INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1909 RESERVE LAND SURRENDER CLAIM OF THE MOOSOMIN FIRST NATION

PANEL

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To the Indian Claims Commission
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You may rest assured that when you go to your reserves you will be followed by the watchful eye and sympathetic hand of the Queen's Councillors.

– Hon. Alexander Morris, Lieutenant Governor of the North-West Territories, Treaty 6 negotiations, Fort Carlton, August 22, 1876

PART I

INTRODUCTION

This report deals with the inquiry of the Indian Claims Commission into the 1909 surrender of Moosomin Indian Reserves (IR) 112 and 112A. The question before us is straightforward:

> Does the Government of Canada owe an outstanding lawful obligation to the Moosomin First Nation of Saskatchewan as a result of the 1909 surrender of the First Nation's reserve lands and its subsequent relocation?

In 1876, Canada and the Plains and Wood Cree of central Saskatchewan and Alberta entered into Treaty 6. In exchange for the surrender of aboriginal title to 121,000 square miles of fertile agricultural land on the prairies, Canada promised to set aside reserves for the Indians to assist them in making a transition from a subsistence livelihood to an agricultural-based economy. In the spring of 1881, 23 square miles, or 14,720 acres, of rich agricultural land was set aside as IR 112 for the Moosomin Indian Band[1] on the south side of the North Saskatchewan River near Battleford, Saskatchewan. In 1887, an additional 2 square miles, or 1280 acres, of excellent hay land was set aside as IR 112A for the joint use and benefit of the Moosomin and Thunderchild Bands. Despite government policies between 1889 and 1896 that impeded the progress of many Indian farmers, the Moosomin Band made significant progress in farming and raising cattle. These achievements were recorded by the Indian Agent on several occasions.

In part because of the Band's success in farming, local settlers and politicians began to lobby Indian Affairs officials in 1902 to move the Moosomin and Thunderchild Bands so that their reserve lands could be made available for the settlers flooding into the west. The initial response of Indian Affairs officials to this request was that it might be beneficial to the Band if the Moosomin reserve were exchanged for lands of similar quality closer to its hay reserve. No further action was taken regarding this proposal.

Around the same time, Chief Moosomin passed away and the Band remained without a Chief recognized by Indian Affairs until shortly after the surrender in 1909. In the years that followed Chief Moosomin's death, rumours spread of a possible surrender. This prompted Chief Moosomin's son,

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1 Alternatively referred to as "Moosomin," "the Band," or the "First Nation," depending on the historical context.

Josie Moosomin, to write a letter in November 1906 to Canada stating that his people "never want to sell this reserve." Despite his statement that the Band wished to retain the reserve, local politicians from the Battleford area pressed Indian Affairs to seek a surrender of the reserves set aside for the Moosomin and Thunderchild Bands. In August 1907, Indian Agent Day presented a proposal for surrender to the Moosomin Band which was flatly refused.

The following year, another proposal for surrender was presented to the Thunderchild and Moosomin Bands. The events of this well-documented meeting disclose that the Thunderchild Band narrowly approved the surrender, while the Moosomin Band was overwhelmingly against it. Rather than respecting the Band's wishes, senior officials in Ottawa reprimanded Agent Day for failing to obtain the surrender of Moosomin's reserve as instructed. In any event, Day had already taken steps to counteract the "baleful interference" of outsiders who were advising the Band not to surrender, and he expressed confidence that the Band would soon be "clamouring for the same privileges accorded to the Thunderchild Band."

In January 1909, a letter of petition, purporting to represent the views of 22 members of the Moosomin Band, proposed the surrender of IR 112 on certain terms. Curiously, not a single member of the Band actually signed or affixed his mark to the document as an expression of their intention to surrender the reserve. This letter prompted local clergymen and Indian Affairs officials to renew their efforts to secure a surrender of both of the Band's reserves on less favourable terms. Agent Day returned to the Moosomin Reserve on May 7, 1909, with $20,000 in cash to be distributed to the Band if it agreed to surrender.

In this third and largely undocumented attempt by Canada to obtain the surrender, descendants of Chief Moosomin purported to surrender 15,360 acres of the best agricultural land in Saskatchewan in exchange for a reserve that the Department itself later described as hilly, stony, and practically useless. Even though the Department's records are replete with information on virtually every other subject involving the Band, there is a complete absence of any details from Agent Day on whether a surrender meeting was held with the Band, where it was held, what was discussed, how many eligible voters attended, and how many voted in favour or against the surrender. In the absence of a reliable documentary record, a fair-minded observer would have to question whether a meeting

and a vote were even held that day and, if such a meeting and vote were held, what amount of coercion, bribery, or duress might have been required to convince the Band to reverse its position.

In the final analysis, the most that can be said of the events of May 7, 1909, is that the Band was simply overwhelmed by the constant pressure exerted by settlers, politicians, clergymen, and officials from every level of Indian Affairs to surrender these reserves. Following the surrender, the Band was moved north to its present reserve bordering Murray Lake near Cochin, Saskatchewan, but the new reserve had very limited agricultural potential. IR 112 was subdivided and sold at public auction commencing in 1909. One half of the 2-square-mile hay reserve was later restored to the Band for its use and benefit.

On July 15, 1986, the Moosomin First Nation submitted a claim, pursuant to Canada's Specific Claims Policy, asserting that the 1909 surrender was invalid because Canada had not met the legal requirements for a valid surrender. On March 29, 1995, the Specific Claims Branch of Indian Affairs informed Chief Ernest Kahpeaysewat that, in Canada's view, "the evidence and submissions are insufficient to establish that the surrender of Indian Reserve No. 112 was invalid or that a fiduciary obligation was breached by Canada in obtaining the surrender."[2] On July 17, 1995, the Moosomin First Nation requested that the Indian Claims Commission (the Commission) conduct an inquiry into this claim.

After a thorough consideration of the relevant facts and law in relation to this claim, we have come to the conclusion that the Crown owes an outstanding lawful obligation to the Moosomin First Nation arising out of the 1909 surrender of its reserves. We express our hope that the Canadian government will act on our recommendation and enter into negotiations with the Moosomin First Nation to bring a fair and just resolution to this long-standing grievance.

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2 Allan Tallman, Specific Claims West, to Chief Ernest Kahpeaysewat, March 29, 1995, Department of Indian Affairs and Northern Development (DIAND), file BW8260-SK374-C1 (ICC Documents, pp. 1434-39).

PART II

THE INQUIRY

BACKGROUND TO THIS INQUIRY

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries and issue reports on "whether a claimant has a valid claim for negotiations under the [Specific Claims] Policy where that claim has already been rejected by the Minister."[3] The Specific Claims Policy states that Canada will accept claims for negotiation where such claims disclose an outstanding "lawful obligation" on the part of the federal government.[4] Our role in this inquiry is to determine whether Canada owes an outstanding lawful obligation to the Moosomin First Nation as a result of the 1909 surrender of Indian Reserves 112 and 112A.

The inquiry commenced with a planning conference held on October 19, 1995. Following this conference, a community session was conducted at the Moosomin Reserve near Cochin, Saskatchewan, on February 21, 1996. At that time, the Commission outlined its expectations for the submission of written argument by both parties. The First Nation's written submissions were received on June 18, 1996. With the First Nation's agreement, Canada was granted an extension to further consider its position on the claim, and the oral submissions, which were to proceed in July 1996, were rescheduled to September 24, 1996, to accommodate Canada's request.[5] When the Commission convened a session to hear oral submissions on September 24, 1996, Canada advised that it had not formulated any position in the inquiry and, therefore, would not be providing written

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

4 DIAND, *Outstanding Business, A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in [1994] 1 ICCP 171-85 [hereinafter *Outstanding Business*]. The policy states that a "lawful obligation" or "obligation derived from the law on the part of the federal government" may arise out of any of the following circumstances: (i) "The non-fulfillment of a treaty or agreement between Indians and the Crown"; (ii) "A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder"; (iii) "A breach of an obligation arising out of government administration of Indian funds or other assets"; (iv) "An illegal disposition of Indian land."

5 Daniel J. Maddigan, Counsel for the First Nation, to Kim Kobayashi, Specific Claims West, June 27, 1996.

or oral submissions to the Commission. The Commission expressed concerns about not having Canada's position on the issues and decided to grant counsel from the Department of Justice a further extension until October 28, 1996. This new deadline passed without a response, and the Commission remains without any written or oral submissions from Canada on the merits of this claim.

The Commissioners are angered and concerned by Canada's failure to file any written submissions in this matter. Certainly every reasonable opportunity was afforded to Canada to meet its obligation to assist this Commission fully in its deliberations. The First Nation has waited long enough for a resolution of this historical grievance, and this Commission has a duty to report which it intends to discharge. Accordingly, on November 12, 1996, we advised the parties that we would proceed to write and issue our report on the claim.[6]

The essence of the First Nation's argument is that: (1) the Band's consent to the surrender of May 7, 1909, did not comply with the requirements of the *Indian Act*; (2) the Crown did not fulfil its fiduciary obligations in relation to that surrender; and (3) the Crown should properly have withheld its consent to the surrender. As noted above, Canada has taken no position on the claim.

Based on a thorough consideration of the facts and the relevant case law, we have concluded that the Government of Canada breached fiduciary obligations owed to the Moosomin First Nation in relation to the 1909 surrender of Indian Reserves 112 and 112A. Therefore, it was not necessary for the Commission to make any findings on whether the surrender complied with the procedural surrender requirements of the 1906 *Indian Act*. In our view, Canada's conduct in the context of this surrender constituted a serious departure from the standard demanded of a fiduciary. In fact, Canada improperly influenced and pressured the Band into surrendering its land. Finally, Canada procured and consented to a surrender which was obviously foolish, improvident, and exploitative and which resulted in great detriment to the Band. The Commission's findings and recommendations are set out in this report.

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6 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Michel Roy, Director General, Specific Claims Branch, November 12, 1996.

HISTORICAL BACKGROUND

In the course of this inquiry, the Commission examined the documentary record consisting of more than 2000 pages of material submitted by the Government and the First Nation. The record also consists of the information received at the community session on February 21, 1996, during which the Commission heard from Peter Bigears, Norman Blackstar, Sidney Ironbow, Jimmy Myo, Isidore Osecap, and Adam Swiftwolfe, all elders of the Moosomin First Nation, and from Edward Okanee, an elder of the Thunderchild First Nation.

Written submissions were received from the First Nation on June 18, 1996, and the First Nation made oral submissions to the Commission in the presence of counsel for Canada on September 24, 1996. The written submissions, documentary evidence, transcripts, and the balance of the record of this inquiry are referred to in Appendix A to this report.

Treaty 6

Treaty 6 was concluded between Canada and the Plains and Wood Cree of central Saskatchewan on August 23 and 28, 1876, near Fort Carlton and on September 9, 1876, near Fort Pitt. North-West Territories Lieutenant Governor Alexander Morris, together with fellow Treaty Commissioners James McKay and W.J. Christie, negotiated the treaty on Canada's behalf over the course of several meetings with the bands of that area.[7] The Secretary to the Treaty Commission, Dr A.G. Jackes, took detailed notes at those meetings and specifically recorded the commentary and speeches of the various parties. Commissioner Morris included this record with the treaty document when he transmitted it to the Department of Indian Affairs and noted that "it will be of great value to those who will be called on to administer the treaty, showing as it does what was said by the negotiators and by the Indians, and preventing misrepresentations in the future."[8]

Dr Jackes's notes, along with Morris's own report of the negotiations, make it clear that all parties were concerned that farming be facilitated by the treaty, given the dramatic depletion in the

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7 *Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1966) (ICC Documents, pp. A1-A11).

8 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A7); notes of Dr A.G. Jackes, December 31, 1876 (ICC Documents, pp. 1492-1541).

buffalo herds which had, to that point, provided for the economic livelihood of the Plains Indian people. Morris wrote, "I . . . fully explained to them the proposals I had to make, that we did not wish to interfere with their present mode of living, but would assign them Reserves and assist them as was being done elsewhere, in commencing to farm, and that what was done would hold good for those that were away."[9] In response to what he viewed as excessive requests for assistance, Morris emphasized agriculture as the way that the Indians could support themselves, saying that "we cannot support or feed the Indians every day, further than to help them to find the means of doing it for themselves by cultivating the soil."[10] He also wrote that he was encouraged by the Indians' interest in taking up agriculture, that it was important for Canada to comply with the terms of treaty promptly to further this interest, and that "advantage should be taken of this disposition to teach them to become self-supporting, which can best be accomplished [with] the aid of a few practical farmers and carpenters to instruct them in farming and house building."[11]

This encouragement to engage in agriculture is reflected in the terms of the treaty itself. The relevant provisions of Treaty 6 read as follows:

> Her Majesty the Queen hereby agrees and undertakes to lay aside Reserves for farming lands . . . and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such Reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families. . . .
>
> It is further agreed between Her Majesty and the said Indians, that *the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land*, that is to say: – Four hoes for every family actually cultivating, also two spades per family as aforesaid; one plough for every three families as aforesaid, one harrow for every three families as aforesaid; two scythes, and one whetstone and two hayforks and two

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9 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A2).

10 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1524).

11 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A6).

reaping hooks for every family as aforesaid; and also two axes, and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief, for the use of his Band, one chest of ordinary carpenter's tools; also for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band, four oxen, one bull and six cows, also one boar and two sows, and one handmill when any Band shall raise sufficient grain therefor. *All the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians*. . . .

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

That during the next three years, after two or more of the Reserves hereby agreed to be set apart to the Indians, shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars to be expended for them by Her Majesty's Indian Agents, in the purchase of *provisions for the use of such of the Band as are actually settled on the Reserves and are engaged in cultivating the soil, to assist them in such cultivation*. . . .

That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region), there shall, during three years, after two or more Reserves shall have been agreed upon and surveyed, *be distributed each spring among the Bands cultivating the soil on such Reserves*, by Her Majesty's Chief Indian Agent for this treaty in his discretion, a sum not exceeding one thousand dollars, in the purchase of *provisions for the use of such members of the Band as are actually settled on the Reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation*.[12]

While negotiating the treaty, to encourage prompt adherence and selection of lands, Morris alluded to the danger of settlers interfering with Indian settlement, but he assured the Indians that, once land had been reserved for them, it could not be taken away without their consent. He stated :

12 Alexander Morris, Lieutenant Governor, to the Superintendent General of Indian Affairs, December 4, 1876, Department of Indian Affairs, *Annual Report*, 1876, Special Appendix F (ICC Documents, p. A8). Emphasis added.

> [U]nless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be. . . . [W]e wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. . . . *[U]nderstand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes*.[13]

Morris also assured the Indians that "when you go to your reserves you will be followed by the watchful eye and sympathetic hand of the Queen's Councillors."[14]

Dr Jackes noted that Yellow Sky, the Chief of the band that included members of what was to become known as the Moosomin Band, was not present for the negotiations, but was "favourably disposed" to the treaty.[15] Nevertheless, when Indian Agent M.G. Dickieson met with Yellow Sky's people in August 1877, they declined to sign an adhesion to the treaty, preferring to remain independent and "to not come under the law."[16] It appears, however, that Moosomin, who was a headman of Yellow Sky's band, and a number of others settled in the Battleford area some time in the summer of 1880[17] and later adhered to the terms of Treaty 6. From 1881 until 1884, Yellow Sky

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13 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, pp. 1501-02). Emphasis added.

14 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1509).

15 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, Including the Negotiations on Which They Were Based* (Toronto: Belfords, Clarke and Co., 1880) (ICC Documents, p. 1526).

16 M.G. Dickieson, Indian Agent, to Lieutenant Governor of the North-West Territories, September 14, 1877, National Archives of Canada [hereinafter NA], RG 10, vol. 3656, file 9092 (ICC Documents, pp. 3-4).

17 T.P. Wadsworth, Inspector of Indian Agencies, Winnipeg, to [Superintendent General], December 1, 1881, Department of Indian Affairs, *Annual Report,* 1881, p. 119 (ICC Documents, p. 27). E. Dewdney, Indian Commissioner, to Superintendent General, December 31, 1880, Department of Indian Affairs, *Annual Report*, Canada, Parliament, *Sessional Papers*, 1880-81, No. 14 (ICC Documents, p. 14).

continued to be recognized by Indian Affairs as the Chief of Moosomin's Band, but this changed when Indian Commissioner Edgar Dewdney appointed Moosomin as Chief.[18]

Moosomin Indian Reserves 112 and 112A

In the spring of 1881, Indian Affairs surveyor George Simpson surveyed 23 square miles, or 14,720 acres, of land as Indian Reserve 112 for the Moosomin Band.[19] IR 112 consisted of good agricultural land along the south bank of the North Saskatchewan River near Battleford, Saskatchewan. Simpson described the land in his 1882 report to Indian Commissioner Dewdney:

> The banks of the river are as well timbered and the soil excellent . . . The east boundary passes over a rolling country, good soil, timber, poplar in groves, one small lake on this line; plenty of water in the valleys, but in a dry season water would be scarce. The soil on the south boundary is a light sandy loam.[20]

For the Thunderchild Band, Simpson surveyed a reserve of similar size and quality, IR 115, which adjoined Moosomin IR 112 to the west.[21] The Indian Commissioner, however, thought it preferable to settle Thunderchild and Napahas on the Moosomin reserve as well. This arrangement proved to be satisfactory to no one, and Thunderchild's people eventually moved to the reserve that had been set aside for them.[22]

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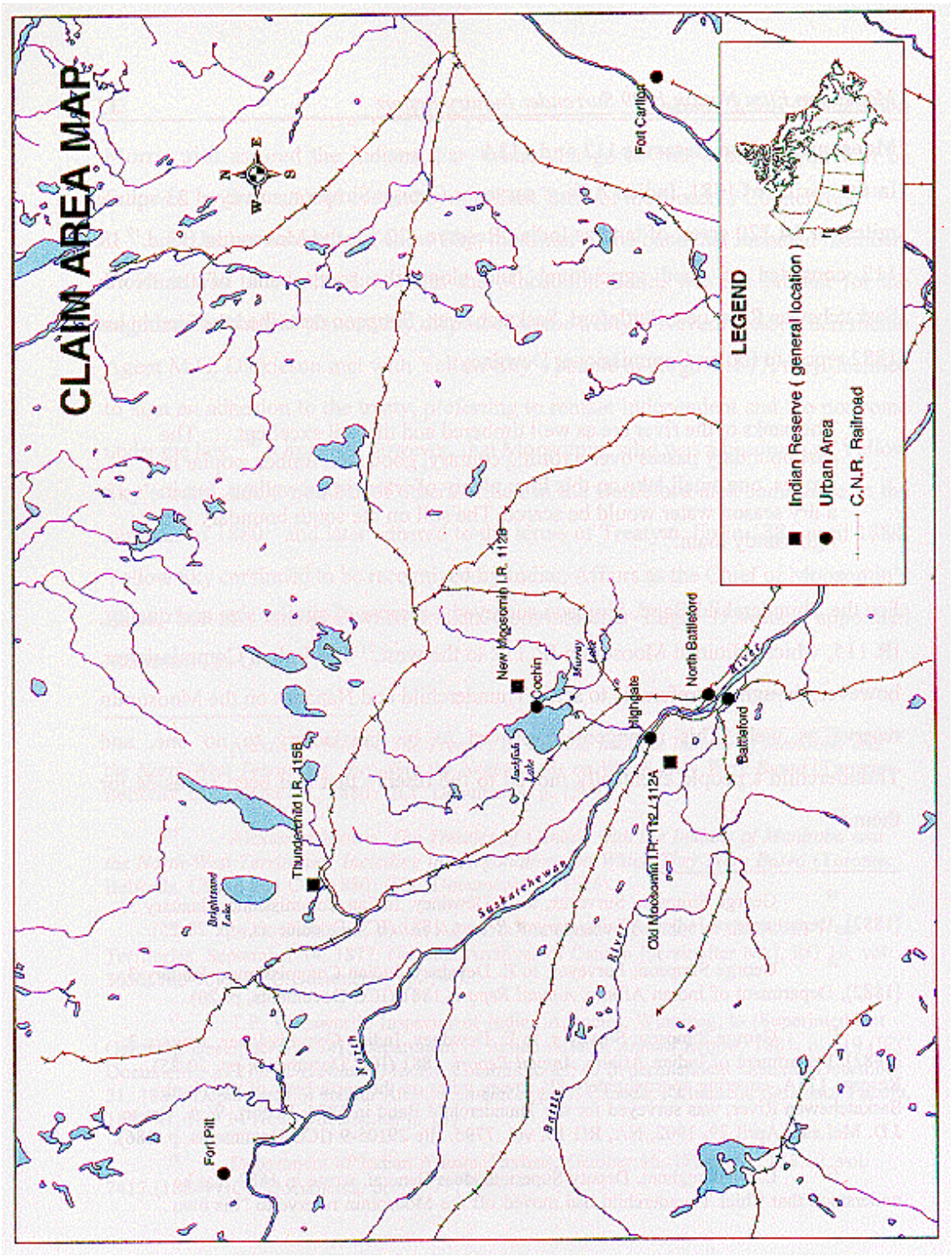
18 Department of Indian Affairs, Paylists, October 16, 1884, NA, RG 10, vol. 7417 (1884) (ICC Documents, pp. 74-77).

19 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, pp. 20-25).

20 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 20).

21 George Simpson, Surveyor, to E. Dewdney, Indian Commissioner, January 3, [1882], Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, pp. 20-25). Reserve 115A, covering approximately 8½ square miles on the north bank of the North Saskatchewan River, was surveyed for the Thunderchild Band in 1884. Report, W.A. Orr to J.D. McLean, April 29, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 186).

22 L. Vankoughnet, Deputy Superintendent General, wrote in 1883 that he understood that Chief Thunderchild had moved off the Moosomin reserve to "his own Reserve." L. Vankoughnet to Sir John A. Macdonald, Superintendent General, November 15, 1883 (ICC Documents, p. 40). Hayter Reed wrote in 1884 that he had "placed Thunderchild and Na-pa-hese on the reserve of the former adjoining that of Moosomin." Reed to Indian Commissioner, December 28, 1883, NA, RG 10, vol. 3668, file 10644 (ICC Documents, pp. 57-58).


CLAIM AREA MAP
N
E
S
W
LEGEND
Indian Reserve (general location)
Urban Area
C.N.R. Railroad
Fort Carlton
New Moosomin I.R. 112B
Cochin
Murray Lake
Jackfish Lake
Highdale
North Battleford
Battleford
Saskatchewan River
Old Moosomin I.R. 112A
Thunderchild I.R. 115B
Brightsand Lake
Fort Pitt
North Battle River

In 1887, R.C. Laurie, Dominion Lands Surveyor, surveyed an additional 2 square miles, or 1280 acres, of excellent hay lands as Indian Reserve 112A for the joint use and benefit of the Moosomin and Thunderchild Bands.[23] Reserves 112 and 112A were both confirmed by Order in Council PC 1151 on May 17, 1889.[24]

The 1902 Annual Report prepared by J.P.G. Day, the Indian Agent for the Battleford Agency, stated that the Moosomin and Thunderchild reserves "are extremely well suited for mixed farming and are also well supplied with small timber."[25] In 1903, the value of the reserves was further enhanced by the construction of the main line of the Canadian Northern Railway (which ran directly through the reserves) and the building of a railway station on Moosomin IR 112 at Highgate. W.J. Chisholm, the Inspector of Indian Agencies, provided this report on the subject to the Superintendent General on September 14, 1903:

> The route of the Canadian Northern railway as now located west of Battleford crosses these reserves, (Moosomin and Thunderchild) and with the inrush of settlement the Indians are awakening to a very lively appreciation of the value of their inheritance.[26]

Agent Day's Annual Report for 1905 provided a similar description of Moosomin IR 112:

> Moosomin reserve is twelve miles west of Battleford; it contains 14,720 acres. This land lies between the Battle and Saskatchewan rivers; the country is rolling and partially wooded with bluffs of poplar; the soil is a sandy loam and is well adapted for both agricultural purposes and stock-raising. Water is plentifully distributed all over the reserve. . . .

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23 Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1, vol. 419 (ICC Document, p. 86 at 110). Laurie's survey of IR 112A was later approved by John Nelson, in charge of Indian Reserve Surveys, Ottawa, on January 23, 1889.

24 Order in Council PC 1151, May 17, 1889, NA, RG 2, series 1, vol. 419 (ICC Documents, p. 95).

25 J.P.G. Day to Superintendent General, Department of Indian Affairs, August 20, 1902, Department of Indian Affairs, *Annual Report*, 1902 (ICC Documents, p. 200).

26 W.J. Chisholm to Superintendent General, Department of Indian Affairs, Sept- ember 14, 1903, Department of Indian Affairs, *Annual Report*, 1903 (ICC Documents, p.205).

> The building of the Canadian Northern railroad through this reserve has been a great help to these Indians by providing work and a near market for all their produce.[27]

It is evident from the historical record that IR 112 was considered excellent for mixed farming, and the Band used it for that purpose.[28] Norman Blackstar related his mother's description of the reserve as "the fertile most prime land that was ever – that humans could possibly possess."[29] When one takes into account the soil quality on IR 112, the availability of water and timber on the land, its proximity to the town of Battleford, and its accessibility by rail, it is not surprising that the Moosomin Band thrived on these lands. These same qualities attracted the interest of local settlers and politicians, who sought to acquire the land from the Band for their own purposes.

