Reserve Land Surrenders:
Best Practices for Documenting Historic Grievances

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This paper was written for a workshop on the surrender of reserve lands for the 2006 Aboriginal and Treaty Rights Advocacy Conference presented by Maurice Law and the University of Saskatchewan’s Native Law Centre of Canada. It focuses on the historical background of reserve surrenders and the best practices for researching surrender claims. The legal foundation and tests used to assess reserve surrenders are being discussed at the workshop by Ron Maurice.

Reserves were created to protect Indian Lands
Land for the exclusive use and occupation of First Nations has been reserved across Canada by various mechanisms. Most commonly, they were created according to particular terms outlined in treaties entered into between the Crown and a First Nation or group of First Nations. This practice began as early as 1790 in Upper Canada and the mid-19th century in British Columbia.1 Probably the best known circumstances are the reserves set aside according to formulas specified in the so-called numbered treaties and their adhesions (1871 to 1929-30).2 Treaties entered into in the pre-Confederation era, before the advent of the numbered treaties, provided for the establishment of reserve lands based on descriptions of tracts of land rather than the acres-per-person formulas used in the numbered treaties.3

Reserve lands were set aside for the exclusive use and occupation of First Nations by various means other than through treaties. Like their pre-Confederation counterparts, these reserves were not based on any particular formula but coincided with use areas or negotiated boundaries. Historically, reserves developed out of lands initially granted to religious bodies or humanitarian organizations for Indian occupation, including seigneurial grants in New France and Indian missions in the Maritimes.4 Tracts granted

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1 The 1790 McKee Purchase in what is now southwestern Ontario reserved land for the exclusive use of the Hurons. In 1861, Governor Douglas directed village reserves to be clearly defined and protected as promised in the Vancouver Island treaties dating from 1850 to 1854.


3 Some, but not all, of the pre-Confederation treaties in Upper Canada included provisions for the reservation of lands for signatory First Nations. Those reserving lands include: the 1790 McKee Purchase, the 1806 Head of the Lake Purchase, the 1827 Huron Tract and 1822 Longwoods Tract Purchases, the 1836 Saugeen Peninsula Treaty, the Robinson-Superior and Robinson-Huron Treaties of 1850, the 1856 Islands in Georgian Bay Treaty, and the 1862 McDougall Treaty.

4 Under the old French seigneurial system, many religious bodies were granted lands for the purpose of establishing and maintaining Indian missions. The relative interests of the First Nations and the missionaries in those lands has long been in dispute. Examples of seigneurial lands that became “reserves” include Kahnawake, Lorette, Quarante Arpents, Odanak, and a portion of Wolinak in Lower Canada. For more details, see Larry Villeneuve, revised and updated by Daniel Francis, The Historical Background of Indian Reserves and Settlements in the Province of Quebec (Ottawa: Indian and Northern Affairs Canada, 1984).
by the Imperial government to members of the Six Nations for military service, such as the lands on the Grand River and in Tyendinaga Township, were later declared to be reserves, as were lands purchased by First Nations. In addition, reserves were created from lands purchased specifically for reserve purposes by the federal government, from lands occupied under licenses of occupation from the Crown, and those created by legislation and federal-provincial agreements. Pre-Confederation legislation was written to bring tracts of land set aside or occupied by Indians under the control and management of the colonial and ultimately the federal government.

Regardless of how the reserves were created over the last two centuries, their common and fundamental purpose was the same; they were set aside to provide protected land for the exclusive use of First Nations. The Imperial and Colonial governments’ intention to protect land for the exclusive use of First Nations was expressed in a substantial body of proclamations, legislation, and instructions which established policies that eventually culminated in the more detailed requirements laid out in the first Indian Act.

Lennox Island on Prince Edward Island was purchased in 1870 by the Anti-Slavery and Aborigines Protection Society of London and held in trust for the Indians by a Board of Trustees assisted by a local committee, which included the Indian Commissioner. It was surrendered to the Crown in 1912 and vested under the Indian Act, R.S.C. 1906, c. 81, s. 47. Similarly, the Morton Reserve in Nova Scotia was vested in the Micmac Missionary Society in trust. It was surrendered to the Crown in 1907. Richard H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada*, Studies in Aboriginal Rights No. 9 (Saskatoon: University of Saskatchewan Native Law Centre, 1986), pp. 6 and 11.

Some reserves, such as Scugog and Rama in Ontario, were created on land originally purchased by First Nations using their own funds.

