of Indian Affairs, *Annual Report for the Year Ending June 30, 1901*, 191.

[38] J.A. Sutherland, Acting Indian Agent, NWT, to SGIA, August 1, 1904, Canada, Department of Indian Affairs, *Annual Report for the Year Ending June 30, 1904*, 148.

[39] J.A. Sutherland, in charge, Crooked Lake Agency, to J.A.J. McKenna, Assistant Commissioner, Winnipeg, June 14, 1904, NA, RG 10, vol. 3561, file 82-4 (ICC Documents, pp. 106–7).

At the annuity payments in July 1904, Commissioner Laird proposed to the Crooked Lake Bands that they surrender the southern part of their reserves as a means of raising money to fence the reserve, and the idea was left for the band members to consider:

> At the annuity payments in July [1904] the matter was brought up, as a favourable opportunity occurred in connection with a complaint that settlers' animals strayed upon the reserve and were left there by owners for grazing purposes. Mr. Lash, of this office, who was in charge of the payments, fully explained to the Indians the benefit they would derive by surrendering a strip of the reserve and a portion of the proceeds received from the sale being used to fence the reserve. The Indians appeared to appreciate the suggestion, but wanted time to think it over. Of course, Mr. Lash was not authorized to make any definite offer; but he explained to the Indians that on other reserves the plan had been adopted and was very satisfactory to the Indians. The Cowesses [sic] Band headed by their Chief, Joe LeRat, wanted the full proceeds of the land surrendered handed over to the Indians to do with as they saw fit. This suggestion Mr. Lash told them could not be acted upon. Joe LeRat is a nonprogressive Halfbreed and a good talker, so that he is readily listened to by the Indians. I would suggest that shortly after the new Agent has been appointed and the affairs of the agency fully reported upon by the Inspector, that the question of surrender be taken up with the Indians either by myself or the Asst. Commissioner, with full power to make a definite proposal to the Indians of say 10% of the proceeds of sale to be expended for their benefit in farming outfits and in a per capita payment in cash or for liquidation of debts.[40]

Commissioner Laird stressed that "[a]t the present time it would not be well to push the matter too hastily, as it is one that requires very careful handling."[41] The secretary of the department agreed that the issue should be let stand until after the affairs of the Agency had been put in order.[42] The matter lay dormant for two years.

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[40] David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 110–11).

[41] David Laird, Indian Commissioner, to the Secretary, DIA, September 30, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 111).

[42] J.D. McLean, Secretary, DIA, to David Laird, Indian Commissioner, October 4, 1904, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 113).

1907 SURRENDER OF LAND IN IR 73

Prelude to Surrender

In March 1906, the Department of Indian Affairs received a letter from a resident of Saskatchewan through the local Member of Parliament, Mr Turiff, asking whether or not an Indian could sell reserve land to a non-Indian. In reply, departmental Secretary J.D. McLean informed the individual that such an arrangement would be a violation of the *Indian Act*, but added that the department would soon be arranging to have certain lands within the Crooked Lake Reserves surrendered and placed on the market, to "be sold for the benefit of the Indians, due notice of the sale being given to all parties."[43]

In June 1906, William Morris Graham, the Inspector of Indian Agencies for the Qu'Appelle Inspectorate, wrote in a "personal" letter to the Superintendent General of Indians Affairs, Frank Oliver, that he had just returned from three days in the Crooked Lake Agency where he had been "feeling the Indians with regard to the surrender of their land (about 95,000 acres)."[44] According to Graham, the bands knew about the "good cash payment down" received by the Pasqua Band at its recent surrender, and, he thought, they might be willing to surrender land on similar terms:

> I am satisfied that if this matter were handled promptly and on about the same lines as the Pasqua's surrender was obtained, these Indians would consent to sell. In fact, I am sure that if I had had the papers and money with me when I was there I could have obtained the surrender.
>
> ... The trouble in the past has been due to the fact that too many people have been dabbling in the matter. The people in the adjacent towns are keen for the surrender, and as a result, the Town Council, the Board of Trade and Individuals have been talking to the leading Indians, and they now have all kinds of ideas of [sic] their heads. In my opinion, the matter should be handled by our own people, without the knowledge of the outside public, as was done at Pasqua's, the people at Fort Qu'Appelle did not know anything until the matter was settled.
>
> I drove over the reserve and saw the land again, and I believe that a proper basis on which to pay would be $3.00 for the Ochapowace reserve, and $5.00 for Ka-ka-wistahaw and Cowesses [sic] reserves. The difference could be made up when the

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[43] J.D. McLean, Secretary, DIA, to A. Lowes, Grayson, Saskatchewan, March 16, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 113).

[44] W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 114–16).

> second twentieth is paid. As this is a large deal it would be necessary to have the matter thoroughly understood and the terms of surrender should be thoroughly decided upon before the proposition is put to the Indians, as it would have a bad effect if the Department had to go back to them with a second proposition. Outsiders would interfere in the interval as in the past. If a little latitude were given to the Officer taking the surrender, he could perhaps meet any small requests, that would come from the Indians at the meeting.[45]

On July 6, 1906, headquarters asked Inspector Graham to provide precise acreages for the land to be surrendered from each reserve.[46] Graham responded at the end of September with the following report, giving the acreages, estimated value, and his opinions about how the Indians should be approached in this matter:

> My opinion is that the Indians should be asked to surrender all of the land lying in Township 17, Ranges 3, 4, 5 and 6, – in all about 90,240 acres. The land in each reserve would be as follows, – Coweses, 36,480, Ochapowace, 21,120, Ka Ka wis ta haw, 32,640. The Department are aware that several futile attempts have been made to get this surrender. I am of the opinion, however, that it can be obtained if handled judiciously. The money for the first payment should be on hand the day the meeting asking for the surrender is held, and the whole matter should be handled with dispatch. I am almost certain that Ka Ka wistahaw and Ochapowace Indians will surrender and I am hoping that Coweses Indians will fall in line when they see the other Indians surrendering.[47]

W.A. Orr, the officer in charge of Lands and Timber Branch, provided J.D. McLean, the acting deputy minister, with the details of the proposed surrender in a memorandum dated September 28, 1906, at the end of which he asked "whether forms of surrender should be sent to Inspector Graham for submission to the Indians, on terms as above proposed by him."[48] Overwritten on this

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45 W.M. Graham, Inspector of Indian Agencies, to Frank Oliver, SGIA, June 19, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 114–16).

46 W.A. Orr, In Charge of Lands & Timber Branch, to J.D. McLean, Secretary, July 3, 1906, and J.D. McLean to W.M. Graham, Inspector of Indian Agencies, July 6, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 119–20).

47 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 122–23).

