

# **Indian Claims Commission**



## **KEY WORDS INDEX AND REPORT SUMMARIES**

**SEPTEMBER 2007**



# **Indian Claims Commission**



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## **CHIEF COMMISSIONER**

Renée Dupuis, C.M., Ad.E.

## **COMMISSIONERS**

Daniel J. Bellegarde  
Jane Dickson-Gilmore  
Alan C. Holman  
Sheila G. Purdy

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## **FROM THE CHIEF COMMISSIONER**

The Indian Claims Commission (ICC) is proud of what it has accomplished over the past 15 years in carrying out its mandate. From its inception in 1991 to March 31, 2006, the Commission has published 68 inquiry and 11 mediation reports. The Summaries and Key Words Index project was conceived as an attempt to facilitate access to the results of our work.

This publication therefore includes a short summary of each of our completed inquiry and mediation reports, and each of these summaries includes a list of the significant events and concepts discussed in the report. An index of key words has been prepared, facilitating a search of the text of the summaries. The project is intended to provide a tool for parties before the Commission (First Nations and Canada), as well as for researchers, policy-makers, the legal community, interested parties, and indeed ourselves, to access the wealth of historical and legal information and analysis contained within the ICC reports. As we note in each of these summaries, they are intended for research purposes only, and readers should refer to the published reports for the complete account. The summaries reflect the published report and the only updating has been to add any activity relating to the inquiry that occurred subsequent to publication. As new reports are issued by the Commission, their summaries and the key words to them are added to the edition of this publication available on the ICC internet site.

I hope that this information will assist readers to better understand the Commission's work and its unique contribution to the resolution of specific claims.

Although everyone who has worked at the Commission since 1991 has played an important role in the conduct of these inquiries and mediations, there are several people who played a key role in preparing this publication. This was a major project for a small team of people who managed to complete this work in addition to their ongoing workload. I would like to extend a special thanks to these individuals in particular: Commissioner Sheila Purdy, Commissioner Jane Dickson-Gilmore, John Edmond, Jo-Ann Smith, Melissa Capay, Lucie Légaré, Rebecca Morin, and Mary McDougall Maude.

Renée Dupuis, C.M., Ad.E.  
Chief Commissioner



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*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3

## TREATY LAND ENTITLEMENT

*Bigstone Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2000), reported (2000) 12 ICCP 343

*Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)

*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

*Saulteau First Nation Treaty Land Entitlement and Lands in Severalty Inquiry* (Ottawa, April 2007)

## FIDUCIARY OBLIGATION See FIDUCIARY DUTY

## FIDUCIARY RELATIONSHIP See FIDUCIARY DUTY

## FISHING See TREATY RIGHT

## **FLOODING**

### **DAM**

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159  
*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)  
*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

### **FRAUD See also SPECIFIC CLAIMS POLICY – BEYOND LAWFUL OBLIGATION**

*Chippewas of the Thames First Nation Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307  
*Chippewas of the Thames First Nation Clench Defalcation Mediation* (Ottawa, August 2005)  
*Homalco Indian Band Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89  
*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)  
*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Touchwood Agency Mismanagement (1920-24) Claim Mediation* (Ottawa, August 2005)

### **EQUITABLE FRAUD**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

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### **GATHERING See TREATY RIGHT – HARVESTING**

### **GRAVE SITE See CULTURE AND RELIGION – BURIAL SITE**

- H -

### **HARVESTING See TREATY RIGHT**

### **HISTORICAL SITE See CULTURE AND RELIGION**

### **HUNTING See TREATY RIGHT**

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### **INDIAN ACT See also STATUTE – LAWFUL OBLIGATION**

#### **ALLOCATION**

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

#### **BAND MEMBERSHIP**

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

#### **BILL C-31**

*Friends of the Michel Society 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69

#### **ENVIRONMENT**

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

EXPROPRIATION See also RIGHT OF WAY

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)  
*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Keeseekoowenin First Nation 1906 Land Claim Mediation* (Ottawa, August 2005)  
*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

INDIAN STATUS

*Friends of the Michel Society 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69

PERMIT See also RIGHT OF WAY

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159  
*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)  
*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)  
*Sturgeon Lake First Nation Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3

REGISTRATION OF INDIAN RESERVE

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

SUBDIVISION

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

SURRENDER See also RESERVE – SURRENDER

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)  
*Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)  
*Canupauakpa Dakota First Nation turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263  
*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209  
*Cowessess First Nation 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223  
*Cowessess First Nation 1907 Surrender Phase II Inquiry* (Ottawa, July 2006)  
*Duncan's First Nation 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53  
*Fisbing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219  
*Fisbing Lake First Nation 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291  
*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)  
*Kabkewistabaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3  
*Kabkewistabaw First Nation 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3  
*The Key First Nation 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3  
*Lax Kw'alaams Indian Band Tsimpsian Indian Reserve 2 Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99  
*Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333  
*Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101  
*Moosomin First Nation 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004)  
*Paul First Nation Kapasiwin Townsite Inquiry* (Ottawa, February 2007)  
*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3  
*Sumas Indian Band 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281

*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

**TAXATION**

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

**THIRD PARTY**

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

**TRESPASS**

*Mamalelegala Qwe'qwa'sot'eno Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

**INDIAN CLAIMS COMMISSION** See **MANDATE OF INDIAN CLAIMS COMMISSION** See also **SPECIFIC CLAIMS POLICY**

**INDIAN LANDS** See **BRITISH COLUMBIA – INDIAN SETTLEMENT**

**INDIAN SETTLEMENT** See **BRITISH COLUMBIA – INDIAN SETTLEMENT**

**INDIAN STATUS** See **INDIAN ACT**

**INDIAN TITLE** See **ABORIGINAL TITLE**

**INTERVENOR** See **PRACTICE AND PROCEDURE**

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**JURISDICTION** See **MANDATE OF INDIAN CLAIMS COMMISSION**

- L -

**LAWFUL OBLIGATION** See **SPECIFIC CLAIMS POLICY; INDIAN ACT; STATUTE**

**LAND OCCUPIED PRIOR TO TREATY** See **TREATY LAND ENTITLEMENT**

**LETTERS PATENT** See **PRE-CONFEDERATION CLAIM; RESERVE**

- M -

**MANDATE OF INDIAN CLAIMS COMMISSION** See also **SPECIFIC CLAIMS POLICY**

**ABORIGINAL TITLE**

*Kluane First Nation Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007)

*Walpole Island First Nation Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117

**COMPENSATION CRITERIA**

*Lax Kw'alaams Indian Band Tsimpsean Indian Reserve 2 Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

*Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)

**CONSTRUCTIVE REJECTION**

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

*Blueberry River First Nation and Doig River First Nation Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006)

*Mikisew Cree First Nation Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

*Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

#### DECLARATION OF RIGHTS

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

#### DEEMED REJECTION See MANDATE OF INDIAN CLAIMS COMMISSION – CONSTRUCTIVE REJECTION

#### DELAY

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

*Blueberry River First Nation and Doig River First Nation Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006)

*Mikisew Cree First Nation Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

#### ISSUES

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

#### MEDIATION

*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

*Chippewas of the Thames First Nation Clench Defalcation Mediation* (Ottawa, August 2005)

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

*Fisbing Lake First Nation 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291

*Kabkewistabaw First Nation 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3

*Keeseekoowenin First Nation 1906 Land Claim Mediation* (Ottawa, August 2005)

*Moosomin First Nation 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004)

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Roseau River Anishinabe First Nation Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

*Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)

*Touchwood Agency Mismanagement (1920-24) Claim Mediation* (Ottawa, August 2005)

**REJECTED CLAIM**

*Micmacs of Gesgapegiag First Nation Horse Inland Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 253

**SUPPLEMENTARY MANDATE**

*Canupawakpa Dakota First Nation turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

*Friends of the Michel Society 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69

*Roseau River Anishinabe First Nation Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3

*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

**MANITOBA**

*Canupawakpa Dakota First Nation turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263

*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3

*Keeseekoowenin First Nation 1906 Land Claim Mediation* (Ottawa, August 2005)

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

*Opaskwayak Cree Nation Streets and Lanes Inquiry* (Ottawa, February 2007)

*Peguis First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 183

*Roseau River Anishinabe First Nation Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3

*Roseau River Anishinabe First Nation Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

**MCKENNA-MCBRIDE COMMISSION See BRITISH COLUMBIA****MEDIATION See MANDATE OF INDIAN CLAIMS COMMISSION****MEMBERSHIP See INDIAN ACT – BAND MEMBERSHIP; See also BAND****MINERALS See TREATY RIGHT; See also FIDUCIARY DUTY – MINERALS**

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**NATURAL RESOURCES TRANSFER AGREEMENT, 1930**

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

*Cold Lake and Canoe Lake First Nations Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

**NEW BRUNSWICK**

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3

## **NUNAVUT**

### **NUNAVUT LAND CLAIMS AGREEMENT**

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177

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## **ONTARIO**

*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209

*Chippewas of the Thames First Nation Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307

*Chippewas of the Thames First Nation Clench Defalcation Mediation* (Ottawa, August 2005)

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

*Mississaugas of the New Credit First Nation Toronto Purchase Inquiry* (Ottawa, June 2003), reported (2004) 17 ICCP 227

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

*Walpole Island First Nation Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117

**ONUS OF PROOF See EVIDENCE**

**ORDER IN COUNCIL See SPECIFIC CLAIMS POLICY**

**ORAL TERMS See TREATY INTERPRETATION – OUTSIDE PROMISES**

**OUTSIDE PROMISES See TREATY INTERPRETATION**

**OUTSTANDING BUSINESS See SPECIFIC CLAIMS POLICY**

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## **PARK**

### **INDIAN LAND**

*Kluane First Nation Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007)

**PERMIT See RIGHT OF WAY; See also INDIAN ACT**

**POLICY See SPECIFIC CLAIMS POLICY; TREATY LAND ENTITLEMENT; ABORIGINAL TITLE – ADDITIONS TO RESERVE POLICY**

**POTLATCH See CULTURE AND RELIGION**

**PRACTICE AND PROCEDURE See also EVIDENCE**

**ELDER WITNESS** See EVIDENCE – ORAL HISTORY

**INTERVENOR**

*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

**WITNESS** See also EVIDENCE – ORAL HISTORY

*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

**PRE-CONFEDERATION CLAIM See also SPECIFIC CLAIMS POLICY**

**COMPENSATION**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations)*

*Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

**LETTERS PATENT**

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

*Micmacs of Gesgapegiag First Nation Horse Inland Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 253

**PETITION OF RIGHT**

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

*Micmacs of Gesgapegiag First Nation Horse Inland Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 253

**PURCHASE**

*Mississaugas of the New Credit First Nation Toronto Purchase Inquiry* (Ottawa, June 2003), reported (2004) 17 ICCP 227

*Walpole Island First Nation Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117

**RESERVATION**

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

**RESERVE CREATION**

*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

**SURRENDER**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

*Mississaugas of the New Credit First Nation Toronto Purchase Inquiry* (Ottawa, June 2003), reported (2004) 17 ICCP 227

*Walpole Island First Nation Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117

**PRE-EMPTION See BRITISH COLUMBIA**

**PRE-CONFEDERATION TREATY See PRE-CONFEDERATION CLAIM; See also TREATIES**

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**QUALITY OF LAND See also TREATY LAND ENTITLEMENT**

## QUEBEC

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)  
*Micmacs of Gesgapegiag First Nation Horse Inland Inquiry* (Ottawa, December 1994), reported (1995)  
3 ICCP 253

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**REGISTRATION OF INDIAN RESERVE See INDIAN ACT**

**RELIGION See CULTURE AND RELIGION**

**RELIGIOUS SITE See CULTURE AND RELIGION – SPIRITUAL SITE**

**RES JUDICATA See DEFENCES**

**RESERVE See also RIGHT OF WAY**

### ABANDONMENT

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)  
*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported  
(1995) 3 ICCP 175

### ALLOTMENT

*Homalco Indian Band Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported  
(1996) 4 ICCP 89  
*Namgis First Nation Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3

### COMPENSATION

*Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3  
*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

### DE FACTO RESERVE

*Canupawakpa Dakota First Nation turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported  
(2004) 17 ICCP 263  
*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209  
*Esketemc First Nation Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported  
(2002) 15 ICCP 3

### DISPOSITION

*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997),  
reported (1998) 8 ICCP 209  
*Chippewas of the Thames First Nation Muncey Land Inquiry* (Ottawa, December 1994), reported  
(1995) 3 ICCP 285  
*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning  
[Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003),  
reported (2004) 17 ICCP 187  
*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219  
*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)  
*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Paul First Nation Kapasiwin Townsite Inquiry* (Ottawa, February 2007)  
*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)  
*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996)  
4 ICCP 3  
*Sumas Indian Band 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8  
ICCP 281

LEASE

*Sturgeon Lake First Nation Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3

LETTERS PATENT

*Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3  
*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

PERMIT See RIGHT OF WAY

PROCEEDS OF SALE

*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209

*Chippewas of the Thames First Nation Glench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307

*Chippewas of the Thames First Nation Glench Defalcation Mediation* (Ottawa, August 2005)

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

*Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333

*Opaskwayak Cree Nation Streets and Lanes Inquiry* (Ottawa, February 2007)

*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

*Sumas Indian Band 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281

RESERVE CLAUSE See TREATY INTERPRETATION

RESERVE CREATION See also BRITISH COLUMBIA

*Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

*Esketemc First Nation Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3

*Mamalelegala Qwe'qwa'sot'eno Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

*Nak'azdli First Nation Abt-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81

*Namgis First Nation McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109

*Taku River Tlingit First Nation Wenah Specific Claim Inquiry* (Ottawa, March 2006)

*Williams Lake Indian Band Village Site Inquiry* (Ottawa, March 2006)

REVERSIONARY INTEREST See RIGHT OF WAY

RIPARIAN RIGHTS

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

ROAD See RIGHT OF WAY

SALE See RESERVE – DISPOSITION

STREETS AND LANES

*Opaskwayak Cree Nation Streets and Lanes Inquiry* (Ottawa, February 2007)

SURRENDER

*Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3

*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)  
*Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)  
*Canupauakpa Dakota First Nation turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263  
*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209  
*Chippewas of the Thames First Nation Glench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307  
*Chippewas of the Thames First Nation Glench Defalcation Mediation* (Ottawa, August 2005)  
*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187  
*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31  
*Cowessess First Nation 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223  
*Cowessess First Nation 1907 Surrender Phase II Inquiry* (Ottawa, July 2006)  
*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Duncan's First Nation 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53  
*Fisbing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219  
*Fisbing Lake First Nation 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291  
*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3  
*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)  
*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Kabkewistabaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3  
*Kabkewistabaw First Nation 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3  
*The Key First Nation 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3  
*Lax Kw'alaams Indian Band Tsimpsian Indian Reserve 2 Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99  
*Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333  
*Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101  
*Moosomin First Nation 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004)  
*Nak'azdli First Nation Abt-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81  
*Paul First Nation Kapasiwin Townsite Inquiry* (Ottawa, February 2007)  
*Peguis First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 183  
*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3  
*Sumas Indian Band 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281  
*Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)

#### SURRENDER FOR EXCHANGE

*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3  
*Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)

#### THIRD PARTY

*Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3  
*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

## TRESPASS

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

## RIGHT OF WAY

### ABANDONMENT

*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

### BRIDGE

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)

### DAM

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

### EXPROPRIATION

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)

*Blueberry River First Nation and Doig River First Nation Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006)

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

### HIGHWAY See RIGHT OF WAY – ROAD

### HYDRO LINE

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

### PERMIT

*Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

### RAILWAY

*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

### REVERSIONARY INTEREST

*Sumas Band Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3

### ROAD

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)

*Blueberry River First Nation and Doig River First Nation Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006)  
*Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333

#### **SURRENDER**

*Betsiamites Band Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005)

#### **TRESPASS**

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3  
*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

#### **RIPARIAN RIGHTS See RESERVE**

#### **ROAD See RIGHT OF WAY**

#### **ROBINSON-HURON TREATY (1850) See TREATIES**

#### **ROBINSON-SUPERIOR TREATY (1850) See TREATIES**

#### **ROYAL PREROGATIVE**

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

#### **ROYAL PROCLAMATION OF 1763**

*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

*Mississaugas of the New Credit First Nation Toronto Purchase Inquiry* (Ottawa, June 2003), reported (2004) 17 ICCP 227

*Walpole Island First Nation Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117

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#### **SASKATCHEWAN**

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

*Cold Lake and Canoe Lake First Nations Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3

*Cowessess First Nation 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223

*Cowessess First Nation 1907 Surrender Phase II Inquiry* (Ottawa, July 2006)

*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219

*Fisbing Lake First Nation 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

*Kabkewistabaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3

*Kabkewistabaw First Nation 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3

*Kabkewistabaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*The Key First Nation 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3

*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235

*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109

*Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333

*Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101

*Moosomin First Nation 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004)

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Sakimay First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

*Sturgeon Lake First Nation Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3

*Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)

*Touchwood Agency Mismanagement (1920-24) Claim Mediation* (Ottawa, August 2005)

*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

#### TREATY LAND ENTITLEMENT FRAMEWORK AGREEMENT

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

#### SETTLEMENT LANDS See BRITISH COLUMBIA – INDIAN SETTLEMENT

#### SPECIFIC CLAIMS POLICY See also MANDATE OF INDIAN CLAIMS COMMISSION

#### ABORIGINAL TITLE

*Esketemc First Nation Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3

## BAND

*Friends of the Michel Society 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

## BEYOND LAWFUL OBLIGATION

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

*Mamalelegala Que'qwa'sot'enoX Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

## COMPENSATION CRITERIA

*Lax Kw'alaams Indian Band Tsimpsean Indian Reserve 2 Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

## COMPREHENSIVE CLAIM

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Kluane First Nation Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007)

## FIDUCIARY DUTY

*Esketemc First Nation Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3

*Mamalelegala Que'qwa'sot'enoX Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

*Namgis First Nation Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3

*Namgis First Nation McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109

*Taku River Tlingit First Nation Wenah Specific Claim Inquiry* (Ottawa, March 2006)

## FIFTEEN-YEAR RULE

*Sturgeon Lake First Nation Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3

## FRAUD

*Homalco Indian Band Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89

*James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)

## INDIAN LAND

*Kluane First Nation Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007)

## INDIAN SETTLEMENT

*Homalco Indian Band Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89

## LAWFUL OBLIGATION

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Esketemc First Nation Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3

*Mamalelegala Que'qwa'sot'enoX Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

*Namgis First Nation Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3

*Namgis First Nation McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109

**ORDER IN COUNCIL**

*Namgis First Nation Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3

**OUTSTANDING BUSINESS**

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

**PRE-CONFEDERATION CLAIM**

*Micmacs of Gesgapegiag First Nation Horse Inland Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 253

**SCOPE**

*Mamalelegala Que'qwa'sot'enoq Band McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199

*Namgis First Nation Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3

*Namgis First Nation McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109

**STANDING** See SPECIFIC CLAIMS POLICY – BAND

**SPIRITUAL SITE – See CULTURE AND RELIGION**

**STATUS** See INDIAN ACT – INDIAN STATUS

**STATUTE**

**LAWFUL OBLIGATION**

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

**SUBDIVISION** See INDIAN ACT

**SUPPLEMENTARY MANDATE** See MANDATE OF INDIAN CLAIMS COMMISSION

**SURRENDER** See RESERVE

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**TAXATION** See INDIAN ACT

**TERMS OF UNION, 1871** See BRITISH COLUMBIA

**TIMBER** See TREATY RIGHT – HARVESTING

**TLE** See TREATY LAND ENTITLEMENT

**TREATIES**

**COLDWATER TREATY (1836)**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations) Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187

**COLLINS TREATY (1785)**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

**ROBINSON-HURON TREATY (1850)**

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

ROBINSON-SUPERIOR TREATY (1850)

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

TREATY OF 1779

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3

TREATY OF 1836

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

TREATY 1 (1871)

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

*Peguis First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 183

*Roseau River Anishinabe First Nation Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3

*Roseau River Anishinabe First Nation Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

TREATY 2 (1871)

*Keeseekoowenin First Nation 1906 Land Claim Mediation* (Ottawa, August 2005)

TREATY 3 (1792)

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

TREATY 4 (1874)

*Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209

*Cowessess First Nation 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223

*Cowessess First Nation 1907 Surrender Phase II Inquiry* (Ottawa July 2006)

*Fisbing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219

*Fisbing Lake First Nation 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291

*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3

*Kabkewistabaw First Nation 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3

*Kabkewistabaw First Nation 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3

*Kabkewistabaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*The Key First Nation 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)

*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations) Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159

*Qu'Appelle Valley Indian Development Authority (QVIDA) Flooding Mediation* (Ottawa, December 2005)

*Sakimay First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Standing Buffalo Dakota Nation Flooding Mediation* (Ottawa, March 2004)

TREATY 5 (1876)

*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*Opaskwayak Cree Nation Streets and Lanes Inquiry* (Ottawa, February 2007)

## TREATY 6 (1876)

- Alexis First Nation TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21
- Gold Lake and Canoe Lake First Nations Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3
- Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)
- Friends of the Michel Society 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69
- James Smith Cree Nation Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005)
- James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)
- James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)
- James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)
- Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47
- Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235
- Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109
- Mistawasis First Nation 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333
- Moosomin First Nation 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101
- Moosomin First Nation 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004)
- Paul First Nation Kapasiwin Townsite Inquiry* (Ottawa, February 2007)
- Sturgeon Lake First Nation Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3
- Thunderchild First Nation 1908 Surrender Mediation* (Ottawa, March 2004)
- Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

## TREATY 7 (1877)

- Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3
- Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)
- Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)
- Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

## TREATY 8 (1899)

- Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117
- Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3
- Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177
- Bigstone Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2000), reported (2000) 12 ICCP 343
- Blueberry River First Nation and Doig River First Nation Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006)
- Duncan's First Nation 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53
- Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3
- Mikisew Cree First Nation Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183
- Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

- Saulteau First Nation Treaty Land Entitlement and Lands in Severality Inquiry* (Ottawa, April 2007)  
TREATY 10 (1906)  
*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3  
*Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177  
*Gold Lake and Canoe Lake First Nations Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3  
*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47
- TREATY 25 (1822)  
*Chippewas of the Thames First Nation Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307  
*Chippewas of the Thames First Nation Clench Defalcation Mediation* (Ottawa, August 2005)
- TREATY 29 (1827)  
*Chippewas of Kettle and Stony Point First Nation 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209
- WILLIAMS TREATY (1923)  
*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31  
*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

**TREATY See TREATIES; TREATY AMENDMENT; TREATY INTERPRETATION; TREATY LAND ENTITLEMENT; TREATY RIGHT**

**TREATY AMENDMENT**

- Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3  
*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

**TREATY INTERPRETATION See also TREATIES; TREATY RIGHT**

**COMPENSATION**

- Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

**EXTINGUISHMENT**

- Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177

**ORAL TERMS See TREATY INTERPRETATION – OUTSIDE PROMISES**

**OUTSIDE PROMISES**

- Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177  
*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135  
*Roseau River Anishinabe First Nation Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3  
*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

**PRE-CONFEDERATION CLAIM**

- Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31  
*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

**RESERVE CLAUSE**

- Carry the Kettle First Nation Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209  
*Cumberland House Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

*Fishing Lake First Nation 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219  
*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)  
*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235  
*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109  
*Peepeekisis First Nation File Hills Colony Inquiry* (Ottawa, March 2004)  
*Roseau River Anishinabe First Nation Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3

#### RIGHT OF PASSAGE

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations) Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31

#### SCOPE

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117  
*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

#### TREATY LAND ENTITLEMENT

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3  
*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3  
*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269  
*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109  
*Roseau River Anishinabe First Nation Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3

#### TREATY LAND ENTITLEMENT

##### ABSENTEE

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

##### AMALGAMATION

*James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)  
*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)  
*Sakimay First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

##### DATE OF FIRST SURVEY

*Bigstone Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2000), reported (2000) 12 ICCP 343  
*Blood Tribe / Kainaiwa Big Claim Inquiry* (Ottawa, March 2007)  
*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3  
*Gamblers First Nation Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3  
*Kabkewistabaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21  
*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73  
*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235  
*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109

*Peguis First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 183

#### LAND OCCUPIED PRIOR TO TREATY

*James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

#### LANDLESS TRANSFER

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

#### LATE ADHERENT

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

#### LOSS OF USE

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

#### MARRIAGE

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

#### PAYLIST

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

#### POLICY

*Bigstone Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 2000), reported (2000) 12 ICCP 343

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235

*Sakimay First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

#### POPULATION FORMULA

*Fort McKay First Nation Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3

*Kabkewistabaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235

*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

## QUALITY OF LAND

*James Smith Cree Nation Treaty Land Entitlement Inquiry Report on Issues 9: Amalgamation* (Ottawa, March 2005)

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

*Sandy Bay Ojibway First Nation Treaty Land Entitlement Inquiry* (Ottawa, June 2007)

## PAYLIST

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

## SASKATCHEWAN TLE FRAMEWORK AGREEMENT

*Kabkewistabaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21

*Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73

*Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235

*Young Chipeewayan Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175

## SETTLEMENT AGREEMENT

*Long Plain First Nation Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269

*Lucky Man Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109

## SUFFICIENCY OF TREATY LANDS

*James Smith Cree Nation Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

## TREATY PROMISE See TREATY RIGHT; TREATY INTERPRETATION

## TREATY RIGHT See also CONSTITUTION

### AGRICULTURAL BENEFITS

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

*Mikisew Cree First Nation Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183

### ANNUITY

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

### ECONOMIC BENEFITS

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

### FISHING See also TREATY RIGHT – HARVESTING

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

*Eel River Bar First Nation Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3

### GATHERING See also TREATY RIGHT – HARVESTING

### HARVESTING

*Athabasca Deneuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3

*Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations) Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177

*Gold Lake and Canoe Lake First Nations Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

### HUNTING See also TREATY RIGHT – HARVESTING

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

**MEDICAL AID**

*Roseau River Anishinabe First Nation Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3

**MINERALS**

*Blood Tribe / Kainaiwa 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3

*Blood Tribe / Kainaiwa 1889 Akers Surrender Mediation* (Ottawa, August 2005)

*James Smith Cree Nation Indian Reserve 100A Inquiry* (Ottawa, March 2005)

**RESERVE** See also TREATY LAND ENTITLEMENT; RESERVE

*Moose Deer Point First Nation Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135

*Nekaneet First Nation Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91

**TIMBER** See also TREATY RIGHT – HARVESTING

**TRAPPING** See also TREATY RIGHT – HARVESTING

*Athabasca Chipewyan First Nation W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47

**TRESPASS** See INDIAN ACT; See also RESERVE; RIGHT OF WAY

- X -

**X MARK** See EVIDENCE – SIGNATURE BY MARK

- Y -

**YUKON**

*Kluane First Nation Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007)



## SUMMARY

### **ALEXIS FIRST NATION TRANSALTA UTILITIES RIGHTS OF WAY INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21.

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

**Panel:** Commissioner R.J. Augustine, Commissioner D.J. Bellegarde, Commissioner S.G. Purdy

**Treaties** – Treaty 6 (1876); **Right of Way** – Hydro Line – Expropriation – Permit; **Compensation** – Damages; **Fiduciary Duty** – Right of Way – Third Party; **Indian Act** – Taxation; **Mandate of Indian Claims Commission** – Constructive Rejection – Delay; **Evidence** – Onus of Proof; **Alberta**

#### **THE SPECIFIC CLAIM**

The Alexis First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in October 1995, alleging that in the 1950s and 1960s, Canada breached its obligations to the First Nation in the grant of three rights of way to Calgary Power Ltd (now TransAlta Utilities Corp.) to install two electrical distribution lines and a transmission line on the reserve. In August 1997 the First Nation requested that the Indian Claims Commission (ICC) accept the claim for an inquiry, although it had not yet been formally rejected by Canada. In October 1999, the ICC accepted the request for an inquiry, whereupon Canada challenged the Commission's mandate to proceed. In April 2000, the ICC issued an interim ruling accepting the claim for inquiry on the basis that Canada's delay in processing what was a modest claim was tantamount to a rejection: see (2003) 16 ICCP 47; Appendix A to the report.

Canada initially participated in the inquiry as an observer, becoming a full participant after it formally rejected the claim in January 2001. The ICC also ruled in March 2001 that it would proceed with the inquiry although litigation on the same matter was proceeding in the Federal Court of Canada: see Appendix C to the report. The community session was held in December 2001 and the oral hearing, based on written submissions, took place in Edmonton in August 2002.

#### **BACKGROUND**

Pursuant to Treaty 6, Indian Reserve (IR) 133 northwest of Edmonton was set aside for the Alexis Band. In 1959, a right of way for an electrical distribution line to serve the Alexis Day School was granted by way of permit to Calgary Power. The Band was promised jobs to clear the land but received no compensation for the right of way.

In 1967, Calgary Power was granted a permit for a second right of way, to build a distribution line from the 1959 line south to a location outside the reserve. It was originally intended to serve cottages on the south shore of Lac Ste Anne. The line brought electricity to nearby houses on the reserve. The Band received \$195 in compensation.

In 1969, Calgary Power obtained a permit from the Crown, in the nature of an expropriation, for a right of way to build a high-voltage transmission line across the reserve, serving only communities outside the reserve. The Band was not required to give its consent but did pass a Band Council Resolution (BCR) agreeing to the terms. The Band received a one-time lump sum payment of \$4,296 in compensation, and band members were promised jobs clearing the land. The main focus of the claim is the 1969 transmission line.

#### **ISSUES**

Did Canada breach its fiduciary duties, if any, to the Band in the manner in which Canada granted rights of way to Calgary Power in 1959, 1967, and 1969? Did Canada breach its fiduciary duty to the Band by failing to obtain a reasonable annual fee, rental, or charge as permitted in agreements between DIAND and Calgary Power?

**FINDINGS**

The Alexis Band was vulnerable and dependent on DIAND to represent the Band's interests in the negotiations with Calgary Power for the three rights of way. The documentary and oral history evidence show that harsh economic times, unemployment, lack of education, little knowledge of English, and a relatively poor relationship with the Indian Agents created a situation in which the Band's leadership was at an obvious disadvantage in negotiations with a major power company.

Even though the Band was vulnerable in its dealings with Calgary Power, the onus does not shift to Canada to prove the fairness of the transaction. The First Nation continues to bear the burden of proving that the Band's transactions with the corporation were unjust and that the responsibility for those results lies with the Crown.

Although the Band was in a vulnerable situation, the people understood that the 1959 line would bring electricity to the school, perceiving it to be a benefit, and the Band Council approved the line in a BCR. The 1959 line, built solely for the school, was in the Band's best interests and the Crown had no fiduciary duty to obtain compensation.

Regarding the 1967 line, its collateral purpose was to service houses on the reserve in the vicinity of the right of way. Without any evidence to suggest that the compensation of \$195 was patently unreasonable in circumstances in which the Band benefited from access to electricity, Canada had no duty to obtain better terms for the Band.

With respect to the 1969 expropriation for the transmission line, the Crown had the sole discretion to approve an expropriation and was required to balance the best interests of the Band, including the preservation of its reserve land, with the public purpose of providing adequate electrical services to the general population. The fiduciary duty in an expropriation includes the duty to prevent exploitation of the band; the duty to ask whether a reasonable person of ordinary prudence managing his own affairs would agree to the arrangement; and the duty to minimally impair the band's legal interest in the land.

Given the Band's vulnerability, the Crown breached its duty to scrutinize the 1969 deal, in particular, by not finding out and telling the Band the cost to Calgary Power of rerouting the line outside the reserve. It was not necessary, however, for the Crown in this case to obtain an independent appraisal of the value of the land, as the information provided by a DIAND official that land values were \$100 per acre were well within the range of land prices at the time.

DIAND officials knew or ought to have known that the one-time lump sum payment in 1969 was not in the Band's best interest. Although certain officials acted conscientiously in trying to improve the terms for the Band, ultimately DIAND approved a transaction that was known to include inadequate compensation. The policy on compensation for expropriations was under review, but, whatever the policy may have been at the time, it did not shield the Crown from its legal duty to First Nations. The Crown made no serious attempt over a period of 15 months to try to get a deal that would provide annual payments to the Band. Meanwhile, the Band Council was not kept informed about its options. In applying the test of the reasonable person managing his own affairs (*Apsassin*), the panel finds that the Crown would not have made this deal for itself, given its awareness that a lump sum payment was inadequate compensation for a long-term interest. Instead, the Crown acquiesced to the commercial interests of Calgary Power and put the Band's interests second. As such, the Crown failed to prevent the exploitation of the Band.

The Crown breached its fiduciary duty to investigate all possible alternatives to a lump sum payment, including taxes or grants in lieu of taxes, and to discuss the options with the Band. The evidence shows that tax assessment information was readily available and that a portion of the transmission line outside the reserve had been subject to taxation since 1968.

The Crown met the duty of minimal impairment to the Band's legal interest in its reserve lands by inserting a taxation clause in the 1969 agreement, even though the Band was prohibited by the *Indian Act* from passing taxation bylaws. However, the Crown breached a continuing fiduciary duty to advise the Band that its agreement contained a taxation authority and either to help the Band implement it or to collect the tax equivalencies on its behalf.

**RECOMMENDATION**

That the Alexis First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Norberg v. Wynrib* (1992), 92 DLR (4th) 449 (SCC); *Morrison v. Coast Finance Ltd.* (1965), 55 DLR (2d) 710 at 713; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC); *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA); *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 DLR (4th) 385 (SCC); *Semiahmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (FCA).

**Treaties and Statutes Referred To**

Treaty 6, reproduced in Canada, *Indian Treaties and Surrenders*, vol. 2 (Saskatoon: Fifth House Publishers, 1993); *Indian Act*, RSC 1952, as amended by SC 1956, RSC 1927, RSC 1985; *The Water, Gas, Electric and Telephone Companies Act*, RSA 1955, as amended by SA 1956.

**Other Sources Referred To**

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

**COUNSEL, PARTIES, INTERVENORS**

J.N. Slavik, T. Kondro for the Alexis First Nation; C. Vary, K.B. McNeil for the Government of Canada; K.N. Lickers, C. Metallic to the Indian Claims Commission.



# SUMMARY

## **ATHABASCA CHIPEWYAN FIRST NATION W.A.C. BENNETT DAM AND DAMAGE TO INDIAN RESERVE 201 INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran, Commissioner A. Gill

**Treaties** – Treaty 8 (1899); **Treaty Right** – Hunting – Fishing – Trapping; **Treaty Interpretation** – Scope; **Indian Act** – Third Party – Environment; **Fiduciary Duty** – Protection of Land – Third Party – Environment; **Environment**; **Natural Resources Transfer Agreement, 1930**; **Constitution** – Constitution Act, 1982; **Reserve** – Riparian Rights; **Statute** – Lawful Obligation; **Alberta**

### **THE SPECIFIC CLAIM**

In 1991, the Athabasca Chipewyan First Nation advised the Department of Indian Affairs and Northern Development (DIAND) of a proposed specific claim concerning damages to its reserve and livelihood from the drying up of the Peace-Athabasca Delta, a result of the 1960s construction of the W.A.C. Bennett Dam in British Columbia. The parties conducted scientific and legal research on the claim, but it was rejected by Canada in May 1994. The Indian Claims Commission (ICC) provided a mediator but further talks were unsuccessful. The ICC then agreed to conduct an inquiry into the rejected claim. Community sessions were held in October and November 1996, and written submissions were followed by oral arguments in September 1997.

### **BACKGROUND**

The Chipewyan Band, predecessor of the Athabasca Chipewyan First Nation, adhered to Treaty 8 in 1899. They continued their traditional livelihood of hunting, fishing, and trapping near Lake Athabasca, Alberta, and did not request reserve land until 1922 when non-Indian hunters started to encroach on the Band's traditional lands. It took until 1935 for the federal and provincial governments to agree to establish Indian Reserve (IR) 201, 49,600 acres of excellent land for traditional harvesting pursuits.

As early as 1959, Canada was aware of the proposed Bennett Dam and its potential impacts downstream. Construction of the dam began in 1962. At public hearings into the project, an Indian Affairs official opposed it on behalf of a BC band but no Alberta bands. By 1968, the dam was producing hydroelectric power. Various federal departments studied the environmental impacts of the dam in the Peace-Athabasca Delta and the economic impacts on affected bands. Requests by the Prime Minister in 1970 for a joint initiative to study the problem of reduced water flow in the delta were rejected by the BC Premier. Subsequent efforts by the federal, Alberta, and Saskatchewan governments to mitigate the effects of the dam through the construction of weirs were largely unsuccessful.

### **ISSUES**

Did the Crown breach the First Nation's treaty rights by allowing an unreasonable and unjustified interference with its hunting, fishing, and trapping rights on IR 201? Did the Crown have a statutory or fiduciary obligation to the First Nation to have prevented, mitigated, or sought compensation for environmental damages to IR 201 caused by a third party?

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## FINDINGS

The parties agreed that the inquiry would proceed on the assumption that the Bennett Dam had caused damages to IR 201. In order to dispose properly of the arguments, however, the ICC was required to make findings regarding the impact of the dam on IR 201. Based on the available evidence, the ICC concluded that the Band sustained significant environmental damage from the construction and operation of the dam.

The federal Crown undertook to protect the Band's treaty rights and its exclusive use, occupation, and enjoyment of IR 201. The Crown's discretion and power to do so stems from the *Royal Proclamation of 1763*, section 91(24) of the *Constitution Act, 1867*, and the *Indian Act*. The Crown, in its negotiation of Treaty 8 and the allocation of reserve land to the Band, also specifically undertook to protect the reserve's natural resources for the Band's exclusive use and the Indian way of life, based on hunting, trapping, and fishing. The Band adhered to Treaty 8 in order to have those rights protected and it selected IR 201 because of its abundant wildlife. Government officials recognized that this land had no other commercial value.

No reasonable interpretation of Treaty 8 could permit the Crown to destroy the Band's ability to exercise its treaty harvesting rights, destroy its economy, or allow the substantial interference with its treaty rights on reserve land. The Crown was not obligated to take positive steps to protect the Band from even the slightest encroachment by a third party, but, in this instance, the results were extreme hardship and economic loss. The dam's impact substantially interfered with the exercise of the Band's treaty rights – rights that were not extinguished and are now protected by section 35 of the *Constitution Act, 1982*.

The federal Crown could have prevented the ecological destruction of those lands. The Crown had significant power and discretion to exercise its constitutional jurisdiction over navigation, conservation of fish and migratory birds, riparian rights, and federal property, including national parks and Indian lands. The Crown had an affirmative duty to exercise its regulatory authority under the *Navigable Waters Protection Act*.

The Crown also had a fiduciary duty arising from the treaty and the *Indian Act* to protect and preserve the treaty rights, the reserve land base, and the legal and economic interests of the Band. The Band was peculiarly vulnerable to the Crown's power and discretion with respect to the Bennett Dam project. The Crown knew of the proposal but did not inform the Band and allow it to react. The Band only learned about the dam when the delta began to dry out and the muskrat declined. The Crown knew or ought to have known of the impact the dam would have on the way of life of the Band, and should have disclosed this information. The Crown, not the Band, had the knowledge, resources, and influence to prevent, mitigate, or seek compensation for the damages.

## RECOMMENDATION

That the Athabasca Chipewyan First Nation's claim be accepted for negotiation under Canada's Specific Claims Policy.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Quebec (A.-G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA); *Guerin v. R.*, [1984] 2 SCR 335; *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 [sub nom. *Apsassin*]; *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Van Der Peet*, [1996] 2 SCR 507; *Frame v. Smith*, [1987] 2 SCR 99; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 SCR 574; *Hodgkinson v. Simms*, [1994] 3 SCR 377; *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 (SCC); *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA); *Delgamuukw v. British Columbia* (1997), SCC File No. 23799 [unreported]; *R. v. Badger* (1996), 133 DLR (4th) 324 (SCC); *R. v. Horseman*, [1990] 1 SCR 901; *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (CA); *Friends of the Oldman River Society v. Canada* (1992), 88 DLR (4th) 1 (SCC); *Province of Bombay v. City of Bombay*, [1947] AC 58; *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302.

**ICC Reports Referred To**

*Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3; *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

**Treaties and Statutes Referred To**

*Royal Proclamation of 1763*, RSC 1970, App. I; *Treaty No. 8, Made June, 1899 and Adhesions, Reports, Etc.* (Ottawa: Queen's Printer, 1966); *Constitution Act, 1867*, s. 91(24); *Navigable Waters Protection Act*, RSC 1952, as amended by SC 1956; *Indian Act* (various); *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2)*.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994) 1 ICCP 171; Northern Rivers Basin Study Board, *Northern Rivers Basin Study: Report to the Ministers, 1996* (Edmonton: Nautilus Publications, 1996); Jeffrey E. Green, "A Preliminary Assessment of the Effects of the W.A.C. Bennett Dam on the Athabasca River Delta and the Athabasca Chipewyan Band," Vancouver: The Delta Environmental Management Group Ltd., 1992; W.A. Fuller and G.H. La Roi, *Historical Review of Biological Resources of the Peace-Athabasca Delta* (Edmonton: University of Alberta, Water Resources Centre, 1971); J. Pollock, "Early Cultures of the Clearwater River Area," Alberta Culture, Historical Resources Division, Archaeological Survey of Alberta, *Occasional Paper #6* (1978); G.H. Blanchet, "Emporium of the North," *The Beaver*, outfit 276 (March 1946); Olive P. Dickason, *Canada's First Nations, A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992); Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa, DIAND, 1986); René Fumoleau, *As Long as This Land Shall Last* (Toronto: McClelland and Stewart, 1975); Earl K. Pollon and Shirlee Smith Matheson, *This Was Our Valley* (Calgary: Detselig Enterprises Ltd, 1989); Patricia A. McCormack, "How the (North) West Was Won: Development and Underdevelopment in the Fort Chipewyan Region," unpublished PhD thesis, University of Alberta, Edmonton, 1984; Michael Harvey, Lyndhurst Environment Management, Sherwood Park, Alberta, *Impacts of Hydro Projects on Indian Lands in Western Canada: Indian Strategies*, prepared for Resource Development Impacts Directorate, Indian and Northern Affairs Canada, September 30, 1984; Richard Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Law Library, 1990).

**COUNSEL, PARTIES, INTERVENORS**

J. Slavik, K.E. Buss for the Athabasca Chipewyan First Nation; F. Daigle for the Government of Canada; R.S. Maurice, R.D. House to the Indian Claims Commission.

**CANADA'S RESPONSE**

In April 2001, the Minister of Indian Affairs rejected the recommendation of the ICC: see (2001) 14 ICCP 279.



# SUMMARY

## **ATHABASCA DENEULINE (FOND DU LAC, BLACK LAKE, AND HATCHET LAKE FIRST NATIONS) TREATY HARVESTING RIGHTS INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3.

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

**Panel:** Chief Commissioner H.S. LaForme, Commissioner C.T. Corcoran, Commissioner C. Dutcheshen

**Treaties** – Treaty 8 (1899) – Treaty 10 (1906); **Treaty Interpretation** – Scope; **Treaty Right** –Harvesting; **Mandate of Indian Claims Commission** – Declaration of Rights; **Compensation** –Damages; **Specific Claims Policy** – Outstanding Business – Lawful Obligation – Comprehensive Claim; **Administrative Referral**; **Saskatchewan**; **Nunavut** – Nunavut Land Claims Agreement

### **THE SPECIFIC CLAIM**

In January 1993, the Athabasca Denesuliné First Nations submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that the Athabasca Denesuliné have treaty rights to hunt, fish, and trap north of the 60th parallel. In 1991, the Government of Canada rejected the specific claim. In January 1993, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim and ruled that it had the jurisdiction to do so (see Appendix A of the report or ICC, *Athabasca Denesuliné (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry – Interim Ruling* (Ottawa, May 1993), reported (2003) 16 ICCP 3). Two community sessions were held in May 1993, and the oral hearing, based on written submissions, took place in September 1993.

