

INDIAN CLAIMS COMMISSION

MISTAWASIS FIRST NATION INQUIRY 1911, 1917, AND 1919 SURRENDERS

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PART I

INTRODUCTION

In October 1992, the Mistawasis First Nation¹ submitted a claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that three land surrenders taken of certain portions of the Mistawasis Indian Reserve (IR) 103, received after the First Nation signed Treaty 6, were null and void on various grounds. The claim, which was filed under the federal Specific Claims Policy, specifically contended that the Crown had breached its fiduciary obligations to the Band in obtaining the surrenders, and that the surrenders were obtained as a result of undue influence, in unconscionable circumstances, and in violation of the terms of the *Indian Act*.

The claim was reviewed by the Department of Indian Affairs and Northern Development and the Department of Justice, in accordance with the Specific Claims process. On August 10, 1994, Jack Hughes, of Specific Claims West, informed the Chief and Council of the Mistawasis First Nation of the federal government's preliminary position regarding the claim. According to Mr Hughes's letter, the Government of Canada was prepared to accept part of the claim for negotiation, on the basis that the Crown apparently failed to administer and collect proceeds from the 1911 surrender and sale in a proper manner.² At the request of the solicitor for the Band, the Specific Claims Branch undertook further research and reviewed its preliminary position with respect to the 1917 and 1919 surrenders. As a result, Jack Hughes advised the Chief and Council, by letter dated October 4, 1994, that Canada was also prepared to accept portions of the claim relating to the two later surrenders, on essentially the same basis as that upon which they had agreed to negotiate the 1911 surrender.³ A formal letter to this effect was sent to Chief Daniels on November 3, 1994, by Assistant Deputy Minister John Sinclair.⁴

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

² Jack Hughes, Specific Claims West, DIAND, to Chief Leona Daniels and Council, Mistawasis First Nation, August 10, 1994 (ICC file 2107-35-01, vol. 1).

³ Jack Hughes, Specific Claims West, DIAND, to Chief Leona Daniels and Council, Mistawasis First Nation, October 4, 1994 (ICC file 2107-35-01, vol. 1).

⁴ John Sinclair, Assistant Deputy Minister, Claims and Indian Government, to Chief Leona Daniels, Mistawasis First Nation, November 3, 1994 (ICC file 2107-35-01, vol. 1).

In the First Nation's view, this response did not sufficiently address its historical grievances. As a result, on August 29, 1996, its solicitor, Lesia Ostertag, wrote to the Indian Claims Commission (ICC) asking the Commission to review the rejected portions of its claim.⁵ On September 9, 1996, Commission Counsel Ron Maurice wrote to the director general of the Specific Claims Branch and to the senior general counsel of DIAND Legal Services to inform them that the Commission had agreed to conduct an inquiry into the matter.⁶ On September 20, the First Nation requested that the Commission put the inquiry into abeyance, pending the outcome of negotiations on the accepted portions of the claim. When those negotiations did not prove successful, the First Nation requested the ICC to proceed with the inquiry into the rejected portions of the claim, in May 1998.⁷

As part of the Commission's inquiry into this claim, a planning conference was held on January 5, 1999, at which the formulation of the issues in the claim was discussed extensively. A community session was also held at the reserve on June 15, 1999. At this time, Commission staff heard evidence from several of the community's elders.

Settlement discussions took place between the parties throughout the year 2000, and as a result the inquiry was again placed in abeyance. In the spring of 2001, the Commission was informed that the Mistawasis First Nation had ratified a Surrender Settlement Agreement with the Government of Canada.⁸

As a result of this process, the Commission suspended its inquiry into the claim and was not required to make any findings. This report is based on historical reports and documents submitted to the Commission by the Mistawasis First Nation and the Department of Indian Affairs and Northern Development. The balance of the record in this inquiry is referenced as Appendix A to this report.

⁵ Lesia S. Ostertag, Counsel for the Mistawasis First Nation, to Indian Claims Commission, August 29, 1996 (ICC file 2107-35-01, vol. 1).

⁶ Ron S. Maurice, Commission Counsel, ICC, to Michel Roy, Director General, Specific Claims Branch, et al., September 9, 1996 (ICC file 2701-35-01, vol. 1).

⁷ Band Council Resolution, Mistawasis First Nation, May 13, 1998 (ICC file 2701-35-01).

⁸ Kathleen Lickers, Commission Counsel, ICC, to Chief and Council, Mistawasis First Nation, April 11, 2001 (ICC file 2701-35-01, vol. 2).

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission’s mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.”⁹

This Policy, outlined in the department’s 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.¹⁰ The term “lawful obligation” is defined in *Outstanding Business* as follows:

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

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

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

The policy also addresses the following types of claims, characterized as “Beyond Lawful Obligation”:

- i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

⁹ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

¹⁰ DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994), 1 ICCP 171– 85 (hereafter *Outstanding Business*).

- ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.¹¹

The Commission has the authority to review thoroughly the historical and legal bases for the claim and the reasons for its rejection with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

¹¹ *Outstanding Business*, 20; reprinted in (1994), 1 ICCP 171–85.

PART II

HISTORICAL BACKGROUND

EARLY HISTORY OF THE MISTAWASIS BAND

The Cree ancestors of the Mistawasis Band migrated to present-day Saskatchewan from the woodlands of eastern Manitoba and the Great Lakes area of Ontario in the 17th and 18th centuries. This migration was fuelled by the European fur trade, specifically by the establishment of fur trade posts on the western shores of Hudson Bay in the years following 1670.¹² Although the Cree did not completely relinquish their woodland culture, they developed a new means of subsistence on the Plains, which involved hunting the buffalo on horseback. They also developed a relationship of mutual dependence with the Hudson's Bay Company (HBC), the company that would eventually become the leading commercial concern in the inland trade. In the course of that relationship, the Cree became the dominant middlemen of the fur trade in western Canada, controlling European access to furs trapped by Indians in the more remote regions in the west, while making a profit on trade goods exchanged for furs. The Cree occupied that position until the depletion of furs in the lands draining into the Saskatchewan and Nelson Rivers impelled fur traders to establish trading posts further inland and to the north of Cree territory. As the fur trade began to focus on the Mackenzie and Athabasca river systems, aboriginal groups located further north, such as the Chipewyan, took over what had been the exclusive domain of the Cree. As a result, the latter became progressively more involved with the provisioning trade, hunting deer and buffalo for meat to supply the employees of the increasing number of inland trading posts.¹³

By the 1860s, the buffalo were disappearing from the eastern Plains, the homeland of the Cree. To find buffalo for their own subsistence, the Cree were forced to enter the territory of the Blackfoot, further west. Although the Cree and Blackfoot had been peaceful trading partners during the former nation's tenure as middleman in the fur trade, the depletion of their common food source

¹² John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 5.

¹³ John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 19–20.

increasingly led to violent conflict between them.¹⁴ Together with the devastating effects of periodic epidemics, the battles over buffalo territory began to decimate aboriginal populations on the southern Plains. Both the Cree and the Blackfoot recognized the futility of continued warfare, and, in 1871, a peace agreement was concluded between them. By this treaty, the Cree retained access to the buffalo in the Cypress Hills, the only place on the southern Plains where the buffalo were still to be found on a consistent basis.¹⁵

This, however, was a short-term solution to the problem of survival. The depletion of the buffalo signalled the beginning of the end of an era. The transfer of the vast HBC territories to Canada in 1870, and the prospect of agricultural settlement moving into the lands occupied by the Cree and other nations, was its death knell. The stage was set for the coming of the treaties, and the beginning of a settled way of life for the Cree of the Plains.