48 W.A. Orr, In Charge of Lands & Timber Branch, to the Acting Deputy Superintendent General, September 29, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 126).

memorandum are three notes, one from McLean to the Minister dated September 28: "Submitted whether Inspector Graham should be authorized to submit a surrender to the Indians on the lines herein indicated"; a response dated September 29: "Approved, go right ahead, B.O.M. [By Order of the Minister]" but the initials are unreadable; and finally McLean to Orr: "for necessary action" dated October 1, 1906.[49]

On the following day, October 7, 1906, the Chief Surveyor prepared a description for the surrender of approximately 20,704 acres on the Cowessess Reserve.[50] On October 3, 1906, McLean sent Graham the forms of surrender for the three Crooked Lake Bands, "which surrenders you are hereby authorized to submit to the Indians under and in accordance with the provisions of the Indian Act," along with a cheque for $22,046 – "being one-half of the 10% of the price of land on the different reserves, estimated on the basis referred to in your communication."[51] Graham replied that other work prevented him from immediately going to Crooked Lake to submit the surrenders, but he did not "consider that a delay will have any prejudicial effect on the proposition, in fact, I think it will have a contrary effect."[52] Graham also suggested that he "be authorized to insert the same conditions as were in the Pasqua Surrender," and on October 16, Secretary J.D. McLean forwarded an amendment to the original instructions:

> I beg to enclose, as requested, copy of the conditions in the surrender of the Pasqua lands, which may be inserted in the surrender of the Crooked Lake Reserves, making any necessary changes to suit the circumstances in each case.
>
> It will be satisfactory if you make an estimate of the value of improvements, but you should furnish the Department with full information in regard thereto, giving

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[49] See memorandum from W.A. Orr, In Charge of Lands & Timber Branch, to the Acting Deputy Superintendent General, September 29, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 126).

[50] S. Bray, Chief Surveyor, Description for Surrender, October 2, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 129).

[51] J.D. McLean, Acting Superintendent General of Indian Affairs, to Inspector W.M. Graham, October 3, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 130).

[52] W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 131).

> the nature of improvements and value thereof as well as the owner, so that the surveyor may be furnished with a complete statement in regard thereto.[53]

In early December 1906, Graham wrote to headquarters asking for money to complete the down payment to the Pasqua Band for their surrender before he went to the Crooked Lake Agency, "as I think it will have an effect on these Indians if they see how the Pasqua Indians have been dealt with."[54]

The First Surrender Meeting, January 21, 1907

Graham arrived at Crooked Lake at the end of January and proceeded to meet separately with the Cowessess, Ochapowace, and Kahkewistahaw Bands. His first meeting was held Monday, January 21, 1907, with the Cowessess Band, at the Agency office, which was on its reserve. With Graham was Indian Agent Matthew Millar and Peter Hourie, acting as interpreter. Hourie worked for 20 years as an interpreter in the Indian Commissioner's office in Regina before being posted to Sakimay's reserve as farming instructor in February 1898.[55]

According to the Agency's minute book entry, this first meeting on January 21 was "called for the purpose of considering a proposition for the surrender of a portion of their reserve lands lying on the south side of the Reserve," and advance notice of the meeting "had been given through the Chief Joe LeRat and Headman Ambrose Delorme."[56] At the beginning of the meeting, roll was called

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53 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, October 9, 1906, and J.D. McLean, Secretary, DIA, to W.M. Graham, October 16, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 131, 133).

54 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, December 7, 1906, NA, RG 10, vol. 2389, file 79921 (ICC Documents, p. 134).

55 In 1901, Hourie asked for a raise in his salary because, he stated, he acted as interpreter as well as farming instructor and "when there is any difficulty with Indians I am always sent there" (Peter Hourie to T.O. Davis, April 10, 1901, NA, RG 10, vol. 3770, file 34060). There is, however, no reference in the Agency's minute book or any of the other correspondence that Hourie acted as interpreter at the Crooked Lake Agency on any other occasion.

56 Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21, 1907 (ICC Exhibit 1, p. 54). Note: A copy of the Broadview Area Minutes Book was submitted to the ICC by counsel for the First Nation in March 1998. According to Mr. Al Brabant, this copy was made from a copy obtained by Senator Edwin Pelletier while he was Chief of the Cowessess Band. The original cannot be located, and was probably destroyed in a fire in DIAND's district office in Yorkton in the 1970s. The ICC's Exhibit 1 contains only the portions of that minute book which relate to the Cowessess First Nation.

prior to the discussion of business, but, unlike the subsequent meetings at Ochapowace and Kahkewistahaw, there is no record of the number of band members attending or their names.

The minute book entry for this first meeting states:

> Inspector Graham then addressed all present at length explaining the terms of the agreement which had been made by the Department and which was [illegible] submitted to them to decide and vote either for acceptance of the proposition or rejection as they may determine by their votes.[57]

Directly below this paragraph, a single word appears to have been inserted, and subsequently erased at an unknown date. It appears as though the word *originally* read "Refused." The last paragraph of these minutes – directly following the erasure – describes the conclusion of this meeting, without any reference to a vote having been taken:

> Chief Joe LeRat then spoke and said that he thought that the terms of the proposition had been well explained and that they understood it. Mr. Graham told them that he would be pleased to answer any question or make any further explenation [sic] they could suggest, and wanted them to take plenty of time before reaching a decision – meeting adjourned till Turday [sic] January 29th to meet again at the same place.[58]

Inspector Graham's subsequent report states that no vote was taken at this first meeting:

> On the 21st of January I called the Indians of Cowesses Band, Reserve 73, together, for the purpose of explaining to them the conditions of surrender that I wished to submit to them for a vote at a later date. At this meeting I arranged for a full meeting of the Band one week later ...[59]

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[57] Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21 and 29, 1907 (ICC Exhibit 1, pp. 54–56).

[58] Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 21 and 29, 1907 (ICC Exhibit 1, pp. 54–56).

[59] W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 802–3).

The next day, January 22, Graham, Millar, and Hourie met with the Ochapowace Band. At this meeting, the government party also included E.D. Sworder, a clerk in Graham's Regina office, H. Nichol, the clerk for the Crooked Lake Agency, H. Cameron, the department's official interpreter, and J.A. Sutherland, formerly the farming instructor on Cowessess Reserve and now the miller and blacksmith for the Agency.[60] A vote was taken at this meeting and failed, four voting in favour and 16 against. On the next day, January 23, the same seven government officials met with the Kahkewistahaw Band and again a vote was taken, and again a surrender was refused, five voting for the surrender and 14 against.[61] Inspector Graham did not explain why he took votes at the initial meeting with Ochapowace and Kahkewistahaw and not with Cowessess, but from earlier correspondence it appears clear that he "was almost certain that Ka Ka wistahaw and Ochapowace Indians will surrender and I am hoping that Cowesses Indians will fall in line when they see the other Indians surrendering."[62]

The Second Surrender Meeting, January 29, 1907

Five days later, on January 28, Graham again met with the Kahkewistahaw Band at its request, and again put the surrender proposition to a vote. On this occasion, the surrender was accepted by a margin of 11 to six. Immediately after the surrender, the Inspector "at once began paying the approximate one-twentieth, which was $94.00 each. This payment lasted well on to mid-night and the day following."[63]

On the next day, January 29, Graham, Millar, Sworder, Nichol, Sutherland, and Cameron proceeded to the Cowessess Reserve to meet with that Band, as proposed at the first meeting. Mr

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60 All information about departmental employees is taken from the Department of Indian Affairs *Annual Reports*.

61 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 802–3). For a comprehensive discussion of the Kahkewistahaw surrender see Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998), 8 ICCP 3.

62 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, September 24, 1906, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 122).

63 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 802).

Hourie is not listed as attending, but, despite the presence of the department's paid interpreter, Harry Cameron, band member Alex Gaddie acted as interpreter. Mr Gaddie, often cited in the annual reports of the department as one of the most productive farmers in the Cowessess Band, had acted as interpreter at other meetings, according to other minute book entries.