### **BACKGROUND**

The claimants Fond du Lac and Black Lake First Nations are descendants of Maurice's Band, which signed an adhesion to Treaty 8 in 1899. The claimant Hatchet Lake First Nation signed an adhesion to Treaty 10 in 1907. The Athabasca Denesuliné were apprehensive about entering into the treaties for fear that their traditional way of life – hunting, fishing, trapping – would be jeopardized. To counter these concerns, the Treaty Commissioners gave oral assurances that they would be “as free to hunt and fish after the Treaty as if they had never entered into it,” and that “the treaty would not lead to any forced interference with their mode of life.” The written texts of Treaties 8 and 10, both of which contain similar language, included an extinguishment clause requiring that the claimants surrender all their rights, titles, and privileges to the lands included in the treaty areas and to “all other lands wherever situated,” including the Northwest Territories (NWT). The treaties also preserved the right of the claimants to pursue their harvesting activities “throughout the tract surrendered as heretofore described,” subject to certain qualifications. Based on anthropological evidence and Elders' testimony, the parties agreed that the Athabasca Denesuliné used and occupied the traditional lands north of the 60° parallel from time immemorial, and continue to use those lands today.

In 1927, under new regulations, the Athabasca Denesuliné were granted permission to hunt and trap in the NWT without having to pay a non-resident game licence. In 1951, their traplines north of the 60th parallel were registered. The claimants continued to be recognized by Canada as occupants and users of the traditional lands north of 60° until 1989, when Canada took the position that the Athabasca Denesuliné's harvesting rights in the NWT (outside the Treaty 8 boundary) had been extinguished by the treaties. The 1993 Nunavut Land Claims Agreement, defining the territory of Nunavut and settling Inuit land claims, contains a provision dealing with the overlapping claims of other Aboriginal peoples.

**ISSUES**

Does the geographical scope of Treaties 8 and 10 extend north of the 60th parallel? If not, do the claimants have treaty harvesting rights beyond the territory as described in Treaties 8 and 10? If yes to the second question, has Canada breached its lawful obligation to the claimants by failing to recognize that they have treaty harvesting rights north of the 60th parallel?

**FINDINGS**

The ICC is not bound by the principles of treaty interpretation developed by the courts. Guideline 6 of the Specific Claims Policy provides that all relevant historical evidence will be considered, not only evidence that would be admissible in a court. Treaties 8 and 10 are ambiguous in describing the geographic boundaries pertaining to the harvesting rights' clause; therefore, the extrinsic evidence of the oral assurances at the time of treaty negotiations is admissible to show the parties' intentions. The evidence demonstrates that Canada knew that the claimants regularly occupied and harvested north of the 60th parallel. Canada also admits that the claimants sought, and believe they had received, promises from Canada's officials that the traditional way of life of the claimants would be protected by the treaties. Canada's intention was to acquire through treaties specific tracts of land for settlement, mining, and forestry purposes. This land did not include land north of 60° outside the treaty area. Thus, there was no intention by the parties to include the Athabasca Denesuliné's traditional lands north of 60° in the boundaries of the treaties. These boundaries should not be extended northward.

The preferred interpretation of Treaties 8 and 10 is that the reference to preserving the claimants' harvesting rights in the "tract surrendered and heretofore described" applies to the land surrendered within the metes-and-bounds description of the treaty areas *and* to "all other lands wherever situated." Thus, the claimants continue to have treaty harvesting rights in their traditional lands north of 60° outside the treaty areas. The conduct of the parties before and after the signing of the treaties is consistent with this interpretation.

For a claim to proceed under the Specific Claims Policy, Canada must be shown to have an outstanding lawful obligation to the claimant. Here, Canada has an outstanding obligation to recognize the treaty harvesting rights of the claimants. The claimants are not seeking declaratory relief, nor would the ICC, not being a court, have the jurisdiction to grant such remedy. The proper test is that the claim must show some loss or damage capable of being negotiated under the Policy. Here, the only substantiated complaint is that Canada refuses to recognize their treaty harvesting rights. The Specific Claims Policy is unable, therefore, to deal with this claim because there appears to be no loss or damage capable of being negotiated under the Policy.

**RECOMMENDATIONS**

The parties should remain mindful of the spirit and intent of the [Specific Claims] Policy and process, which is to encourage and support the fair negotiation of outstanding claims. This is best done without the application of technical court rules and procedures.

*Outstanding Business* does not strictly allow for the negotiation of this claim. However, other processes for negotiation of similar issues have been established by Canada, one of which is described as "Administrative Referral." As soon as possible, the parties should commence negotiation of the claimants' grievance pursuant to that process.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Hamlet of Baker Lake v. Minister of Indian Affairs*, [1979] 3 CNLR 17 (Fed. C.A); *R. v. Sparrow*, [1990] 1 SCR 1075; *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570.

**ICC Reports Referred To**

*Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3.

### **Treaties and Statutes Referred To**

*Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (1899; repr. Ottawa: Queen's Printer, 1966); *Treaty No. 10 and Reports of Commissioners* (1907; repr. Ottawa: Queen's Printer, 1966); *Constitution Act, 1982*; *Nunavut Land Claims Agreement (Tungavik Federation of Nunavut Agreement)*.

### **Other Sources Referred To**

Gabriel Breynat, *Cinquante ans au pays des neiges: I – Chez les Mangeurs de Caribous* (Montreal, 1945); DIAND, *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: Minister of Supply and Services, 1982); *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, 1993); James G.E. Smith, "Chipewyan," in *Subarctic*, June Helm, vol. ed., vol. 6 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1981); George Simpson, *Journal of Occurrences in the Athabasca Department, 1820 and 1821, and Report*, ed. E.E. Rich, Hudson's Bay Record Society Publications, 1 (London: Hudson's Bay Record Society, 1938); *Missions de la Congrégation des Missionnaires Oblats de Marie-Immaculée*, December 1870, p. 25; Rene Fumoleau, *As Long as This Land Shall Last* (Toronto: McClelland & Stewart, 1975); *Missions de la Congrégation des Missionnaires Oblats*, No. 198, June 1912; *Missions de la Congrégation des Missionnaires Oblats de Marie Immaculée*, Tome Sixième (Paris, 1867); J.W. Tyrrell, *Across the Sub-Arctic of Canada, A Journey of 3,200 Miles by Canoe and Snowshoe through the Barren Lands* (London: T. Fisher Unwin, 1898); Richard Daniel, "The Spirit and Terms of Treaty Eight," in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Montreal: Institute for Research on Public Policy, 1979).

### **COUNSEL, PARTIES, INTERVENORS**

D. Knoll, D. Gerecke for the Athabasca Denesu—iné First Nations; R. Winogron, F. Daigle for the Government of Canada; R.F. Reid, QC, W. Henderson, K. Fullerton, R.S. Maurice to the Indian Claims Commission.

### **CANADA'S RESPONSE**

In August 1994, the Minister of Indian Affairs and Northern Development rejected the ICC's findings that the claimants have treaty harvesting rights in the NWT outside their treaty areas and the recommendation that Canada address this claim through the process of "Administrative Referral." The Minister stated that the Athabasca Denesu—iné could nevertheless continue these traditional harvesting activities and that they were now safeguarded under the Nunavut Land Claims Agreement. The Minister referred to meetings between his Parliamentary Secretary and all interested Aboriginal parties to try to work out practical solutions. The ICC subsequently issued a Special Report in 1995, which reproduces this letter as Appendix B: see Indian Claims Commission, *Athabasca Denesu—iné (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177.



# SUMMARY

## **ATHABASCA DENESULINE (FOND DU LAC, BLACK LAKE, AND HATCHET LAKE FIRST NATIONS) TREATY HARVESTING RIGHTS SPECIAL REPORT Saskatchewan**

The report may be cited as Indian Claims Commission, Athabasca Denesuline (Fond du Lac, *Black Lake, and Hatchet Lake First Nations*): *Treaty Harvesting Rights Special Report* (Ottawa, November 1995), reported (1996) 4 ICCP 177.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commission Co-Chair P.E.J. Prentice, QC

**Treaties** – Treaty 8 (1899) – Treaty 10 (1906); **Treaty Right** – Harvesting; **Treaty Interpretation** – Extinguishment – Outside Promises; **Aboriginal Title** – Extinguishment; **Constitution** – Constitution Act, 1982; **Saskatchewan**; **Nunavut** – Nunavut Land Claims Agreement

### **THE SPECIFIC CLAIM**

In a previous inquiry by the Indian Claims Commission (ICC) into the specific claim of the Athabasca Denesuliné concluded in December 1993, the ICC concluded that the claimants have treaty harvesting rights in their traditional lands north of the 60° parallel. The ICC found, however, that, although Canada has an outstanding obligation to recognize those treaty harvesting rights, the claimants were unable to show any loss or damages capable of being negotiated under the Specific Claims Policy. Instead, the ICC recommended that the parties commence negotiations of the claimants' grievance pursuant to a process outside the policy known as "Administrative Referral": see ICC, *Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3.

The Minister of Indian Affairs and Northern Development provided a formal response to the report on August 5, 1994, stating that although the traditional harvesting activities of the Athabasca Denesuliné were protected under Article 40 of the Nunavut Agreement, the Minister saw "nothing in the Commission's report which would make the Government of Canada change its view that the claimant bands do not have, under treaties 8 and 10, treaty rights in the Nunavut Settlement Area." Despite Canada's position, the Minister agreed to appoint his Parliamentary Secretary to hold discussions with the Athabasca Denesuliné and the Inuit on future harvesting activities in the Keewatin district of Nunavut. The Minister's letter is reproduced as Appendix B to this report.

The talks started but, in July 1994, the Keewatin Inuit Association withdrew from discussions, stating that they were unwilling to enter into an overlap agreement or co-management arrangement with the Denesuliné unless Canada or the courts formally recognized that the Denesuliné have existing treaty rights in the Nunavut Settlement Area. The Athabasca Denesuliné then asked the ICC to help resolve this impasse.

### **FINDINGS**

By way of a special report, the ICC provided further explanation and analysis of its findings that the Athabasca Denesuliné have treaty harvesting rights in the area in question.

The contemporaneous statements made by the parties during the treaty negotiations provide clear evidence that the parties did not intend to extinguish the Denesuliné's harvesting rights in their traditional lands. The Denesuliné, had they known that the blanket extinguishment clause meant that they were surrendering their harvesting rights north of 60°, would not have signed the treaty.

It was necessary to consider oral assurances made by the Treaty Commissioners during the negotiations and subsequent conduct of the parties, as well as the broad historical evidence of the treaties without regard to technical rules of

admissibility. The treaty is not clear whether the clause guaranteeing harvesting rights applied only to those lands contained within the metes-and-bounds description or whether it also applied to all land given up by the Denesułiné, including their traditional territory outside the treaty boundaries in the Northwest Territories (NWT).

The parties did not intend to extinguish the harvesting rights of the Denesułiné north of 60° when Treaties 8 and 10 were signed. Such an interpretation is not consistent with what Canada's representatives told the Denesułiné and would lead to an absurd result, that the Denesułiné would have knowingly undermined their very survival by giving up the right to hunt caribou in the barrens.

Even in cases where the treaties are not ambiguous and Canada's interpretation of the written terms supports its argument, it would be unconscionable for Canada as a fiduciary to rely upon the written terms when oral assurances to the contrary have been made to the Indians. During the Treaty 8 negotiations, Canada's representatives assured the Denesułiné that they would be free to hunt and fish as though they never entered into the treaty.

Although Article 40 of the Nunavut Agreement may provide some protection to the Denesułiné, the harvesting rights granted under the Agreement are not on the same legal footing as existing Aboriginal or treaty rights under section 35(1) of the *Constitution Act, 1982*. The harvesting activities granted under Article 40 could be unilaterally extinguished by an Act of Parliament or by the parties to the Nunavut Agreement.

Formal recognition of treaty rights in the Nunavut area would not be counter to the terms of the Nunavut Agreement signed with the Inuit because Article 40 contemplates that other First Nations may have pre-existing treaty or Aboriginal rights in the same area. Therefore, if Canada recognizes the existence of Denesułiné treaty rights in the NWT, the Inuit have stated that they are prepared to enter into negotiations with the Denesułiné to provide for the joint ownership of lands, joint participation in wildlife management, and other initiatives.

### **RECOMMENDATION**

We recommend that the Ministers of Indian Affairs and Justice formally recognize that the Athabasca Denesułiné have unextinguished rights to hunt, fish, and trap throughout their traditional territories pursuant to Treaties 8 and 10. In the alternative, if Canada is not prepared to recognize the existence of Denesułiné treaty rights north of 60°, we would recommend that Canada provide litigation funding to the Denesułiné to facilitate a resolution of the issue in the Federal Court.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*Horse v. R.*, [1988] 1 SCR 187; *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (Ont. CA); *R. v. Sioui*, [1990] 1 SCR 1068; *Nowegijick v. The Queen* [1983], 1 SCR 29; *Guerin v. R.*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075.

### **ICC Reports Referred To**

ICC, *Athabasca Denesuline (Fond du Lac, Black Lake, and Hatchet Lake First Nations): Treaty Harvesting Rights Inquiry* (Ottawa, December 1993), reported (1995) 3 ICCP 3.

### **Treaties and Statutes Referred To**

Treaty 8; Treaty 10; *Constitution Act, 1982*, RSC 1985; *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Nunavut Agreement).

### **Canada's Response**

By letter dated January 17, 1996, the Minister of Indian Affairs and Northern Development advised the ICC that its special report on treaty harvesting rights of the Athabasca Denesułiné would be useful in the review of the claim that the Department of Justice agreed to undertake: see (1996) 4 ICCP 203.

## Summary

### **BETSIAMITES BAND HIGHWAY 138 AND RIVIÈRE BETSIAMITES BRIDGE INQUIRIES Quebec**

The report may be cited as Indian Claims Commission, *Betsiamites Band: Highway 138 and Rivière Betsiamites Bridge Inquiries* (Ottawa, March 2005).

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

**Panel:** Commissioner S.G. Purdy (Chair), Commissioner A.C. Holman

**Right of Way – Road – Bridge – Surrender – Expropriation; Indian Act – Surrender – Expropriation; Band – Trust Fund;  
Quebec**

#### **THE SPECIFIC CLAIM**

The Betsiamites Band submitted two specific claims to the Department of Indian Affairs and Northern Development (DIAND) in May 1995, alleging that reserve lands taken for the purpose of a provincial highway and bridge were never surrendered to Canada and transferred to the Province of Quebec, or expropriated with the consent of the Governor in Council. In April 1999, DIAND rejected the claims, whereupon the Band requested that the Indian Claims Commission (ICC) conduct inquiries into the two claims: the first relating to the construction of Highway 138 (formerly Highway 15) across the reserve; and the second relating to the bridge over the Rivière Betsiamites on the reserve, built to accommodate the highway. Having accepted the claims for inquiry in 2000, the ICC conducted a community session in June 2001, and a hearing in May 2002 to receive the evidence of a former employee of DIAND. The ICC also ruled in August 2002 that 83 documents tendered by Canada would be admitted into evidence as relevant to determining whether English only was used in the drafting of band documents: see Appendix A to the report. Prior to completing the ICC inquiry, the Minister of Indian Affairs, in January 2004, accepted the two specific claims for negotiation.

#### **BACKGROUND**

In 1924, the Betsiamites Band passed a Band Council Resolution (BCR) permitting “the Provincial Government of Quebec to construct a colonisation road across [its] Reserve at Bersimis” and asking “the Department of Indian Affairs to make such arrangements in connection with the granting of right-of-way of such road as may be best in [its] interests.” In 1928, DIAND assumed full financial responsibility for construction, which began without the right of way having been granted to the Quebec government. Lack of funds during the Depression years contributed to delays in completing the highway, but in 1932, the Indian Agent recommended that construction resume as a means of providing work to the Band. DIAND sought band approval to use band funds to help finance the roadworks on the reserve, and some evidence exists that the Band approved an expenditure of \$2,000 for that purpose. After 1938, the government of Quebec took over full responsibility for completing the highway on the reserve. When the highway was finally completed in 1942, title to the reserve land taken for the road still remained with the federal government.

The second specific claim relates to a proposal in 1954 to replace the ferry across the Rivière Betsiamites with a bridge to accommodate the increase in traffic on the highway. The proposed location of the bridge required additional reserve land and, with band approval, DIAND gave Quebec permission to build the bridge, which was completed in 1958. From time to time, federal officials informed Quebec of the requirements to take a right of way over the reserve land taken for the highway and the bridge, but the process was never completed.

The community session revealed that, in the 1970s, the band members learned that title to the right of way for the highway had never been transferred to Quebec. Subsequently, the Band took the position that, in any negotiations with the province, it would not surrender the land for the right of way but instead demand compensation for past use of the land an an

annual lease fee for future use. After attempts to negotiate a settlement with Quebec failed, the Band filed its specific claims with DIAND in 1995.

### **ISSUES**

Did Canada breach its lawful obligations with respect to Highway 15 (now Highway 138) within the boundaries of the Betsiamites Reserve? Did Canada breach its lawful obligations with respect to the bridge over the Rivière Betsiamites and its connecting road? Did Canada breach its lawful obligations by withdrawing funds held in trust for the Betsiamites Band to pay for roads within the boundaries of the Betsiamites Reserve between 1928 and 1939?

### **OUTCOME**

The ICC made no findings. Prior to the completion of the inquiries, the two specific claims were accepted for negotiation by Canada in January 2004.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Treaties and Statutes Referred To**

*An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, SProvc 1851 (14–15 Vict.); *Indian Act*, RSC 1927, RSC 1952.

### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85; Claude Gélinas, *Entre l'assommoir et le godendart: Les Atikamekw et la conquête du Moyen-Nord québécois, 1870–1940* (Sillery: Septentrion, 2003).

### **COUNSEL, PARTIES, INTERVENORS**

R. Mainville for the Betsiamites Band; C. Vary, S. Picard for the Government of Canada; J.B. Edmond to the Indian Claims Commission.

# SUMMARY

## **BIGSTONE CREE NATION TREATY LAND ENTITLEMENT INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Bigstone Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 2000), reported (2000) 12 ICCP 343.

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

**Panel:** Commission Co-Chair D.J. Bellegarde; Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 8 (1899); **Treaty Land Entitlement** – Date of First Survey – Policy; **Fiduciary Duty** – Treaty Land Entitlement; **Alberta**

### **THE SPECIFIC CLAIM**

In July 1989, the Bigstone Cree Nation filed a treaty land entitlement (TLE) claim with the Department of Indian Affairs and Northern Development (DIAND) under the Specific Claims Policy. As the result of concerns raised by the Department of Justice about the validity of the claim, the First Nation and DIAND prepared a joint submission to the Department of Justice in June 1994. The claim was ultimately rejected for negotiation in March 1996. In April 1996, the Bigstone Cree Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim. The ICC conducted three community sessions in October 1996, July 1997, and December 1997. Prior to the completion of the inquiry, Canada decided to accept the claim.

### **BACKGROUND**

In the 19th century, the Bigstone Cree Nation's population was diffused over a large area of northern Alberta, with numerous hunting groups living apart from one another as separate entities for parts of the year. At other times, they congregated in common areas to hunt and fish. Membership among hunting and regional bands was flexible. For this reason, numerous membership adhesions were made to Treaty 8 between 1899 and 1941.

In 1913, the Department of Indian Affairs authorized I.J. Steele to perform a land survey for the Bigstone Cree reserve; 37,352 acres were allotted to satisfy the land entitlement of 291 persons, then determined to be the total population of the Bigstone Cree Nation. By 1925, a request was made on behalf of the Bigstone Cree Nation to Indian Affairs for more land at Wabasca Indian Reserve (IR) 166. The department determined that 109 persons had joined the Bigstone Cree Nation by marriage or adhesion between 1913 and 1925.

Indian Affairs concluded in 1931 that a shortfall of 4,480 acres of land was owed the Bigstone Cree from the date of first survey in 1913, and that additional reserve land for the 213 persons who had joined the First Nation since 1913 was appropriate. The amount of additional lands to which the First Nation was entitled totalled 31,744 acres. In 1937, the Surveyor General suggested that the Bigstone Cree Nation was entitled to additional reserve land. However, no action was taken, and in 1973 the Minister of Indian Affairs suggested that there was no record of a commitment to provide the entitlement.

In 1942, the Department of Indian Affairs sent Malcolm McCrimmon, chief clerk of the Reserves and Trust sections, to accompany the Indian Agent to the reserve to investigate, and act upon, the 1941 admission of eight men and their children at Wabasca. The eight families were expelled as "half-breeds," and McCrimmon removed a further 256 persons from the Bigstone paylists as "non-Indians." Following an outcry from the First Nation, Justice W.A. MacDonald of the Supreme Court of Alberta conducted an inquiry into the expulsions and recommended in August 1944 that 143 persons be reinstated. Of those 143, the Indian Affairs Branch reinstated 119.

### **ISSUES**

What should be considered as the date or dates of first survey? What categories of individuals are entitled to be counted for treaty land entitlement purposes? Does Canada owe additional land to the First Nation? Has Canada breached any fiduciary, legal, equitable, or other duties to the First Nation in providing their land entitlement under Treaty 8? In particular, have these breaches, if any, been a result of arguments or facts raised in the claimant's Supplementary Brief submitted to the Department of Justice in December 1995?

### **OUTCOME**

In October 1998, the Bigstone Cree Nation was informed by the Minister of Indian Affairs and Northern Development that its TLE claim had been accepted for negotiation. This acceptance was a result of Canada's new TLE policy approved in April 1998: see DIAND, News Release, "Canada Broadens Approach to Historic Treaty Land Entitlements" (April 30, 1998), reprinted as Appendix A to the report. Canada's change to its TLE policy was in part the result of the ICC's report on the TLE claim of the Fort McKay First Nation.

Following Canada's acceptance of the claim, the ICC duly suspended its inquiry.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **ICC Reports Referred To**

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

#### **Treaties and Statutes Referred To**

*Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, etc.*, DIAND Publication QS-0576-EE-A-16 (1899; repr. Ottawa: Queen's Printer, 1966); *Indian Act*, SC 1985.

#### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Patricia Sawchuk and Jarvis Gray, *The Isolated Communities of Northern Alberta* (Edmonton: Métis Association of Alberta, 1980).

#### **COUNSEL, PARTIES, INTERVENORS**

W.S. Grodinsky for the Bigstone Cree Nation; P. Robinson for the Government of Canada; D.E. Osborn, QC, K.N. Lickers to the Indian Claims Commission.

# SUMMARY

## **BLOOD TRIBE / KAINAIWA 1889 AKERS SURRENDER MEDIATION Alberta**

The report may be cited as Indian Claim Commission, *Blood Tribe / Kainaiwa: 1889 Akers Surrender Mediation* (Ottawa, August 2005).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 7 (1877); **Treaty Amendment; Reserve** – Surrender – Third Party – Letters Patent – Compensation; **Fiduciary Duty** – Post-surrender – Minerals; **Treaty Right** – Minerals; **Mandate of Indian Claims Commission** – Mediation; **Alberta**

### **THE SPECIFIC CLAIM**

In April 1995, the Blood Tribe submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the 1889 Akers surrender was invalid and that no compensation was paid for the land that was taken. In December 1995, Canada agreed to negotiate the portion of the claim relating to lack of compensation, and those negotiations led to a settlement in March 1997. In June 1997, the Blood Tribe asked the Indian Claims Commission (ICC) to conduct an inquiry into the validity of the surrender. The ICC agreed, and, in the process of conducting its inquiry, DIAND reviewed the claim based on new case law, oral testimony gathered during the ICC's community sessions, and written submissions. As a result, in April 1998, the Minister accepted the claim for negotiation. Canada and the First Nation requested, and Canada agreed, that the ICC facilitate the negotiation process.

### **BACKGROUND**

The background to this mediation is contained in the ICC's inquiry report, found at Indian Claim Commission, *Blood Tribe / Kainaiwa: 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3.

### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

### **OUTCOME**

In November 2003, the Blood Tribe / Kainaiwa ratified the proposed settlement of \$3.55 million in compensation

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



# SUMMARY

## **BLOOD TRIBE / KAINAIWA 1889 AKERS SURRENDER INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Blood Tribe / Kainaiwa: 1889 Akers Surrender Inquiry* (Ottawa, June 1999), reported (2000) 12 ICCP 3.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commission Co-Chair D.J. Bellegarde, Commissioner C.T. Corcoran

**Treaties** – Treaty 7 (1877); **Treaty Amendment**; **Reserve** – Surrender – Third Party – Letters Patent – Compensation; **Fiduciary Duty** – Post-surrender – Minerals; **Treaty Right** – Minerals; **Alberta**

### **THE SPECIFIC CLAIM**

In April 1995, the Blood Tribe / Kainaiwa submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) concerning the Akers reserve land surrender of 440 acres on September 2, 1889. The department acknowledged that a portion of the specific claim, the Akers claim, disclosed an outstanding lawful obligation to the First Nation but rejected the claim's allegation that the surrender was unlawful. In August 1996, the First Nation asked the Indian Claims Commission (ICC) to conduct an inquiry into its rejected claim. The ICC agreed to place the inquiry in abeyance at the request of the First Nation. The inquiry was resumed in March 1997 and, in October 1997, the ICC conducted a community session, after which DIAND requested time to review the claim in light of new case law, in particular, *Apsassin*. The claim was again put into abeyance with agreement of the parties, and was accepted by DIAND in April 1998.

### **BACKGROUND**

In September 1877, the Blood Tribe / Kainaiwa signed Treaty 7. The Blood Tribe was dissatisfied with the location of the reserve set aside for it, and the government agreed to exchange it for a new reserve. A non-Indian squatter named David Akers, however, occupied the eastern area of the new reserve. In July 1883, the Blood Tribe signed an amendment to the treaty that created the new reserve. The description of the new reserve was intended to exclude Akers's holdings; however, a clerical error resulted in part of his land remaining within the reserve's boundaries. In 1885, Akers applied for a grant of 600 acres that he believed were outside the reserve; the Department of the Interior, also unaware of the error, informed him in February 1886 that he would be issued a patent. Shortly thereafter, the error was discovered. In September 1886, another amendment to the treaty was signed by the Blood Tribe to rectify the mistake. Nevertheless, in January 1887, the Chief Surveyor reported that some of the land claimed by Akers was still included in the reserve. This discovery resulted in the Blood Tribe surrendering 440 acres of reserve land on September 2, 1889, to accommodate Akers's claim. There is no evidence that compensation was ever offered or paid.

Akers received a patent for the land in August 1892. By 1893 the land was possessed by his creditors and he died the next year. Although DIAND considered purchasing some of Akers's land and returning it to reserve status, the department learned that it no longer had control over the land and that a homestead grant had been issued to William Arnold. Between 1894 and 1970, DIAND took no action; however, in 1970, it acquired several parcels of land and assigned them as reserve status. There was no further evidence before the ICC for the period between 1970 and 1995.

### **ISSUES**

Was the Akers surrender valid? If valid, did the Crown breach its fiduciary duty to the First Nation to act in its best interests in dealing with the lands and the underlying mining and mineral rights?

## **OUTCOME**

The ICC made no findings since, in the course of the inquiry, DIAND accepted that an outstanding lawful obligation to the First Nation existed and agreed to enter into compensation negotiations with the Blood Tribe. At Appendix A to the report, DIAND's letter of April 15, 1998, states that its decision was "based on the premise that the full and informed consent of the adult, male members of the Tribe was not properly obtained, thereby rendering the September 2, 1889 surrender of 440 acres legally invalid."

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

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

### **ICC Reports Referred To**

*Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

### **Treaties and Statutes Referred To**

*Treaty and Supplementary Treaty No. 7, made 22nd Sept., and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod* (1877; repr. DIAND Publication No. QS-0575-000-EE-A, Ottawa: Queen's Printer, 1966); No. 203, Canada, *Indian Treaties and Surrenders, from 1680 to 1890 in Two Volumes* (1891); facsimile reprint, Saskatoon: Fifth House Publishers, 1993), 2; No. 237, Canada, *Indian Treaties and Surrenders, from 1680 to 1890 in Two Volumes* (1891); facsimile reprint, Saskatoon: Fifth House Publishers, 1993), 2; No. 282, Canada, *Indian Treaties and Surrenders, Volume III: Treaties 281–483* (Ottawa: C.H. Parelee Printer, 1912).

### **Other Sources Referred To**

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

## **COUNSEL, PARTIES, INTERVENORS**

L. Ostertag for the Blood Tribe / Kainaiwa; D.E. Osborn, QC, to the Indian Claims Commission.

## **UPDATE**

The parties negotiated a settlement of the claim with the assistance of the ICC's mediation services. A final settlement was reached in November 2003: see ICC, *Blood Tribe / Kainaiwa: Akers Surrender Mediation* (Ottawa, August 2005).

# SUMMARY

## **BLOOD TRIBE / KAINAIWA BIG CLAIM INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Blood Tribe / Kainaiwa: Big Claim Inquiry* (Ottawa, March 2007).

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

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman

**Treaties** – Treaty 7 (1877); **Reserve** – Surrender – Reserve Creation; **Indian Act** – Surrender; **Treaty Land Entitlement** – Date of First Survey; **Fiduciary Duty** – Treaty Land Entitlement; **Alberta**

### **THE SPECIFIC CLAIM**

The Blood Tribe has long pursued its claim to the Big Claim lands. This claim involves the area between the Kootenay (Waterton) and Belly Rivers, the location of the southern boundary of the reserve, and an outstanding treaty land entitlement. The Blood Tribe submitted its claim in July 1996 under the current Specific Claims Policy of the Department of Indian Affairs and Northern Development (DIAND). Supplemental submissions were made in December 1997. Canada, advising of its preliminary review in November 1999, stated that there was no outstanding lawful obligation with respect to the claim. The Blood Tribe made further submissions in March 2000, and, in November 2001, Canada advised that no outstanding obligation existed with respect to the treaty land entitlement aspect of the claim. All parts of the claim were rejected by Canada in November 2003.

The Blood Tribe formally requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim in January 2003.

### **BACKGROUND**

The Blood Tribe is a member of the Blackfoot Confederacy, which also includes the Siksika, and the Piikani (Peigan) in Alberta, and the Blackfoot Nation of Montana. The traditional territory of the Blackfoot Confederacy is the area between the North Saskatchewan River and the Yellowstone River from the Cypress Hills to the mountains in the west, and the home base of the Blood Tribe is the area between the Kootenay (Waterton) and St Mary Rivers extending to the mountains at the international boundary.

Today, the Blood Tribe's reserve in southern Alberta is the largest Indian reserve in Canada. The reserve's northern boundary is located at the confluence of the St Mary and Belly Rivers at Kipp, and extends southward to an east-west line located 14 miles north of the international boundary. By the time Treaty 7 was concluded on September 22, 1877, the Blood Tribe's way of life in its home base was in transition. The buffalo were becoming extinct; meanwhile, colonization and settlement brought whiskey traders and new diseases to the area. Treaty 7, concluded between Canada and three tribes from the Blackfoot Confederacy, including the Blood Tribe, was intended to open lands to settlers while ensuring reserve lands for Indians. One of the terms of Treaty 7 included a joint reserve set aside for the Blood Tribe, the Blackfoot, and the Sarcee along the Bow River. Following the conclusion of Treaty 7, Red Crow, Chief of the Blood Tribe, broke camp and returned to the Blood Tribe's home base.

The Blood Tribe never moved to the joint reserve at Bow River. Instead, in 1880, an Order in Council was issued, authorizing a surrender of the Blood Tribe's portion of the joint reserve at Bow River, with a view to setting aside a reserve near Fort Kipp. Following a surrender in September 1880, lands were selected for the Blood Tribe reserve.

The Blood Tribe reserve was surveyed twice. In 1882, a 650-square-mile reserve, large enough for 3,250 people and located between the Belly and St Mary Rivers with the southern boundary located nine miles north of the international border,

was surveyed by John Nelson, Dominion Land Surveyor. The second survey, in 1883, moved the southern boundary of the reserve farther north, resulting in a 547.5-square-mile reserve surveyed for approximately 2,737 people.

In 1887, a group of Mormons arrived from Utah and settled near Lee's Creek at what eventually became the town of Cardston. The Mormons were camped within the boundary of the reserve as surveyed in 1882, but outside the boundary as surveyed in 1883. Much confusion surrounded the reserve's southern boundary, with the result that Indian Agent William Pocklington requested a map showing its exact location. Once a map was received, Pocklington met with Red Crow and showed him where the southern boundary was located. He reported that Red Crow was under the impression that his reserve extended between the two rivers back to the mountains. More specifically, Red Crow believed that the southern boundary was much farther south and ended at the mountains at the international border. Pocklington explained that, if that were the case, the Blood Tribe would have more land than it was entitled to. Following this meeting, the confusion over the location of the southern boundary was considered resolved by the Department of Indian Affairs, and in 1888, the Mormons obtained Crown grants to the lands they had camped upon.

In 1889, an Order in Council confirmed the Blood Tribe reserve as surveyed in 1882 and amended in 1883.

### **ISSUES**

As a result of events that occurred between the making of Treaty 7 and 1880, did the Blood Tribe hold the Big Claim lands for its use and benefit? In the alternative, as a result of the events that occurred between the making of Treaty 7 and 1880, what lands did the Blood Tribe hold for its use and benefit? Was there a valid surrender of the Blood Tribe's interest in the Bow River Reserve? Was the reserve established by the Nelson survey work in 1882? If the reserve was established by the Nelson survey work in 1882 then was a surrender required to move the boundary and effectively remove approximately 102.5 square miles of reserve land as a result of the Nelson survey work in 1883? Does the formula described in the written terms of Treaty 7 with respect to the minimum sizes of reserves apply to the creation of the Blood Tribe's reserve? If the formula applies to the creation of the Blood Tribe's reserve then what is the proper date for the basis of the calculation of the treaty land entitlement? On the basis of that date, what then is the Blood Tribe Treaty Land Entitlement?

### **FINDINGS**

The panel concludes that, although a reserve in the Blood Tribe's home base was not formally set aside by Treaty 7, the Crown was nevertheless obligated to set aside a reserve for the Blood Tribe. Historical events show that the Crown and the Blood Tribe agreed that the reserve would at least be located within the Blood Tribe's home base and, presumably, subject to the other terms of Treaty 7, including the treaty land entitlement formula. From the panel's perspective, the Blood Tribe held what could be described as a cognizable interest in its lands in the home base.

With respect to the surrender of the Blood Tribe's interest in the Bow River reserve, the panel finds that a surrender was required. The panel further finds that the statutory requirements of a meeting and a vote on the surrender did not take place, and, as a result, the *Indian Act* was breached. However, the effect of a breach of these statutory requirements is technical in nature and does not render the surrender invalid. In examining whether a breach of fiduciary duty occurred with respect to the surrender, the panel concludes that the Blood Tribe did not abnegate its decision-making power and that the surrender was not an exploitative bargain. No breach of fiduciary duty occurred with respect to the surrender.

As for when the Blood Tribe's reserve was established, the panel concludes that John Nelson's 1882 survey established the reserve. Although the panel is mindful that the 1883 survey is acknowledged as confirming the reserve, the panel states that the circumstances surrounding the 1883 survey warrant careful examination. Because the reserve was established in 1882, a surrender was necessary in 1883 to move the southern boundary. Also, the panel concludes that the Crown failed to fulfill its fiduciary obligations with respect to the movement of the southern boundary.

With respect to the treaty land entitlement (TLE) portion of this inquiry, the panel notes that the parties had agreed to limit their arguments to the date of first survey (DOFS) only and not address the remaining TLE issues. As the panel has concluded that the Blood Tribe's reserve was established in 1882, the panel also concludes that the DOFS is 1882.

### **RECOMMENDATIONS**

Recommendation 1: That the claim for the Big Claim lands constituting the reserve not be accepted. The panel finds that the Blood Tribe reserve would at least be located within the Blood Tribe's home base, subject to the treaty land entitlement formula and the other terms of Treaty 7. Recommendation 2: That the claim that the 1882 Nelson survey established the

Blood Tribe reserve be accepted. The panel finds that the 1882 Nelson survey established the reserve and that a surrender was required to move the southern boundary. Recommendation 3: That the date of first survey for the Blood Tribe be accepted as 1882.

#### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### Cases Referred To

*R. v. Marshall*, [1999] 3 SCR 456; *Cardinal v. R.*, [1982] 1 SCR 508; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Semiabmoo Indian Band v. Canada* (1997), 148 DLR (4th) 523 (Fed. CA); *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245; *Ross River Dena Band v. Canada*, [2002] 2 SCR 816; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

#### ICC Reports Referred To

*Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004); *Kahkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Kahkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3; *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Nak'azdli First Nation: Aht-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *'Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *'Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (Ottawa, March 2006); *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

#### Treaties and Statutes Referred To

*Copy of Treaty and Supplemental Treaty No. 7, Made 22nd Sept., 1877, and 4th Dec., 1877, between Her Majesty the Queen and the Blackfeet and Other Indian Tribes at the Blackfoot Crossing of Bow River and Fort MacLeod* (1877; reprint, Ottawa: Queen's Printer, 1966); Amendment to Treaty 7, June 20, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, June 27, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); Amendment to Treaty 7, July 2, 1883, Canada, *Indian Treaties and Surrenders*, Volume II: *Treaties 140–280* (1891; facsim. reprint, Saskatoon: Fifth House, 1993); *Indian Act*, SC 1876.

#### Other Sources Referred To

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

#### COUNSEL, PARTIES, INTERVENORS

K. MacLeod, E. Creighton, J. Crook, M. Wells for the Blood Tribe / Kainaiwa; D. Faulkner for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.



## SUMMARY

### **BLUEBERRY RIVER FIRST NATION AND DOIG RIVER FIRST NATION HIGHWAY RIGHT OF WAY INDIAN RESERVE 172 INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Blueberry River First Nation and Doig River First Nation: Highway Right of Way Indian Reserve 172 Inquiry* (Ottawa, March 2006).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Chief Commissioner R. Dupuis, C.M. (Chair), Commissioner D.J. Bellegarde, Commissioner J. Dickson-Gilmore

**Treaties** – Treaty 8 (1899); **Right of Way** – Road – Expropriation; **Fiduciary Duty** – Right of Way; **Mandate of Indian Claims Commission** – Constructive Rejection – Delay; **British Columbia**

#### **THE SPECIFIC CLAIM**

On February 13, 1995, the Treaty 8 Tribal Association submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) on behalf of the Blueberry River and Doig River First Nations concerning a highway right of way through the St John Indian Reserve (IR 172) in the Peace River area of northeastern British Columbia. The First Nations claimed the Crown had breached its legal and fiduciary obligations to the Fort St John Indian Band by agreeing to transfer lands within IR 172 to the Province of British Columbia for the purpose of building a road, without paying compensation or notifying the Band of the expropriation.

In 2003, the Indian Claims Commission (ICC) accepted this claim as having been constructively rejected by the Minister. In September 2004, Canada accepted the claim for negotiation. For the purposes of negotiation, Canada recognized that a lawful obligation was owed to the Blueberry River and Doig River First Nations. As a result of this acceptance, the Commission panel declared the inquiry closed on May 31, 2005.

#### **BACKGROUND**

In 1934, British Columbia requested that Canada transfer to it a strip of land passing through IR 172 for the purpose of a highway right of way. The province stated the reserve was not being used by the Fort St John band members, and the right of way was needed for nearby settlers. The province also stated it wished the transfer to be free of charge, since the Indians would benefit from having the improved access and the land would increase in value. Canada transferred 32.11 acres of land to the province in 1934. Canada did not pay compensation to the Band, nor, apparently, did it notify the Band of the expropriation.

#### **OUTCOME**

The specific claim was accepted for negotiation by Canada in September 2004, before the parties had agreed to a joint statement of issues.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

#### **Cases Referred To**

*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*).

**Treaties and Statutes Referred To**

*British Columbia Terms of Union* [16<sup>th</sup> May, 1871]; *Constitution Act, 1867*.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85.

**COUNSEL, PARTIES, INTERVENERS**

M. Vanderkruyk for the Blueberry River First Nation; A. Rana for the Doig River First Nation; P. Robinson for the Government of Canada; J.B. Edmond, K.L. Webb to the Indian Claims Commission.

## SUMMARY

### **CANUPAWAKPA DAKOTA FIRST NATION TURTLE MOUNTAIN SURRENDER INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263.

*This summary is intended for research purposes only.*

*For a complete account of the inquiry, the reader should refer to the published report.*

**Panel:** Commissioner R.J. Augustine, Commissioner D.J. Bellegarde, Commissioner S.G. Purdy

**Reserve** – De Facto Reserve – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** –Pre-surrender; **Mandate of Indian Claims Commission** – Supplementary Mandate; **Culture and Religion** – Burial Site – Spiritual Site; **Manitoba**

#### **THE SPECIFIC CLAIM**

In April 1993, the Canupawakpa Dakota First Nation (formerly Oak Lake Sioux First Nation) submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) on behalf of the descendants of the Turtle Mountain Band, alleging that the vote to surrender Turtle Mountain Indian Reserve (IR) 60 was improperly taken. In January 1995, Canada rejected the First Nation's claim. In May 2000, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim, which the ICC agreed to do. The Sioux Valley Dakota First Nation (formerly Oak River First Nation) was permitted, with the parties' agreement, to participate in the inquiry. Community sessions were conducted at the Sioux Valley reserve in December 2001 and at the Canupawakpa reserve in January 2002. The oral hearing, based on written submissions, began in Winnipeg on October 22, 2002, adjourned by agreement, and concluded on November 15, 2002.

#### **BACKGROUND**

In 1862, Dakota Chief Hdamani and his followers fled hostilities in the United States, relocating to Turtle Mountain in south-western Manitoba. The Dakota had allied with the British in the War of 1812 and claimed a right to live on British soil. Although Canadian authorities considered the Dakota to be American Indians with no land rights in Canada, they agreed in the 1870s to set aside three reserves for them – Birdtail Creek, Oak River, and Oak Lake.

Chief Hdamani's Band refused to move from Turtle Mountain, where the members hunted, fished, trapped, and farmed, in order to live at one of the Dakota reserves. In 1886, after repeated requests, a reserve of 640 acres was surveyed for them at Turtle Mountain. Government officials, however, expressed concern that the reserve was too close to the international border and too far from the Indian Agency and farming instructor. When the Band complained that it had not received food supplies for one year or farming equipment promised to it, DIAND replied that, as the Dakota were refugees, anything done for them was "a matter of grace and not of right." Officials reiterated their wish to have the Dakota relocated to an area where they would receive farming assistance. In 1898, three families moved from Turtle Mountain to Oak Lake reserve, two of them receiving \$40 each from the department to assist them in building new homes. Indian Agent J.A. Markle refused compensation to the third family; in 1913, however, the third family received payment.

The relocation of three families prompted the department to consider again a surrender of the reserve, but it took no action until 1908. Meanwhile, there were rumours and concerns about American Sioux Indians, who often travelled across the border, staying at Turtle Mountain. In 1908, Indian Agent J. Hollies counted only 13 families, comprising 45 people, resident on the reserve. In the same year, four families were accepted into the Oak Lake Band.