BACKGROUND TO TREATY 6

In 1871, several Plains Cree Chiefs, having heard of the transfer of Rupert's Land to the Dominion of Canada, contacted the Lieutenant Governor of the North-West Territories, Adams. G. Archibald, to petition the government to enter into a treaty with them. They referred to the destitution of their people, caused by disease and the disappearance of the buffalo, and requested cattle, tools, and implements from the Canadian government in order to enable them to adjust to the new realities of life.¹⁶ The chief factor of the Hudson's Bay Company, who had transcribed and forwarded the petition, advised the Lieutenant Governor in the strongest terms that a treaty with the Cree of Saskatchewan was necessary to preserve the peace. Despite this, however, the treaty process in Saskatchewan was delayed for several years.

¹⁴ Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence, A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 93–94.

¹⁵ John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988), 117–18.

¹⁶ 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, Clark & Co., 1880), 170–71 (ICC Exhibit 5, tab I).

The Council of the North-West Territories, a representative body exercising certain executive and legislative powers in the lands newly acquired by Canada, had recommended in 1873 that treaties be made with the Indians located between the boundaries of the existing treaties (Treaties 1, 2, and 3), and Fort Carlton, an area that would have included the territory of Chief Mistawasis and his followers. Notwithstanding this recommendation, however, Treaty 4, signed in 1874, only included the Cree and Saulteaux of the southern Plains.

The uncertain future of those Indian nations remaining outside treaty contributed to a state of unease among them.¹⁷ The Cree were aware of the promises made to the Indian nations living within the borders of the United States, promises that had subsequently been broken in the furtherance of the American government's expansionist settlement policies. To pressure the dominion government to address their concerns by means of a treaty, Cree leaders took steps to prevent the use of their traditional lands.¹⁸ According to one source, Chief Mistawasis took an active role in this strategy. In 1875, he apparently ordered his men to stop the construction of a telegraph line within Cree territory, and to turn back a survey party from the Geological Survey of Canada, which had been working in the area.¹⁹

By such means, the attention of the dominion government was engaged. Lieutenant Governor Alexander Morris, Archibald's successor, received permission from Interior Minister David Mills to send an emissary to the Cree living near Fort Carlton to inform them that Commissioners would be sent the following summer to negotiate a treaty with them. According to the envoy selected, the Reverend George McDougall, the news allayed much of the Crees' discontent. He informed Morris that Mistawasis, whom he described as the "head Chief of the Carlton Indians," expressed great

¹⁷ Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence, A History of Saskatchewan Treaties* (Montreal: McGill-Queen's University Press, 2000), 102.

¹⁸ John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879–1885," in J.R. Miller, ed., *Sweet Promises: A Reader in Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), 213–14.

¹⁹ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 7.

satisfaction at the news of the forthcoming negotiations.²⁰ The process that would lead to the conclusion of Treaty 6 was underway.

THE NEGOTIATION OF TREATY 6

The dominion government appointed three Commissioners to negotiate a treaty with the Indians at Forts Carlton and Pitt – Lieutenant Governor Morris, the Honourable James McKay, and HBC Chief Factor W.J. Christie. They proceeded from Winnipeg in the summer of 1876, arriving at Fort Carlton on August 15. On that evening, the two most senior and respected Chiefs of the district, Mistawasis and Ahtakakup, came to the fort to pay their respects to Morris. The start of negotiations was delayed, however, as the assembled Indians wished to confer among themselves.²¹

At this meeting of the assembled Cree negotiators, Mistawasis spoke strongly in favour of the treaty. Referring to the disappearance of the buffalo, the ravages of smallpox, and his desire that the North-West Mounted Police (NWMP) protect his people against the importation of alcohol, Mistawasis stated:

I speak directly to Poundmaker and The Badger and those others who object to signing this treaty. Have you anything better to offer our people? ... I for one think that the Great White Queen Mother has offered us a way of life when the buffalo are no more. Gone they will be before many snows have come to cover our heads or graves if such should be.²²

Chief Ahtakakup expressed similar views, arguing that the inevitability of white settlement made the treaty – “the acceptance of the Queen’s hand” – the only sensible course of action.²³

²⁰ 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, Clark & Co., 1880), 173–75 (ICC Exhibit 5, tab I).

²¹ 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, Clark & Co., 1880), 181–82 (ICC Exhibit 5, tab I).

²² Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence, A History of Saskatchewan Treaties* (Montreal: McGill-Queen’s University Press, 2000), 131.

²³ Arthur J. Ray, Jim Miller, and Frank J. Tough, *Bounty and Benevolence, A History of Saskatchewan Treaties* (Montreal: McGill-Queen’s University Press, 2000), 132.

Negotiations began on August 18, 1876, following a sacred pipe ceremony. Morris's speech was translated by a Métis interpreter named Peter Erasmus, who had been chosen by the Chiefs. The secretary to the Treaty Commission, Dr A.G. Jackes, took detailed notes of that first meeting and at all subsequent meetings, specifically recording the commentary and speeches of the various parties.²⁴ Dr Jackes's notes, along with Morris's own report of the negotiations, make it clear that all parties were concerned that the treaty facilitate farming, given the dramatic depletion in the buffalo herds that provided the economic livelihood of the Plains Indian. 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.²⁵

In addition to the setting aside of reserves, Morris specifically mentioned the provision of schools, the prohibition of alcohol, the provision of agricultural implements, tools, cattle, and seed, and the provision of annuities.²⁶ At the end of Morris's speech, Chief Mistawasis arose, thanked him, and advised that the Chiefs of the assembled bands required some time to consider what he had said, and that they would meet him again a few days later.

The second meeting took place on August 22, 1876. From representations made by several of the Chiefs, it was immediately obvious that the Indians' main concern was the issue of support or assistance from the government once they had settled on reserves. Morris apparently viewed these concerns as excessive requests for aid. In response, he emphasized agriculture as the way the Indians could support themselves, telling them that

²⁴ 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, Clark & Co., 1880), 197–244 (ICC Exhibit 5, tab I). 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.”

²⁵ 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, Clark & Co., 1880), 184.

²⁶ 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, Clark & Co., 1880), 205–06.

we could not assume the charge of their every-day life, but in a time of great national calamity they could trust to the generosity of the Queen.²⁷

To this, Chief Mistawasis replied that he had not meant to ask for food every day, but only when his people commenced to farm, and in case of famine. What was contemplated, Chief Ahtakakup added, was food in the spring, when they were planting instead of hunting, and proportionate help as they advanced in their new way of life.²⁸ The meeting then adjourned, at the Chiefs' request, so that they could consult among themselves.

On August 23, the parties returned to the negotiations. At the outset, the Chiefs' interpreter read aloud a list of requests from the Chiefs, which included greater quantities of tools, implements, and cattle, as well as horses, wagons, medicines, assistance for the sick and destitute, the right to cut timber on Crown lands, and other benefits. After consulting with the other Commissioners, Morris agreed to make some concessions, such as food provisions for three years after each Band commenced farming, and an increased number of farming implements and farm animals.²⁹ The assembled Chiefs then indicated their acceptance, and Treaty 6 was signed that day, with Mistawasis and Ahtakakup signing as head Chiefs.