The minutes of the meeting state as follows:

> Adjourned meeting of Cowesess Band of Indians held this 29th day of January, 1907 for the further consideration of an agreement for the surrender of a portion of their lands. Mr. Inspector Graham presiding Mr. M. Millar Indian Agent with Mr Sworder Mr. H. Nichol Mr J.A. Sutherland and H. Cameron were also present a member of the Band Alex Gaddie acted as Interpreter. The roll being called 29 [numbers superimposed over each other] voting Indians answered to their names. Mr. Graham again carefully made further explination [sic] of the matter under consideration after which a vote was proceeded with, the number voting being
>
> **For Surrender:**
> 1. N Sparvier
> 2. M. Lavallee
> 3. T. Gopher
> 4. B. Henry
> 5. Wm Trottier
> 6. Max Gunn
> 7. J.J. Stevenson
> 8. Nap Delorme
> 9. Aug. Peltier
> 10. Aisican
> 11. Agecoutay
> 12. Ed Peltier
> 13. Gilbert Gaddie
> 14. Stanislaus
> 15. Alex Gaddie
>
> **Against Surrender:**
> 1. Napahpenness
> 2. Joe LeRat
> 3. Ambrose Delorme
> 4. Kanaswayweting
> 5. Bapt. McLeod
> 6. Wm Aisaican
> 7. Zac LeRat
> 8. Alex Tanner
> 9. St. Pierre Aisaican
> 10. Joe Peltier
> 11. Ambrose LeRat
> 12. Pierre LeRat Jr.
> 13. Wapamoose
> 14. Pierriche Peltier
>
> After taking the vote payment was proceeded with when the following signed the agreement for surrender:

1. Aisican
2. Edward Peltier
3. Norbert Delorme
4. Max Gunn
5. Michael LaVallee
6. J.J. Stevenson
7. Wm Trottier
8. Atjecoutay
9. Francis Delorme
10. Napoleon Sparvier
11. William Sparvier
12. Baptiste Henry
13. Augustin Peltier
14. Gilbert Gaddie
15. Stanislaus Young
16. Wapamoose
17. Joseph Peltier
18. Alexander Gaddie
19. Tom Gopher
20. Ambrose LeRat
21. Nepahpeness
22. Ambrose Delorme

[sgd] M. Millar
Indian Agent[64]

At the community session held in the course of the Commission's inquiry into this surrender, Chief Joe LeRat's daughter, Harriet LeRat, who was born about 1911, consistently testified that her father attended the meeting and voted, but was ill and left before voting was complete. According to her testimony, the vote was tied when the Chief left and two men later informed Chief LeRat that a "stranger" had cast the deciding vote in favour of the surrender:

> A stranger is the one that sold it. My dad and the rest didn't want to sell....
>
> I remember there was a tie on that meeting but two men came along and told my dad they had lost, but they said the man was a stranger....
>
> He came home right after the meeting because he was sick, so after that that's when the men come to this place and told him about it, that they had lost....
>
> [In answer to the question: "Was your dad at the surrender meeting?" she said:] Yes, but when it was over he went home before it really come out evenly....
>
> He was there for the vote, but before they counted them he came home.[65]

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64 Broadview Area Minute Book, Reserve No. 73, Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 55–56).

65 ICC Transcript, March 11, 1998, pp. 12–15 (Harriet LeRat).

Alex Gaddie's name is the last one listed on the "yes" side, and in July 1908 Gaddie stated that he had indeed been the tie breaker:

> I had, as Mr. Graham knows well, the deciding vote on the surrender of our reserve, and had Mr. Graham told me before the surrender I was to receive nothing for my improvements, I certainly would not have given him my vote or helped him as I did."[66]

At our community session, elder Harold LeRat also implied that Gaddie was the tie breaker:

> They were – they were prepared to have a vote, and they were – supposedly had a vote, which was tied, and so I think it was Commissioner Graham at the time decided to have a meeting a week later, which is the 29th of January, in the meantime they went and got an extra person by the name of Alex Gaddie to come down to the meeting.[67]

The surrender document was witnessed by E.D. Sworder, H. Nichol, and M. Millar, Indian Agent (Inspector Graham's name is not listed), and signed by the 22 men listed above. Norbert Delorme, Max Gunn, Stanislaus Young, Wm Trottier, Ambrose LeRat, and Napoleon Sparvier signed their names; the others marked with an "X." A comparison of the voters' list with the surrender document reveals that 14 individuals named as voting "yes" are also named on the surrender document (the name "Nap Delorme" is not on the surrender); that six named as voting "no" are on the surrender document (Napahpeness, Wapamoose, Ambrose Delorme, William Aisaican, Joseph Peltier, and Ambrose LeRat), and that two names appear on the surrender which do not appear on the voters list (Norbert Delorme and Francis Delorme). Based on the 1906 paylist, there were 37 eligible voters at the time.[68] Of these eligible individuals, only two (No. 142 Alex Payasis/Tanner and No. 169 Emmanuel LeRat) were not paid the advance money. Further, there is one notation to the effect that the advance money was paid to a relative because the man, No. 190

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66 Alex Gaddie, Crooked Lake Agency, to David Laird, Indian Commissioner, July 13, 1908, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 226).

67 ICC Transcript, March 11, 1998, p. 20 (H. LeRat).

68 DIAND, Treaty Annuity Paylists, Crooked Lake Agency, Cowessess Band, July 13, 1906 (ICC Documents, pp. 641–53).

Isadore Sparvier, was too ill to attend.[69] These three names do not appear on the voters list or the surrender.

Two days later, on February 2, 1907, Inspector Graham and Alexander Gaddie swore the affidavit required under the *Indian Act*, before Justice of the Peace E.L. Wetmore. The affidavit stated: "The same having been first read over and explained to the said Alexander Gaddie who seemed to perfectly understand to same and made his make thereto in my presence." In this affidavit, both Graham and Gaddie attested that the surrender was assented to by a majority of the male members of the Band over the age of 21 years, and "That no Indian was present or voted at said council or meeting who was not a member of the Band or interested in the land mentioned in the said Release or Surrender."[70]

On February 12, 1907, Inspector Graham reported on the second Cowessess meeting as follows:

> Tuesday [January] 29th. The Band assembled on this date and after a great deal of talking a vote was taken which stood fifteen for selling and fourteen against. Chief Jo LeRat and Headman A. Delorme are non-progressive Indians voting against the surrender. Although the vote was so close it is interesting to note that twenty-two out of the twenty-nine Indians at the meeting signed. I began paying these Indians their approximate one-tenth which was $66.00. This payment continued well on into the night and for several days following.[71]

Originally, the band was to receive only one-twentieth of the estimated value of the land, but on the day of the surrender, Inspector Graham telegraphed to headquarters and received approval to

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69 Record of Advance Payments, Cowessess, January 29, 1907, and February 4, 1907, NA, RG 10, vol. 9849 (ICC Documents, pp. 147–67). Both Emmanuel LeRat and Alex Tanner, "who were absent at the time the land surrender money was paid," were paid in April 1908: see J.D. McLean, Secretary, DIA, to M. Millar, Indian Agent, April 6, 1908, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 215).

70 Surrender affidavit, February 2, 1907, DIAND Land Registry, Registry Number 1127-5 (ICC Documents, pp. 797, 799). The wording in Gaddie's portion of the affidavit reads "a habitual resident on the Reserve" rather than "a member of the Band."

71 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, p. 803).

increase the payment to one-tenth.[72] The payment was made in two instalments of $33.00 each per person, on January 29 and February 4, 1907.

The surrender was confirmed by Order in Council PC 409, dated March 4, 1907,[73] and the surrendered land was subdivided in May 1907 and offered for sale by auction in November 1908 and June 1910.

[72] Telegram, W.M. Graham, Inspector of Indian Agencies, to J.D. McLean, Secretary, DIA, January 29, 1907, and telegram, Frank Pedley, DSGIA, to Graham, February 1, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 872 and 875).