On March 11, 1909, Hollies discussed surrender with band members Bogaga and Tetunkanopa, who were in favour, and Chief Hdamani, who was not. All three were over the age of 65 and on the ration list. Bogaga was also blind. The Indian Commissioner wrote two letters to Chief Hdamani, at his request, recommending surrender. Hollies met with them again at the Chief's request but suspended the meeting when he discovered that Tetunkanopa was absent. On August 5, 1909, Hollies

arrived at Turtle Mountain reserve to inform them that a meeting of the Band would be held the next day to consider surrender. At the August 6 meeting, three band members – Bogaga, Tetunkanopa, and his son Charlie – voted in favour, while Chief Hdamani and his grandson Chaske voted against surrender.

On August 9, the surrender papers were signed at Deloraine in the presence of the Chief of Police, and an affidavit certifying band assent was signed by Tetunkanopa and Hollies in the presence of a Justice of the Peace. Although the surrender of the reserve was confirmed by Order in Council in 1909, its actual creation occurred four years later when the Turtle Mountain reserve was withdrawn from the operation of the *Dominion Lands Act*.

### ISSUES

Was Turtle Mountain Indian Reserve a reserve within the meaning of the *Indian Act*? Did the 1909 surrender accord with the provisions of the 1906 *Indian Act*: in particular, was Bogaga entitled to vote; and was there compliance with the requirements for the surrender affidavit? Did Canada owe any fiduciary duties to the Band in the taking of a surrender: in particular, was the Band's understanding adequate; did the Band abnegate its decision-making power to the Crown; did the Crown engage in tainted dealings; or should the Crown have rejected the Band's decision to surrender on the basis that it amounted to an exploitative bargain?

### FINDINGS

After initially taking the position that the Turtle Mountain reserve was not a reserve within the meaning of the *Indian Act*, Canada accepted that "Turtle Mountain No. 60 became a de facto reserve at the latest by 1890 because of its clear demarcation, its treatment by the Crown and its continued use by the Turtle Mountain band. In particular, the Crown treated the tract as a reserve when it obtained the surrender in 1909." Bogaga was an habitual resident of Turtle Mountain on the date of the surrender vote, because it was the place to which he customarily returned with a sufficient degree of continuity to be properly described as settled, despite temporary or casual absences.

The 1906 *Indian Act* required that a band's assent to surrender had to be certified on oath by "some of the chiefs or principal men." Only one principal man, Tetunkanopa, signed the affidavit. The ICC determined that, as a question of interpretation, "some" principal men can mean "one" principal man. Further, given the small number of principal men and Bogaga's blindness, it was reasonable for Agent Hollies to obtain only one signature. Agent Hollies complied with both the technical requirements and their objective, which was to ensure that the surrender was validly assented to by the Band. In any event, the certification requirements of the *Indian Act* are directory, not mandatory. The failure to meet these requirements would not nullify the result of a surrender vote that was otherwise valid.

Canada was not in breach of its fiduciary duty to ensure that the Band adequately understood the surrender and its consequences. In the early years, the Band repeatedly refused to consider surrendering its reserve. Agent Hollies discussed surrender with the principal men on two occasions over a five-month period prior to the surrender meeting in August 1909. He used an interpreter at meetings. The voters understood that they were giving up their rights to IR 60, that they would relocate to other Sioux reserves, and that they would receive the proceeds of sale of IR 60. Their understanding was adequate and Canada conducted itself with the required diligence. There is no evidence to support the assertion that the Band abnegated its decision-making authority to Agent Hollies.

The Crown had a duty to ensure that, while patient in its pursuit and persuasive in its approach, the consequences of surrender were not exploitative and were in the best interests of the Band. Indian Agent Markle's decision to withhold rations to the Band, while questionable, happened 18 years before the surrender vote. Although he offered money for new houses as an inducement to two families to relocate, he did not extend the offer to a third family who also wanted to move. The department did not carry out a systematic depopulation of IR 60; for example, there is no evidence of any relocations between 1898 and 1908, when four families relocated. The events leading up to and including surrender at all times involved the consent of individual members.

The surrender was in the interests of the remaining band members: three of the five eligible voters were elderly and could no longer farm; they would benefit from the proceeds of sale as they were no longer self-sufficient; the population of the reserve had diminished; they would have better services at the other Sioux reserves; and Bogaga and Tetunkanopa were afraid that, if they did not surrender the reserve, Chief Hdamani would dispossess them of their interest.

**SUPPLEMENTARY MANDATE**

The ICC's supplementary mandate, outlined by the Minister of Indian Affairs in 1991, permits the ICC to draw to the government's attention any circumstances in which it considers the outcome to be unfair, even though the circumstances do not give rise to an outstanding lawful obligation. In 1898, the Indian Department approved of widow Kastro's request that two small pieces of burial land on the reserve be preserved. This promise was never kept and the exact location of the sites is now unknown.

**RECOMMENDATION**

That, after consultation with the Canupawakpa Dakota First Nation and the Sioux Valley Dakota First Nation, the Government of Canada acquire an appropriate part of the lands once taken up as Turtle Mountain IR 60, to be suitably designated and recognized for the important ancestral burial ground that it is.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Adderson v. Adderson* (1987), 36 DLR (4th) 631 (Alberta CA); *Canard v. Attorney General of Canada and Rees*, [1972] 5 WWR 678 (Manitoba CA), affirmed by *Canard v. Canada*, [1976] 1 SCR 170; *Blueberry River Indian Band v. Canada* (sub nom. *Apsassin*), [1995] 4 SCR 344; *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654, aff'd (1996) 31 OR (3d) 97 (CA); *Guerin v. The Queen*, [1984] 2 SCR 335.

**ICC Reports Referred To**

*Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Moosomin First Nation: 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004).

**Treaties and Statutes Referred To**

*Indian Act*, SC 1895, SC 1906, RSC 1906; *Loi des sauvages*, SRC 1906.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Gontran Laviolette, *The Sioux Indians in Canada* (Regina: The Marian Press, 1944); Peter Douglas Elias, *The Dakota of the Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988); J.H.C. Morris, ed., *Dicey and Morris on the Conflict of Laws*, 10th ed. (London: Stevens & Sons, 1980), 144–45.

**COUNSEL, PARTIES, INTERVENORS**

P. Forsyth for the Canupawakpa Dakota First Nation; U. Ihsanullah for the Government of Canada; K.N. Lickers, C. Metallic to the Indian Claims Commission.



## SUMMARY

### **CARRY THE KETTLE FIRST NATION CYPRESS HILLS INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner R.J. Augustine, Commissioner C.T. Corcoran

**Treaties** – Treaty 4 (1874); **Treaty Interpretation** – Reserve Clause; **Reserve** – Reserve Creation – De Facto Reserve; **Indian Act** – Reserve; **Royal Prerogative; Mandate of Indian Claims Commission** – Supplementary Mandate; **Culture and Religion** – Historical Site – Spiritual Site; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In 1992, Carry the Kettle First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that a reserve surveyed for the Assiniboine in the Cypress Hills had been wrongfully taken. Canada rejected the claim in December 1993, on the basis that a reserve had not been created legally or de facto. In August 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim. The ICC held two community sessions, in May and October 1997, and heard oral arguments, based on written submissions, in May 1999.

#### **BACKGROUND**

The Cypress Hills were used and occupied by several Indian nations including the Assiniboine. The Carry the Kettle First Nation are descendants of two of the Chiefs and headmen of the Assiniboine Band who adhered to Treaty 4 at Cypress Hills in 1877. Carry the Kettle Elders testified that the Cypress Hills are part of their homeland, to which they have always maintained a spiritual connection. They make an annual pilgrimage to the burial site constructed at Cypress Hills after the 1873 massacre of their ancestors by American wolf hunters, whose horses had been stolen by other Indians.

The Assiniboine Chiefs verbally selected a site for their reserve when they met Indian Commissioner Edgar Dewdney in June 1879. Dewdney visited the site in October and assigned farm instructor John English to start a farm there. In 1880, Surveyor A.P. Patrick surveyed the Assiniboine reserve, totalling 340 square miles, in consultation with the Chiefs. Dewdney observed that the Assiniboine had not yet settled on their “reservations,” but the North-West Mounted Police and others referred to the site as the “Assiniboine Reservation” or “Assiniboine Reserve.” Patrick’s survey reached Ottawa in July 1881, but in the interim the Indian Department decided to relocate the Assiniboine after Commissioner Dewdney, in late 1880, recommended moving them out of the Cypress Hills because of the unsuitable climate for farming. No evidence exists that officials considered compensating the Assiniboine Band for improvements or for the loss of the surveyed land or discussed taking a surrender.

The Assiniboine at Cypress Hills were starving in the winter of 1880–81, unable to subsist by hunting, farming, or selling their labour. Many destitute Indians converged on Fort Walsh looking for relief but, although Assistant Commissioner E.T. Galt wanted them to return to their reserves to get rations, he also acknowledged that it would be a waste of money to survey reserves in the area, because eventually they would have to be relocated. In 1881, Galt directed Inspector T.P. Wadsworth to try to persuade all the Indians to leave Cypress Hills and take reserves to the north; to help achieve this end, the Fort Walsh Indian Agency was closed.

Despite considerable resistance to leaving Cypress Hills, the Assiniboine were relocated in 1882 to a reserve at Indian Head near Fort Qu’Appelle where there existed good soil, hay grounds, wood, water, and the Canadian Pacific Railway a few miles to the north. Nevertheless, the Assiniboine informed officials that they did not like the north, that their friends all lived

in the south, and that their old people were buried there. Many initially returned to Fort Walsh but, by 1883, they again settled at Indian Head. Indian Reserve (IR) 76 was surveyed at Indian Head for the two Assiniboine bands whose descendants make up the Carry the Kettle First Nation. In 1909, an Indian Affairs official, in response to a request for a map of the Assiniboine Reserve in the Cypress Hills, stated that the department had no Indian reserve there.

### **ISSUES**

Was a reserve set apart at Cypress Hills for the ancestors of the Carry the Kettle Band, pursuant to Treaty 4 or the *Indian Act*, or was a de facto reserve created? If a reserve was created, was there a valid surrender or extinguishment of the Band's interest in the reserve? If there was a valid surrender, did the Crown breach any treaty, fiduciary, or other lawful obligation owed by Canada to the Band?

### **FINDINGS**

A reserve at Cypress Hills was not created for the Assiniboine Band on any basis. The requisite elements to the setting aside of reserves under Treaty 4 included consultation and selection, followed by survey, and then by ultimate acceptance by both the First Nation and Canada. The acceptance of the survey could be effected in a formal manner or could be found in the conduct of either party. Here, the First Nation accepted the land surveyed as its reserve. There is no evidence, however, that Canada formally accepted the survey, and Canada's conduct indicates that it would not have accepted Patrick's survey when it reached Ottawa in July 1881 because Canada had already decided to relocate the band from the Cypress Hills.

The *Indian Act* is silent as to the process for creating a reserve, but the absence of specific provisions does not indicate that setting aside reserve land is simply a matter of royal prerogative. The absence of a statutory reserve creation process directs us to the provisions of the treaty. The treaties contemplated the involvement of both parties and a true meeting of minds was fundamental to the selection, surveying, and setting aside of reserves. Here, the Government of Canada was not a party to such consensus. In addition, the evidence does not demonstrate that a de facto reserve was created, as the Crown, by its conduct, cannot be found to have accepted the creation of the reserve for the Assiniboine, nor can a surveyor hired by the government unilaterally create a reserve that the government must accept.

### **SUPPLEMENTARY MANDATE**

Under the ICC's supplementary mandate, the Commission considers the outcome, based on the Specific Claims Policy, in this instance unfair, even though the ICC finds that Canada does not owe an outstanding lawful obligation to the First Nation. The Assiniboine people sought to preserve their connection to the Cypress Hills when reserves were being selected under Treaty 4 and fought the government's attempts to relocate them. Eventually, they succumbed to the pressure, but did so reluctantly and only when faced with starvation.

### **RECOMMENDATIONS**

That the site of the Cypress Hills Massacre be acquired by the Government of Canada and appropriately designated and recognized as the important historical location it is.

That the Government of Canada work together with the Assiniboine people to secure an appropriate site in the Cypress Hills for the cultural and spiritual purposes of this First Nation.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*R. v. Badger*, [1996] 1 SCR 77; *R. v. Marshall*, [1999] 3 SCR 456; *Re Indian Claims* (1895), 25 SCR 434; *Ross River Dena Council Band v. Canada*, [1998] 3 CNLR 284 (YSC); *Ross River Dena Council Band v. Canada* (December 15, 1999), (YCA) [unreported]; *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245; *Canadian Pacific Ltd. v. Paul et al.*, [1988] 2 SCR 654; *Lac La Ronge Band v. Beckman*, [1990] 3 CNLR 10 (Sask. QB).

**ICC Reports Referred To**

*Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Gamblers First Nation: Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3.

**Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Adhesion to Treaty No. 4 between the Assiniboine Band of Indians and Her Majesty the Queen at Fort Walsh* (Ottawa: Queen's Printer, 1966); Treaty 4 (1874), also in John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985); Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971); *Indian Act*, SC 1876.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994) 1 ICCP 171; Barry Potyondi, *In Palliser's Triangle: Living in the Grasslands, 1850–1930* (Saskatoon: Purich Publishing, 1995); articles on Cypress Hills, Assiniboine, North-West Mounted Police, North-West Territories Act, Fort Walsh, Dominion Lands Policy, Railway History, Fort Qu'Appelle, Sir Edgar Dewdney, Dewdney Trail, National Policy, and Indian Head, in *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988); Bill Yenne, *Encyclopedia of North American Tribes: A Comprehensive Study of Tribes from the Abitibi to the Zuni* (New York/Avenel, New Jersey: Crescent Books, 1986); David Reed Miller, "Assiniboine," *Encyclopedia of North American Indians*, ed. Frederick E. Hoxie (Boston/New York: Houghton Mifflin Company, 1996); Thomas R. Ross and Tyrel G. Moore, eds., *A Cultural Geography of North American Indians* (Boulder: Westview Press, 1987); John Laird Farrar, *Trees in Canada* (Markham: Canadian Forest Service/Fitzhenry & Whiteside, 1995); Walter Hildebrandt and Brian Hubner, *The Cypress Hill: The Land and Its People* (Saskatoon: Purich Publishing, 1994); Dan Kennedy, *Recollections of an Assiniboine Chief*, edited and with an introduction by James R. Stevens (Toronto: McClelland & Stewart, 1972); Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971); Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939); Valerius Geist, *Buffalo Nation: History and Legend of the North American Bison* (Saskatoon: Fifth House Ltd., 1996); Canada, *The Canadian Indian* (Ottawa: DIAND, 1990); Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990); *Manual Shewing the System of Survey Adopted for the Public Land of Canada in Manitoba and the North-West Territories, with Instructions to Surveyors, Illustrated by Diagrams* (1871); *General Instructions for the Survey of Indian Reserves, Department of Indian Affairs 1883 Circular*; Richard Bartlett, "The Establishment of Indian Reserves on the Prairies," [1980] 3 CNLR 11.

**COUNSEL, PARTIES, INTERVENORS**

T.J. Waller for the Carry the Kettle First Nation; A.N. Alibhai for the Government of Canada; D.E. Osborn, QC, K.N. Lickers to the Indian Claims Commission.

**CANADA'S RESPONSE**

By letter of January 2001 (undated), the Minister of Indian Affairs and Northern Development acknowledged that Canada would not reconsider its original rejection of the claim. The Minister referred the First Nation to the Minister of Canadian Heritage, if they are interested in a designation of Cypress Hills as a national historic site. Further, the letter points out that the Department of Indian Affairs is assisting the First Nation to re-establish its association with the Cypress Hills through the development of a cultural interpretive program, and that a separate treaty land entitlement settlement has enabled the First Nation to purchase Crown and private land near the Cypress Hills. See (2002) 15 ICCP 373.



## SUMMARY

### **CHIPPEWA TRI-COUNCIL (BEAUSOLEIL, CHIPPEWAS OF GEORGINA ISLAND, AND CHIPPEWAS OF MNJIKANING [RAMA] FIRST NATIONS) COLDWATER-NARROWS RESERVATION SURRENDER INQUIRY Ontario**

The report may be cited as Indian Claims Commission, Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations): Coldwater-Narrows Reservation Surrender Inquiry (Ottawa, March 2003), reported (2004) 17 ICCP 187.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commissioner R.J. Augustine, Commissioner D.J. Bellegarde, Commissioner R. Dupuis

**Treaties** – Coldwater Treaty (1836); **Royal Proclamation of 1763**; **Pre-Confederation Claim** – Surrender; **Reserve** – Surrender – Disposition – Proceeds of Sale; **Fiduciary Duty** – Pre-Surrender – Post-Surrender; **Fraud** – Equitable Fraud; **Ontario**

#### **THE SPECIFIC CLAIM**

In November 1991, the Chippewa Tri-Council submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the Coldwater-Narrows Reservation had never been properly surrendered to the Crown. It was alleged that the 1836 treaty purporting to surrender the land had not been understood by the Chippewas of Lakes Huron and Simcoe, who believed that the treaty would secure their title to the reserve. In April 1996, DIAND rejected the claim as not disclosing an outstanding lawful obligation on the part of the Government of Canada. The Tri-Council then asked the Indian Claims Commission (ICC) to inquire into the rejected claim, and, in August 1996, the ICC agreed to this request. In March 2002, after additional research by the Tri-Council had been reviewed by Canada, and, following eight planning conferences over six years, Canada agreed to accept the claim for negotiation. On July 23, 2002, the Minister of Indian Affairs and Northern Development wrote to the Chiefs of the Chippewa Tri-Council offering to accept the claim for negotiation. As a result, the Commission suspended its inquiry into the claim.

#### **BACKGROUND**

In the late 18th and early 19th centuries, the three bands that today comprise the Chippewa Tri-Council occupied lands along Lake Simcoe and Lake Huron. The Band of Chief Yellowhead or Musquakie, Chief Snake's followers, and Chief Aisance's people lived apart and acted independently, but met seasonally for tribal councils.

In 1829, the Lieutenant Governor authorized the building of an Indian settlement for the Chippewas of Lake Huron and Lake Simcoe to be established at Coldwater. The land comprising the reserve was near lands already occupied by some members of the three bands and totalled some 9,800 acres. It stretched for 14 miles from the Narrows between Lakes Simcoe and Couchiching to Matchedash Bay on Lake Huron, following a traditional portage route. Two villages were planned: Coldwater at the western or Matchedash end of the reserve, where Aisance's band and the Potaganasees agreed to settle, and the Narrows at its eastern end, where Chiefs Yellowhead and Snake agreed to settle.

The Tri-Council communities succeeded as farmers and entrepreneurs despite difficulties, and, as development on the reserve continued, the Bands petitioned the government for greater control, including having their land laid out in 50-acre lots at their own expense, and allowing the bands to manage all operations on the Coldwater-Narrows Reserve, including the schools, mills, and agricultural enterprises. It is not known whether a response was received.

In the meantime, however, because of the encroachment of settlement, many of the Chiefs decided to explore the option of moving to one large settlement. In January 1836, Chief Yellowhead convened a council at the Narrows to consider

this idea. The Chiefs apparently asserted that, should removal to one settlement be recommended by the government, the only acceptable tract was the Indian territory at Saugeen.

The Lieutenant Governor at the time, Sir Francis Bond Head, a proponent of separating Indian settlements from white ones, proposed to relocate the Indians to the Manitoulin Islands and the Saugeen tract on the Bruce Peninsula. On November 26, 1836, at Toronto, Chiefs Yellowhead and Aisance, together with 10 principal men of their bands plus representatives of the Snake Band, signed the Coldwater Treaty, whereby they agreed to surrender their reserve for sale in exchange for the annual interest on one-third of the proceeds of sale. The remaining two-thirds of the proceeds were to be applied to other purposes unrelated to the Chippewas of Coldwater and the Narrows. One-third was to be applied for the “general use of the Indian Tribes of the said Province,” and the remainder “to any purpose (but not for the benefit of the said Indians) as the Lieutenant Governor may think proper to direct.”

A year later, in response to a petition from religious leaders expressing the dissatisfaction felt by the Indians of Upper Canada over recent land surrenders, Bond Head asserted that the bands at Coldwater and the Narrows had been unanimously in favour of the treaty and relocation. The sole surviving report of the bands’ position conflicts with this report. Within one year of the treaty signing, both the First Nations and numerous non-Indians registered their concerns about the uncertainty and confusion caused by the document and its impact on the communities.

The surrender of the Coldwater-Narrows Reserve was allowed to stand, and the Chippewas began to leave their homes, although the new Chief Superintendent of Indian Affairs, S.P. Jarvis, reported that the majority of the Indians did not want to go to Manitoulin Island, but instead wished to settle as near as possible to the old villages of Coldwater and the Narrows. As a result, Chief Yellowhead proposed that approximately 1,000 acres of land on the east side of Lake Simcoe in the Township of Rama be purchased for them. The purchase was authorized by Order in Council in August 1838, and the necessary funds were taken from Chippewa Tri-Council’s annuity account. In 1840, the sale of the Coldwater-Narrows Reserve at eight shillings per acre was approved; however, an 1844 inspection revising the valuation upwards and distinguishing between town lots and lots on the road between Orillia and Coldwater was approved. The road allowances were not sold or patented. The land sales took place between 1838 and 1872, with the bulk of activity occurring in the 1840s and 1850s. The total proceeds collected amounted to \$28,855.06, representing principal and interest on instalments. A small amount (approximately \$156) was collected for improvements. It is not possible to know from the record whether all the money collected was deposited to the credit of the bands.

## **ISSUES**

Was there a surrender of the Coldwater-Narrows Reservation on November 26, 1836? Did the Coldwater Treaty reflect the intentions of the Chippewa Tri-Council? If not, is the surrender invalid? If not, did the Crown breach a fiduciary duty or commit an equitable fraud in accepting the surrender?

Did the Coldwater Treaty represent a surrender that was improvident or exploitative? Did the Coldwater Treaty require the relocation of the Chippewa Tri-Council to lands of their choosing within a reasonable time? Did the Coldwater Treaty require the Crown to sell the land and improvements in a timely fashion and for fair value?

Whether there was a surrender of the Coldwater-Narrows Reservation, did the Crown breach its fiduciary duties to the Chippewa Tri-Council while taking or purporting to take the surrender?

## **OUTCOME**

The claim was accepted for negotiation by Canada on July 23, 2002, prior to the conclusion of the inquiry. As such, the Commission made no findings or recommendations.

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

## **ICC Reports Referred To**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Edward Rogers and D.B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Oxford, 1994); John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter since 1534* (Toronto: University of Toronto Press, 1984).

**COUNSEL, PARTIES, INTERVENORS**

A. Pratt for the Chippewa Tri-Council; L. Klee for the Government of Canada; K.N. Lickers to the Indian Claims Commission.



## SUMMARY

### **CHIPPEWA TRI-COUNCIL (BEAUSOLEIL, CHIPPEWAS OF GEORGINA ISLAND, CHIPPEWAS OF RAMA FIRST NATIONS) COLLINS TREATY INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, Chippewas of Rama First Nations): Collins Treaty Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 31.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner R.J. Augustine

**Pre-Confederation Claim** – Surrender – Compensation; **Treaties** – Collins Treaty (1785) – Treaty 3 (1792) – Williams Treaty (1923); **Treaty Interpretation** – Pre-Confederation Claim – Right of Passage – Compensation; **Reserve** – Surrender; **Ontario**

#### **THE SPECIFIC CLAIM**

The Beausoleil First Nation, Chippewas of Georgina Island First Nation, and Chippewas of Rama First Nation, also known as the Chippewa Tri-Council, submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in June 1986. It alleged that the Deputy Surveyor General and an official of the Indian Department entered into a treaty with the Chippewas in 1785 without the appropriate authority to do so; that a proper surrender of lands included in the treaty never took place; and that compensation was never paid. In June 1993, DIAND advised the First Nations that no outstanding lawful obligation existed. In August 1993, the Chippewa Tri-Council requested that the Indian Claims Commission (ICC) review Canada's rejection of the Collins Treaty claim. In February 1994 the ICC agreed to conduct an inquiry. Between 1994 and 1997, the ICC conducted five planning conferences with the parties. In January 1998, after reviewing the claim based on new information, Canada formally accepted the claim for negotiation.

#### **BACKGROUND**

In the interests of securing a military and trade route between Lake Simcoe and Georgian Bay, the Lieutenant Governor dispatched John Collins, Deputy Surveyor General, to survey such a line in May 1785. He was additionally charged with reporting the lands that might need to be purchased from the Indians. Collins's memo of August 9, 1785, states that an agreement was made between the Crown and the Chiefs that granted the King and his subjects the right to make roads through the "Missisaga Country," erect "Forts, Ridouts, Batteries, and Storehouses," navigate the rivers and carry out free trade unmolested. In return, the Indians were to receive clothing. This agreement is referred to as the "Collins Purchase" or "Collins Treaty."

In 1830, the Lieutenant Governor of Upper Canada settled the Chippewas on a tract of land between Coldwater and Lake Couchiching, but the land was surrendered in 1836. The Chippewas would later divide into three bands, settling on reserves at Beausoleil Island, Rama, and Georgian Island (formerly Snake Island). The band at Beausoleil Island later moved to the Christian Islands.

The Williams Treaty of 1923 was initiated to deal with claims submitted by the Chippewa Indians of Lakes Huron and Simcoe, and the Mississauga Indians of Rice Lake, Mud Lake, and Lake Scugog. The treaty was concluded with the "Chippewa Indians of Christian Island, Georgina Island and Rama" and provided for the surrender of three large parcels of land in south and central Ontario.

#### **ISSUES**

Did the representatives of the Chippewa Tri-Council Nations and the Crown enter into a treaty in 1785? Were the Indian representatives in 1785 the ancestors of the present-day Chippewa Tri-Council? If a treaty was entered into, was it ratified and

confirmed by Treaty 3 (1792)? If a treaty was entered into, what were the rights and obligations of the parties under the terms of the treaty and were they fulfilled?

**OUTCOME**

During the inquiry, Canada accepted the claim for negotiation on the basis that the Crown's promise in the "Collins Treaty" to provide clothing to the Chippewas in exchange for a right of passage had never been fulfilled: see letters of January 28, 1998 at Appendix B of the report.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Treaties and Statutes Referred To**

*Royal Proclamation of 1763*, reprinted in RSC 1970, App. II; Collins Treaty (Deputy Surveyor John Collins's Memorandum on Indian Purchase, August 9, 1785), quoted in Joan Holmes and Associates, "Collins Treaty Lands, Draft Analytical Report," prepared for Specific Claims Branch, DIAND, August 1991, revised September 1992; Treaty 3 (1792); Williams Treaty (1923), referred to in Robert J. Surtees, *Treaty Research Report: The Williams Treaties* (Ottawa: DIAND, 1986).

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Edward Rogers and Donald B. Smith, eds., *Aboriginal Ontario: Historical Perspectives on the First Nations* (Toronto: Dundurn Press, 1994); E.G. Guillet, ed., *The Valley of the Trent*, Champlain Society, Ontario Series, 1 (Toronto: University of Toronto Press, 1967); E.A. Cruikshank, ed., *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada*, 5 vols. (Toronto: Ontario Historical Society, 1923–31); F.B. Murray, ed., *Muskoka and Haliburton, 1615–1875: A Collection of Documents*, The Champlain Society, Ontario Series, 6 (Toronto: University of Toronto Press, 1963).

**COUNSEL, PARTIES, INTERVENORS**

A. Pratt for the Chippewa Tri-Council; E. Daigle, L. Klee for the Government of Canada; R.S. Maurice and R. Keesickquayash to the Indian Claims Commission.

## SUMMARY

### **CHIPPEWAS OF KETTLE AND STONY POINT FIRST NATION 1927 SURRENDER INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209.

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

**Panel:** Commissioner R.J. Augustine, Commission Co-Chair D.J. Bellegarde

**Treaties** – Treaty 29 (1827); **Royal Proclamation of 1763**; **Reserve** – Surrender – Disposition – Proceeds of Sale; **Fiduciary Duty** – Pre-surrender – Post-surrender; **Indian Act** – Surrender; **Ontario**

#### **THE SPECIFIC CLAIM**

In November 1992, the Chippewas of Kettle and Stony Point First Nation commenced an action in the Ontario Court (General Division) claiming that the 1927 surrender of reserve lands was invalid as the result of fraud and bribery, and that the Crown had breached its fiduciary obligations to the First Nation in the surrender process. In March 1993, Canada advised the First Nation that, under the Specific Claims Policy, there was no lawful obligation by Canada arising out of this claim. The First Nation then asked the Indian Claims Commission (ICC) to review Canada's rejection of the claim under the Policy. In February 1994, the ICC commenced the inquiry, holding a community session in March 1995, receiving expert testimony on band membership in July 1995, and conducting an oral hearing in October 1995.

The court action on the validity of the 1927 surrender proceeded concurrently. Canada succeeded in August 1995 in obtaining summary judgment upholding the validity of the surrender, a decision upheld by the Ontario Court of Appeal in December 1996.

#### **BACKGROUND**

Treaty 29, dated July 10, 1827, established reserves at Kettle Point, Stony Point, Sarnia, and Walpole Island for the Chippewas of Sarnia Band. The Chippewas from Kettle Point and Stony Point separated from the Sarnia Band in 1919 and together became one band; however, while they were still part of the Sarnia Band, their reserves on the shore of Lake Huron were surveyed and subdivided into lots.

The waterfront land was highly desirable for summer resort purposes, but initial efforts to obtain a surrender of those lands for lease failed. In January 1927, "Crawford and Co." made a request to purchase 83 acres of land at Kettle Point at \$85 per acre. Crawford also paid or expected to pay individual "bonuses" above the \$85 per acre to each of the eligible voters. Indian Agent Thomas Paul supported a surrender for sale. On March 30, 1927, two band members moved to accept Crawford's offer. Agent Paul's "Poll Book" indicates that 27 of 44 eligible voters attended the vote and voted in favour of the surrender. Crawford was present at the vote and issued payments of cash to some of the band members before, and after, they had cast their vote. It was later alleged that those who attended the surrender vote received \$5 before casting their vote and \$10 afterwards, if they had voted in favour of the surrender. As well, several of the eligible voters who voted in favour of the surrender had not attended the surrender vote. The department rejected any suggestion that the circumstances of the vote rendered the surrender invalid; by order in council the surrender was accepted in May 1927.

The "Original Members" or "Treaty Indians" of the Band unsuccessfully protested the surrender on the basis of voter eligibility. In November 1927, Crawford advised Indian Affairs that he was unable to procure the funds necessary for the purchase, and requested more time. In August 1928, the Band Council wrote to Crawford demanding payment within 30 days or the agreement would be withdrawn. In October 1928, the law firm of LeSueur, LeSueur and Dawson sent a cheque for the lands and promised "cash bonuses" to Agent Paul. On the same date, deeds were issued for transfers of the surrendered land

from Crawford and John A. White to eight individuals or couples in the United States. The payment was conditional on the Crown issuing a grant to Crawford and pointed to Crawford's intention to resell the land at a higher price. Crawford's payment was returned by the Chief owing to the length of time that had passed. A similar lakefront surrender on the Stony Point reserve also took place in October 1928.

Eventually, the department accepted a joint bid from Crawford and White, although White alone had earlier submitted a higher bid. In June 1929, 81 acres of land were conveyed to them for \$7,706.20 (an overpayment adjustment lowered the price by \$190.40). Indian Affairs received full payment for the Kettle Point lands in June 1929, but band members did not receive payment until late October, two years and seven months after the surrender vote.

### **ISSUES**

Was there a valid surrender of 81 acres of Kettle and Stony Point Reserve in March 1927? If so, were there conditions to the surrender and were they fulfilled? Did the Crown have, and breach, any fiduciary obligations in relation to the surrender?

### **FINDINGS**

The Ontario Court of Appeal determined that it was clear that the Stony and Kettle Point First Nation understood that it was surrendering 80 acres of its reserves, and that this was the intention of the First Nation despite objections by a minority. It was noted that the mandatory preconditions to the validity of the surrender were fulfilled. The court also held that the alleged tainted dealings, in the form of cash payments at the time of the vote, were bonuses rather than bribes and were not prohibited by the *Royal Proclamation of 1763*.

Regarding the delay in completing the sale of the surrendered land, the court held that time was not a condition of the surrender transaction and thus did not affect its validity, although the Crown's conduct in allowing the delay was open to scrutiny under the claim of breach of fiduciary duty, which was not dismissed by the court. As such, the court's decision was that the surrender was valid and unconditional. Following from the decision of the court, the ICC likewise concludes that the surrender was valid and unconditional.

The ICC found, however, that Canada had pre-surrender and post-surrender fiduciary duties towards the Band, which it breached. The transaction consented to by the Crown was exploitative in that Crawford bought the land for \$85 per acre and immediately "flipped" it for \$300 per acre. The profit associated with this action cannot be attributed to improvements or entrepreneurial risk, as the lots were pre-sold and unimproved. *Apsassin* states that the Crown has a fiduciary obligation to prevent exploitative bargains. As Canada failed to inquire into the market potential of the land, it breached its pre-surrender fiduciary duty. By failing to disclose to the Band White's higher offer and by failing to seek the Band's consent on how to proceed, the department subordinated the interests of the Band to third-party economic interests and thus breached its fiduciary duty to the Band. Furthermore, by ignoring an implied term in the surrender agreement, that of closing the transaction in a timely manner, the Crown breached its fiduciary duty.

### **RECOMMENDATION**

That the claim of the Chippewas of Kettle and Stony Point First Nation be accepted for negotiation under the Specific Claims Policy.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.); *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97, 106 (CA); *Smith v. R.*, [1983] 1 SCR 554; *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335.

### **Treaties and Statutes Referred To**

Treaty 29, July 10, 1827, in Canada, *Indian Treaties and Surrenders* (Toronto: Coles, 1971); *Indian Act*, RSC 1906; *Royal Proclamation of 1763*, in B. Slattery, "First Nations and the Constitution" (1992) 71 *Can. Bar Rev.* 261.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; R.J. Surtees, “Indian Land Surrenders in Ontario, 1763–1867,” paper dated February 1984 (Ottawa: DIAND, 1983 [sic]); E.S. Rogers, “Southeastern Ojibwa,” in *Northeast*, ed. B.G. Trigger, vol. 15 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1978); James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potawatami into Upper Canada, 1830 to 1850* (Ottawa: National Museum of Man, 1975); Helen Hornbeck Tanner, ed., *Atlas of Great Lakes Indian History* (Norman and London: University of Oklahoma Press, 1987); Nin.Da.Waab.Jig, *Walpole Island: The Soul of Indian Territory* (Walpole Island and Windsor: Commercial Associates, 1987, repr. 1989).

**COUNSEL, PARTIES, INTERVENORS**

R.M. Raikes, C.L. Godby for the Chippewas of Kettle and Stony Point First Nation; R. Winogron, F. Daigle for the Government of Canada; K. Fullerton, R.S. Maurice, and I. Gros-Louis Ahenakew to the Indian Claims Commission.



## SUMMARY

### **CHIPPEWAS OF THE THAMES FIRST NATION CLENCH DEFALCATION INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Chippewas of the Thames First Nation: Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Chief Commissioner P. Fontaine, Commissioner D.J. Bellegarde

**Treaties** – Treaty 25 (1822); **Reserve** – Surrender – Proceeds of Sale; **Fraud; Ontario**

#### **THE SPECIFIC CLAIM**

In 1974, the Union of Ontario Indians submitted a claim to the Minister of Indian and Northern Affairs, alleging a misappropriation of money around 1854 by Indian Superintendent J.B.Clench. The alleged defalcation concerned moneys obtained from the sale of lands surrendered in 1834, and which had been set aside for the Chippewas of the Thames First Nation by Treaty 25 (1822). The claim was rejected by the Minister in February 1975, on the basis of a final release signed by the Chiefs and principal men of the Chippewas in 1906. In August 1998, the Chippewas of the Thames requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejection of its claim by way of a review of research materials.

#### **OUTCOME**

This review of research materials led to a reconsideration of the rejection by Canada. On June 18, 2001, it agreed to accept the First Nation's claim. As this inquiry did not proceed past the initial phase of the planning conference prior to the acceptance of the claim and the suspension of the Commission's involvement, there are no formal inquiry report, findings, or recommendations.

#### **COUNSEL, PARTIES, INTERVENORS**

P. Williams for the Chippewas of the Thames First Nation; M. Brass for the Government of Canada; K.N. Lickers to the Indian Claims Commission.

#### **UPDATE**

The parties negotiated a settlement of the claim with the assistance of the ICC's mediation services. A final settlement was reached in June 2004: see ICC, *Chippewas of the Thames First Nation: Clench Defalcation Mediation* (Ottawa, August 2005).



# SUMMARY

## **CHIPPEWAS OF THE THAMES FIRST NATION CLENCH DEFALCATION MEDIATION Ontario**

The report may be cited as Indian Claim Commission, *Chippewas of the Thames First Nation: Clench Defalcation Mediation* (Ottawa, August 2005).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties – Treaty 25 (1822); Reserve – Surrender – Proceeds of Sale; Fraud; Mandate of Indian Claims Commission – Mediation; Ontario**

### **THE SPECIFIC CLAIM**

In December 1974, the Union of Ontario Indians submitted a claim to the Minister of Indian Affairs, alleging that, between 1845 and 1854, Indian Agent Joseph B. Clench failed to account for money paid for the purchase of surrendered land in southwestern Ontario, including that of the Chippewas of the Thames. That claim was rejected by Canada, and, in August 1998, the Chippewas of the Thames First Nation asked the Indian Claims Commission (ICC) to conduct an inquiry. The ICC agreed, and in the process of the inquiry, the First Nation and the Department of Indian Affairs and Northern Development (DIAND) entered into a joint research project. The results of the research allowed the parties to refine the issues and for Canada to reconsider its initial rejection. In June 2001, the Minister accepted the claim for negotiation and the parties agreed that the ICC should facilitate the negotiations.

### **BACKGROUND**

The background to this mediation is contained in the ICC inquiry report, found at Indian Claim Commission, *Chippewas of the Thames First Nation: Clench Defalcation Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 307.

### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings and consult with the parties to establish acceptable agendas, venues, and times for meetings.

### **OUTCOME**

In June 2004, the Chippewas of the Thames First Nation ratified the proposed settlement of \$15 million in compensation.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



## SUMMARY

### **CHIPPEWAS OF THE THAMES FIRST NATION MUNCEY LAND INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Chippewas of the Thames First Nation: Muncey Land Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 285.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commissioner D. Bellegarde, Commissioner P.E.J. Prentice, QC

**Pre-Confederation Claim** – Reserve Creation – Reservation – Letters Patent – Petition of Right; **Reserve** – Disposition; **Mandate of Indian Claims Commission** – Mediation; **Ontario**

#### **THE SPECIFIC CLAIM**

In February 1980, the Chippewas of the Thames Indian Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that 192 acres of unsurrendered reserve land were illegally patented in 1831. The claim was accepted for negotiation in June 1983. The parties reached an Agreement in Principle in 1987 that was subsequently rejected in three band referendum votes. Negotiations remained stalled until 1990, but, in 1991, the Band rejected Canada's revised offer. Canada rejected mediation by the Indian Claims Commission (ICC) to break the impasse on the grounds that the ICC's mandate to provide mediation services does not include a situation in which one party rejects a proposed settlement agreement. The ICC then agreed to the Band's request to conduct an inquiry, which commenced in November 1993. The ICC held a series of planning conferences and, with the parties' consent, chaired two negotiation sessions that led to a second Agreement in Principle in June 1994.

#### **BACKGROUND**

The Chippewas, who are Ojibwa, began to settle in southern Ontario in the early 18th century. In 1760, after the defeat of the French in Canada during the Seven Years' War, the British guaranteed the French that their Indian allies, including the Ojibwa, would be maintained in the lands they inhabited if they wished. The Ojibwa and the British engaged in a series of battles, known as "Pontiac's War," until 1764, when they held peace talks at Fort Niagara. The *Royal Proclamation of 1763* had also reinforced the Crown's commitment to protect Indian territories. By the early 19th century, the pressure of European settlement led to government initiatives to acquire Indian lands for sale to settlers. As a result, the Chippewas of the Thames agreed to surrender a large tract of land subject to conditions that included the creation of a reserve. This condition was stated in two provisional agreements with the Crown, although a confirmatory agreement in 1822 omitted the reference to reserve land.

In 1827, the Surveyor General notified the government about discrepancies between the descriptions of land in the agreements that the Chippewas had signed and a survey done by the Chippewas. In 1829, John Carey, a missionary teacher, established a school at Muncey town, where the Muncey Band, who are Delaware, had settled. He then petitioned for a patent on the Muncey village site but the patent was not issued. When the site for the Chippewas' reserves was surveyed in 1829, the Crown realized that there were competing interests for the land: the surveyor was to receive 981 acres as payment; 2,200 acres had been set aside for a government-controlled land speculation company; and 3,200 acres had been designated as Clergy Reserves.

In 1831, Carey applied for a second patent describing the land requested as being within a reserve. This time he was successful on both patents on the basis that he was located on the land and had made improvements before it became a reserve. Carey received letters patent for 161 acres in Lot 12, and 32 acres in Lot 13. Eventually, the lands offered to other parties were restored to the Chippewas of the Thames, but nothing was done about Carey's land holdings. In 1894, the

Chippewas of the Thames filed a Petition of Right claiming land on which the Muncey Band was residing and the two lots subject to Carey's patents. In 1896, a Board of Arbitrators dismissed a claim brought by Canada on behalf of the Chippewas and others against the Provinces of Ontario and Quebec. This decision was upheld on review. In 1974, the Band revived its claim to the two lots on which the Village of Muncey is now located, resulting in Canada's 1983 decision to accept the claim.

### **OUTCOME**

These proceedings began as an inquiry, but, through a process of planning conferences and negotiating sessions chaired by the ICC, the parties reached an Agreement in Principle. The Minister of Indian Affairs advised the ICC in March 1995 that the Chippewas of the Thames First Nation had voted to accept the agreement.

In the course of the proceedings, the ICC determined that its mandate to provide mediation services to the parties in settlement negotiations is unqualified with the exception that, if one party objects to the mediation, the ICC is prevented from participating. Here, the ICC's mandate extended to a situation in which the band membership had refused to ratify the settlement agreement.

### **REFERENCES**

In addition to various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Treaties and Statutes Referred To**

*Royal Proclamation* of October 7, 1763, RSC 1970, App. 2; Treaty No. 2, May 19, 1790, Canada, *Indian Treaties and Surrenders ...*, 2 vols. (Ottawa, Queen's Printer, 1891; repr. Saskatoon: Fifth House Publishers, 1992–93) 1: *Treaties 1–138*; Chippewas of the Thames Indian Band, Provisional Agreement No. 21, March 9, 1819, Canada, *Indian Treaties and Surrenders*, vol. 1; Chippewas of the Thames Indian Band, Provisional Agreement No. 280 ½, May 9, 1820, Canada, *Indian Treaties and Surrenders*, vol 2: *Treaties 140–280*; Chippewas of the Thames Indian Band, Confirmatory Agreement No. 25, July 8, 1822, Canada, *Indian Treaties and Surrenders*, vol. 1.

#### **Other Sources Referred To**

Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991); *Articles of Capitulation*, Article XL, as translated by Adam Shortt and A.G. Doughty, in *Documents Relating to the Constitution History of Canada ...* (Ottawa, 1907), and reprinted in *Documents of the Canadian Constitution, 1759–1915* (Toronto: Oxford University Press, 1918); Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992).

#### **COUNSEL, PARTIES, INTERVENORS**

P. Williams for the Chippewas of the Thames First Nation; R. Winogron and F. Parsons for the Government of Canada; R. Maurice to the Indian Claims Commission.