In his official report, Morris 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."³⁰

²⁷ 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), 185.

²⁸ 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), 213.

²⁹ 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), 215–17.

³⁰ 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), 194.

The terms regarding agriculture agreed to between Morris and the Chiefs were incorporated into the written treaty itself. The relevant provisions state:

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 reaping-hooks for every family as aforesaid; and also two axes, and also one cross-cut saw, and also 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.*³¹

While negotiating the treaty, Morris encouraged prompt adherence and selection of lands. He alluded to the danger that settlers might claim good land if it were not first selected for Indian settlement. He also assured the Indians that, once land had been reserved for them, it could not be taken away without their consent.

[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.*³²

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.”³³

³¹ 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), 351–65. Italic emphasis added.

³² 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), 204–05. Emphasis added.

³³ 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), 212.

MISTAWASIS INDIAN RESERVE 103

Chief Mistawasis was among the first of the Cree leaders to ask that his reserve be set aside.³⁴ He chose a location at the Band's traditional wintering grounds, after consultation with the Reverend John Hines, a missionary he respected.³⁵ In 1878, Surveyor Edgar Bray surveyed a reserve of 77 square miles or 49,280 acres for Chief Mistawasis and his Band of 53 families. The reserve was located at Snake Plains, 20 miles northwest of Fort Carlton. The reserve is described in Nelson's Book of Surveys:

The north-western part of this reserve is well wooded with poplar, jack-pine, spruce, birch, and tamarac. The south-eastern part is a bushy prairie interspersed with bluffs of poplar and willow. There are numerous swamps affording hay of excellent quality. In the flats the sub-soil is a rich loam covered by a considerable thickness of vegetable mould, and on the high grounds the soil is generally sandy. The reserve is well watered and the pasture magnificent.³⁶

The reserve was formally set aside on May 17, 1889, by Order in Council PC 1151.³⁷

BACKGROUND TO THE SURRENDERS

The followers of Chief Mistawasis were part of a group of Cree often referred to as the "House People," because they had acquired the custom of living in dwellings.³⁸ Having close ties to the missionaries and the Hudson's Bay Company, they had begun to grow crops prior to the signing of Treaty 6,³⁹ and, by 1878, had over 20 acres under cultivation.⁴⁰ They were hampered, however, by

³⁴ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 29.

³⁵ John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at Federation of Saskatchewan Indian Nations [FSIN], n.d.), 9.

³⁶ Nelson's Book of Surveys, Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 3).

³⁷ Nelson's Book of Surveys, Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 3).

³⁸ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 12.

³⁹ John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 4.

⁴⁰ Sarah Carter, *Lost Harvests* (Montreal: McGill-Queen's University Press, 1990), 71.

the poor quality of the implements provided to them pursuant to the treaty. This circumstance, coupled with the general slowness with which the government forwarded the promised supplies, caused discontent, and motivated Chief Mistawasis to advocate for the rights of his people in the years after the treaty was signed.⁴¹

The situation was exacerbated by the total disappearance of the buffalo in 1879. At that time, only the provision of emergency rations from the NWMP, and from the government pursuant to the “famine” clause of Treaty 6, kept many of the Plains nations from starving.⁴²

The privations suffered by many of the bands of the Plains and the fear that discontent would turn into violence prompted the government to establish a farm instruction program in 1879. Notwithstanding this new form of assistance, Chief Mistawasis continued to press the newly appointed Indian Commissioner, Edgar Dewdney, for adequate supplies of implements and provisions, stressing that the Band’s previous appeals had been ignored.⁴³ As well, when the Governor General, Lord Lorne, passed through Battleford on his 1881 tour of western Canada, Mistawasis and other Treaty 6 Chiefs made representations to him, advising him that the terms of the treaty had not been fulfilled in this respect.⁴⁴ The Governor General agreed to pass on the Chiefs’ concerns to government officials in Ottawa; however, these were largely ignored, and any moves towards self-sufficiency came as a result of the Band’s own efforts.⁴⁵

A severe drought in 1884 affected all the bands’ ability to feed themselves and contributed to the general discontent among the Plains nations. This discontent fuelled support for the political aims of Louis Riel and his Métis followers. Notwithstanding their grievances, however, Chief Mistawasis and his Band remained loyal to the Crown during the North-West insurrection of 1885,

⁴¹ John L. Tobias, “History of Mistawasis Band, 1870–1925” (unpublished manuscript on file at FSIN, n.d.), 10.

⁴² John L. Tobias, “History of Mistawasis Band, 1870–1925” (unpublished manuscript on file at FSIN, n.d.), 12–13.

⁴³ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 37.

⁴⁴ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 42.

⁴⁵ John L. Tobias, “History of Mistawasis Band, 1870–1925” (unpublished manuscript on file at FSIN, n.d.), 14.

paying for their loyalty through the loss of many of their homes, which were looted and destroyed in the course of the rebellion.⁴⁶

After the uprising had been quelled, the Mistawasis Band returned to its reserve to farm. Before long, however, policy changes within the Department of Indian Affairs were to have detrimental effects on their efforts.

In 1889, Indian Commissioner Hayter Reed adopted an agricultural policy by which

Indian farmers were to emulate “peasants of various countries”, who kept their operations small and their implements rudimentary.⁴⁷

The Commission first examined this policy in the 1907 Reserve Land Surrender Inquiry of the Kahkewistahaw First Nation. There the Commission noted:

Under the severalty policy, reserves were to be surveyed and subdivided into 40-acre plots for distribution to individual band members, on the rationale that this would allow the best lands to be divided more equitably. By the same token, however, it also led to large tracts of “unused” reserve lands that could then be sold, a goal which local settlers and newspapers endorsed and which Reed envisaged as the logical outcome of the policy.

...

The related peasant farming policy reflected the notion that an Indian farming family should possess only the amount of land it could cultivate using the most primitive of hand tools, most of which were to be manufactured by the family itself. The official goal was to free Indians from “communistic” tribal culture by converting them into European peasant-style subsistence farmers.⁴⁸

⁴⁶ Blair Stonechild and Bill Waiser, *Loyal until Death* (Calgary: Fifth House, 1997), 82.

⁴⁷ 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 in Indian-White Relations in Canada*. (Toronto: University of Toronto Press, 1991), 353–77.

⁴⁸ ICC, *Kahkewistahaw First Nation 1907 Reserve Land Surrender Inquiry Report* (Ottawa, February 1997), reported (1998), 8 ICCP 3 at 31-32.

Sophisticated, labour-saving machinery was banned, a policy that caused the Mistawasis Band to lose a portion of its crop in 1891.⁴⁹ Asserting that the new policy was a violation of the terms of Treaty 6, Chief Mistawasis appealed to departmental officials to permit the use of modern implements, but his pleas were ignored.⁵⁰ Thereafter, the Band's agricultural activities went into decline, particularly after the Chief, long an advocate of farming, grew old.

After the turn of the century, only a few members of the Band continued to farm, even though the peasant farming policy had been discontinued in 1897. There was still some interest in stock-raising and farming, however, as indicated by a March 19, 1906, meeting between the Band and the Agent to discuss fencing the Band's lands.⁵¹ It was agreed that in order to pay for the proposed fencing, band members would be taxed at a rate of one dollar per head for all stock owned by them. Band members not owning animals would be charged one dollar per person. It is not known if the 1906 fencing plan came to pass, but, ironically, fencing would be the issue that would precipitate the first surrender of the Band's lands.