Pikwakanagan (formerly known as Golden Lake) was purchased by Canada from Ontario in 1873. Similarly, small parcels of land in Nova Scotia and New Brunswick were purchased by the Dominion and set apart as reserves from 1874 to 1910. Bartlett, pp. 12-13, 18-19.

Land grants were made for Mi’kmaq and Malecite families in Nova Scotia and New Brunswick as early as 1783 through the issue of licenses of occupation. Later, some of these parcels were protected for Indian use by Order in Council under the guidance of the Commissioner of Crown Lands. Bartlett, pp. 9-20.

Many of the reserves in Quebec were set aside pursuant to legislation enacted to provide protected lands for specific groups without a land base or to give security of tenure to the use and occupation of traditional village sites. Examples include lands set aside under 1851 legislation (14-15 Vic., cap. 106) such as Betsiamites, Coucoucach, Doncaster, Mamiwaki, Manouane, Ouiatchouan, Sept-Iles, Timiskaming, and Weymontachingue. Additional reserves were created pursuant to the Quebec *Lands and Forests Act* in 1922, such as Eastmain, Lac Rapide, Lac Simon, Mingan, Mistassini, Obedjiwan, Schefferville, and Waswanipi.

For example, an 1876 agreement between Canada and British Columbia set up the Joint Indian Reserve Commission to allot reserves in response to local conditions. By 1897, most of the reserves in BC had been allotted but remained in the Crown in right of the Province. See Dorothy I. D. Kennedy, *A Reference Guide to the Establishment of Indian Reserves in British Columbia, 1849-1911* (Ottawa: Claims and Historical Research Centre, Indian and Northern Affairs Canada, 1995), pp. 1-4. The Province of Nova Scotia granted several small areas to the Dominion for the establishment of reserves shortly after Confederation. Bartlett, p. 12.

The 1850 *Act for the better protection of the Lands and Property of the Indians in Lower Canada* (S.C. 13-14 Vic., cap. 42) vested land or property set apart or appropriated for the use of tribes or bodies of Indians in the Commissioner of Indian lands in Lower Canada. At the same time, legislation was passed in Upper Canada, *An Act for the Protection of the Indians in Upper Canada from imposition and the property occupied or enjoyed by them from Trespass and injury* (S.C. 13-14 Vic., cap. 74), giving the government authority to manage Indian land. Proclamations issued in 1851 and 1854 brought specific lands set aside for Indian use in Upper Canada under operation of the 1850 act. In 1868, *An Act providing for the organization of the Dept. of the Secretary of State of Canada and for the management of Indian and Ordinance Lands* (S.C. 31 Vic., cap. 42) gave the Secretary of State of Canada, in his role as Superintendent General of Indian Affairs, control and management of Indian lands, property, and funds in what was then Canada. An 1874 proclamation specifically applied the 1868 act to additional Indian lands in Ontario.
The Crown’s view on the importance and expediency of protecting Aboriginal land was articulated in the Royal Proclamation of 1763. The Royal Proclamation stated the Crown had the exclusive right to purchase Aboriginal land, and forbade private purchases and encroachment by settlers on Indian land, thus articulating the concept that the Crown would protect Indian land from encroachment by standing between the First Nations and other parties. Furthermore, the Royal Proclamation entrenched the principle that purchases by the Crown had to be made at a public meeting, stressing the importance of obtaining consent in an open and transparent manner. These fundamental principles were further developed in ensuing colonial policies, conferences, and instructions to Governors, entrenched in Upper and Lower Canada legislation in the mid-19th century, and finally incorporated in the first Indian Act in 1876.

The fundamental principles of exclusive use, protection and consent that had evolved since the 1763 proclamation appeared in an 1868 act which regulated the management of Indian land. According to the 1868 act, a surrender had to meet the following criteria in order to be valid:

• the Chief or a majority of the Chiefs (if more than one) had to give their assent;
• the Chief(s) must be entitled to vote under this act (i.e., be an Indian in the meaning of the act);
• the surrender had to be taken at a meeting or council summoned for that purpose according to the rules of the First Nation;
• the meeting had to be held in the presence of the Secretary of State or an officer duly authorized by the Governor in Council or by the Secretary of State; and
• only those habitually residing on or near the reserve could vote or be present at the council meeting.

The major change in the 1876 Indian Act was the requirement for a vote of eligible band members. From that date forward, a surrender was valid only if:

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12 See, for example, An Act for the protection of the Lands of the Crown in this Province, from trespass and injury, 1839; An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury, 1850, and its counterpart in Lower Canada, An Act for the better protection of the Lands and Property of the Indians in Lower Canada; and the 1860 Act Respecting the management of Indian Lands and Property (cited above).