## SUMMARY

### **COLD LAKE AND CANOE LAKE FIRST NATIONS PRIMROSE LAKE AIR WEAPONS RANGE INQUIRIES Alberta and Saskatchewan**

The report may be cited as Indian Claims Commission, *Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3.

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

**Panel:** Chief Commissioner H.S. LaForme, Commissioner D.J. Bellegarde, Commissioner P.E.J. Prentice, QC

**Treaties** – Treaty 6 (1876) – Treaty 10 (1906); **Treaty Right** – Harvesting; **Fiduciary Duty** – Breach of Treaty; **Natural Resources Transfer Agreement, 1930; Alberta; Saskatchewan**

#### **THE SPECIFIC CLAIM**

The Cold Lake First Nations and Canoe Lake Cree Nation submitted a joint claim to the Department of Indian Affairs and Northern Development (DIAND) in 1975, alleging a breach of the Crown's trust responsibilities to the claimants in regard to the establishment of the Primrose Lake Air Weapons Range, in failing to provide adequate compensation and sufficient retraining and economic rehabilitation. The Minister rejected these claims, and in October 1992, the Indian Claims Commission (ICC) agreed to conduct inquiries into the rejected claims. The ICC held two community sessions in December 1992 and February 1993, followed by a hearing to receive the testimony of the former Superintendent of the Saddle Lake Indian Agency in April 1993. The following month the parties presented their legal arguments.

#### **BACKGROUND**

The Cold Lake First Nations became parties to Treaty 6 in 1876. They settled on reserves (IR 149, 149A, and 149B) at the northern edge of the prairie and around Primrose Lake, an area which was the focal point of their traditional life and which contained a small settlement, a store, and a church. The Canoe Lake Cree Nation became a party to Treaty 10 in 1906. Its members settled on reserves at Canoe Lake, to the east of Primrose Lake, on lands around Arsenault Lake and McCusker Lake which the First Nation had traditionally relied upon for its subsistence. In April 1951, the federal government announced its intention to establish a bombing and gunnery range 100 miles northeast of Edmonton, at Primrose Lake, well within the traditional territories of the claimants. The 4,490 acres used for the range deprived the Canoe Lake people of lands providing 75 per cent of their livelihood; the Cold Lake people were severed from all of their traditional lands in the northern forest. The Department of Indian Affairs represented the First Nations in negotiations with the Department of National Defence for compensation, determining without consultation with the First Nations the amount and the recipients. Between 1954 and 1961, the claimants fell into a cycle of desperation and poverty.

#### **ISSUES**

Did the Government of Canada breach its treaties with the peoples of the Cold Lake First Nations and the Canoe Lake Cree Nation by excluding their people from their traditional hunting, trapping, and fishing territories in the early 1950s so that those lands could be converted for use as the Primrose Lake Air Weapons Range? Did Canada breach any fiduciary obligation owed to the First Nations, following the exclusion of their people from their traditional territories?

#### **FINDINGS**

The creation of the Primrose Lake Air Weapons Range had such a profound impact on the Canoe Lake community that, within one generation, a self-reliant and productive group of people became largely dependent upon welfare payments. The cumulative impact was to destroy the community as a functioning social and economic unit. The facts demonstrate that the creation

of the weapons range interfered drastically with the way of life of the Cold Lake Chipewyans, that the Primrose Lake area was the “centre of operations” for the social and economic activities of the Cold Lake people, and that they relied heavily upon those lands for their sustenance and survival.

The compensation paid was inadequate. Furthermore, fewer than half the treaty Indians affected received any compensation at all. No compensation was paid into their band funds, and no plan was ever put in place to replace the economic loss the communities had suffered.

Canada breached Treaties 6 and 10 when the claimants were expelled from their traditional territories in 1954. In negotiating the treaties, the government’s objective was to extinguish Indian title to the treaty lands, opening those lands for settlement, lumbering, mining, and other purposes. But the government also wished to protect the Indian economy based mostly on hunting, trapping, and fishing in their traditional areas. The claimants’ inducement to enter into the treaties was to protect their rights to hunt, trap, and fish as they had always done in their traditional areas. Those treaty rights, extending into the area now occupied by the weapons range, existed prior to the time of treaty and were exercised continuously up to the creation of the range. Neither the treaties nor the Natural Resources Transfer Agreement precludes compensation. A right of compensation arises from this breach.

In breaching the treaties, the government breached its fiduciary obligations thereunder. In addition, the Department of Citizenship and Immigration failed in its duty to represent and inform the claimants during the compensation negotiations. After the final payment was made in 1961, that department abandoned the issue of economic rehabilitation.

### RECOMMENDATION

That the Primrose Lake Air Weapons Range claims of the Canoe Lake Cree Nation and the Cold Lake First Nations be accepted for negotiation under Canada’s Specific Claims Policy.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Horse v. The Queen*, [1988] 1 SCR 187; *R. v. Sioui*, [1990] 1 SCR 1025; *R. v. Horseman*, [1990] 1 SCR 901; *R. v. Taylor and Williams* (1981), 34 OR (2d) 360; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Simon v. The Queen*, [1985] 2 SCR 387; *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; *Apsassin v. Canada*, [1993] 2 CNLR 20 (Fed. CA); *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570; *Lyell v. Kennedy* (1889), 14 App. Cas. 437; *Frame v. Smith*, [1987] 2 SCR 99; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Canadian Aero Services Ltd. v. O’Malley*, [1974] SCR 592; *Canson v. Boughton*, [1991] 3 SCR 534; *K.M. v. H.M.*, [1992] 3 SCR 6; *St. Ann’s Island Shooting and Fishing Club Ltd. v. The King*, [1950] SCR 211; *Kruger v. The Queen*, [1986] 1 FC 3; *Stott v. Merit Investment Corp.* (1988), 63 OR (2d) 545 (Ont. CA).

### Treaties and Statutes Referred To

Treaty 6, in A. Morris, *The Treaties of Canada with the Indians* (1880; reprint Toronto: Coles, 1979), also in Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles, 1971); Treaty 10, in G.J. Fedirchuk and E.J. McCullough, *Historical Context: Treaties 6, 8, 10* (Indian Claims Commission, 1993); *The Saskatchewan Act* (1905), reprinted in RSC 1985, App. II, No. 21; *Constitution Act*, 1930, reprinted in RSC 1985, App. II, No. 26; *Indian Act*, RSC 1927; *Constitution Act, 1982*.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, 1993).

### COUNSEL, PARTIES, INTERVENORS

B.A. Crane, QC, L. Mandamin for the Cold Lake First Nations; D. Opekokew, A. Pratt for the Canoe Lake Cree Nation; R. Wino-gron, B. Becker, F. Daigle for the Government of Canada; B. Henderson, R.S. Maurice to the Indian Claims Commission.

**CANADA'S RESPONSE**

On March 2, 1995, the Minister of Indian Affairs and Northern Development wrote that, although the Government of Canada continues to believe that there has been no breach of treaty or fiduciary obligations, he was offering to initiate negotiations to achieve a settlement in light of the unusually severe impacts of the weapons' range on the claimants: see (1995) 3 ICCP 319.



## SUMMARY

### **COWESSESS FIRST NATION 1907 SURRENDER INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223.

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

**Panel:** Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Indian Act** – Surrender; **Reserve** – Surrender; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

The Cowessess First Nation submitted a specific claim to the Minister of Indian Affairs in March 1981, alleging that a 1907 surrender of 20,704 acres from Indian Reserve (IR) 73, near Broadview, Saskatchewan, was invalid because it did not comply with procedures mandated by the *Indian Act*. The First Nation in 1984 also reserved the right to challenge the surrender on grounds relating to breach of treaty, breach of fiduciary duty, fraud, and unconscionability. The First Nation made further submissions to the Department of Indian Affairs and Northern Development (DIAND) in March 1992. DIAND reviewed the claim and, in March 1994, rejected it as falling outside Canada's lawful obligations. Two years later, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its claim, which the ICC agreed to do in August 1996. A community session was held in March 1998, followed by the parties' written submissions, and an oral hearing in October 1999.

#### **BACKGROUND**

The ancestors of the Cowessess First Nation adhered to Treaty 4 at Fort Qu'Appelle in September 1874. They did not immediately select a reserve but, in 1878, the government promised to situate their reserve first at a site north of Fort Walsh, and then at Maple Creek in the Cypress Hills. No reserve was surveyed at this time, however, but Cowessess's followers commenced farming near Maple Creek. In 1880, a reserve was surveyed at Crooked Lake for headman Louis O'Soup and his followers. In the spring of 1883, Chief Cowessess and his followers were persuaded to join O'Soup's group at Crooked Lake; subsequently, the boundary of the reserve was adjusted to reflect the reconstituted band's total membership. In 1889, Cowessess Indian Reserve (IR) 73 was confirmed by Order in Council. The other reserves at Crooked Lake were Sakimay IR 74, Kahkewistahaw IR 72, and Ochapowace IR 71.

From 1886 to 1903, settlers located near the reserves lobbied to have the southern portion of the reserves at Crooked Lake surrendered for sale and the reserves relocated a distance from the non-Indian settlement. Indian Agent Alan McDonald opposed a surrender as not being advantageous to the Indians but stated that, if it proceeded, adequate haylands in close proximity to the reserve would be needed for the Cowessess farmers. Owing to McDonald's protests, the question of surrender was dropped, but, in 1891, a proposed surrender of the southern portion of the Crooked Lake Reserves was again presented to the department, and again resisted by McDonald, who also raised concerns about the quality of the lands proposed to be offered in exchange for those surrendered. In January 1899, a local MLA proposed a surrender directly to Clifford Sifton, Minister of the Interior and Superintendent General of Indian Affairs, but most government officials opposed the idea. The pressure to open up the reserve lands to settlers continued in 1902 and in 1904, but, again, the matter was dropped.

In June 1906, William Graham, Inspector of Indian Agencies for the Qu'Appelle Inspectorate, wrote that the Crooked Lake bands knew about the "good cash payment down" received by the Pasqua Band at its recent surrender, and, he thought, might be willing to surrender land on similar terms. Graham also advised the department that, when the surrender meeting took place, the money for the first payment should be on hand. He was confident that the other bands –Kahkewistahaw and

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Ochapowace – would surrender and he hoped that Cowessess would do likewise when they saw the other Indians surrendering. In September 1906, Graham received departmental approval to seek the surrender.

Records indicate that two surrender meetings were held. The first was held on January 21, 1907, at the Agency office on the Cowessess reserve; with Graham were Indian Agent Matthew Millar and Peter Hourie, acting as interpreter. At the beginning of the meeting, a roll was called but, unlike the subsequent meetings at Ochapowace and Kahkewistahaw, there is no record of the number of band members attending or their names. The outcome of this meeting is inconclusive but it appears to have been adjourned until January 29th. Those attending the second meeting included Graham and Millar, and band member Alex Gaddie acted as interpreter. The minutes of the meeting record 29 band members in attendance. The surrender was obtained by a vote of 15 in favour, 14 against; 22 members signed the surrender document. The deciding vote was cast by Alex Gaddie, the interpreter. The name “Nap Delorme” appears in the minutes as one of the band members voting for the surrender; however, it is unknown whether “Nap Delorme” was in fact Norbert Delorme, one of two individuals signing the surrender document whose names were not on the voters’ list.

Two days later, on February 2, 1907, Graham and Gaddie swore the affidavit required under the *Indian Act*, before Justice of the Peace E.L. Wetmore. The surrender was confirmed by Order in Council dated March 4, 1907, the surrendered land was subdivided in May 1907, and the land was offered for sale by auction in November 1908 and June 1910.

### ISSUES

On the basis that a majority of eligible band electors attended the surrender meeting, does section 49 of the *Indian Act* require a majority of those attending the surrender meeting, or a majority of those voting at the surrender meeting, to vote in favour of the surrender in order to achieve the requisite consent? How many eligible voters of the Cowessess Band attended the surrender meeting on January 29, 1907? Did a majority of the eligible voting members of the Cowessess Band assent to the surrender of a portion of IR 73 within the requirements of the *Indian Act*?

### FINDINGS

Section 49 of the 1906 *Indian Act* requires that a surrender of reserve land must be assented to by “a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose.” To determine the composition of the majority, we must decide whether the majority in favour of a surrender must be drawn from all those in attendance at the surrender meeting, or whether it may be drawn merely from those present and voting. Section 49 must be interpreted in a way that takes into account the policy of protecting the interests of the entire band with respect to its land base. Those interests are best protected if consent to the surrender is secured from the greatest number of band members. Therefore, it makes sense to interpret section 49 to require the consent of a greater number of band members, as opposed to a smaller number. Having regard to the language, context, and purpose of section 49, the requirement that majority consent be obtained from all those present at the surrender meeting is to be preferred.

How many eligible voters attended the surrender meeting? The parties agree that there were 37 potential eligible voting members of the Cowessess Band at the time of the surrender. The parties differ, however, on the number attending the meeting. The January 29, 1907, surrender document reveals that Francis Delorme signed the surrender, a fact confirmed by the minutes. Moreover, he was not the last to sign the document. Francis Delorme and Norbert Delorme were the only two names not on the voters list who signed the surrender. It appears more reasonable to conclude that Francis was present at the time of the vote but abstained than to conclude that he arrived later only to sign and be paid. Aside from Norbert, Francis is the only non-voter who signed the surrender in addition to being paid; this fact tips the balance in favour of the conclusion that he was in attendance at the meeting but abstained from voting. Thus, the attendance of Francis Delorme brings the total number in attendance at the surrender meeting to 30 eligible voters.

Did a majority of eligible voters assent? Given the finding that Francis Delorme was present at the meeting, the surrender must fail, for the reason that a majority vote could not have been obtained, notwithstanding the question raised about the identity of “Nap Delorme.” Even if there were 15 valid votes in favour of the surrender (i.e., if “Nap Delorme” was in fact Norbert Delorme), Francis’s presence brings the total in attendance to 30, which means that a majority was not achieved. If Nap Delorme’s vote is completely discounted, there would remain 14 votes in favour of the surrender, out of 29 eligible voters present. Either way, the surrender fails. Therefore, it is not necessary to determine the identity of “Nap Delorme.”

## **RECOMMENDATION**

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

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

## **Cases Referred To**

*Cardinal v. R.*, [1982] 1 SCR 508; *Chippewas of Kettle and Stony Point v. Attorney General of Canada*, [1996] 1 CNLR 54; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Blueberry River Indian Band v. Canada*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Sellars v. R.*, [1980] 1 SCR 527; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *R. v. Lewis*, [1996] 1 SCR 921; *Guerin v. The Queen*, [1984] 2 SCR 335.

## **ICC Reports Referred To**

*Kabkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Friends of the Michel Society: 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69.

## **Treaties and Statutes Referred To**

*Royal Proclamation of 1763*; *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1906.

## **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994), 1 ICCP 171; Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; reprint Toronto: Coles, 1971); K.J. Tyler, "A History of the Cowessess Band, 1874–1907," paper prepared for the Federation of Saskatchewan Indians, 1975; D.H. Hall, "Clifford Sifton and Canadian Indian Administration, 1896–1905" (1977) 2, 2 *Prairie Forum* 127.

## **COUNSEL, PARTIES, INTERVENORS**

D.J. Maddigan, W.A. Brabant for the Cowessess First Nation; J.A. Hutchinson, R. Wex for the Government of Canada; K.N. Lickers to the Indian Claims Commission.

## **CANADA'S RESPONSE**

By letter dated March 27, 2002, the Minister of Indian Affairs and Northern Development rejected the recommendation of the ICC: see (2002) 15 ICCP 376.



# SUMMARY

## **COWESSESS FIRST NATION 1907 SURRENDER PHASE II INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission,  
*Cowessess First Nation: 1907 Surrender Phase II Inquiry* (Ottawa, July 2006).

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

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

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Fiduciary Duty** – Surrender; **Indian Act** – Surrender; **Saskatchewan**

### **THE SPECIFIC CLAIM**

The Cowessess First Nation submitted a specific claim in 1981 alleging that the 1907 surrender of a portion of Indian Reserve (IR) 73 was invalid because it did not meet the surrender requirements of the *Indian Act*. Between 1984 and 1992, the First Nation made further submissions, in which it asserted the right to challenge the surrender on the grounds of fiduciary duty, fraud, and unconscionable conduct. In March 1994, Canada rejected the claim as not having shown a breach of the Crown's lawful obligation to the First Nation. In August 1996, at the request of the First Nation, the ICC agreed to conduct an inquiry into the rejected claim. By agreement of the parties and the Commission, the inquiry was split into two phases.

The ICC's report for phase I of the inquiry is at (2001) 14 ICCP 223. The phase I panel determined that a valid surrender vote had not been obtained and recommended that Canada accept the claim. By letter dated March 27, 2002, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation in phase I: see (2002) 15 ICCP 376. Consequently, in October 2002, the First Nation requested that the ICC proceed with phase II of the inquiry on the grounds that the Crown had breached its fiduciary duty to the Cowessess Band when taking the 1907 surrender. A new panel was struck for phase II. At the First Nation's request, this panel did not conduct a community session. The panel heard the parties' legal arguments, based on written submissions, on September 21, 2004.

### **BACKGROUND**

The ancestors of the Cowessess First Nation adhered to Treaty 4 at Fort Qu'Appelle in September 1874. Cowessess and his followers settled at Maple Creek in the Cypress Hills, but, in 1880, a reserve was surveyed at Crooked Lake for Headman Louis O'Soup and his followers. Shortly thereafter, Chief Cowessess was persuaded to move with his followers to the Crooked Lake reserve. In 1889, the Cowessess Indian Reserve was confirmed by order in council. Four reserves made up the Crooked Lake Agency – Sakimay IR 74, Cowessess IR 73, Kahkewistahaw IR 72, and Ochapowace IR 71.

The Cowessess Band lived, farmed, and raised livestock in the north of its reserve. The southern portions – the hay lands – were used primarily for cutting wild hay. Beginning in 1886, settlers located near the agency reserves made repeated requests to the federal government to have the southern portion of the reserves at Crooked Lake surrendered for sale and the reserves relocated a distance from the non-Indian settlement. During the 1890s, Indian Agent Allan McDonald opposed a surrender of the Cowessess Band's southern reserve land on the grounds that it would limit the Band's future ability to increase its stock. In 1899, a local MLA unsuccessfully appealed to the responsible Minister, Clifford Sifton, to pursue surrenders of the southern portion of the Crooked Lake Agency's reserves, and, in 1902, a petition bearing the names of 190 local residents who supported the surrenders was sent to Ottawa.

At the July 1904 annuity payments to the agency's bands, Indian Commissioner David Laird's assistant discussed surrender with the band members as a means of raising funds to fence the reserves to protect them from incursions by neighbouring settlers' cattle. According to Laird, the Cowessess Band appeared to appreciate the suggestion but wanted some time to consider it.

The matter was dropped again, but, in October 1906, Inspector William Graham received approval to propose a surrender of the southern portions of the Ochapowace, Kahkewistahaw, and Cowessess reserves. Graham held two meetings with the Cowessess Band. On January 21, 1907, he explained the proposed surrender to the Band and adjourned the meeting to January 29, at which time the Band voted 15 in favour of the surrender and 14 against. Twenty-two members signed the surrender document. Alexander Gaddie, a band member who had acted as interpreter, voted in favour. At the surrender meetings of the other two agency bands, the Ochapowace Band voted against a surrender of part of its reserve, whereas the Kahkewistahaw Band voted in favour of surrender.

On February 2, 1907, Graham and Gaddie swore the Cowessess surrender affidavit before a Justice of the Peace. The surrender was confirmed by order in council on March 4, and the land was subdivided in May 1907. It was offered for sale by auction in November 1908 and in June 1910.

## ISSUES

With regard to the January 29, 1907, surrender of a portion of IR 73, what was Canada's pre-surrender fiduciary duty? Did Canada breach its pre-surrender fiduciary duty and, if so, does Canada owe an outstanding lawful obligation to the Cowessess First Nation?

## FINDINGS

### Reasons of Commissioner Purdy and Commissioner Dickson-Gilmore

The appropriate test for finding a breach of the Crown's pre-surrender fiduciary duty, based on the *Apsassin* case, is to ask whether the Band's understanding of the proposed surrender was inadequate; whether the Crown's conduct tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention; whether the Band ceded its decision-making authority to the Crown; or whether the surrender was so foolish or improvident as to amount to exploitation.

The Cowessess Band lived at the north end of its reserve near the Qu'Appelle River, on the reserve's best agricultural land. The southern portion was marshy, gravelly, alkaline, and inferior slough land that was used to cut hay. By all accounts, the Cowessess Band was the most progressive band in the Crooked Lake Agency, both in agriculture and in diversifying its economy. One-half of the Band carried on farming and cattle-raising; individuals also earned income by selling produce or working for settlers. The department's annual reports indicate that, because of their Métis ancestry, the Cowessess people had adapted more readily to agriculture than had the other agency bands. The Band had also had prior experience in negotiating the terms of proposed surrenders. When the Band and officials met on January 21, 1907, to discuss the surrender in question, the minutes state that Inspector Graham explained the proposal and that Chief Joseph LeRat confirmed it to have been well explained and understood. The meeting was adjourned to January 29, permitting band members sufficient time to consider the proposal. The Band understood what the surrender entailed, and, as experienced farmers and ranchers, members would have known the advantages and disadvantages of surrendering the hay lands.

The fact that the Crown initiated the surrender discussions in 1904 and favoured a surrender does not establish that the Crown engaged in tainted dealings. No evidence exists that the conduct of officials was driven by personal gain, nor is there any evidence that they employed improper conduct during the surrender meeting. The provision of a cash down payment was not an undue influence in this case, given the Band's relative health and self-sufficiency. Moreover, it was an agreed-upon condition of the surrender, permitted by the *Indian Act*. The conflicting evidence regarding Alex Gaddie's compensation claim does not permit a finding that the Crown intentionally withheld material information from the Band.

No evidence exists that the Band ceded its decision-making power to the Crown in the 1907 surrender. The Crown would be expected to act with ordinary diligence in explaining the reasonably foreseeable consequences of the surrender, such as the anticipated sale price. Still, there is no evidence that the Crown failed to explain such consequences. At the same time, the Band's demonstrated understanding of its own situation, in particular its use of the hay lands, would have influenced the nature of those discussions. In addition, the Band was not in a vulnerable state and had always had strong leadership; Chief LeRat was a capable leader who, in considering other surrender proposals, had demanded large down payments in return for band consent.

The surrender was not a case of exploitation. The Cowessess reserve contained 49,920 acres, of which 41 per cent was surrendered. The Band kept the best agricultural land and voted to surrender inferior land. The evidence shows that the surrender had no permanent impact on agricultural production, as the Band continued for decades to farm and ranch only a

small percentage of the residual reserve. The benefits to the Band included annual payments to band members to purchase farm implements, household articles, food supplies, and fencing to keep out settlers' cattle. The land sales met or exceeded the upset price. From the perspective of the Band – living in the north on good land, close to fresh water and wood – the southern hay lands were not a priority in 1907 or for the foreseeable future. The surrender vote itself indicates that the band members were somewhat divided in respect of their needs. In the years after 1907, the Band complained to the Crown, directly and through its solicitors, about the interest payments, but never about the surrender itself.

### **Reasons of Commissioner Holman**

When the Crown signed Treaty 4 in 1874 with the Saulteaux and Cree, it made an agreement with the First Nations. Part of that agreement was to set aside reserve land for the Cowessess Band. One purpose of setting aside reserves was to protect the bands from encroachment by settlers. For the Crown to take back the land barely 30 years later, for the benefit only of the settlers and in the light of the Crown's own knowledge of why the Cowessess Band needed it, is a breach of the Crown's fiduciary duty to the Cowessess Band.

The Crown owed a fiduciary duty to the Cowessess Band to act in its best interests with regard to the protection and preservation of reserve land. The duties owed by the Crown to the First Nation include loyalty, good faith, and full disclosure. The tests of whether the Band's understanding of the surrender was inadequate, and whether the Crown's conduct so tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention, must be assessed against those duties. The Crown had no duty to act on behalf of the local settler population.

The motives of the Crown in obtaining the surrender must be assessed against its duty to be loyal to the Band with respect to its reserve land and its duty to act only in the Band's best interests. The surrender of the southern 33 sections of land, which contained the Band's hay lands, was not in the Band's best interest, since the surrender left the Band without a good source of hay.

The evidence shows clearly that, before 1904, Crown officials resisted any pressure from the local population to open up reserve land for settlement, on the basis that the Band required the hay lands to feed its cattle. Crown officials were well aware of the value of the land to the Band. After 1906, when a number of new officials and politicians had become involved, there was no consideration of whether a surrender would benefit the Band and no consideration of what would happen to the Band if it no longer had ready access to a reliable source of hay.

Because the panel in phase I of this inquiry determined that the recorded vote in favour of surrender was not a majority of the eligible voters in attendance at the surrender meeting, the analysis of whether the Crown should have refused to add its consent to the surrender was done only in the hypothetical. Applying the standard of the foolish or improvident bargain to the surrender, had there been a valid vote in favour of surrender, the Crown should have known it was improvident for the Band to surrender land it required for stock-raising.

The surrender vote resulted in more than 41 per cent of the reserve being sold to settlers. Although that was less than half the reserve, the surrender affected the agricultural potential and economic future of the Cowessess Band because it was almost 95 per cent of the Band's slough hay acres and almost 75 per cent of its open arable land. Much of the land on the remaining reserve was covered in trees. The Band was hindered in its use of the remaining reserve for agriculture because of the deep gully and steep slopes of Ekapo Creek.

The surrender must be assessed in terms of the Crown's fiduciary duty to the Band, not the Band's ability to withstand pressure from both the Crown and the local settlers.

### **RECOMMENDATIONS**

**Commissioners Purdy and Dickson-Gilmore:** That the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907 not be accepted for negotiation under Canada's Specific Claims Policy on the single issue of fiduciary duty.

**Commissioner Holman:** That Canada accept the claim of the Cowessess First Nation regarding the portion of Indian Reserve 73 surrendered in 1907 and that it negotiate a settlement under Canada's Specific Claims Policy on the single issue of fiduciary duty.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Chippewas of Kettle and Stony Point v. Canada (Attorney-General)* (1996), 31 OR 3rd 97 (Ont. CA); *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Badger*, [1996] 1 SCR 771; *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 SCR 388; *Hodgkinson v. Simms*, [1994] 3 SCR 393; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA).

### ICC Reports Referred To

*Cowessess First Nation: 1907 Surrender Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 223; *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3; *Kabkewistahaw First Nation: 1907 Reserve Land Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53.

### Treaties and Statutes Referred To

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1886, c. 43, *Indian Act*, RSC 1906, c. 81.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords Clark, 1880; Coles reprint, 1971).

### COUNSEL, PARTIES, INTERVENORS

D.J. Maddigan, W.A. Brabant for the Cowessess First Nation; V. Russell for the Government of Canada; J.B. Edmond, K. Webb Johnston to the Indian Claims Commission.

## SUMMARY

### **CUMBERLAND HOUSE CREE NATION INDIAN RESERVE 100A INQUIRY Saskatchewan**

This report may be cited as Indian Claims Commission, *Cumberland House Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005).

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

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

**Treaties** – Treaty 5 (1876) – Treaty 6 (1876); **Treaty Interpretation** – Reserve Clause; **Band** – Division – Amalgamation; **Reserve** – Surrender – Disposition; **Fiduciary Duty** – Protection of Reserve Land; **Royal Prerogative**; **Practice and Procedure** – Intervenor – Witness; **Evidence** – Admissibility; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

The Cumberland House Cree Nation (CHCN) submitted a specific claim regarding the unlawful taking of 22,080 acres of IR 100A by surrender. On December 10, 1997, Canada rejected the First Nation's claim on the basis argued by the First Nation but did admit a lawful obligation for Canada's failure to have ensured an equitable division of assets between, in its view, the separate Cumberland Band that had evolved at IR 100A and the original Cumberland Band.

In February 2000, knowing that the James Smith Cree Nation (JSCN) had submitted its own rejected claim to the Indian Claims Commission (ICC) for an inquiry and knowing that the JSCN was asserting a claim over the same IR 100A, the CHCN requested an inquiry. Accepting both claims for an inquiry and following discussions between both First Nations, the panel decided to conduct a single fact-finding process with respect to the history of IR 100A, while maintaining separate inquiries for each First Nation.

#### **BACKGROUND**

On September 7, 1876, the Cumberland Band adhered to Treaty 5 at The Pas. Beginning in 1882, a reserve was surveyed on "Cumberland Island" for the Cumberland Band. This reserve was designated as IR 20 for the Cumberland Band. Then, "owing to the utter uselessness for agricultural purposes of the land in the Reserve at Cumberland," Canada granted the Cumberland Band's repeated requests to be permitted a reserve at Fort à la Corne – a territory outside Treaty 5 and wholly within the territory of Treaty 6 – so long as this *Cumberland* Band was "always designated and known as the 'Fort a la Corne Band of Treaty No. 5.'" On May 17, 1889, IR 100A was confirmed "[f]or the Indians of Cumberland District (of Treaty No. 5)." On July 24, 1902, Canada took a surrender of 22,080 acres of IR 100A and sought to amalgamate the "owners of the James Smith's Indian Reserve No. 100" and the "owners of Cumberland Reserve No. 100A." It is the validity of this surrender that is at issue in this inquiry.

#### **ISSUES**

Did the "Peter Chapman Band" become a separate band from the CHCN at any time prior to 1902? Could the CHCN lawfully have been divided or split and deprived of its reserve without its knowledge or consent? If a separate band was not established, what is the effect of the 1902 surrender? If a separate band was established, does the band split bring an end to the interest of the CHCN in IR 100A?

#### **FINDINGS**

Today, Canada concedes that IR 100A was set aside for the Cumberland Band. We agree. Based upon the totality of the evidence, a separate Band was not created at any point in time at IR 100A. The Cumberland Band that adhered to Treaty 5

resided at two locations: IR 20 and IR 100A. The Cumberland Band continues to exist and continues its treaty relationship with the Crown. This relationship and the terms of Treaty 5 limit the exercise of the Crown's royal prerogative, especially where that prerogative is being exercised to deprive a band of its reserve land. Thus, a transfer of an interest (i.e., a reallocation) in reserve lands, set aside under treaty, to a group other than the band for whom it was originally set aside triggers the requirement, under treaty, that Canada seek and obtain the consent of the band to dispose of its interest in its reserve lands. On the evidence, no such consent was sought.

It was a breach of Canada's treaty obligation to the Cumberland Band to have assigned an interest in IR 100A without the knowledge and consent of the whole of the Cumberland Band. Canada is in breach of its fiduciary duty for its failure to have protected the Cumberland Band's interest in its reserve at IR 100A.

**RECOMMENDATION**

That the Cumberland House Cree Nation's claim regarding Indian Reserve 100A be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

**ICC Reports Referred To**

*Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175.

**Treaties Referred To**

*Treaty 5; Treaty 6.*

**COUNSEL, PARTIES, INTERVENORS**

Thomas Waller for the Cumberland House Cree Nation; Uzma Ihsanullah and Robert Winogron for the Government of Canada; Kathleen N. Lickers to the Indian Claims Commission.

# SUMMARY

## **DUNCAN'S FIRST NATION 1928 SURRENDER INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran, Commissioner R.J. Augustine

**Treaties** – Treaty 8 (1899); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** –Pre-surrender; **Alberta**

### **THE SPECIFIC CLAIM**

The Duncan's First Nation submitted a specific claim to the Government of Canada in February 1989, alleging that the surrenders of eight parcels of reserve land – Indian Reserves (IR) 151 and 151B to 151H – were void, not having been obtained in compliance with the *Indian Act*. The Department of Indian Affairs and Northern Development (DIAND) rejected the claim in August 1994. In October 1994, the Indian Claims Commission (ICC) agreed to the First Nation's request to hold an inquiry into the rejected claim. During the inquiry, DIAND agreed to negotiate the claim regarding IR 151H, thereby reducing the claim to seven parcels from eight. The community session was held in September 1995, and the oral hearing, based on written submissions, took place in November 1997.

### **BACKGROUND**

In July 1899, headman Duncan Testawits signed an adhesion to Treaty 8 on behalf of his people. Treaty 8 guaranteed band members reserve land in common or, for those who wished, in severalty. Duncan's Band's reserves were staked out in 1900. Six parcels were marked as "temporary" reserves, but soon settlers started to trespass on the land. In 1905, 10 reserves were surveyed for the Band. IR 151B to 151G on the northwest bank of the Peace River were intended for individual band members. IR 151 and 151A were larger, communal reserves adjacent to the present-day Berwyn and Brownvale villages. The final two parcels for individual band members were surveyed at Bear Lake (IR 151H) and on the trail south to Grouard (IR 151K). IR 151 and 151A to 151G were confirmed in 1907; IR 151H and 151K were not confirmed until 1925.

Duncan's band members were hunters and trappers but by 1908 were also progressing as garden farmers. The Band, however, gradually abandoned farming, owing to several factors – harsh weather, lack of a farm instructor, a desire to hunt, and several deaths during the 1918 influenza epidemic. By 1928, the Band relied primarily on trapping and hunting.

Competition for land in the Peace River area was intense because of the good soil and temperate climate. Squatters had to be evicted from the land set aside for the Band's reserves. After World War I, the *Soldier Settlement Act* made it possible for war veterans to apply for 160 acres of Crown land in addition to the 160 acres available under the *Dominion Lands Act*. An amendment to the former Act permitted DIAND to sell surrendered Indian lands to the Soldier Settlement Board for transfer to veterans. Initially, Superintendent General D.C. Scott and Indian Commissioner W. Graham refused to seek surrenders from the Duncan's Band, on the basis that other good Crown land was available in that district.

The pressure to open up the lands for settlement continued unabated: one settler who had mistakenly built his house inside IR 151G asked to purchase the 5.61-acre reserve in 1922; another settler requested a lease on IR 151E in 1923. The department decided to seek surrenders of most of the Duncan's reserves on the grounds that they had not been worked for many years. There is no evidence that DIAND told the Band about the offer of a lease.

In 1925, the Municipal District of Peace proposed the surrender and sale of a number of IR 151 reserves based on their unoccupied status and a wish by "the few Indians left who were attached thereto" to surrender. Acting Indian Agent H.

Laird met with the Indians and reported that they were willing to sell, but DIAND refused to proceed because of low land values. Another request from local interests was also put on hold for the same reason. Nevertheless, Laird discussed surrender again with the Band at treaty payment time in 1927, possibly at the Band's request. He later informed DIAND of an increase in land values and recommended the terms for a surrender.

The department was also discussing surrenders with two nearby bands, Swan River and Beaver. Following discussions with Alberta politicians, Scott tried to obtain surrenders from all three Bands, including the surrender of all the Duncan's reserves except for the largest, IR 151A. The proposal to secure a series of surrenders in this area gained momentum with the public and Inspector W. Murison was successful with the Duncan's and Beaver Bands, but not Swan River.

The surrender of Duncan's IR 151 and IR 151B to 151G reportedly took place on September 19, 1928. Little evidence of the surrender meeting exists; however, Murison later reported that seven of the 53 band members were males over 21 years of age, that five of the seven were present at the meeting, and that the vote was unanimous. Murison indicated that he believed that the Indians had discussed surrender thoroughly after receiving notice on August 3 of the surrender meeting. He also reported that, although he could not tell them the value of the land, he promised them each a \$50 initial payment before December 15. He noted that the Band appeared to be decreasing in size and that IR 151A, at 5,120 acres, 35 per cent of which was good farm land, would be ample for their needs. Following receipt of the surrender document, affidavit, and voters list showing the eligible band members and record of the vote, the surrender was confirmed by Order in Council on January 19, 1929.

## ISSUES

Did the surrender meet all the requirements of the 1927 *Indian Act*? Did the Crown meet its pre-surrender fiduciary duty?

## FINDINGS

### ***Compliance with the Indian Act***

The ICC finds that the surrender meeting took place. No evidence exists that Murison met only with band members individually or in small groups. Meeting them at the Beaver Band's reserve also made sense, as most of the Duncan's band members congregated there for treaty annuity payments.

The requirement that the meeting be called for the precise purpose of dealing with the surrender was met. The notice requirements were also met. Surrender had been discussed with the Band for many years. Posting a notice on the reserve would have been futile since most band members were at the Beaver reserve in August. Notice of the surrender meeting was given on August 3, 1928, at the Beaver reserve to at least four eligible voters, and the majority of the eligible voters did attend the surrender meeting. In this case, notice was sufficient. The Band's negotiation of certain conditions of surrender to be inserted into the surrender document also points to its preparedness.

The requirement that the meeting be summoned according to the rules of the band was also met, as the First Nation failed to establish that it had any fixed rules in 1928 for calling meetings.

The voter eligibility requirements were also met. Eight individuals were male band members of at least 21 years of age in 1928. The Act also requires that the voter "habitually resides on or near, and is interested in the reserve in question." The words "the reserve in question" cannot strictly apply here because there was a series of reserves, some of which were set apart in severalty with no one living on or near them. Each of the Duncan's reserves could have been considered as part of the Band's "reserve."

The condition of being "interested in" the reserve should not be interpreted as limiting the interest to those living on or adjacent to the reserve and making actual use of the reserve. Its purpose is to prevent surrender meetings from being disrupted or influenced by Indians who are not sufficiently interested in the band's reserve lands. The persons who are permitted to vote should have a reasonable connection to the reserve – using it for residential, economic, or spiritual purposes. What constitutes a reasonable connection depends on the circumstances.

The requirement that the voter "habitually resides" on or near the reserve means that his place of residence will be the location to which he customarily returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite temporary or casual absences. The quality of residence is the overriding concern. Nearness is a question of fact to be decided on the circumstances of each case. Duncan's members engaged in hunting, trapping, and fishing that took them far afield, returning to their reserves at the end of the season.

Following the appropriate notice, five adult male members of the Band, four of whom resided on or near and were interested in the reserves, convened on IR 152 on September 19, 1928, for the express purpose of deciding whether to surrender IR 151 and IR 151B to 151G. The four eligible voters constituted a quorum of the eligible voting members and unanimously assented to the surrender. The post-surrender requirements for the taking of an affidavit and the Crown's acceptance of the surrender were also met. The 1928 surrender complied in all material respects with the *Indian Act*. Although a fifth Indian voted who was ineligible, this fact does not invalidate the surrender. The requirement that only eligible persons may vote is directory, not mandatory in nature. In the absence of evidence demonstrating that the presence or vote of an ineligible Indian has cast the Band's majority assent into doubt, the vote should be treated as valid.

### ***Pre-surrender Fiduciary Duty***

There is no evidence to support the conclusion that the Band did not understand the terms of the surrender. Murison's evidence, corroborated by testimony of the Elder who attended the meeting, indicates that the Band was prepared and also negotiated additional terms. After the surrender, the Band petitioned to be paid a second installment from the sale proceeds. No evidence exists that the Band complained or sought to reverse the surrender.

Both Canada and the Band had an interest in obtaining the surrender – Canada, to make land available for settlement, and the Band, to dispose of reserve lands that were of no immediate benefit in exchange for cash payments and annual interest to be used to purchase goods. The Crown turned down a number of proposals for surrender and remained largely non-committal until the conditions for surrender improved. There is no evidence of unscrupulous methods to force or trick the Band into surrendering its unused reserves, nor is the allegation that the surrender documents were forged because of the similarity of the voters' marks proven. The process of touching the pen is a reasonable explanation for the similarities of the marks on one document and the dissimilarities between the documents.

The Band did not cede or abnegate its decision-making power to the Crown. Although the Band did not have a chief at the time, there was no leadership void, nor was the Band prevented from selecting a chief or seeking outside advice. Inability to understand English does not equate with powerlessness or incapacity. In fact, the band members appear to have been largely independent and self-supporting, and were not reliant on the reserves surrendered or each other to sustain themselves. There was nothing in Canada's motives and methods deserving of reproach, other than perhaps a lack of detail in the records.

The surrender must be judged from the perspective of what appeared to be in the Band's best interests at the time. The 1918 amendment to the *Indian Act* giving the government authority to lease reserve land for agricultural purposes without the band's consent was a response to demands for increased production during the war years, but, in 1928, the Crown still considered that surrendering for sale and investing the proceeds was a prudent course in the interests of bands. In addition, if the lands were leased, there would be no one to supervise the lessees properly. The only exception is IR 151E, which was the subject of a lease proposal in 1923. Canada was under a positive duty to present the offer to the Band for a decision, as leasing was a viable option. The Crown should have withheld its consent to the surrender of IR 151E.

### **RECOMMENDATION**

That the claim of the Duncan's First Nation regarding the surrender of IR 151E be accepted for negotiation under the Specific Claims Policy.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*Cardinal v. R.*, [1982] 1 SCR 508; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344; *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1996] 1 CNLR 54 (Ont. Ct. (Gen. Div.)); *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1996), 31 OR (3d) 97 (Ont. CA); *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Opetchesabt Indian Band v. Canada*, [1997] 2 SCR 119; *Guerin v. The Queen*, [1984] 2 SCR 335; *Apsassin v. The Queen*, [1988] 1 CNLR 73 (FCTD); *Smith v. The Queen*, [1983] 1 SCR 554; *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (May 20, 1999), No. 25708 (SCC); *Attorney-General of*

*Canada v. Canard* (1975), 52 DLR (3d) 548 (SCC); *Adderson v. Adderson* (1987), 36 DLR (4th) 631 (Alta CA); *R. v. Barnett London Borough Council, Ex p. Nilish Shah*, [1983] 2 AC 309 (HL); *R. v. Lewis*, [1993] 5 WWR 608 (BCCA); *Mitchell v. Peguis Indian Band* (1990), 71 DLR (4th) 193 (SCC); *Montreal Street Railway Company v. Normandin*, [1917] AC 170 (PC); *British Columbia (Attorney General) v. Canada*, [1994] 2 SCR 41; *Apsassin v. Canada*, [1993] 2 CNLR 20, 3 FC 28 (FCA); *Chippewas of Kettle and Stony Point v. Canada (Attorney General)*, [1998] 1 SCR 756; *King v. The Queen*, [1986] 4 CNLR 74 (FCTD); *Glass Bottle Blowers' Association of the United States and Canada v. Dominion Glass Co. Ltd.*, [1943] OWN 652 (Lab. Ct); *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3 (FCA); *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 14 FTR 161 (TD); *Norberg v. Wynrib*, [1992] 4 WWR 577 (SCC); *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); *Frame v. Smith*, [1987] 2 SCR 99.

### ICC Reports Referred To

*Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004); *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281.

### Treaties and Statutes Referred To

*Royal Proclamation of 1763*, RSC 1985, App. II; *Treaty No. 8, Made June 21, 1899, and Adhesions, Reports, Etc.* (1899; reprinted Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1927; *An Act to Assist Returned Soldiers in Settling upon the Land, or, Soldier Settlement Act* (August 29, 1917) and *Soldier Settlement Act* (July 7, 1919); *Matrimonial Property Act*, RSA 1980; *Railway Act*, RSC 1985.

### Other Sources Referred To

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### COUNSEL, PARTIES, INTERVENORS

J. Slavik, K.E. Buss for the Duncan's First Nation; P. Robinson for the Government of Canada; D.E. Osborn, QC, T.A. Gould to the Indian Claims Commission.

### CANADA'S RESPONSE

In June 2001, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation to negotiate the claim regarding the surrender of IR 151E: see (2001) 14 ICCP 285.