The first decade of the 20th century was characterized by a government policy that often put the interests of immigrant agricultural settlers ahead of the needs of Indian bands. This was especially true during the tenure of Frank Oliver as Minister of the Interior, during the years 1905–11. During his term of office, agricultural immigration was not only encouraged by the dominion lands policy, it was also facilitated by amendments to the *Indian Act* designed to make the surrender of reserve land more attractive to Indian bands. The surrendered land would then be opened for settlement, often through the medium of land speculators, who made a profit on its resale.

The Carlton district, home to the Mistawasis Band as well as to other First Nations, was not immune to the influx of settlers during this period in history. As homesteads began to be taken up, the department began to field inquiries from outside parties regarding the future availability of

⁴⁹ John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 20.

⁵⁰ John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 21.

⁵¹ John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 22–23.

reserve land for homesteading purposes.⁵² At one point, surrender of the nearby Muskeg Lake Reserve, and the amalgamation of that Band with the Mistawasis Band, was discussed.⁵³ Nothing came of this discussion; however, before long, the Mistawasis reserve itself would be the subject of surrender discussions.

1911 SURRENDER

By 1910, some band members were expressing a renewed interest in farming on the reserve. The progress of settlement around the reserve hampered these plans, however, as animals from neighbouring homesteads would trespass on the Band's land. Therefore, during the winter of 1910, the Band asked the local MP, Mr Ruttan, to help them secure funds to fence the reserve. The Indians were willing to provide the posts but wanted the department to purchase the wire fencing. The estimated cost of the wire to fence the 38-mile perimeter of the reserve was \$1,500, an amount that excluded the cost for posts and labour.⁵⁴ The department informed Indian Agent Thomas Borthwick that funds were unavailable, and suggested that the Indians use their annuities to purchase wire.⁵⁵ Borthwick responded that the Indians would not agree to this suggestion, but preferred to surrender 118 acres on the extreme southeast corner of the reserve, which was cut off from the main portion of the reserve by the Canadian Northern Railway's right of way. The Band proposed to use these funds to cover the necessary costs. Borthwick also informed the department that the Indians wanted to purchase farm machinery with the money obtained from the surrender.⁵⁶

⁵² John L. Tobias, "History of Mistawasis Band, 1870–1925" (unpublished manuscript on file at FSIN, n.d.), 22–23.

⁵³ W.A. Orr to Deputy Minister, November 26, 1907, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 26).

⁵⁴ D.C. Scott, Chief Accountant, Department of Indian Affairs, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, January 27, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 34–35).

⁵⁵ D.C. Scott, Chief Accountant, Department of Indian Affairs, to Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, January 27, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 34–35).

⁵⁶ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas A. Borthwick, Indian Agent, January 31, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 36–37).

The department felt the sale of such a small piece of land would not be sufficient to pay for the fencing and the farm machinery. It proposed instead that the Band surrender a larger block, comprising 1,607 acres on both sides of the right of way located at the southeast corner of the reserve.⁵⁷ Surveyor Lestock Reid had described part of this area several years earlier as being “very choice, prairie with poplar bluffs and admirably suited for agriculture.”⁵⁸

On January 31, 1911, the department instructed Indian Agent Borthwick to submit a surrender to the Band for the southeast corner of the reserve. On February 22, 1911, Borthwick returned the signed surrender to the department. He advised that the Indians had insisted on an upset price of \$15 per acre, and that they had inserted a clause in the surrender stating that the department should pay 50 per cent of the proceeds to band members.⁵⁹

On February 28, 1911, Assistant Deputy and Secretary J.D. McLean returned the surrender to Borthwick. He advised that the two clauses regarding the \$15 upset price and the payment to band members of 50 per cent of proceeds from sales were unacceptable, since it was believed that a price that high would effectively render part of the land unsaleable. McLean requested that Indian Agent Borthwick have the surrender amended and, if the Indians consented, an upset price could be fixed on each quarter section later. Borthwick was also instructed to tell the Indians that the distribution of money from sales would hinder any effort to accumulate interest to help pay for the repair and maintenance of farm machinery. As a result, the Indians were to be advised that, if the clause regarding the payment of proceeds was not removed, the entire plan would have to be abandoned.⁶⁰

The Band apparently agreed to the new terms, but added a provision that horses be purchased out of the sale proceeds.

⁵⁷ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Thomas A. Borthwick, Indian Agent, January 31, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 36–37).

⁵⁸ Lestock Reid, surveyor, to J.D. McLean, Secretary, Department of Indian Affairs, January 2, 1908, National Archives (hereafter NA), RG 10, f. 307541, C-10176 (ICC Documents, p. 27).

⁵⁹ Thomas A. Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 22, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 39–40).

⁶⁰ J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs, to Indian Agent Thomas Borthwick, February 28, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 41–42).

On March 20, 1911, Chief Jacob Johnstone, and 22 other band members signed the surrender, along with Agent Borthwick and the interpreter, William Dreaver.⁶¹ The surrender stipulated that the department would sell the 1,607 acres and use the funds to fence the reserve, to purchase three specified pieces of farm machinery, and to maintain the machinery for the first year of operation. It was agreed that the department would advance funds to pay for the contemplated expenditures, which would be charged against the future proceeds of sales. The department would credit the balance to the Band, and the accrued interest would pay for future maintenance of the fence and farm machinery.⁶² In addition, half the balance would be utilized to buy horses and machinery “as required by the Band.”

On the same day, the affidavit attesting to the circumstances surrounding the surrender was sworn by the Chief and three headmen, the agent, and the interpreter, before a justice of the peace.⁶³ An Order in Council dated April 20, 1911, accepted the surrender.⁶⁴

The surrendered land was sold by public auction on August 2, 1911, for an average price of almost \$18 per acre. The terms of the sale were one-tenth cash down, with the balance to be paid in nine equal instalments, with 5 per cent interest on the unpaid balance. The purchasers, real estate agents P.D. Tyerman and W.R. MacLeod, paid only the first two instalments, plus some interest on the balance, but did not make any other instalment payments. By 1928, the purchasers owed over \$42,000 in principal and interest. The department then cancelled most of the sales, and the land was resold to new purchasers, often for less than the 1911 price.⁶⁵

On April 30, 1913, by Order in Council, the Department of Indian Affairs granted a right of way for a road allowance to the Province of Saskatchewan, over 17.1 acres within the surrendered

⁶¹ Surrender document signed on March 20, 1911, DIAND Land Registry, Instrument No. ILR X17161D (ICC Documents, pp. 43–45).

⁶² Surrender document signed on March 20, 1911, DIAND Land Registry, Instrument No. ILR X17161D (ICC Documents, pp. 43–45).

⁶³ Affidavit, March 20, 1911, NA, RG 2, vol. 1167 (ICC Documents, p. 46).

⁶⁴ Order in Council PC 793, April 20, 1911 (ICC Documents, p. 54).