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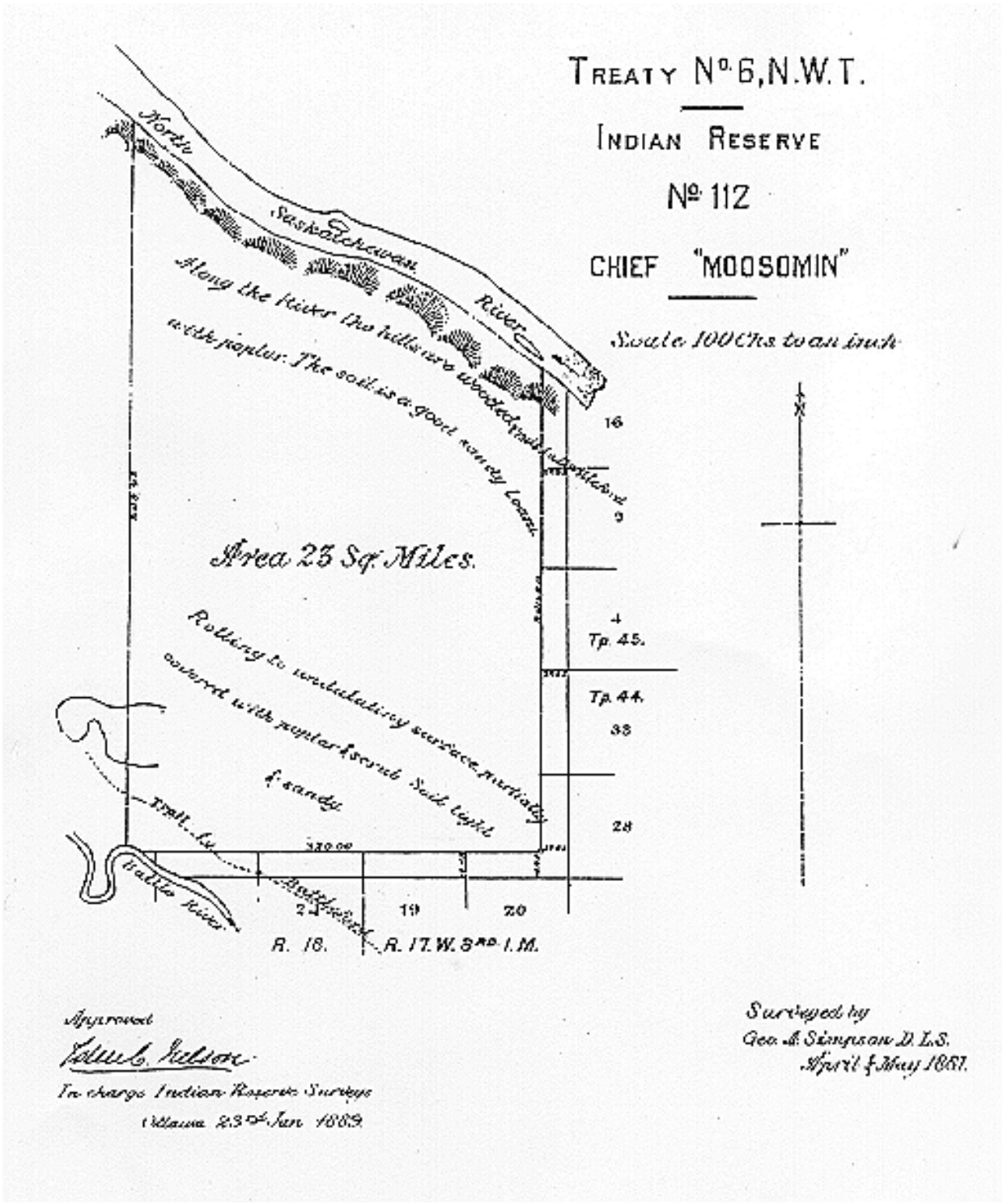
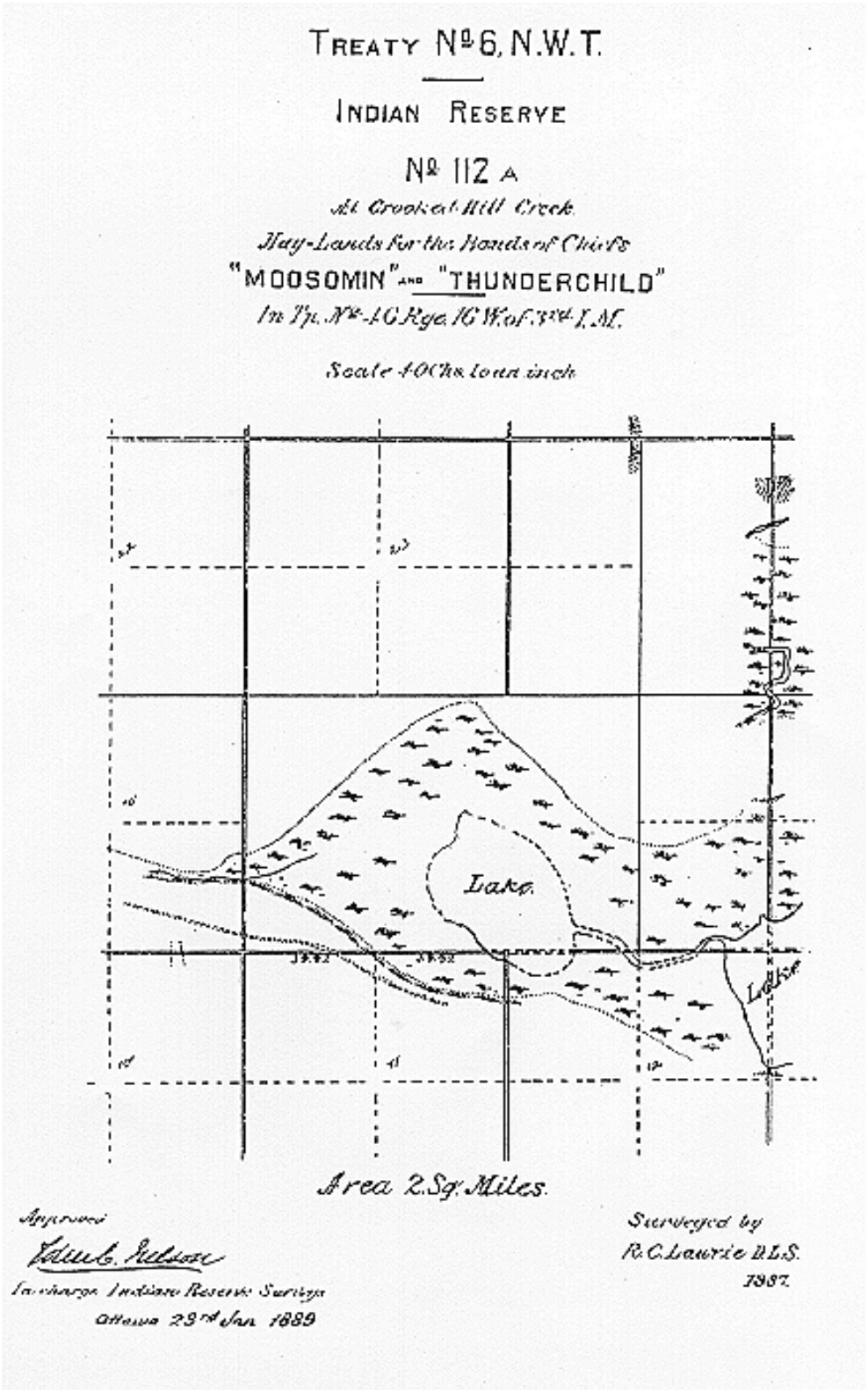
27 Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

28 B. Prince, MLA, to T.O. Davis, MP, April 16, 1902 (ICC Documents, p. 178). In his letter to Davis, Prince referred to it as three miles of "the best possible land."

29 ICC Transcript, February 21, 1996, p. 21 (Norman Blackstar).


TREATY Nº 6, N.W.T.
INDIAN RESERVE
Nº 112
CHIEF "MOOSOMIN"
Scale 100 Chs to an inch
North Saskatchewan River
Along the River the hills are wooded with poplar. The soil is a good sandy Loam.
Area 23 Sq. Miles.
Rolling to undulating surface mostly covered with poplar & scrub. Soil light & sandy.
Battle River
16
9
4
Tp. 45.
Tp. 44.
33
28
19
20
R. 16.
R. 17. W. 3RD I.M.
Approved
Edgar Dewdney
In charge Indian Reserve Surveys
Ottawa 23rd Jan 1889.
Surveyed by
Geo. A. Simpson D.L.S.
April & May 1887.


TREATY Nº 6, N.W.T.
INDIAN RESERVE
Nº 112 A
At Crooked Hill Creek
Hay-Lands for the Bands of Chiefs
"MOOSOMIN" AND "THUNDERCHILD"
In Tp. Nº 40 Rge 16 W of 3rd P.M.
Scale 40 Chs to one inch
Lake
Lake
Area 2 Sq. Miles.
Approved
Edouard Deputy
In charge Indian Reserve Surveys
Ottawa 29th Jan 1889
Surveyed by
R.C. Laurie D.L.S.
1887

The Changing Relationship between the Crown and the Band

Although the numbered treaties were entered into on the express representations that the bands would be given assistance and instruction to encourage them to take up agriculture on the reserves, in the years that followed, the Canadian government actively pursued policies that effectively undermined the bands' efforts in making this transition. These policies were based on the assumption that Indians required "civilized guidance" and, therefore, that it was necessary to appoint Indian agents to work closely with the prairie Indian bands. Indian agents soon began to control virtually every aspect of Indian life on the reserve. Historian Helen Buckley described the role of Indian agents as follows:

> A network of agents had charge at the local level, each responsible for one or more reserves, and they were powerful figures in their own right, given the primitive communications of the day. These were the men who saw the farm programs implemented, enforced school attendance, allocated housing, and dealt with domestic disputes and a great many other matters. They wrote full reports to Ottawa on both the progress and the problems of their charges. Some agents were dedicated men who did the best they could within the limits of the system; some were political appointees, poorly educated and unsuited for the job; a few were rogues, intent on profiting from their position.[30]

Given the broad powers and authority of the Indian agents, the introduction of the agency system resulted in the Indians losing much of their autonomy. Indian agents imposed control over many aspects of band life. One policy that was characteristic of this time was the pass system, which was introduced in the years following the Rebellion of 1885 to ensure stricter supervision of the Plains Indians. The pass system required any Indian who sought to leave the reserve to first obtain the written authorization of the Indian agent. Although the system did not prove to be very effective, since all involved "knew there was no legal basis for interfering with the Indians" in this manner,

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30 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 43. See also H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958), 486.

Indian Commissioner Hayter Reed instructed the agents to issue the passes anyway to preserve an appearance of control and to gain knowledge of the Indians' movements.[31]

Reed, who served as the Indian Commissioner from 1888 until his dismissal in 1897 by Wilfrid Laurier's newly elected Liberal government, introduced a number of policies that were designed to protect, assimilate, or control the activities of Indians. These policies made it very clear to the Indians that the Indian Affairs Branch wielded a great deal of power when it came to their future well-being. These policies hampered the ability of Indian farmers to develop and cultivate their reserve lands. In the face of ever expanding settlement on the prairies, these lands became increasingly desirable to covetous settlers and increasingly vulnerable to opportunistic politicians who articulated the settlers' aspirations.

In 1881, Canada introduced the permit system that required Indian farmers to obtain permission from the Indian agent to sell their own stock and produce.[32] Buckley noted that this system was another instrument of control imposed on Indians: "[I]f an agent did not like an individual or was displeased for some reason, he could refuse or delay his permit indefinitely."[33] Furthermore, Indians were not permitted to engage in cash transactions; all commerce had to be carried out with "chits" which could be exchanged at the store. Even white settlers expressed the view that this restriction was unreasonable and made it impossible to carry out a successful farm operation, but the policy was nonetheless followed until at least the 1960s.[34]

In 1889, the introduction of the peasant farming and severalty policies further impeded the progress of Indians in agriculture. The peasant farming policy required Indian farmers to tend small parcels of land on which they could farm only enough grain, vegetables, and stock to sustain

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31 J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), 192-93.

32 *An Act to Amend "The Indian Act, 1880"* SC 1881, c. 17, ss. 1, 2.

33 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 53.

34 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 54. This practice was still carried on with respect to the sale and purchase of goods by the Cold Lake and Canoe Lake First Nations into the 1960s: see Indian Claims Commission, *Inquiry into the Primrose Lake Air Weapons Range* (Ottawa: August 1993), [1994] 1 ICCP 3.

themselves and their families. According to Buckley, this "daft" policy was grounded in Commissioner Reed's misguided sense of social evolution: in his view, allowing Indian farmers to use modern technology would result in their "skipping" a prescribed stage of development on their route to civilization.[35] Accordingly, use of the modern machinery available to non-Indian farmers was forbidden, meaning not only that Indians were not permitted to obtain new implements but that they had to cease using some of the machinery they already owned. In spite of the Indians' protests, and those of some of the agents who were forced to implement it, the policy was established and "fatally chang[ed] the course of reserve agriculture."[36] Thus, while non-Indian settlers had the freedom to develop their agricultural operations profitably and logically, Indian farmers were required "to step aside and function in isolation from the rest of western Canadian society."[37] The result for the Moosomin and Thunderchild Bands was described at the community session by Ed Okanee:

> They didn't buy any machinery, you know, to improve the quality of farming, and they just natural – they naturally use – they cut them with scythes, and they tied it up themselves by hand, and they know. You know, they had used the old thrashing methods, the earliest thrashing methods. They used the canvas, and then they threw it in the air, and the chaff flew off. And the agents never did anything to improve the quality of farming. It was the agents and the priest that were behind all of this that just did their extreme – used the extreme methods of discouraging people, and once they became destitute, it was easy for them to move away.[38]

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35 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen's University Press, 1990), 212-13. Reed commented that "the fact is often overlooked, that these Indians who, a few years ago, were roaming savages, have been suddenly brought into contact with a civilization which has been the growth of centuries. An ambition has thus been created to emulate in a day what white men have become fitted for through the slow progress of generations." Reed to Superintendent General, October 31, 1889, Department of Indian Affairs, *Annual Report*, 1889, 162.

36 Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992), 53.

37 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen's University Press, 1990), 216. See also "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 353-77.

38 ICC Transcript, February 21, 1996, pp. 53-54 (Ed Okanee).

Commissioner Reed's severalty policy promoted the subdivision of reserves into smaller plots for individual farmers, rather than having the entire reserve cultivated by the band as a whole. In his view, this was an important step towards the individualism he felt would be necessary to assimilate Indians into non-Indian society; the "communistic" ties that bound the tribal system together had to be broken. In addition to promoting individualism, the policy of severalty also created large blocks of "surplus" reserve land that could be sold off, since land would be allotted to each farmer and the balance would be available for surrender. Severalty, therefore, enhanced more than one goal of the Canadian government: it not only sought to recast Indian farmers into an individualistic mould (thus supposedly improving their capacity to farm), but it also reduced the amount of land that the band could put to effective use.[39]

Commissioner Reed also sought to undermine the traditional systems of leadership and organization of the prairie Indian bands, since he considered these systems to be "communistic" in nature. Historian Sarah Carter noted that the "chiefs of bands perceived to be disloyal in 1885 were deposed, and Reed hoped that as the other chiefs and headmen died off, these offices might be allowed to lapse."[40] Where the leaders of a band did not fully endorse departmental policy, they were not recognized by government officials as speaking for the band.

It is unfortunate, to say the least, that the laudable goal of the treaty signatories – to see Indians become self-sufficient through agriculture – was hampered by the imposition of Reed's wrong-headed farming policies. The effect of these policies curtailed and reversed the development of Indian agricultural economies; in addition, the perception that Indians had "surplus lands" that were not being put to productive use made vast tracts of reserve land vulnerable to encroachment by settlers, railway companies, speculators, and politicians alike.

The election of Laurier's Liberal government in 1896 marked a fundamental shift in national policy as the government focused its attention on immigration, expansion, and western development to be fuelled largely by agriculture. The new Minister of the Interior and Superintendant General of

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39 Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 353-57.

40 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston, McGill-Queen's University Press, 1990), 149.

Indian Affairs, Clifford Sifton, began a campaign of "efficiency" by increasing central control of Indian Affairs; by temporarily placing both Indian Affairs and the Department of the Interior under a single Deputy; and by "slashing budgets, dismissing personnel and reducing salaries."[41] On a policy level, "Sifton's lack of background in Indian Affairs and his 'perspective that Indian assimilation in "white" society took second place to rapid economic development,'[42] [meant that] the primary focus of the combined department was to attract new settlers and to develop western Canada economically."[43] Sifton's policies were quite successful in encouraging western expansion, and the population of western Canada increased by nearly one million during the 10 years of his administration from 1896 to 1905.[44]

With pressure on the government to make prime agricultural land on Indian reserves available to settlers, Canada introduced legislative changes that made it easier for reserve land to be surrendered or otherwise taken without a band's consent. This process began in 1894 with an amendment to the *Indian Act* that permitted the Superintendent General of Indian Affairs to lease, without first obtaining a surrender, lands belonging to Indians who could not work it themselves because of illness or disability.[45] Much more ambitious measures were implemented under Frank Oliver, who succeeded Sifton as Minister of the Interior and Superintendent General of Indian Affairs in 1905.

Oliver, a former editorial writer for the Edmonton *Bulletin*, had long campaigned in private life to free up reserve land for settlement. He aggressively pursued changes to the *Indian Act* in

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41 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 237-38.

42 John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978), 104.

43 Indian Claims Commission (ICC), *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 36.

44 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 37.

45 Brian Titley has called this amendment "the thin edge of the wedge of confiscation," since it was Canada's first arrogation of the power to obtain Indian reserve land without the consent of the band. See *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 16.

response to the growing perception, fuelled in large measure by Oliver himself and by other political figures, that Indian reserve holdings were excessive in relation to the Indians' needs and that reserves should be opened up for settlement. The following excerpts from the Commission's inquiry into the 1907 Kahkewistahaw surrender[46] provide an ample illustration of Mr Oliver's views and the extent to which they were embraced by his officials and entrenched in legislation:

> Oliver's appointment in 1905 brought wholesale changes in the official attitude of the Department towards the reserve land question. In response to an inquiry in the House of Commons by R.S. Lake about the proposed Crooked Lake surrenders [including the Kahkewistahaw Reserve], Oliver replied that "[t]he case of the Broadview reserve is only one of many in the west, and it is no doubt a hardship to the surrounding country and to large business enterprises." He noted that "*of course the interests of the people must come first and if it becomes a question between the Indians and the whites, the interests of the whites will have to be provided for*."[47]
>
> This attitude quickly pervaded the Department. In his annual report to the Minister for 1908, Deputy Superintendent General Frank Pedley conveyed a similar philosophy:
>
> > The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with relation to the sale of Indians' lands.
> >
> > So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.
> >
> > Conditions, however, have changed and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve *pro tanto* the country of the burden

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46 ICC, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 47-49. Some of the footnote references in the excerpted passages have been retained but renumbered to follow the sequence here.

47 Canada, House of Commons, *Debates*, March 30, 1906, pp. 947-50. Emphasis added.

> of their maintenance, it is in the best interests of all concerned to encourage such sales.[48]

In keeping with these sentiments, one year after his appointment Oliver sponsored an amendment to the *Indian Act* allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members.[49] Previously, the *Indian Act* had limited such cash distributions to 10 per cent of the sale price, with the rest to be held in trust in a capital account for the band in question. Oliver was quite candid in explaining to the House of Commons his motivations for seeking the amendment:

> This [10 per cent cash distribution] we find in practice, is very little inducement to them to deal for their lands and we find that there is very considerable difficulty in securing their assent to any surrender. Some weeks ago, when the House was considering the estimates of the Indian Department, it was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country.[50]

The new provision proved its usefulness almost immediately, for the next year the Department was able to dispose of the longstanding and troublesome issues associated with the St Peter's reserve in Manitoba. A series of doubtful land transactions involving settlers at St Peter's since the 1870s culminated in several investigations and inquiries between 1878 and 1900, none of which resolved the competing claims to lands within the reserve boundaries. Finally, in September 1907, Deputy Superintendent General Pedley came to the reserve in person, reportedly carrying a briefcase containing $5000 in cash, and managed to get the desired

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48 Canada, Parliament, *Sessional Papers*, 1908, No. 27, "Annual Report of the Deputy Superintendent General to Superintendent General, September 1, 1908," xxxv.

49 SC 1906, c. 20, s. 1 (amending s. 70 of the Act). Royal Assent was given on July 13, 1906. This was not the only *Indian Act* amendment promoted by Oliver to reduce in size or eliminate Indian reserves. In 1911, two others were passed, together referred to by Indians as the "Oliver Act." The first allowed public authorities to expropriate reserve land without the need of a surrender. Any company, municipality, or other authority with statutory expropriation power was enabled to expropriate reserve lands without Governor in Council authorization so long as it was for the purpose of public works. The second allowed a judge to make a court order that a reserve within or adjoining a municipality of a certain size be moved if it was "expedient" to do so. There was no need for band consent or surrender before the entire reserve could be moved. SC 1911, c. 14, ss. 1 and 2, respectively.

50 Frank Oliver in Canada, House of Commons, *Debates*, June 15, 1906, 5422.

surrender.[51] The surrender document called for disbursement to the Band of 50 per cent of the proceeds of sale one year following the surrender.[52] Indian discontent surfaced later, however, and ultimately the surrender was attacked in Parliament on the basis that "the methods employed by the government agent had been anything but creditable to the government."[53]

Carter summarizes the federal government's policies during this period and the effect they had on Indians and their lands as follows:

> [T]he major preoccupation of Indian Affairs administrators was to induce Indians to surrender substantial portions of their reserves, a policy which ran counter to efforts to create a stable agricultural economy on reserves . . . Not all departmental officials were in favour of an unrestrained, comprehensive program of reserve land surrender. . . . Sifton himself was reluctant at least publicly to give in to pressure to surrender Indian land and insisted the government's role was to act as trustee for the Indians. His attitude did not prevent his civil servants, such as Smart and Pedley, from speculating in Indian lands, even while acting as the supposed representative of the Indians.
>
> Others in Indian administration, such as Frank Oliver, appointed superintendent general of Indian Affairs in 1905, favoured the wholesale alienation of reserve land. Oliver even originally hoped reserve land could be thrown open for settlement without the consent of the Indians. During his term of office, bands across the North-West were pressured to surrender, and hundreds of thousands of acres were alienated. It was Oliver who introduced the 1906 amendment to the *Indian Act* that permitted the distribution of 50 per cent of the purchase price, a measure he predicted would accelerate the surrender process. . . . The Edmonton Bulletin, Oliver's newspaper, campaigned from the 1880's for the removal of Indians from areas of settlement. . . .
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> These sentiments received widespread support from farmers, townspeople, merchants, railroad executives, newspapermen, and speculators. All those with a

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51 Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 22.

52 For a review of the St Peter's claim, see "The St. Peter's Reserve Claims," in R. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: DIAND, Research Branch, February 1980), 104-21.

53 It was attacked by the member for Selkirk, G.H. Bradbury. Canada, House of Commons, *Debates*, March 22, 1911, cols. 5837 ff.

> stake in the expansion of agriculture were interested in reducing the size of Indian landholdings.[54]

Thus, even though one of the purposes of Treaty 6 was to facilitate a move from a subsistence economy to one rooted in agriculture, Canada pursued policies and legislative amendments which, by both design and effect, worked to undermine the recently established Indian farmers. Combined with the significant pressure exerted by prospective settlers to obtain "surplus" Indian land, these policies and laws demonstrated the challenges faced by Indian farmers to work – and keep – their treaty land.

It is also important to mention that the conflicting policy objectives of government in dealing with Indian lands, and the corrupt practices of certain government officials, were later made the subject of a special investigation by the Ferguson Royal Commission.[55] Frank Pedley, for example, served as Deputy Superintendent General of Indian Affairs from 1902 to 1913 under both Clifford Sifton and Frank Oliver until he was forced to resign as a result of his involvement in land speculation. When the Ferguson Commission's findings were raised in the House of Commons in 1915, future Prime Minister R.B. Bennett had this to say about the surrender policies at the turn of the century:

> During the fifteen years from 1896 to 1911 everything that could be done to alienate the public resources of Canada by conspiracy on the part of the hon. gentlemen who then were administering the country and their friends, was done . . . I live in the province of Alberta, and I saw men with nothing, grow suddenly rich at the expense of the public. I saw the land of this country being alienated – graft is the proper word to describe the situation – by men whose corrupt ideas degenerated and degraded the public life of the country . . . [O]ne would think that it would be sufficient that all these things should have happened, but it was not. *Lo, the poor Indians they must suffer! The wards of the nation! The aborigines of Canada! The men whose rights they were sworn to protect were the victims of the conspiracy of a Turriff, a Pedley*

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54 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 244-45.

55 See Canada, House of Commons, *Debates*, April 14, 1915 (ICC Documents, pp. 1873-1904); Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 17-22; Pierre Berton, *The Promised Land* (Toronto: McClelland and Stewart, 1984), 245-48.

> *and a White. If anything has ever in the annals of Parliament been placed upon the table of this House calculated to bring the blush of shame to the face of any Canadian, it is the revelation contained in the evidence that is here to-night.*[56]

It was this "shameful" conduct and attitude that provided the backdrop for the events leading up to the surrender of the Moosomin reserve in 1909, to which we now turn.