13 An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands. S.C. 31 Vic., c. 42.

14 An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands S.C. 31 Vic., c. 42, Section 8 subsection 1.
it was assented to by a majority of the male members of the band of the full age of twenty-one years;

- it was taken at a meeting or council summoned for that purpose according to the rules of the First Nation;
- the meeting was held in the presence of the Superintendent General or an officer authorized by the Governor in Council or by the Superintendent General; and
- only those habitually residing on or near the reserve voted or were present at the surrender meeting.15

### The Advance of Settlement and Pressures to Surrender

While the intent of policies and legislation appeared to ensure protection, history shows that, in practice, a great deal of reserve land has been alienated from First Nations. For the most part, reserve land has been surrendered in response to the settlement and development aspirations of non-Aboriginal peoples. The pattern of the Crown responding to pressures to open reserve land for development and settlement has followed the advance of settlement across the country. A few examples illustrate this trend.

In Upper Canada, land cession treaties were conducted in direct response to the movement of settlers into the area and the Imperial Crown purported to have obtained cessions to all of the land in southwestern Ontario between 1764 and Confederation. The population in Upper Canada rose from 6,000 in 1785 to 25,000 in 1796, largely due to an influx of Loyalists and land seekers from the United States. By 1811, the population had reached 60,000 and more than doubled to 150,000 by 1824.16 The largest growth was experienced between 1825 and 1851 when it soared to 952,000.17 Settlement was initially concentrated along the eastern and western ends of Lake Ontario and the Grand, Niagara, Thames, and Detroit Rivers. By the mid-19th century, lands were being settled across the southern part of the Province as far northward as the southern tip of Georgian Bay and up the Ottawa River.18

Lands reserved from land cession treaties in southern Ontario began to be surrendered as early as 1800 in the vicinity of the areas initially settled. By the mid-19th century, few reserves in southwestern Ontario remained untouched by surrenders. These surrenders were initiated by the Crown to make way for non-Aboriginal settlements and interests,19 to regularize the occupation of squatters who had established themselves on reserves,20 or

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15 An Act to amend and consolidate the laws respecting Indians. S.C. 1876, 39 Vic., c. 18, Section 26 subsection 1.
17 Gentilcore, ed., Plate 10.
18 Gentilcore, ed., Plate 10.
19 See, for example: Surrender of the Huron Church Reserve, 1800; Mississauga Surrenders at the Credit River, Twelve Mile Creek and Sixteen Mile Creek, 1820; Surrenders at the Grand River, 1831; Caradoc Surrender 1834; Coldwater-Narrows, 1836; Moravians Tract, 1836; the Anderdon Surrender, 1836; Saugeen Strip 1851; Moravian Tract, 1857. The 1836 surrenders were intended to raise funds to defray the general cost of running the Indian Department as well as to open the lands for non-Aboriginal use.
20 See, for example: Thurlow Purchase 1811-16; Tyendinaga Surrenders 1820 & 1835.
to remove whole villages to more remote locations\textsuperscript{21} and open vast tracts previously reserved in anticipation of settlement and development.\textsuperscript{22}

Similarly, lands granted to Mi’kmaq and Malecite in the Maritimes were impacted by settlement, especially during the era of Loyalist influx in the late 18\textsuperscript{th} century and by persistent and uncontrolled occupation by squatters to the time of Confederation. In Nova Scotia, an 1842 act\textsuperscript{23} allowed the Commissioner of Indian Affairs to sell reserve land to squatters. Likewise, in New Brunswick, an 1844 act allowed the Province to control lands granted to Indians, including selling them to facilitate settlement.\textsuperscript{24} By 1867, over 10,000 acres of New Brunswick reserve land had been sold under this act.\textsuperscript{25} After Confederation, the Dominion took over control and management of Indian Affairs and encouraged the surrender of reserve land in the Maritimes. For example, most of the Buctouche Reserve was surrendered and sold to squatters in 1871, as was land at Tobique.\textsuperscript{26} Between 1919 and 1933, approximately 3500 acres were surrendered in Nova Scotia. A 1911 amendment to the \textit{Indian Act} allowed for Indians to be removed from reserves adjoining or within incorporated towns or cities and for the sale of the land. That section was used to remove reserve communities in favour of the alleged interests of the non-Aboriginal public.\textsuperscript{27} As of the early 1970s, reserve land in Nova Scotia provides about five acres per capita; in New Brunswick the rate is approximately eight acres per capita.\textsuperscript{28}