⁶⁵ Submission to the Minister of Indian and Northern Affairs on the Mistawasis Surrender Claims, October 26, 1992 (ICC Documents, pp. 739-70).

land.⁶⁶ The province paid for the right of way based on the average price realized from the other land sales within the surrendered block. Another Order in Council, dated May 17, 1916, transferred the road allowances surrounding each section within the surrendered block to the province, without reference to any additional compensation.⁶⁷

A SECOND SURRENDER

The question of a second surrender arose before the details of the first surrender were settled. Shortly after the August 2, 1911, auction, the Mistawasis Band approached Agent Borthwick with various requests. One was that half of the proceeds of the 1911 sale be divided and placed at the disposal of each individual band member. This request had been rejected by departmental officials prior to the original surrender earlier that year. Borthwick wrote to his superiors that he could not recommend carrying out the request, as it would encroach on the rights of future generations of band members, but that

it is very desirable that the Indians be encouraged to a further sale of land to the extent of the balance of the surveyed southern portion of the reserve before the fencing is carried out.⁶⁸

On September 7, 1911, Borthwick reported to J.D. McLean that he had been present at a meeting of the Mistawasis Band on September 4, at which the Indians decided to sell the remainder of the surveyed strip across the south portion of the reserve.⁶⁹ The Band proposed that all the proceeds of the sale of surrendered land be left in the Band's capital account, provided that the funds from the 1911 surrender were placed at their disposal. In response, Frank Pedley, the Deputy Superintendent General, instructed Agent Borthwick, to present a surrender of 5,066 acres of land to the Band on

⁶⁶ Order in Council PC 955, April 30, 1913 (ICC Documents, p. 125).

⁶⁷ Order in Council PC 1176, May 17, 1916 (ICC Documents, p. 176).

⁶⁸ Thomas Borthwick to J.D. McLean, August 12, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 67–69).

⁶⁹ Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, September 7, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 72–73).

slightly different terms.⁷⁰ The new surrender allowed the proceeds of sale from the first surrender to be used by the Band, so long as the expenditures did not exceed 50 per cent of the proceeds of all the land sales, less the fencing costs.

The Band rejected these terms. Agent Borthwick reported on November 3, 1911, that the Indians would only surrender on the terms set out in Borthwick's letter of September 7.⁷¹ The department responded with a slightly altered proposal, which would allow the Indians to utilize all the funds of the first sale, less the cost of the fencing, to purchase horses and machinery. The purchases could not exceed 50 per cent of the total sales to date less the cost of fencing.⁷²

Apparently, the Band was willing to consent to this arrangement, provided that the proceeds of the first sale were made available to them immediately.⁷³ McLean, however, wrote back in January 1912 that no advances could be made until the amount of sale proceeds was ascertained.⁷⁴

On February 7, 1912, Agent Borthwick wrote to J.D. McLean advising that the Indians wished to know the department's decision concerning their understanding of the terms of the proposed surrender:

The understanding of the Indians was that each could only claim a share of the proceeds in proportion to the number of members in his family, and also that each one was personally responsible for the value of the horses placed in his hands last summer, and would make a payment upon them from his above specified share.⁷⁵

⁷⁰ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Indian Agent, Thomas Borthwick, September 23, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 74–78).

⁷¹ Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, November 3, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 80–81).

⁷² J.D. McLean, Secretary, Department of Indian Affairs, to Thomas Borthwick, Indian Agent, November 17, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 82).

⁷³ Thomas Borthwick to J.D. McLean, Secretary, Department of Indian Affairs, December 21, 1911, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 83).

⁷⁴ J.D. McLean, Secretary, Department of Indian Affairs to Thomas Borthwick, January 5, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 85).

⁷⁵ Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, February 7, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 92).

There was apparently no response from the department to the above. As a result, the Band held a meeting on September 27, 1912, and passed a resolution requesting the department to report on the progress of the proposed surrender. The band members apparently still understood that if they sold the land, they would receive 50 per cent of the proceeds on a per capita basis.⁷⁶

In 1912, as part of the 1911 surrender agreement, the department fenced the Mistawasis IR 103 at a cost of \$5,546.50 and purchased horses and harnesses for \$5,487.27.⁷⁷ Departmental officials apparently decided not to charge the Band for the machinery. The department allowed the Band the use of its tractor engine and gang plough on a pay-per-use basis. This equipment could be used on other reserves on payment of a fee.⁷⁸

The above correspondence caused departmental officials to turn their minds again to the proposed second surrender. On November 11, 1912, Pedley sent a memorandum to the Lands and Accounts Branch asking for a report as to whether the surrender was still advisable or necessary.⁷⁹ The department asked W.J. Chisholm, Inspector of Indian Agencies, to produce the necessary report.⁸⁰ The report was evidently incomplete, since McLean wrote on February 18, 1913:

The report can hardly be called a full one because you failed to deal with the present financial and industrial position of these Indians and do not touch upon the effect which the surrender would have upon them and their affairs ...⁸¹

⁷⁶ Thomas Borthwick, Indian Agent, to J.D. McLean, Secretary, Department of Indian Affairs, October 8, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 113).

⁷⁷ W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, February 10, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 117–18).

⁷⁸ J.D. McLean, Assistant Deputy & Secretary, Department of Indian Affairs to Jas. McKay, MP, Prince Albert, August 14, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 110).

⁷⁹ Frank Pedley, Deputy Superintendent General, Department of Indian Affairs, to Lands and Accountant's Branches, November 11, 1912, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 114).

⁸⁰ W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, February 10, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 117–18).

⁸¹ J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, February 18, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 119).

Chisholm submitted a second report on May 14, 1913, stating that he could not see any reason why further land should be surrendered. He noted that the Band had been equipped several times and that

experience goes to show that if a portion of their land were now sold in order to renew their farming equipment, a few years hence they would be applying for the sale of a further portion for the same purpose.⁸²

Chisholm also mentioned that the debts owed by some individuals in the Band were considerable, but he would not recommend using capital funds to pay for these debts, as it would be unjust to those members who had not been advanced funds to purchase horses.⁸³ McLean responded on June 4, 1913, and agreed with Chisholm that a surrender was not necessary.⁸⁴

For the next two years the Band continued to incur debt for farming expenses, and owed the department \$5,526.67 by 1915.⁸⁵ This situation was largely due to the fact that, as noted above, W.R. McLeod and P.D. Tyerman, who had purchased the lands surrendered in 1911, had not paid any instalments after 1912. In his 1915 annual report to the department, Chisholm wrote that the Carlton Agency Indians had

become discouraged, owing to the burden of debts, which they had no prospect of removing. Latterly these have in some of the more serious cases been charged against the funds of the band under certain conditions.⁸⁶

⁸² W.J. Chisholm, Inspector of Indian Agencies, to J.D. McLean, Secretary, Department of Indian Affairs, May 14, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 126–28).

⁸³ Chisholm had reported on April 29, 1913, that the Indians owed a total of \$9,511.71 for the purchase and repair of farming equipment. See W.J. Chisholm, Inspector of Indian Agencies, Individual Liability Statement, April 29, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 123–24).

⁸⁴ J.D. McLean, Secretary, Department of Indian Affairs, to W.J. Chisholm, Inspector of Indian Agencies, June 4, 1913, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 129).

⁸⁵ J.D. McLean, Secretary, Department of Indian Affairs, to S.A. Milligan, Indian Agent, March 5, 1915, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 156–60).

⁸⁶ Department of Indian Affairs, *Annual Report for the year ended March 31, 1915*, p. 71 (ICC Documents, p. 175).