[73] Order in Council PC 409, March 4, 1907 (ICC Documents, p. 176).

PART III

ISSUES

The Commission has been asked to determine whether Canada owes an outstanding lawful obligation to the Cowessess First Nation as a result of events surrounding the surrender of a portion of IR 73 in 1907. The parties agreed to frame the issues before the Commission in the following manner:

Issue 1 What is the proper interpretation of section 49 of the *Indian Act*?
In particular, on the basis that a majority of eligible Band electors attended the surrender meeting, does section 49 require a majority of those attending the surrender meeting, or a majority of those voting at the surrender meeting, to vote in favour of the surrender in order to achieve the requisite consent?

Issue 2 Based on a preponderance of the evidence presently before the Commission in this inquiry, how many eligible voters of the Cowessess Band attended the surrender meeting on January 29, 1907, for the purpose of a surrender vote?

Issue 3 Based on a preponderance of the evidence placed before the Commission in this inquiry, did a majority of the eligible voting members of the Cowessess Band assent to the surrender of a portion of reserve No. 73 within the requirements of the *Indian Act*?

PART IV

ANALYSIS

ISSUE 1 INTERPRETATION OF SECTION 49 OF THE *INDIAN ACT*

What is the proper interpretation of section 49 of the *Indian Act*?

In particular, on the basis that a majority of eligible Band electors attended the surrender meeting, does section 49 require a majority of those attending the surrender meeting, or a majority of those voting at the surrender meeting, to vote in favour of the surrender in order to achieve the requisite consent?

Surrender Provisions of the 1906 *Indian Act*

For a surrender of Indian reserve land to be valid, the parties must comply with the procedural requirements in section 49:

> **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, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 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, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> 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.[74]

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[74] *Indian Act*, RSC 1906, c. 81, s. 49

The historical origin of section 49 lies in the *Royal Proclamation of 1763*. The surrender provisions of the latter document arose from the recognition that "Great Frauds and Abuses" had been perpetrated in the acquisition of Indian lands by Europeans. As a result, and in order to protect its aboriginal subjects from exploitation, the Crown interposed itself between First Nations and third parties by prohibiting the alienation of Indian lands to anyone other than the Crown.

The Supreme Court of Canada considered the meaning of section 49 of the *Indian Act* in *Cardinal v. R.*[75] In that leading case, Estey J provided the following summary of the Act's surrender provisions:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Part I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of s. 49(2). Fifthly, the meeting must be held in the presence of an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.[76]

The main issue in *Cardinal* was whether the "majority" contemplated by section 49(1) of the Act required that an absolute majority of all eligible voting members of the Band vote in favour of the surrender. On behalf of the Court, Estey J rejected that view. Rather, he held that the section only required that a majority of eligible voters be in attendance at the meeting, and that a majority of the quorum give their assent to the surrender.[77]

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75 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

76 *Cardinal v. R.*, [1982] 1 SCR 508 at 518–19, 13 DLR (4th) 321, 3 CNLR 3 at10.

77 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, 3 CNLR 3 at 10.

Therefore, it is clear from the above that section 49(1**)** comprises four components:

- A meeting must be summoned for the express purpose of considering the surrender;
- The meeting must be summoned in accordance with the rules of the Band;
- The meeting must be held in the presence of the Superintendent General or an authorized officer; and
- A majority of the male members of the band of the full age of 21 years must attend the meeting, and a majority of the quorum must assent to the surrender.

The provisions of section 49(1) have been held to be mandatory in nature, with the result that a failure to comply with those terms will render a surrender void *from the outset.* In the words of the trial judge in the case of *Chippewas of Kettle and Stony Point*:

> Section 49(1) lays down, in my view, in explicit terms, a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.[78]

This interpretation has been accepted by this Commission in previous inquiries,[79] and, as a result, if it is found on the facts of this case that the provisions of section 49(1) were not followed, the surrender must be considered void.

In this case, the parties have identified a preliminary issue concerning the nature of the majority assent required by the Act. As a result, our analysis will commence with this issue.

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78 *Chippewas of Kettle and Stony Point v. Attorney General of Canada*, [1996] 1 CNLR 54 at 83.

79 See ICC, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3 at 68; *Duncan's First Nation Report on 1928 Surrender Inquiry* (Ottawa, September 1999), 171, reported (2000), 12 ICCP 53 at 208–9.

Majority Assent

The preliminary legal issue in this inquiry concerns a narrow point that did not specifically arise on the facts in *Cardinal*. This point concerns the composition of the majority of the quorum at the surrender meeting, often referred to as the "second majority" in reference to Justice Estey's interpretation of section 49(1) of the *Indian Act.* To determine the composition of the majority of the quorum, we are required to decide whether the majority in favour of a surrender must be drawn from all those in attendance at the surrender meeting, or whether it may be drawn merely from those present and voting. In other words, we must decide whether abstentions from the vote are to be taken into account in determining the validity of a surrender. The two parties to this inquiry hold opposing views on this issue.

In his written submission, counsel for the Cowessess First Nation refers to the Supreme Court's recognition in *Cardinal* that section 49(1) may be interpreted in number of ways, including both of the two interpretations articulated above. Quoting Estey J:

> Section 49(1) may be capable of at least five interpretations (assuming always a validly called meeting regularly held):
> 1. A majority of all eligible voters in the band must attend a meeting and that same absolute majority must assent to the surrender.
> 2. A majority of all eligible voters in the band must attend a meeting and a majority of those present must assent to the surrender.
> 3. A majority of all eligible voters in the band must attend a meeting and a majority of those present and voting must assent to the surrender.
> 4. A simple majority of all eligible voters who attend the meeting must assent to the surrender.
> 5. A simple majority of all eligible voters who attend and vote must vote in favour of the surrender.[80]

The First Nation's counsel contends that, given the decision of the Supreme Court in *Cardinal*, options 1, 4, and 5 are effectively eliminated. This leaves only options 2 and 3, which represent the interpretations put before us by the Cowessess First Nation and Canada, respectively.

Counsel for the First Nation also points out that Estey J stated:

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[80] *Cardinal v. R.*, [1982] 1 SCR 508 at 511–12, 13 DLR (4th) 321, 3 CNLR 3.

> No distinction was made by the majority of the Court of Appeal as between a majority of members present or a majority of those voting at a meeting called for these purposes, perhaps because on the facts here it is unnecessary to do so.[81]

As a result, the First Nation takes the position that it is open to us to accept option 2 above, and it puts forward several arguments in support of its interpretation. First, counsel draws an analogy between the surrender provision and statutory provisions having an impact upon aboriginal and treaty rights. He argues that, since section 49(1) is the legislative means by which the aboriginal right to occupy land can be extinguished, it must be interpreted strictly and in a way that has the least potential to extinguish the aboriginal right.[82]

Secondly, counsel cites with approval the comments of Dickson J in *Nowegijick v. The Queen* to the effect that

> treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian.[83]

He argues that, as between the two possible interpretations of section 49(1), the position put forward by the First Nation in this case has the greater capacity to reveal the intent of the entire Band with respect to a surrender. As a result, he submits that option 2 is consistent with *Nowegijick* in that it is clearly in the First Nation's favour that consent be obtained from the greatest number of its members.[84]

Counsel also states that, although Justice Estey in *Cardinal* noted that option 3 was generally consistent with the common law approach to majority voting requirements in the context of corporations and unincorporated associations, it should not follow that the same reasoning should be applied to the surrender requirements of the *Indian Act*. He cites McLachlin J in *Apsassin* in support of his position:

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81 *Cardinal v. R.*, [1982] 1 SCR 508 at 513, 13 DLR (4th) 321, 3 CNLR 3.