The prairie provinces remained sparsely populated following the initial treaty making period; however, as settlers moved into the west and surpassed the Aboriginal population, demands were made to open reserves for non-Aboriginal settlement. In the decade from 1881 to 1891, the population of Manitoba and the Northwest Territories more than doubled to a quarter of a million people. This influx was precipitated by the advent of the railway, followed by a general economic boom in 1896-97, which encouraged immigration and increased the demand for land. In the first decade of the 20\textsuperscript{th} century (1901 to 1911), the population of Manitoba doubled and that of Alberta and Saskatchewan increased by a factor of five.\textsuperscript{29}

\textsuperscript{21} See, for example: Mississaugas of the Credit, 1847 and 300 acres at Anderdon, 1848; Caughnawaga Tract, 1857; Nawash Surrender 1857; Colpoys Bay Reserve, 1861.

\textsuperscript{22} Good examples of large scale surrenders of reserved territory are the surrender of Manitoulin Island in 1862 leaving only a few small reserves, and the 1854 surrender of the Saugeen Peninsula.

\textsuperscript{23} \textit{An Act to Provide for the Instruction and Permanent Settlement of the Indians}, S.N.S. 1842, c. 16.

\textsuperscript{24} \textit{An Act to regulate the management and disposal of the Indian Reserves in this Province}, S.N.B. 1844, c. 47.

\textsuperscript{25} Bartlett, pp. 32-33.

\textsuperscript{26} Bartlett, pp. 32-33.

\textsuperscript{27} The Morrell River Reserve in PEI was established in 1859 in exchange for a small acreage previously granted to Indian families which had been overrun by Irish immigrants. Bartlett, p. 7.

\textsuperscript{28} Bartlett, pp. 13 and 20, respectively.

The demand for land and speculation in land led directly to widespread surrenders across the prairies. In the four decades from the 1890s to the 1930s, over 100 land surrenders were taken on the prairies. In the period from 1896 to 1911, 21% of reserve land in the prairie provinces was surrendered to accommodate western expansion.\(^{30}\)

The milieu in which these surrenders took place was one of great enthusiasm for opening the west to settlement and provided exceptional opportunities for speculation in land and extreme pressure on First Nations to consent to surrendering land. Under the Laurier government, Clifford Sifton, Minister of the Interior and Superintendent General of Indian Affairs (1896-1905), actively promoted settlement of the west, as did his successor, Frank Oliver (1905-1911).

In the rush to accommodate settlement, significant changes were made to the \textit{Indian Act} that made it easier for the Crown to obtain surrenders. Most notably, in 1906, the permissible amount of cash distributed at the time of surrender was increased from 10% of the sale price to 50%.\(^{31}\) The increase was designed to make proposed surrenders more attractive to band members. As of 1910, the interest earned on sales could be distributed rather than deposited to the more restrictive capital account. This provision served as both an inducement, as it gave bands more opportunity to make expenditures, and also benefited the government because the band’s money could be used for expenditures rather than relying on parliamentary appropriations. In 1911, the \textit{Indian Act} was amended to allow the Crown to take land near towns without the band’s consent.\(^{32}\)

Other provisions of the \textit{Indian Act} also enhanced the Crown’s ability to negotiate surrenders and/or impaired the First Nations’ ability to resist pressure to surrender their land. These factors include conditions such as the pass system introduced in 1885, which exercised tight control on off-reserve movement, thus preventing First Nations’ leadership from being informed and lending mutual support. In addition, the legal capacity of the Crown to depose chiefs was expanded in 1895 to apply to those who held office by custom, as well as those elected under the provisions of the \textit{Indian Act}. General conditions of distress and poverty also placed bands in a position in which they might agree to surrender in order to raise capital to invest in development of their reserves.

The study done by Peggy Martin-McGuire concluded that Dominion land policies, including provisions for railway lands and land development companies, allowed for an environment of rampant speculation and funneling of political patronage for personal gain.\(^{33}\) Her examination of land purchased suggests that sales of surrendered Indian land prior to 1906 were mostly for speculation not settlement.\(^{34}\) One of the most infamous