## SUMMARY

### **EEL RIVER BAR FIRST NATION EEL RIVER DAM INQUIRY New Brunswick**

The report may be cited as Indian Claims Commission, *Eel River Bar First Nation: Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner R.J. Augustine, Commissioner A. Gill

**Treaties** – Treaty of 1779; **Treaty Right** – Fishing; **Indian Act** – Expropriation – Permit; **Right of Way** – Dam – Permit – Expropriation – Trespass; **Fiduciary Duty** – Third Party; **Flooding** – Dam; **New Brunswick**

#### **THE SPECIFIC CLAIM**

In February 1987, the Eel River Bar First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that the Crown owed lawful obligations to the First Nation as a result of the construction of a dam that would flood its reserve land. The Minister rejected the claim on the basis that the First Nation had been compensated fully for its loss, and that a 1970 agreement for compensation was valid. The First Nation resubmitted its claim in 1992 and provided further submissions in 1995, but Canada again rejected the claim. The Indian Claims Commission (ICC) agreed to hold an inquiry into the First Nation's rejected claim in September 1995. Two community sessions were held in April and July 1996, following which the parties submitted written arguments. An oral hearing was held in February 1997.

#### **BACKGROUND**

The ancestors of the Eel River Bar First Nation were signatories to the 1779 Treaty of Peace and Friendship with the British. The Eel River Bar Indian Reserve was set aside in 1807 by Order in Council of the Province of New Brunswick. The fishery – in particular, of clams – was the foundation of the First Nation's economy and was recognized as such when the reserve was created. The reserve land was unsuitable for farming.

In 1962, the New Brunswick Water Authority (NBWA) proposed damming the Eel River, a tidal river, in order to attract industry by securing a supply of fresh water. Although the dam would be off reserve, the Band opposed the plan, arguing that the dam would flood 50 per cent of its clam production area. Fisheries' researchers and engineers studied the impacts and viability of the proposed sites for the dam. The Band, the Town of Dalhousie, and Indian Affairs also discussed possible compensation and employment for the Band. The Band signed a Band Council Resolution (BCR) in 1963, setting out the terms by which it would consent to the dam; however, it was built the same year without any final agreement of the parties or authorization under the *Indian Act*.

Between 1963 and 1968, the Band and the town continued, without success, to negotiate an agreement covering the construction of the dam and headpond, the latter on reserve land. In 1968, the NBWA requested an expansion of the reservoir, requiring 82 additional acres of reserve land and a second pipeline right of way. Following protracted negotiations, a final agreement was signed in 1970 that included a lump sum and annual pumping fees to the Band for the transfer of the reserve lands. The Band subsequently requested that Indian Affairs correct problems of pollution in the river, erosion of the shoreline, and flooding from leaks in the pipeline, but nothing was done. In 1995, the Band and the Government of New Brunswick renegotiated the pumping fee provisions of the original agreement.

**ISSUES**

Did the Crown breach the Eel River First Nation's fishing rights under the Treaty of 1779? Did the Crown breach the *Indian Act* in granting a permit and in expropriating reserve land for the purpose of the dam and headpond in 1970? Did the federal Crown breach a fiduciary duty to negotiate the 1970 agreement on behalf of the Band?

**FINDINGS**

The construction of the dam in 1963 infringed upon the First Nation's treaty fishing rights as it interfered with its right to fish free from any interference on the part of the Crown. The treaty was intended to protect the First Nation's traditional livelihood of fishing. The First Nation, therefore, was entitled to compensation for the infringement of its treaty rights and damages to its livelihood. It was open, however, to the First Nation to negotiate a settlement to compensate it for this breach, and it did so with the NBWA and the federal Crown in 1970. The agreement was intended to compensate the First Nation for the damages caused to its fishery. There is, therefore, no outstanding lawful obligation owed by the Crown for breach of treaty.

In 1963, Indian Affairs permitted the construction of a dam without a section 28(2) permit under the *Indian Act* or other authority. Permits were issued in 1968 and 1970 for the purpose of an access road, pipeline, and pumping station. The 1970 permit was properly granted under section 28(2) of the Act, as it was for an indefinite but clearly ascertainable and justiciable period. The interest in the land granted was not of such a nature that it required the consent of the entire Band in accordance with the surrender provisions of the *Indian Act*.

In 1970, 61.57 acres of reserve land was expropriated for a headpond under section 35 of the *Indian Act*. The province was empowered to expropriate for that purpose because it was a public work, to promote economic activity and job creation. But because the Band consented to the expropriation, the land was transferred under section 35(3) without triggering the compulsory taking requirements of the provincial *Expropriation Act*. Although the Band consented to the use of expropriation powers and agreed to compensation, it was still a compulsory taking of land. The Crown's expropriation power under section 35 was validly exercised.

From 1963 to 1970, there was trespass on the Band's reserve land by the town and the NBWA. Use and occupation of reserve land must be authorized by the Crown in one of the forms contemplated by the *Indian Act* – surrender, expropriation, or permit – to prevent a band from being exploited. Therefore, the consent of the Band, as expressed in its 1963 BCR, is void because no section 28(2) permits were issued for most of that period. Nevertheless, the 1970 agreement was intended to compensate the Band for all its losses and damages arising from the construction of the dam.

The twin principles of autonomy and protection are paramount when dealing with the disposition of Indian interests in reserve land. On the facts of this case, Canada properly discharged its fiduciary obligations to the Band for the following reasons. First, the Band Council was well aware of the nature of the dealings surrounding the dam and its consequences. Second, there is no evidence that Indian Affairs officials tainted the dealings such that it would be unsafe to rely on the Band's understanding. The dealings were initiated by the province and the Town of Dalhousie, not Canada or the Band, and throughout the protracted negotiations, federal officials acted consistently to protect the Band's interests and advocate on its behalf. Third, the Band did not cede its power to make decisions. Its representatives were capable and persistent advocates, and the Band made its own decisions, albeit with the assistance of Indian Affairs and others. As such, its decisions are to be respected. Finally, the 1970 agreement was not a foolish, improvident, or exploitative transaction that ought to have been rejected by the Crown. The negotiations contemplated various proposals of land exchange, employment, development opportunities, cash, and reversionary interests. In arriving at a final settlement, the parties relied heavily on the advice of a fisheries' biologist, whose sole motivation was to provide a report that fairly and fully recognized the Band's losses.

The Band experienced hardships caused by the lengthy negotiations and the unwillingness of the town and the NBWA to find employment for band members, but these hardships were not the result of any breach of duty on the part of the federal Crown.

**RECOMMENDATION**

That the Eel River Bar First Nation's claim not be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*R. v. Paul*, [1981] 2 CNLR 83 (NBCA); *Pasco v. Canadian National Railway Co.*, [1986] 1 CNLR 34 (BCCA); *R. v. Sparrow*, [1990] 1 SCR; *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA); *Guerin v. The Queen*, [1984] 2 SCR 335; *Quebec (Attorney-General) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Opetchesabt Indian Band v. Canada* (1997), unreported, SCR, file no. 24161; *Smith v. The Queen*, [1983] 1 SCR 554; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *Kruger v. The Queen*, [1985] 3 CNLR 15 (FCA); *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344; *Norberg v. Wynrib*, [1992] 4 WWR 577 (SCC); *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC).

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### **Other Sources Referred To**

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### **COUNSEL, PARTIES, INTERVENORS**

D. Opekokew, M. Klippenstein for the Eel River Bar First Nation; E. Daigle for the Government of Canada; R.S. Maurice, K. Lickers to the Indian Claims Commission.



# SUMMARY

## **ESKETEMC FIRST NATION INDIAN RESERVES 15, 17, AND 18 INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, November 2001), reported (2002) 15 ICCP 3.

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

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner S.G. Purdy

**British Columbia** – Terms of Union, 1871 – Indian Settlement – Pre-emption – McKenna-McBride Commission – Ditchburn-Clark Review – Reserve Creation; **Reserve** – Creation – De Facto Reserve; **Fiduciary Duty** – Reserve Creation – Protection of Land – Indian Settlement; **Specific Claims Policy** – Fiduciary Duty – Lawful Obligation – Aboriginal Title

### **THE SPECIFIC CLAIM**

The Esketemc First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in 1992 on the basis that lands known as Indian Reserves (IR) 15, 17, and 18 were reserves, having been set aside in 1916 by the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission). The First Nation alleged that IR 15 and 17 were wrongfully disallowed, and IR 18 improperly reduced, by Canada and British Columbia as a result of the Ditchburn-Clark review. In August 1994, Canada issued a preliminary position rejecting the claim for negotiation. The First Nation conducted additional research and presented further evidence and arguments to Canada in March 1996. In 1998, the First Nation revised its submissions to incorporate the *Delgamuukw* decision. The claim was again rejected by Canada in October 1998, after which the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry. The ICC held a community session and site visit in May 2000, and an oral hearing in September 2000. The parties provided further submissions arising from an argument raised for the first time at the oral hearing.

### **BACKGROUND**

The Alkali Lake Band (Esketemc First Nation), located on a tributary of the Fraser River, lived on and used lands known as IR 15, 17, and 18 (the Lands) to gain their livelihood before settlers arrived. In 1858, up to 35,000 miners moved into the Fraser River valley to search for gold, and they were followed by an influx of settlers. Indians suffered from disease and other problems caused by large-scale immigration into the area. In 1860, British Columbia introduced the pre-emption system allowing settlers to acquire up to 160 acres of unsurveyed land easily and cheaply, so long as it was not “an Indian Reserve or Settlement.” But protecting Indian land in a climate of land-hungry settlers and provincial indifference proved difficult. In 1864, the Band’s land base was limited to a 40-acre reserve.

British Columbia joined Canada in 1871, but the governments continued to disagree on Indian land rights. To resolve the problem of reserve selection, Canada and British Columbia set up a Joint Reserve Commission in 1876; by 1880 this task was given to Commissioner Peter O’Reilly alone. When he visited the Alkali Lake Band in 1881, O’Reilly found that most of the good land had already been pre-empted or purchased by settlers and that the Band was discontented at the loss of Crown lands on which it depended for ranching and farming. Settlers, who by 1891 formed the majority population in BC, exerted considerable pressure on the province to be given the best agricultural land and to leave the “wild lands” to the Indians.

As a result of the work of the Joint Reserve Commission and O’Reilly, the Alkali Lake Band obtained 14 reserves. But the BC government continued to deny Indian title. It also asserted a reversionary interest in surrendered reserve lands, and actively sought to have some reserves reduced. All efforts by the BC tribes and their allies to protect Indian lands were unsuccessful. In 1910 and 1911, Canada amended section 37A of the *Indian Act* to permit it to act on behalf of Indians whose lands were claimed by a third party.

The McKenna-McBride Commission, a joint BC and federal body, was established in 1912 to settle all differences between the two governments regarding Indian lands in the province. It had the power to adjust the acreage of Indian reserves and set apart new reserves, subject to final approval by the two governments. Between 1913 and 1915, the Commission visited all of BC's bands to hear their views. At Alkali Lake, band members submitted 17 applications for reserves, testifying about their residency, use of, and improvements on the lands. Commissioners also listened to non-Aboriginal farmers, municipalities, and others. Indian Agents typically accompanied the Commissioners.

In 1916, the Commission confirmed 13 of the 14 existing reserves of the Band, directing IR 6 (Wycott's Flat) to be cut off, but allowing new reserves, including IR 15, 17, and 18. In the same year, the Allied Tribes of British Columbia was created to voice the Indians' dissatisfaction with the Commission. In 1919 and 1920, British Columbia and Canada passed parallel legislation permitting them to implement, as they considered reasonable, the recommendations of McKenna-McBride, including in Canada's case, the ability to order reductions or cut-offs without having to take a surrender. Largely owing to British Columbia's dissatisfaction with the McKenna-McBride recommendations, however, the governments launched a joint review of the Commission's work by W.E. Ditchburn and J.W. Clark.

The Ditchburn-Clark review led to the disallowance of IR 15 and 17, and the reduction of IR 18, on the basis that these new reserves would interfere with the settlers' use of the summer range. Wycott's Flat, an area of high, dry land, was reinstated. By 1924, both governments had passed Orders in Council confirming the reserve allotments recommended by McKenna-McBride, as amended by Ditchburn and Clark.

## ISSUES

Did the First Nation suffer a loss that can be negotiated under the Specific Claims Policy? Did the McKenna-McBride Commission set aside lands known as IR 15, 17, and 18 as reserves that conformed with all legal requirements? If not, were the Lands de facto reserves? Did Ditchburn and Clark exceed their authority with respect to the Lands? Did Canada owe, and breach, a fiduciary duty to protect the Lands and obtain reserve status for them? When British Columbia and Canada disagreed over reserve selection, did Canada have a fiduciary duty to invoke Article 13 of the *Terms of Union*; invoke section 37A of the *Indian Act*; declare the Lands to be reserves under section 91(24) of the *Constitution Act, 1867*; or obtain adequate alternate lands or pay compensation to the Band?

## FINDINGS

### ***Jurisdiction: Comprehensive vs. Specific Claim; Fiduciary Obligation***

The Specific Claims Policy characterizes a lawful obligation owed to the First Nation by the federal government as a non-fulfillment of a treaty, a breach of the *Indian Act*, a breach of an obligation in relation to administration of Indian assets, or an illegal disposition of Indian land. The First Nation's claim, that the allotments made by the McKenna-McBride Commission constituted reserves or de facto reserves that could only be taken away by surrender, falls within the last three categories of "lawful obligation." The same would also hold true if the lands were not reserves but found to be another form of Indian land or asset. With respect to the question whether a breach of fiduciary obligation can result in an outstanding lawful obligation within the policy, it is settled law since *Guerin* that the Crown's fiduciary relationship with First Nations can provide a distinct source of legal or equitable obligation. The Specific Claims Policy, written prior to *Guerin*, must therefore be read as incorporating the fiduciary obligation as a source of "lawful obligation."

The history of reserve selection in British Columbia, including the mandate of the McKenna-McBride Commission, was based on a denial of Aboriginal title. If this claim includes issues of traditional use and occupancy, they are incidental to the fundamental question whether Canada's participation in modifying the Commission's conclusions constituted a specific breach of Canada's fiduciary obligation to the Band.

### ***IR 15, 17, and 18 as Reserves or de facto Reserves***

Reserve creation requires no formalities but does require an intention to create a reserve and an act by a public official with authority to act that gives effect to the intention. An additional layer to the question of authority exists where the proprietary jurisdiction in the lands to be reserved is held by the province, in which case it must concur in the decision. The McKenna-McBride Commission's powers were expressly limited by the Order in Council creating it, which made its proceedings "subject to the approval of the two Governments." The intent of both governments was to limit the Commission's authority to making recommendations, not binding decisions.

### ***Authority of Ditchburn and Clark***

Both governments passed laws permitting them to do whatever they considered reasonable or expedient to implement the McKenna-McBride report. These laws indicate that Canada and British Columbia intended their agents to have considerable scope in reviewing the McKenna-McBride recommendations and proposing changes, including reductions to recommended reserve additions. Ditchburn and Clark did not exceed their jurisdiction in proposing these changes.

### ***Fiduciary Obligation***

The terms of the McKenna-McBride Agreement created temporary reservations of land, protected from pre-emption or sale pending a final decision by the governments. The 1911 BC *Land Act* protected “unreserved Crown lands, not being an *Indian settlement*,” from pre-emption. The Band proved that IR 15, 17, and 18 were “Indian settlements” sufficient to show a prima facie, pre-existing legal interest in the Lands to which a fiduciary obligation attached. The Band was vulnerable given the Commission process agreed to by Canada. Canada unilaterally assumed the responsibility for representing the interests of the Band and had a duty to act in its best interests. That duty was breached when Canada’s representatives failed to scrutinize Clark’s proposals, obtain the Band’s views, seek its instructions, and ultimately withhold consent to an improvident transaction.

### ***Alternative Remedies***

The First Nation claimed that, had Canada vigorously but unsuccessfully pressed the Band’s case with the BC government, Canada should have turned to one or more of the following remedies:

Article 13, *Terms of Union*, provided that, in case of a disagreement between the two governments regarding the quantity of reserve land to be granted, the matter could be referred for a decision to the Secretary of State for the Colonies. The governments chose instead to negotiate using a series of Commissions and a review. When Canada’s agent, Ditchburn, disagreed with Clark’s proposals, Canada should have employed Article 13. By not so doing, it breached a fiduciary obligation to the Band.

Section 37A of the *Indian Act* permitted the federal Crown to litigate on behalf of Indians in the Exchequer Court where land claimed by Indians was withheld or adversely occupied. This remedy did not apply to these facts, however, because there was no third-party involvement in IR 15, 17, and 18, nor would the effect of disallowing them result in the dispossession of the Lands, as they continued to be used as settlement lands.

Section 91(24) of the *Constitution Act, 1867*, did not leave open to Canada the option of placing the Lands beyond the competence of the provincial government by declaring them to be reserves under this section. The Lands could only become reserves if both British Columbia and Canada agreed and acted jointly to create them. Nor did section 91(24) impose on Canada a positive obligation to create reserve lands at the request of a band.

Alternative lands: as Canada was unable to insist on BC’s cooperation in setting apart IR 15, 17, and all of 18 as reserves, Canada should have made efforts to obtain adequate alternative lands for the Band or provide compensation so that the Band could acquire other lands.

### **RECOMMENDATION**

That the claim of the Esketemc First Nation regarding the disallowance or reduction of IR 15, 17, and 18 be accepted for negotiation under the Specific Claims Policy.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *Swanson Estate v. Canada* (1991), 80 DLR (4th) 741 (FCA); *Gosnell v. Minister of Lands* (Victoria: The Colonist Presses, 1912) (SCC); *Guerin v. The Queen*, [1984] 2 SCR 335; *Jules v. Harper Ranch Ltd.*, [1989] 3 CNLR 67 (BCSC); *Roberts v. The Queen* (unreported, FCA, October 12, 1999, Docket No. A-655-95); *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 (Sask. QB); *Ross River Dena Band Council v. Canada*, [2000] 2 CNLR 293 (YTCA); *Ontario Mining Company v. Seybold*, [1903] AC 73; *Northern Pacific Railway v. Wis-*

*mer*, 246 US 283 at 288–89 (1918); *Canadian Pacific Ltd. v. Paul* (1981), 34 NBR (2d) 382 (NBQB), [1988] 2 SCR 654; *Winters v. United States*, 207 US 564 (9th Cir. 1908); *United States v. Walker River Irrigation District*, 104 F. 2d 334 (9th Cir. 1939); *St. Catherines Milling and Lumber Company v. The Queen* (1887), 13 SCR 577; *Esquimalt and Nanaimo Railway Co. v. McLellan*, [1918] 3 WWR 645 (BCCA); *R. v. Nikal*, [1996] 1 SCR 1013; *Sac and Fox Tribe of the Mississippi in Iowa and United States v. Licklider*, 576 F. 2d 145 (8th Cir. 1978); *Venne v. Canada*, [2001] SKCA 109 (Sask. CA); *Lac La Ronge Indian Band v. Beckman*, [1990] 3 WWR 1 (Sask. QB); *R. v. Sioui*, [1990] 1 SCR 1025; *R. v. Marshall* (1997), 146 DLR (4th) 257 (NSCA), [1999] 3 SCR 456; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *Osoyoos Indian Band v. Town of Oliver* (1999), 172 DLR (4th) 589 (BCCA); *R. v. Lewis*, [1996] 1 SCR 921; *Roberts v. Canada*, [2000] 3 CNLR 303 (FCA); *Dunstan v. Hell's Gate Enterprises*, [1986] 3 CNLR 47 (BCSC); *Wewayakum Indian Band v. Canada* (1995), 99 FTR 1; *British Columbia (A.G.) v. Canada (A.G.)*, [1906] AC 552; *Jules v. Harper Ranch Ltd.*, [1989] 3 CNLR 67 (BCSC); *R. v. Sparrow*, [1990] 1 SCR 1075; *Québec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Frame v. Smith*, [1987] 2 SCR 99; *Fairford First Nation v. Canada (A.G.)*, [1999] 2 CNLR 60 (FCTD); *Scrimbitt v. Sakimay Indian Band Council*, [2000] 1 CNLR 205 (FCTD); *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*, [1999] FCJ No. 1822 (FCA); *Girardet v. Crease & Co.* (1987), 11 BCLR (2d) 361 (SC); *Hodgkinson v. Simms*, [1994] 3 SCR 377; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *M. (K.) v. M. (H.)*, [1992] 3 SCR 6; *Semiabmoo Indian Band v. Canada*, [1998] 1 FC 3 (CA); *Apsassin v. Canada*, [1988] 3 FC 3 (TD); *Musqueam Holdings Ltd. v. British Columbia*, [2000] BCJ No. 1114 (BCCA).

### ICC Reports Referred To

*'Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *'Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89; *Nak'azdli First Nation: Abt-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81; *Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Inquiry – Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75; *Friends of the Michel Society: 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69; *Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

### Treaties and Statutes Referred To

British Columbia, *British North America Act, 1867, Terms of Union with Canada, Rules and Orders of the Legislative Assembly* (Victoria: R. Wolfenden, 1881); *Crown Liability Act*, SC 1952–53; *Land Ordinance*, repr. in RSBC 1871; *Land Pre-emption Ordinance*, repr. in RSBC 1871; *Pre-emption Consolidation Act, 1861*, repr. in RSBC 1871; *Vancouver Island Land Proclamation, 1862*, repr. in RSBC 1871; *Land Ordinance, 1865*, repr. in RSBC 1871; *Pre-emption Ordinance, 1866*, repr. in RSBC 1871; *Land Ordinance, 1870*, repr. in RSBC 1871; *Indian Act*, RSC 1906, as amended by SC 1910, SC 1911, RSC 1927, RSC 1985; *Indian Affairs Settlement Act*, SBC 1919; *British Columbia Indian Lands Settlement Act*, SC 1920; *Inquiries Act*, RSC 1906; *Land Act*, SBC 1908, RSBC 1911; *Land Act Amendment Act*, SBC 1918.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; Wilson Duff, *The Indian History of British Columbia, Vol. 1: The Impact of the White Man* (Victoria: Royal British Columbia Museum, 1969); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed. (Vancouver: UBC Press, 1992); Edgar McInnis, *Canada: A Political and Social History*, 3rd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1969); Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997); Philip Drucker, *The Native Brotherhoods: Modern Intertribal Organizations on the Northwest Coast* (Brighton, Mich.: Native American Book Publishers, 1958); Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974); George Edgar Shankel, “The Development of Indian Policy in British Columbia,” unpublished doc-

toral thesis, University of Washington, August 1945; Forrest E. LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto: University of Toronto Press, 1961); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990); Richard Bartlett, “The Establishment of Indian Reserves on the Prairies,” [1980] 3 CNLR 3; P.D. Finn, “The Fiduciary Principle,” in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Agincourt, Ontario: Carswell, 1989).

**COUNSEL, PARTIES, INTERVENORS**

S. Ashcroft for the Esketemc First Nation; M. Mladen for the Government of Canada; K.N. Lickers, T.A. Gould to the Indian Claims Commission.



## SUMMARY

### **FISHING LAKE FIRST NATION 1907 SURRENDER INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Fishing Lake First Nation: 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Treaty Interpretation** – Reserve Clause; **Reserve** – Surrender –Disposition; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-Surrender; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In April 1989, the Fishing Lake First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the 1907 surrender of reserve lands at Indian Reserve (IR) 89 was invalid. The claim was rejected in February 1993 on grounds that no outstanding lawful obligation had been established. The First Nation submitted supplemental submissions in 1994 and 1995, but Canada's position remained unchanged. During the same period, the First Nation submitted a request to the Indian Claims Commission (ICC) to conduct an inquiry into its rejected claim; the ICC agreed to this request in March 1995. A community session and a hearing to receive expert testimony took place in July 1995.

#### **BACKGROUND**

The Yellow Quill Band adhered to Treaty 4 in August 1876, at Fort Pelly, North-West Territories. Three reserves were subsequently surveyed for the Band. The first reserve, located at Nut Lake, comprised 10,342 acres; a second reserve of 22,080 acres was surveyed at Fishing Lake, where some families of the band were already residing, and the third reserve, containing 9,638 acres, was surveyed in 1900 "in the locality which [the Kinistino] Indians have for sometime occupied."

Following the surveys, the Canadian Northern Railway Company was granted a right of way over a portion of the Fishing Lake reserve. In 1905, the company requested that the northern end of this reserve be opened for settlement and Department of Indian Affairs personnel recommended a surrender of a portion of the reserve.

The Reverend Dr John McDougall of Calgary was asked to help negotiate the surrender and met with the Fishing Lake Indians several times. At a meeting on August 2, 1906, the Indians rejected the surrender because of the condition that the three bands would share equally in the proceeds from the Fishing Lake Band's surrender. McDougall recommended that "these People be considered as three distinct Bands." Once the agreement separating the Nut Lake, Fishing Lake, and Kinistino Bands was signed, the surrender of 13,170 acres of the Fishing Lake reserve would take place. The department agreed to advance 10 per cent of the proceeds from the surrendered lands for distribution among the Indians when the surrender was signed, and \$10,000 in cash was made available for this purpose.

The "Principal men" of Nut Lake affixed their marks to an agreement recognizing them as a separate band on July 27, 1907, followed by the "Principal men" of Kinistino on July 31. One week later, on August 7, the "Principal men" of Fishing Lake affixed their marks to this agreement. Two days later, on August 9, 1907, Inspector W.M. Graham secured the surrender of 13,170 acres from the Fishing Lake Band. Upon surrender, Graham paid each Indian at Fishing Lake \$100. Nine members of the Fishing Lake Band affixed their marks to the surrender document. In Graham's report to Secretary McLean on August 21, 1907, he explained that the Indians at Fishing Lake were "not at all anxious to sell and it was two days before they agreed to sell." Graham stated that he was ready to leave when a number of the Band told him they were willing to sign the surrender.

The Governor in Council approved the surrender and sanctioned the proposed sale in September 1907. Most of the land was sold at three public auctions in 1909 and 1910.

### **ISSUES**

Was there a valid surrender on August 9, 1907, of some 13,170 acres of the Fishing Lake Reserve IR 89? In particular, did the Crown obtain the surrender as a result of duress, undue influence, an unconscionable agreement, or negligent misrepresentation? Did the Crown when obtaining the surrender comply with the surrender procedures required by the *Indian Act*? Did the Crown have any trust or fiduciary obligations in relation to the surrender of 1905 from the First Nation? If so, did the Crown fulfill those obligations? Did the provisions of Treaty 4 require the Crown to obtain the consent of the Indians entitled to the Fishing Lake Reserve, prior to disposing of some 13,170 acres of the reserve, and if so was that consent obtained?

### **OUTCOME**

Prior to the conclusion of the inquiry, Canada accepted the claim for negotiation by letter dated August 27, 1996: see Appendix C to the report. New evidence had come to light that one or more individuals who had signed the surrender document in 1907 were not 21 years of age, contrary to the *Indian Act* requirements for taking a valid surrender. The ICC, therefore, did not make findings or recommendations.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), Cat. No. Ci 72-0466; Canada, *Indian Treaties and Surrenders* (Ottawa 1891; facsim. repr. Toronto: Coles, 1971), vol. 1, no. 135; *The Judicature Ordinance; Indian Act*, RSC 1886, RSC 1906.

### **COUNSEL, PARTIES, INTERVENORS**

S.M. Pillipow, L.D. Wilhelm for the Fishing Lake First Nation; B. Becker, K. Kobayashi for the Government of Canada; R.S. Maurice, K. Fullerton, K.N. Lickers, G. Christoff to the Indian Claims Commission.

### **UPDATE**

The Commission was asked by the parties, and agreed, to act as facilitator for the negotiations, which were successfully concluded in August 2001: see ICC, *Fishing Lake First Nation: 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291.

# SUMMARY

## **FISHING LAKE FIRST NATION 1907 SURRENDER MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Fishing Lake First Nation: 1907 Surrender Mediation* (Ottawa, March 2002), reported (2002) 15 ICCP 291.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** –Pre-surrender; **Mandate of Indian Claims Commission** – Mediation; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In April 1989, the Fishing Lake First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that the Fishing Lake surrender of 13,170 acres of land from Fishing Lake Indian Reserve (IR) 89 on August 9, 1907, was made under duress, undue influence, and through an unconscionable surrender bargain, and in breach of the *Indian Act*. DIAND rejected the claim in February 1993. Following further submissions by the First Nation in September 1994 and January 1995, the claim was again rejected, whereupon the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry. As a result of the inquiry process, DIAND accepted the specific claim in August 1996. At the request of the First Nation and with DIAND's approval, the ICC agreed to facilitate the resulting negotiations in December 1996.

### **BACKGROUND**

The background to this mediation may be found at Indian Claims Commission, *Fishing Lake First Nation: 1907 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 219.

### **MATTERS FACILITATED**

The ICC facilitated the negotiations, including a protocol and principles to guide the negotiation process. The ICC coordinated loss-of-use studies concerning traditional activities, agriculture, forestry, and mining, to determine the net losses to the First Nation resulting from the 1907 surrender. Negotiations also involved a determination and resolution of matters of traditional activities, a burial site, the compensation for these losses, and a final payment schedule.

### **OUTCOME**

A Settlement Agreement was initialled by the parties, and members of the Fishing Lake First Nation voted to ratify their settlement on March 12, 2001.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



# SUMMARY

## **FORT MCKAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

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

**Panel:** Commissioner C.T. Corcoran, Commission Co-Chair P.E.J. Prentice, QC

**Treaties** – Treaty 8 (1899); **Treaty Interpretation** – Treaty Land Entitlement; **Treaty Land Entitlement** – Policy – Date of First Survey – Population Formula – Late Adherent – Absentee – Landless Transfer – Marriage; **Band** – Membership; **Alberta**

### **THE SPECIFIC CLAIM**

In May 1987, the Fort McKay First Nation filed a specific claim with the Department of Indian Affairs and Northern Development (DIAND) alleging that Canada had not fulfilled its Treaty 8 obligation to provide treaty land for “late adherents” and “landless transfers.” This treaty land entitlement (TLE) claim was based on the criteria established in the DIAND publication “Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims” (1983 ONC Guidelines), reproduced at Appendix C of the report. The 1983 ONC Guidelines were changed in 1993 to provide that late adherents and landless transfers might be taken into account only if a date of first survey (DOFS) shortfall was first established. The First Nation’s claim, based only on late adherents and landless transfers, was therefore rejected by Canada in January 1994. The Fort McKay First Nation undertook further research to establish the claim’s validity under the new guidelines, but Canada continued to reject it. At the First Nation’s request, the Indian Claims Commission (ICC) commenced an inquiry into the rejected claim in May 1994. The ICC held a community session in November 1994, three expert evidence hearings in late 1994 and early 1995, and a hearing of the legal arguments in May 1995.

### **BACKGROUND**

In June 1899, some Cree Indians and the Treaty 8 Commission executed Treaty 8 at Lesser Slave Lake. That summer, the Commission travelled the northern river system extending the same treaty offer to other Indian bands, including Chipewyan and Cree Indians at Fort McMurray, who adhered to Treaty 8 in August 1899. The groups represented at Fort McMurray were arbitrarily placed on a single payroll as “The Cree-Chipewyan Band of Fort McMurray,” even though no such band existed and the groups were distinct in ancestry, language, and residence.

In 1915, a surveyor was assigned to lay out reserves for the Fort McMurray Cree-Chipewyan Band, which included the Fort McKay group of Chipewyan Indians. However, given the non-existence of a separate treaty payroll for the Fort McKay group and the lack of Indian Agents in that region, the surveyor was hard-pressed to determine the population and hence calculate the treaty land entitlement. It is assumed that he based his figure of 106 people on advice given by a Chipewyan headman. The survey plans included 13,465 acres of land, which amounted to land for approximately 105 persons.

Between 1915 and 1963, the Fort McKay group, which officially became a band in 1954, received 11 late adherents, and 54 landless transfers. These additions, coupled with the DOFS population of 70, brought the total population of the Fort McKay Band, for TLE purposes, to 135. Under the 1983 ONC Guidelines, the Fort McKay Band appeared to have a legitimate TLE claim; however, it was rejected based on the 1993 change in TLE policy.

## **ISSUES**

What is the nature and extent of the right to reserve land under Treaty 8? Has Canada satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation 8?

## **FINDINGS**

The following are the ICC's findings on the nature and extent of TLE under Treaty 8:

- 1 The purpose, meaning, and intent of the treaty is that each Indian band is entitled to a certain amount of land based on its membership numbers, and each treaty Indian is entitled to be included in an entitlement calculation as a member of an Indian band (or to lands in severalty).
- 2 Every Indian is entitled to land as a member of a band (or individually through severalty). For members of a band, the entitlement crystallized at the date of the first survey (DOFS) of the reserve. The quantum of land to which the band is entitled at the DOFS is a question of fact, determined by band membership, including Indians absent ("absentees") at DOFS.
- 3 Every band is entitled to receive additional reserve land for every Indian who adhered to the treaty and joined the band following the DOFS. The quantum of additional land to which the band is entitled is a question of fact, determined on the basis that the entitlement crystallized when those Indians ("late adherents") joined the band.
- 4 Every band is entitled to additional reserve land for every Indian who transferred from one band to another ("landless transfers"), provided that the former band had never received land on that person's account.
- 5 Natural increases or decreases in the population of a band following DOFS, other than late adherents or landless transfers, do not affect TLE.
- 6 Additional land entitlement does not arise from treaty Indian women who marry into a band from the same treaty, unless they are late adherents or landless transfers. Additional land entitlement does not arise from non-treaty Indian women who marry into a band under any circumstances.
- 7 The band's population on the date the treaty was signed is not relevant to the determination of the quantum of the band's TLE.
- 8 The band's current population is not relevant to the determination of the quantum of the band's TLE.
- 9 If a band receives a surplus of land at DOFS, Canada is entitled to credit those surplus lands against subsequent landless transfers or late adherents.
- 10 Establishing a DOFS shortfall is not a prerequisite for a valid TLE claim.

Canada has not satisfied its treaty obligation to provide reserve land to the Fort McKay First Nation. Based on its total population of 135, including landless transfers and late adherents, the First Nation's TLE is 17,280 acres. As it has been given 13,465 acres, which is enough reserve land for approximately 105 people, it is owed a further 3,815 acres.

## **RECOMMENDATION**

That the treaty land entitlement claim of the Fort McKay First Nation be accepted for negotiation under Canada's Specific Claims Policy.

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*R. v. Blackfoot Band of Indians*, [1982] 3 CNLR 53 (FCTD); *R. v. Taylor and Williams*, [1981] 3 CNLR 114 (Ont. CA); *R. v. Sioui*, [1990] 3 CNLR 127; *R. v. Ireland*, [1991] 2 CNLR 120 (OCJGD); *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA); *Simon v. R.*, [1985] 2 SCR 387; *Joe et al. v. Findlay and Canada* (AG), [1981] 3 CNLR 58; *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 34 BCLR (2d) 344 (CA); *R. v. Jones and Nadjiwon*, [1993] 14 OR (3d) 421; *R. v. Little*, [1993] 3 CNLR 214 (BCSC); *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC); *Ontario (AG) v. Bear Island Foundation*, [1991] 2 SCR 570.

### **Treaties and Statutes Referred To**

*Treaty No. 8, 21 June 1899, and Adhesions, Reports, etc.*, IAND Publication No. QS-0576-000-EE-A-16 (Ottawa: Queen's Printer, 1966).

### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1979); Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: DIAND, 1986); Rene Fumoleau, *As Long as This Land Shall Last* (Toronto: McClelland & Stewart, 1975); *The Canadian Almanac and Miscellaneous Directory for the year 1915* (Toronto: Copp Clark, 1914); Donna Gordon, "Treaty Land Entitlement – A History," unpublished manuscript prepared for ICC, Ottawa, November 1995, Schedule of Validated Claims to 1990, published in (1996) 5 ICCP 339.

### **COUNSEL, PARTIES, INTERVENORS**

J. Slavik for the Fort McKay First Nation; B. Becker, L. Senechal for the Government of Canada; R.F. Reid, QC, K. Fullerton, D. Belevsky, G. Christoff to the Indian Claims Commission.

### **CANADA'S RESPONSE**

After conducting a TLE policy review based on the ICC report, the Minister of Indian Affairs and Northern Development accepted the First Nation's claim for negotiation by letter dated April 28, 1998: see (1998) 10 ICCP 227.



## SUMMARY

### **FRIENDS OF THE MICHEL SOCIETY 1958 ENFRANCHISEMENT INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Friends of the Michel Society: 1958 Enfranchisement Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 69.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 6 (1876); **Indian Act** – Indian Status – Bill C-31; **Band** – Band List – Status; **Specific Claims Policy** – Band; **Mandate of Indian Claims Commission** – Supplementary Mandate; **Alberta**

#### **THE SPECIFIC CLAIM**

In 1985, some former Michel Band members and descendants (Friends of the Michel Society) submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the enfranchisement of certain band members in 1928 and the entire Band in 1958 was invalid, and that Canada had breached its statutory and fiduciary duties in relation to various surrenders of reserve land in the early 1900s. Canada refused to consider the alleged improprieties of the surrenders, asserting that only recognized bands may submit claims under the Specific Claims Policy. Canada did agree to review the 1928 and 1958 enfranchisements to determine whether the claimants were entitled to be recognized as a band. The Society then petitioned the Minister to reconstitute the Michel Band under section 17 of the *Indian Act*; this request was rejected.

In 1995, the Society requested that the Indian Claims Commission (ICC) inquire into the enfranchisement aspect of its claim. In May 1997, the parties agreed that the ICC would consider only the preliminary issue of whether Canada has a statutory obligation to reconstitute the Michel Band, assuming that it ceased to exist in 1958. Canada agreed not to challenge the ICC's mandate to conduct this inquiry. A community session was held in December 1996, followed by the written submissions of the parties.

#### **BACKGROUND**

The Michel Band adhered to Treaty 6 in 1878; in 1880, a 40-square-mile reserve was surveyed as Michel Indian Reserve (IR) 132 and confirmed by Order in Council in May 1889. Over the years, the Band's membership was affected by individuals and families being enfranchised in accordance with the *Indian Act* provisions on Indian status and band membership. In 1958, a Committee of Inquiry appointed under the *Indian Act* enfranchised the entire Michel Band; by 1962, all reserve lands and assets had been distributed to its enfranchised members. As a result of Bill C-31 in 1985, 660 former Michel band members and descendants who were enfranchised before 1958 regained their Indian status and were included in the Indian Register. Those who were enfranchised with the entire Band in 1958 were entitled to be registered only if they qualified under section 6 of the Act.

#### **ISSUE**

Are the descendants and former members of the Michel Band entitled to be recognized as a band under the *Indian Act*? In particular, did the 1985 amendments to the *Indian Act* (Bill C-31) impose a statutory obligation on Canada to reconstitute the Michel Band as a band within the meaning of the Act and the Specific Claims Policy?

**FINDINGS**

While statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation. Canada was not required to maintain a band list after the 1958 enfranchisement, as there must be a band in existence for the obligation to arise. If Parliament had intended to ensure that lists would be maintained for any band ever in existence, it could have provided for this in section 8 of the Indian Act. Since the assumption for purposes of this inquiry is that the Band ceased to exist in 1958, there is no band on which to predicate Canada's obligation to maintain a band list.

Further, Canada does not have a statutory obligation to place the names of former band members and descendants who regained status on a Michel band list. If Parliament had intended to reinstate all categories of Indians enfranchised under the repealed sections of the *Indian Act*, it could have done so in clear and simple language. In addition, based on the plain language of the Act, the band enfranchisees do not fall within the scope of the Bill C-31 amendments. The Society does not satisfy the definition of "band" in the *Indian Act*, which is construed as a body of Indians that had lands set aside at some point and continues to hold those lands. The Bill C-31 amendments, therefore, do not reconstitute the Michel Band.

**Supplementary Mandate**

Since there is no statutory obligation by Canada to recognize the Society as a band under the *Indian Act*, the Society is not eligible to bring a claim under the Specific Claims Policy, which contemplates claims by a band, not individuals or other groups. This result, although correct from a technical legal perspective, is unfair, as it results in the Michel Society having no practical means of recourse to address its claims against Canada. The ICC's mandate includes a supplementary mandate to make recommendations where it concludes that the Specific Claims Policy was implemented correctly but unfairness has resulted.

**RECOMMENDATION**

That Canada grant special standing to the duly authorized representatives of the Friends of the Michel Society to submit specific claims in relation to alleged invalid surrenders of reserve land for consideration of their merits under the Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*St. Mary's Indian Band v. Cranbrook* (1997), 147 DLR (4th) 385; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *R. v. Lewis*, [1996] 1 SCR 921.

**ICC Reports Referred To**

*Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175.

**Treaties and Statutes Referred To**

*Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964); *Indian Act*, SC 1876, SC 1951, RSC 1952, RSC 1970, RSC 1985.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted (1994) 1 ICCP 171; Royal Commission on Aboriginal Peoples, *Report*, 5 vols. (Ottawa: Minister of Supply and Services, 1996), vol. 1: *Looking Forward, Looking Back*, 271; Jack Woodward, *Native Law* (Toronto: Carswell, 1989); P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991); Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994).

**COUNSEL, PARTIES, INTERVENORS**

J. Slavik, K. Buss for the Friends of the Michel Society; R. Wex for the Government of Canada; R.S. Maurice, D. Belevsky to the Indian Claims Commission.

**CANADA'S RESPONSE**

By letter dated October 2, 2002, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation: see (2004) 17 ICCP 357.



## SUMMARY

### **GAMBLERS FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Gamblers First Nation: Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner R.J. Augustine, Commissioner C.T. Corcoran

**Treaties** – Treaty 4 (1874); **Treaty Land Entitlement** – Date of First Survey; **Treaty Interpretation** – Treaty Land Entitlement; **Reserve** – Surrender – Surrender for Exchange; **Manitoba**

#### **THE SPECIFIC CLAIM**

The Gamblers First Nation first submitted an outstanding treaty land entitlement (TLE) claim to the Department of Indian Affairs and Northern Development (DIAND) in 1981 that was considered and rejected by the department in March 1994. In January 1996, the First Nation requested that the Indian Claims Commissioner (ICC) convene an inquiry into the rejected claim. The ICC commenced the inquiry in June 1996. The community session evidence and oral argument, based on written submissions, were heard on November 5 and 6, 1996, respectively.

#### **BACKGROUND**

The Gamblers adhered to Treaty 4 in 1874 as part of a group of Indians referred to as the “Fort Ellice Band,” led by Chief Waywayseecappo. In June 1877, a reserve was surveyed on lands selected by Chief Waywayseecappo at Bird Tail Creek. The survey plan included 45,869 acres (71.67 square miles) of land, this being determined by the calculation specified in the treaty of one square mile per family of five. The reserve size, therefore, provided enough land for 358 people.

In 1881, separate paylists were established for five groups who had previously been paid annuities under Waywayseecappo at Fort Ellice: Waywayseecappo, Sakimay, South Quill, Rattlesnake, and followers of the Gambler. The Gambler, however, was dissatisfied with the survey at Bird Tail Creek and proposed a surrender in 1881 of a portion of Waywayseecappo’s reserve in exchange for a separate reserve at Silver Creek for the Gambler and his followers. On March 7, 1881, a surrender of 30 square miles was signed by Chief Waywayseecappo and two headmen, one of whom was the Gambler.

In April 1883, the surveyor was instructed to mark off both the land surrendered by Waywayseecappo and the new reserve for the Gamblers group. The survey of IR 63 for the Gamblers was completed in June 1883 for 44 families.

#### **ISSUES**

Is the proper date of first survey for the Gamblers First Nation 1877 or 1883? To what extent, if at all, did the “surrender for exchange” in 1881 affect the TLE of the First Nation?