Agriculture on the Moosomin Reserves

In 1880, shortly after Moosomin settled near Battleford but prior to these lands being surveyed and set apart as IR 112, Indian Commissioner Dewdney reported:

> There are about thirty acres broken by contract, and [Moosomin's] Indians are a splendid lot of workers. Although they have been there about a couple of months, they have built five excellent houses for new beginners, and are taking out rails to fence the ploughed land.[57]

In 1883, Hayter Reed, then the Acting Assistant Commissioner, wrote that "'Moosomins' Band has done well, and were the benefits of a Mill to be had they might be relieved from Government aid. . . ."[58]

The later reports of the Indian agents on the Band's progress in cultivating the reserve indicate that Band members were able to make a good living through a combination of farming, stock-raising, freighting, and selling timber, among other activities. It is significant that these

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56 Canada, House of Commons, *Debates*, April 14, 1915 (ICC Documents, p. 1900). Emphasis added. Turriff, Pedley, and White were Indian Affairs officials during the relevant time period studied by the Ferguson Royal Commission. Unfortunately, the Commission's report, released in the spring of 1915, was destroyed in a parliamentary fire during the same period. It was, however, the subject of some comment in the House of Commons *Debates* (ICC Documents, pp. 1873-1904).

57 E. Dewdney, Indian Commissioner, to Superintendent General, December 31, 1880, Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 14).

58 Hayter Reed, Acting Assistant Commissioner, to Indian Commissioner, December 28, 1883, NA, RG 10, vol. 3668, file 10644 (ICC Documents, p. 57).

successes were achieved in spite of the significant challenges faced by the new farmers, including a poor climate, competition for the lands, and detrimental government policy.[59]

In his 1889 Annual Report, P.J. Williams, the Indian Agent for the Battleford Agency at the time, provided the following comments on the progress of the Moosomin and Thunderchild Bands:

> Since my last report, the Indians of this agency have reaped and benefited by a bountiful harvest. Moosomin and Thunderchild's Bands fed themselves with their own flour for eight months; and some of the Indians, after feeding their old and helpless relatives, have several sacks of flour in their houses yet. . . . The Indians were delighted with the idea of handling and using their own crop; so much so, that every Indian this spring commenced work with renewed energy, and the result was that over six hundred acres were sown with wheat; oats and barley, in less quantities, as the sale for these grains was limited; potatoes, turnips, and garden seeds were planted in great quantities; every available acre of old land was seeded. . . .
>
> The individual earnings of the Indians were spent to good advantage in buying reapers, mowers, self binders, waggons etc. This year the Indians themselves propose giving one dollar each out of their treaty money to purchase a steam thresher, as they experienced great difficulty in getting the threshing done last year. . . .
>
> The cattle are doing remarkably well on all of the reserves. . . .
>
> The sheep have done very well on Moosomin's Reserve. . . .[60]

It is important to observe that this report covers the 1888-89 agricultural year and precedes the implementation of Hayter Reed's peasant farming policy in 1889.

By 1902, the Moosomin Band had made very real progress in mixed farming despite the imposition of the peasant farming and severalty policies. The 1902 Annual Report from Indian Agent Day for the Battleford Agency states:

> In Moosomin's band there are twenty-six men, thirty-one women, twenty-three boys, and twenty-eight girls, making a total of one hundred and eight. . . . Mixed farming is carried on by these Indians (Moosomin and Thunderchild Bands), with a very fair measure of success; they also make a little extra by the sale of hay, firewood, charcoal and lime.

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59 With respect to the climate, Miller has noted that conditions for agriculture at the time were "among the worst climatically in prairie history." J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989), 199.

60 Canada, Parliament, *Sessional Papers*, 1890, No. 12, "Annual Report of Deputy Superintendent General" (ICC Documents, p. 1560).

> The cattle belonging to these bands (Moosomin and Thunderchild) number four hundred and seventy-four head. They are all in prime condition. . . .
>
> These bands have a sufficient number of farming implements for their present requirements, and they take good care of them. . . .
>
> The men of these bands are good workers, but they need constant supervision to keep them in the right path.
>
> I am confident that with good men here in charge for a few years these bands will become entirely self-supporting.[61]

Agent Day's Annual Reports from 1905 to 1909 demonstrate that the Moosomin Band continued to make advancements in agriculture and was on the road to becoming completely self-sufficient. In 1905, Day reported:

> Mixed farming is a decided success here; the members of this band not only make a good livelihood at it, but some of them are getting to be very prosperous and would scout the thought of asking for government rations. They are energetic, and if one source of revenue fails, they try another; but they keep moving all the time, and in the right direction.
>
> The building of the Canadian Northern railroad through this reserve has been a great help to these Indians by providing work and a near market for all their produce.
>
> There are 279 head of cattle belonging to this band; they are a fine bunch of animals, and are well attended to. . . .
>
> A very complete equipment of farm implements is owned by this band; they paid for them out of their earnings; they are familiar with their use and take good care of them. . . .
>
> [T]hese Indians are decidedly progressive and industrious.[62]

In the Annual Report for 1906, Agent Day offered these comments in relation to the Moosomin Band:

> The population of this band is 134.
>
> These Indians farm, raise stock, sell hay and fire-wood, work for settlers and railroad companies, and also do a lot of freighting. . . .

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61 J.P.G. Day, Indian Agent, to Superintendent General, August 20, 1902, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, pp. 199-201).

62 J.P.G. Day, Indian Agent, to Superintendent General, September 15, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

> The cattle belonging to this band are very good, and are well looked after all the time. . . .
>
> These people are well equipped with all classes of farm implements. They own them, and look after them well. Last year this and Thunderchild band bought a new threshing-separator out of the proceeds of the right of way through their reserves for the Canadian Northern railroad. . . .
>
> These Indians are very thrifty and prosperous. The progress they are making is very creditable, and, judging from appearances, it is permanent.
>
> There is little, if any, intemperance. . . .[63]

In 1907, Agent Day commented:

> Nearly all the Indians on this reserve farm and keep stock; they sell their surplus grain, also fire-wood and hay; altogether they make a very good living. . . .
>
> These Indians are industrious, well behaved, and are making a comfortable living.[64]

The 1908 Annual Report includes these remarks by Agent Day:

> These men are all farmers and stock-raisers; they also sell hay and fire-wood; do quite a lot of freighting for the railways, work for settlers; and make a very comfortable livelihood.[65]

In his 1909 Annual Report, it is curious that Day made no mention of the fact that the Band had surrendered its reserve and had been relocated. He did, however, provide these comments on the condition of the Moosomin Band:

> There are 137 Indians in this band.
>
> The health of this band is good, and everything in the way of hygiene is done to keep them in a healthy state.

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63 J.P.G. Day, Indian Agent, to Superintendent General, July 19, 1906, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1636).

64 J.P.G. Day, Indian Agent, to Superintendent General, May 1, 1907, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1642).

65 J.P.G. Day, Indian Agent, to Superintendent General, April 29, 1908, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1650).

> The Indians are successful farmers and stockmen; they also sell a lot of firewood, freight and work for settlers.
>
> The buildings on this reserve are all constructed of logs. . . . They are all clean and comfortable inside. . . .
>
> Cattle and horses wintered well and without loss. Much interest is taken in the stock industry by these Indians. . . .
>
> The Indians are becoming better equipped each year with wagons, mowers, binders, rakes, seeders, sleighs, harness, etc, besides all the necessary small implements required in their farming operations. . . .
>
> The Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous.
>
> No cases of intemperance have come to my notice during the past year by any member of this band. . . .[66]

Such was the state of the Moosomin Band in the very year in which the Band surrendered the land that had provided it with a measure of prosperity and the potential for an independent and successful future.

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66 J.P.G. Day, Indian Agent, to Superintendent General, April 19, 1909, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1753).

Pressure to Surrender the Moosomin Reserves

We note in examining the historical record the apparently close link between the surrender of Moosomin Indian Reserves 112 and 112A and the surrender of nearby Thunderchild Indian Reserve 115. Although the circumstances of the Thunderchild surrender are not before the Commission in this claim, the events surrounding that surrender must be touched on in this report because of that link. The Commission takes particular note of the Department's perception, as discussed below, that, after the death of Chief Moosomin in or around 1902, Chief Thunderchild, as the only recognized Chief of the Thunderchild and Moosomin Bands, spoke on behalf of the Moosomin Band in relation to the surrender of Reserves 112 and 112A.

Early Conflict over Indian Farming and Hay Lands

Conflict over the land set aside for Moosomin and Thunderchild began in the late 1880s, even before the reserve was confirmed by Order in Council in 1889. By 1888, settlers from the Battleford area had delivered a petition to the local Member of Parliament complaining about the success of the Indian bands in farming. The incident and Commissioner Reed's response, which was reported in the *Saskatchewan Herald* on October 13, 1888, were described by Carter:

> Residents of Battleford and district were particularly strident in their objections to Indian competition in the grain, hay, and wood markets. In 1888 they petitioned their Member of Parliament and complained that the "Indians are raising so much grain and farm produce that they are taking away the market from the white settlers." During his visit to Battleford in October of that year, Hayter Reed reported that he was assailed by such complaints. He met with a deputation of farmers and one of townspeople and informed both that his department "would do whatever it reasonably could to prevent the Indians from entering into competition with the settlers during the present hard time.". . . Reed arranged with the Battleford citizens to divide up the limited markets in the district. . . . The Indians were allowed to supply wood to the agency. . . . The sale of grain in the district was left exclusively to the white settlers.[67]

The question of additional lands for hay also caused dissatisfaction among neighbouring settlers. The original reserve (IR 112) was surveyed before departmental officials decided that cattle

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67 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 188.

ranching was the most economically viable economy in this area, and, as a result, the surveyor inadvertently failed to provide adequate hay lands for the Band during the initial survey of its reserve. As early as 1883, however, the local Indian Agent indicated that it would be advisable also to reserve an area on the north side of the North Saskatchewan River that the Indians were already using to supply their hay needs. Thus, in 1887, 2 square miles in that location (i.e., Township 46, Range 16, west of the third Meridian) were surveyed as "Hay Grounds" for the joint use and benefit of the Moosomin and Thunderchild Bands (IR 112A), and this reserve was confirmed by Order in Council in 1889.

According to Indian Affairs officials, however, the hay in IR 112A was not sufficient. In 1889, both Commissioner Reed and Indian Agent P.J. Williams requested additional reservations of hay lands in the same area. Williams insisted that additional hay lands "be procured at once, for the reason that it has come to the notice of the settlers that there are such hay-lands on the north side of the North Saskatchewan River, and nearly every one who has stock are after these lands."[68] In response, the Dominion Lands Agent reported on the growing dissatisfaction among the local settlers, who felt that the largest and best areas north of the Saskatchewan were reserved by the Indian Department and that these prime areas were not being fully harvested and were not used exclusively by Indians.[69]

On more than one occasion, Agent Williams strongly refuted these allegations, stating that "[n]ot one foot of our Reserve lands was cut by white settlers, nor was one forkfull cut on shares and every acre that was reserved was cut, that was fit for hay."[70] According to Williams, the resentment

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68 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, September 24, 1889, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 114).

69 E. Brokowski, Dominion Land Agent, Battleford, to Commissioner of Dominion Lands, Winnipeg, October 28, 1889 (ICC Documents, pp. 116-18). There was, in fact, a widespread feeling among settlers that the Indians' use of hay lands was wasteful. Sarah Carter noted that the settlers "claimed that Indians had adequate hay lands and 'to tie up more hay land than is really required is to throttle an important agricultural industry in its infancy.' Settlers who had taken up homesteads at Jackfish and Round Hill Lakes with a view to ranching objected to the reservation of hay lands there for Indians, so that 'pioneer settlers' may be allowed to enjoy the benefit of their enterprise and expenditure." *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990), 186.

70 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, March 3, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 143). Williams added: "I have made a careful investigation of the hay lands reserved for Indians use and I find that every available acre so reserved was cut and not an acre cut on shares as stated by the Agent of Dominion Lands here, and great dissatisfaction is expressed by the settlers as to the way

stemmed from factors other than the reservation of land for the Bands. He noted that, while settlers were reacting to a particularly poor year for hay on their own land, the Moosomin Band had only the hay reserve on which to rely for hay. In fact, Williams specifically requested additional hay reserves so that "our Indians and their cattle will not conflict with the white and half-breed settlers . . . who are ever ready to find fault with the Indians and the Department in their dealings with them."[71]

Commissioner Reed wrote that, in spite of the resentment felt by settlers, it was imperative that additional hay reserves be set aside, since the Department's intent was for Moosomin to rely on stock-raising. Therefore, adequate hay had to be available for the Band to permit it to earn a livelihood. He observed that "[i]t would be just as great a drawback to the country were the Indians restricted in their advancement owing to their inability to procure hay as it would be were the whites to find themselves short."[72] He concluded that, although it was possible that the Indians did not require all the hay lands requested, which and how much land should be provided to the Band ought to be carefully considered. To that end, Agent Williams provided a list of the lands he considered "absolutely necessary," and added that "if we do not get them it will be absolutely impossible for us to winter the now large and ever increasing stock of Indian cattle."[73] The Department of the Interior agreed to provide all but one quarter section of the lands identified by Williams (the quarter section not allowed had already been let under permit to someone else), but A.M. Burgess, Deputy Minister of the Interior, warned Deputy Superintendent General Vankoughnet that this arrangement was not intended by the government to be permanent:

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permits on hay lands are granted to favorites by the Land Agent here. I have no desire to interfere with the management of the Department of the Interior but when their Agent makes statements which the facts of the case will not justify, statements many if not all are very far wide of the truth I feel bound to represent matters in their true light." Williams to Indian Commissioner, March 26, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 151-52).

71 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, March 24, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, p. 149).

72 Hayter Reed, Indian Commissioner, Regina, March 28, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 153-54).

73 P.J. Williams, Indian Agent, to Indian Commissioner, Regina, April 16, 1890, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 156-57).

> As soon as the lands are required for the purposes of actual settlement, of which one year's notice will be given, it will be necessary to remove the reservation. The Minister adds: "The Indians must be instructed to raise their own hay on their reserves. This can be done, as some of the reserves can be easily irrigated."[74]

The conflict between settlers and the Moosomin Band over the hay lands was an early indicator of the pressure that would come to "open up" reserve land for settlement, given the increasing numbers of settlers on the prairies generally and in the Battleford area in particular.

Request for Surrender in 1902

In 1902, Mr B. Prince, a Member of the Legislative Assembly for the North-West Territories, wrote to Mr T.O. Davis, the local Member of Parliament, concerning surrender of the Thunderchild and Moosomin reserves:

> You are aware that about twelve miles from Battleford, we have the Moosomin and Thunder Child Reserves who are in the line of march of settlers, as each of these reserves occupies about six miles square of the best possible land in the centre of settlement and between the two rivers. I have been asked by a good number of our mutual friends of Battleford to try and get these two reserves moved on the other side of the river, to which I think these Indians would have no objection. In having these reserves opened for settlement it would very much benefit Battleford and its surroundings. I therefore ask you to use your influence on the Commissioner of Indian Affairs to obtain from him this favor, which I consider would be in the interest of all concerned.[75]

In response, the Department took the position that the proposal for surrender was probably not feasible. In a letter dated April 25, 1902, the Department emphasized that "full consultation with the Indians themselves" was required prior to obtaining a surrender and expressed doubt that the

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74 Lyndwode Beroira, Assistant Secretary, Department of Interior, to L. Vankoughnet, May 30, 1890, and A.M. Burgess to L. Vankoughnet, January 9, 1891, NA, RG 10, vol. 3782, file 40316 (ICC Documents, pp. 162 & 167).

75 B. Prince to T.O. Davis, April 16, 1902 (ICC Documents, p. 178).

Bands' agreement could be secured.[76] Immediately thereafter, the Deputy Superintendent General of Indian Affairs, James A. Smart, asked the Secretary of the Department, J.D. McLean, to "make a full report on these two Reserves, the number of Indians, and any particulars with regard to them."[77] This task was delegated to Indian Commissioner David Laird,[78] and then to W.J. Chisholm, the Inspector of Indian Agencies. Chisholm was asked "whether in your opinion the Indians would offer serious objections to the proposed transfer," and also to comment on "the quality of the land across the river."[79]

Inspector Chisholm quickly replied that, in his view, the lands immediately across the river were "equally good [as] those of the reserves and equally well adapted to grain growing." He suggested that relocation to the other side of the river would substantially benefit the Bands in that they would be "nearer to their hay-lands" and the difficulties of crossing the river would be avoided. He added that the "range for grazing is better on the north side; and water for stock more convenient."[80]

As for the wishes of the Moosomin and Thunderchild Bands, Inspector Chisholm did not canvass their views but noted that "[s]ome objection would in all probability be raised by a few, yet this would, I think, be overcome by a careful explanation of the objects and advantages." Finally, he noted that the case might be different if the relocation in question was to be to some point farther north of the North Saskatchewan River, and not to the immediate north bank.[81] Commissioner Laird

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76 Unsigned letter to T.O. Davis, April 25, 1902 (ICC Documents, p. 181). It is not clear who the author of this letter is, but the letter states on behalf of Indian Affairs that "it would be out of the question for the Department to undertake" a surrender at the moment.

77 J.A. Smart, Deputy Superintendent General, to J.D. McLean, April 25, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 182).

78 J.D. McLean, Secretary, Department of Indian Affairs, to Indian Commissioner, Regina, April 26, 1902 (ICC Documents, p. 183).

79 D. Laird, Indian Commissioner, to W.J. Chisholm, Inspector of Indian Agencies, April 30, 1902 (ICC Documents, p. 193).

80 W.J. Chisholm, Inspector of Indian Agencies, to D. Laird, April 30, 1902 (ICC Documents, pp. 194-96).

81 W.J. Chisholm, Inspector of Indian Agencies, to D. Laird, April 30, 1902 (ICC Documents, pp. 194-96).

echoed Chisholm's assessment of the situation, adding that if "they were asked to select a reserve some distance North of the river I doubt very much if they would entertain the proposal."[82] No further action appears to have been taken with respect to the request for surrender at this time.

It is important to observe that, in response to the initial pressures from settlers between 1888 and 1902, departmental officials generally acted in a reasoned and responsible manner and with full regard for the best interests of the Moosomin and Thunderchild Bands. For example, in 1888, when settlers pressed government officials to refrain from setting aside additional hay lands for the Bands, the Department persisted in its view that hay lands were necessary to assist the Band in developing its burgeoning cattle operation. In 1902, although the Department did not dismiss the proposal to surrender Moosomin's IR 112 out of hand, it is apparent that Inspector Chisholm and Commissioner Laird gave the proposal favourable consideration only on the understanding that lands of similar size and quality could be obtained for the Band on the other side of the North Saskatchewan River in a location that was closer to the Band's hay reserve.

Requests for Surrender in 1906 and 1907

Following the request for surrender in 1902, there was very little activity relating to the surrender of Moosomin's reserves until 1906. However, a few notable events that took place during this period warrant special mention.

First, it appears that Chief Moosomin died in or around 1902 since his name appeared on the July 13, 1901, paylist but his death was noted on the treaty paylist of July 14, 1902.[83] Apparently, "Old" Chief Moosomin's son, Josie Moosomin, was elected as Chief by the Band on May 3, 1904.

Although Indian Agent Day must have been aware of Chief Moosomin's death and Josie Moosomin's election as Chief, Secretary McLean stated that Ottawa was not advised of these developments until February 18, 1907, when Myeow, a Band member, sent a letter to Indian Affairs

82 D. Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, May 7, 1902, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 198).

83 Treaty Annuity Paylists, Moosomin Band, July 13, 1901 (ICC Documents, p. 1593), and July 14, 1902 (ICC Documents, p. 1596).

asking if the Department intended to recognize Josie Moosomin as Chief.[84] At that time, McLean expressed some confusion about the letter and asked Day to look into the matter.[85] There is nothing in the record as to what, if any, action Day took in following up on this request. However, judging from subsequent letters on the subject, it would appear that, contrary to a departmental policy which entitled every band with more than 100 members to a Chief, Agent Day refused to recognize Josie Moosomin as the Band's choice as Chief.[86] Therefore, the Moosomin Band had no recognized Chief throughout the critical period from 1902, when the surrender was first proposed, until shortly after the surrender was obtained in 1909. It strikes us as being more than just a coincidence that Agent Day sought to have Josie Moosomin appointed Chief on June 21, 1909, just days after the surrender was finally secured.[87]

Another significant event at the time was the construction of the Canadian Northern Railway (CNR) in 1903 through the Moosomin and Thunderchild reserves and the building of a railway station at Highgate on Moosomin IR 112. On June 25, 1904, the Superintendent General of Indian Affairs asked the Governor in Council for authority under section 38 of the *Indian Act* to sell the land to the CNR for the right of way and railway station "upon such terms as may be agreed upon." By Order in Council dated July 25, 1904, authority was granted to take a 93.25-acre right of way across the Moosomin and Thunderchild reserves, with an additional 9.24-acre parcel for the Highgate station grounds.[88] As mentioned earlier, the railway line not only enhanced the value of the

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84 Myeow, Moosomin Reserve, to Secretary, Department of Indian Affairs, February 18, 1907, NA, RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1645).

85 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 28, 1907, NA RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1646).

86 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 265-66).

87 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, June 21, 1909, NA, RG 10, vol. 3939, file 121698-5 (ICC Documents, p. 1700). Day was authorized to appoint Josie Moosomin as Chief on July 8, 1909, and on July 26, 1909, Day confirmed that he had done so. J.D. McLean to J.P.G. Day, July 8, 1909, and J.P.G. Day to J.D. McLean, July 26, 1909 (ICC Documents, pp. 1708 and 1712); Josie Moosomin is noted on the 1909 paylist as "Chief," Treaty Annuity Paylist, Moosomin Band, June 26, 1909 (ICC Documents, p. 1702).

88 Order in Council, PC 1298, July 25, 1904. The submission to Council of June 25, 1904, is mentioned in the Order in Council.

Moosomin reserve but it also benefited Band members by "providing work and a nearby market for all their produce."[89]

Although there was very little correspondence relating to Moosomin between 1902 and 1906, it appears that there was considerable "unofficial" activity, causing rumours to spread about possible surrenders of the Moosomin and Thunderchild reserves. At the same time, external forces were beginning to galvanize to achieve this objective. In June 1905, Day wrote to Commissioner Laird:

> [F]or some time past there have been rumours current in this district, that the "Moosomin" and "Thunderchild" Bands were to be transferred to other Reserves: this has made the work of handling these Bands very difficult, for of course they have heard the rumour too; They refuse to plow or fence, saying that it is no good making work or improvements, for someone else, for nothing, they asked me if there is any truth in the report; I told them that I had heard nothing from you on the subject.[90]

Accordingly, in January 1906, Agent Day wrote to Commissioner Laird concerning the possible surrender of Thunderchild's IR 115A on the north side of the North Saskatchewan River. Day noted that the Thunderchild Band did not find this reserve to be of much use and that settlers had expressed interest in the land.[91]

It is not clear where rumours of a possible surrender originated, but it is evident that they were widespread: a letter dated October 3, 1906, from Jervais Newnham, Anglican Bishop of Saskatchewan, to Commissioner Laird confirmed the existence of the rumours. Bishop Newnham asked whether there was

> any likelihood of the Indians on Thunder Child's, Moosomin's, Sweetgrass *&c* Reserves being moved soon? The present Reserves constitute a great waste of land, a great waste of work in teaching and overseeing them. The 5 Reserves have only Indians enough for 1 or at most 2. I would humbly suggest that the Protestant Indians

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89 J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General, September 15, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 27, 105 (ICC Documents, p. 1632).

90 J.P.G. Day, Indian Agent, to Indian Commissioner, June 19, 1905, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 214).

91 J.P.G. Day, Indian Agent, to Indian Commissioner, January 30, 1906 (ICC Documents, p. 213.)

> be *advised* to settle around Sandy Lake, and the R.C. Indians at Turtle [?] Plains, or Mistawasis, or some R.C. Indian reserve. Some such action would mean great economy and much less friction.[92]

Commissioner Laird responded promptly, advising that "[i]t would be difficult, I think, to get them all to agree to such a movement," and that while it might be a good idea to separate the Catholic from the Protestant Indians, it would not likely be effective.[93]

Although there is no record of any meeting between Agent Day and the Moosomin Band, it appears that he did informally discuss the matter with a small group of Band members who favoured a surrender. This discussion prompted Josie Moosomin, who identified himself as Chief of the Moosomin Band, to write a letter on November 23, 1906, to "the Government of Ottawa" to express his concerns and to make it clear that Band members did not want to surrender the reserve:

> *Now my Governor as I am sending this letter I want to tell that we never want to sell this reserve. Now when my Father the Chief was living he told me never to leave this his reserve.* So though I am not honorable enough to tell you this. But I'll tell you that I am always trying my very best to help the Agent and the Farm Instructor in the line of work. Off [sic] Course this is what my father always followed. *That's the very reason why I am not ashamed to tell you this, as you are honorable.*
>
> I am sending you this letter to tell you that there are some men here in the reserve who want to sell this land. Those men are not the most industrious people. . . . Off [sic] course these men have no saying in this reservation. We are too willing to let them leave, if we the undersigned have any rights to let them go. So in your reply please let us know whether we have the right to let them leave.[94]

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92 Jervais A. Saskatchewan, Prince Albert, to D. Laird, Indian Commissioner, October 3, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 216).

93 D. Laird to Bishop of Saskatchewan, Prince Albert, October 11, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 217).

94 Josie Moosomin, Chief, to Government of Ottawa, November 23, 1906, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 218). Emphasis added.