\(^{30}\) Martin-McGuire, p. xiii.
\(^{32}\) \textit{Indian Act}, S.C. 1911, cap. 14, s. 2.
\(^{33}\) Martin-McGuire, pp. 7-65.
\(^{34}\) Martin-McGuire, pp. xxii-xxiv. For example, 80% of land surrendered for sale in 1902 from Enoch’s Stony Plain Reserve was purchased by two Edmonton buyers who were friends of Minister Frank Oliver; all of the Carry the Kettle lands were purchased by two buyers who did not reside in the area.
examples of speculation and conflict of interest was the land-buying scheme perpetrated by Deputy Superintendent General Frank Pedley and his associates James Smart and William White. They formed a syndicate and purchased land surrendered from the Ocean Man/Pheasant’s Rump and Chacastapaysin Bands in 1901-02 at prices well below the going rate paid for railway lands in the vicinity. They were later found by the Ferguson Commission to be in a position of conflict of interest. Pedley resigned prior to the Royal Commission’s findings becoming public.

The surrender of reserve lands in the face of settlement and development pressure has given rise to long-standing grievances amongst First Nations who believe that their lands were taken from them in an illegal or dishonest fashion. Through these historic circumstances they lost much of the land that was reserved for their exclusive use and gained little or no benefit from their surrender. These grievances can be pursued through a specific claims process.

The specific claims process is based on discharging the Crown’s lawful obligations to First Nations - an obligation on the part of the federal government derived from the law. According to Canada’s Outstanding Business: A Native Claims Policy:35

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

i) The non-fulfillment of a treaty or other 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 regulations thereunder.

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

iv) An illegal disposition of Indian land.

In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:

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

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

Best Practices for Researching Surrender Claims

The methods used to research and document surrender claims should be driven by the legal tests that have evolved for assessing the validity of surrenders and/or their implementation. These tests derive from key decisions made by the Canadian courts and serve as a guide to judging whether a surrender of Indian reserve land was taken in a valid and legal manner and whether the terms of the surrender were fulfilled in a dutiful manner. While the tests serve to inform the research process, they in no way replace competent legal advice. Researchers should work closely with legal advisors to determine

the focus and direction of research. It is in the interest of First Nations to focus their research in an effective way by guiding their research to answer questions that correspond to the legal tests regarding surrenders.

The focus of research efforts should respond to the specific nature of the alleged breach. In other words, it may not be necessary to research every aspect of the surrender and its implementation, depending on the nature of the alleged breach. For example, if the First Nation believes that a surrender was invalid because an insufficient number of people voted or that ineligible people voted, then the research should focus on the conduct of the surrender meeting, vote, and details of the band membership. It would not be necessary to investigate all of the aspects of the implementation of the terms of the surrender if the issue is the validity of the surrender from the outset.

The design of the research should also take into account specifics of the time period, as the legal requirements for a valid surrender change through time. For example, if the First Nation believes that a promise of a large cash distribution was used to induce the membership to vote in favour of a surrender, they should note that the terms of the Indian Act changed in 1906 to allow a 50% distribution of the proceeds of sale at the time the surrender is taken. Thus, it becomes important whether the surrender was taken before or after the changes in the legislation. Similarly, prior to 1876 no vote was required so earlier surrenders could be taken with the consent of the Chief and Headmen only.

**Suggested Basic Legal Tests**

1. *Cardinal v. Her Majesty The Queen* (Supreme Court of Canada - 1982)

The Supreme Court of Canada identified precautions that were built into the surrender procedures of Section 49 of the 1906 *Indian Act*. These procedures may be enumerated as follows:

- A surrender meeting must be called beforehand to consider the question of a reserve land surrender explicitly.
- The meeting must be called in accordance with the rules of the Indian band.
- The Head Chief or Principal Man must certify on oath the surrender vote and that the surrender meeting was properly constituted.
- Only residents of the reserve, or band members living nearby, can vote upon a reserve land surrender.
- The surrender vote meeting must be held in the presence of an officer of the Crown.
- The surrender may be accepted or refused by the Governor in Council.

One of the key outcomes of the *Cardinal* case is that a reserve land surrender must be agreed to by a “majority of a majority” of band members in attendance at a meeting called for the purpose of giving or withholding assent to a proposed surrender of reserve land. The criteria outlined in the *Cardinal* case are applicable to reserve surrenders dating back to the first *Indian Act* in 1876.
Historical researchers may use the *Cardinal* criteria to assure themselves that the surrender process was conducted in accordance with the accepted practices beginning in 1876.