#### **FINDINGS**

There was a consensus between Canada and the Band on the selection of the reserve at Bird Tail Creek. This consensus was only reached in 1877 following the survey, at which time the Band signalled its acceptance of the reserve as surveyed by residing on and using the land for its collective benefit. The survey of 1877 was conducted in accordance with the requirements of Treaty 4 and was accepted by both parties. There is no evidence that the selection and survey of the reserve resulted in some manifest unfairness towards the First Nation. As such, the date for first survey for land entitlement calculations should be 1877 and not 1883 as argued by the First Nation.

In 1881, the parties did not intend to survey a new reserve but simply decided to surrender a specific portion of the existing reserve in exchange for new land at Silver Creek to satisfy the Gambler and his followers. The “surrender for exchange” does not imply that there had always been two separate bands or that the Gambler wanted to have a reserve set aside for him and his followers in accordance with the treaty formula. This surrender was simply the result of a band split and a decision to divide the existing land entitlement between the two factions. Thus, the “surrender for exchange” in 1881 did not affect the TLE of the Gamblers First Nation. The appropriate date of first survey for the Gambler and his followers remains 1877, when they were members of the Fort Ellice Band under Chief Waywayseecappo.

#### **RECOMMENDATION**

That the Gamblers First Nation’s outstanding treaty land entitlement, if any, should be calculated based on an 1877 date of first survey.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*J.E. Verrault & Fils Ltee v. Attorney General for Quebec* (1975), 57 DLR (3d) 403 (SCC); *R v. Howard*, (1994) 2 SCR 299.

#### **ICC Reports Referred To**

*Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3; *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235; *Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175.

#### **Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu’Appelle and Fort Ellice* (Ottawa: Queen’s Printer, 1966); *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen’s Printer, 1957); *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen’s Printer, 1964); *Indian Act*, SC 1876.

#### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991); Cliff Wright, Office of the Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990); DIAND, “Criteria Used in Determining Bands with Outstanding Entitlements in Saskatchewan,” August 1977; DIAND, “Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims,” May 1983; Office of the Treaty Commissioner (Saskatchewan), “Research Methodology for Treaty Land Entitlement (TLE),” 1994; G.H.L. Fridman, *Fridman’s Law of Agency*, 7th ed. (Toronto: Butterworths, 1996).

#### **COUNSEL, PARTIES, INTERVENORS**

P. Forsyth for the Gamblers First Nation; F. Daigle for the Government of Canada; R.S. Maurice, T.A. Gould to the Indian Claims Commission.

#### **CANADA’S RESPONSE**

By letter dated November 26, 1998, the Minister of Indian Affairs and Northern Development accepted the recommendation of the ICC: see (1999) 11 ICCP 303.

# SUMMARY

## **HOMALCO INDIAN BAND AUPE INDIAN RESERVES 6 AND 6A INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner C.T. Corcoran, Commissioner A. Gill

**British Columbia** – Terms of Union, 1871 – Indian Settlement – Pre-emption – McKenna-McBride Commission; **Reserve** – Allotment; **Constitution Act, 1867**; **Fiduciary Duty** – Indian Settlement; **Fraud**; **Specific Claims Policy** – Fraud – Indian Settlement

### **THE SPECIFIC CLAIM**

In July 1992, the Homalco Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) concerning lands allotted to the Band as Aupe Indian Reserves (IR) 6 and 6A. After Canada rejected the claim in March 1994, the Indian Claims Commission (ICC) agreed to the Band's request to hold an inquiry into its rejected claim. The ICC visited the site in April 1995 and heard legal arguments in Vancouver in June 1995.

### **BACKGROUND**

In 1888, the federal Indian Reserve Commissioner for British Columbia, Peter O'Reilly, and federal Surveyor Ashdown Green consulted with the Homalco Band regarding reserve allotment, resulting in six parcels of land being allotted to the Band as reserves, including Aupe IR 6, described as 25 acres in the Minute of Decision and O'Reilly's sketch. Surveyor E.M. Skinner's resulting survey plan of Aupe IR 6 accorded with the metes-and-bounds description but included only 14 acres. The allotment was given federal and provincial approval despite the discrepancy. In 1907, the Band unsuccessfully requested an additional 80 acres of reserve land adjoining Aupe IR 6, containing better farm land and the Band's graveyard.

In 1910, William Thompson, who had arrived in 1908 to operate the Band's school, applied to pre-empt 160 acres of land adjoining Aupe IR 6, claiming that the land was unoccupied, unreserved Crown land, was not part of an Indian settlement, and was not timber lands. In spite of band objections, the pre-emption was allowed. In late 1910, after a provincial school inspector reported to DIAND that the school and graveyard were on the pre-empted lands, federal officials threatened to cancel part of the pre-emption. Thompson denied having deliberately misled the government and protested the proposed exclusion of 40 acres of his best land.

Tensions between the Band and Thompson were high, culminating in arguments before the 1912 Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission), a joint Canada-BC initiative to adjust the acreage of reserves in the province. It recommended that a 29.7-acre parcel be established as a reserve. The federal government agreed and issued an Order in Council, but the province refused. After inheriting her husband's pre-emption rights, Mrs Thompson successfully negotiated title to 145 of the 160 acres of land. In 1924, 20.08 acres adjoining Aupe IR 6, containing the graveyard, became Aupe IR 6A.

### **ISSUES**

Did Canada breach a lawful obligation to the Homalco Band in the allotment process for Aupe IR 6? Did Canada have and breach an obligation to acquire 80 additional acres of reserve land for the Band in 1907? Did Canada have and breach an obligation to protect the Band's settlement lands from Thompson's pre-emption claim?

**FINDINGS**

Both the reserve's acreage description in the Minute of Decision and the metes-and-bounds description were technical methods foreign to the Homalco Band. It is doubtful that the parties intended either type of description to be the sole method of identifying the boundaries. The Minute of Decision also included sketches and notes recording the parties' intentions, but the sketches differed from each other and from the subsequent survey plan. Other documents clarify that the parties intended to set apart enough land for houses and firewood, and intended that the reserve include the physical features pointed out by the Band and land for a future school. No evidence exists that the discrepancy in acreage was discussed with the Band before the allotment was confirmed. The shortfall of 11 acres, however, was remedied by 20.08 acres allotted to the Band in 1924. Further, no loss of use exists, since the Band continued to use the disputed land.

A loss arises from the failure of the federal Indian Superintendent for BC to fulfill his duty to supervise Reserve Commissioner O'Reilly, as required by the Order in Council appointing O'Reilly. Proper supervision would have resulted in a survey plan that placed the future school within the boundaries of the reserve, and Thompson would therefore have been unable to satisfy his pre-emption residency requirements. This failure constitutes "a breach of an obligation arising out of [a statute] pertaining to Indians [or] the regulations thereunder," within the meaning of the Specific Claims Policy.

Canada did not have an obligation under section 91(24) of the *Constitution Act, 1867*, or a fiduciary obligation to acquire 80 additional acres of reserve land. Further, given the lack of information available to it, the panel is unable to find an obligation under the *BC Terms of Union, 1871*, to provide this land.

Thompson's declarations in his pre-emption application constituted fraud. He was a federal government employee, and the fraudulent declarations were in connection with the acquisition of Indian land. Although the land was Indian settlement lands, not reserve land, the Specific Claims Policy covering fraud by government employees should be interpreted to include this type of breach. Alternatively, Canada breached a fiduciary obligation to the Band by failing to dismiss Thompson. A prompt dismissal would have prevented him from fulfilling his pre-emption requirement to live on the land a minimum period and would have ensured that the Band received 29.2 acres instead of 20.08 acres.

**RECOMMENDATION**

That the claim of the Homalco Indian Band with respect to Aupe IR 6 and Aupe IR 6A be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Apsassin v. Canada* (1987), [1988] 1 CNLR 73 (FCTD); *Apsassin v. Canada*, [1993] 2 CNLR 20 (FCA); *Jack v. The Queen*, [1979] 2 CNLR 25 (SCC); *Nocton v. Lord Ashburton*, [1914] AC 932 (HL); *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC); *Simon v. The Queen*, [1986] CNLR 153 (SCC); *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC); *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC); *Hodgkinson v. Simms* (1994), 97 BCLR (2d) 1 (SCC); *M. (K.) v. M. (H.)* (1992), 14 CCLT (2d) 1 (SCC).

**ICC Reports Referred To**

*Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations: Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47.

**Treaties and Statutes Referred To**

*Interpretation Act*, RSC 1970; *Inquiries Act*, RS 1952; *Indian Act*, RSC 1886; *Terms of Union, 1871*, RSC 1985; *Constitution Act, 1867*; *Indian Act*, RSC 1906, as amended; *Land Act*, SBC 1908.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British*

*Columbia, 1849–1989* (Vancouver: UBC Press, 1990); R. Dussault and R. Bourgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1985); Jack Woodward, *Native Law* (Scarborough: Carswell, 1994); Robin Fisher, “Joseph Trutch and Indian Land Policy,” in W.P. Ward and R.A.J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver: Douglas & McIntyre, 1981), 155; Robert Exell, “History of Indian Land Claims in B.C.” (1990), 48 *The Advocate* 866; Paul Tennant, “The Historical and Legal Dimensions,” in Frank Cassidy, ed. *Reaching Just Settlements* (Lantzville, BC: Oolichan and Institute for Research on Public Policy, 1991), 30; Barbara Burnaby, *Languages and Their Roles in Educating Native Children*, Informal Series 16 (Ontario: Ontario Institute for Studies in Education Press, 1980), 39.

**COUNSEL, PARTIES, INTERVENORS**

D.L. Kydd, S.M. Kelliher for the Homalco Indian Band; B. Becker, S. Kelleher for the Government of Canada; R.F. Reid, QC, K. Fullerton, I. Gros-Louis Ahenakew, D. Jordan to the Indian Claims Commission.

**CANADA’S RESPONSE**

In December 1997, the Minister of Indian Affairs and Northern Development rejected the ICC’s recommendation: see (1998) 8 ICCP 373–74.



## SUMMARY

### **JAMES SMITH CREE NATION CHAKASTAYPASIN INDIAN RESERVE 98 INQUIRY Saskatchewan**

This report may be cited as Indian Claims Commission, *James Smith Cree Nation: Chakastaypasin Indian Reserve 98 Inquiry* (Ottawa, March 2005).

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

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

**Treaties** – Treaty 6 (1876); **Band** – Migration – Membership; **Reserve** – Abandonment – Surrender – Disposition – Proceeds of Sale – Trespass; **Indian Act** – Surrender – Band Membership; **Fiduciary Duty** – Pre-surrender – Post-surrender – Protection of Reserve Land; **Fraud; Specific Claims Policy** – Beyond Lawful Obligation – Fraud; **Royal Prerogative; Practice and Procedure** – Intervenor; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In May 1984, the James Smith Cree Nation (JSCN) submitted a claim to the Minister of Indian Affairs and Northern Development challenging the validity of the surrender and sale of the Chakastaypasin Band's Indian Reserve (IR) 98. The claim regarding the validity of surrender was rejected. On January 19, 1998, Canada offered to negotiate a beyond lawful obligation regarding the land sales on the grounds that senior federal officials were involved in fraudulent activities in connection with the sale of 71 of the 114 quarter sections of the reserve at below fair market value. The offer to negotiate, however, was conditional upon the identification of all potential beneficiary First Nations and agreement among the beneficiaries regarding how any compensation would be divided. On June 18, 1999, the Indian Claims Commission (ICC) accepted the JSCN's request to conduct an inquiry into the surrender and sale of IR 98. On November 1, 2002, the panel ruled that the other Host Bands would be allowed to submit evidence and submit legal arguments but would not be included as parties to the inquiry.

#### **BACKGROUND**

The Chakastaypasin Band signed Treaty 6 in 1876. On May 17, 1889, IR 98 was confirmed by order in council for the Band. Following the North-West Rebellion in 1885, some members of the Band fled from the reserve, but others stayed. In the months following the rebellion, the Department of Indian Affairs sought to implement policies to punish those Indians labelled "rebels" and to reward those determined to be "loyal." The Chakastaypasin Band was branded as "rebel," and the department decided to "break up the Band" and "amalgamate them with others." Within three years of this decision, the department would come to rely upon band members' "transfer" to other bands as resulting in the abandonment of IR 98, thus opening the way for the complete surrender of IR 98 in 1897.

#### **ISSUES**

Was a surrender of Chakastaypasin IR 98 required prior to the sale of those lands? If the answer is yes, then what were the requirements of surrender? If no, did the fact that Canada took a surrender nevertheless create a fiduciary obligation on the part of Canada? Did Canada breach any obligation which may arise under Issues 2 or 3? Is the effect of any breach such that it invalidates the surrender of IR 98 or gives rise to a claim for damages? What were the obligations of Canada in disposing of IR 98, including Sugar Island? Did Canada breach any further obligation concerning the sale of IR 98? What obligations did Canada have regarding Sugar Island prior to the alleged surrender of 1897? Did Canada breach these obligations?

## **FINDINGS**

The physical relocation of band members does not in and of itself prove the transfer of membership. For the individuals and families of the Chakastaypasin Band transferring to IR 100A, what is required by section 140 of the *Indian Act* is evidence of the consent of the receiving band at IR 100A. In this case, the receiving band is the whole of the Cumberland Band, including those resident at IR 20. There is no evidence of this consent, and, therefore, there were no valid transfers from Chakastaypasin into IR 100A.

The nine signatories to the IR 98 surrender document were all members who allegedly transferred to IR 100A. The Department of Indian Affairs was aware, however, of members residing at other locations at the time of the surrender. Canada had an obligation to seek the consent of all eligible voters to the IR 98 surrender, not just those resident at IR 100A. Canada cannot rely upon its prerogative power to take control of the Band's reserve lands. A surrender vote is required. There is no evidence of the government's attempts to meet with or seek the consent of these other members outside IR 100A. The surrender is therefore invalid.

In disposing of IR 98 lands, Canada owes a treaty, statutory, and fiduciary duty to administer reserve land sales as a prudent fiduciary to maximize the Band's benefit. Canada breached these duties when it permitted the sale in 86 of the 114 quarter sections at below fair market value. Further, we are unable to conclude, on the basis of the evidence, fraud beyond the transactions to which Canada has admitted a beyond lawful obligation.

Finally, Canada owes a treaty, statutory, and fiduciary obligation to protect reserve lands, once created, from exploitation. We find Canada in breach of these duties for permitting a continuous trespass to IR 98 lands and resources.

## **RECOMMENDATION**

That the James Smith Cree Nation's Chakastaypasin Indian Reserve 98 claim be accepted for negotiation under Canada's Specific Claims Policy.

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

### **ICC Reports Referred To**

*Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281.

### **Cases Referred To**

*Snake v. The Queen*, 2001 FCT 858; *Wewayakum Indian Band v. Canada*, [2002] 4 SCR 245; *Blueberry River Indian Band v. Canada*, [1996] 2 CNLR 25; *Fales v. Canada Permanent Trust Co.*, [1977] 2 SCR 302; *Lalonde v. Sun Life Assurance Co. of Canada*, [1992] 3 SCR 261.

### **Treaties and Statutes Referred To**

*Treaty 6*; *Indian Act*, RSC 1886; 1888 *Indian Land Regulations*.

### **Other Sources Referred To**

F. Laurie Barron, "Indian Agents and the North-West Rebellion," in F.L. Barron and James B. Waldram, eds., *1885 and After: Native Society in Transition* (Regina: Canadian Plains Research Center, 1986); Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Calgary: Fifth House Publishers, 1997); Sarah A. Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990); D.W.M. Waters, *The Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984).

**COUNSEL, PARTIES, INTERVENORS**

W. Selnes for the James Smith Cree Nation; U. Ihsanullah and R. Winogron for the Government of Canada; K. N. Lickers to the Indian Claims Commission; D. Kovatch for the One Arrow First Nation; R. Cherkewich for the Muskoday First Nation; D. Knoll and D. Gerecke for the Sturgeon Lake First Nation; B. Slusar for the Kinistin Saulteaux First Nation.



## SUMMARY

### **JAMES SMITH CREE NATION INDIAN RESERVE 100A INQUIRY Saskatchewan**

This report may be cited as Indian Claims Commission,  
*James Smith Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005).

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

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

**Treaties** – Treaty 6 (1876) – Treaty 5 (1876); **Treaty Interpretation** – Reserve Clause; **Treaty Right** – Minerals; **Band** – Division – Amalgamation; **Reserve** – Surrender – Disposition; **Royal Prerogative**; **Fraud**; **Practice and Procedure** – Intervenor – Witness; **Evidence** – Admissibility; **Mandate of Indian Claims Commission** – Issues; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

On January 24, 1991, the James Smith Cree Nation (JSCN) submitted a specific claim regarding the surrender and sale of the southern portion of Indian Reserve (IR) 100A totalling 22,080 acres. The First Nation claimed that Canada breached its statutory, treaty, trust, and fiduciary duties in taking the alleged surrender and further argued that Canada breached its statutory, treaty, trust, and fiduciary duties in its unlawful disposition of IR 100A. On March 13, 1998, Canada rejected the First Nation's claim regarding the validity of the surrender, while accepting for negotiation an outstanding lawful obligation with respect to the sale of the surrendered lands. The Indian Claims Commission (ICC) accepted the May 18, 1999 request of the JSCN to conduct an inquiry into the surrender and subsequent sale of IR 100A.

#### **BACKGROUND**

Chief James Smith and four councillors signed Treaty 6 in August 1876 on behalf of the James Smith Band. On May 17, 1889, IR 100 was confirmed for the James Smith Band by Order in Council 1151 and consisted of 27.8 square miles.

On July 24, 1902, Canada took a surrender of 22,080 acres from IR 100A and sought to amalgamate the “owners of the James Smith's Indian Reserve No. 100” and the “owners of Cumberland Reserve 100A.” For both the surrender and amalgamation, Canada relied upon two signatories who had allegedly transferred to IR 100A in 1896 from the Chakastaypasin Band. With this amalgamation, IR 100A lands were joined with IR 100, and any outstanding treaty land entitlement owed to the James Smith Band at IR 100 was, in Canada's view, cured by the addition of IR 100A to IR 100 lands.

In 1903, Canada subdivided the surrendered land for sale. The majority of the quarter sections were purchased by government officials who were investigated in 1913 and found to be in breach of their duties. All quarter sections were sold for less than their appraised value.

#### **ISSUES**

What were Canada's obligations in taking the 1902 surrender at IR 100A? Is Canada in breach of any such obligations, and, if so, is the surrender valid and does Canada owe an outstanding obligation? Was there an amalgamation of the “Peter Chapman Band” and the James Smith Band? What were Canada's obligations in disposing of IR 100A? Was there a surrender of the IR 100A Strip, and, if so, what were Canada's obligations in disposing of it?

#### **FINDINGS**

Canada today concedes that IR 100A was set aside for the Cumberland Band. We agree. Based on the totality of the evidence, a separate band was not created at any time. The Cumberland Band that adhered to Treaty 5 resided at two locations: IR 20 and IR 100A. The Cumberland Band continues to exist and continues its treaty relationship with the Crown. This relationship

and the terms of Treaty 5 limit the exercise of the Crown's royal prerogative, especially where that prerogative is being exercised to deprive a band of its reserve land. Thus, a transfer of an interest (i.e., a reallocation) in reserve lands to some other group triggers the requirements, under treaty, that Canada seek and obtain the consent of the Band to dispose of its interest in its reserve lands. On the evidence, no such consent was sought.

Canada's failure to have sought the informed consent of the whole of the Cumberland Band to the transfer of people into IR 100A, to the surrender of the southern portion of IR 100A, and to the agreement to amalgamate its interest in IR 100A with the James Smith Band at IR 100 is breach of treaty, statute, and fiduciary duties.

Upon the surrender of reserve land, Canada has treaty, statutory, and fiduciary duties in disposing of this land by sale. Canada has admitted its breach of fiduciary duties in accepting prices below the appraised value and for failing to enforce the terms of sale. Canada has admitted it breached its statutory duty for its failure to have immediately dismissed its employee for his conduct involving the sale of IR 100A and for its failure to have cancelled the sales attributable to him. In the absence of clear and unequivocal evidence, the panel is unable to make a finding of fraud.

### **Recommendation**

That the lawful obligations that arise from Canada dispositions of Indian Reserve 100A be accepted for negotiation with the Cumberland House Cree Nation.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

### **Cases Referred To**

*Blueberry River Indian Band v. Canada*, [1996] 2 CNLR 25; *Guerin v. The Queen*, [1984] 2 SCR 335.

### **ICC Reports Referred To**

*Canupawakpa Dakota First Nation: Turtle Mountain Surrender Inquiry* (Ottawa, July 2003), reported (2004) 17 ICCP 263; *Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 209; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281.

### **Treaties and Statutes Referred To**

*Treaty 5*; *Treaty 6*; *Indian Act*, RSC 1886.

### **COUNSEL, PARTIES, INTERVENORS**

W. Selnes, for the James Smith Cree Nation; U. Ihsanullah and R. Winogron for the Government of Canada; K.N. Lickers to the Indian Claims Commission.

# SUMMARY

## **JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT INQUIRY REPORT ON ISSUES 9: AMALGAMATION Saskatchewan**

This report may be cited as Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry – Report on Issue 9: Amalgamation* (Ottawa, March 2005).

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

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

**Treaties – Treaty 6 (1876); Treaty Land Entitlement – Amalgamation – Land Occupied Prior to Treaty – Quality of Land;  
Mandate of Indian Claims Commission – Issues; Saskatchewan**

### **THE SPECIFIC CLAIM**

On May 10, 1999, the James Smith Cree Nation (JSCN) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Minister of Indian Affairs and Northern Development's rejection of its treaty land entitlement (TLE) claim. The Commission accepted the First Nation's request for an inquiry; however, prior to the first planning conference, Canada objected to the scope of the inquiry and argued that the First Nation was advancing new issues of land quality and lands occupied prior to treaty that had not been previously considered by the Minister. After hearing from the parties on the mandate of the Commission, the ICC ruled on May 2, 2000, that it would proceed with an inquiry into all issues raised by the First Nation but would provide adequate time for Canada to prepare and respond to the issues of land quality and lands occupied prior to treaty during the course of this inquiry.

By agreement of the parties, the ICC was asked to first decide upon the issue of the JSCN's amalgamation with the Cumberland Band 100A in 1902. Concurrently, Canada was given until April 2005 to respond fully to the issues of land quality and lands occupied prior to treaty.

This report addresses the issue of the alleged 1902 amalgamation. The ICC will deliver its final report on all other issues upon the receipt of Canada's submissions and upon hearing the arguments of counsel for the parties in an oral session.

### **BACKGROUND**

In the early 1980s, the Federation of Saskatchewan Indian Nations (FSIN) on behalf of the JSCN submitted a claim to the Minister of Indian Affairs alleging an outstanding treaty land entitlement under Treaty 6. On May 22, 1984, Canada rejected JSCN's TLE, stating that the shortfall of land at the time of survey was fulfilled as a result of the amalgamation of the James Smith Band at IR 100 and the Cumberland Band at IR 100A in 1902.

### **ISSUE**

Was there an amalgamation of the "Peter Chapman Band" and the James Smith Band?

### **FINDINGS**

The "owners of the Cumberland Reserve No. 100A" were the whole of the Cumberland Band who had adhered to Treaty 5 in 1876. The whole of the Band included those resident at IR 20 and at IR 100A, and not just those resident at IR 100A. Canada relied upon two signatories, who had allegedly transferred into the Cumberland Band at IR100A, to amalgamate that Band with the James Smith Cree Nation. There is no evidence to indicate that those members who were the "owners" of IR 100A and living at IR 20 and IR 100A voted to amalgamate.

In our view, the amalgamation agreement is invalid because its two signatories could not have given a joint and undivided interest in IR 100A, since they were not the “owners of Cumberland 100A.”

**RECOMMENDATION**

None.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend upon a base of oral and documentary research that is fully referenced in the report.

**ICC Reports Referred To**

*Cumberland House Cree Nation: IR 100A Inquiry* (Ottawa, March 2005); *James Smith Cree Nation: IR 100A Inquiry* (Ottawa, March 2005).

**Treaties Referred To**

*Treaty 6.*

**COUNSEL, PARTIES, INTERVENORS**

W. Selnes for the James Smith Cree Nation; U. Ihsanullah, R. Winogron for the Government of Canada; K.N. Lickers to the Indian Claims Commission.

# **SUMMARY**

## **JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

This report may be cited as Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, February 2007)

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

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

**Treaties** – Treaty 6 (1876); **Treaty Land Entitlement** – Amalgamation – Land Occupied Prior to Treaty – Quality of Land – Paylist – Sufficiency of Treaty Lands; **Mandate of the Indian Claims Commission** – Issues; **Saskatchewan**

### **THE SPECIFIC CLAIM**

On May 10, 1999, the James Smith Cree Nation (JSCN) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Minister of Indian Affairs and Northern Development's rejection of its treaty land entitlement (TLE) claim. The Commission accepted the First Nation's request for an inquiry; however, prior to the first planning conference, Canada objected to the scope of the inquiry and argued that the First Nation was advancing new issues of land quality and lands occupied prior to treaty that had not been previously considered by the Minister. After hearing from the parties on the mandate of the Commission, the ICC ruled on May 2, 2000, that it would proceed with an inquiry into all issues raised by the First Nation but would provide adequate time for Canada to respond to the issues of land quality and lands occupied prior to treaty during the course of this inquiry.

By agreement of the parties, the ICC was asked to first decide upon the issue of the JSCN's amalgamation with the Cumberland Band 100A in 1902. Concurrently, Canada was given until April 2005 to respond fully to the issues of land quality and lands occupied prior to treaty. Canada was unable to meet the April 2005 deadline and formally requested an extension of time to file submissions. On June 22, 2005, the Commission panel granted an extension until January 2006. The delivery of Canada's submission was delayed until April 13, 2006.

In March 2005, the Commission delivered its report on the single issue of the validity of the 1902 "amalgamation" of the James Smith Band and the Cumberland Band 100A. The Commission panel found the amalgamation to be invalid. This report addresses the remaining issues.

The community sessions for this inquiry were held in June 2001 and October 2002, and an expert witness session was held in June 2003. Oral hearings, based on written submissions, took place in June 2004 and June 2006.

### **BACKGROUND**

In the early 1980s, the Federation of Saskatchewan Indian Nations (FSIN) on behalf of the JSCN submitted a claim to the Minister of Indian Affairs alleging an outstanding treaty land entitlement under Treaty 6. On May 22, 1984, Canada rejected JSCN's TLE, stating that the shortfall of land at the time of survey was fulfilled as a result of the amalgamation of the James Smith Band at Indian Reserve (IR) 100 and the Cumberland 100A Band at IR 100A in 1902.

### **ISSUES**

What was the population of the James Smith Cree Band for the purposes of calculating land entitlement under Treaty 6, starting with the date of first survey of 1884? Does Treaty 6 obligate Canada to provide lands of specified quality, and, if so, what lands did Canada actually provide of specified quality? In terms of Treaty 6 requirements with regards land quality, did Canada breach any obligation(s) in setting aside IR 100? Does Treaty 6 and/or the *Indian Act* of 1876 exclude lands occupied prior to treaty from treaty land quantum calculations, and, if so, what should have been excluded? Did Canada

breach any obligation(s) based on any requirement to exclude lands? As regards the alleged amalgamation, did the Peter Chapman Band have a surplus of treaty lands at the time of the alleged amalgamation? What effect if any did Peter Chapman's surplus treaty land have on the entitlement of James Smith? In sum, did Canada provide sufficient treaty lands to fulfill its obligations to James Smith Cree Nation under Treaty 6?

## **FINDINGS**

### ***Paylist***

After additional research undertaken during the course of this inquiry, the parties agreed upon a 155-person shortfall at the date of first survey. As a result of this agreement, no further analysis is required from the panel on this issue.

### ***Quality of Lands***

The purpose and intention of the reserve clause of Treaty 6 is to set aside a reserve specifically for (a) farming land, and (b) other purposes (without limitation). The Band is to be consulted about the location of the reserve land. That choice is dependent upon the nature and the quality of the land. The evidence is that, the James Smith Band was consulted on the location and the quality of the lands to be set aside as its reserve and the Band selected land that would support multiple uses, including farming. The Crown did not breach its obligation to the Band.

### ***Lands Occupied Prior to Treaty***

It is a fundamental principle in calculating treaty land entitlement that every treaty Indian is entitled to be counted as a member of a band. According to the terms of Treaty 6, the James Smith Band was entitled to 128 acres of land for each member of the Band. This treaty land entitlement is a right of the Band as a collective and is not a right that attaches to the land under cultivation. Therefore, lands under cultivation by an individual prior to treaty are not relevant to and have nothing to do with determining a Band's entitlement under treaty.

### ***Alleged Amalgamation***

According to our March 2005 *Report on Issue 9: Amalgamation*, the "owners of the Cumberland Reserve No. 100A" were the whole of the Cumberland Band who had adhered to Treaty 5 in 1876. The whole of the Band included those resident at IR 20 and IR 100A, and not only those resident at IR 100A. Canada relied upon two signatories, who had allegedly transferred into the Cumberland Band at IR100A, to amalgamate that Band with the James Smith Cree Nation. There is no evidence to indicate that those members who were the "owners" of IR 100A and living at IR 20 and IR 100A voted to amalgamate.

The amalgamation agreement is invalid because its two signatories could not have given a joint and undivided interest in IR 100A as they were not the "owners of Cumberland 100A." Canada's failure to seek and obtain the informed consent of the whole of the Cumberland Band is a breach of its treaty and fiduciary duties.

As a result of the July 24, 1902, surrender and amalgamation, the Cumberland House Cree Nation has been deprived of its interest in IR 100A. We find that Canada has improperly satisfied the James Smith Cree Nation's outstanding TLE shortfall by the addition of IR 100A lands to IR 100.

### ***Sufficiency of Treaty Lands***

Given our findings on the issue of amalgamation, the IR100A lands could not have been validly transferred to the credit of the James Smith Band in 1902, and yet today the Band is in possession of the unsurrendered portion of IR 100A. In our view, there is an outstanding obligation owed to the Cumberland House Cree Nation which includes the 2,048 acres of IR 100A that the Crown used to cure the 16-person shortfall of the James Smith Cree Nation's treaty land entitlement.

## **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend upon a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*R. v. Marshall*, [1999] 3 SCR 456.

**ICC Reports Referred To**

*James Smith Cree Nation: Treaty Land Entitlement Report on Issue 9 – Amalgamation* (Ottawa, March 2005); *Cumberland House Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005); *James Smith Cree Nation: Indian Reserve 100A Inquiry* (Ottawa, March 2005).

**Treaties and Statutes Referred To**

Canada, *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964); *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House with Adhesions* (Ottawa: Queen's Printer, 1969); *Indian Act*, SC 1876.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 (ICC) 171; Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976); A.G. Jackes, "Narrative of Proceedings," in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; facsim. repr., Toronto: Prospero Books, 2000); John Leonard Taylor, *Treaty Research Report, Treaty Six* (Ottawa: Treaties and Historical Research Centre, DIAND, 1985).

**COUNSEL, PARTIES, INTERVENORS**

W. Selnes for the James Smith Cree Nation; P. Robinson for the Government of Canada; K.N. Lickers to the Indian Claims Commission.



## SUMMARY

### **JOSEPH BIGHEAD, BUFFALO RIVER, WATERHEN LAKE, AND FLYING DUST FIRST NATIONS PRIMROSE LAKE AIR WEAPONS RANGE REPORT II INQUIRIES Alberta and Saskatchewan**

The report may be cited as Indian Claims Commission, *Joseph Bighead, Buffalo River, Waterhen Lake, and Flying Dust First Nations: Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47.

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

**Panel:** Commissioner D.J. Bellegarde, Commissioner P.E.J. Prentice, QC

**Treaties** – Treaty 6 (1876) – Treaty 10 (1906); **Treaty Right** – Harvesting – Trapping; **Fiduciary Duty** – Breach of Treaty – Fiduciary Expectation; **Natural Resources Transfer Agreement, 1930; Specific Claims Policy** – Band; **Alberta; Saskatchewan**

#### **THE SPECIFIC CLAIM**

In 1954, the Government of Canada took up 4,490 square miles of the traditional hunting territory of the Buffalo River, Joseph Bighead, Waterhen Lake, and Flying Dust First Nations in northern Alberta and Saskatchewan, to serve as an air force bombing and gunnery range, known as the Primrose Lake Air Weapons Range (PLAWR). The First Nations maintain that they depended upon this land for their livelihood, and that Canada's taking was without compensation or provision for economic rehabilitation, and in violation of Treaties 6, 10, and the Crown's fiduciary duty. In 1975, the First Nations submitted specific claims to the Department of Indian Affairs and Northern Development (DIAND) for losses resulting from the creation of the range. Canada rejected those claims in December 1975. In June 1993 and February 1994, the Indian Claims Commission (ICC) agreed to the requests of the First Nations to conduct inquiries into their rejected claims. Six separate community sessions for the four First Nations were held between June and August 1994. The oral hearing, based on written submissions, took place on November 2 and 3, 1994.

#### **BACKGROUND**

The Flying Dust, Joseph Bighead, and Waterhen Lake First Nations adhered to Treaty 6 in 1878, 1913, and 1921, respectively. The Clear Lake Band, which later became the Buffalo River First Nation, signed Treaty 10 in 1906. The purpose of these treaties was to make land available for settlement, in return for which the Indians were given annuities, reserves, agricultural implements, and assured hunting, trapping, and fishing rights over the ceded territory. In 1946, under a federal-provincial agreement, and regulations under Saskatchewan's *The Fur Act*, a large area of northern Saskatchewan was designated a "fur block" for purposes of managing and conserving fur resources. The plan was to allow the fur-bearing animal population to stabilize by restricting trapping privileges to local (primarily Indian and Métis) residents. The fur block was divided into smaller community sections known as Fur Conservation Areas (FCAs), and each of the claimant First Nations had a designated FCA in or near the range.

The fur block regime was in place when the air weapons range was established in 1954 for the exclusive use of the Department of National Defence. As a result, Buffalo River First Nation lost access to approximately 15 per cent of its trapping area; Flying Dust and Waterhen Lake First Nations lost access to approximately one-third of their shared trapping area; and Joseph Bighead First Nation lost none of its FCA when the range was created. The terms of a 1951 Saskatchewan-Canada agreement under which the range was created provided for compensation from Canada "to persons or corporations having rights in the area, including rights in respect of ... trapping." Some compensation was paid to certain individuals with trapping and fishing rights in the range, as well as to the Cold Lake and Canoe Lake First Nations, but only a few members of the claimant First Nations received compensation. The claimants apparently were never the subject of any comprehensive

compensation or economic rehabilitation program, because the government did not consider them to be “directly or materially affected” by the range.

### **ISSUES**

Did Canada breach its treaty obligations? Did Canada have a fiduciary duty towards the claimants, and did it breach that duty?

### **FINDINGS**

The legal test for breach of treaty requires a balancing of the Indian’s harvesting right and the government’s right to take up land. Because the government’s right to occupy land is, on the face of the treaties and the 1930 Natural Resources Transfer Agreement (NRTA), unlimited, the threshold for breach of treaty will be high and will occur where the government’s taking up of land overwhelms the food-harvesting right.

The claimant First Nations suffered hardship because they were excluded from the range lands; however, the magnitude of that hardship was not so great as to give rise, in law, to a breach of treaty. The claimants were able to continue to exercise their food-harvesting right in a meaningful way after the range was created. The right guaranteed in the treaties is a general right to continue the avocations of hunting, trapping, and fishing within the tract surrendered, but it is subject to the Crown’s right to take up land.

A breach of treaty constitutes a breach of fiduciary duty; however, there was no breach of treaty here and, thus, no basis under treaty to claim a breach of fiduciary duty. There remain two possible grounds for breach of fiduciary duty: first, a fiduciary relationship; and second, a unilateral undertaking to compensate. Regarding the fiduciary relationship between the Crown and Aboriginal peoples, it is not the same as a general, all-embracing fiduciary duty. A fiduciary duty must be shown to arise in the specific circumstances of the relationship. The government’s action in taking up land for the range was consistent with the terms of the treaty. There was no further, fiduciary-based limitation on the government’s power to take up land and there was no constitutional protection of treaty rights until 1982.

A unilateral undertaking to compensate the claimants would give rise to a fiduciary duty, regardless of the terms of the treaty, and would apply to the claimants’ lost food-harvesting right and commercial harvesting right, such as those derived from individual licences or communal privileges under Saskatchewan’s *The Fur Act*. In this case, there was no unilateral undertaking to compensate for the reduction of food harvesting rights. The government, however, so implicated itself in the claimants’ affairs that it generated a “fiduciary expectation” that attached to the government promise to provide compensation to anyone whose traplines were affected. The evidence is clear that a significant number of people were affected when they were no longer able to trap in portions of their FCAs. The government failed to discharge its duty with respect to the claimant First Nations that lost commercial harvesting rights as a result – Flying Dust, Buffalo River, and Waterhen First Nations. Joseph Bighead First Nation did not suffer such a loss.

### **RECOMMENDATIONS**

That the claim of the Flying Dust, Buffalo River, and Waterhen Lake First Nations, with respect to lost commercial harvesting rights only, be accepted for negotiation pursuant to the Specific Claims Policy.

That the claim of the Joseph Bighead First Nation was properly rejected by the Minister pursuant to the Specific Claims Policy.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Cases Referred To**

*R. v. Sikyey* (1964), 43 DLR (2d) 150 (NWT CA); *R. v. Strongquill* (1953), 8 WWR (NS) 247 (Sask. CA); *R. v. Sutherland*, [1980] 3 CNLR 71 (SCC); *Horse v. R.*, [1988] 1 SCR, 187; *R. v. Sioui*, [1990] 1 SCR 1068; *R. v. Sundown*, [1988] 4 CNLR 116 (Sask. QB); *Sieinhauer v. R.*, [1985] 3 CNLR 187 (Alta. QB); *Nowegijick v. R.*, [1983] 1 SCR 29; *R. v. Horseman*, [1990] 1 SCR 901; *Simon v. R.*, [1985] 2 SCR 387; *R. v. Taylor and Williams* (1988), 34 OR (2d) 360 (CA); *R. v. Sparrow*, [1990] 1 SCR 1075; *Quebec (AG) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC); *Lac Minerals v.*

*International Corona Resources*, [1989] 2 SCR 574; *Apsassin v. Canada*, [1988] CNLR 73 (FCTD); *Frame v. Smith*, [1987] 2 SCR 99.

### **ICC Reports Referred To**

*Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3.

### **Treaties and Statutes Referred To**

*Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964); *Treaty No. 10 and Reports of Commissioners* (Ottawa: Queen's Printer, 1966); *Constitution Act, 1982*; *The Fur Act*, RSS 1940, RSS 1953; *National Resources Transfer Agreement*, SS 1930.

### **Other Sources Referred To**

A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979); DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982).

### **COUNSEL, PARTIES, INTERVENORS**

J.D. Jodouin, D.J. Kovatch for the Buffalo River, Joseph Bighead, and Waterhen Lake First Nations; J.R. Beckman, QC, for the Flying Dust First Nation; B. Becker, M. Parkes for the Government of Canada; R.F. Reid, QC, K. Fullerton, R.S. Maurice, D. Belevsky to the Indian Claims Commission.

### **CANADA'S RESPONSE**

By letter dated March 27, 2002, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation to accept the claim of the Buffalo River, Waterhen Lake, and Flying Dust First Nations on the basis that the Specific Claims Policy does not address the claims of individuals or groups of individuals, only bands: see Response to PLAWR II Inquiries at (2002) 15 ICCP 378.



# SUMMARY

## **KAHKEWISTAHAW FIRST NATION 1907 RESERVE LAND SURRENDER MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** –Pre-surrender; **Evidence** – Onus of Proof; **Mandate of Indian Claims Commission** –Mediation; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In March 1989, the Kahkewistahaw First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), seeking “recognition of [its] claims and compensation for the losses and damages sustained” as a result of a 1907 surrender of portions of Indian Reserve (IR) 72 and IR 72A. The surrender was alleged to have been taken under conditions of duress, undue influence, and negligent misrepresentation, rendering the surrender an unconscionable bargain. The First Nation also claimed the surrender was invalid as the *Indian Act* regulations regarding surrender were not respected, nor were the consent requirements articulated in Treaty 4. It was also alleged that Canada had failed to meet its fiduciary obligations to the Kahkewistahaw people. DIAND rejected the claim in 1994 as failing to establish a lawful obligation on the part of the Crown. Supplementary submissions from the First Nation did not alter Canada’s position. In August 1994, the Indian Claims Commission (ICC) agreed to the First Nation’s request for an inquiry into its rejected claim. When the parties were brought together in the ICC process to discuss the claim, the Kahkewistahaw First Nation presented new arguments and evidence. The Commission concurred with its position that Canada had breached its fiduciary obligations to the Kahkewistahaw people; Canada reconsidered its position and accepted the claim for negotiation in December 1997. The Commission was then asked by the parties to facilitate the negotiation process, which it agreed to do.

### **BACKGROUND**

The background to this mediation may be found at Indian Claims Commission, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

### **MATTERS FACILITATED**

The ICC’s role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish mutually acceptable agendas, venues, and times for the meetings. The ICC also mediated disputes and coordinated the various studies undertaken by the parties to support the negotiations, including loss-of-use studies and land appraisals.

### **OUTCOME**

In November 2002, the Kahkewistahaw First Nation successfully ratified the proposed settlement of \$94.65 million as compensation for the surrender of 33,248 acres of reserve land taken in 1907.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



## SUMMARY

### **KAHKEWISTAHAW FIRST NATION 1907 RESERVE LAND SURRENDER INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender; **Evidence** – Onus of Proof; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In March 1989, Kahkewistahaw First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), seeking “recognition of [its] claims and compensation for the losses and damage sustained” as a result of the 1907 surrender of portions of Indian Reserves (IR) 72 and 72A. Subsequent to a review of the claim, completed in January 1992, the First Nation updated and resubmitted its claim, which the department rejected. The First Nation then requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim, which it agreed to do in August 1994. The Commission heard community evidence and the expert testimony of an agrologist in May 1995, and legal argument in February 1996.

#### **BACKGROUND**

Chief Kahkewistahaw signed Treaty 4 in 1874. In 1881, the federal government completed the survey of IR 72 and a fishing station, IR 72A, for his Band pursuant to the terms of the treaty. The two reserves consisted of 46,816 acres, sufficient land for 365 people.

Prior to the treaty, Kahkewistahaw’s Band, made up of Plains Cree and some Saulteaux, had led a nomadic existence, and depended more on the buffalo than other Crooked Lake bands. By the late 1800s, however, the Band’s economy had slowly evolved to a relatively self-sustaining, mixed-farming operation. Although its members were not as well known for farming as the adjacent Cowessess Band, they soon made farming and stock-raising their main economic activity. By 1886, however, disease had reduced the Band’s population from 274 to 183, in turn reducing the number of farmers.

Local pressure to open up the Kahkewistahaw and other Crooked Lake reserves to settlement had begun by 1885. The Indian Agent rebuffed an 1886 request for a surrender of the southern portion of these reserves. An 1890 surrender for road allowances proceeded, but an 1891 request to open up the reserve land was turned away. As the settler population grew by nearly one million between 1896 and 1906, pressure on the Kahkewistahaw lands, including the haylands, intensified. Successive Indian officials objected to any surrender of lands as needed by the Indian farmers. By 1906, William Graham had been promoted Inspector of Indian Agencies in southern Saskatchewan, and Frank Oliver, a former journalist who had campaigned to free up reserve land for settlement, had become Minister of the Interior and Superintendent General of Indian Affairs. In 1906, Oliver sponsored an amendment to the *Indian Act* allowing up to 50 per cent of the proceeds of a surrender and sale to be distributed immediately to band members. After Graham advised the Minister that a surrender might be possible if handled properly, he received the surrender forms and a cheque, and was directed to seek a surrender of 33,281 acres of the Kahkewistahaw reserve. Graham arrived in January 1907, when illness and the need for rations were intensified among the Crooked Lake bands, and the Kahkewistahaw Band was leaderless, Chief Kahkewistahaw and two headmen having died in 1906.