By January 1917, McLeod and Tyerman owed the department \$14,644.05. In an attempt to collect the moneys owed, J.D. McLean instructed W.B. Crombie, Inspector of Indian Agencies, to tell McLeod and Tyerman

that it is absolutely essential in order that good faith may be kept with the Indians, who are entitled to have the interest paid on the purchase price received by the Department and distributed, that the arrears be promptly paid.⁸⁷

Crombie wrote back on March 14, 1917, advising that even if the land were repossessed, the department would probably not receive a better price on a resale than had been received in 1911.⁸⁸ He also advised that, if McLeod and Tyerman had better luck in the forthcoming year with their crop, there was no reason why they would not be able to make a substantial payment on their overdue account. As a result, he recommended that they be given an extension of time, to January 1918, to repay their debt.

1917 Surrender

In February 1917, the issue of a second surrender was resurrected when Indian Agent S.A. Milligan informed the department that the Band was willing to surrender 5,000 acres:

The Mistawasis Indians are also prepared to sell the 5000 acres outside of the reserve fence, at any time the Department think it advisable to do so. If suitable prices can be obtained, I would recommend that this request be granted as they all have more land than they will ever be in a position to use.⁸⁹

⁸⁷ J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to W.B. Crombie, Inspector of Indian Agencies, January 9, 1917, NA, RG 10, vol. 6655, file 107A-5-5, part 1 (ICC Documents, pp. 186–87).

⁸⁸ W. B. Crombie, Inspector of Indian Agencies, to J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, March 14, 1917, NA, RG 10, vol. 6655, file 107A-5-5, part 1 (ICC Documents, pp. 189–90).

⁸⁹ S.A. Milligan, Indian Agent, to the Department of Indian Affairs, February 27, 1917, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 188).

Therefore, on April 10, 1917, McLean instructed Agent Milligan to submit to the Band a surrender of 5,028 acres of land along the southern boundary of the reserve, plus all adjacent road allowances. The Band signed the surrender on May 21, 1917. It stated:

This surrender is made on the understanding that the land be sold at not less than Ten Dollars (\$10.00) per acre.

...

That half of the proceeds of the sale shall be funded and the balance, as well as the interest be divided among the members of the band, annually in cash.⁹⁰

The surrender was forwarded to the department on May 25, 1917. Agent Milligan reported that the Band had insisted that the clauses concerning the upset price and the disposition of proceeds be added.⁹¹

On June 5, 1917, McLean wrote to Agent Milligan expressing his dissatisfaction with the manner in which the surrender had been taken. McLean criticized Milligan for ignoring the surrender instructions and advised that the surrender report lacked a voters' list, as well as information concerning the number of voters present and the number voting in favour of or against the surrender. Additionally, the surrender was not dated, and the affidavit had not been properly executed. McLean returned the documents, with new affidavits, to Milligan, and instructed him to correct them.⁹²

On June 15, 1917, Agent Milligan returned the corrected surrender and the other documents to the department. The surrender was approved by Order in Council PC 1839, on June 30, 1917.⁹³

⁹⁰ Surrender document dated May 21, 1917, DIAND Land Registry, Instrument No. ILR X17173 (ICC Documents, pp. 201–05).

⁹¹ S.A. Milligan, Indian Agent, to the Secretary, Department of Indian Affairs, May 25, 1917, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 207).

⁹² J.D. McLean, Assistant Deputy and Secretary, Department of Indian Affairs, to S.A. Milligan, Indian Agent, Department of Indian Affairs, June 5, 1917 (ICC Documents, pp. 208–09).

⁹³ Order in Council PC 1839 and Surrender (ICC Documents, pp. 215).

1919 SURRENDERS

By mid-July 1917, departmental officials had begun to recommend that the land surrendered a month before be made available to the Soldier Settlement Board.⁹⁴ This board had been established pursuant to a government policy intended to benefit soldiers returning from World War I. The policy contemplated the provision of good agricultural land from the dominion government's supply, plus other benefits, to assist the returning soldier to make a start in farming. After the war ended in 1918, the demand for good farming land for the program increased dramatically. Most of the good land in western Canada had already been taken up, however, because of the influx of immigrant agricultural settlers and others since 1896. As a result, Indian reserves became a target of the program, and to facilitate their acquisition, the dominion government passed legislation in 1918 permitting the Soldier Settlement Board to purchase surrendered Indian lands. It was therefore not surprising that the recently surrendered portion of Mistawasis IR 103 should have come to the attention of government officials advocating for the soldier settlement scheme.

For two years following the 1917 surrender, no steps were taken to deal with the land. In April 1919, the Band requested information regarding the status of the lands surrendered in 1917, as well as a report on proceeds collected from the 1911 surrender and sales.⁹⁵ On April 23, 1919, the department informed Indian Agent S.A. Rowland that, once an agreement had been made with the Soldier Settlement Board, the department intended to transfer any unsold surrendered lands to the board.⁹⁶

On May 10, 1919, Commissioner W.M. Graham reported that he was preparing for a joint inspection of the Mistawasis reserve with Walter Govan, a representative of the Soldier Settlement Board. Graham requested a copy of the 1917 surrender from departmental headquarters, so that he

⁹⁴ W.B. Crombie, Inspector of Indian Agencies, to D.C. Scott, DSGIA, July 13, 1917, DIAND file 674/34-13-103, vol. 1 (ICC Documents, pp. 218–19).

⁹⁵ J.A. Rowland, Indian Agent, to J.D. Mclean, Department of Indian Affairs, April 8, 1919, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 354).

⁹⁶ W.A. Orr, In Charge, Lands and Timber Branch, to J.A. Rowland, Indian Agent, April 23, 1919, DIAND file 674/34-13-103, vol. 1 (ICC Documents, p. 357).

would be aware of the terms of the surrender before his visit to the reserve.⁹⁷ J.D. McLean advised Graham on May 14, 1919, that the surrender contemplated an upset price of \$10 per acre.⁹⁸

Graham visited the Mistawasis reserve in late June. He immediately sent a telegram to Deputy Superintendent General Duncan Campbell Scott advising that he had valued the land surrendered in 1917 at \$12 an acre, and that he had a “promise from [the] Mistawasis Indians for [an] additional surrender of eleven thousand five hundred acres.”⁹⁹ Graham’s formal report to the Minister of the Interior, Arthur Meighan, written a few days later, advised that a joint inspection of 16,500 acres at the south end of Mistawasis IR 103 had been carried out. Graham described the land as “a first class proposition,” and stated that 60 per cent was ready for farming. He emphasised that he considered this land to be one of the best parcels examined so far. Graham also informed Meighan that the Band had surrendered some 5,000 acres of this land a few years before, but that the sale and conditions of the surrender had not been carried out. Graham recommended that the department sell the previously surrendered land for \$12 per acre, *en bloc*.¹⁰⁰

On the same day, Graham wrote to Deputy Superintendent General Scott, reiterating that the Mistawasis Band was willing to surrender more land, and outlining proposed terms for the new surrender:

To surrender 11,520 acres more or less to be disposed of to such person or persons as the Department see fit, for the sum of One hundred and thirty-eight thousand Dollars (\$138,000.00):

That all monies from the disposition thereof shall, after deducting the usual proportion for expenses of management, be disposed of in the following manner: -

⁹⁷ W.M. Graham, Commissioner, to D.C. Scott, DSGIA, May 10, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 373).

⁹⁸ J.D. McLean, Department of Indian Affairs, to W.M. Graham, Commissioner, May 14, 1919 (ICC Documents, p. 378).