Josie Moosomin also polled the Band's voters and advised Commissioner Laird that there were "26 Men for the keeping of the reserve. 6 want to sell it."[95]

Commissioner Laird apparently expressed some consternation over Agent Day's discussion with the Band regarding a proposed surrender, especially given that Laird had received "no intimation from the Department that the above reserve was to be disposed of."[96] Accordingly, Laird forwarded the matter to Day and asked why "Chief Moosomin" thought that the reserve was to be surrendered. In response to Laird's inquiry, Day wrote:

> [S]ome seven Indians asked me to have their Reserve changed, providing that it could be done advantageously: before they were through speaking, Josie Moosomin came in; and, I presume that this is his reason for writing to you. I would say that no steps were taken in the matter, nor was it my intention to do anything in the matter, unless approached by a majority of the Band, so that his fears were groundless.[97]

Agent Day went on to state that he did not regard Josie Moosomin as a Chief, and that "these Indians told me that there were a number of other members of the Band who were of the same opinion as themselves." He also offered to make a full report on the matter.[98] Ultimately, Josie Moosomin's plea to retain the reserve received only a brief reply dated December 11, 1906, in which Secretary McLean indicated that the land could not be disposed of without a surrender from the Band in accordance with the *Indian Act*.[99]

Although Commissioner Laird was apparently unaware of any proposed surrender, Ottawa did have plans, at the request of local politicians, to pursue surrenders with the Moosomin and

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95 Josie Moosomin, Chief, to Commissioner, received November 27, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 219).

96 David Laird, Indian Commissioner, to Indian Agent, Battleford, November 28, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 220).

97 J.P.G. Day, Indian Agent, to Indian Commissioner, Winnipeg, December 21, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 222).

98 J.P.G. Day, Indian Agent, to Indian Commissioner, Winnipeg, December 21, 1906, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, p. 222).

99 J.D. McLean, Secretary, Department of Indian Affairs, to Josie Moosomin, , December 11, 1906, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 221).

Thunderchild Bands. It is clear from a March 16, 1907, letter from George McCraney, the local Member of Parliament, to Deputy Superintendent General Frank Pedley that a meeting with Pedley took place in Ottawa about two months earlier with respect to the possible surrender of the Moosomin and Thunderchild reserves:

> You will recollect that when Mr. Prince and Mr. Champagne, M.L.A. of Battleford, were here a couple of months ago, we discussed the question of the removal of the Indians from Moosomin and Thunder Child Reserves, and you intimated that instructions would be given to Mr. Day, Indian Agent, to open communication with the Indians, with a view to their removal.[100]

Although there is no detailed record of the lobbying efforts of Messrs Prince and Champagne, the clear implication from this letter is that the Indians were to be removed from the reserves. Having the Bands *retain* the land does not appear to have been considered as an option by Indian Affairs.

There can be no doubt that this meeting, which must have occurred in or around the middle of January, triggered a flurry of activity, beginning with a memo from Deputy Superintendent General Pedley to W.A. Orr of the Lands and Timber Branch on January 21, 1907, regarding the proposed surrender of Indian Reserves 112, 112A, 115, and 115A. Without first obtaining a report from Agent Day on the matter, Pedley instructed Mr Orr as follows:

> A letter to the Inspector with surrender papers for the surrender of the whole of the Moosomin and Thunderchild's Reserves may as well be sent the Agent, so that he may take the matter up with the Band or Bands interested.
>
> Should the Indians be willing to surrender it will be, I presume, upon the basis of a cash payment at the time of surrender and the allotment of a new Reserve. The Agent should be so advised.[101]

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100 G.E. McCraney, Member of Parliament, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 16, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 246).

101 Deputy Superintendent General of Indian Affairs to Mr Orr, January 21, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 223).

Just three days later, on January 24, 1907, Deputy Superintendent Pedley asked for surrender forms to be prepared and sent to Agent Day.[102] Pedley also drafted a letter to Inspector Chisholm on the same day advising him that the surrender forms had been sent to Day and asking Chisholm to assist in obtaining the surrender, if such aid was necessary.[103] Pedley then appears to have reconsidered this hasty approach and chose instead to take up Day's earlier offer to provide a report on the matter. On January 28, 1907, Secretary McLean instructed Day not to take any action until he heard further from the Department.[104]

The following day, Mr Orr wrote to Deputy Superintendent Pedley stating that, if the latest population figures were used to determine the reserve land entitlements of the Moosomin and Thunderchild Bands under Treaty 6, Moosomin would be entitled to a larger area, whereas Thunderchild held 9 square miles of "excess" land.[105] Orr's memo also suggested that the proposed surrender "provide for sale of their present Reserve at best prices obtainable and purchase of another Reserve as desired by the Indians and the funding of the balance of the purchase money, after paying percentage as may be agreed, between ten and twenty per cent and the cost of removal of Indians."[106]

Deputy Superintendent Pedley accepted Mr Orr's advice. One week later, on February 6, 1907, Pedley sent a memo to Oliver suggesting that the agent open discussions with the Bands regarding the surrender of their reserves in consideration for a cash payment and "a suitable reserve upon the basis of the same acreage they would have received according to their present population if a Treaty were now being made."[107] Oliver appears to have approved this plan of action: on

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102 Deputy Superintendent General of Indian Affairs to J.P.G. Day, Indian Agent, January 24, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 229).

103 Deputy Superintendent General of Indian Affairs to W.J. Chisholm, Inspector of Indian Agencies, January 24, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 229).

104 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 28, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 232).

105 W.A. Orr, in Charge Lands & Timber Branch, to Deputy Minister, January 29, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 233-34).

106 W.A. Orr, in Charge Lands & Timber Branch, to Deputy Minister, January 29, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 233-34).

107 Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 235).

February 18, 1907, Day was finally given instructions by Secretary McLean to meet with the Moosomin and Thunderchild Bands to propose a surrender of Reserves 112, 112A, 115, and 115A in exchange for other lands. The idea of reducing the size of the Thunderchild reserve and increasing the size of the Moosomin reserve was dropped; instead, Day was told to present the idea as a straight exchange of the reserve land for other land to see if there was any interest in this proposal.[108]

Indian Affairs Postpones Plan to Seek Surrender

It is clear from this sequence of events that Indian Affairs headquarters was prompted to take action by two members of the Legislative Assembly, Mssrs Prince and Champagne, and the local Member of Parliament, Mr McCraney. They made these overtures on behalf of their constituents who had expressed their discontent on many occasions going back to at least 1888 over the fact that the Moosomin and Thunderchild Bands were occupying prime agricultural lands.

Until February 1907, not one meeting had been called for the specific purpose of discussing a proposed surrender with members of either the Moosomin or the Thunderchild Bands. Nevertheless, the prospect of these surrenders evidently spurred interest in the local community, both on and off the Moosomin and Thunderchild reserves. For example, Secretary McLean received several letters in late February 1907 from prospective homesteaders asking, in response to local newspaper reports, when the reserve lands might be available for settlement.[109] A few weeks after this influx of interest, Agent Day wrote to McLean on March 9, 1907, to advise that he had not yet raised the matter with the Bands because outside influences had intervened:

> *[T]here have been three or four busybodies at work trying to dissuade the Indians from giving up their present Reserves*: I know these people, and that their action is prompted from mercenary motives. Another nasty feature of the case is the fact that for the last few months Articles have appeared, from time to time, in the local Press,

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108 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 18, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 237).

109 Frederick T. Pick, to Minister of the Interior, February 18, 1907; D. Lamont, Napinka, Saskatchewan, to Department of Indian Lands, February 20, 1907; Philip Donahue to Dominion Lands Branch, February 25, 1907; A.Y. Silverlock, Balana, Manitoba, February 26, 1907; G.J. Blackwell, Churchbridge, Saskatchewan, to Minister of the Interior, February 26, 1907; all in NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 238-42).

> discussing the subject of these Reserves being ceded, and in such a tone which made it appear that the whole business was practically prearranged; also the Town Council and Board of Trade have passed resolutions, and talked over the same matter. All these proceedings have been viewed with suspicion by the Indians; and they naturally resented the idea of the Land being disposed of without their consent; so much so was this the case that they wrote to find out if it was true; and the Commissioner's answer that he had no intimation from the Department that the Reserve was to be disposed of, reassured them. In view of the foregoing circumstances, *I have therefore not yet approached, or even mentioned the matter to the Indians, as a whole.*[110]

Having perceived that the "prearranged" appearance of the surrender was distressing many members of the Band, Agent Day suggested that the whole matter should be carefully handled if the Department hoped to obtain the desired surrenders:

> What I would prefer to do, and I think the wisest course to pursue, would be for me to go down and lay the case, with full particulars, before you, and then come back with the Papers of surrender already prepared, call a meeting of the Indians, and have the whole question settled at the one meeting; this is, I think, feasible: if a meeting were called now for the purpose of discussing conditions of surrender, and it were postponed for approval and ratification; these people would get at the Indians, in the meantime, and give them bad advice, so that they might not even agree at a future meeting, to what they might be willing to accept now. I have gone thoroughly into the pros and cons of the case, and feel sure that I could elaborate a plan, and give you all the necessary data; to successfully put through this transaction, in a manner satisfactory to the Department and the Indians.[111]

We note Agent Day's attitude towards opinions coming from outside the Department and which he described as "bad advice," "mercenary," and the product of "busybodies." Given the atmosphere prevailing in the Battleford Agency at the time, with settlers actively seeking the surrenders for their own benefit, it is difficult to see how opposition to a surrender could have been considered "mercenary." Day's attitude towards these "busybodies," however, seemed to reflect the Department's view that it would have to isolate the Band from advice and opinions that were

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110 J.P.G. Day, Indian Agent, to Secretary, Deparatment of Indian Affairs, March 9, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 244). Emphasis added.

111 J.P.G. Day, Indian Agent, to Secretary, Deparatment of Indian Affairs, March 9, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 244-45).

contrary to its own. In any event, Day's letter made it clear that the Department believed its goals would be threatened by any reflection and contemplation by the Band.

Meanwhile, the settlers were getting restless: MP McCraney wrote to Deputy Superintendent Pedley to ask why Agent Day had not yet opened "communication with the Indians, with a view to their removal."[112] In his response of March 21, 1907, Pedley advised McCraney that Day had been

> confronted with certain difficulties arising from persons up in that neighbourhood endeavouring to dissuade the Indians from giving up the present reserve. . . .
>
> The Department and Agent, however, are trying to arrive at a proposition which will be favourably considered by the Indians, and, while this may take some little time, the Agent hopes that he will be able to carry it through.[113]

To quote counsel for the Moosomin First Nation, Pedley's letter and subsequent events only served to demonstrate that Indian Affairs had become

> an unabashed advocate and proponent of surrender in respect of both the Moosomin and Thunderchild Reserves. From this point forward, insofar as senior Department officials [were] concerned, it [was] only a matter of debating the how and when but never the why of surrender, relative to these two Bands and their Reserves.[114]

A New Surrender Proposal Is Offered

In response to a request from Secretary McLean, Agent Day wrote a letter dated April 15, 1907, proposing that the following terms of surrender be submitted to the Moosomin and Thunderchild Bands "as a fair basis for exchange":

- an equal area of unoccupied land north of Battleford near Brightsand Lake in exchange for the present reserves;
- a payment of $4 per acre to be paid by the government as compensation for improvements and as a premium for the exchange, of which $1 was to be paid in cash, $1 was to be paid

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112 G.E. McCraney, Member of Parliament, to Frank Pedley, Deputy Superintendent General of Indian Affairs, March 16, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 246).

113 Frank Pedley, Deputy Superintendent General of Indian Affairs, to G.E. McCraney, MP, March 21, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 247).

114 Written Submissions of the Moosomin First Nation, June 18, 1996, p. 64.

for provisions and outfitting at the time of surrender, and the balance of $2 was to be funded with the Department (i.e., placed in the Bands' trust accounts);

- the interest earned from the balance in the trust accounts to be expended semi-annually for the benefit of the Bands and distributed in accordance with Band votes, subject to the Department's approval;

- the government to set aside a timber berth or issue a permit in the vicinity of the new reserves and provide a shingle mill, engine, and planer in time for the Bands to procure building material for their new houses, stables, and barns;

- the Indians to have the right to take their wire fencing with them to their new reserves; and

- the Indians to receive free rations for six months.

Agent Day also emphasized that a cash payment would have to be paid at the time of the surrender since the Bands were concerned that, "unless they receive some money at the time of surrender, they will have to wait indefinitely for any benefit to accrue to them from their Reserves."[115] Although Day stated that "the price of C.P.R. Land, in the neighbourhood of these two Reserves is $12.00 per Acre," there is no evidence before the Commission regarding the value of the proposed replacement land at Brightsand Lake.

In light of Mr Orr's view that the Department would require $153,200 to implement the terms of surrender (if approved by the Band) and that such moneys would require parliamentary approval, Deputy Superintendent Pedley forwarded Day's proposal and Orr's cost estimates to Minister Oliver with a request for instructions on whether to carry out this proposed plan.[116] Although Day estimated the value of the lands at Highgate to be approximately $12 per acre, it is interesting to note Pedley's suggestion that "if these reserves were sold by this Department, it is assumed that we might realise probably $8 per acre therefor, and this, on the basis of retaining $4 for the Indians as indicated in paragraph 2 of the Agent's letter, would leave $4 for purchase from the Interior Department of land

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115 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G.Day, Indian Agent, March 23, 1907, and Day to McLean, April 15, 1907, both in NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 249-51).

116 Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol.7795, file 29105-9 (ICC Documents, pp. 252-54).

in the vicinity of Bright Sand Lake and a timber berth adjacent thereto, as well as for other incidentals."[117]

There is no record of a direct response from Oliver, but it appears from Pedley's letter to Orr on July 11, 1907, that instructions were received to offer less favourable terms than those suggested by Agent Day. The proposed terms were as follows:

> The Department will provide a new reserve of equal area, at Bright Sand Lake, which will have to be purchased from the Department of the Interior at $3.00 per acre, including the timber land. We will also pay the Indians at the time of surrender $10,000, and will compensate them for their improvements, ration them for six months after surrender, and will pay whatever is necessary to remove and rehabilitate them on the new reserve, provide a shingle mill, engine and planer, and allow the Indians to take their wire fences with them. The Indians to appoint delegates who with the Agent will select the land on the new reserve.
>
> After meeting these expenditures the balance of the money realized from the sale of the old reserve to be funded for the benefit of the Indians.[118]

Important differences emerge when these terms are compared with those originally proposed by Day on April 15, 1907. Instead of proposing an exchange of the old reserves for new reserves plus a timber berth and a fixed premium, the Department now sought to cover the cost of the new reserves, the timber berth and the saw mill, and the expense of moving the Bands and rehabilitating them on the new reserves out of the moneys realized from the sale of the existing reserves after surrender.

On July 25, 1907, Secretary McLean instructed Agent Day to propose the above terms of surrender to the Bands. Day met with the Bands on August 24, 1907, and provided this report of his meeting:

> I arranged a meeting with the Indians of these two Bands, which was held on the 24th ultimo. I stated to them the object of the assembly and the very liberal terms offered by the Department, but I met with a flat refusal; they evidently were predetermined

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117 Frank Pedley, Deputy Superintendent General, to Frank Oliver, Superintendent General, February 6, 1907, NA, RG 10, vol.7795, file 29105-9 (ICC Documents, pp. 252-54).

118 Frank Pedley, Deputy Superintendent General, to Mr Orr, July 11, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 262-63).

> not to accept any proposal of this nature; the reason for which I subsequently ascertained, was because of the rumors which they had heard of some months ago, when the Public, Press, Town Council, and Board of Trade were discussing the subject, and as I informed you in my Letter of even number of March 9th last, these Indians had been ill advised; and being naturally of a doubting nature, all this talk had aroused their suspicions, and *judging from the hasty rejection of any and all terms of surrender, it was quite apparent that the subject had been much discussed among themselves, and that they had taken a very prejudiced view of it!*
>
> Old Chief Thunderchild was the spokesman for the two Bands: one of the first questions he asked was why he was the only Chief in the Agency; to which I replied that the Department thought it wiser and better not to appoint others when they died off. . . .[119]

It is important to recognize that it is not clear how the Moosomin Band, in particular, responded to the proposal because their elected Chief, Josie Moosomin, was apparently not entitled to represent them at this meeting. It will be recalled that, on February 18, 1907, Myeow had asked whether Josie Moosomin would be recognized as Chief, but the Department had provided no written response. It is not clear why Agent Day did not follow up on this request.

After the meeting, Day suggested to the Bands that he "thought it wiser for them to have a little time to think the matter over, so that they might fully realize the good chance offered to them."[120] He reported that the Bands had discussed the matter among themselves at some length, and had "decided for Chief Thunderchild and two delegates from each Band to go down to Ottawa and negotiate the business; and they ask for myself and Interpreter to go along with them."[121]

It is apparent that the question of these proposed surrenders created a great deal of interest and unrest in the area. In spite of this unsettled situation, the Department did not take up the offer to meet with Chief Thunderchild and his delegation in Ottawa and apparently failed to respond at all. In fact, nothing happened for several months until Minister Oliver raised the matter again in a memorandum to Deputy Superintendent Pedley. It seems likely that this inactivity would have served

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119 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265). Emphasis added.

120 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

121 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

only to increase the anxiety level among members of the Bands. Just as Agent Day had remarked almost two years earlier, Band members were "disquieted" by rumours of a transfer to other lands, and they did not see the point in working at improving the land if it was only going to be given to someone else.[122]

Proposals for Surrender in 1908

After a brief lull, the matter resurfaced in March 1908 when Deputy Superintendent Pedley provided a memorandum to Minister Oliver reminding him of the state of affairs in Battleford. Then, on May 6, 1908, Oliver received a surrender proposal signed by 27 members of the Thunderchild Band and witnessed by Father Delmas, a Catholic priest; Reverend Macdonald, an Anglican minister; and A. Suffern, a farmer from the Thunderchild reserve.[123] The Thunderchild proposal indicated that Band members were willing to surrender IR 115 on the following terms:

> That this Reserve be sold at an upset price of not less than six Dollars per acre; that we be given, North of the Saskatchewan River, where we may choose, the same number of acres, as we have in our present Reserve, for which we are willing to pay three dollars per acre. . . . That the difference in value between this amount ($3.00) and the actual amount realized from the sale of our present Reserve, over and above the six dollars' upset price be given to us in the following manner: That the Department will pay to the Thunderchild Band of Indians at the time of surrender $15,000 cash, That we receive fishing privileges on some Lake we may choose in the neighbourhood of our new Reserve and that we be given ammunition and twine for nets. . . . That all money, minus fifteen thousand dollars realized from the sale of our present Reserve be funded for our use and benefit and that the money be given to us once in three months. . . . That the Indians shall have a voice in the expenditure of the interest on the funded money.[124]

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122 J.P.G. Day, Indian Agent, to David Laird, Indian Commissioner, Department of Indian Affairs, May 6, 1906, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 214).

123 Thunderchild Band Members to Frank Oliver, Superintendent General of Indian Affairs, May 6, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 1655-59).

124 Thunderchild Band Members to Frank Oliver, Superintendent General of Indian Affairs, May 6, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1655).

The balance of the Thunderchild proposal was comparable to the proposal made by the Department to the Bands almost a year earlier, except that Thunderchild requested rations for five years instead of six months. The Band also did not propose land at Brightsand Lake, but merely specified "North of the Saskatchewan River" and that it be entitled to choose where its new reserve would be located. Of the 27 names on this proposal, some appear to be signatures, but most are simply names accompanied by an "X" and the words "by his mark." It is not clear who wrote the letter itself. There is no evidence concerning the initiation of this surrender proposal, or regarding the circumstances of any meetings between these persons and the two clergymen and the farmer who witnessed the document. However, it appears that Father Delmas took particular interest in the surrender.

About one week after the Thunderchild proposal, on May 14, 1908, Father Bérubé wrote to Oliver stating that he understood the Thunderchild Band had decided to surrender its reserve and that Moosomin would follow suit.[125] Before receiving any word from Indian Affairs about its views on the Thunderchild proposal, Father Delmas wrote to Oliver on May 18 requesting land on the Thunderchild reserve. Apparently assuming that the letter he had secured from the Band was sufficient to effect a surrender, Father Delmas stated:

> [T]he Thunderchild Band of Indians have surrendered their Reserve, I hope your Department will accept the terms of the agreement and close the deal as soon as possible. It has been a very difficult task to get them to accept the terms. . . . *As I have worked hard to get the Indians to repose confidence in the Government and to surrender their Reserve, I would consider it a great favor if you would allow me to put a Catholic Colony on this Reserve.* . . . I sincerely trust, that you will not allow this Reserve be sold to speculators. . . . [I]f you give this letter your favourable consideration . . . you can communicate with the Reverend Father Berubé. . . .[126]

Father Delmas's remarkable statement that the Thunderchild Band had surrendered its reserve was no doubt considerably motivated by self-interest since, to secure the surrender, he had exerted much effort in seeking to have the Band "repose confidence in the Government." In any

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125 Reverend A.P. Bérubé to Frank Oliver, Minister of the Interior, May 14, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 269).

126 Reverend Father H. Delmas to Frank Oliver, Minister of the Interior, May 18, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1660). Emphasis added.

event, the Department does not appear to have been at all perturbed by this state of affairs. Rather than calling for an investigation into the matter or seeking information on the circumstances leading to the surrender proposal, Deputy Superintendent Pedley responded by seeking even more favourable terms to the Government. He insisted that the new reserve be at Brightsand Lake, that the timber berth be included in the reserve rather than as an addition to it, and that only six months' rations be provided.[127] Pedley also asked Agent Day whether he thought the Moosomin reserve could also be obtained, to which Day replied that it might.[128]

Accordingly, Deputy Superintendent Pedley advised Agent Day to hold off on obtaining the surrender from Thunderchild until surrender papers concerning Moosomin's IR 112 and the joint Thunderchild-Moosomin hay reserve (IR 112A) were prepared. On June 17, 1908, Pedley sent the surrender papers to Day with express instructions to seek surrenders from both Bands "in order that new locations may be arranged for them at the same time . . . as it would appear advisable to deal with both bands, instead of making any arrangement as to transfer of only one band."[129] Day responded that, to secure the surrenders, he would need $15,000 per band to be paid at the time of the surrender, since this had been "arranged with the Indians during the negociations [sic]." Day also asked for authority to offer rations for a full year rather than just six months.[130]

The rations were approved, but the Department did not respond concerning the cash payment. Day noted that, "unless they receive, at the time of signing, the money, $15,000 for each Band, which they say was promised to them . . . *it looks as if they would upon the slightest available pretext, back*

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127 Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.A. Orr, Officer in Charge, Lands and Timber Branch, June 3, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 272).

128 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, Telegram, June 13, 1908 (ICC Documents, p. 273). Note: this telegram is hard to read, but it looks as though it has "Moosomin" in it, and Day's next telegram appears to be responding to it; J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, June 15, 1908 (ICC Documents, p. 274).

129 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, June 17, 1908 (ICC Documents, p. 276).

130 J.P.G. Day, Indian Agent, to Secretary, Department of Indian Affairs, June 27, 1908 (ICC Documents, p. 277).

out of the surrender, and exchange, altogether!"[131] On the face of the documents, it would appear that the Bands were concerned that, if they did not receive money up front, they would never see any of the proceeds of a surrender.[132] Whatever the cause for the Bands' concern, Day was obviously not confident that they would consent to a surrender, and he thought that the $15,000 cash on hand would be necessary to persuade them to go through with it. It took some effort to obtain this sum in cash, however, since the Department was reluctant to entrust such a large amount to Day alone.[133]

Surrender Meetings with Thunderchild and Moosomin in August 1908

On August 6, 1908, after receiving a cheque to cover the cash payments, Commissioner Laird, who had been instructed to attend and assist in the surrender meetings, informed Day that he should notify the Bands about the meetings.[134] Laird provided this detailed report of the surrender meetings with the Thunderchild and Moosomin Bands on August 26 and August 28, respectively:

> I wrote Mr. Agent Day on the 6th August to notify the Indians of the meetings of the Bands as required by law in such cases. . . .
>
> On the 19th I received a letter from Mr. Day that the Indians of Thunderchild's and Moosomin's Bands were notified to come in for the surrender on the 26th August. . . .
>
> On Wednesday, the 26th ultimo, we proceeded to Thunderchild's reserve, taking with us half the money and two policemen. We met the Band at 2 o'clock, there being a pretty full attendance of all Indians on the reserve having votes. I explained the terms contained in the form of surrender. . . . The Chief, who spoke first, and every Indian that followed, except two or three objected most strongly to

131 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, July 20, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 281). Emphasis added.

132 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 15, 1907 (ICC Documents, p. 250).

133 D.C. Scott, Accountant, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 9, 1908 (ICC Documents, p. 278); J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, Department of Indian Affairs, July 30, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 285).

134 David Laird, Indian Commissioner, Department of Indian Affairs, to J.P.G. Day, Indian Agent, August 6, 1908, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 1665).