82 Written Submission on Behalf of the Cowessess First Nation, September 27, 1999, pp. 13–15, 21; citing *R. v. Badger*, [1996] 1 SCR 771 at paragraph 41.

83 *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36, (1983) 144 DLR (3d) 193 at 198.

84 Written Submission on Behalf of the Cowessess First Nation, September 27, 1999, pp. 15–17.

> The formal surrender requirements contained in the *Indian Act* serve to protect the Indians' interest by requiring that free and informed consent is given by a band to the precise manner in which the Crown handles property which it holds on behalf of the Band. The Act also recognizes the Indians as autonomous actors capable of making decisions concerning their interest in reserve property and ensures that the true intent of an Indian Band is respected by the Crown. No matter how appealing it may appear, this Court should be wary of discarding carefully drafted protections created under validly enacted legislation in favour of an *ad hoc* approach based on novel analogies to other areas of the law.[85]

Counsel argues that the First Nation's interpretation, option 2, is also consistent with the "intention-based" approach to surrenders mandated by the Supreme Court of Canada in *Apsassin*, above. In that case, both the majority and the minority judgments referred to the intention of the *band* as the purpose underlying section 49.[86] Counsel submits that Canada's interpretation, option 3, "clearly serves to enhance the potential for minimizing Band participation in the surrender decision."[87] As a result, he argues that option 2, which requires majority assent from the entire quorum, follows the Supreme Court's direction that the true intention of the Band be ascertained.

Canada, for its part, takes the position that certain comments made by Justice Estey in *Cardinal* support its position that a valid consent within the meaning of section 49(1) of the Act only requires that a majority of those present and voting vote in favour of the surrender:

> Unless otherwise prescribed by the statute (and this statute does not do so), a meeting expresses assent by a majority of votes cast at that meeting.[88]

Counsel for Canada also quotes passages from *Cardinal* that appear to apply the common law in the interpretation of section 49(1):

> In the common law, and indeed in general usage of the language, a group of persons may, unless specially organized, express their view only by an agreement of the

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85 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 395–96.

86 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 370–71, 391.

87 Written Submission on Behalf of the Cowessess First Nation, September 27, 1999, p. 21.

88 *Cardinal v. R.*, [1982] 1 SCR 508 at 520, 13 DLR (4th) 321, 3 CNLR 3.

> majority. A refinement arises where all members of a defined group present at a meeting do not express a view. In that case, as we shall see, the common law expresses again the ordinary sense of our language that the group viewpoint is that which is expressed by the majority of those declaring or voting on the issue in question....
> ...
> To require otherwise, that is to say more than a mere majority of the prescribed quorum of eligible band members present to assent to the proposition, would put an undue power in the hands of those members who, while eligible, do not trouble themselves to attend, or if in attendance, to vote....[89]

Although the facts of *Cardinal* did not specifically require consideration of the issue of abstentions from the surrender vote, counsel for Canada submits that comments such as the above, when made by the Supreme Court, should be respected and followed, in particular when they are found in the Court's leading decision on the meaning of section 49(1).[90]

With respect to the interpretation of treaties and statutes applicable to Indians, counsel for Canada acknowledges that the *Nowegejick* case stands for the proposition that statutes concerning Indians should be liberally construed. He submits, however, that the principles enunciated in that case have been somewhat amended by subsequent decisions of the Supreme Court of Canada. For example, counsel for Canada quotes Justice La Forest in *Mitchell v. Peguis Indian Band*:

> But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament.... I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and in particular the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them....
> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would

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89 *Cardinal v. R.*, [1982] 1 SCR 508 at 516–17, 13 DLR (4th) 321, 3 CNLR 3.

90 Written Submission on Behalf of the Government of Canada, October 7, 1999, pp. 11–12, citing *Sellars v. R.*, [1980] 1 SCR 527 at 530.

> favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.[91]

Relying on the subsequent decision of the Supreme Court of Canada in *R. v. Lewis*,[92] which quoted with approval the above reasoning in *Mitchell*, counsel for Canada submits that the *Indian Act* must be interpreted having regard to the "wording, context, and purpose of the statutory provision."[93] Counsel for Canada argues that the ordinary meaning of the wording of section 49(1) supports the conclusion that Parliament intended that a valid consent could be obtained from a majority of those present and voting.

Further, Canada submits that, although the protective purpose of the surrender provisions of the Act were recognized in *Cardinal*, Justice Estey himself stated in that case:

> It serves no purpose to interpret the language of Parliament by attributing to it meanings which are not plain and natural but rather which are superimposed upon the words adopted by Parliament in order to promote an intention conceived by the Court to be inadequately attended to by Parliament itself.[94]

As a result, counsel for Canada submits that its interpretation of the section is consistent with the rules of statutory interpretation enunciated by the most recent decisions of the Supreme Court on the subject.

Thirdly, Canada submits that the First Nation's interpretation, option 2, leads to an absurd result, in that it would "give undue effect to the indifference of a small minority."[95]

Finally, Canada submits that its interpretation of section 49(1) preserves the option of neutrality and precludes the need to make assumptions about the intentions of abstainers.[96]

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91 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 143.

92 *R. v. Lewis*, [1996] 1 SCR 921.

93 *R. v. Lewis*, [1996] 1 SCR 921 at 954.

94 *Cardinal v. R.*, [1982] 1 SCR 508 at 520, 13 DLR (4th) 321, 3 CNLR 3.

95 Written Submission on Behalf of the Government of Canada, October 7, 1999, p. 18.

96 Written Submission on Behalf of the Government of Canada, October 7, 1999, pp. 19–22.

As noted earlier in this report, Justice Estey was not required to choose between options 2 and 3 in his decision in *Cardinal*. Both parties to this inquiry have referred to selected passages from Justice Estey's decision, which, if viewed in isolation, appear to support both option 2 and option 3. Therefore, it is open to us to interpret the provision ourselves, and to apply that interpretation to the facts before us in this inquiry. As a result, the question before us is, Which of the two interpretations is more legally sound, having regard to the principles governing the interpretation of statutes relating to Indians, and keeping in mind the reasoning of the Supreme Court of Canada in *Cardinal*, which remains the leading judicial authority interpreting section 49(1) of the Act?

As a first step, we must consider the relevant principles of statutory interpretation. As discussed above, the decision of the Supreme Court of Canada in *Nowegejick v. The Queen*[97] is authority for the proposition that treaties and statutes relating to Indians must be liberally construed and doubtful expressions resolved in favour of the Indians. Subsequent decisions of that Court, however, have amended the general principle as it pertains to statutes. The decision of the majority of the Court in *Mitchell v. Peguis Indian Band*[98] requires an examination of the purpose of the policy that the Act seeks to promote. Building on the reasoning in Mitchell, the Court's subsequent decision in *R. v. Lewis*[99] required that the "wording, context, and purpose of the statutory provision" be examined in the course of its interpretation.

This Commission had occasion, in the Friends of the Michel Society Inquiry,[100] to consider the above authorities in the context of the interpretation of other provisions of the *Indian Act*. In our report we stated:

> Thus, the principle is not simply that any construction favouring the Indians ought to be accepted, because we still, of course, demand fidelity to the language and purpose of the statute. Statutes relating to Indians should be construed liberally, having regard for parliamentary intent as embodied in the text....