On January 23, 1907, after having visited the Cowessess reserve to discuss surrender, and the Ochapowace reserve, where a surrender vote failed, Graham, Indian Agent Matthew Millar, and other witnesses arrived at Kahkewistahaw, to hold a surrender meeting. Out of 19 eligible voters present, only 5 voted in favour of a surrender, after which, according to Graham and Miller, some band members requested a second meeting. The second vote was held January 28th at the same location. This time, 17 voting members of the Band were present along with Graham, Millar, and most of the same witnesses from the earlier vote. This time they voted 11 to 6 in favour of surrender, and all 17 of the voters in attendance signed or affixed their marks to the surrender document. Graham then distributed the promised 1/20th of the estimated purchase price – \$94 per person. The surrender left Kahkewistahaw with only 11 per cent of the arable land originally set apart for the Band, but 75 per cent of the non-arable land. In 1908 and 1910, the surrendered lands were sold at public auction to non-Indian farmers; unsold parcels were later distributed through the Soldier Settlement Board following the First World War.

### **ISSUES**

Was the 1907 surrender valid? Did the Crown comply with the *Indian Act* when obtaining the surrender of part of IR 72? Did the Crown have any trust or fiduciary obligations to the First Nation in relation to the surrender, and, if so, were they fulfilled? In particular, did the Crown obtain the surrender as a result of duress, undue influence, an unconscionable agreement, or negligent misrepresentation? If the evidence is inconclusive on any of the issues, which party has the onus of proof?

### **FINDINGS**

#### **The *Indian Act* Requirements for a Valid Surrender**

The evidence suggests that there was adequate notice for both the first and second surrender meetings, that the meetings were called “according to the rules of the Band,” that a duly authorized officer was present, and that the surrender was assented to by a majority of eligible voters. There is no evidence to suggest that any of the voters were ineligible by reason of non-residency.

Section 49(3) of the 1906 *Indian Act* also required that the surrender vote be certified on oath by “some of the chiefs or principal men present” at the surrender meeting. On the certificate of surrender, the preprinted word “Chief” was crossed out and the word “Indian” substituted so that Kahkanowenapew, an ordinary member of the Band, could certify the surrender. Thus, there was a breach of the Act because there was no Chief or headman to attest to the propriety of the surrender process. This failure, however, does not defeat the surrender in this case, because it is apparent that the assent of the majority had already been given. The purpose of section 49(3) is merely to confirm satisfaction of the requirements of the Act, in particular that majority assent of the band members was given at an open meeting called for the purpose of discussing the surrender. The failure to fulfill the technical surrender requirements of the Act does not, in itself, give rise to an outstanding lawful obligation.

#### **Pre-surrender Fiduciary Duties of the Crown**

Even if the Kahkewistahaw people understood the consequences of surrender and intended to surrender reserve lands, the larger question is whether the Crown’s conduct tainted the dealings in a manner that would make it unsafe to rely on the Band’s understanding and intention. At that time, the Kahkewistahaw Band was particularly vulnerable because its members were poor, starving, illiterate, and without a Chief. The meeting took place in the context that each band member would immediately receive \$94. Graham also intended to ensure that the Band did not receive independent advice, and there is also evidence that he threatened that the members would not receive further government assistance unless they agreed to the surrender.

The evidence indicates that the Crown failed to satisfy its fiduciary duty to the Band when faced with conflicting interests. We recognize that the Crown has the dual and concurrent responsibility to represent the interests of both the general public and Indians; such conflicting duties do not necessarily mean that the Crown has breached its fiduciary obligation to the First Nation. Rather, it is the manner in which the Crown manages that conflict that determines whether the Crown has fulfilled its fiduciary duty.

The Band rejected Graham’s surrender proposal by a vote of 14 to 5 at the first meeting; yet, as a result of the developments in the following days, the Band reversed itself and adopted a position detrimental to its best interests. On the facts of this case, the Band effectively ceded its decision-making power regarding the 1907 surrender to the Crown, and the Crown procured the surrender through its own “tainted dealings.”

The Governor in Council had the power, under subsection 49(4) of the 1906 *Indian Act*, to reject a surrender that was clearly foolish and improvident and constituted exploitation, but failed to do so in this case.

### RECOMMENDATION

That the claim of the Kahkewistahaw First Nation be accepted for negotiation under the Specific Claims Policy.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Cardinal v. R.*, [1982] 1 SCR 508; *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161 (TD); *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD); *Apsassin v. Canada*, [1993] 3 FC 28 (Fed. CA); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 (SCC) (sub nom. *Apsassin*); *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* unreported, [1996] OJ No. 4188 (December 2, 1996) (Ont. CA); *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 24 OR (3d) 654 (Ont. Ct GD); *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Horseman*, [1990] 3 CNLR 95 (SCC); *Norberg v. Wynrib*, [1992] 4 WWR 577 (SCC); *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC).

### ICC Reports Referred To

*Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

### Treaties and Statutes Referred To

*Royal Proclamation of 1763*, in 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 & Co., 1880; facsimile reprint, Saskatoon: Fifth House Publishers, 1991); *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Indian Act*, SC 1880, RSC 1906; *An Act for the Protection of the Lands of the Crown in This Province from Trespass and Injury*, RSUC 1792–1840 (1839); *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, Province of Canada Statutes 1850; *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*, Province of Canada Statutes 1850; *An Act respecting the Management of Indian Lands and Property*, SC 1860; *An Act Providing for the Organization of the Department of the Secretary of State of Canada and for the Management of Indian and Ordnance Lands*, SC 1868; *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria, chapter 42*, SC 1869.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted [1994] 1 ICCP 171; Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990); John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy," John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change," Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889–1897," and J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy," in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991); John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2d ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978); Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated; Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986); Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992); H.B. Hawthorn, C.S.

Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958); F.L. Barron, "The Indian Pass System in the Canadian West, 1882–1935," *Prairie Forum* (spring 1988); D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896–1905," in I.A. Getty and A.S. Lussier, eds., *As Long as the Sun Shines and the Water Flows* (Vancouver: Nakoda Institute and UBC Press, 1979); "The St. Peter's Reserve Claims," in R. Daniel, *A History of Native Claims Processes in Canada, 1867–1979* (Ottawa: DIAND, Research Branch, February 1980).

**COUNSEL, PARTIES, INTERVENORS**

S. Pillipow et al. for the Kahkewistahaw First Nation; B. Becker, K. Kobayashi for the Government of Canada; R.S. Maurice, K. Fullerton, K.N. Lickers to the Indian Claims Commission.

**CANADA'S RESPONSE**

By letter dated December 18, 1992, the Minister of Indian Affairs and Northern Development accepted the Kahkewistahaw claim for negotiation: see (1998) 8 ICCP 371.

**UPDATE**

The parties negotiated a settlement of the claim with the assistance of the ICC's mediation services. A final settlement was reached in November 2002: see ICC, *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3.

## SUMMARY

### **KAHKEWISTAHAW FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 4 (1874); **Treaty Land Entitlement** – Date of First Survey – Population Formula – Saskatchewan TLE Framework Agreement; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

The Kahkewistahaw First Nation's claim to an outstanding treaty land entitlement (TLE) was considered and rejected by the Department of Indian Affairs and Northern Development (DIAND) in the early 1980s. The issue resurfaced in 1992 during negotiations regarding the Saskatchewan Treaty Land Entitlement Framework Agreement, resulting in the submission of a new claim in May 1992, centred on the proper payroll for TLE purposes. In May 1994, DIAND rejected the claim for a second time, on grounds that the correct year for the date of first survey (DOFS) was 1881, which would not indicate a TLE shortfall. Thus the claim was deemed not to fall within the Specific Claims Policy. In August 1994, the Indian Claims Commission (ICC) agreed to the First Nation's request for an inquiry into its rejected claim. In May 1995, the ICC took evidence from expert witnesses on TLE, and, in February 1996, conducted an oral hearing based on the parties' written submissions.

#### **BACKGROUND**

Kahkewistahaw was one of the 13 chiefs who signed Treaty 4 at Fort Qu'Appelle in 1874. In 1875, Commissioner W.J. Christie met with the Indians of Treaty 4 to pay annuities and select reserves. Although some 289 people followed Kahkewistahaw to Qu'Appelle to receive annuities in 1875, consistent with the Band's desire to continue a nomadic lifestyle, no reserve was surveyed. In 1876, surveyor William Wagner and Indian Agent Angus McKay met with Kahkewistahaw and other chiefs who had not yet obtained reserves for their bands. At this time, Wagner surveyed a reserve for Kahkewistahaw comprising 41,414 acres, which, based on the Treaty 4 formula of 128 acres per person, was enough land for 323 people. It was situated on the site of the present reserve for the Ochapowace First Nation. However, the evidence indicates that Kahkewistahaw and his people never settled on this reserve, nor is there any record of its confirmation or surrender. Neither Canada nor the First Nation argued that Wagner's survey should be considered Kahkewistahaw's "first survey" for TLE purposes.

By the time treaty annuities were paid in 1880, the Kahkewistahaw Band's living conditions had become very difficult. The Indian Agent's reports indicate that a reserve was surveyed for the Kahkewistahaw Band in that year; however, no survey plan or other record has ever been located, and the boundaries laid out are therefore uncertain. The Agent's year-end report of January 3, 1881, specifies that the reserve for "Kakewistahaw" was "yet to be completed." A second effort was made to set the boundaries of the reserve. On August 20, 1881, Surveyor John C. Nelson completed a sketch showing four Indian reserves on Crooked Lake and Round Lake – Mosquito, O'Soup, Kahkewistahaw, and Kakishway/Chacachas. A more formal plan of the four reserves was also prepared, but is undated and unsigned. Several years later, after assuming a broader responsibility for Indian reserve surveys, Nelson approved the documents which were later confirmed by Order in Council in 1889 as the official plans of survey for IR 72 and IR 72A. Kahkewistahaw received a total allocation of 46,816 acres – sufficient land for 365 people under the Treaty 4 formula.

Kahkewistahaw's TLE exists within the context of the closure of Fort Walsh, shifting buffalo migration patterns, sickness, and famine, all of which caused significant fluctuations in band populations. According to the treaty annuity paylists, the

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number of people paid with Kahkewistahaw grew from 65 in the year of treaty to 266 in 1876, 376 in 1879, and 430 in 1880. The population then fell sharply to 186 in 1881 and 160 in 1882, before rebounding to 274 in 1883.

### ISSUES

What is the appropriate date for calculating Kahkewistahaw's TLE? What is Kahkewistahaw's population for TLE purposes? Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding TLE on the same or substantially the same basis as the Entitlement Bands who are party to the Agreement?

### FINDINGS

As a general principle, a band's population on the date of first survey (DOFS) shall be used to calculate TLE rather than its population on the date of selection of reserve land. In the case of Kahkewistahaw, the substantial changes made by Nelson in 1881 to the survey work in 1880 constituted "a new survey of a new reserve," and not "just a change in the boundaries of a reserve essentially in the same location." These changes arose out of Kahkewistahaw's desire to include adjoining agricultural land, river frontage, and timber land in its reserve. Therefore, the DOFS was August 20, 1881, the date of Nelson's survey, which was conducted in accordance with the treaty and accepted by both Canada and the First Nation.

The payroll that provides the most reliable evidence of a band's population at DOFS is the payroll closest in time to the DOFS. This is the time when the band's treaty land is set aside for its use and benefit. Nevertheless, the treaty payroll is simply a starting point in determining the band's population for TLE purposes, since the payroll must be analysed to establish the band's actual membership as opposed to individuals who were simply counted with the band in a given year. The most reliable, objective evidence of the Band's population as of the August 20, 1881, DOFS – and thus the appropriate "base payroll" – was the August 4, 1881, payroll, subject to adjustments being made for absentees and "late additions," such as new adherents to treaty and transferees from landless bands. Using the 1881 base payroll as the starting point, the evidence shows that the Band had a population of 186, plus 70 absentees and arrears, at the DOFS. However, all the payroll research was predicated on an 1880 DOFS, so there are no reliable figures on the number of "late additions" to add to the total of 256.

For its claim to be validated, the First Nation must demonstrate that more than 109 (365 minus 256) absentees, new adherents, or landless transfers – including individuals who may have been counted with Nekaneet in 1881 – subsequently joined or rejoined the Kahkewistahaw Band. The evidence shows that Canada's officials conferred with Chief Kahkewistahaw and acted in good faith to provide a land base in accordance with treaty, having sufficient river frontage, timber, and agricultural land for the First Nation's future needs.

The only basis upon which a band can establish an outstanding TLE claim is in accordance with the legal obligations that flow from the treaty. Section 17.03 of the Saskatchewan Treaty Land Entitlement Framework Agreement does not provide the Kahkewistahaw Band with an independent basis for validation of its TLE claim. It merely provides non-Entitlement Bands whose claims are subsequently validated by Canada with the opportunity to settle their claims in accordance with the Framework Agreement's principles of settlement. The Kahkewistahaw First Nation has not established an outstanding entitlement in accordance with treaty, and therefore section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with the First Nation.

### RECOMMENDATION

That the claim of the Kahkewistahaw First Nation with respect to outstanding treaty land entitlement not be accepted for negotiation under Canada's Specific Claims Policy.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### ICC Reports Referred To

*Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP; *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235.

**Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983.

**Other Sources Referred To**

Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated; DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Teresa M. Homik, "Kahkewistahaw Reserve Date of First Survey," October 27, 1993; Office of the Treaty Commissioner (Saskatchewan), "Surveys of the Kahkewistahaw Reserve," March 29, 1994; Office of the Treaty Commissioner (Saskatchewan), "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876–1884," May 1995; Office of the Treaty Commissioner (Saskatchewan), "Research Methodology for Treaty Land Entitlement (TLE)," 1994.

**Counsel, Parties, Intervenors**

S. Pillipow for the Kahkewistahaw First Nation; B.Becker, I.D. Gray for the Government of Canada; R.S. Maurice, K. Fullerton, K. Lickers to the Indian Claims Commission.



# SUMMARY

## **KAWACATOOSE FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Treaty Land Entitlement** – Policy – Population Formula – Date of First Survey – Late Adherent – Landless Transfer – Marriage – Saskatchewan TLE Framework Agreement; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In 1992, Kawacatoose First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging an outstanding treaty land entitlement (TLE). The First Nation claimed that it was entitled to 31,104 acres but had received only 27,040 acres, enough land for 211 people, resulting in a shortfall of 4,064 acres. Following additional research by the parties, DIAND communicated that it was not willing to negotiate Kawacatoose's claim. The Band, therefore, sought an Indian Claims Commission (ICC) inquiry based on DIAND's preliminary position. The ICC agreed to conduct an inquiry in May 1994, whereupon DIAND issued a formal rejection. Community sessions to hear Elders, experts, and other witnesses were held in November and December 1994, and a hearing of expert witnesses was conducted in May 1995. The parties presented their oral argument, based on written submissions, in October 1995.

### **BACKGROUND**

The Kawacatoose Band adhered to Treaty 4 on September 15, 1874. Its reserve, Indian Reserve (IR) 88, comprised of 27,040 acres (42.25 square miles), was surveyed in 1876. On account of an error in the original survey, the boundaries were altered by Dominion Land Surveyor John C. Nelson in 1889 upon confirmation of the survey by Order in Council, at which time the area of the reserve was stated to be 42.5 square miles (27,200 acres). Based on the Treaty 4 allocation of one square mile per family of five (or 128 acres per person), enough land was surveyed for 212 people. In 1876, Kawacatoose and his people were paid annuities at or near the Touchwood Hills. However, the paylists from Fort Walsh showed two families (13 people in total) paid in 1876 under the heading "Poor Man": the first family (one man, one woman, and five children) had the name Paahoska or Long Hair, and the second (one man, two women, and three children) were named Wui chas te oo ta be or Man That Runs. Both families were paid arrears for 1874 and 1875 but were not paid for 1876. Neither family appears at any other time on the paylists for either the Cree Kawacatoose (Poor Man) Band or the Assiniboine Lean Man (Poor Man) Band, although other members of Kawacatoose were paid at Fort Walsh in 1879. The Angelique Contourier family was paid arrears in 1883 for 1876 with Kawacatoose, but also appeared on the 1875 payroll for the George Gordon Band; the survey for that Band, although completed in 1876, was begun in 1875 following the Band's receipt of its treaty annuity payments. The questions relating to these families require the ICC to make a determination of Kawacatoose's population to establish whether, in the first instance, the First Nation has an outstanding TLE, and, if so, the residual acreage owed by Canada to the First Nation. If the date-of-first-survey (DOFS) threshold approach, which Canada submits is its lawful obligation, is applied and the Contourier family or either of the Fort Walsh families is excluded, Kawacatoose's DOFS population would drop from the figure of 215 put forward by the First Nation to a level below the threshold of 212 for whom land was provided in the First Nation's 1876 survey.

**ISSUES**

Who were the members of the Kawacatoose Band in the year of survey and thereby entitled to be included in the TLE equation? In particular, are the 13 members of two families who appear on the 1876 treaty payroll for Fort Walsh members of Kawacatoose's band ("Poor Man Band") or Lean Man's band ("Poor Man")?

Assuming that the DOFS formula for determining outstanding TLE is the appropriate formula, does the First Nation have an outstanding TLE on the basis that the additions (new adherents, landless transfers, and marriages to non-treaty women) to the First Nation after the DOFS are entitled to land under the terms of Treaty 4, and/or are to be counted in establishing the First Nation's DOFS population?

Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding TLE on the same or substantially the same basis as the Entitlement Bands which are party to the Framework Agreement?

**FINDINGS**

The 13 members of the two families paid at Fort Walsh in 1876 under the heading "Poor Man" were members of Kawacatoose and not the Assiniboine Poor Man Band. However, all five individuals in the Contourier family, who in 1883 were paid arrears for 1876 with Kawacatoose, had already been included in the TLE calculation for Gordon's Band and could not be counted a second time with Kawacatoose. Therefore, the DOFS population for Kawacatoose is 210, subject to further research that may be undertaken. Since sufficient land was surveyed for 212 people, no DOFS shortfall exists in the calculation of the Kawacatoose reserve.

The ICC adopts the findings in its report on Fort McKay First Nation's TLE claim. Neither the Kawacatoose Band under Treaty 4 nor the Fort McKay Band under Treaty 8 were stable, self-contained units at the time of treaty. It was recognized that many Indians would not settle onto reserves and convert to an agrarian-based economy for some time. It cannot reasonably be concluded that the members of Kawacatoose, or any of the signatories of Treaty 4, would have been prepared to cede their rights to the vast areas of land contemplated by the treaty on the basis of a rigid DOFS population approach that does not recognize certain additions to the Band for the purpose of TLE. The treaty conferred upon each Indian an entitlement to land as a member of a band, with entitlement crystallizing at the date of first survey in 1876 for those individuals who were members of the band at that time. The quantum of land to which Kawacatoose was entitled in that first survey is a question of fact, determined on the basis of the actual band membership, including band members who were absent or received arrears, on the date of first survey. The DOFS population was 159 – including the 13 members of the two Fort Walsh families, but excluding the five members of the Contourier family – plus 51 absentees and arrears, for a total of 210. The treaty also conferred upon every band the entitlement to receive additional reserve land for every Indian who adhered to the treaty and joined that band subsequent to the DOFS. The quantum of additional land to which Kawacatoose is entitled as a result of new adherents is likewise a question of fact, determined on the basis that the entitlement crystallized when those Indians joined the Band. The ICC concludes that a total of 43 individuals joined Kawacatoose as new adherents to treaty following the DOFS.

The treaty also conferred upon the Band an entitlement to receive additional reserve land for every Indian who transferred from one band to another, where the band from which the Indian transferred had not yet had a TLE calculation and survey. There were 19 landless transfers to Kawacatoose. Finally, as a result of marriages, 5 women who were new adherents or landless transfers in their own right became members of Kawacatoose. All these numbers are subject to review if the parties should agree to undertake further research; however, on a preliminary basis, the First Nation's TLE claim, including individuals on the base payroll, absentees and arrears, new adherents, and landless transfers, should be 277. This figure gives rise to a TLE of 35,456 acres. When the first survey area of 27,200 acres is set off against this TLE, the result is that the Kawacatoose First Nation is owed an additional 8,526 acres.

The Saskatchewan TLE Framework Agreement does not give non-Entitlement Bands such as Kawacatoose a separate legal right to have its TLE validated; nevertheless, Kawacatoose First Nation has substantiated its claim for an outstanding TLE on the same basis as the Entitlement Bands – that is, in accordance with the terms of Treaty 4. Section 17.03 of the Framework Agreement does not impose a fiduciary or contractual obligation upon Canada to accept the Kawacatoose claim for negotiation, nor is Canada estopped from denying an obligation to validate this claim. Even so, once substantiation of the claim of a non-Entitlement Band has occurred, as in the present case, section 17.03 applies, stipulating that Canada and Saskatchewan will support the extension of the principles of settlement contained in the Agreement to that band. Although Kawacatoose is not a party to the Agreement and is not in a position to enforce the obligations of Canada and Saskatchewan

under section 17.03, Canada's submissions indicate that it will consider itself honour-bound to fulfill the obligations to non-Entitlement Bands set forth in section 17.03.

### RECOMMENDATIONS

That the treaty land entitlement claim of the Kawacatoose First Nation be accepted for negotiation under Canada's Specific Claims Policy.

In accordance with section 17.03 of the Saskatchewan Framework Agreement, that Canada and Saskatchewan support the extension of the principles of settlement contained in that agreement to the Kawacatoose First Nation in order to fulfill the outstanding treaty land entitlement obligations to the First Nation.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Delgamuukw v. British Columbia*, [1991] 5 CNLR 1 (BCSC); *Twinn v. The Queen* (July 6, 1995), (FCTD) [unreported]; *Saillant v. Smith* (1973), 33 DLR (3d) 61; *Simon v. The Queen*, [1986] 1 CNLR 153 (SCC); *Rex v. Findlay*, [1944] 2 DLR 773 (BCCA); *The Queen v. Blackfoot Band of Indians*, [1982] 3 CNLR 53; *R. v. Taylor and Williams*, [1981] 3 CNLR 114; *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 QB 256 (CA); *Calgary Hardwood & Veneer Ltd. v. Canadian National Ry. Co.* (1979), 100 DLR (3d) 302 (Alta. SC App. Div.); *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC); *R. v. Sioui*, [1990] 3 CNLR 127 (SCC); *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC); *R. v. Agawa*, [1988] 3 CNLR 73 (Ont. CA); *R. v. Bombay*, [1993] 1 CNLR 92 (Ont. CA); *Eastman Band v. Canada (Federal Administrator)*, [1993] 3 CNLR 55 (FCA); *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 SCR 171; *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 SCR 12; *Guerin v. The Queen*, [1984] 2 SCR 335.

### ICC Reports Referred To

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

### Treaties and Statutes Referred To

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians* (Ottawa: Queen's Printer, 1964); *Treaty No. 8, June 21, 1899* (Ottawa: Queen's Printer, 1966).

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted [1994] 1 ICCP 171; Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint, Toronto: Coles, 1971); Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990); Kenneth Tyler, "Report Concerning the Calculation of the Outstanding Treaty Land Entitlement in Saskatchewan, 1978–1980" (n.c.); DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983; *Saskatchewan Treaty Land Entitlement Framework Agreement*, September 22, 1992; S.M. Waddams, *The Law of Contract*, 2d ed. (Toronto: Canada Law Book Inc., 1984).

### COUNSEL, PARTIES, INTERVENORS

S. Pillipow for the Kawacatoose First Nation; B. Becker for the Government of Canada; K. Fullerton, K.N. Lickers, T.A. Gould to the Indian Claims Commission.

### CANADA'S RESPONSE

By letter dated April 28, 1998, the Minister of Indian Affairs and Northern Development accepted the Kawacatoose First Nation's TLE claim for negotiation: [see (1998) 10 ICCP 228]. The parties reached a settlement in October 2000.



# SUMMARY

## **KEESEEKOOWENIN FIRST NATION 1906 LAND CLAIM MEDIATION Manitoba**

The report may be cited as Indian Claim Commission, *Keeseekoowenin First Nation: 1906 Land Claim Mediation* (Ottawa, August 2005).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 2 (1871); **Indian Act** – Expropriation; **Mandate of Indian Claims Commission** – Mediation;  
**Manitoba**

### **THE SPECIFIC CLAIM**

In December 1994, the Keeseekoowenin First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that land purchased adjacent to its fishing station, Indian Reserve (IR) 61A, was illegally expropriated in 1935 when the Riding Mountain Forest Reserve was established. Canada accepted the claim for negotiation in May 1997. Canada and Keeseekoowenin negotiated on their own until October 2002, when both parties asked the ICC to assist them in reaching an agreement, which it agreed to do.

### **BACKGROUND**

The Indians of Riding Mountain and Dauphin Lake entered into Treaty 2 in 1871. In 1875, IR 61 was surveyed for the Band along the Little Saskatchewan River. Because of the Band's continuing reliance on fish and game 10 miles away at Clear Lake, in 1896 the Department of Indian Affairs (DIA) created IR 61A along the shore of Clear Lake as a fishing station.

When the Canadian National Railway located a line through the IR 61 in 1904, it cut off 264 acres from the rest of the reserve. The Band requested that the 264 acres be exchanged for 320 acres adjacent to IR 61A. This land was owned by the Hudson's Bay Company (HBC). The Band surrendered the 264 acres in July 1906, with the understanding that the proceeds of sale would be used to purchase the 320 acres. After the sale of the surrendered land in October 1907, the DIA purchased the replacement land from the HBC, but no order in council was ever issued confirming this land as an addition to IR 61A.

In 1906, IR 61A and the adjacent 320 acres were included in the boundaries of Riding Mountain Forest Reserve; in 1929, the forest reserve became Riding Mountain National Park. At that time, eight families were living at IR 61A, and others hunted and cut timber there.

The Indian Agent proposed a surrender of IR 61A in 1935, but the proposal was not recommended by the Inspector of Indian Agencies, nor was it ultimately agreed to by the Band. Later that year, the government used the *Indian Act* to expropriate the reserve land within the national park, compensating the Band \$4,733.45 for the value of the land and improvements, as well as the cost of moving the Indians to the main reserve and building houses for them. The Band was not consulted about the expropriation or the compensation. Band members were forcibly removed from IR 61A with little notice and their houses subsequently burned.

### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for meetings. A series of "shuttle mediation" sessions assisted the parties in reaching the general principles of a settlement agreement.

### **OUTCOME**

In November 2004, the Keeseekoowenin First Nation ratified the proposed settlement of \$6,999,900 for the expropriation of Indian Reserve 61A.

**REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

# SUMMARY

## **THE KEY FIRST NATION 1909 SURRENDER INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *The Key First Nation: 1909 Surrender Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 3.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender; **Evidence** – Onus of Proof – Expert – Signature by Mark – Oral History; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In June 1989, The Key First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that a 1909 surrender of part of Indian Reserve (IR) 65 was invalid. Canada rejected the claim in March 1993. Two years later, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim. Having agreed to this request in September 1995, the ICC conducted three community sessions in January 1996, November 1997, and March 1998. In addition, the ICC conducted a separate hearing in January 1999 to receive the evidence of an expert witness. Legal arguments based on the parties' written submissions were heard in June 1999.

### **BACKGROUND**

In 1875, The Key Band, who had resided near Shoal River since the mid-1800s, adhered to Treaty 4. In 1878, 31,000 acres were surveyed for the Band at Swan River, but the Department of Indian Affairs decided that annual flooding made that location unsuitable. Chief The Key and 12 families agreed to relocate 90 miles away at Fort Pelly in 1882, but the majority of the Band refused to leave its traditional homeland and petitioned the department three times for a reserve at Shoal River. The department refused and proceeded to survey and confirm a reserve at Pelly for 190 people, believing that the entire Band would eventually settle there.

In 1889, the department began to survey some small reserves for the Shoal River Indians. Several of the orders in council confirming these reserves indicate that they were set aside for the entire Key Band, and at least one referred merely to the Indians of Treaty 4. Until 1902, the Shoal River Indians were included in the payroll with Chief The Key's followers and travelled to Pelly for their annuity payments. Thereafter, they were placed on a separate Shoal River Band payroll.

The Key Band at the Pelly reserve began to farm but had greater success at stock raising. To support ranching, the department set aside 20 square miles of haylands in 1893 for communal use by The Key, Keesekoose, and Cote Bands. Within five years, however, one-half of the haylands were taken back by the government for a Doukhobor settlement. In 1902–3, Indian Affairs proposed a plan to exchange less valuable lands on the reserves of the three bands for the remaining 6,000-acre haylands. Although a majority of The Key Band's members indicated their assent to the surrender of two strips of reserve land in exchange for a portion of the haylands and money for machinery and horses, the proposal never materialized.

In the early 1900s, the government initiated a policy to encourage non-Aboriginal settlement on the prairies by promoting the surrender and sale of reserve farm land that was considered to be beyond the possible requirements of a band. The 1906 *Indian Act* was amended to increase the maximum advance of the anticipated sale proceeds to band members on surrender from 10 to 50 per cent.

Following up on a local MP's interest in The Key reserve and a report that certain band members wished to sell 13 sections of reserve land, Inspector W.M. Graham met with members of The Key Band in January 1909. He later reported that he had persuaded them to surrender 17 sections of land and that their request to increase the payment per member from

\$80 to \$100 was reasonable. The department, however, did not act until Indian Agent W.G. Blewett reported in April that members of The Key Band were anxious about the delay. Graham held the surrender meeting at The Key reserve on May 18, 1909, reporting that “nearly all members of the Band were present and the vote was unanimous.” Seven band members marked or signed the surrender document, but no record exists of the number who attended the meeting or voted in favour. The payroll indicates that 87 band members were each paid the \$100 advance. Graham and Chief The Key executed the surrender affidavit on May 19, 1909, and the surrender of 11,500 acres was confirmed in June 1909. There is no evidence that any band member made a contemporary complaint about the 1909 surrender.

### ISSUES

Was there a valid surrender in 1909 of a portion of The Key Band’s reserve, IR 65; in particular, were the Treaty 4 provisions regarding band consent complied with? Was the 1906 *Indian Act* complied with; in particular, did a majority of the male members of the Band, 21 years of age and over, assent? Were the Shoal River Indians members of The Key Band in 1909 and therefore entitled to vote? Did Canada have, and breach, any pre-surrender fiduciary duties to the Band? In particular, was the surrender obtained as a result of undue influence or misrepresentation?

### FINDINGS

There is no evidence that, at the time Treaty 4 was made, the parties intended to establish within its terms a standard or threshold of consent for the surrender of land. As a result, there is no evidence of a conflict between the terms of the treaty and the provisions of the *Indian Act*. The evidence does not support the argument that The Key Band had a treaty right to have decisions regarding surrender made according to its traditions of clan governance.

The *Indian Act* contemplates five mandatory components of a surrender: a meeting must be called for the express purpose of a surrender; it must be held in accordance with the rules of the band; it must be held in the presence of an authorized officer; a majority of the male members of the band 21 years of age and older must attend; and a majority of those must vote in favour. Here, there was a lack of detailed documentary and oral history evidence concerning events on the day of surrender. Nevertheless, all the evidence must be considered; the absence of oral history evidence is not determinative of the issue of compliance with the Act. Further, the expert’s evidence that the “X” marks on the surrender document were not authentic is not legally relevant, since there is no legal requirement that any band members sign the surrender document. Even if it were accepted in its entirety, it would not be determinative, as the law permits an illiterate person to authorize another person to sign or make a mark on his or her behalf, which could have happened in this case.

Were the Shoal River Indians members of The Key Band? Although the *Indian Act* does not define a “band,” the ICC has previously held that a body of Indians must live as a collective community in order to be considered a “band.” Based on the evidence of the mutual intention of the Shoal River and The Key Indians to live as separate, autonomous entities, they were not one “band.” Even if they were one band, the Shoal River Indians did not travel to The Key reserve after 1902 and repeatedly rejected any interest in it. They were not habitually resident on or near, or interested in, the reserve in 1909. In either case, they would have been ineligible to vote.

The four benchmarks used in *Apsassin* to measure the Crown’s conduct regarding its pre-surrender fiduciary duty are: adequacy of the band’s understanding; tainted dealings by the Crown; the Band having ceded or abnegated its decision-making authority; or a surrender that is so foolish or improvident as to be exploitative. In addition, Justice McLachlin’s judgment in *Apsassin* appears to indicate that, in circumstances where Canada faces conflicting political pressures in the form of preserving the land for the band, on the one hand, and, on the other, making it available for sale to other parties, Canada bears the onus of demonstrating that it did not breach its fiduciary duty to the band. The circumstances of each case, however, will determine whether Canada must discharge this onus. Here, Canada is required to establish that the band members understood that they were giving up forever all their rights to the reserve. The evidence of Chief The Key’s understanding of surrender, plus the actions of the Band to initiate surrender discussions and renegotiate its terms, indicate that the Band’s understanding was adequate.

Canada has discharged the onus upon it to establish that it did not engage in tainted dealings. The Crown had a policy to encourage surrenders for the purpose of agricultural settlement, arguably placing it in a conflict of interest. Graham also reported that he persuaded the Band to surrender 17 instead of 13 sections. Yet, the surrender discussions were initiated by the Band, took place over 10 months, and included the renegotiation of a term by the Band. The evidence does not suggest that the surrender involved a concerted, sustained campaign of pressure by either the Crown or settlers.

The Band did not cede or abnegate its decision-making power over the surrender to the Crown. The Band was not lacking effective leadership; departmental officials were not intent on obtaining a surrender despite all obstacles; the Band initiated the surrender discussions and inquired when the surrender would be taken; and the Band's post-surrender conduct and interest in sale proceeds are consistent with a finding that it intended to surrender reserve land.

The surrender was not exploitative. Although it took almost one half of the reserve, it did not take only the best land. The Band was left with 8,000 acres of arable land and 5,000 acres of grazing land. With 80 to 90 members and only 100 acres cultivated at the time, the land remaining was sufficient to provide for the Band's foreseeable agricultural needs.

#### **RECOMMENDATION**

That the claim of The Key First Nation regarding the surrender of a portion of IR 65 not be accepted for negotiation under Canada's Specific Claims Policy.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*R. v. Sparrow* (1990), 56 CCC (3d) 263 (SCC); *R. v. Marshall*, [1999] SCJ no. 55, file 26014; *R. v. Marshall* (1999), 177 DLR (4th), 513 at 526 (SCC); *R. v. Sioui*, [1990] 1 SCR 1025 at 1069; *Cardinal v. R.*, [1982] 1 SCR 508; *Chippewas of Kettle and Stony Point v. Attorney General of Canada*, [1996] 1 CNLR 54; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *Cardinal v. The Queen*, [1982] 1 SCR 508; *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406, Court File No. 95-CU-92484 (Ont. Sup.Ct); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *DiGiacomo v. DiGiacomo Canada Inc. et al.* (1989), 28 CPR (3d) 77 (Ont. HCJ); *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 (TD); *McCarthy v. Kenny*, [1939] 3 DLR 556 (Ont. Sup.Ct).

#### **ICC Reports Referred To**

*Kabkewistahaw First Nation: 1907 Reserve Land Surrender Mediation* (Ottawa, January 2003), reported (2004) 17 ICCP 3; *Duncan's First Nation: 1928 Surrender Inquiry* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Moosomin First Nation: 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004); *Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175; *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281.

#### **Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1906.

#### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988); Laura Peers, *The Ojibway of Western Canada, 1780–1870* (Winnipeg: University of Manitoba Press, 1994); Arthur J. Ray, *Indians and the Fur Trade: Their Roles as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay, 1660–1870* (Toronto: University of Toronto Press, 1974); Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984); E. Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Edmonton: Fifth House Publishers, 1997); Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992); Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; reprint, Toronto: Coles, 1971); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1991); D.J. Hall, "Clifford Sifton: Immigration and Settlement Policy, 1896–1905," in Howard Palmer, ed., *The Settlement of the West* (Calgary: University of Calgary Press, 1977); Gerald Friesen, *The Canadian*

*Prairies: A History* (Toronto: University of Toronto Press, 1987); Chester Martin, “*Dominion Lands*” Policy (Toronto: McClelland & Stewart, 1973); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986); *The Historical Development of the Indian Act* (Ottawa: DIAND, 1978); S.M. Waddams, *The Law of Contract*, 4th ed. (Toronto: Canada Law Book, 1999).

**COUNSEL, PARTIES, INTERVENORS**

J. Jodouin for The Key First Nation; R. Wex for the Government of Canada; D.E. Osborn, QC, R. Keesickquayash to the Indian Claims Commission.

# SUMMARY

## **KLUANE FIRST NATION KLUANE NATIONAL PARK AND KLUANE GAME SANCTUARY INQUIRY Yukon**

The report may be cited as Indian Claims Commission, *Kluane First Nation: Kluane National Park and Kluane Game Sanctuary Inquiry* (Ottawa, February 2007).

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

**Panel:** Commissioner A.C. Holman, Commissioner S.G. Purdy

**Mandate of Indian Claims Commission** – Aboriginal Title; **Specific Claims Policy** – Comprehensive Claim – Indian Land; **Park** – Indian Land; **Fiduciary Duty** – Indian Land – Consultation – Compensation; **Yukon**

### **THE SPECIFIC CLAIM**

The Kluane First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in October 1996, alleging that Canada breached its fiduciary obligations to it by establishing the Kluane Game Sanctuary and, later, the Kluane National Park and by denying it access to its traditional territory in these areas. In March 1999, DIAND rejected the claim on the grounds that the claim was based on the assertion of unextinguished native or aboriginal title. The First Nation requested that the Indian Claims Commission (ICC) convene an inquiry into the claim, and the ICC accepted the claim for inquiry in October 1999. In February 2000, Canada requested a hearing to address whether the ICC had the mandate to inquire into the Kluane claim. The ICC received written submissions from the parties and conducted a hearing in September 2000. In December 2000, the ICC ruled that the subject matter of the Kluane claim fell within the scope of the Specific Claims Policy and, therefore, the ICC had the mandate to inquire into the claim: see (2003) 16 ICCP 75. The ICC conducted a community session in February 2002. Prior to completing the ICC inquiry, the subject of this inquiry was resolved by the Kluane First Nation Final and Self-Government Agreements, which came into effect in February 2004.

### **BACKGROUND**

Traditionally, the Kluane people covered hundreds of square kilometres in their seasonal round of hunting, fishing, and trapping, and, from time immemorial, a part of this traditional territory has included the land between the Slims River and the White River in what is now the Yukon Territory of Canada. The area was not included in any of the numbered treaties (1 to 11). The discovery of gold in the area in 1903 and the construction of the Alaska Highway in 1942 significantly changed the traditional lifestyle of the Kluane people. To protect and conserve the unique wildlife in the area, the 1938 *Yukon Game Ordinance* was amended in 1943 to establish the Kluane Game Sanctuary, with the Alaska Highway as its northern boundary. The area was proclaimed as a National Park in 1972. Until 1983, no one, including the Kluane people, was allowed to hunt within the limits of the Game Sanctuary or Park except by special permit to alleviate hardship within the Kluane community. In 1983, the Yukon Court of Appeal acquitted two Kluane hunters on the grounds that the prohibition against hunting in the sanctuary did not apply to Indians hunting for food.

### **ISSUES**

Did the Kluane First Nation specific claim fall within the Specific Claims Policy? Did Canada owe an outstanding legal obligation in respect of breaches of fiduciary duty to the Kluane First Nation? Were the Kluane park lands “Indian lands” within the meaning of the Specific Claims Policy and the common law? Did Canada breach an obligation by failing to consult with the Kluane First Nation in the establishment of the Park and Game Sanctuary or by failing to disallow the Yukon Government legislation establishing the Kluane Game Sanctuary? Did Canada breach a fiduciary obligation by failing to compensate the Kluane First Nation?

**OUTCOME**

The ICC made no findings. Prior to completion of the inquiry, the subject of the inquiry was resolved by the completion of the Kluane First Nation Final and Self-Government Agreements in February 2004.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Michel*, [1984] 1 CNLR 157.

**Treaties and Statutes Referred To**

*Rupert's Land and North-Western Territory Order*, June 23, 1870; *Yukon Territory Act*, SC 1898; *Yukon Game Ordinance*, May 2, 1938, amended April 1943; *Yukon Game Ordinance*, July 17, 1947.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in (1994) 1 ICCP 171–85; Luigi Zanasi, “Kluane National Park and Reserve Economic Impact Study: Economic History of the Kluane Region Background Paper,” March 3, 2005; “Alcan Highway: A Brief History of the Alaska Highway,” in Bill Surface, *The “Surface” of Alaska*, 1996.

**COUNSEL, PARTIES, INTERVENORS**

D. Joe for Kluane First Nation; J. A. Hutchinson for the Government of Canada; J.B. Edmond to the Indian Claims Commission.

# SUMMARY

## **LAC LA RONGE INDIAN BAND TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 6 (1876); **Treaty Interpretation** – Reserve Clause; **Treaty Land Entitlement** – Date of First Survey – Population Formula – Policy – Saskatchewan TLE Framework Agreement; **Band Council** – Band Council Resolution – Powers; **Fiduciary Duty** – Treaty Land Entitlement; **Saskatchewan**

### **THE SPECIFIC CLAIM**

The Lac La Ronge Indian Band treaty land entitlement (TLE) claim, summarized in a 1982 report of the Joint Entitlement Committee of the Federation of Saskatchewan Indian Nations and the Department of Indian Affairs and Northern Development (DIAND), was rejected by Canada in June 1984 and again in April 1992. The Indian Claims Commission (ICC) agreed to hold an inquiry into the rejected claim in March 1993. The ICC conducted a community session in January 1994, received oral expert evidence in April 1994, and heard legal arguments, based on written submissions, in Saskatoon in June 1994.

### **BACKGROUND**

The ancestors of the Lac La Ronge Indian Band adhered to Treaty 6 in 1889. The treaty stipulated that reserves shall not exceed “one square mile for each family of five, or in that proportion for larger or smaller families.” The treaty was silent on the date to be used to count the population for entitlement purposes. From 1897 to 1973, land was set aside for the Band at several reserves. The first survey took place in 1897, the second in 1909, but the reserve selection process led to many delays and confusion over band entitlement. The 1930 *Natural Resources Transfer Agreement* further complicated reserve selection in the Prairie provinces. After surveys in 1935 and 1948, additional land was set aside for the Band.

In the early 1960s, DIAND acknowledged a shortfall in the Band’s reserve lands of approximately 63,000 acres. The Band, concerned that suitable lands were fast disappearing, repeatedly requested that more land be set apart to satisfy its entitlement. Subsequently, Canada and Saskatchewan tentatively agreed to transfer 63,330 acres to the Band, based on a formula using the 1961 band population. Canada met with the Band Council in May 1964, resulting in a Band Council Resolution (BCR) agreeing to accept this acreage as full treaty land entitlement. No chief was in office at the time, and seven out of nine council members attended the meeting.

By 1973, following four more surveys of land, the Band had received a total reserve allocation of 107,147 acres, including 43,762 acres set aside prior to the 1964 settlement.