> accept one year's rations instead of the five asked for in their proposal to the Department. They talked the whole afternoon on this point. . . . [W]e agreed to offer two years' rations. Even with this concession the whole forenoon of the following day was taken up in discussion and two or three attempts at voting which were unsatisfactory. In the afternoon we tried again. The Chief stood aside and would not vote until others voted. This was done by calling over the roll and asking each specifically how he voted. The vote when done stood 15 to 15. I then asked the Chief for the casting vote. He made a long speech, and asked if they might take away or sell their houses. I consulted with the Agent and Rev. McDonald and Father Delmas, who were present. . . . We agreed to this change, and the Chief and Principal men signed the surrender, and the payments were at once begun, but were not finished on the reserve until the 28th. . . . 107 Indians were paid on the reserve $120.00 each making $12,840.00. . . .
>
> *We met Moosomin's Band at their reserve at 2 o'clock on the 28th ultimo. I explained the terms conceded to Thunderchild's Band. Nearly all the men spoke and were overwhelmingly against the surrender; only Monday had the vote been near, a tie, or had there been any hope of an immediate change, but as matters stood it seemed useless to prolong the negotiations.*[135]

Moosomin's resolve to oppose the surrender was underscored in Agent Day's report of September 18, 1908, regarding the surrender meetings:

> The Moosomin Indians refused to surrender; and to show that this was caused by prejudice, I may add that they handed us a signed refusal dated the day previous to hearing the terms and conditions of the proposed surrender; their only reason advanced was that they did not wish to give up their present holdings. *I have since heard that a number of these Indians were hoodwinked into signing this refusal, by a few of the ones who were influenced by outsiders; I have taken steps to counteract this baleful interference; and feel quite confident that the Moosomin Indians will soon be clamouring for the same privileges accorded to the Thunderchild Band.*[136]

It is interesting to note that, although Commissioner Laird offered no explanation as to why the Moosomin Band refused to accept the surrender, suggesting only that further persuasion would not prove useful, Agent Day again characterized the independent advice of outsiders as harmful and

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135 David Laird, Indian Commissioner, to J.D. McLean, Secretary, Department of Indian Affairs, September 3, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 290-94). Emphasis added.

136 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 12, 1908 (ICC Documents, p. 295). Emphasis added. The "signed refusal" is not found in the historical record: accordingly, we do not know who or how many signed it.

pernicious, and something to be "counteracted." To Day, the Band's aspirations were unsatisfactory. Although the Band was prospering on its existing reserves, Day seemed to turn a blind eye to the fact that Band members had good reasons for wanting to keep the lands they were provided under Treaty 6. Honouring those aspirations – and giving effect to the Band's intention – was clearly not the paramount consideration of Day and his superiors.

When news arrived at Ottawa headquarters that the Moosomin reserve had not been surrendered, senior officials were upset with Agent Day because he failed to obtain a surrender from the Moosomin Band as instructed. On September 14, 1908, Deputy Superintendent Pedley abruptly reminded Day of his instructions:

> I would call your attention to the fact that the instructions given you were to obtain a surrender from both bands of Indians, as it was not considered advisable that a surrender should be taken from one Band. . . . I have to ask you to report at once action taken in the matter, and why a surrender was taken contrary to instructions given from only one Band, notwithstanding instructions that surrender should only be taken if both Bands were willing to grant same.[137]

When Day did not immediately respond to this letter, another letter was sent by Secretary McLean on January 27, 1909, reminding Day of Pedley's letter and stating that "[y]our failure to explain such action which was in direct neglect of positive instructions, can not be allowed to pass without censure."[138]

Day's reply to McLean on February 8, 1909, offered an explanation in defence of his actions. He concluded by stating: "I regret exceedingly that the Department views my action, in this matter, in such a light as to call forth a censure: from my point of view it was not merited, as I certainly did my utmost to carry out faithfully the Department's instructions; and am always ready and willing to

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137 Frank Pedley, Deputy Minister, to J.P.G. Day, Indian Agent, September 14, 1908, NA, RG 10, vol. 3563, file 82-11 (ICC Documents, p. 297). Frank Pedley, Deputy Minister, to David Laird, Indian Commissioner, Department of Indian Affairs, September 1, 1908, stating that his "[i]nstructions were to take surrenders from both Bands Thunderchild and Moosomin, not from one band" and demanding a prompt explanation (ICC Documents, p. 288).

138 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 27, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 304).

do my best, under any and every circumstance, in my duty to the Department and the Indians."[139] McLean's terse reply to Day on February 18, 1909, stated simply that "your explanations are not considered satisfactory."[140]

It would appear from this correspondence that Agent Day's censure and the unwavering determination of the Department to obtain the surrender of the Moosomin and Thunderchild reserves likely had the effect of inspiring Day to intensify his efforts to secure the Moosomin surrender so that he might restore himself in the eyes of his superiors. As he mentioned in his reporting letter of September 12, 1908, he had already taken steps to counteract the "baleful interference" of outsiders and he felt "quite confident that the Moosomin Indians will soon be clamouring for the same privileges accorded to the Thunderchild Band."[141]

Letter of Petition from Members of the Moosomin Band in 1909

Events at Moosomin in 1909 followed a path similar to the events at Thunderchild the previous year. There is, however, a conspicuous absence of detail in departmental records as to precisely what happened in the days and weeks leading up to the surrender of Moosomin's reserves on May 7, 1909.

On January 8, 1909, a letter of petition surfaced which purported to represent the views of 22 members of the Moosomin Band. The letter was addressed to "The Superintendent General of Indian Affairs of Ottawa" and stated:

> We the undersigned of the Indians belonging to the Moosomin's Band, after due consideration beg to state that we are willing to surrender under the following conditions.
>
> That this reserve be sold for $12.00. [That] we be given the same number of acres around the Lake called Little Jack Fish Lake, for which we are willing to pay $3.00 an acre. That we keep our hay land at Round Hill and that this said land

139 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of indian Affairs, February 8, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 306).

140 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, February 18, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 309).

141 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 12, 1908 (ICC Documents, p. 295).

> belonging to us as a part of our Reserve. That the difference in value that is to say $9.00 an acre to be given to us cash down. We want a Surveyor, before we get the money. We can put the price up, If this, is not satisfactory. We see, how Thunderchild people some of them no money, for winter, and they don't know whether Lake is open or not. That's why we want a Surveyor first then we can go and work if our reserve ready to get in.[142]

Unlike the letter that was prepared for the Thunderchild Band the year before, it is curious that all 22 names on this letter are set out in the same handwriting and that not a single member of the Band signed his name or attached "his mark" to this letter as an expression of his intention to surrender IR 112 on the conditions outlined above. One person on the list, John Applegarth, does not appear to have even been a Band member, and it is not clear who he was or what his interest would have been in signing this document. It is also noteworthy that, although Josie Moosomin's actual signature later appears on the documents of surrender, he does not appear to have signed this letter. When these irregularities are considered in light of the Crown's unwavering desire for the surrender and the information provided by the elders during this Commission's hearings (to be reviewed in the following pages), we have serious reservations about whether this letter provides reliable evidence of the Band's intentions, particularly when none of the Band members signed it. There is simply no evidence regarding who wrote this letter, what prompted it, and whether the Moosomin Band as a whole was consulted about its contents. Under these circumstances, we do not attach much weight to this letter of petition as evidence of the Moosomin Band's intention to surrender its reserves.

In any event, it is clear that the letter of petition prompted the Department to renew its efforts to obtain the surrender of IR 112 and the Round Hill hay lands at IR 112A. On January 26, 1909, Secretary McLean instructed Agent Day to resume his discussions with the Moosomin Band on the issue of surrender.[143] Mr Orr's response to the proposed terms of surrender, which was set out in a handwritten notation on the bottom of the letter itself, was that the terms "would not appear

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142 Moosomin Band Members to Frank Oliver, Superintendent General of Indian Affairs, January 8, 1909, NA, RG, vol. 4041, file 335-933 (ICC Documents, p. 300).

143 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 26, 1909 (ICC Documents, p. 303).

satisfactory as DIA could not pay all cash as desired."[144] This objection was amplified by McLean in a letter to Day, stating that "the price placed upon the reserve is too high."[145] It is noteworthy that the price requested for Moosomin IR 112 is the same value Day proposed in 1907 when he wrote that "the price of C.P.R. Land, in the neighbourhood of these two Reserves is $12.00 per Acre."[146]

On February 19, 1909, Agent Day reported to Secretary McLean regarding a meeting he had with the Band. He stated that "in accordance with your wishes I went very thoroughly into the subject with these Indians, and have succeeded in getting them to assent to the attached conditions, upon which they are willing to surrender."[147] Even assuming that the letter was representative of the wishes expressed by at least some members of the Band, it is clear that they had proposed very specific terms on which they were willing to surrender, including the land to which they wished to relocate and payment of an additional $5000 at the time of surrender. Again, there is some question about the individuals with whom Day met and whether there was broad support among members of the Band for the proposed surrender.

We note the role of the clergy in pursuing these surrenders. In relation to the Thunderchild surrender, Father Delmas told Frank Oliver that he had "worked hard to get the Indians to repose confidence in the Government, and to surrender their Reserve."[148] The evidence confirms that Father Delmas played a critical role in obtaining a surrender of Thunderchild's reserves, so it is likely that he employed a similar approach with respect to Moosomin. On March 29, 1909, Anglican Bishop Newnham wrote to Minister Oliver describing the Battleford surrenders:

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144 Moosomin Band Members to Frank Oliver, Superintendent General of Indian Affairs, marginal note by W.A. Orr, Officer in Charge, Lands and Timber Branch, January 8, 1909, NA, RG, vol. 4041, file 335-933 (ICC Documents, p. 300).

145 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, January 26, 1909 (ICC Documents, p. 303).

146 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 15, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 250).

147 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 312).

148 Reverend Father H. Delmas, to Frank Oliver, Minister of the Interior, May 18, 1908, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 1660).

> I understand that Thunder Child's Indians are about to remove from the Battleford Reserve which they surrendered; but it is not yet fully decided where they will locate. Moosomin's band are nearly persuaded to do the same thing. It will not take much to persuade Sweet Grass, Little Pine and Poundmaker to do the same.[149]

Oliver passed this letter on to Deputy Superintendent Pedley, who suggested that "there is no reason why the Indians could not be influenced through their clergymen and by our own officers."[150]

The clergy also sought to influence where the Bands would settle. On February 19, 1909, the same day that Agent Day wrote to Secretary McLean concerning the surrender, Reverend Macdonald wrote to Commissioner Laird about the proposed relocation to Little Jackfish Lake and the possibility of ensuring that Thunderchild would also settle there for the convenience of the farm instructor and the clergy.[151] Laird's terse reply was that "there is not the slightest probability that this condition [of relocation to Little Jackfish Lake] will be acceded to. The two Bands must be near each other for economical management."[152] A different tone was sounded in Ottawa, where, on receipt of Day's terms, McLean set out to determine whether the lands and fishing rights sought by the Band were, in fact, available.[153] His letters of February 26, 1909, emphasize that "it is very much desired

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149 J.A. Saskatchewan to Frank Oliver, Minister of the Interior, March 29, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 328).

150 Frank Pedley, Deputy Superintendent General of Indian Affairs, to Frank Oliver, Minister of the Interior, April 18, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 357).

151 D.A. Macdonald to David Laird, Indian Commissioner, Department of Indian Affairs, February 19, 1909, NA, RG 10, vol. 3563, file 82 pt. 11 (ICC Documents, p. 310). Bishop Newnham wrote a similar request to Minister Oliver in regard to where the Bands should be allowed to move to, noting that some of the locations the Bands had mentioned would be inconvenient for the "economical management" of the Bands. J.A. Saskatchewan, to Frank Oliver, Minister of the Interior, March 29, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 331).

152 David Laird, Indian Commissioner, Department of Indian Affairs, to D.A. Macdonald, February 22, 1909, NA, RG 10, vol. 3563, file 82 pt. 11 (ICC Documents, p. 316).

153 J.D. McLean, Secretary, Department of Indian Affairs, to P.G. Keyes, Secretary, Department of the Interior, February 26, 1909 (ICC Documents, p. 317); J.D. McLean, Secretary, Department of Indian Affairs, to Deputy Minister, Department of Marine & Fisheries, February 26, 1909 (ICC Documents, p. 319). Both found in NA, RG 10, vol. 4041, file 335-933.

to comply with these conditions as the surrender of their present reserve is required in the interest of advancing settlement."[154]

The Department of the Interior, however, "decided that it is not practicable to lay out a satisfactory tract of land as an Indian Reserve" on the land sought by the Band. Secretary McLean then provided Agent Day with the following instructions:

> Kindly explain the above to the Indians of the Moosomin Band and show them that it would be to their advantage to select their reserves at some locality north of the north boundary of township 53. Kindly attend to this matter as soon as possible as in the event of the surrender being taken it will be convenient to have the necessary survey made immediately that the survey work for the Thunderchild Band is completed.[155]

It is not clear why this request was made, especially given that no response concerning availability of lands appears to have been received until April 19, 1909, and given that the eventual response from Secretary P.G. Keyes was that the lands desired by the Band could be reserved.[156] It is also not at all clear how moving Band members still farther north could possibly have been "to their advantage."

Perhaps recognizing the impossibility of attempting to impose further terms on the Band, Secretary McLean wired Agent Day on April 10, 1909, and advised him not to provide the foregoing explanation to the Band.[157] He then forwarded Keyes's letter to Surveyor Lestock Reid, stating that "[i]t is hoped that when the Indians have selected the tract of land they are willing to accept in

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154 J.D. McLean, Secretary, Department of Indian Affairs, to P.G.Keyes, Secretary, Department of the Interior, February 26, 1909 (ICC Documents, p. 317); J.D. McLean, Secretary, Department of Indian Affairs, to Deputy Minister, Department of Marine & Fisheries, February 26, 1909 (ICC Documents, p. 319). Both found in NA, RG 10, vol. 4041, file 335-933.

155 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, April 6, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 334).

156 P.G. Keyes, Secretary, Department of the Interior, to J.D. McLean, Secretary, Department of Indian Affairs, April 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 359).

157 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, April 10, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 356).

exchange for the Moosomin Reserve, the Agent will have no trouble obtaining from the Band the necessary surrender."[158]

Although the Department accepted most of the terms proposed in the letter of petition, some important changes were made. Even those members of the Band who presumably agreed with the letter of petition did not wish to surrender the hay lands in IR 112A at Round Hill. Nonetheless, McLean indicated the Band would be asked to surrender this reserve as well.[159] Additionally, Duncan Campbell Scott, the Chief Accountant who later became the Deputy Superintendent General of Indian Affairs, suggested deletion of the term which stated that "the money be given to us once in three months."[160]

The insistence on securing IR 112A, important as it was, does not appear to have been specifically communicated to Agent Day. On April 23, 1909, Deputy Superintendent Pedley forwarded the surrender forms to Day, but Pedley's covering letter made no mention of the addition of IR 112A, even though he saw fit to point out the "slight difference in the land included in the surrender" since some of the land had already been patented.[161] He also instructed Day to submit the proposed surrender to the Moosomin Band and advised him that provision had been made for the payment of $20,000 at the time of the surrender; Pedley, however, failed to specifically ask Day to seek a surrender of IR 112A.[162] Other than this letter from Pedley, there appears to have been no other correspondence with Day following McLean's telegram of April 10, 1909. There is also no mention in the correspondence of any additional land being set aside for the Moosomin Band as

158 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 363).

159 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 21, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 364).

160 D.C. Scott, Chief Accountant, to Chief Surveyor, Department of Indian Affairs, April 22, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 366).

161 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 367).

162 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 367).

consideration for this additional surrender.[163] It is remarkable that such an important addition to the terms of surrender – the addition of the land that a previous agent had described as "absolutely necessary" to the Band's well-being – would be excluded from mention by mere oversight.

On April 30, 1909, Agent Day reported to Secretary McLean that he had discussed the revised terms with the Moosomin Indians, who "expressed themselves as perfectly satisfied with the arrangements and terms and agreed to sign the surrender, just as soon as the money is here."[164] The report adds, however, that the Band wished to retain its hay lands at IR 112A, since this reserve was close to the Band's new location. As an aside, it must be noted that Day's report was lacking particular details about whether the entire Band was summoned for this discussion or whether the revised terms were raised with only a small group of Indians who purported to represent the entire Band. This is an important point in light of two facts: first, that the Department, and Day specifically, did not recognize Josie Moosomin as Chief of the Band and, second, that for all intents and purposes the Band did not have a Chief at the time of the surrender and during the discussions leading up to it.

In response to Agent Day's report, Secretary McLean wired the blunt reply that the "Indians must surrender all their present reserves including hay land."[165] He amplified these comments in a subsequent letter, saying that "[a]fter due consideration it has been decided that it is not desirable to allow the said lands to be held by the Indians."[166]

On May 6, 1909, Agent Day wrote to Secretary McLean acknowledging these instructions and stating that they "shall be carefully carried out." Day also noted that $20,000 in cash had arrived

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163 Frank Pedley, Deputy Superintendent General of Indian Affairs, to J.P.G. Day, Indian Agent, April 23, 1909 (ICC Documents, p. 367); S. Bray, Chief Surveyor, to D.C. Scott, Chief Accountant, April 21, 1909 (ICC Documents, p. 365). Both found in NA, RG 10, vol. 4041, file 335-933.

164 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, April 30, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 370).

165 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 3, 1909 (ICC Documents, p. 372).

166 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 4, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 372).

at the bank the day before and that he intended to "take the surrender" and distribute the cash the following day.[167]

The Surrender Meeting of May 7, 1909

Unlike the Department's correspondence relating to the surrender meetings at the Thunderchild and Moosomin reserves in August 1908, Agent Day's report concerning the Moosomin surrender in May 1909 offers very few details. Remarkably, there are no documents that record with any significant particularity the discussion at the surrender meeting of May 7, 1909. Only a handful of documents offer assistance in determining what happened during this critical meeting.

Day was accompanied to the meeting by a Royal North-West Mounted Police (RNWMP) escort to ensure the safekeeping of the $20,000 in cash to be paid to the Moosomin Band for the surrender.[168] Band members apparently agreed to surrender both IR 112 and IR 112A that same day. A duplicate of the surrender document indicates that the terms agreed to by the Band were not exactly those set out in the January 8 letter of petition, with the most notable difference being that the Band would not be paid $12 per acre but, rather, that the lands would be sold for not less than an upset price of $6 per acre. On the last page of the surrender, it appears that 15 members of the Band either signed or affixed their marks with an "X" beside their names on the document.[169]

Later that day, Agent Day, Josie Moosomin, and Etowekeesik attended before C.J. Johnson, who was Day's clerk and a Justice of the Peace, in Battleford to provide a sworn certificate of surrender as required by section 49(3) of the *Indian Act*. The standard form certificate states that the surrender was "assented to by a majority of the male members of the said Band of Indians of the Moosomin Reserve of the full age of twenty-one then present," at a "meeting or council of the said

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167 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 6, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 373).

168 RNWMP Superintendent of "C" Division report for the month of May 1909 (ICC Documents, p. 1696).

169 Surrender Instrument and related documents, May 7, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 389).

Band summoned for that purpose and according to its rules."[170] Since Josie Moosomin was not recognized as the Chief, the certificate was amended so that he and Etowekeesik were referred to as "Chief men" of the Moosomin Band.

Although there is no detailed report of the meeting itself, Day did provide a brief summary of the meeting in a letter to Secretary McLean on May 18, 1909:

> The Moosomin Band have requested me to ask you for two Copies of their Surrender, one for themselves, and the other for *Rev. Father Delmas who did all the talking and interpreting for them.*
>
> As you will observe; I took the surrender of their Hay Swamp at Round Hill, although I had the greatest difficulty in procuring their consent to let this go.[171]

The record contains no evidence as to what notice was given of the meeting, no minutes of the meeting, no list of eligible voters, and no tally of voters for and against the surrender. That the Band does not appear to have been given much, if any, notice of the surrender meeting is borne out by the fact that Agent Day's letter of May 6, 1909, suggests that he decided to travel to the Moosomin Reserve on May 7 only after he had received the funds required for the $20,000 cash advance that day. Nor does it appear that the Band was given notice of the proposed terms of the surrender, since Josie Moosomin wrote to say that he was "very surprised" that the Department expected the Band to surrender its hay lands as well as the main reserve, adding that "[w]e did, but against our will."[172] Day's brief letter of May 18, 1909, confirms that he

> *had the greatest difficulty in procuring their consent to let this go*; *their contention being hard to overcome*, that this Hay land is close to their new Reserve; and that unless they are able to procure sufficient Hay for their stock, they will be compelled to abandon this industry which is their most important means of making a livelihood.

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170 Surrender Instrument and related documents, May 7, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 390).

171 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 18, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 399). Emphasis added.

172 Chief Josie Moosomin to the Department of Indian Affairs, May 12, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 397).

> I told them that they might rest assured that the Department would see that they did not suffer loss on this account, and would arrange for Hay Land on the Reserve.[173]

On the face of this account, it would seem that assuming there was in fact a meeting, whoever attended the surrender meeting on behalf of the Band was convinced to surrender both Reserves 112 and 112A on May 7, 1909, on the basis of oral representations by Agent Day which are reflected nowhere in the terms of surrender. The Band received no advice as to the precariousness of entering into such an arrangement and relied instead on Day's assurances. As is clear from subsequent correspondence detailed below, Day was in no way capable of keeping these promises. The option of holding off on the surrender until the question of alternative hay lands could be sorted out was not canvassed by Day. This is understandable, given the clear instructions he had received from the Department to secure the surrender and to see that IR 112A would not be retained by the Band.

Since the official record of the surrender is remarkably sparse, it is of particular importance for the Commission to consider carefully the information provided by Moosomin elders at the community session on February 21, 1996, to supplement the documentary evidence. The elders paint a very different picture from that of a Band "clamouring for the benefits" of surrender, as Day had previously predicted. Instead, it shows that many Band members, far from being concerned with the impact of a possible surrender, were unaware that a surrender was even being considered.

Ed Okanee's father was the headman of the Thunderchild Band at the time of these surrenders, and his mother's uncle was former Chief Josie Moosomin. He described what his father and great uncle had told him about the meetings at the Thunderchild and Moosomin reserves in August 1908:

> They told us that they had worked on Moosomin for many, many years to let go of this land. Because previous to that, Thunderchild had moved away. Moosomin stood ground. Then Mr. Laird and other agents ganged up on him to surrender. If he did not let go of the surrender, if he didn't go ahead with the surrender, he would lose his title as a chief. . . . [I]t was Mr. Laird that told Jessie if he did not surrender, he would lose his chieftainship. There were 15,000 that was put on the table, and if you don't accept this money, he says, from this day on, you will never see this kind of money

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173 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, May 18, 1909 (ICC Documents, p. 399). Emphasis added.

> again. But even to this day, we are still – we need money for everything, and it dictates our daily life in order that he wasn't speaking the truth when he said that about the 15,000. And there were more. They were misled, you know, towards in giving up this land.[174]

With respect to the Moosomin surrender itself, Jimmy Myo, whose father signed the surrender document, commented his father said that

> there was no meetings, and there was no vote. They just came and took that land. . . . I watched them as they put my name down that I received the money, and after we were told that we didn't have a chief, even though we had one, but he wasn't recognized as a chief by the white people, and there was a chief at Thunderchild who was recognized as a chief by the government, by the white people, and when they sold their land, we were told that they had a vote to sell the land, so we didn't have to vote; they already did that kind of job over there by Thunderchild. That was good enough for us. . . .
>
> [I]n those days, the Indian Affairs, the government had a lot of power. They could have done anything to us. I don't know what would have happened if they didn't – if the Indians didn't leave. My father used to say that; I don't know what would happen to us. Maybe they'd just gather all of us, he said, and go and dump us some place in the bush up north. That's how much power they had. We didn't have. One of the reasons why we didn't have any power, because we didn't understand English. We couldn't talk English, and those are the interpreters. The interpreters that we had at the time, they weren't to be trusted. They interpret things the way they wanted . . . all they wanted was something out of it, whether it's money or land. Father Delmas was after the land, and Day, it was probably money.[175]

Jimmy Myo added that "the bottom line is . . . 90 per cent of the Indian people from that reserve didn't know what was going on."[176] He also confirmed that, whatever informal discussions there may have been, there was no knowledge of a meeting that was held by the adult male members of Moosomin regarding a surrender.[177]

On the subject of whether a vote was even held, Peter Bigears stated:

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174 ICC Transcript, February 21, 1996, pp. 50-52 (Ed Okanee).