2. **Guerin v. Her Majesty The Queen** (Supreme Court of Canada - 1984)

In this case, the Supreme Court of Canada characterized the relationship between the Crown and Aboriginal peoples as fiduciary in nature. The Court stated that, in the event of a surrender of reserve lands, the Crown had to act in the best interests of band members and the Crown would be liable for any failure to do so. The fiduciary relationship depended heavily upon the conclusion that an Indian band’s interest in reserve land is not lifted except upon surrender to the Crown. The Supreme Court found in the *Guerin* case that the Crown breached a post-surrender fiduciary obligation when it did not honour the terms of the surrender in regard to a lease of the surrendered reserve land.

Instances where a researcher might use the *Guerin* test could occur when the terms of a surrender for sale or lease were not upheld by the Crown, or were changed without consultation and agreement by the affected Indian band.

3. **Chippewas of Kettle & Stony Point v. Her Majesty The Queen et al** (Court of Appeal for Ontario - 1996)

In this case, the Court of Appeal for Ontario stated that reserve land surrenders required the following:

- A public meeting with band members and attended by officers of the Crown, where the surrender is discussed.
- Dealings concerning reserve land surrenders to be conducted in the open in a clear manner.
- The true “intent” of an Indian band must be respected and the decision of the Indian band to sell should be honoured.
- A surrender, absolute in its express terms, does not become a conditional surrender because of implied terms or oral understandings.

A historical researcher should use the *Kettle & Stony Point* criteria to determine whether a public surrender meeting occurred and that the reserve land surrender negotiations were conducted openly in a transparent fashion. The historical evidence could then assist in determining whether the intentions of the band in regard to surrendering reserve land had been honoured by the Department of Indian Affairs.

4. **Blueberry River Indian Band (Apsassin) v. Her Majesty The Queen** (Supreme Court of Canada - 1995)

The Apsassin case identified the concept of a breach of a “pre-surrender fiduciary duty,” that is, a breach due to actions either taken, or not taken, by the Crown prior to reserve land surrenders. This would then involve reserve land surrenders, which may be
construed as foolish, improvident, or amounting to exploitation when “viewed from the perspective of the Band at the time.” The following criteria might lead to the suggestion of a breach of a “pre-surrender fiduciary duty,” in regard to a reserve land surrender:

- A foolish or improvident transaction from the perspective of the Indian band.
- “Tainted dealings” on behalf of government representatives (e.g., the possibility that Crown officials involved in the surrender personally benefited).
- Evidence that the First Nation completely gave up its decision-making power to the Crown.
- The existence or lack of documentary evidence (e.g., no record of a vote, no surrender document).

In *Apsassin*, the Supreme Court of Canada pointed out that the Crown had to look more deeply at a surrender than just at the documentary evidence. The Court identified the importance of oral history as well as documentary evidence. It is also important to make an assessment of whether or not a reserve land surrender was foolish and had no clear benefit for the Indian band. In effect, if a researcher suspects that a breach of a pre-surrender fiduciary duty may have occurred, he/she should use the above criteria to help assess the intentions of both the First Nation and the Crown in regard to a surrender.

It should be noted that the concept of a “pre-surrender breach of fiduciary duty” is a relatively new idea and may be more difficult for a historical researcher to prove than breaches associated with the other basic legal tests. However, historical evidence, which includes oral tradition, is relevant for assessing whether there is any indication of exploitation, tainted dealings, or a lack of informed consent between the Crown and Indians in regard to a particular reserve land surrender.

**Basic Questions to Direct Research**

For the purpose of organizing research, the researcher can structure his or her methodology to provide contextual background and then address four basic aspects of the surrender process: the negotiation of the surrender; the assent to the surrender; the terms of the surrender; and the implementation/fulfillment of the surrender. At a minimum, each section should answer the following questions.

**Background:**

1. Where is the reserve and what are its boundaries?
2. What First Nation(s) has an interest in the reserve?
3. Who wanted the land surrendered and why?
4. Were there any previous attempts to take a surrender?

**Negotiation of surrender:**

1. Who had authority to negotiate for the Crown? For the First Nation(s)?
2. How and when were interested band members informed of the meeting?
3. Who participated in the meeting(s)? Were they eligible to attend?
4. What was said at the meeting(s)?
5. What was agreed to at the meeting(s)?
6. Where any maps or drawings used to show the area to be surrendered?

**Assent:**

1. Was there a vote? How was it conducted? Who voted? Were they eligible?
2. What was the result? Was a majority of majority attained?
3. If there was no vote, who assented on behalf of the band?
4. Was the affidavit (form 66) properly executed?
5. Did the Crown give its assent through an O.C.?

**Terms of the Surrender:**

1. What was written in the surrender document?
2. Are there any other accounts of the terms of the surrender?
3. Is there any written or oral evidence that discrepancies existed between the terms as written and the discussion at the meeting?