⁹⁹ W.M. Graham, Commissioner, to D.C. Scott, DSGIA, June 30, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 391).

¹⁰⁰ W.M. Graham, Commissioner, to Arthur Meighan, Minister of the Interior, July 4, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 393–94).

- (a) That at the time of signing the surrender there shall be paid to each member of the Band resident upon the Reserve, the sum of One hundred dollars (\$100.00):
- (b) That of the monies collected from the sale of land after deducting the initial cash payment, fifty per cent, shall be placed to Capital Account for the benefit of the Band in accordance with authority vested in the Honourable the Superintendent General for this purpose.
- (c) That the remaining monies collected from the sale of land shall be placed to the credit of an account to be used at the discretion of the Honourable Superintendent General of Indian Affairs, for the following purposes:-
 - (1) To provide Rations for the old, sick and destitute members of the Band.
 - (2) Suitable Houses, Furniture and Clothing for old and destitute members of the Band, or houses for young men who start farming.
 - (3) Farming Outfits of Horses, Harness, Plows or other necessary implements for ablebodied members of the Band who start farming, and for the purchase of Cattle or Threshing Outfits.
 - (4) To provide compensation to be paid to any Indian who owns buildings or other improvements upon any of the land surrendered.
 - (5) To make advances free of interest to ablebodied Returned Indian Soldiers who are members of the Mistawasis Band of Indians, for the purpose of providing them with Houses, Stables, Horses, Cattle or Farming Implements.
- (d) That on or about the first day of February in each year there shall be distributed equally amongst the members of the Band, an amount equal to the interest accruing from all funds held in trust by the Department.¹⁰¹

On July 9, 1919, Scott sent Graham duplicate copies of the 1917 surrender advising that “if the Soldiers Settlement Board purchases this land it will be possible to make a distribution to the Indians of 50% of the capital under the terms of the surrender.”¹⁰² On July 21, however, Graham wrote back to Scott warning that a 50 per cent distribution was unwise, as it would cause the

¹⁰¹ W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 4, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 395–97).

¹⁰² D.C. Scott, DSGIA, to W.M. Graham, Commissioner, July 9, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 398).

department to “[lose] control of this expenditure.” He proposed instead to renegotiate the 1917 surrender with the Band on the basis of an upfront payment of \$50 per person, with the balance of proceeds to be divided in two. Half the balance was to be deposited to the Band’s capital account, and the rest was to be dealt with on the same terms as he had proposed for the new surrender.¹⁰³

On August 8, 1919, Graham presided at a surrender meeting at Mistawasis IR 103 at which two surrenders were executed. The first, which concerned the 5,028 acres previously surrendered in 1917, provided that the Band would receive \$60,000 for the land, the proceeds to be handled as Graham had contemplated above.¹⁰⁴ The second surrender, for the 11,520 acres that the Band had agreed to surrender that year, provided for proceeds of \$138,000, which would be distributed as Graham had originally suggested in his letter to Scott of July 4.¹⁰⁵ The documents were forwarded by Graham to Ottawa on August 12, 1919. Attached to each surrender was the standard affidavit, which had been sworn on August 9, 1919, before a justice of the peace. As well, the surrender documents were accompanied by a voters’ list and roll of each recorded vote, which had been certified by Inspector W.B. Crombie.

In his formal report, Graham explained the circumstances surrounding the execution of the two surrenders to Deputy Superintendent General Scott. Graham wrote that he had met with the Band at the reserve on August 8 and had read the terms of the 1917 surrender to them. According to Graham,

they were very indignant over it claiming that they were misled as to the terms of the surrender. They unanimously requested that a new surrender be taken and that the former surrender be cancelled. I accordingly took a new surrender from them in which was embodied the conditions as set out in my previous correspondence with you on the subject. The surrender in duplicate, together with the necessary affidavits and voters’ list is enclosed herewith which I trust you will find to be in order ...

¹⁰³ W.M. Graham, Commissioner, to D.C. Scott, DSGIA, July 21, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 405).

¹⁰⁴ Surrender document signed on August 8, 1919 (5028 acres), DIAND Land Registry, Instrument No. ILR X17174 (ICC Documents, pp. 407-12).

¹⁰⁵ Surrender document signed on August 8, 1919, DIAND Land Registry, Instrument No. ILR X17175 (ICC Documents, pp. 413-18).

I also enclose herewith formal surrender taken from the Mistawasis Band of 11,530 [sic] acres, which they agreed to surrender upon my previous visit. The books covering payments made to the Band will go forward under separate cover.¹⁰⁶

According to the above documents, all 43 eligible voters present at the meeting voted in favour of each surrender.¹⁰⁷

Both surrenders were approved by an Order in Council dated September 10, 1919:

The Committee of the Privy Council have had before them a Report, dated 4th September, 1919, from the Superintendent General of Indian Affairs, referring respectively to an Order in Council of 30th June, 1917, (P.C. 1839) accepting a surrender, given on the 21st May, 1917, on the conditions therein mentioned, by the Mistawasis band of Indians, of 5028 acres of their reserve, No. 103, in the Carlton Indian Agency, in the province of Saskatchewan; ...

As the conditions on which the above mentioned surrender[s] were given have proved to be unsatisfactory, and, it having been found desirable to permit of the surrender[s] being renewed under altered conditions, the Minister recommends that the above mentioned Order[s] in Council of 30th June, 1917, ... be cancelled.

The Minister states that the land comprised within the above mentioned surrender[s] has been applied for by the Soldier Settlement Board of Canada, and that the Mistawasis ... band[s] have renewed the surrender[s] of the 5028 acres in reserve No. 103, by surrender dated 8th August, 1919, ... on the altered conditions set out in the said surrender[s];

That an additional area of 11520 acres having been applied for by the Soldier Settlement Board, in Indian reserve No. 103, a surrender thereof has been given, dated 8th August, 1919, by the Mistawasis band, on the conditions therein mentioned.

The Minister further states that the ... surrenders last above mentioned, which are submitted herewith in duplicate, have been duly authorized, executed and attested in the manner required by the 49th Section of the Indian Act;¹⁰⁸

¹⁰⁶ W.M. Graham, Commissioner, to D.C. Scott, DSGIA, August 12, 1919, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 424–25).

¹⁰⁷ “Certified voting lists” (2), dated August 8, 1919, certified by W.B. Crombie, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 419, 421–22).

¹⁰⁸ Order in Council PC 1893, September 10, 1919 (ICC Documents, pp. 437–39).

Two weeks later, the land was transferred by Order in Council to the Soldier Settlement Board, for the price contemplated in the surrenders.¹⁰⁹

Although the 1917 surrender had specifically included road allowances, neither the replacement surrender, nor the new surrender of 11,520 acres, referred to road allowances in any way. This omission became an issue in 1920, when a question arose as to who owned the road allowance between Townships 47 and 48, which was the dividing line between the land originally surrendered in 1917 and the 11,520 acres surrendered in 1919. When Agent John Weir advised departmental officials that the Indians of the Mistawasis Band had taken the position that they owned the road allowance referred to above, J.D. McLean replied that it was “understood” that the road allowances had also been surrendered.¹¹⁰ In a letter written the same day to Commissioner Graham, McLean directed that, if there were “any further trouble regarding this matter,” Graham was to explain it to the Indians.¹¹¹

The following year, Surveyor H.W. Fairchild reported that he had been approached by the Chief and councillors of the Mistawasis Band with a complaint that the surveyors subdividing the surrendered portion of the reserve had located the road allowance north of the north boundary of Township 47, thereby encroaching into the reserve. After examining the surrender, Fairchild concluded that no road allowance had been surrendered, and he recommended that the Band be compensated for the land in question.¹¹² An internal memorandum prepared by an official of the department confirmed Fairchild’s conclusion concerning the legal effect of the surrender. The official wrote, however, that, since the Soldier Settlement Board had paid for a portion of the surrendered land which was covered by water, the resulting overpayment more than compensated

¹⁰⁹ Order in Council PC 1982, September 24, 1919 (ICC Documents, pp. 441–44).