175 ICC Transcript, February 21, 1996, pp. 25-26 (Jimmy Myo); see also pp. 44-45.

176 ICC Transcript, February 21, 1996, p. 45 (Jimmy Myo).

177 ICC Transcript, February 21, 1996, p. 69 (Jimmy Myo).

> There was no vote. No gathering took place to discuss the issue. No vote took place. They were literally asked to come and sign. They were asked whether they wanted to let go and sell the land, but a fair majority did not agree, so they were asked, and George Day and the priest signed those names. It wasn't their thinking or to decide to sign.[178]

Norman Blackstar described what his mother told him about the surrender:

> Nothing was asked. No referendum took place. A lot – a lot of the membership did not know what transpired. It was difficult in those days. There was hardly anyone that understood English at the time.[179]

Sidney Ironbow described how the surrender was related to him by his late father and another elder named Louis Bigear:

> In the old days, they used to sit us on top of the hill when they shared their knowledge. There was a lot of regret in his mind. Expressed regret in his mind, and there was a lot of stress because of what had transpired and now considering where the land that they had they were made to settle on. Where we are sitting, where we are sitting, look at. Look. Look in the far distance. As far as you can see, as far as land you can see, all of this land, he says, was originally ours. Look to the south across the river. There is rich, fertile land that we had when we once had, that we had to leave. *To this day, we don't realize – we don't know what transpired, why we had to leave.* Louis Bigear was his name. I couldn't say anything when he was talking, but I just listened intensely. Facing south. Facing south talking about the land that we were cheated on, he says, that was good land. There was a lot of other people that did not know what transpired. *My late father, my father never said that there was any discussion, any meetings that took place, a referendum or a vote, nothing. My mind is vivid, he said. When we left there, it was a pitiful sight and pitiful to see. People scattered, not knowing what was going on when we had to leave.* When he was telling me the story, he became very emotional and tears started coming out – or tears rolled down his face, he says. This is the kind of land that we have now, he says. I don't know what it's going to be like for your future, your grandchildren, the unborn. You have a lot to consider, to think about how – what kind of living, life they are going to have. Even myself, I was emotional while I was listening to him. *As far as I knew, no transaction took place. No meeting took place to talk about this land.* He says, when we brought here, he says, the Saulteauxs – Saulteauxs didn't appreciate

178 ICC Transcript, February 21, 1996, p. 46 (Peter Bigears).

179 ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

> our arrival. They questioned who made the decision; who told you to come, to come into the land that we had chosen to live on. A lot of questioning took place. And we could never sold the land. We could never take money for land. To this day, it's not known how the transaction took place. There was a ceremony that took place in the old town, and then again the people that went from Moosomin that went to that gathering shared the story, told of their emotional – their emotions, how they felt. Most of them cried when they were telling the story, the loss of the land. I would like to share again that nothing took place. *No transaction took place. No meeting took place.*[180]

The elders also described confusion and unrest following the surrender when some of the Band members either refused to leave the land or returned to it after moving to the new reserve. Jimmy Myo testified:

> When we finally moved out of there, some went back, still didn't know or didn't believe, some didn't know, some didn't believe that the land was sold, was surrendered. But they were – as he put it, they were chased away from there by the police. And he used to go on and say that land wasn't surrendered or wasn't sold. It was just taken away from us he said, used to say. Maybe some day we will know for sure. We will know for sure what I am talking about he used to say. But he was hurt pretty bad too, my dad, like many others that wanted to make a living, and he said we worked hard from day until night to make our living, and that was a good land to make a living.[181]

Peter Bigears summarized what his father said:

> This is what happened in 1911. And that's where the policemen, Mounted Policemen arrived, and they chased us away from there. Those that came home this way did not believe that the land was being sold.
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> . . .
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> It was at Thunderchild that first sold that land, and we were in – they just took the impression on the government's side was was [sic] that we had decided to do that also, that the money was disbursed, but I don't know how much was given. Some received wagons and some received horses. *That they came here, and then they went back. Then shortly after that, 1911, they were literally chased out of there. That's*

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180 ICC Transcript, February 21, 1996, pp. 28-29 (Sidney Ironbow). Emphasis added.

181 ICC Transcript, February 21, 1996, p. 16 (Jimmy Myo).

> *when they believed that this transaction had taken place without their full knowledge of what was behind it.*[182]

All of these details point to a surrender that was taken without the specific knowledge or consent of many, if not most, members of the Moosomin Band. At most, even those who had been persuaded to support the surrender were "surprised" that they were asked, contrary to their express wishes, to surrender the hay lands, and even Josie Moosomin stated that they agreed to the surrender, "but against our will."

Events following the Surrender

With respect to the Band's concern about losing its hay lands, the Department suggested that suitable substitute hay land be found near the new reserve, and that, if such land was not available, an extra square mile could be added to the new reserve.[183] Secretary McLean supported this idea and instructed the Department's surveyor, Lestock Reid, to see if such substitute hay land could be obtained.[184] On May 26, 1909, however, Reid strongly advised McLean to hold 1 square mile of the hay reserve at IR 112A for the Band, since there were no hay lands available within 20 miles of the new reserve.[185] Chief Surveyor Samuel Bray later advised McLean that the surrender should exclude Moosomin's share of IR 112A, or that this square mile should be granted back to the Band in the same Order in Council accepting the surrender.[186]

On June 10, 1909, the surrender was submitted to the Governor in Council for acceptance or rejection. The submission noted that "at the time the surrender was negotiated it was the intention

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182 ICC Transcript, February 21, 1996, pp. 19-20 (Peter Bigears). Emphasis added.

183 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, May 19, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 401).

184 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, May 22, 1909 (ICC Documents, p. 402).

185 Order in Council PC 1539, July 6, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 422-28 at p. 426).

186 Samuel Bray, Chief Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, June 2, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 412).

of the Department to provide these Indians with a square mile of land elsewhere for growing hay," but since land could not be found in that vicinity it was recommended that a square mile of IR 112A should be retained for the Band. The Order in Council accepting the surrender and confirming that the Band was to retain 1 square mile of IR 112A was approved on July 6, 1909.[187]

Shortly before the Order in Council was approved, Agent Day wrote to the Department requesting on the Band's behalf that Josie Moosomin be appointed Chief of the Moosomin Band.[188] This request was accepted by Secretary McLean, who noted that Day had never reported the death of old Chief Moosomin. McLean continued:

> However, as the Moosomin Band has a population of about 130, the Department is not aware of any reason why a new chief should not be appointed. Although you do not recommend Josie Moosomin, whom the Indians would like to see appointed, it is presumed that you consider him suitable for this office. On that understanding you are hereby authorized to appoint Josie Moosomin as chief.[189]

Management and Disposition of IR 112

By August 1909, the town of Battleford was clamouring for information regarding the date and method of sale of the former Moosomin and Thunderchild reserves. The town's Secretary-Treasurer advised the Department that the Town Council was advertising the sale and had received "a great number of applications" and "many enquiries on the subject."[190] Secretary McLean responded that "the mode of disposition of these lands cannot be determined until after subdivision survey has been made, and then full information in regard to the sale will be given."[191]

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187 Order in Council PC 1539, July 6, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 422).

188 J.P.G. Day, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 21, 1909 (ICC Documents, p. 1700).

189 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, July 5, 1909 (ICC Documents, p. 1708).

190 H.C. Adams, Secretary-Treasurer, Town of Battleford, to P.G. Keyes, Secretary, Department of the Interior, August 3, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, pp. 444, 445).

191 J.D. McLean, Secretary, Department of Indian Affairs, to H.C Adams, Secretary-Treasurer, Town of Battleford, August 13, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 449).

Surveyor Reid had completed his fieldwork on the survey in mid-July 1909, at which time he submitted his notes regarding subdivision of the reserves, including per acre valuations and descriptions of the land by quarter section.[192] On September 14, Chief Surveyor Bray provided Deputy Superintendent Pedley with this information and the plans of subdivision for Indian Reserves 112, 115, and 115A, noting that, "[a]s far as the plans and valuations are concerned, the sale may now be made at any time."[193] In a subsequent letter, Bray recommended that "these valuations should be accepted for guidance at the sale."[194]

Eleven days later, a draft advertisement had been prepared announcing the proposed sale of the lands by public auction on November 3, 1909, in Battleford. The lands were to be "offered for sale in quarter sections, cash, or one-tenth cash and the balance in nine equal annual instalments with interest at 5 per cent on the unpaid purchase money."[195] The advertisement was run in selected newspapers in Alberta, Saskatchewan, Manitoba, and Ontario over a three-week period commencing October 11, 1909, which, by way of comparison, was only half the exposure for sales of other reserve lands during that period.[196] W.W. Smith, Secretary of the Battleford Board of Trade, objected to the short time frame:

> I have been instructed by the Board of Trade and Council of Battleford to bring to your attention the advisability, in our opinion, of postponing the sale of the Indian lands at this point to a later date, preferably next spring. Our objection to the date set is due to the fact that after having spent considerable time and money advertising the coming sale in Eastern papers we now find that owing to the short notice, we will be unable to get the interested parties on the ground by that date.

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192 Lestock Reid, Surveyor, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, July 15, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, pp. 432-39).

193 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, September 14, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 1717); Lestock Reid Survey Plan of Moosomin IR 112, 115, and 155A, approved by Frank Pedley and Samuel Bray, Chief Surveyor, July 1909 (ICC Documents, p. 1705).

194 Samuel Bray, Chief Surveyor, to Frank Pedley, Deputy Minister, September 23, 1909 (ICC Documents, pp. 1717-18).

195 J.D. McLean, Secretary, Department of Indian Affairs, Newspaper Advertisement, September 25, 1909 (ICC Documents, p. 454).

196 *Regina Leader Post*, Saskatchewan. Advertisement of the sale of Reserve Lands (ICC Documents, pp. 1720, 1723, 1724).

> I might state that a very large number of inquiries have been received regarding these lands from Eastern farmers, as well as from parties residing in the United States, and in event of the sale being fixed for a more opportune time, there is every reason to believe that a very large part of these lands will be purchased by farmers and so brought under cultivation at an early date.
>
> If the sale takes place as advertised on November 3rd, there is little doubt that the greater part of the land purchased will go to speculators, and as you know, the easy terms offered make possible for the withholding of this land from settlement for an indefinite time. . . .[197]

Secretary McLean replied on October 28, 1909, that, as "the time the sale is advertised to take place, namely, 3rd proximo, is a favourable one to bring the lands into the market," it was considered "in the best interests of the Indians [that] the sale should proceed as advertised."[198]

Nevertheless, Mr Smith's prediction proved to be remarkably accurate. Excluding subdivided lots in the Village of Highgate, IR 112 was sold under 115 separate agreements for sale, including 82 in November 1909, 13 in June 1910, five from 1913 to 1918, and 15 after 1920. In each case, the terms included a downpayment of 10 percent, with interest on the balance outstanding payable at rates ranging from 5 to 7 percent, depending on the year of sale. Fully one-half of the parcels sold in 1909 were purchased by lawyers F.W. Grant of Midland, Ontario, and James T. Brown of Moosomin, Saskatchewan, both of whom were land speculators. A report prepared for the Federation of Saskatchewan Indians asserts that other purchasers, notably W.J. Aikens and W.A. Kenning, also appear from Grant's personal papers to have been in league with Grant and Brown to purchase a large portion of the reserve under a prearranged understanding not to compete with one another during the bidding. These four men alone purchased 58 of the 82 parcels sold in 1909.[199]

Of the 115 agreements for sale, 112 went into default, in most cases on the first anniversary of the sale when the first annual instalments fell due. Half of the agreements were eventually cancelled due to chronic arrears, generally years after initially going into default, with interest for

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197 W.W. Smith, Secretary, Battleford Board of Trade, to Frank Pedley, Deputy Minister, October 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, pp. 458 and 459-60).

198 J.D. McLean, Secretary, Department of Indian Affairs, to W.W. Smith, Secretary, Battleford Board of Trade, October 28, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 465).

199 Don McMahon, Federation of Saskatchewan Indians, Claim Submission, August 1, 1985 (ICC Documents, pp. 828-29); Notes and documents from the personal files of F.W. Grant (ICC Documents, pp. 2108-10)

periods of 10 to 15 years being unpaid and lost. The remaining 58 agreements were eventually paid out, but in most cases after extended periods of arrears. Of the 82 sales in 1909, 66 had gone into arrears by 1910 and all were in arrears by 1914. Fully 39 of the sales were cancelled for chronic arrears, with 35 of those cancellations taking place in 1925 or later.

On February 29, 1916, Mr Smith wrote to Secretary McLean regarding the former Moosomin and Thunderchild reserves:

> These lands were purchased largely by speculators, and due to exceptional circumstances which have since held, these buyers have apparently been unable to transfer to actual settlers, and this condition is even more pronounced at the present time owing to war conditions and the consequent lack of immigration. . . . [M]ost of the original buyers appear to have allowed their payments to run in arrears. . . .[200]

Although neither the parties nor the Commission have had the benefit of seeing a full accounting for these sales, it is evident from the record that the Moosomin Band never received the full benefit from the sale of its reserve lands. This issue, however, is not before the Commission in this inquiry.

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200 W.W. Smith, Secretary, Battleford Board of Trade, to J.D. McLean, Secretary, Department of Indian Affairs, February 29, 1916, NA, RG 10, vol. 4041, file 335-933-1A (ICC Documents, p. 630).

Relocation to IR 112B

The historical record does not make it entirely clear when Moosomin's people actually moved to their new reserve, but it appears that they had at least begun moving by August 1909.[201] In his annual report for 1909, Agent Day apparently did not view the surrender and relocation as worthy of special comment; indeed, his report comments only on the state of the Band prior to the surrender and makes no reference to the relocation.[202] The new reserve was surveyed during the process of negotiating the surrender, since it was hoped that having the land selected would help secure the surrender.[203] The evidence taken at the community session shows that there was confusion among the Band members about the relocation. It appears that a few members returned to the original reserve lands at some point and were not aware that the land had been surrendered.[204]

Early on, the land was known to be only minimally suited to agriculture. In 1903, Surveyor Reilly had noted the following with regard to Township 48: "The whole Tp. is stony. The soil is a good loam, mostly clay subsoil and supports a good growth of grass, but it is too stony to be used for cultivation purposes and consequently only fit for stock raising."[205] Surveyor Wilkins had previously noted in 1889 that "[Township 48] is not adapted to agriculture, except to a very limited extent."[206] With respect to Township 47, Wilkins reported that it was "in general a very poor one in an agricultural sense [and with] the exception of sections 2, 3, 4, 5, & 6 there is none of it really first

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201 At that point, the Secretary-Treasurer of the Town of Battleford was inquiring about the status of the "recently vacated" reserve lands. H.C. Adams, Secretary-Treasurer, Town of Battleford, to Secretary, Department of the Interior, August 3, 1909, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 444).

202 J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, 1910, No. 27, "Report of Indian Agents" for the Year Ended March 31, 1909, 128 (ICC Documents, p. 1753). Day's 1909 report continues to refer to Moosomin's reserve as "12 miles west of Battleford . . . between the Battle and Saskatchewan Rivers," December 31, 1909 (ICC Documents, p. 1753)

203 J.D. McLean, Secretary, Department of Indian Affairs, to Lestock Reid, Surveyor, Department of Indian Affairs, April 20, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 363).

204 ICC Transcript, February 21, 1996, p. 20 (Peter Bigears); p. 58 (Jimmy Myo); and p. 95 (Adam Swiftwolfe).

205 W.R. Reilly, Surveyor, to Surveyor General, June 12, 1903 (ICC Documents, p.1611).

206 Field notes of Fred W. Wilkins on the Survey of Township No. 48 Range 16 West of the 3rd Initial Meridian, September 30, 1889 (ICC Documents, p. 1588).

class land."[207] He noted that the grazing was excellent throughout the Township. Four years after the surrender, however, the Department noted that "the conditions for stock raising are only moderately good on this reserve," but that "it is thought that by better application to agriculture requirements can be easily met without depending as much as at present upon native hay for the cattle."[208]

By way of comparison, in relation to the original reserve, Agent Day had been able to report in 1909:

> These Indians are successful farmers and stockmen; they also sell a lot of fire-wood, freight and work for settlers. . . . [M]uch interest is taken in the stock industry by these Indians, and I have every hope that by this means they will ultimately become perfectly independent of government aid. . . . The Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous.[209]

Neither Day nor the Band's new Indian Agent, J.A. Rowland,[210] was able to report similar success on the new reserve. Rowland's monthly reports concerning the Battleford Agency rarely made reference to work or agriculture on the Moosomin reserve, although his reports were often generally favourable regarding the state of affairs in the Agency as a whole. Any references that Rowland *did* make to Moosomin, however, were generally negative.

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207 Field notes of Fred W. Wilkins on the Survey of Township No. 47 Range 16 West of the 3rd Initial Meridian, September 19, 1889 (ICC Documents, pp. 1571-74). Both of Wilkins's reports make reference to an abundance of hay land in the area. However, when the new reserve was surveyed in 1909, it was found that there was "very little hay": Samuel Bray, Chief Surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, June 2, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 412).

208 Acting Deputy Superintendent General to J.A. Rowland, Indian Agent, October 19, 1915 (ICC Documents, p. 1911).

209 J.P.G. Day, Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, 1910, No. 27 "Report of Indian Agents" for the year ended March 31, 1909, 128 (ICC Documents, p. 1753).

210 Rowland was appointed Indian Agent by Order in Council on February 18, 1912. J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to A. Rowland, February 17, 1912 (ICC Documents, pp. 1802-08).

Some of the Band's lack of success was attributed by agents to poor weather and other conditions.[211] It is also important, however, to consider the disruption felt by Band members as a result of the relocation. Norman Blackstar described what his grandfather had told his mother:

> He said they didn't like what transpired. They were hurt, emotionally hurt, and they cried, he said. Now today, now today, he says, if you were over there, he says, you wouldn't have to suffer this much. He says you would just go on with your work.[212]

Rowland himself observed that "[t]hey have never raised a good crop on the Moosomin Reserve, and they have met with so many failures that it is hard to get them to take any interest in farming."[213]

In the Department's view, the Agent was paying insufficient attention to the Band's sense of dislocation. In 1914, Deputy Superintendent General Duncan Campbell Scott admonished Rowland:

> Agriculture, on this reserve, appears to be making little or no progress. This may be due in part to the loss of interest caused by their removal four years ago but it is thought that they have now been sufficiently long on this reserve to have become settled and show a more active interest in earning a livelihood.[214]

This letter prompted Rowland to respond that the absence of progress in farming was due to the ineptitude of the farm instructor provided for the Band, and that waiting for interest payments was having a negative effect on the band members.[215]

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211 See, for example, J.P.G. Day, Indian Agent, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, June 20, 1911 (ICC Documents, pp. 1798-99): "The weather has been ideal for farming purposes; we have had abundant rains on all the Reserves but Moosomin's where they have had practically none worth mentioning"; J.P.G. Day, Indian Agent, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, August 24, 1911 (ICC Documents, pp. 1800-01): "On account of the drought at the beginning of the season, and also the gophers, the instructor at Moosomin Reserve had to plow down his grain."

212 ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

213 J.A. Rowland, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, June 7, 1918 (ICC Documents, p. 671).

214 D.C. Scott, Deputy Superintendent General of Indian Affairs, to J.A. Rowland, Indian Agent, April 16, 1914 (ICC Documents, pp. 1836-47).

215 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, June 12, 1914 (ICC Documents, pp. 1848-53).

Later that year, Deputy Superintendent General Scott again criticized Agent Rowland's performance and the results he was obtaining at the reserve. Scott noted that, in view of the fact that "the Indians have not yet become properly re-established in their industries since their removal from their old reserves," Rowland should be particularly careful to visit the reserve at least once a month.[216] Again, Rowland wrote in his own defence, this time observing that because the reserve was not accessible by train, it was difficult to visit it.[217] Rowland also commented:

> When I took charge in this agency, the financial and social condition of the Indians was at a low ebb. The agency had been exploited for political and personal ends and the welfare of the Indians was not taken into consideration. The number of their cattle were steadily declining, the debts were increasing and their farming was only done in a half-hear[t]ed manner.[218]

Although the record does not reveal the full state of affairs on the Moosomin reserve, it is apparent that the social and economic life of the community was in serious decline following the surrender.

Perhaps the most poignant description of the Moosomin Band's life after surrender was given by W.M. Graham in 1930, 20 years after the relocation. Graham was appointed Inspector of Indian Agencies for South Saskatchewan in 1904 and played a key role in the surrender of the Kahkewistahaw Reserve, as is discussed in the Commission's Report on that claim. In 1920, he was appointed to the recently resurrected post of Indian Commissioner, and it was in that capacity that he made a report to Deputy Superintendent Scott concerning the state of affairs on some of the western reserves under his supervision.[219] In responding to Scott's inquiry into the conditions on the Alexis reserve, in central Alberta, Graham wrote:

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216 D.C. Scott, Deputy Superintendent General of Indian Affairs, to J.A. Rowland, Indian Agent, January 26, 1915 (ICC Documents, pp. 1861-64).

217 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, February 19, 1915 (ICC Documents, pp. 1865-70).

218 J.A. Rowland, Indian Agent, to D.C. Scott, Deputy Superintendent General of Indian Affairs, October 3, 1917 (ICC Documents, p. 665).

219 Graham's career in Indian Affairs, and his conflicts with Scott, are described in Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 184-99.

> Agriculture apparently was the last thing that was in the minds of those who agreed to set aside this particular reserve for Indians. . . . Farming . . . cannot be carried on here, and the next thing to consider is the question of getting the Indians moved to another point. The land on the Alexis reserve is valueless and would not bring anything if offered for sale. There is no hay on it, so that it would not be any good even as a ranch proposition. We have another situation almost equal to that at [Alexis], which will have to be dealt with sooner or later; *I refer to the Indians on the Moosomin Reserve. You will recall that they surrendered a splendid farming reserve, and were removed to their present location, which is hilly, stony, in a frost belt and practically useless as a farming proposition. This is not the only objectionable feature. One of the inducements which was used to get them to move was that fishing would be accessible in the lake which adjoins the reserve. Unfortunately, commercial fishing has been allowed here also, and I am told that the lake has been practically fished out. In addition to this, extra restrictions have been placed on the Indians regarding fishing, which makes it difficult for them to make a living.*[220]

In short, the best description of the land, as Jimmy Myo put it at the community session, is that "the right word to use in that is no good."[221]

220 W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General of Indian Affairs, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, pp. 740-42). Emphasis added.

221 ICC Transcript, February 21, 1996, p. 18 (Jimmy Myo).

PART III

ISSUES

The fundamental question before the Commission in this inquiry is to determine whether Canada owes an outstanding "lawful obligation" to the Moosomin First Nation concerning the surrender of Indian Reserves 112 and 112A in 1909. To assist in addressing this broad question, the parties agreed on the following statement of issues:

1. Were the provisions of the *Indian Act*, 1906, complied with when the surrender of Reserves 112 and 112A were obtained?

2. Did the Crown owe any pre-surrender fiduciary obligations to the Band and, if so, did it fulfil those obligations?

3. Was the surrender of Reserves 112 and 112A obtained as a result of undue influence or duress?

4. If the evidence is inconclusive in determining any of the above issues, upon whom does the onus of proof rest?

5. As a consequence of the determination of the above issues, were Reserves 112 and 112A lawfully surrendered by the Moosomin First Nation?

We will deal with the substantive issues in two broad categories: (1) compliance with the *Indian Act*; and (2) discharge of the Crown's fiduciary obligations with respect to surrender. Finally, in issue 3 we will offer a few closing comments on the onus of proof.

PART IV

ANALYSIS

ISSUE 1 COMPLIANCE WITH THE 1906 *INDIAN ACT*

Sections 48, 49, and 50 of the *Indian Act*, 1906, set out the formal requirements for a valid surrender of all or part of an Indian reserve:

> 48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.
>
> 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.

> 50. Nothing in this Part shall confirm any release or surrender which, but for this Part, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than His Majesty, shall be valid.[222]

Section 49 is the *sole* statutory protection provided for a band to ensure that its goals and choices with respect to its land are honoured. As McLachlin J stated in *Blueberry River Indian Band v. Canada*[223] (referred to as the *Apsassin* case throughout this report), "[t]he basic purpose of the surrender provisions of the *Indian Act* is to ensure that the intention of Indian bands with respect to their interest in their reserves be honoured."[224]

In contrast to the evidence before the Court in *Chippewas of Kettle and Stony Point v. Canada*,[225] and before this Commission in our inquiry into the Kahkewistahaw surrender, there is a gaping hole in the official record concerning the surrender of Indian Reserves 112 and 112A by the Moosomin First Nation. In *Chippewas of Kettle and Stony Point*, where the Court of Appeal considered a challenge to the validity of the surrender, there was ample evidence, beyond that contained in the standard form certificate, which provided "overwhelming proof that the Band gave its assent to the surrender with a strong overall majority vote of at least 26 out of 44 eligible

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222 RSC 1906, c. 81, as amended. These protective provisions of the *Indian Act* trace their origin to the *Royal Proclamation of 1763*, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians. The proclamation states:

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

223 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC).

224 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 223 (SCC).

225 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)), affirmed in *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA).

voters."[226] In Kahkewistahaw, the Indian Agent kept minutes of both meetings, including a tally of voters.[227]

In this case, however, the only contemporaneous evidence before us is the surrender document, the sworn certificate of surrender, and Josie Moosomin's letter of May 12, 1909, stating that the Band had surrendered both IR 112 and 112A, "but [surrendered the hay lands in IR 112A] against our will." Although the Chief's letter is evidence of an intention to surrender (which we will discuss fully below), it cannot be construed as conclusive evidence that the Act's provisions were complied with. The same reasoning applies to the standard form certificate of surrender, which states that the surrender was "assented to by a majority of the male members of the said Band of Indians of the Moosomin Reserve of the full age of twenty-one then present." The surrender document also discloses that 15 members of the Band apparently either signed the surrender or affixed their marks to the document by placing an "X" beside their names. The census report for that year indicates that there were 30 men of the full age of 21 years in the Band at the time.[228] It is in this factual context that we must consider the relevant statutory regime.

In *Cardinal v. R.*,[229] the Supreme Court found that the requirement in section 49 that the surrender 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," was ambiguous. Estey J, writing for the Court, found that there were five possible meanings to this requirement. However, he concluded that the Act should be interpreted to mean that a majority of the eligible voters of the Band had to attend the surrender meeting, and that a majority of those present had to vote in favour of the surrender.[230]

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226 *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 at 692 (Ont. Ct (Gen. Div.)).

227 Indian Claims Commission, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 54-55.

228 "Census Return of Resident and Nomadic Indians," December 31, 1909, Canada, Parliament, *Sessional Papers*, 1910, No. 27, 48-49 (ICC Documents, p. 1755).