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97 *Nowegejick v. The Queen*, [1983] 1 SCR 29.

98 *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.

99 *R. v. Lewis*, [1996] 1 SCR 921.

100 ICC, *Friends of the Michel Society Inquiry Report on 1958 Enfranchisement Claim* (Ottawa, March 1998), reported (1998) 10 ICCP 69.

> In summary, then, while statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation.[101]

It appears to us that the language of section 49(1), by itself, can support either the interpretation put forward by Canada or the interpretation advanced by the First Nation. Therefore, we must examine the purpose of the provision in order to determine which of the two possible interpretations is to be preferred.

The origin of section 49(1) of the *Indian Act* is found in the *Royal Proclamation of 1763*, which stated:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In Order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians ... 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....[102]

By its own terms, the above provision recognized that "great Frauds and Abuses" had been committed in the acquisition of the Indians' lands. Its clear purpose was to prevent the exploitation of the aboriginal subjects of the Crown in land transactions, a purpose that was *protective* in nature. All subsequent *Indian Acts*, including the 1906 Act at issue in this inquiry, have contained surrender provisions embodying the substance of the above, namely, that lands reserved for Indians cannot be disposed of except to the Crown. Therefore, if we determine that the policy underlying section 49(1)

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[101] ICC, *Friends of the Michel Society Inquiry Report on 1958 Enfranchisement Claim* (Ottawa, March 1998), reported (1998) 10 ICCP 69 at 93–94.

[102] *Royal Proclamation of 1763*.

of the 1906 Act was the intention to protect Indian bands from improvident transactions, we must interpret the requirement of majority assent in that light.

It is useful, in this context, to examine the views of the Supreme Court of Canada concerning the purpose of the surrender provisions of the *Indian Act*. First, we note that Justice Estey, in *Cardinal*, referred to section 49 of the 1906 Act in its entirety as a "background of precautionary measures" against which the assent of eligible voters was to be ascertained.[103] Subsequently, Justice Dickson observed, in *Guerin v. The Queen*: "The purpose of the surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited."[104]

More recently, McLachlin J stated in *Apsassin*: "My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection."[105] We are mindful of the fact that the Act confers autonomy upon a First Nation to consent to the sale or lease of its reserve, and its decisions in these matters, according to the Supreme Court in *Apsassin*, are to be respected and honoured.[106] Nevertheless, we conclude from all of the above that a major purpose underlying the surrender provisions of the *Indian Act*, a purpose dating from the earliest origins of the provision, is to protect a band from exploitative or ill-considered transactions concerning its land base.

As referred to earlier in this report, the Supreme Court of Canada in *R. v. Lewis*[107] stated that the context of a statutory provision, in addition to its language and purpose, must be considered in the course of its interpretation :

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103 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, 3 CNLR 3 at 10.

104 *Guerin v. The Queen*, [1984] 2 SCR 335 at 383.

105 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 370

106 *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 at 358.

107 *R. v. Lewis*, [1996] 1 SCR 921.

> In order to arrive at the correct interpretation of statutory provisions, the words of the text must be read in context: see *Driedger on the Construction of Statutes, supra* at p. 193.[108]

As a result, we have taken notice of the definitions of the terms "band" and "reserve" found in section 2 of the *Indian Act* of 1906, which are a part of the context within which the surrender provisions of the 1906 Act were enacted:

> 2(d) "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown....
> ...
> 2(i) "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians....[109]

We note that section 2 of the 1906 *Indian Act*, above, defined a "reserve" as land set aside for the use or benefit of a "band." In turn, the Act defined "band" as a "body of Indians who own ... a reserve *in common* ..."[110] Thus, it may be concluded that reserve land, in the context of the *Indian Act*, is set aside for *all* the members of a band, not merely for some. In other words, it is clear that ownership of a reserve is shared by the entire membership, notwithstanding that the 1906 Act only entitled a portion of the band to vote on a surrender. When we consider this aspect of the statutory scheme, in conjunction with the twin purposes of protection and autonomy underlying the surrender provisions of the Act, we conclude that section 49(1) must be interpreted in a way that takes into account the policy of protecting the interests of the entire band with respect to its land base. In this context of common ownership, we must determine which of the two possible interpretations best serves the above purposes.

It appears clear to us that the interests of the entire band with respect to its commonly held land are best protected if consent to the surrender is secured from the greatest number of band members. Therefore, it makes sense to us to interpret section 49(1) of the *Indian Act* so as to require

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108 *R. v. Lewis*, [1996] 1 SCR 921 at 955.

109 *Indian Act*, RSC 1906, c. 81, s. 2.

110 *Indian Act*, RSC 1906, c. 81 s. 2. Emphasis added.

the consent of a greater number of band members, as opposed to a smaller number. Option 3, the position advanced by Canada, would permit a smaller portion of those attending the surrender meeting to determine the fate of land set aside for present and future generations of the band as a whole. Option 2, however, would require the entire quorum in attendance at the meeting to be taken into account before such a decision could be made. Having regard to the language, context, and purpose of section 49(1) of the *Indian Act* of 1906, we determine that option 2, the requirement that majority consent be obtained from all those present at the surrender meeting, is to be preferred.

ISSUE 2 NUMBER OF ELIGIBLE VOTERS AT 1907 SURRENDER MEETING

Based on a preponderance of the evidence presently before the Commission in this inquiry, how many eligible voters of the Cowessess Band attended the surrender meeting on January 29, 1907, for the purpose of a surrender vote?

The parties to this inquiry agree that there were 37 potential eligible voting members of the Cowessess Band at the time of the surrender in 1907. The parties differ, however, on the number attending the meeting. Normally, it is necessary to establish the number in attendance for two purposes: to determine if a proper quorum was in attendance (which is not at issue here), and to determine whether majority consent was achieved. Our analysis will focus on the second aspect of majority consent.

The First Nation takes the position that this factual issue must be examined in the context of all the evidence pertaining to the events surrounding the surrender. Counsel for the First Nation argues that, based on all the evidence before us in this inquiry, there were at least 30, and perhaps as many as 35, eligible voters at the meeting, and that, as a result, a valid majority was not achieved.

First, counsel for the First Nation compares the voters list transcribed in the minutes of the meeting[111] with the surrender document itself,[112] and points out that although the minutes apparently record 29 votes, the 22 marks or signatures on the surrender include two individuals (Norbert Delorme and Francis Delorme) who were not listed on the voters list. Since the surrender was signed

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111 Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 136–37).

112 Surrender – Cowessess Band of Indians, January 29, 1907 (ICC Documents, pp. 138–40).

the same day the vote was taken, counsel argues that, by inference, these two individuals must have attended the meeting as well. In further support of this conclusion, counsel submits that Inspector Graham's report to his superiors[113] implies that all 22 who signed the surrender were at the meeting, and that, as the voters list names eight individuals who did not sign the surrender, there must have been at least 30 in attendance.[114] Further, the First Nation takes the position that the record of the first advance payment to the Band,[115] made on the same day as the surrender vote was taken, includes the names of five eligible voters who neither voted nor signed the surrender. Since the minutes indicate that the advance payment took place after the vote, and at the same time as the signing of the surrender, counsel submits that some or all of these five must have also been present at the meeting.[116] Finally, counsel relies on the Band's oral history, which was presented at the community session, to the effect that both Norbert Delorme and Francis Delorme were present at the meeting,[117] and that there were abstainers present at that time as well.[118]

For its part, Canada argues that the only credible evidence regarding the number in attendance at the meeting supports its position that only 29 eligible voters were present. Since Canada also takes the position that there were 15 authentic votes in support of the surrender, it argues that the surrender is valid.