¹¹⁰ J.D. McLean, Assistant Deputy and Secretary, to John Weir, Indian Agent, June 9, 1920, NA, RG 10, vol. 6655, file 107A-5-4 (ICC Documents, p. 469).

¹¹¹ J.D. McLean, Assistant Deputy and Secretary, to W. Graham, Commissioner, June 9, 1920, NA, RG 10, vol. 6655, file 107A-5-4 (ICC Documents, p. 470).

¹¹² H.W. Fairchild, Surveyor, to J.D. McLean, Assistant Deputy and Secretary, November 17, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 484).

the Band for the road allowances.¹¹³ Later that month, J.D. McLean informed Chief Dreaver of the above, and advised that the land comprising the road allowance was to be expropriated under the *Indian Act*, and transferred to the province of Saskatchewan.¹¹⁴ The transfer, by Order in Council, took place on February 20, 1922.¹¹⁵

¹¹³ D.F. Robertson to J.D. McLean, Assistant Deputy and Secretary, November 21, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, pp. 485–87).

¹¹⁴ J.D. McLean, Assistant Deputy and Secretary, to Chief George Dreaver, Mistawasis Band, November 24, 1921, NA, RG 10, vol. 7533, file 26107-3, part 1 (ICC Documents, p. 490).

¹¹⁵ Order in Council PC 381, February 20, 1922 (ICC Documents, pp. 494–98).

PART III
ISSUES

The broad question before the Commission was whether Canada owes an outstanding lawful obligation to the Mistawasis First Nation as a result of events arising out of the 1911, 1917, and 1919 surrenders. After extensive discussion between the parties, the following list of issues were agreed upon.

1911 SURRENDER

- 1 Were the surrender provisions of the *Indian Act*, RSC 1906, c. 81 complied with when the surrender of part of reserve no. 103 was obtained in 1911? If not, did any such non-compliance render the surrender invalid?
- 2 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1911 surrender? In particular:
 - (a) Was the 1911 surrender exploitative in nature?
 - (b) Was the 1911 surrender obtained as a result of tainted dealings?
 - (c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of this surrender, do any such breaches render the surrender invalid?

- 3 Did Canada breach any obligations in failing to purchase specific farm machinery for the Band from the proceeds of sale, as required by the terms of the surrender? In particular:
 - (a) Did Canada's failure to purchase such equipment from the Band's sale funds amount to a breach of duty in light of Canada's subsequent decision to purchase, on its own, such equipment for the use of all the bands within the Agency, including the Mistawasis First Nation? and
 - (b) To the extent a breach of duty exists, do any damages flow from such a breach?
- 4 If a valid surrender was taken, did it include the mines and minerals associated with this land, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?

- 5 Was the First Nation properly compensated in relation to road allowances within the surrendered lands and, if not, did this constitute a breach of Canada's fiduciary obligation to the First Nation?

1917 SURRENDER

- 6 Were the surrender provisions of the *Indian Act*, R.S.C. 1906, c. 81 complied with when the surrender of part of reserve no. 103 was obtained in 1917? If not, did any such non-compliance render the surrender invalid?
- 7 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1917 surrender? In particular:
- (a) Was the 1917 surrender exploitative in nature?
 - (b) Was the 1917 surrender obtained as a result of tainted dealings?
 - (c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of this surrender, do any such breaches render the surrender invalid?

- 8 If a valid surrender was taken, did it include the mines and minerals associated with this land, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?
- 9 Did Canada properly revoke the 1917 surrender?

1919 SURRENDERS

- 10 Were the surrender provisions of the *Indian Act*, R.S.C. 1906, c. 81 complied with when the surrenders of part of reserve no. 103 were obtained in 1919? If not, did any such non-compliance render the surrenders invalid?
- 11 Did Canada owe any pre-surrender fiduciary obligations to the Band, and if so, did Canada fulfil such obligations in the context of the 1919 surrenders? In particular:
- (a) Were the 1919 surrenders exploitative in nature?
 - (b) Were the 1919 surrenders obtained as a result of tainted dealings?

- (c) Are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations?

To the extent Canada breached any pre-surrender fiduciary obligations in the context of these surrenders, do any such breaches render the surrenders invalid?

- 12 If valid surrenders were taken, did they include the mines and minerals associated with these lands, and if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation when it failed to reserve the mines and minerals for the benefit of the First Nation?
- 13 If valid surrenders were taken, did the Crown breach any fiduciary or trust obligations owed to the First Nation by not ensuring the First Nation was properly compensated for improvements to the land?
- 14 (a) Did any road allowances form part of the Indian reserve?
- (b) If valid surrenders were taken, did they include any road allowances within the land surrendered and, if so, did the Crown breach any fiduciary or trust obligations owed to the First Nation in its subsequent handling of these road allowances?
- (c) Was the First Nation properly compensated for any portion of the road allowance which, subsequent to the surrenders, remained within the Indian reserve and which was subsequently expropriated in 1922?
- 15 If valid surrenders were taken, has the Crown breached any lawful obligations owed to the First Nation in relation to approximately 256.6 acres of wet lands located on this land?

GENERAL

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

PART IV

CONCLUSION

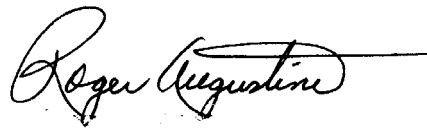
On November 3, 1994, Assistant Deputy Minister John Sinclair, of the Department of Indian Affairs and Northern Development, informed Chief Leona Daniels of the Mistawasis First Nation that Canada was prepared to accept for negotiation portions of the First Nation's surrenders claim. Although the First Nation applied to the Commission for a review of the rejected portions of the claim in 1996, the claim was subsequently put into abeyance when the parties resumed negotiations. In the spring of 2001, the Commission was informed that the parties had concluded a Settlement Agreement with respect to this claim.

In light of the above, the Commission suspended its inquiry and congratulates the parties on their Settlement Agreement.

FOR THE INDIAN CLAIMS COMMISSION



Phil Fontaine
Chief Commissioner



Roger Augustine
Commissioner

Dated this 27th day of March, 2002.

APPENDIX A

MISTAWASIS FIRST NATION INQUIRY – 1911, 1917, AND 1919 SURRENDERS

- 1 Planning conference January 5, 1999
- 2 Community session June 15, 1999

One community session was held at the Mistawasis First Nation school gymnasium. The Commission heard evidence from elders Leonard Johnstone, Annie Ledoux, Albert Badger, Arthur Ledoux, Walter Johnstone, Antoine Sand, and Gladys Johnstone.

- 3 Content of formal record

The formal record for this inquiry consists of the following materials:

- the documentary record (4 volumes of documents plus one annotated index)
- 9 exhibits tendered during the inquiry

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