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

230 *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 8-10 (SCC).

Since 15 out of 30 eligible voters apparently signed or affixed their marks to the surrender document, there is some evidence to suggest that the required majority of the majority assented to the surrender. However, without any independent evidence to confirm that the required majority attended the surrender meeting and that all 15 men who signed or affixed their marks to this document also voted in favour of the surrender, the evidence is inconclusive on whether a majority of all eligible voters attended the meeting and a majority of those voted in favour of the surrender. Although there is some evidence to support this proposition, it would not be prudent for the Commission to make such a conclusion without some form of independent evidence, given the dubious circumstances surrounding the events of the surrender.

In addition to the ambiguity of the certificate, the absence of any further evidence means that we cannot determine whether a meeting was called according to the Band's rules for the express purpose of considering the surrender proposal. Assuming there was such a meeting, there are no details of any notice of the meeting, when and to whom notice was given, the number of persons present at the meeting, whether an actual vote was taken, and, if such a vote was taken, the tally of votes for and against the surrender. There is also no evidence of the nature of any discussion with the eligible voters and the extent to which the terms of the surrender were explained to members of the Band. We find it astounding that, although Agent Day was vigilant about communicating virtually every detail of his activities to the Department on other subjects prior to the surrender, he kept no records pertaining to this most important of meetings.

The elders' testimony supports the conclusion that some sort of meeting was held and that those present may have signed the surrender document at that time. However, it is not clear whether the 15 men who signed or affixed their marks to the document were aware of what it meant, since there is no evidence of what was discussed at this meeting. Furthermore, the information provided by the elders suggests that, in view of the close relationship between the Thunderchild and Moosomin Bands, along with the fact that Chief Thunderchild was recognized by the Department as spokesman for the two Bands but Josie Moosomin was not recognized as Chief, those members of the Moosomin Band who did attend the meeting may have operated under the misconception that the Thunderchild Band's assent to the 1908 surrender was considered effective with respect to the

Moosomin reserves as well. That there may have been some confusion in this regard is reinforced by the elders' statements and by the fact that IR 112A was held by both Bands in common.

In this case, the surrender document and sworn certificate must be considered in light of the oral history and the Department's own records, both of which raise very real doubts about whether the Band fully understood what was going on with respect to the surrender. The First Nation submitted that the surrender document and certificate should be given minimal weight, given the interest of the signatories in obtaining the surrender of these reserves – with Agent Day believing his job hinged on this result and Josie Moosomin likewise believing that his chieftainship was on the line. In our view, the combination of all these factors makes it at least arguable that section 49 was not complied with when the surrender was taken in 1909.

In the final analysis, however, this Commission is unable to reach a conclusion as to whether section 49(1) of the *Indian Act* was complied with and we doubt, in light of the absence of historical documentation regarding the surrender, that a reliable conclusion can ever be reached on this question. In any event, in view of our findings below concerning the Crown's fiduciary obligations with respect to this surrender, it is not necessary for the Commission to make a finding on whether there was compliance with section 49(1) of the *Indian Act* and we decline to do so.

ISSUE 2 CANADA'S PRE-SURRENDER FIDUCIARY OBLIGATIONS

The more important task before us in this inquiry is to determine whether the Crown owed any fiduciary duties to the Moosomin Band in relation to the surrender of IR 112 and 112A and, if so, whether the facts disclose that the Crown discharged these duties. Accordingly, we shall begin with a review of the Supreme Court of Canada's decisions in *Guerin v. The Queen*[231] and *Apsassin* as the leading authorities on this issue.

231 *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 (SCC).

The *Guerin* Case

In *Guerin*, the Supreme Court of Canada dealt with the Musqueam Band's 1957 surrender of 162 acres of its reserve land to the Crown. This land was surrendered for the purpose of leasing the land to the Shaughnessy Golf Club, on the understanding that the lease would contain the terms and conditions presented to and accepted by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. Subsequently, however, the Band discovered that the lease did not give effect to the understanding reached between the Band Council and the Crown. In fact, the terms were even less favourable to the Band.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. However, three sets of reasons for judgment were rendered, disclosing different conceptions of the nature of this duty. On behalf of the majority of the Court, Dickson J (as he then was) wrote:

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the *Act*... [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. . . .[232]

Therefore, the *Indian Act*, which codified and confirmed the "historic responsibility" undertaken by the Crown "to act on behalf of the Indians so as to protect their interests in transactions with third parties," recognizes a distinct fiduciary obligation on the Crown which is enforceable in the courts. The protective provisions over Indian lands as set out in the *Indian Act* and the terms of Treaty 6 are simply expressions of the Crown's "historic responsibility."

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232 *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 at 175 (SCC).

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case . . . The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2)."[233] Accordingly, fiduciary principles will always bear on the relationship between the Crown and Indians, but, depending on the context, a fiduciary duty may be narrowed because the Crown's discretion is lesser and a First Nation's scope for making its own free and informed decisions is greater.[234] Section 49(1) of the 1906 *Indian Act* is an example of such narrowing: although reserve land is held by the Crown on behalf of a band (pursuant to section 19 of that *Act*), it may not be surrendered except with the band's consent. It is this "autonomy" to decide how to deal with reserve land that the Supreme Court considered in *Apsassin*, to which we now turn.

The *Apsassin* Case

In *Apsassin*, the Court considered the surrender of reserve land by the Beaver Indian Band, which later split into two bands now known as the Blueberry River Band and the Doig River Band. The reserve contained good agricultural land, but the Band did not use it for farming. It was used only as a summer campground, since the Band made a living from trapping and hunting farther north during the winter. In 1940, the Band surrendered the mineral rights in its reserve to the Crown, in trust, to lease for the Band's benefit. In 1945, the Band was approached again, to explore the surrender of the reserve to make the land available for returning veterans of the Second World War interested in taking up agriculture.

After a period of negotiations between the Department of Indian Affairs (DIA) and the Director, *Veteran's Land Act* (DVLA), the entire reserve was surrendered in 1945 for $70,000. In

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233 *Guerin v. The Queen*, [1984] 2 SCR 335, [1985] 1 CNLR 120, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161 at 176-77(SCC).

234 This view was reaffirmed in *R. v. Sparrow* (1990), 70 DLR (4th) 385, [1990] 3 CNLR 160 (SCC), and most recently by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 at 147 (SCC), where he states:
"It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd*. (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed."

1950, some of the money from the sale was used by DIA to purchase other reserve lands closer to the Band's traplines farther north. After the land was sold to veterans, it was discovered to contain valuable oil and gas deposits. The mineral rights were considered to have been "inadvertently" conveyed to the veterans, instead of being retained for the benefit of the Band. Although the DIA had powers under section 64 of the *Indian Act* to cancel the transfer and reacquire the mineral rights, it did not do so. On discovery of these events, the Band sued for breach of fiduciary duty, claiming damages from the Crown for allowing the Band to make an improvident surrender of the reserve and for disposing of the land at "undervalue."

At trial,[235] Addy J dismissed all but one of the Band's claims, finding that no fiduciary duty existed prior to or concerning the surrender. He also concluded that the Crown had not breached its post-surrender fiduciary obligation with respect to the mineral rights, since they were not known to be valuable at the time of disposition. He found, however, that the DIA breached a post-surrender fiduciary duty by not seeking a higher price for the surface rights.

The Federal Court of Appeal[236] dismissed the Band's appeal and the Crown's cross-appeal. However, the majority rejected Addy J's conclusion regarding a pre-surrender fiduciary duty: they found that the combination of the particular facts in the case and the provisions of the *Indian Act* imposed a fiduciary obligation on the Crown. The content of that obligation was to ensure that the Band was properly advised of the circumstances concerning the surrender and the options open to it, particularly since the Crown itself sought the surrender of the lands to make them available to returning soldiers. On behalf of the majority, Stone JA (with Marceau JA concurring and Isaac CJ dissenting) concluded that the Crown discharged its duty, since the Band had been fully informed of "the consequences of a surrender," was fully aware that it was forever giving up all rights to the

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235 An abridged version of the decision is reported as *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD), and the complete text is reported as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73, 14 FTR 161 (TD).

236 *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA).

reserve, and gave its "full and informed consent to the surrender."[237] Stone JA also found that there was no breach of the post-surrender fiduciary obligation concerning the mineral rights, since there was a "strong finding" that the mineral rights were considered to be of minimal value, so it was not unreasonable to have disposed of them. Finally, once the rights had been conveyed to the DVLA, any post-surrender fiduciary obligation on the part of the Department of Indian Affairs was terminated, and the Crown had no further obligation to deal with the land for the benefit of the Band.

The Supreme Court of Canada divided 4-3 on the question of whether the mineral interests were included in the 1945 surrender for sale or lease. Nevertheless, the Court was unanimous in concluding that the Crown had breached its post-surrender fiduciary obligation to dispose of the land in the best interests of the Band, first, when it "inadvertently" sold the mineral rights in the reserve lands to the DVLA, and, second, when it failed to use its statutory power to cancel the sale once the error had been discovered. Justices Gonthier and McLachlin, respectively writing for the majority and the minority, also concluded that, to the extent the Crown owed any pre-surrender fiduciary duties to the band, they were discharged on the facts in that case.

The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under section 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.

The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident, or otherwise exploitative. We will address this question in the final part of our analysis.

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237 *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 at 46 (Fed. CA).

Pre-Surrender Fiduciary Duties of the Crown

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

For the majority of the Court, Gonthier J focused on the context of the surrender, concerning himself with giving "effect to the true purpose of the dealings" between the Band and the Crown.[238] He wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[239]

At the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[240] In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or there were tainted dealings involving the Crown which make it unsafe to rely on the band's decision as an expression of its true understanding and intention.

Where there are "tainted dealings" involving the Crown, caution must be exercised in considering whether or not the band's apparently autonomous decision to surrender the land should be given effect. In *Chippewas of Kettle and Stony Point*, for example, Laskin JA considered that the alleged bribe provided to the Band members by the prospective purchaser of the reserve lands might constitute "tainted dealings." Although he recognized that it was a question for trial which could not be dealt with in Canada's preliminary application for summary judgment, he nevertheless forged the explicit link between "tainted dealings" and fiduciary obligation that Gonthier J was not required to

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238 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

239 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 202 (SCC).

240 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

make in the context of *Apsassin*.[241] In our view, Canada's failure both to properly manage competing interests (which was stressed by the Federal Court of Appeal in *Apsassin*) and to use its position of authority to apply undue influence on a band to effect a particular result can contribute to a finding of "tainted dealings" involving the Crown. Such a finding may cast doubt on a surrender as the true expression of a band's intention. Both of these elements are relevant to the question of "tainted dealings," because they have the potential to undermine the band's decision-making autonomy with respect to a proposed surrender of reserve land.

Although Gonthier J did not expand on his sense of what would constitute "tainted dealings," we note that the Court of Appeal concluded that the Crown was in a conflict of interest. McLachlin J also commented that the Crown was arguably in a conflict of interest because of the presence of conflicting pressures "in favour of preserving the land for the Band on the one hand, and making it available for distribution to veterans on the other."[242]

Nevertheless, in *Apsassin*, the Supreme Court was able to find, beneath the technical irregularities and confusion over the nature of the surrender, a genuine intention on the part of the Beaver Indian Band, formulated with the assistance of a conscientious Indian Agent, to dispose of reserve land for which it had no use. Thus, the Court had no difficulty in concluding that there was a neat reconciliation of the Crown's interests in opening up good agricultural land for returning soldiers and the Band's interests in selling land it did not use to obtain alternative lands closer to its traplines.

Even if we were to assume that the Moosomin Band provided a technically valid surrender (an issue on which we express no finding), when one looks beyond the question of technical compliance with the *Indian Act*, the weight of the evidence leads us to conclude that the Crown's officials applied coercion, improper influence, and pressure on the Band to surrender its land. Taken together, these actions constituted tainted dealings on the part of Crown agents who sought to "remove" the Indians from their treaty entitlement so that these lands could be "opened up" for

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241 *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 at 106 (CA).

242 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 214 (SCC).

settlers. Rather than making an earnest attempt to reconcile the competing interests of settlers and the Crown with those of the Moosomin Band, Crown officials like Indian Agent Day, Secretary McLean, Deputy Superintendent Pedley, and Minister Oliver deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians who had long sought the removal of the Indians and the sale of their lands.

When conflicts over reserve land first arose between the Band and prospective settlers in 1889, the Department conscientiously took the position that the long-term interests of the Bands had to be secured rather than giving in to the pressure of settlement. From 1902 on, however, the official record discloses no effort to balance or protect the interests of the Band. Rather, the Crown commenced a concerted campaign to move the Band off the land and to establish the settlers whose political representatives went to great pains to ensure that the Department of Indian Affairs pressed for a surrender. As counsel for the First Nation pointed out, Crown officials were concerned only with the *how* of surrender, rather than the *why* or *whether* of surrender. At the time of this surrender, Indian Affairs was apparently not mindful of the promises made to the Indians in Treaty 6, as officials began to succumb to, and indeed advance, the interests of non-Indians who sought the land for settlement. In keeping with this shift in loyalties, the surrender of Indian Reserves 112 and 112A was motivated solely by the political interest in "removing" Indians in order to "open up" the land for settlement by homesteaders. On the evidence as a whole, no other conclusion is possible.

It is important to observe that there is absolutely no evidence to suggest that the option of *not* surrendering the land was ever presented to the Band, even though the Band repeatedly expressed an intention to retain it. Any "intention to surrender" evidenced by the Band was single-handedly created and pursued by the Crown, and the exercise of "giving effect to the Band's intention" would be contrived, to say the least.

In our review of the documentary record, we have noted that the surrender was considered by all parties (other than the Band) to be a matter of "opening up" the land for settlement. The fact that it would simultaneously destroy the Band's agricultural economy was never mentioned or considered. This is not a case in which the Band had surplus land in its reserve holdings of which it was not making any use, and which it sought to dispose of in a mutually advantageous exchange.

It is also not a case in which the Crown's wish to secure the reserve land for other purposes was coincident with the Band's desire to secure other land for its own purposes, as in *Apsassin*. On the contrary, this is a case in which the Band's interests conflicted directly with those of prospective settlers, since all concerned sought the land for precisely the same purpose – its excellent agricultural potential. The Moosomin Band was asked to surrender the entirety of its reserve lands solely for the benefit of others, and the instigating parties did not much concern themselves with where the Band ended up, so long as it was "removed."

In all the dealings surrounding this surrender, the question of whether *any* surrender, on *any* terms, was truly desired by the Band, or in its best interests, was never asked or answered by departmental officials. The only apparent inquiry on record came in 1902, when Inspector Chisholm commented that, although the Moosomin and Thunderchild Bands might consent to a move across the North Saskatchewan River (since they might even *benefit* from being closer to their hay lands), a move farther north would no doubt be opposed.[243] To the extent that any inquiries were made by the Crown, the answer was clear that the Band had no intention of surrendering its land. This attitude is amply reflected in Josie Moosomin's letter of November 23, 1906, and the fact that the Band consistently rejected surrender, at least until 1909.

Jimmy Myo emphasized that the Department wielded a great deal of power over the Band, and that Band members at the time of surrender were concerned about what would happen to them if they did not comply with the Department's apparent wishes. At the time, Josie Moosomin also stated his desire to "help the Agent" and to do what the Department wanted. We also know from his letter of November 23, 1906, that he trusted the Department to ensure that the Band would never have to surrender the reserve, because the Government of Canada was "honorable."[244] This letter makes it clear that Josie Moosomin trusted the Crown and believed that the Department would protect his people's interests – a view echoed by Father Delmas, who said he had "worked hard to

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243 W.J. Chisholm to Commissioner D. Laird, April 30, 1902, NA, RG 10, vol. 3563, file 82, pt. 11 (ICC Documents, pp. 194-96).

244 Josie Moosomin to the "Government of Ottawa," November 23, 1906 (ICC Documents, p. 218).

get the Indians to repose confidence in the Government."[245] Josie Moosomin wanted the Department to understand that the Band did not want to surrender its land.

Accordingly, at the time the Department began to press for the surrender in 1907, it had before it a statement by Josie Moosomin (identifying himself as Chief, though the Agent did not recognize him in that position) that the Band never wanted to surrender its land. Josie Moosomin also sent an unofficial tally of voters which indicated that 26 men of the Band opposed a surrender, while only six favoured the idea. Although Agent Day stated that the question of surrender had been raised with Band members, he had not gone into it in any detail and had not provided the Department with a full report. The Department's response was to assure Josie Moosomin that the land could not be disposed of without a surrender. Rather than accepting Josie Moosomin's letter as an expression of the Band's intention to retain its land, the Department turned a blind eye to his plea and promptly took steps to arrange for that very surrender.

In our view, the Department's only interest in IR 112 was its surrender, and its only inquiries into the matter related to the means, terms, and conditions by which that surrender could be obtained. Accordingly, it is our view that the Department gave no consideration to the best interests of the Band, with the exception of Inspector Chisholm's suggestion in 1902 that a surrender in exchange for land on the other side of the Saskatchewan River and in closer proximity to its hay lands might actually benefit the Band. For the sake of clarity, we do not mean to suggest that it was the Crown's duty to decide for the Band whether or not to surrender its land; rather, it was required to consider the Band's best interests and to ensure that its decision was informed and free from duress, undue influence, and other factors that would taint the Crown's dealings with the Band and undermine the Band's autonomy to make this decision on its own.

In our view, *Apsassin* does not represent a checklist of the conditions that must prevail in order to make a surrender valid. It is nonetheless instructive to compare the Moosomin surrender with the surrender granted by the Beaver Indian Band. In considering whether the Crown discharged its fiduciary obligation in allowing the surrender of the surface rights to the land, the Court in *Apsassin* placed a great deal of significance on the following factors:

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245 Father Delmas to Frank Oliver, Minister of the Interior, May 18, 1908 (ICC Documents, p. 1660).

- the Department struggled with the question of selling the reserve;
- the Band's goal was to get different land closer to its trapline, which it could not do without the proceeds of sale;
- the land was "virtually useless to the Band at the time";
- when the surrender was given, the Band had already selected alternative sites after "mature consideration";
- the question of surrender was fully discussed among Band members themselves and with departmental representatives prior to the surrender actually being signed;
- although Band members "would not have understood and probably would have been incapable of understanding the precise nature of the legal interest they were surrendering, they did in fact understand that by the surrender they were giving up forever all rights to I.R. 172, in return for the money which would be deposited to their credit once the reserve was sold and with their being furnished with alternate sites near their trapping lines to be purchased with the proceeds";[246] and
- perhaps most important of all, Crown officials had fully explained the consequences of a surrender, had not attempted to influence the Band's decision, and had acted conscientiously and in the best interests of the Band throughout the entire process.

These factors are conspicuously absent from the present claim. The stark reality of the situation is that Indian Affairs must have known that the surrender of this rich agricultural land, in exchange for land that was marginal at best, could never have been in the best interests of the Moosomin Band. On the facts before us, it is clear that the Department acted opportunistically and sought the surrender in the face of repeated rejections by the Band and the clear statement by Josie Moosomin that the Band wished to retain its land forever. The Department's consultations with the Band were directed towards the sole objective of persuading it to surrender the land, rather than allowing a free and open consideration of the idea.

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246 *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161, 1 CNLR 73 at 130 (TD).

The question of "influences," undue and otherwise, is a matter of particular interest. We note the Department's attitude towards the "influences" it thought were motivating the Band to oppose surrender and Agent Day's consistent view that the less information the Band had, and the less exposure it had to outside opinion and advice, the better off it would be. Accordingly, Day actively took steps to insulate the Band from the independent advice of "busybodies" because he was aware that this was a critical obstacle in the way of obtaining the Band's consent to surrender. By insulating the Band from these "baleful" external influences, Day was in a much better position to encourage the Band to place its trust and confidence in him. The Crown in turn used this trust and confidence only to obtain a surrender and not to give effect to the Band's stated intention of keeping its reserves.

According to Agent Day, the Band's lack of interest in surrender was due to the "naturally doubting nature" of the Indians and the bad advice they had received. Day never attributed this reluctance to the fact that the Moosomin and Thunderchild reserves were widely regarded as some of the best farming land in central Saskatchewan, and that the Bands were making a good living from them. Given that the Bands appeared to receive no objective advice whatsoever from Indian Affairs officials, who chose instead to keep them deliberately in the dark, Day's criticism of outside advisers is suspect.

In our view, the evidence amply demonstrates that Indian Affairs simply saw the Band's intention to remain exactly where it was as an obstacle to be "overcome," rather than as a decision that ought to be "respected and honoured."[247] In view of the trust and confidence reposed in the Department to respect and give effect to the decisions of the Band, such an approach represents a serious departure from the standard of conduct expected from the Crown. As the Court stated in *Apsassin*, "the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[248] The *time* for honouring and respecting decisions is not only at the moment of surrender but at all points

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247 This attitude is also evident in the clerical interventions in the matter, such as those of Father Delmas and Bishop Newnham: see, for example, Bishop Newnham's letter to Commissioner Laird, October 3, 1906 (ICC Documents, p. 216), and Father Delmas's letter to Frank Oliver, May 18, 1908 (ICC Documents pp. 1660-61).

248 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200 (SCC).

leading up to it. If the Crown is obliged to truly honour and respect those decisions, surely its officials must refrain from engaging in "tainted dealings" that improperly influence the Band and completely overwhelm its ability to act autonomously and to make a decision after a mature consideration of its options.

The evidence before the Commission points to a conclusion that the Moosomin Band consistently expressed its opinion on numerous occasions prior to the surrender that it did not want to give up its land. There is no evidence that the Department considered it beneficial for the Band to move to another location; the only evidence is that the Department sought to locate the Band anywhere other than IR 112. Furthermore, there is no evidence that the Department's proposal for surrender was so rich that it amounted to an offer that the Band, in its own best interests, could not refuse. In spite of this, the Band's desire to retain its land was not honoured; rather, it was overcome by the Department's influence and pressure. In the final result, there is evidence that at least some members of the Band agreed to surrender IR 112 and 112A (the latter against their will), but the only plausible reason why the Band changed its position is because it was simply overborne by Agent Day, either on his own or in concert with Father Delmas.

In so concluding, we have also had regard for the information collected from the elders of the Moosomin and Thunderchild Bands at the community session. This session represents one of the few sources of information concerning the surrender meeting itself, and also provides insight into the events leading up to the surrender and the intentions of the Band. Given the overall historical record, the elders' testimony has the ring of truth to it and, in our view, this information is consistent with and corroborates the documentary record which the Commission has carefully reviewed. Jimmy Myo stated:

> [T]hey didn't know that the white people were after that reserve, because it was a good farm land, and they try to make deals with the chief and with some of probably the band members, but *they didn't want to surrender at all. They didn't want to sell that land or trade it for something*, because that's where many of them were born, and there was graves on that site. They didn't want to leave those . . . but *the main*

> *reason that they didn't want to, they didn't want to part with that part of land is they knew they would make a living out of it.*[249]

Peter Bigears testified that, although his grandfather and other Band members had signed the surrender or affixed their mark beside their names, most were unable to speak or read English and may not have understood what they were signing.[250] He added that the reason they signed was that "they were promised wagons and horses. That's how they got cheated on."[251]

Jimmy Myo added that Father Delmas "used to talk Cree, trying to coax the Indian people to sell the land; the other land would be better for us to live, where there was game and fish. Along with the Indian agent, he was the one that really worked hard to try to get us out of there . . . these two guys worked very, very hard to get rid of us out of there."[252]

Adam Swiftwolfe said "they were cheated out of this land deal . . . The agents and the priest were behind this. That's why they wanted to get rid of the Indians, to occupy this land for themselves. When they were consulted if they wanted to let go of the land, they had refused."[253]

On the facts in this case, we are struck by the fact that each time the Band expressed a desire not to surrender its land, the Department made it clear through its actions and words that it did not find this resolution acceptable. It is clear that, but for the persistence and agenda of the Department, no surrender would have been obtained. It is also clear that a great deal of effort was expended by all the authorities involved in militating for the surrender. Under these circumstances, it is evident that the Band was simply worn down by the persistent efforts of the Department to obtain the surrender. That is not to say that every surrender brought about as a result of influence or pressure from the Department is tainted, since in some instances the Department might take a forceful

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249 ICC Transcript, February 21, 1996, p. 14 (Jimmy Myo). Emphasis added.

250 ICC Transcript, February 21, 1996, pp. 40 and 94 (Peter Bigears); see also ICC Transcript, February 21, 1996, p. 22 (Norman Blackstar).

251 ICC Transcript, February 21, 1996, p. 47 (Peter Bigears).

252 ICC Transcript, February 21, 1996, pp. 16 and 46 (Jimmy Myo); Norman Blackstar also gave testimony to this effect: ICC Transcript, February 21, 1996, p. 24.

253 ICC Transcript, February 21, 1996, p. 95 (Adam Swiftwolfe).

approach to promote the best interests of the Band. Needless to say, those are not the facts in this case.

Finally, we should briefly address the actions of the Band when it agreed "against its will" to a surrender of IR 112A in addition to IR 112. The inclusion of these hay lands was not simply a matter of the Band surrendering additional land; from the Band's perspective, it went to the heart of the bargain as a whole. Agent Day had previously resisted this surrender, emphasizing to the Department that the Band wished to retain these lands. Secretary McLean's terse reply, however, was that "Indians must surrender all their present reserves including hay land,"[254] and that "[a]fter due consideration it has been decided that it is not desirable to allow the said lands to be held by the Indians."[255] The Band was not presented with the option of retaining IR 112A, just as it had not been presented with the option of not surrendering any land at all.[256] It is clear that the bargain struck and represented by the terms and conditions of surrender did not represent the true intentions and understanding of the Band because the whole process had been tainted by the improper conduct of the Crown's officials, who completely abdicated their trustlike responsibilities owed to the Moosomin Band.