**Fulfillment of the Surrender:**

1. Were the terms carried out as written in the surrender document?
2. Were the terms carried out as understood by the First Nation(s)?
3. Is there any documentary or oral evidence that the surrender was not implemented as expected or promised?

A more thorough discussion of these questions is appended to this paper.

**Presentation of Research Findings and Development of the Claim**

The research into a grievance must be thoroughly documented and research findings presented in a clear and concise manner. The research product should consist of four components: a report outlining the findings of the research; a list of the documents and interviews relied upon in the report; a collection of documents and interview transcripts or notes; and a list of the sources that were consulted in the course of doing the research.

1. **Report:**

   The report should state the nature of the historic grievance and then outline the information regarding the surrender that was uncovered in the course of doing the research. The basic questions listed above can serve as a useful organizational guide for the report. If the report is very long or involved, an executive summary is helpful for the reader. A sketch map of the land in question is also recommended.

   All factual information should be footnoted with reference to the source of the information. Sources can include archival documents, maps and plans, secondary sources, local histories, or oral history interviews. It is important that all information contained in the report is substantiated by a source. Opinion, conjecture, supposition,
and conclusions should be identified as such and clearly differentiated from information that can be clearly demonstrated from historical or oral history sources.

2. *List of Documents*
   A list of documents cited in the report should be supplied with the report. The list should include primary archival documents (such as letters, reports, paylists, trust fund accounts, etc.), printed primary sources (such as annual reports), secondary sources (such as scholarly and academic works), local histories, maps and plans, and transcripts or notes of oral history interviews.
   The list should be organized in a logical manner such as by date of document.

3. *Collection of Documents (referenced)*
   The research product should include a complete collection of all documents relied upon and cited in the report. It is useful to have the collection numbered to correspond to the list of documents. Each document should bear an accurate reference (i.e., a bibliographic reference for secondary sources, a proper archival citation for primary documents, a name of interviewee and date of interview for transcripts of interviews).

4. *Record of Sources Consulted*
   The researcher should provide a list of all the sources he or she consulted in the course of researching the claim. It is useful to make brief notes on each source consulted as to the general contents and whether or not it was relevant. Systematic research notes are extremely important to a thorough and methodical investigation of a grievance.

Once the research is completed, the researcher should work closely with the legal advisor to present historical research findings in a format for formal submission as a claim. The claim must be submitted with a clear statement of alleged breaches that are tied to the historical findings as outlined in the report and supported by the document collection.
RESEARCH GUIDELINES

It is suggested that historical research into some or all of the following issues could be very beneficial when making an assessment of a reserve land surrender. Keep in mind that if you focus your research upon one or two of the most promising “basic legal tests” you will probably not have to thoroughly document all of the following issues, as a significant number of them could well be of minor relevance to the claim.

For example, if your historical research demonstrates to your satisfaction that a reserve land surrender was never negotiated, due to the fact that neither a surrender meeting nor surrender vote took place, then it may be of no importance whether the terms of an “invalid” surrender were fulfilled. After all, if you can prove that a surrender was invalid, and reserve land taken illegally, then there is likely no need to research whether or not the Crown properly carried out the sale or lease terms of an “invalid surrender.” The important fact in this case would be that the surrender allegedly never occurred and, if the federal government agreed, a negotiated settlement process could begin.

A. GENERAL HISTORICAL BACKGROUND

1. Document the location of the reserve or Indian land and the identity of First Nation(s) for whom the lands were set aside.
2. Provide information on local circumstances leading to the request for a surrender by the government or a request by the First Nation(s) to surrender land. This may include factors such as squatters on Indian land, pressures from local settlers or business interests, the need to raise capital funds, desire by the First Nation(s) to relocate, amalgamation or division of First Nation(s), etc.
3. Outline the history of any prior attempts to obtain a surrender of the same land.