Counsel for Canada relies on the minutes of the surrender meeting, which apparently record that 29 voting members answered the roll call prior to the vote.[119] Counsel acknowledges that the surrender document records two individuals, Francis Delorme and Norbert Delorme, who are not recorded in the minutes as having voted, but argues that neither document states unequivocally that

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113 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 168–71).

114 Written Submission on Behalf of the Cowessess First Nation, September 27, 1999, pp. 7–8.

115 Record of First Advance Payment ..., January 29, 1907 (ICC Documents, pp. 147–58).

116 Written Submission on Behalf of the Cowessess First Nation, September 27, 1999, p. 9.

117 ICC Transcript, March 11, 1998, p. 43 (George Delorme).

118 ICC Transcript, March 11, 1998, p. 38 (Henry Delorme).

119 Written Submission on Behalf of the Government of Canada, October 7, 1999, p. 29.

the two were present at the vote.[120] With respect to Norbert Delorme, it is Canada's position that he was present, but referred to mistakenly in the Minutes as "Nap" Delorme, which is the subject of Issue 3, below. With respect to Francis Delorme, Canada submits that the preponderance of evidence before this inquiry establishes that he was present at the meeting in time to sign the surrender document but was not present at the time of the vote. In support of this conclusion, Canada points out that the minutes of a later vote on the reserve concerning a different matter[121] specifically record an abstention beside the name of the abstainer. Therefore, counsel argues, the absence of such a notation in the minutes of the 1907 surrender vote is evidence that there were no abstentions on that occasion.[122]

Further, counsel for Canada cites Inspector Graham's report as evidence that the payment of the first advance took many hours to complete, and that there was therefore a significant period of time during which Francis Delorme could have arrived and signed the surrender document.[123]

With respect to the individuals who received the advance payment on January 29, 1907, but were not listed as present in the minutes and did not sign the surrender, counsel for Canada submits that the oral history evidence presented by the First Nation is not reliable. He submits that this evidence lacks the necessary detail, is not based on first-hand knowledge, and appears on its face to be the witnesses' opinion drawn from other documents.[124]

In rebuttal, the First Nation states that the primary evidence relied upon by Canada with respect to this issue, namely the minutes of the surrender meeting dated January 29, 1907, appears to have been altered in a material way. Specifically, it is alleged that the number of voters recorded

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120 Written Submission on Behalf of the Government of Canada, October 7, 1999, p. 30.

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

122 Written Submission on Behalf of the Government of Canada, October 7, 1999, p. 31.

123 Written Submission on Behalf of the Government of Canada, October 7, 1999, p. 31.

124 Written Submission on Behalf of the Government of Canada, October 7, 1999, pp. 32–33.

as answering the roll call was altered from "30" to "29." As a result, counsel argues that the document is unreliable as evidence on this point.[125]

Prior to making any determination on this issue, we must review the evidence before us in this inquiry. The documentary evidence pertaining to the number in attendance at the meeting consists of the minutes of the surrender meeting, the surrender document, and the paylist documenting the first advance payment of proceeds to band members. All the above documents are dated January 29, 1907. Also relevant is the sworn statement attesting to the circumstances of the surrender, dated February 2, 1907, and Inspector Graham's February 12, 1907, report to his superiors.

The most detailed document bearing on the issue of attendance consists of the minutes of the surrender meeting.[126] This document states that the roll was called and that 29 voters answered to their names. From our examination of the original document, however, the number "29" appears to have been superimposed over the number "30" in a subsequent alteration. There is no evidence as to the source of or circumstances surrounding this alteration. The minutes also list the names of 29 individuals who were apparently in attendance at the meeting. Of the 29 voters, it is stated in the document that 15 voted in favour of the surrender and 14 voted against it. It is also stated in the minutes:

> After taking the vote payment was proceeded with when the following signed the agreement for surrender.[127]

The document then lists the names of 22 individuals who signed the surrender, a list in accord with the list of signatories on the surrender document itself.[128] The voting list includes a number of names

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125 Written Rebuttal on Behalf of the Cowessess First Nation, October 14, 1999, pp. 12–13.

126 Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 136–37).

127 Broadview Area Minute Book, Reserve No. 73 – Crooked Lake Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, p. 136).

128 Surrender – Cowessess Band of Indians, January 29, 1907 (ICC Documents, pp. 138–40).

of individuals who did not sign the surrender, but all of these (with the exception of "Nap Delorme") are stated to have voted against the surrender, so their failure to sign is perhaps not unexpected.

Of the 22 signing the surrender, two individuals, Norbert Delorme and Francis Delorme, are not listed in the voters list. Leaving aside the issue of whether Norbert was in fact the "Nap Delorme" who voted, it appears to us that 30 known eligible voters, 28 from the voters list and two from the surrender document, either voted or signed the surrender. In addition, a number of eligible voters received payment of the first advance on that day,[129] but did not sign the surrender and are not listed as having voted.

Another piece of evidence, which is relied on in different aspects by both parties, is Inspector Graham's report to his superiors, dated February 12, 1907. Inspector Graham stated:

> The Band assembled on this date and after a great deal of talking a vote was taken which stood fifteen for selling and fourteen against. Chief Joe Lerat and Headman A. Delorme who are non-progressive Indians voting against the surrender. Although the vote was so close it is interesting to note that twenty-two out of the twenty-nine Indians at the meeting signed. I began paying these Indians their approximate one-tenth which was $66.00 This payment continued well on into the night and for several days following.[130]

Finally, we must consider the sworn affidavit of Inspector Graham and Alexander Gaddie attesting to circumstances surrounding the surrender. The relevant portions of the affidavit, which are preprinted, state that:

> The ... surrender was assented to by a majority of the male members of the said Band of Indians of the [Cowessess Reserve Number 73] of the full age of twenty-one years then present.[131]

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129 Record of First Advance Payment ..., January 29, 1907 (ICC Documents, pp. 147–58).

130 W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 168–71).

131 Surrender Affidavit, William H. Graham and Alexander Gaddie, February 2, 1907 (ICC Documents, p. 145).

What then is the effect of the above on the determination of this issue? Beginning with the minutes of the meeting, we find that the apparent alteration of the number 30 to the number 29 in connection with the number in attendance renders this part of the document of little weight with respect to this issue. There has been no explanation as to how or why this alteration came to be, and, as a result, it would not be safe to rely upon it as determinative of the very issue in question in this inquiry.

Our reading of Agent Millar's comment in the same document, quoted above, regarding the commencement of payment and signing, leads us to conclude that the payment began immediately after the vote, and that the signing of the document and payment took place simultaneously. It is common sense, however, that the payment of the entire Band would take a considerable period of time.

Inspector Graham's report, quoted above, appears to state that 29 were in attendance at the meeting. We agree with counsel for the First Nation, however, that a normal reading of Graham's statement that "twenty-two out of the twenty-nine Indians at the meeting signed" would lead to the conclusion that the 22 signers were certainly in attendance. If that were true, the total in attendance would exceed 29, since Francis Delorme was one of the signers. Therefore, this part of the report appears to contradict itself, which significantly lessens its weight as evidence.