The Department was simply not prepared to allow the deal to fall through if the Band was unwilling to surrender Reserve 112A: the Department's attitude was that the land must be taken regardless of the Band's intentions and, indeed, this is what occurred. As Agent Day's reporting letter discloses, he "had the greatest difficulty in procuring their consent" to the surrender of reserve 112A, but it was nonetheless obtained. This is clear evidence of undue influence being exerted against the Band.

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254 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 3, 1909 (ICC Documents, p. 372).

255 J.D. McLean, Secretary, Department of Indian Affairs, to J.P.G. Day, Indian Agent, May 4, 1909, NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 373).

256 A memo from Chief Surveyor Bray to Frank Pedley, Deputy Minister, on May 27, 1909, provides evidence that officials were instructed by Minister Oliver himself to obtain a surrender of the reserves from the Moosomin Band and not to be dissuaded by the reluctance of the Band to surrender: "The Indians of the Moosomin Band were extremely desirous to retain their share (or one mile) of this reserve for hay purposes. The Minister decided it should be surrendered. It was accordingly surrendered as above stated." NA, RG 10, vol. 4041, file 335-933 (ICC Documents, p. 409).

In conlusion, it is our view that, for the following reasons, it would be unsafe to rely on the 1909 surrender of Indian Reserves 112 and 112A as a true expression of the Moosomin Band's understanding and intention:

1 the Department of Indian Affairs aggressively sought the surrender not because it would benefit the Moosomin Band, but because it was in the interests of local settlers, clergy, speculators, and politicians;

2 the Department did not inform the Band that it was free not to surrender the reserves because the Department did not consider this to be an acceptable option;

3 the Department did not concern itself with the eventual location to which the Band was to be moved, and pursued the surrender while showing a complete disregard for the fact that such a move might cause serious harm to the Band's economic and social conditions;

4 the Department applied, and allowed or encouraged others to apply, pressure on the Band to obtain the surrender;

5 the Department sought to insulate the Band from outside influences and independent advice so that the only opinions and views available to the Band were those of Agent Day and the local clergy, who shared a mutual interest in obtaining the surrender;

6 the surrender eventually agreed to by the Band was obtained "against its will" and on representations which Agent Day had no ability to guarantee and which he had good reason to believe would be rejected by the Department; and

7 the surrender was not in the best interests of the Band.

The situation in this case is markedly different from that prevailing in *Apsassin* where, among other things, "the Department took the view that no pressure should be brought to bear on the Band to promote a sale, rather than a lease, of the land."[257] It is clear that the Department considered only one outcome to be possible and that it made every effort to obtain it. Accordingly, the surrender was obtained in violation of the Crown's fiduciary obligation to respect the Band's decision-making autonomy by ensuring that the surrender was obtained in the absence of improper motivation and

257 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 213 (SCC).

"tainted dealings" on the part of Crown officials. As we said in the Kahkewistahaw inquiry, "the evidence indicates not only that Canada failed in its duty to protect the Band from sharp and predatory practices in dealing with its reserve lands but that Canada itself initiated the 'tainted dealings.'"[258] Under these circumstances, it would be unsafe to rely on the 1909 surrender as an expression of the Moosomin Band's true understanding and intention.

In concluding that the Crown's dealings with the Moosomin Band in relation to the 1909 surrender were "tainted," it is important to observe that we have not simply judged the conduct of these officials by today's moral standards. Rather, we have been cautious to apply what the Supreme Court of Canada in *Apsassin* considered to be the appropriate standard of conduct expected of a fiduciary in the context of the times when these events took place. It is our view that the Crown's conduct was inappropriate regardless of whether the legal and equitable standards against which it is measured are those of 1909 or those of today.

Where a Band Has Ceded or Abnegated Its Power to Decide

In the Commission's report dealing with the 1907 surrender by the Kahkewistahaw Band, we addressed in some detail McLachlin J's reasons concerning the Crown's fiduciary obligations in the pre-surrender context. In considering whether the Crown owes a fiduciary obligation to a band in the pre-surrender context, McLachlin J drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3 SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded

258 Indian Claims Commission, *Kahkewistahaw First Nation Report on the 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 110-11.

> to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[259]

In analyzing this passage, the Commission stated the following in the Kahkewistahaw report:

> On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender* of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. *It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown*." Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."
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> Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all.[260]

After considering further jurisprudence from the Supreme Court of Canada on the question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary, the Commission continued:

> Both *Norberg*[261] and *Hodgkinson* [262] suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes

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259 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 209 (SCC). Emphasis added.

260 Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 112. Footnotes deleted.

261 *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-3 (SCC), McLachlin J.

262 *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J.

> the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.
>
> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.[263]

We remain of the view that, in light of the historic role undertaken by the Crown to "look after" the interests of bands like Moosomin, and based on the nature of the relationship which developed between Canada and Moosomin from the signing of Treaty 6 in 1876 until the 1909 surrender, it would have been reasonable for the Band to expect the Crown to deal with them on the basis of the "loyalty, good faith and avoidance of a conflict of duty and self-interest" referred to by McLachlin J in *Apsassin*. In addressing the issue of "tainted dealings," we have already reviewed at considerable length the facts which have led us to conclude that the Crown's motives and methods in procuring the surrender of IR 112 and 112A from the Moosomin Band were deserving of reproach. We find those same facts equally applicable in our conclusion that the Crown did not meet

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263 Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), 114-15.

the standard required of it in exercising the decision-making power ceded to or abnegated in favour of it (or *by* it).

Moreover, just as the question of leadership was critical in determining whether the Band's decision-making power was ceded to or abnegated in favour of the Crown in the Kahkewistahaw inquiry, there was a parallel leadership vacuum that contributed significantly to the cession or abnegation of decision-making power by the Moosomin Band when it surrendered Indian Reserves 112 and 112A. In the years prior to the surrender, Agent Day had advised Secretary McLean and Commissioner Laird that the Moosomin Band had no Chief, the reason being that "the Department thought it wiser and better not to appoint others when they died off."[264] Day also specifically stated that Josie Moosomin was *not* the Chief. We have also noted that the Department received a letter from Band member Myeow asking whether Josie Moosomin would be recognized as Chief in view of the fact that he had been so elected by members of the Band on May 3, 1904.[265] Confused by this letter, Secretary McLean passed it on to Agent Day for a response, but no further correspondence concerning the fate of this request is in evidence before us. Needless to say, however, no steps were taken, since the Band remained without a Chief for the next two years.

The fact that the Department refused to recognize the Band as having a Chief was a significant factor in the circumstances of this surrender. Jimmy Myo testified that, at the time of surrender, it was either implicitly suggested or explicitly stated that, as Chief Thunderchild was the only Chief in the Battleford Agency, his Band's consent to the 1908 surrender provided sufficient consent for the Moosomin Band as well. In light of the testimony that no vote was held and that Band members may have simply signed a surrender form placed before them as a *fait accompli*, there is strong evidence that the Band's decision-making power with regard to the surrender had been ceded to or abnegated in favour of the Crown, both in *form* as well as in *substance*.

There can be no doubt that the Department was aware that old Chief Moosomin had died and that Josie Moosomin was the Band's choice as its new Chief. Nevertheless, the Department and, in

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264 Day to McLean, September 14, 1907, NA, RG 10, vol. 7795, file 29105-9 (ICC Documents, p. 265).

265 Myeow to Secretary McLean, February 18, 1907, NA, RG 10, vol. 3969, file 121698-5 (ICC Documents, p. 1645).

particular, Agent Day refused to formally recognize Josie Moosomin as Chief. When the matter was brought to the attention of departmental headquarters, nothing was done until after the surrender had been obtained. It was only in the weeks after the surrender that Agent Day recommended Josie Moosomin's appointment as Chief. It strikes us that these events point to something more than a mere coincidence, since nothing of any significance happened between 1904 and 1909 to justify this sudden change of position on the part of Day and his superiors. By withholding this recognition, Josie Moosomin was vulnerable to exploitation at the hands of the Department. Likewise, without a recognized chief or leader, the entire Band was vulnerable to the considerable power and influence wielded by Agent Day and other departmental officials when the question of surrender was raised.

It will be also recalled that, when Thunderchild surrendered its reserve in late August 1908 but Moosomin refused, Deputy Superintendent Pedley demanded a prompt explanation, reminding Laird that his instructions were to "take surrenders from both Bands Thunderchild and Moosomin, not from one band."[266] It is clear that the Department was not prepared to accept any other result. In particular, with regard to IR 112A, the Department would not have considered allowing the deal to fall through if the Band had been unwilling to surrender those prized hay lands; nor was it willing to allow the Band to retain them. The Department's attitude was that all the Band's land would be taken, regardless of the Band's intentions, wishes, or desires – and, indeed, this is what occurred. As Agent Day's reporting letter disclosed, he "had the greatest difficulty in procuring their consent" to the surrender of IR 112A, but it was nonetheless obtained. In our view, this is not so much evidence of a decision being *made* by the Band as a decision being *forced* upon it.

For these reasons, our conclusions in this case are strikingly similar to our findings in the Kahkewistahaw inquiry. Since the surrender was taken at a time when the Band had no recognized Chief or headmen and its members were not allowed to elect new representatives or to seek independent advice, serious questions arise whether the Crown took unfair advantage of the Band at a time when a leadership void existed. In our view, had the Crown been interested in a fair and

266 Telegram from Deputy Superintendent Pedley to Commissioner Laird, September 1, 1908 (ICC Documents, p. 288).

unbiased decision-making process, it would have waited until the Band had a Chief and headmen before placing a decision of such importance before the members for a vote.

In conclusion, we have no hesitation in finding, on the facts of this case, that the Band ceded its decision-making power to the Crown, or, perhaps more appropriately, that the Band's decision-making autonomy was effectively ceded for it by the overwhelming power and influence exercised by Crown officials seeking to obtain the desired surrenders. Accordingly, we find that the Crown failed to meet its fiduciary duty to exercise its power and discretion in a conscientious manner and without unduly influencing the Band's decision-making autonomy with respect to the proposed surrender of Indian Reserves 112 and 112A.

Duty of the Crown to Prevent an Improvident or Exploitative Surrender

In *Apsassin*, McLachlin J considered whether section 51(4) of the 1927 *Indian Act* – which is equivalent to section 49(4) of the 1906 Act – imposed a fiduciary duty on the Crown in the context of the Governor in Council's discretion to accept or refuse a surrender. Building on the understanding that section 49(1) was designed to give effect to a band's true intention with respect to a surrender, McLachlin J wrote:

> 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. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. . . . [T]he Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[267]

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267 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25, 130 DLR (4th) 193 at 208 (SCC). On this point, Gonthier J concurred with McLachlin J's view that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured" (at 200).

In *Chippewas of Kettle and Stony Point,* Killeen J, whose judgment was upheld by the Ontario Court of Appeal, concluded that "the existence of a fair bargain is not a condition precedent to the exercise of the surrender power under s. 49 of the Act or to the acceptance of a surrender by the Governor in Council thereunder," and that a bad bargain cannot work to vitiate the consent of either the Band or the Governor in Council.[268] In other words, evidence of an unconscionable transaction cannot affect an otherwise valid surrender.

Nevertheless, in the present case, the provisions of the *Indian Act* and the nature of the relationship between Canada and the Indians give rise to a fiduciary duty on the Crown, and more specifically the Governor in Council, to withhold its consent to a surrender under section 49(4) of the Act where the Band's decision to surrender was, to use the words of McLachlin J, "foolish or improvident – a decision that constituted exploitation." It is of interest to note that, in *Apsassin*, McLachlin J relied on the trial judge's findings of fact and concluded that the surrender of the reserve by the Beaver Indian Band made "good sense" when viewed from the Band's perspective at the time.[269]

By way of contrast, in the present case we find that the surrender of Indian Reserves 112 and 112A was clearly improvident and exploitative of the Band. Accordingly, the Governor in Council had an obligation to prevent the surrender from taking place by simply withholding its consent. The evidence on this point speaks for itself.

Prior to the surrender, the Band, in common with the Thunderchild Band, held "about six miles square, of the best possible land" for farming in central Saskatchewan.[270] Chief Moosomin and his people had settled on this land in keeping with the promise in Treaty 6 that Indian bands would become self-sufficient by establishing agriculture as their primary means of livelihood. Despite the policies of the Canadian government which nominally promoted Indian farming, but effectively

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268 *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1995) 24 OR (3d) 654 at 698 (Ont. Ct (Gen. Div.))

269 The relevant factors included, as noted above, the Band's interest in acquiring a new reserve closer to its traplines. It will also be recalled that the Band was not using the reserve for farming or any other purpose except as a summer campground.

270 B. Prince to T.O. Davis, April 16, 1902 (ICC Documents, p. 178).

undermined this objective at the same time, the Moosomin Band developed a respectable economy based on mixed farming. Agent Day remarked on the success of Band members as farmers and stockmen on their original reserve and said that he had "every hope that by this means they will ultimately become perfectly independent of government aid." He added that "the Indians of this band are very industrious and progressive. They are keenly alive as to ways and means of earning money, and, as a consequence, are becoming quite prosperous."[271] Despite Day's ready acknowledgments of the Band's success in farming, the Department devastated this prosperity by taking away the Band's high-quality land and replacing it with land that was decidedly inferior.

Indeed, the productive capacity of the land was the evident motivation for the surrender in the first place. Not only was the land actively sought by settlers and politicians acting on their behalf, but the Department laboured under the unfounded perceptions that Indians were competing unfairly with non-Indian farmers, and that the amount of land reserved for Indians was excessive in proportion to their numbers.

In this connection, the Commission adopts the following assessment of the Band's situation prior to the surrender:

> The image of the band acquired from official reports was one of steady material and social improvement, which had been won after considerable initial difficulties had been experienced in settling down to life on the land. The record makes it clear that this progress was not made easily, or without effort. It was evident that there had been many interruptions in the band's movement towards well-being, which developed in part from finally becoming familiar with the place in which the band had made its home since 1882. Just as this progress had begun to be discernible, however, a series of external events were to occur which would disrupt the band's development just as it had begun to accelerate.[272]

The surrender forced the Band to relocate farther north, far from the rich agricultural lands bordering on the North Saskatchewan River and with no access to the river or to the railway. Whereas the Band

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271 Canada, Parliament, *Sessional Papers*, 1910, No. 27, "Annual Report for the Department of Indian Affairs for the Year Ended 31st December, 1909," 128-31 (ICC Documents, p. 1753).

272 Don McMahon, "The Surrender and Sale of Moosomin Indian Reserve No. 112," Federation of Saskatchewan Indians, August 1, 1985 (ICC Documents, p. 784).

had formerly found success in agriculture, the new reserve was inappropriate for mixed farming. Although parts of the reserve were satisfactory for grazing cattle, the land generally was covered in boulders and was rough.[273] Day's successor as Indian agent was eventually forced to report that "[t]hey have never raised a good crop on the Moosomin Reserve, and they have met with so many failures that it is hard to get them to take any interest in farming."[274] The key reasons for these failures may be traced to the surrender – namely, the poor quality of the replacement land and the sense of dislocation suffered by the Band.

The situation that eventually unfolded on the new reserve at Jackfish Lake was well summarized in 1930 by Commissioner Graham, who ironically was the same man who had orchestrated the ruinous surrender of the best part of the Kahkewistahaw reserve in 1907. It will be recalled that Graham equated the situation at Moosomin with the Alexis Reserve in Alberta, where "[a]griculture apparently was the last thing that was in the minds of those who agreed to set aside this particular reserve for Indians."[275] Specifically with respect to the members of the Moosomin Band, Graham commented that "they surrendered a splendid farming reserve, and were removed to their present location, which is hilly, stony, in a frost belt and practically useless as a farming proposition."[276] Graham suggested that moving the Alexis Band was a possible solution, and implied that such action might also be required with respect to the Moosomin Band. Given that the Band had already been moved to this location, supposedly for its greater benefit, it is indeed ironic that the Department's proposed solution was yet another move.

In the Commission's view, this was an entirely predictable result. Departmental officials were aware, or ought to have been aware, that this surrender was utterly foolish and improvident when

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273 Field notes and report of Fred W. Wilkins, September 4, 1889, and September 20, 1889 (ICC Documents, pp. 1561-74, 1575-89); Field notes of W.R. Reilly, May 29, 1903 (ICC Documents, pp. 1599-1610); W.R. Reilly to Surveyor General, June 12, 1903 (ICC Documents, p. 1611).

274 J.A. Rowland, Indian Agent to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, June 7, 1918 (ICC Documents, p. 671).

275 W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, p. 740).

276 W.M. Graham, Indian Commissioner, to D.C. Scott, Deputy Superintendent General, April 24, 1930, NA, RG 10, vol. 4095, file 600324 (ICC Documents, p. 741).

viewed from the Band's perspective at the time. The Band's hard-won successes in agriculture were sacrificed to "open up" the reserve to settlers who coveted the high-quality land. The *goal*, and not simply the *effect*, was to convey these opportunities for success into the hands of settlers. The land to which the Band was dispatched was of significantly poorer quality than that which it had surrendered. While the site of former IR 112 is intensively cultivated, the new reserve (IR 112B) has resisted all efforts to turn it into a viable farming operation. As the evidence demonstrates, this was a known and predictable result at the time of the surrender.

The relocation did more than simply set back the farming operations. It also discouraged Band members from taking up "their industries." Moreover, it evidently confused and distressed many who did not appear to be aware that a surrender had taken place, and it imposed a serious "transition cost" on the Band. The effect of uprooting a community, largely against its will, and attempting to settle it in an unfamiliar and unforgiving location seems to have been wholly disregarded by agents of the Crown. In short, allowing the Band to surrender its reserves amounted to exploitation and a breach of the Crown's fiduciary duty.

There is one question that the Crown should have asked itself, but apparently never did: Is it in the best interests of the Moosomin Band to surrender its land and relocate to IR 112B? The answer was clearly no. The facts disclose *why* this question was never asked: simply put, the answer would not benefit the Crown and local settlers, whose interests were the paramount consideration throughout. We conclude that, not only did the Crown fail to turn its mind to the question whether the surrender was foolish or improvident when viewed from the perspective of the Moosomin Band at the time, but Indian Affairs officials were not even alert to the fact that such a question might be relevant given the trust and confidence placed in the Crown by the Band.

ISSUE 3 STANDARD AND ONUS OF PROOF

In the parties' agreed statement of issues, the Commission was asked to address the following question: "If the evidence is inconclusive in determining any of the above issues, upon whom does the onus of proof rest?" The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. The standard of proof is based on the civil standard described by the British Columbia Court of Appeal in *Rex v. Findley*:

> In a civil action, the plaintiff is said to have made out a *prima facie* case when he has adduced evidence which is capable of showing a greater probability of what he alleges is more correct than contrary. . . . In a civil case, one side may win a decision by the narrowest of margins upon reasons which seem preponderating, although they are not in themselves decisive. . . . The court's decision may rest on the balance of probabilities.[277]

That the First Nation bears the burden of proof is also clear from the Specific Claims Policy, which states:

> The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, *the burden of which rests with the claimant*.[278]

In the present case, the Moosomin First Nation has satisfied the burden of proof on a balance of probabilities. In fact, the evidence is overwhelming and we have little doubt that the Crown breached its pre-surrender fiduciary duties owed to the Moosomin Band. Since the evidence is conclusive on this issue, it is not necessary to consider whether the onus should shift to the Crown under the circumstances.

Although the evidence is clear on the Crown's breach of fiduciary duty, it will be recalled, however, that we declined to make any findings on whether the surrender provisions of the *Indian*

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277 *Rex v. Findley*, [1944] 2 DLR 773 at 776 (BCCA).

278 *Outstanding Business*, 31.

Act had been complied with because, in our view, the evidence was inconclusive. Having said that, we do not intend to resolve this issue by imposing the onus of proof on either the Moosomin Band or Canada because it is simply not necessary to do so in view of our findings on breach of fiduciary obligation.

In declining to address this issue, we note that there is little to be gained from finding that the surrender was invalid or void *ab initio* (i.e., void from the outset) on the grounds that it did not comply with the mandatory provisions of the *Indian Act*. From a practical perspective, the issue of statutory compliance is academic because the Specific Claims Policy clearly states that innocent third parties who subsequently purchase surrendered lands will not be dispossessed of their interest as a result of any settlement reached between Canada and the First Nation.[279] Since the evidence before us suggests that the federal government no longer owns the lands which are the subject of this claim, the First Nation would be entitled only to compensation in lieu of having these specific lands returned to reserve status.

Nor does our decision to not address the compliance issue have any impact on the compensation available to the Moosomin First Nation under the Specific Claims Policy. In this regard, we wish to emphasize that the Moosomin Band would not have surrendered its reserves *but for* the Crown's breach of fiduciary obligation in procuring the surrender. Likewise, we are also satisfied that the Band would not have lost its reserves if the Governor in Council had properly exercised its discretion by refusing to consent to the foolish, improvident, and exploitative surrender of these lands. Since the Band lost its land only as a result of Canada's improper conduct, it is our view that the First Nation would be entitled to claim compensation under the Specific Claims Policy for the "current, unimproved value of the lands" plus loss of use because the lands were not "lawfully surrendered."[280] This result flows not only from the policy but also from the well-established principle of restitution, which suggests that compensation should attempt to place the

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279 *Outstanding Business*, 31. Under the heading of "Compensation," item 8 states: "In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed."

280 See item 3 under the heading of "Compensation" in *Outstanding Business*, 31.

First Nation in the same position it would have been in if the Crown had not breached its fiduciary obligations.

PART V

CONCLUSIONS AND RECOMMENDATION

The question before the Commission is whether the Government of Canada owes an outstanding lawful obligation to the Moosomin First Nation. We have concluded that it does.

In view of our conclusions regarding the Crown's fiduciary obligations with respect to this surrender, it is not necessary for the Commission to make a finding on whether there was compliance with section 49(1) of the *Indian Act*.

We conclude, however, that Canada breached its fiduciary obligations in securing the surrender of Indian Reserves 112 and 112A because the Crown failed to respect the Band's decision-making autonomy and, instead, engaged in "tainted dealings" by taking advantage of its position of authority and by unduly influencing the Band to surrender its land. Rather than taking Josie Moosomin's letter of November 1906 as an expression of the Band's intention to retain its land, the Department ignored Josie Moosomin's plea and promptly took steps to arrange for that very surrender. Crown officials deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians who had long sought the removal of the Indians and the sale of their reserves. The surrender was pursued in the face of consistent statements from the Band that it did not wish to give up its land or relocate. In the final result, the Crown abdicated its trustlike responsibilities and ignored the intentions and wishes of the Band. Under the circumstances, it would be unsafe to rely on the surrender as an expression of the Band's true understanding and intention.

We also have no hesitation in finding, on the facts of this case, that the Band's decision-making autonomy was ceded for it by the overwhelming power and influence exercised by Crown officials seeking to obtain the desired surrenders. Accordingly, we find that the Crown failed to meet its fiduciary duty to exercise its power and discretion in a conscientious manner and without unduly influencing the Band's decision-making autonomy with respect to the proposed surrender of Indian Reserves 112 and 112A.

Finally, the evidence is clear that the Governor in Council gave its consent under section 49(4) of the *Indian Act* to a surrender that was foolish, improvident, and exploitative, both in the

process and in the end result. The Crown's failure to prevent the surrender under these circumstances amounted to a breach of fiduciary duty.

RECOMMENDATION

Accordingly, we find, for the reasons stated above, that this claim discloses an outstanding lawful obligation owed by Canada to the Moosomin First Nation. We therefore recommend to the parties:

> **That the claim of the Moosomin First Nation be accepted for negotiation under the Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

P. E. James Prentice, QC	Carole T. Corcoran	Aurélien Gill
Commission Co-Chair	Commissioner	Commissioner

Dated this 31st day of March, 1997.

Lo, the poor Indians they must suffer! The wards of the nation! The aborigines of Canada! The men whose rights they were sworn to protect were the victims of the conspiracy of a Turriff, a Pedley and a White. If anything has ever in the annals of Parliament been placed upon the table of this House calculated to bring the blush of shame to the face of any Canadian, it is the revelation contained in the evidence that is here to-night.

– Hon. R.B. Bennett, House of Commons debate on Report of the Ferguson Royal Commission, April 14, 1915

APPENDIX A

MOOSOMIN FIRST NATION 1909 SURRENDER INQUIRY

1	Request that Commission conduct inquiry	July 17, 1995
2	Planning conference	October 19, 1995
3	Community session	February 21, 1996

The Commission heard from the following witnesses: elders Peter Bigears, Norman Blackstar, Sidney Ironbow, Jimmy Myo, Isidore Osecap, and Adam Swiftwolfe, all of the Moosomin First Nation, and Edward Okanee, an elder of the Thunderchild First Nation. The community session was held at Cochin, Saskatchewan.

4	Legal argument	September 24, 1996
5	Content of formal record	

The formal record for the Moosomin First Nation Inquiry consists of the following materials:

- 4 exhibits tendered during the inquiry, including the documentary record (6 volumes with two annotated indices)
- written submissions of counsel for the First Nation
- transcripts of the community session and legal argument of the First Nation (two volumes)
- written correspondence among the parties and the Commission

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