B. NEGOTIATIONS and SURRENDER MEETING

1. Provide documents explaining events preceding a formal surrender meeting, including:
   a. preliminary discussions between departmental officials or other interested parties and Chief and Council or other First Nation(s) members, including any discussion of proposed terms of a surrender;
   b. correspondence within the government regarding the proposed surrender, including proposed terms, purpose of surrender, different government, municipal or other parties involved;
   c. authority given to departmental officials to obtain a surrender along with any guidelines or instructions outlined by departmental headquarters;
   d. notice of the time, place, and purpose of the meeting, including information on how the notice was posted or delivered to First Nation(s) members;
   e. any other significant communications about the pending surrender.
2. Provide documents explaining the specifics of the surrender meeting, including:
   a. who attended on behalf of the government;
b. identity of any outside parties present at the meeting (e.g., missionaries, traders, settlers, land speculators, politicians, business interests);

c. official representatives of the First Nation(s) present at the meeting and/or number and identity of First Nation(s) members at the meeting;

d. minutes or notes on the discussion that took place at the meeting;

e. any evidence of undue influence being exerted at the meeting or immediately prior to the meeting. This could include factors such as distribution of cash, lobbying by outside parties, threats to remove chiefs or cut off rations, etc.;

f. any other factors which may have affected the outcome of the vote (for example, if the meeting was called when a large proportion of the membership would be absent).

C. THE SURRENDER VOTE

1. Provide details of the vote including:

a. how many people voted for and against the surrender;

b. the names of voters, their First Nation(s) affiliation, place of residence, age and sex (only males 21 years of age and older were allowed to vote until 1951);

c. any evidence that First Nation(s) members or departmental officials questioned the results of the vote or the eligibility of voters;

d. any evidence that any First Nation(s) other than those voting on the surrender had an interest in the lands being surrendered.

D. TERMS of the SURRENDER and the SURRENDER DOCUMENTS

1. Provide documents that show the following details (most of this information will appear in the written surrender document):

a. description of the land being surrendered, including any maps or plans;

b. written terms of the surrender; i.e., the purpose of the surrender (sale, lease, right of way, sub-surface rights), method and terms specified for disposing of surrendered land, time limitations, how proceeds were to be disbursed and/or banked, alternate lands to be purchased or obtained in exchange, etc.;

c. signatories to the surrender - who signed for the government, who signed for the First Nation(s), identity of any witnesses or other outside parties signing the surrender;

d. affidavit (form 66) attached to the surrender, who swore to the authenticity of the signatories, surrender process, etc.; note place and date of affidavit;

e. provide any evidence that there were outside promises which were not written into the surrender document;

f. provide documents that indicate the satisfaction or dissatisfaction of the signing First Nation(s), or any other First Nation(s), with the terms of the surrender.
E. OFFICIAL ACCEPTANCE of SURRENDER

1. Provide documents related to the formal approval of the surrender by the Crown:
   a. record of departmental official forwarding the signed surrender and affidavit to Headquarters;
   b. submission of surrender to Privy Council or Governor General in Council for acceptance by Order in Council;
   c. Order in Council with any attachments, e.g., maps/plans, correspondence.

F. EXECUTION of TERMS of SURRENDER

1. If the claim hinges on some aspect of the fulfillment of the term(s) of the surrender, provide documents related to the grievances being claimed. This may include any or all of the following:
   a. valuation of the surrendered land and improvements by a surveyor or other official (this may have taken place prior to the surrender);
   b. any record of satisfaction or dissatisfaction on the part of the First Nation(s) regarding the valuation of land and/or improvements;
   c. how and when the surrendered land was surveyed;
   d. any record of satisfaction or dissatisfaction on the part of the First Nation(s) regarding the boundaries or location of the surrendered lands as surveyed;
   e. distribution of cash at the time of surrender, including details on the amount distributed, to whom, and any indication that insufficient or excess amounts were given out or ineligible persons received benefits. Include record of compensation for improvements;
   f. whether expenditures specified in the surrender were made as expected by the First Nation(s). Provide a record of money that was spent as a result of the surrender and compare to the expenditures that were specified in the surrender;
   g. how was surrendered land sold and/or offered for sale (e.g., auction, lottery, by tender, notices of impending sale) and terms of sale (e.g., percentage down payment, interest, time to pay);
   h. if all the surrendered land was not sold, identify unsold surrendered land; also indicate any non-patented land under sales contract (i.e., lands that were sold but payment had not been completed and the lands have not been legally transferred to the purchaser);
   i. any requests made by the First Nation(s) to have unsold land returned to reserve status;
   j. third party interests in unsold surrendered lands;
   k. were proceeds of sale credited to First Nation(s)’s trust accounts (less amount distributed at time of surrender). Specify the name and number of the trust account into which proceeds were deposited;
   l. payment of rents in a timely manner on lands surrendered for lease; deposit of rents into First Nation(s)’s trust accounts;
m. provisions for renewal of leases - was lease automatically renewable at end of rental period, or was it supposed to be renegotiated;

n. provisions for reversion of rented land to reserve status - could First Nation(s) give notice of resumption of land during or at end of rental period.