We also point out that another statement in this report contains an inaccuracy, which may also lessen the weight that should be given to the report as a whole. Specifically, the document contains a statement to the effect that Graham:

> began paying these Indians their approximate one-tenth which was $66.00. This payment continued well on into the night and for several days following.[132]

This statement appears to imply that one payment of $66.00 took place over a period of days. The evidence before this inquiry, however, makes it clear that there were two payments of advance proceeds, one of $33.00, which took place on January 29, 1907,[133] followed by a second of $33.00,

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[132] W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, February 12, 1907, NA, RG 10, vol. 3732, file 26623 (ICC Documents, pp. 168–71).

[133] Record of First Advance Payment ..., January 29, 1907 (ICC Documents, pp. 147–58).

which took place on February 4, 1907.[134] It may be said that this inaccuracy is of slight degree. At the very least, however, it demonstrates that Graham did not record this event precisely. As a result, we believe that care should be taken before accepting the details of his statements as the literal truth.

The surrender affidavit sworn by Graham and Alexander Gaddie states that a majority of those present voted in favour of the surrender.[135] This would imply that no more than 29 eligible voters were present, since other evidence, such as the minutes, indicates that there were 15 votes in favour. The weight to be given to this evidence needs to be considered, however. The reference in the affidavit to a majority of those "present" is found in the preprinted part of the document. It is not a personal statement made by Graham and Geddie at the time of the event. Also, it is clear that Alexander Gaddie was illiterate, as he signified his assent to the affidavit by mark rather than by signature. Therefore, it would not be safe to consider this document as determinative where the evidence is as equivocal as it is in this case.

It is apparent that the evidence discussed up to this point does not reveal a clear preponderance on either side of this issue. In fact we might have been required to decide the issue on the burden of proof alone, were it not for one other piece of evidence before us. Specifically, when we examine the surrender document itself, we find evidence which tends to support the conclusion that Francis Delorme was likely present at the surrender meeting.

As referred to earlier in this discussion, the minutes note that payment of the first advance of proceeds began immediately after the vote, and that the signing of the surrender took place contemporaneously with payment. The January 29, 1907, surrender document[136] reveals that Francis Delorme signed the surrender, a fact confirmed by the minutes.[137] Moreover, he was not the last to sign the document, but signed before five band members who were unquestionably present at the time of the vote. It must be remembered that Francis Delorme and Norbert Delorme were the only

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134 Record of Second Advance Payment ..., February 4, 1907 (ICC Documents, pp. 159–67).

135 Surrender Affidavit, William H. Graham and Alexander Gaddie, February 2, 1907 (ICC Documents, p. 145).

136 Surrender – Cowessess Band of Indians, January 29, 1907 (ICC Documents, pp. 138–40).

137 Broadview Area Minute Book, Reserve No. 73 – Crooked Lakes Agency, Minutes of Council, January 29, 1907 (ICC Exhibit 1, pp. 55–56).

two names not on the voters list who signed the surrender. Leaving aside for the moment the issue surrounding Norbert Delorme, it appears more reasonable to us to conclude that Francis was present at the time of the vote but abstained, than it would be to conclude that he arrived later only to sign and be paid.

In support of this conclusion, we note that five other male members eligible to vote were paid on that day, although they did not sign the surrender and are not listed on the voters list. These individuals were Pierre LeRat (No. 11), Wahpekahnewanp (No. 139), Alfred Cowessess (No. 145), Patrick Redwood (No. 152), and James Kanaswaywetung (No. 162).[138] Aside from Norbert, Francis is the only non-voter who signed the surrender in addition to being paid. His unique position in this respect tips the balance of probabilities in favour of the conclusion that he was in attendance at the meeting.

Therefore, the circumstances surrounding Francis's involvement in the events of January 29, 1907, suggest to us that it is more probable than not that he attended the meeting, but abstained from voting. As a result, and leaving aside for the moment the issue of whether "Nap Delorme" was an eligible voter or not, we find that the attendance of Francis Delorme brings the total number in attendance at the surrender meeting to 30 eligible voters.

ISSUE 3 DID A MAJORITY OF ELIGIBLE VOTERS ASSENT?

Based on a preponderance of the evidence placed before the Commission in this inquiry, did a majority of the eligible voting members of the Cowessess Band assent to the surrender of a portion of reserve No. 73 within the requirements of the *Indian Act*?

In our discussion of Issue 1, above, we interpreted section 49(1) of the *Indian Act* to require that a majority must be obtained from those "present" at the surrender meeting, and not merely from those "present and voting." Given that we have found on the balance of probabilities that Francis Delorme was present at the meeting, we must conclude that the surrender fails, for the reason that a majority vote could not have been obtained, notwithstanding the identity of "Nap Delorme." Our reasoning

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[138] Record of First Advance Payment ..., January 29, 1907 (ICC Documents, pp. 147–58). In addition, Isidore Sparvier, who neither voted nor signed, had his payment given to his brother, the paylist noting that Isidore "was too ill to come."

is as follows. Even if there were 15 valid votes in favour of the surrender (i.e., if "Nap Delorme" were in fact Norbert Delorme), Francis's presence brings the total in attendance to 30, which means that a majority was not achieved. If Nap Delorme's vote is completely discounted, there would remain 14 votes in favour of the surrender, out of 29 eligible voters present. Either way, the surrender fails. Therefore, we need not consider the evidence regarding the identity of "Nap Delorme," or make any determination on this issue.

PART V

CONCLUSIONS AND RECOMMENDATION

The Commission has been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Cowessess First Nation. We have concluded that it does.

First, we have concluded that the surrender provisions of the *Indian Act* require that a majority of eligible voters *attending* a surrender meeting must vote in favour of a surrender, in order for it to be valid. After a careful consideration of the language, purpose, and context of the statutory provisions, we have concluded that Parliament clearly intended the Act to protect an entire band from improvident transactions concerning its land base. To interpret the surrender provisions so as to require a majority from only those present and voting would theoretically permit a small number of band members to consent to the permanent loss of a reserve, which is an asset set side for the band as a whole. As a result, we hold that abstentions must be counted to determine the quorum.

Second, we find that, on the evidence presented before us, it is more probable than not that Francis Delorme attended the surrender meeting, but abstained from voting. Therefore, on the balance of probabilities, we find that there were not 29 but at least 30 eligible voters in attendance at the surrender meeting on January 29, 1907.

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

As discussed in Part IV, we have found that the documentary evidence submitted in the course of the inquiry supports our conclusions. We also note that our determinations are consistent with the beliefs of the elders who gave evidence at the community session to the effect that a valid majority vote was not attained.

In conclusion, we therefore recommend to the parties:

That the claim of the Cowessess First Nation regarding the portion of IR 73 surrendered in 1907 be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Roger J. Augustine
Commissioner

Dated this 28th day of March, 2001.

APPENDIX A

COWESSESS FIRST NATION 1907 SURRENDER INQUIRY CLAIM

1 Planning conferences October 24, 1996
November 19, 1997

2 Community session March 11, 1998

One community session was held at the Cowessess First Nation. The Commission heard evidence from Harriet Lerat, Harold Lerat, Henry Delorme, George Delorme, Audrey Lerat, Theresa Stevenson, Bob Stevenson, George Tanner, and Andrew Delorme.

3 Legal argument Regina, Saskatchewan, October 20, 1999

4 Content of formal record

The formal record for the Cowessess First Nation 1907 Surrender Inquiry consisted of the following materials:

- the documentary record (4 volumes of documents)
- 5 exhibits tendered during the inquiry
- transcript of the community session
- written submissions of counsel for Canada and written submission and rebuttal submission of counsel for the Cowessess First Nation, including authorities submitted by counsel with their written submissions and transcript of oral submissions.

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.