### **ISSUES**

What is the nature and extent of the Crown’s obligation to provide reserve land under Treaty 6? Has Canada satisfied its treaty obligation to provide reserve land to the Band? What impact, if any, did the 1964 Band Council Resolution have on the Band’s TLE claim? In particular, did the Band Council have authority under the *Indian Act* to enter into a binding settlement agreement, and did the Band provide a full and informed consent to the settlement? Did Canada breach any fiduciary duty owed to the Band in the fulfillment of its TLE?

## FINDINGS

Under Treaty 6, each band is entitled to 128 acres of land for each of its members. Because the treaty is silent on the date for determining the population, the intentions of the parties at the time of treaty must be determined. The parties intended to carry out the selection of reserves within a short time following treaty to avoid conflicts with settlers. The general practice of Indian Affairs was to calculate the amount of land by counting the band members on the most recent treaty annual payroll available at the time of survey. Based on the wording of the treaty, the parties' statements during treaty negotiations, and their subsequent conduct, the most reasonable and fair interpretation of the treaty is that every treaty Indian is entitled to be counted once for TLE purposes, and that the parties intended the size of reserves to be based on the band's population on or before the date of the first survey. Canada's failure to provide the full entitlement is a breach of treaty and a corresponding breach of fiduciary obligation.

The Band was entitled to 61,952 acres of reserve land, based on a date-of-first-survey population of 484 in 1897, multiplied by 128 acres per person. When only 30,400 acres were set aside, a shortfall of 31,552 acres resulted. Subsequent surveys in 1909, 1935, and 1948 resulted in an addition of 13,362 acres. A further 32,640 acres were surveyed in 1968, pursuant to the 1964 agreement, and three additional parcels totalling 30,745 acres were surveyed in 1970 and 1973. Canada, therefore, exceeded its obligations under the treaty by 45,195 acres, although it took from 1897 to 1968 to satisfy the Band's TLE.

In light of the panel's finding that Canada had discharged its treaty obligation to the Band by 1968, the 1964 BCR, agreeing to accept 63,330 acres as a final settlement, is no longer relevant to the question of whether the Band's TLE was satisfied. In particular, it is not necessary to address whether the band council had authority under the *Indian Act* to enter into a binding agreement on behalf of the Band in 1964, or the Band provided a full and informed consent to the 1964 settlement.

The claim of a breach of fiduciary obligation is closely connected to the Band's Candle Lake and School Lands claims. Without further evidence and argument on those claims, the Commission is unable to determine whether a distinct fiduciary obligation was owed to the Band.

## RECOMMENDATIONS

That Canada has satisfied its treaty obligation to provide reserve land to the Lac La Ronge Indian Band by providing the Band with 107,147 acres between 1897 and 1973.

That the Commission makes no findings or recommendations as to whether the Band has a valid claim based on restitutionary or fiduciary grounds. If any such claims are to be made, they should form the subject matter of additional submissions in a separate inquiry before the Commission into the Candle Lake and Lac La Ronge School Lands claim.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (Ont. CA); *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196; *R. v. Horse*, [1988] 1 SCR 187; *R. v. Sioui*, [1990] 1 SCR 1025; *Simon v. The Queen*, [1985] 2 SCR 387; *R. v. Horseman*, [1990] 1 SCR 901; *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA).

### ICC REPORTS REFERRED TO

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3; *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Joseph Bighead, Buffalo River, Waterben Lake, and Flying Dust First Nations: Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47.

### Treaties and Statutes Referred To

*Treaty No. 6 between Her Majesty The Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions*, IAND Publication No. QS-0574-000-EE-A-1 (Ottawa: Queen's Printer,

1964); *Constitution Act, 1867*; *Indian Act*, RSC 1886; *Natural Resources Transfer Agreement*, March 20, 1930 [Ottawa: King's Printer, 1930].

**Other Sources Referred To**

Donna Gordon, *Treaty Land Entitlement: A History* (Ottawa: ICC, 1995), reprinted (1996) 5 ICCP 339; *Saskatchewan Treaty Land Entitlement Framework Agreement*, September 22, 1992; Cliff Wright, Office of the Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Regina, Saskatchewan, May 1990).

**COUNSEL, PARTIES, INTERVENORS**

D. Kovatch, J. Jodouin for the Lac La Ronge Indian Band; B. Becker, B. Hilchey for the Government of Canada; K. Fullerton, R.S. Maurice to the Indian Claims Commission.



# SUMMARY

## **LAX KW'ALAAMS INDIAN BAND TSIMPSEAN INDIAN RESERVE 2 INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Lax Kw'alaams Indian Band Tsimpsean Indian Reserve 2 Inquiry* (Ottawa, June 1994), reported (1995) 3 ICCP 99.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Mandate of Indian Claims Commission** – Compensation Criteria; **Specific Claims Policy** – Compensation Criteria; **Aboriginal Title** – Extinguishment; **Reserve** – Surrender; **Indian Act** – Surrender; **British Columbia**

### **THE SPECIFIC CLAIM**

The Lax Kw'alaams Indian Band, formerly the Port Simpson Indian Band, submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in 1979, relating to the 1888 division of Tsimpsean Indian Reserve (IR) 2. In April 1985, the Minister accepted the claim for negotiation under the Specific Claims Policy. After six years of negotiations, a dispute arose over Canada's demand that the release clause in the settlement agreement contain an absolute surrender of all the Band's rights and interests, including Aboriginal title, over the lands forming the subject of the specific claim.

In May 1993, the Indian Claims Commission (ICC) agreed to the Band's request that the ICC conduct an inquiry into the subject matter of the dispute. Canada unsuccessfully challenged the ICC's mandate to conduct the inquiry: see Interim Ruling, dated March 10, 1994 at Appendix C to the report. A community session and an oral hearing, based on written submissions, also took place in March 1994.

### **Mandate Challenge**

Canada took the position that the ICC lacked jurisdiction to inquire into the subject of a dispute between the parties who were negotiating a settlement of the Band's specific claim. The ICC determined that its mandate is remedial in nature and is broad enough to permit inquiry into a wide range of issues that arise in the application of the Specific Claims Policy. The ICC's mandate includes inquiring into "which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria." The compensation offered by Canada is inextricably linked to the release or surrender clause demanded as a condition of settling the claim, in that it appears that Canada is prepared to offer the compensation only in return for an absolute surrender of the Band's interest in the land. The claimant disagrees with the Minister's determination of the applicable compensation criteria, has brought the issue before the ICC as a matter still in dispute, and has an arguable case that the Minister incorrectly determined the applicable criteria in negotiating a settlement of the claim. Thus, this request falls within the mandate of the Commission.

### **BACKGROUND**

The basis of the specific claim was that Tsimpsean IR 2 was illegally split into two separate reserves by government officials in 1888. After the 1888 division, two parcels of land in the southern part of the reserve were surrendered to the Crown without the consent of the claimant Band. The Band alleged that the 1888 division, which purported to extinguish the interest of the Band in the southern portion of the reserve, was illegal and in violation of the Crown's trust relationship with the Band because the Crown did not comply with the surrender provisions of the *Indian Act*.

Canada accepted the Band's claim in 1985. In 1991, the parties came to an agreement in principle on the major terms of settlement. The claim, however, was never settled because a dispute arose over Canada's demand for a release clause that

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provided for an absolute surrender of the subject lands. The Band was concerned that the absolute surrender would have the effect of extinguishing the Tsimpsian peoples' Aboriginal title in the surrendered lands.

### ISSUES

Is it reasonable for Canada to demand an absolute surrender of all rights and interests of the Band, including Aboriginal title, over lands forming the subject of its specific claim relating to the 1888 division of Tsimpsian IR 2?

### FINDINGS

In order to determine which compensation criteria apply in the negotiation of this specific claim, the ICC must examine the facts that gave rise to the claim and the subject matter of the proposed settlement agreement. One of the general rules of the Specific Claims Policy is that compensation will be "based on legal principles." Canada's demand for an absolute surrender undoubtedly has a bearing on whether the compensation offered is consistent with the law of damages.

It was reasonable for Canada to demand an absolute surrender of the Band's reserve interest in the surrendered lands. A surrender under the *Indian Act* appears to be the only effective means of removing the Band's reserve interest and ensuring closure of the claim. The ICC is not satisfied that a contractual release would provide sufficient protection to Canada and interested parties.

Nevertheless, the form of surrender demanded in the draft settlement agreement goes beyond the effect of a surrender under the *Indian Act* because it also purports to extinguish Aboriginal interests in the surrendered lands. In particular, the Band's Aboriginal interests were never the subject matter of negotiations; the Band's negotiators were not informed of Canada's demand for an absolute surrender until after the amount of compensation had been agreed to; the Band's Aboriginal interest could not have been the subject matter of the negotiations because the policy expressly excludes claims based on unextinguished Aboriginal title; and the release contemplated by the policy must be related to the nature of the claim.

### RECOMMENDATIONS

That the surrender clause be modified to expressly provide that the Aboriginal interests of the Lax Kw'alaams Band and the Tsimshian people are excluded from the effect of the surrender and that clauses respecting releases, indemnity, and set-off be included to satisfy Canada's concerns regarding overcompensation.

That the parties redraft the terms of the settlement agreement to give effect to [the ICC's] conclusions, engaging, if necessary, the mediation services of the Commission.

That a meeting be held at Lax Kw'alaams within one month of the release of this report and that the same representatives from the Band, Canada, and the Commission attend that meeting to discuss the findings and recommendations of this report.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; *Delgamuukw v. British Columbia*, [1993] 5 WWR 97 (SCC); *R. v. Taylor and Williams* (1981), 62 CCC (2d) 227 (Ont. CA); *Calder v. Attorney-General of British Columbia*, [1973] SCR 313.

### Treaties and Statutes Referred To

*Indian Act*, SC 1880; *Terms of Union, 1871*, RSC 1985; *Indian Advancement Act, 1884*, SC 1884, in Sharon H. Venne, *Indian Acts and Amendments, 1868–1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981); *British Columbia Indian Lands Settlement Act*, SC 1920; *Indian Affairs Settlement Act*, SBC 1919; *British North America Act, 1867*.

**Other Sources Referred To**

DIAND, *Outstanding Business, A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book, 1991); *Handbook of North American Indians*, vol. 7: *The Northwest Coast* (Washington: Smithsonian Institution, 1990); Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990).

**COUNSEL, PARTIES, INTERVENORS**

H. Slade, B. Freedman for the Lax Kw'alaams Indian Band; B. Becker, I. Gray for the Government of Canada; R.F. Reid, QC, K. Fullerton, R.S. Maurice to the Indian Claims Commission.

**CANADA'S RESPONSE**

By letter dated December 31, 2001, the Minister of Indian Affairs and Northern Development rejected the recommendations of the ICC: see (2004) 17 ICCP 355.



# SUMMARY

## **LONG PLAIN FIRST NATION LOSS OF USE INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Long Plain First Nation: Loss of Use Inquiry* (Ottawa, February 2000), reported (2000) 12 ICCP 269.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commission Co-Chair D.J. Bellegarde, Commissioner C.T. Corcoran

**Treaties** – Treaty 1 (1871); **Treaty Interpretation** – Treaty Land Entitlement; **Treaty Land Entitlement** – Loss of Use – Settlement Agreement; **Compensation** – Loss of Use; **Fiduciary Duty** – Treaty Land Entitlement; **Specific Claims Policy** – Compensation Criteria; **Mandate of Indian Claims Commission** – Compensation Criteria; **Manitoba**

### **THE SPECIFIC CLAIM**

On November 5, 1982, the Department of Indian Affairs and Northern Development (DIAND) accepted Long Plain's claim of an outstanding treaty land entitlement (TLE) under the Government of Canada's Specific Claims Policy. With respect to the government's obligation to provide the shortfall lands, the parties eventually negotiated a Settlement Agreement dated August 3, 1994, providing funds to the First Nation while permitting it to advance a claim to the Indian Claims Commission (ICC) with respect to loss of use of the shortfall acreage. The Agreement also reserved Canada's right to maintain that there was no shortfall. The First Nation submitted its claim for loss of use to Canada in November 1994. In early 1995, the claim was rejected, whereupon the First Nation requested that the ICC conduct an inquiry into the rejected loss-of-use claim on September 25, 1995, and the ICC agreed to do so. The parties submitted a joint statement of agreed facts and asked the Commission to address one legal issue, whether compensation for loss of use is available in the TLE context. A community session was considered unnecessary to deal with this issue, and the oral hearing, based on written submissions, took place in October 1997.

### **BACKGROUND**

On August 3, 1871, the Indians of southern Manitoba, including the Portage Band, entered into Treaty 1. That treaty entitled the Portage Band to a tract of land of sufficient size to provide the Band with 32 acres of land for each band member. Treaty 1 was amended on June 20, 1876, when the Portage Band was divided into the Long Plain and Swan Lake Bands. Chief Short Bear of the Long Plain Band selected the site of the Long Plain reserve in July of that year, and Canada's surveyor, J. Lestock Reid, marked off sufficient land for 165 people under the treaty formula. These lands were formally set apart by Order in Council in November 1913. The acreage set aside by Canada in 1876, however, did not reflect the actual population of the Long Plain Band, which appears to have constituted at least 223 people.

### **ISSUE**

Is a band with an admitted shortfall in its treaty land entitlement entitled to be compensated for its loss of use of the shortfall based on the compensation criteria within the Specific Claims Policy?

### **FINDINGS**

Canada's failure to provide a band with its full TLE gives rise to lawful obligations to make up the shortfall and to compensate the band for loss of use. There are three possible bases in law for such a conclusion. First, Canada's failure to deliver the Band's entire TLE may be said to be a breach of the terms of the treaty itself. Second, it is arguable that this failure is also a violation of the general trust-like responsibilities that Canada owes First Nations in respect of matters concerning Indian title,

and is therefore a breach of fiduciary duty. Third, Canada's conduct giving rise to the shortfall may, in certain cases, substantiate a separate cause of action based on breach of fiduciary duty. Canada's historical and legal obligation in this case was to provide Long Plain with sufficient reserve land to satisfy the Treaty 1 formula of "one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families." The treaty could not be clearer. Since Canada fell short of the required acreage, that fact alone results in a breach of the terms of the treaty. It also constitutes a breach of Canada's fiduciary duty to live up to its treaty obligations. Canada's conduct is not a significant consideration in establishing the existence of a breach of duty.

In this instance, Canada was asked to and did set apart a separate reserve for Short Bear and his followers shortly after the 1876 revision to Treaty 1. Unfortunately, although Canada's initial response to Short Bear's request was timely, its provision of the full measure of treaty land was not. Once it undertook to set apart a reserve, it must also be considered to have undertaken to exercise reasonable diligence, skill, and care in doing so. It is clear that difficulties existed in the land selection process in the late 19th and early 20th centuries; the process could take a number of years. Yet, Canada's failure to provide the full measure of treaty land for 118 years falls short of any reasonable standard of timeliness.

Canada's breach of treaty and fiduciary duty gives rise to a lawful obligation that invokes the compensation provisions of the Specific Claims Policy, including loss of use. Loss of use is a head of damage that must be considered in the context of the TLE claim from which it springs and is not a separate claim or lawful obligation. Since Canada acknowledges the outstanding TLE of a First Nation, nothing further should be required in order to include loss of use as an item for negotiation. If, after confirming that a First Nation has an outstanding TLE, Canada takes the position that loss of use is not compensable on the facts of that claim, it should be open to the First Nation to proceed directly to the ICC under the second part of the Commission's mandate, that the First Nation "disagrees with a decision of the Minister with respect to the compensation criteria that apply in the negotiation of a settlement."

There is nothing conceptually to distinguish "lost opportunity," as contemplated in *Guerin* and in *Canson Enterprises*, from the loss of use contemplated by the parties in the 1994 Settlement Agreement. Equitable compensation for loss of use may be awarded, therefore, as a matter of legal principle, where the Crown owes an outstanding lawful obligation to an Indian band arising from a shortfall in the allocation of reserve land under treaty.

In determining the quantum of such an award, not at issue in this inquiry, the ICC would need to examine such matters as Canada's state of knowledge, its explanation for failing to respond to the claim earlier, the quantum of shortfall land, the economic value of that land, the period during which the shortfall existed, and the conduct of both parties during that period. The compensation payable for loss of use may vary significantly from one case to another, but must be proportionate to the actual loss suffered.

#### **RECOMMENDATION**

That the claim of the Long Plain First Nation regarding the loss of use of its treaty land entitlement shortfall be accepted for negotiation under the Specific Claims Policy.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*St. Mary's Indian Band v. City of Cranbrook* (1997), 147 DLR (4th) 385 (SCC); *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570; *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344; *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534; *Hodgkinson v. Simms*, [1994] 3 SCR 377.

#### **ICC Reports Referred To**

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3; *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235; *Kabkewist-*

*abaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; Robert Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing, 1996); S.M. Waddams, *The Law of Damages*, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1991); Alan Pratt, “Fiduciary Principles and the Compensation Guidelines of ‘Outstanding Business,’” unpublished paper, Toronto, January 1992.

**COUNSEL, PARTIES, INTERVENORS**

R.W. Jones for the Long Plain First Nation; P. Robinson for the Government of Canada; D.E. Osborn, QC, T.A. Gould to the Indian Claims Commission.

**CANADA’S RESPONSE**

By letter dated August 21, 2000, the Minister of Indian Affairs and Northern Development stated that Canada was not in a position to accept or reject the ICC’s recommendation, as it was awaiting the results of the appeal in the *Venne* case, dealing with the same subject matter: see (2000) 13 ICCP 329.



# SUMMARY

## **LUCKY MAN CREE NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 6 (1876); **Treaty Interpretation** – Reserve Clause – Treaty Land Entitlement; **Treaty Land Entitlement** – Population Formula – Date of First Survey – Settlement Agreement; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In July 1995, the Department of Indian Affairs and Northern Development (DIAND) rejected the Lucky Man Cree Nation's request to accept its treaty land entitlement (TLE) claim for negotiation. In December 1995, the First Nation asked the Indian Claims Commission (ICC) to conduct an inquiry into its rejected claim. An oral hearing, based on written submissions, took place in Saskatoon in December 1996.

### **BACKGROUND**

Lucky Man signed an adhesion to Treaty 6 in 1879, but several historical events, including the North-West Rebellion of 1885, delayed the process of reserve selection for Lucky Man's Band. After the uprising, Lucky Man fled to the United States to escape arrest. Indian Reserve (IR) 116 was eventually set aside in 1887 "for the Bands of Chiefs 'Little Pine' and 'Lucky Man.'" It contained 25 square miles or 16,000 acres, sufficient land under Treaty 6 for one square mile for each family of five. Some members of the Lucky Man Band lived on IR 116, but no reserve was requested or set aside for them alone for many years. In 1989, under a TLE Agreement with Canada, the Band obtained a reserve of 7,680 acres within the Treaty 6 boundary, containing sufficient land for 60 people. The First Nation continued to claim, however, that this reserve, used for grazing purposes, did not satisfy its entitlement.

### **ISSUES**

Does the 1989 Settlement Agreement preclude the First Nation from subsequently claiming additional treaty land? Does the Settlement Agreement represent a final agreement that the population of 60 in 1980 is the operative TLE population? If the Settlement Agreement is not determinative of the entire inquiry, what is the appropriate date for calculating the First Nation's population for TLE purposes?

### **FINDINGS**

We interpret the 1989 Settlement Agreement to mean that, in exchange for giving up all rights to IR 116, the First Nation obtained a reserve of 7,680 acres, or sufficient land for 60 people – the population in 1980. The First Nation released Canada from any further obligation to provide land or reimburse the First Nation for any additional costs associated with the Agreement; but the Settlement Agreement specifically reserved the rights of the First Nation to seek compensation in lieu of additional treaty land for loss of use or if it was determined in future that a greater TLE existed.

The use of the 1980 population of 60, therefore, was not a final agreement on population for TLE purposes. The Settlement Agreement specifically contemplated the possibility of a future claim based on a different population. Nor did the evidence support the argument that the Band, for TLE purposes, ceased to exist between 1883 and 1974 when it was without a chief.

Based on the Commission’s findings in the Fort McKay, Kawacatoose, Lac La Ronge, and Kahkewistahaw TLE inquiries, the Commission endorses the date-of-first-survey approach to calculate TLE in the absence of unusual circumstances that would lead to an unfair result. The 1887 survey for both the Little Pine and Lucky Man Bands represents prima facie evidence of the date of first survey for Lucky Man. The evidence does not suggest that applying a date-of-first-survey approach would lead to a manifest unfairness to the First Nation.

Regarding the terms of Treaty 6 to set apart reserves, “after consulting with the Indians thereof as to the locality which may be found to be most suitable for them,” the quantification and the location of a band’s entitlement are not triggered until the parties to the treaty reach a consensus or “meeting of the minds” regarding the specific lands to be set apart. Such consensus would normally occur following a preliminary understanding regarding the location, the completion of the survey, and either express or implicit band acceptance of the surveyed area as its reserve. The treaty, however, does not require that a band settle down before a reserve can be set apart for it.

Here, the appropriate date for calculating the TLE population is 1887, the date of first survey of IR 116. The alternative dates put forward by the First Nation – 1880, 1882, or 1883 – do not reveal a consensus by the Band and Canada on the selection of a specific reserve site. Until some Lucky Man members settled with the Little Pine Band in 1884, there was no specific indication of where they wanted their reserve to be located. The survey was postponed at Little Pine’s request, and given the turmoil of the rebellion, the delay was not unfair or unreasonable.

#### **RECOMMENDATION**

That the parties undertake further research and payroll analysis on the basis of an 1887 date of first survey with a view to establishing the First Nation’s proper treaty land entitlement population.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*R. v. Sioui*, [1990] 3 CNLR 127 (SCC); *Eastmain v. Robinson*, [1993] 1 FC 501; *Nowegijick v. The Queen*, [1983] 1 SCR 29.

#### **ICC Reports Referred To**

*Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lac La Ronge Indian Band: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 235.

#### **Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu’Appelle and Fort Ellice* (Ottawa: Queen’s Printer, 1966).

#### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); reprinted in (1994) 1 ICCP 171; Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Saskatoon: Fifth House Publishers, 1991); John L. Tobias, “Canada’s Subjugation of the Plains Cree, 1879–1885” (1983) 64 *Canadian Historical Review*, 519; Olive P. Dickason, *Canada’s First Nations* (Toronto: McClelland & Stewart, 1992); Hugh A. Dempsey, *Big Bear: The End of Freedom* (Vancouver: Greystone Books, 1984).

#### **COUNSEL, PARTIES, INTERVENORS**

T.R. Berger, QC, for the Lucky Man Cree Nation; R. Wex for the Government of Canada; R.S. Maurice, T.A. Gould, M. Mann to the Indian Claims Commission.

**CANADA'S RESPONSE**

In May 1997, the Minister of Indian Affairs and Northern Development accepted the Commission's recommendation: see (1998) 8 ICCP 369.



## SUMMARY

### **MAMALELEQALA QWE'QWA'SOT'ENOX BAND MCKENNA-MCBRIDE APPLICATIONS INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner R.J. Augustine, Commissioner C.T. Corcoran

**British Columbia** – Terms of Union, 1871 – Indian Settlement – Pre-emption – Reserve Creation – McKenna-McBride Commission – Ditchburn-Clark Review; **Reserve** – Reserve Creation; **Fiduciary Duty** – Indian Settlement – Reserve Creation – Consultation; **Indian Act** – Trespass; **Specific Claims Policy** – Lawful Obligation – Scope – Fiduciary Duty – Beyond Lawful Obligation

#### **THE SPECIFIC CLAIM**

The specific claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band, submitted in 1993, was rejected by the Department of Indian Affairs and Northern Development (DIAND) on four occasions in 1994 and 1995. In October 1995, the Indian Claims Commission (ICC) agreed to inquire into the Band's rejected claim. A site visit and community session were held in May 1996, with the oral hearing, based on written submissions, following in August 1996.

#### **BACKGROUND**

The Band traditionally used and occupied lower Knight Inlet on the British Columbia mainland and islands adjacent to north-eastern Vancouver Island. The BC *Land Act* prohibited the granting of licences, leases, and pre-emptions on “an Indian Reserve or Settlement”; however, British Columbia relied on Canada to protect Indian lands from timber and other licences. In 1905 and 1907, Vancouver Timber and Trading Company applied for a timber licence for lands occupied by the Band.

The 1912 Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission), made up of BC and federal Commissioners, travelled throughout British Columbia to meet with tribes and bands for the purpose of recommending additions or adjustments to reserves. In 1914, the Band applied to the McKenna-McBride Commission to have several traditional sites recognized as reserves, in addition to its five existing reserves. The Band was unaware that most of the land applied for had been alienated through grants of provincial timber licences. The Chiefs told the Commission that Indian Agent W.M. Halliday had failed to inform them that some of their village sites had been alienated.

Subsequently, the Indian Agent recommended accepting in whole or in part only six of the Band's 12 applications (numbered 60 to 71 in the Commission's report), of which only one – Compton Island – was available. The Ditchburn-Clark joint review of the McKenna-McBride recommendations resulted in a final decision to create two additional reserves, Compton Island and Apsagayu, Applications 66 and 64, respectively.

#### **ISSUES**

Did Canada have, and breach, a fiduciary duty to protect the Band's settlement lands? Did Canada have, and breach, a fiduciary duty to represent the Band's interests before the McKenna-McBride Commission? Does Canada owe an outstanding lawful obligation to the Band in accordance with the Specific Claims Policy?

#### **FINDINGS**

Although “Indian settlement” is not defined in the BC *Land Act*, “it is likely that the legislature intended to protect at least those lands for which there was some investment of labour on the part of the Indians – which could include village sites, fish-

ing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether they were immediately adjacent to or in the proximity of other dwellings. Furthermore, it was not strictly necessary for there to be a permanent structure on the land for it to constitute an ‘Indian settlement,’ providing there is evidence of collective use and occupation by the Band.” On the facts, the lands described in Applications 62, 63, 64, and 71 included Indian settlements, although it should be left to the parties to conduct further research into the size of the Band’s settlements at these locations.

The fact that Canada posted Indian Agents in the various BC agencies, combined with the nature of their instructions, provides strong evidence of a unilateral undertaking to act for, on behalf of, or in the interests of the Indians in the protection of their settlement lands. Agents were instructed to advise the Indians, protect them in the possession of their lands, and “look after them as a father would his children”; these instructions to Indian Agents did not, by their terms, limit the Agents’ duties to reserve lands. The fact that the instructions may not have been communicated to the Band does not negate the existence of a fiduciary duty. The protective role of the federal Crown was articulated in Article 13 of the *Terms of Union, 1871*, and furthermore, the provincial *Land Act* provided a clear statutory mechanism for the protection of these lands.

Canada’s discretion could have been exercised unilaterally to affect the Band’s legal interests, through taking out notices in the *British Columbia Gazette*, pursuant to the *Land Act*. Indian Agent Halliday breached a fiduciary duty to the Band when he did not utilize this mechanism to register an objection to the grant of a timber licence or lease. The Band itself was vulnerable in that few band members had any formal education or could read and write; thus, they lacked the requisite knowledge, experience, or literacy to protect their own interests effectively. Moreover, the *Land Act* prohibited Indians from pre-empting their settlement lands without a special order from the Lieutenant-Governor in Council. As there was no treaty in place to provide the formula and agreement for reserve lands, the Band was forced to rely on the goodwill of provincial and federal governments and reserve creation processes like the McKenna-McBride Commission, further adding to the Band’s vulnerability.

The activities described in the provisions on trespass in the *Indian Act* are different from trespassing by virtue of obtaining a timber licence. The latter would not have been visible to the Band nor would the meaning of notices or stakes in the ground have been understood by them. The Band was unaware that its settlement lands had been alienated. Even assuming that an Indian Agent had no positive duty under the *Indian Act* to seek out trespassers, a proactive duty to protect Indian settlement lands from unlawful licences is consistent with the instructions given to Agents. Canada had an obligation to protect Indian settlement lands from unlawful encroachments. The Agents in question were, or ought to have been, aware of the location of the Band’s settlement lands; they had a duty to review the notices in the *Gazette* and local papers; and they should have protested the granting of timber licences and leases over those lands. Canada, therefore, breached its fiduciary duty to the Band in respect of those licences and leases on the Band’s settlement lands gazetted during the tenure of Indian Agents Halliday and G.W. DeBeck (or one of their predecessors).

The same guidelines and analysis of Agent Halliday’s conduct with respect to the Commission’s hearings found in the ICC’s report on the *Namgis First Nation: McKenna-McBride Applications Inquiry* are applied here. Agent Halliday breached a fiduciary duty to the Band prior to the McKenna-McBride hearings when, among other things, he failed to prepare the Band for the process; failed to identify unalienated lands for which the Band could have applied; and failed to provide reasonable and well-informed recommendations to the Commission. Agent Halliday did not breach any fiduciary duties, however, during or after the Commission’s hearings because of the requirement that the Band show that the lands were unalienated and available.

This claim falls within the Specific Claims Policy because it meets the following pre-conditions: it is based on a cause of action recognized by the courts, here an allegation that the Crown breached its fiduciary obligation to the Band; it is not based on unextinguished Aboriginal rights or title; and it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy. If the Policy is ambiguous, it should be resolved in favour of the claimants, given that the underlying purpose of the Policy is remedial in nature.

## RECOMMENDATIONS

That the McKenna-McBride Commission claim of the Mamaleleqala Qwe’Qwa’Sot’Enox Band be accepted for negotiation under the Specific Claims Policy for a minimum of 5 acres in Application 62 (Lull Bay); a minimum of 2.83 acres in Application 64 (Shoal Harbour); and the Band’s settlement lands in Application 71 (Knight’s Inlet), which are covered by the *British Columbia Gazette* notices submitted by the Band as evidence in this inquiry.

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That the McKenna-McBride Commission claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band be accepted for negotiation under the Specific Claims Policy as a result of Canada's breach of fiduciary obligations towards the Band prior to the McKenna-McBride hearings.

#### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### Cases Referred To

*Guerin v. The Queen*, [1984] 2 SCR 335; *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (Fed. CA); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [sub nom. *Apsassin*], [1988] 1 CNLR 73 (Fed. TD); [1993] 3 FC 28 (Fed. CA); [1996] 2 CNLR 25 (SCC); *Delgamuukw v. B.C.*, [1991] 5 CNLR 1 (BCSC); *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *K.M. v. H.M.* (1992), 142 NR 321 (SCC).

#### ICC Reports Referred To

'*Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89; '*Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3.

#### Treaties and Statutes Referred To

*Order of Her Majesty in Council Admitting British Columbia into the Union. At the Court at Windsor, the 16th day of May, 1871*, in Derek G. Smith, ed., *Canadian Indians and the Law: Selected Documents, 1663–1972*, Carleton Library 87 (Toronto: McClelland & Stewart, 1975); *Land Act*, RSC 1897; *Indian Act*, RSC 1886; RSC 1906.

#### Other Sources Referred To

Robert Galois, *Kwakwaka'wakw Settlements, 1775–1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994); Helen Codere, "Kwakiutl: Traditional Culture," in *Northwest Coast*, ed. Wayne Suttles, vol. 7 in *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1990); DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2d ed. (Vancouver: UBC Press, 1992); Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver: UBC Press, 1990); Robin Fisher, "Joseph Trutch and Indian Land Policy," in W. Peter Ward and Robert A.J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver: Douglas & McIntyre, 1981).

#### COUNSEL, PARTIES, INTERVENORS

C.A. Donovan for the Mamaleleqala Qwe'Qwa'Sot'Enox Band; B. Becker, S. Kelleher for the Government of Canada; R.S. Maurice, I. Gros-Louis Ahenakew to the Indian Claims Commission.

#### CANADA'S RESPONSE

In December 1999, the Minister of Indian Affairs rejected the ICC's recommendation to accept the claim for negotiation: see (2000) 12 ICCP 393.



## SUMMARY

### **MICMACS OF GESGAPEGIAG FIRST NATION HORSE ISLAND INQUIRY Quebec**

The report may be cited as Indian Claims Commission, *Micmacs of Gesgapegiag First Nation: Horse Island Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 253.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commissioner D.J. Bellegarde, Commissioner P.E.J. Prentice, QC

**Pre-Confederation Claim** – Petition of Right – Letters Patent; **Specific Claims Policy** – Pre-Confederation Claim; **Mandate of Indian Claims Commission** – Rejected Claim; **Quebec**

#### **THE SPECIFIC CLAIM**

In April 1986, the Micmacs of Gesgapegiag First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), asserting that it held a legal interest in Horse Island on the basis of use and occupation since time immemorial, and alleging that the Crown breached a fiduciary obligation to it in regard to land grants and the alienation of the entire island. The claim was rejected in 1987 on the basis that the claim fell outside the Specific Claims Policy, which barred claims based on events arising before Confederation in 1867 unless the federal government specifically assumed responsibility for them. In April 1991, Canada removed the pre-Confederation exclusion from its Policy. In January 1993, the claimant was advised that Canada was prepared to revisit the claim. The claimant understood, however, that Canada was only willing to reconsider such claims having a value of less than \$500,000. In January 1993, the Micmacs requested an inquiry by the Indian Claims Commission (ICC) into its rejected claim, whereupon Canada informed the claimant that a claim under review by the ICC would not be examined concurrently within the government's specific claims process. At the ICC's first planning conference in September 1993, the parties agreed that the removal of the pre-Confederation bar meant that the claim could no longer be treated as a rejected claim. Canada undertook to review the merits of the claim within its specific claims process.

#### **BACKGROUND**

For two centuries, the Micmacs of Gesgapegiag have claimed ownership to Horse Island, which lies near the mouth of the Cascapedia River in the Gaspé Peninsula. In 1896, the island was described as a "magnificent sugar bush." The claimants' ancestors, who lived in the area prior to European settlement, began to establish permanent settlements on the Cascapedia River by 1784. They produced maple sugar on Horse Island in 14 camps and relied on the sale of maple sugar to buy necessities. By the end of the 1700s, non-Indian settlers began to request title to land along the Cascapedia River. In order to regularize land titles and ensure that settlers received clear title, the Gaspé Land Commission was created. In 1820, it granted one settler title to 300 acres, approximately one-half of Horse Island.

In 1830, the Micmacs submitted the first of many petitions and entreaties to the government of the day requesting confirmation of ownership in the island. In 1833 and 1834, the Micmacs of Restigouche and Cascapedia petitioned the Governor General, protesting the extensive cutting of maple trees by non-Indians on Horse Island and elsewhere, and requesting a title deed to the island. In 1837, the southern half of Horse Island was sold by the Crown over the protests of the Micmacs. In response to a further petition in 1846, protesting the sale of the Micmacs' ancestral lands on Horse Island without their consent, the Crown advised that it regretted the sale of the island but had no power to reverse a legal conveyance or provide restitution to the Micmacs.

A missionary advised the Crown in 1896 that, 40 years earlier, a Micmac Chief had produced a patent document proving ownership of the island and shown it to a settler, causing him to abandon logging on the land. The patent was apparently

lost while in the possession of a Member of Parliament. Over the years, logging and settlement destroyed the maple sugar industry and left the island covered with scrub.

**OUTCOME**

As a result of DIAND's decision to review pre-Confederation claims as part of the Specific Claims Policy, the claim was no longer rejected by the department. The ICC, therefore, had no mandate to proceed with an inquiry.

**RECOMMENDATION**

In order to avoid the confusion which occurred here, we recommend that the Department of Indian Affairs and Northern Development write to all those whose claims were rejected because of the pre-Confederation bar informing them that, if they wish their claim reconsidered, they should notify the department.

**CANADA'S RESPONSE**

In March 1995, the Minister of Indian Affairs and Northern Development advised the ICC that the Micmacs of Gesgapegiag had asked Canada to hold the claim in abeyance pending the decision of the Supreme Court of Canada in a related case: see (1995) 3 ICCP 323.

# SUMMARY

## **MIKISEW CREE FIRST NATION TREATY 8 ECONOMIC BENEFITS INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Mikisew Cree First Nation: Treaty 8 Economic Benefits Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 183.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 8 (1899); **Treaty Right** – Agricultural Benefits; **Mandate of Indian Claims Commission** – Delay – Constructive Rejection; **Alberta**

### **THE SPECIFIC CLAIM**

In January 1993, the Mikisew First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) seeking provision of economic benefits under Treaty 8. In March 1994, the First Nation was informed that the department had made a preliminary decision to reject the claim, but neither party appeared to consider this decision to be final. In June 1995, DIAND indicated a willingness to discuss the claim under the Specific Claims Policy, subject to formal acceptance. Subsequently, DIAND advised the First Nation that acceptance of its claim was in abeyance until a policy review of economic benefits provisions in treaties was completed.

### **Mandate Challenge**

In the absence of a decision from the Minister, the First Nation asked the Indian Claims Commission (ICC) in February 1996 to conduct an inquiry. Canada responded that, as the claim had not been rejected, the Commission did not have the authority to proceed with the inquiry. On the basis of written submissions on the question of jurisdiction, the ICC ruled that Canada's lengthy delay and indecision was "tantamount to a rejection," thereby giving the ICC jurisdiction to conduct the inquiry: see Appendix A to the report, or *Mikisew Cree First Nation: Interim Ruling* (Ottawa, November 1996), reported (2003) 16 ICCP 23. In December 1996, Canada made a formal offer to accept the claim for negotiation: see Appendix B to the report.

### **BACKGROUND**

Representatives of the Mikisew First Nation (formerly the Fort Chipewyan Cree Band) signed Treaty 8 in 1899. In addition to the provision of reserve land, the treaty stated that, should the First Nation take up the pursuits of farming or ranching, it would receive certain economic benefits. In 1922, the First Nation asked for reserve lands to be set aside but, after five years, no action had been taken. The Indian Agent reported that the First Nation was no longer interested in establishing reserve lands.

In 1986, Canada and the First Nation finalized an agreement to establish reserve lands. As part of the agreement, the First Nation released the Crown from any further obligations arising out of Canada's obligation under the treaty to lay aside reserves or provide land in severalty. There was no mention in the release clause of Canada's obligation in the treaty to provide agricultural (economic) benefits.

### **ISSUES**

Is there, under Treaty 8, an outstanding lawful obligation on the part of Canada to provide economic benefits to the First Nation? If so, what is the nature and value of any such outstanding benefits?

### **OUTCOME**

The ICC made no findings or recommendations, as the claim was accepted by Canada for negotiation in December 1996.

Prior to the first meeting of the parties, however, the First Nation commenced a lawsuit against Canada and the Province of Alberta, alleging breaches in relation to Treaty 8 and the 1986 agreement. Canada elected not to negotiate the specific claim for economic benefits, at least until the implications of the lawsuit were known.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

### **Cases Referred To**

*Chief Archie Waquan v. Her Majesty the Queen (Canada and Alberta)*, Action No. 9601-18174, filed December 20, 1996 (Alta QB).

### **Treaties and Statutes Referred To**

*Treaty No. 8*, IAND Publication No. OS-0576-000-EE-A-16.

### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Specific Claims West, DIAND, “Economic Benefits and Treaty No. 8 Bands in Alberta, 1899–1940,” April 1995.

### **COUNSEL, PARTIES, INTERVENORS**

J. Slavik for the Mikisew Cree First Nation; E. Daigle for the Government of Canada; R.S. Maurice to the Indian Claims Commission.

# SUMMARY

## **MISSISSAUGAS OF THE NEW CREDIT FIRST NATION TORONTO PURCHASE INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Mississaugas of the New Credit First Nation: Toronto Purchase Inquiry* (Ottawa, June 2003), reported (2004) 17 ICCP 227.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commissioner D.J. Bellegarde

**Pre-confederation Claim – Surrender – Purchase; Royal Proclamation of 1763;  
Fiduciary Duty – Pre-confederation Claim; Ontario**

### **THE SPECIFIC CLAIM**

In June 1986, the Mississauga Tribal Claims Council, which included the Mississaugas of the New Credit, submitted a number of claims, including the Toronto Purchase claim, to the Department of Indian Affairs and Northern Development (DIAND). The Toronto Purchase claim alleged that a vast expanse of land in southern Ontario, which includes Metropolitan Toronto, had never been properly surrendered to the Crown, and that the 1787 and 1805 transactions concerning the purchase were tainted by breaches of the Crown's fiduciary duty. In June 1993, the claims were rejected by DIAND as falling outside the scope of the Specific Claims Policy. In May 1994, the Mississaugas of the New Credit First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected Toronto Purchase claim with respect to the New Credit First Nation only; the ICC agreed to do so. Following a brief period during which the inquiry was placed into abeyance, and after eight planning conferences, DIAND agreed to accept the claim in part, and the ICC suspended the inquiry process.

### **BACKGROUND**

In 1763, the *Royal Proclamation* established how territories, newly acquired by the British from the French, and including the portion of southern Ontario occupied by the Mississaugas, would be managed and how the purchase of Indian lands would be regulated. The tract of land north of Lake Ontario became increasingly important following the Treaty of Paris, which formally ended hostilities between Great Britain and its former American colonies, both for its military value and for the loyal Iroquois and other British subjects who were fleeing the United States. The Mississaugas had surrendered a strip of land along the west bank of the Niagara River in 1781. In 1783, they surrendered land at Quinte for land for the Iroquois and again in 1784, surrendered a huge tract of land in the Niagara peninsula for Iroquois settlement. British attention then turned to a tract of land banding the north shore of Lake Ontario, as well as the "Carrying Place" of Toronto, an ancient Aboriginal portage that formed part of the route from Lake Ontario to Georgian Bay.

In 1787, Superintendent General of Indian Affairs Sir John Johnson and his party arrived at the Bay of Quinte to meet with the Mississaugas who occupied the lands in question. What discussions or negotiations actually took place, however, remain obscure. The September 23, 1787, surrender document did not describe the physical boundaries or the quantity of land surrendered, nor did the body of the document name the Chiefs of the bands from whom the surrender was taken. At the end of the document, the names of three Chiefs, Wabakinine, Neace, and Pakquan, together with their totems, appeared on slips of paper that had been attached to the document. The witnesses to the surrender were stated to be John Collins, Louis Protle, and interpreter Nathaniel Lines. The only existing descriptions of the meeting postdate the event and contradict one another and the surrender document.

Satisfied that the British had concluded a valid purchase with the Mississaugas, a survey of the purchased lands was conducted but serious disputes arose with the Mississaugas regarding the correct boundaries. No deed of surrender was ever taken, yet it appears that Colonel Butler believed that the British now owned a large block of land on the north shore of Lake

Ontario extending from the mouth of Etobicoke Creek (“Place of beginning”) on the west to the Bay of Quinte on the east. Whether this was an entirely new purchase, or an extension and clarification of the 1787 purchase, is a matter of interpretation. In any event, the vagueness of the original 1787 surrender document, together with the many discrepancies in the accounts of its surrounding circumstances, presaged future doubts as to the surrender’s validity. In 1788, land east of Toronto was purchased from the Mississaugas.

After 1791, when the Province of Quebec was divided into Upper and Lower Canada, the authorities took steps to survey the lands purchased in 1787 and 1788 into counties. The influx of settlers and their encroachment on Indian fisheries caused great worry among the Mississaugas, who began to understand that the purchases of the 1780s were outright surrenders. They protested to government officials and, on occasion, raided settlers’ farms. Concerned by the irregularities in the 1787 surrender, the newly appointed Lieutenant Governor of Upper Canada, John Graves Simcoe, investigated the status of the 1787 purchase. Various officials advised that the surrender was invalid; Governor General Dorchester even stated that the “proceedings are so informal and irregular as to invalidate and set aside the whole transaction,” and that the deed itself was “of no validity or value.” In September 1797, the new Governor General, Robert Prescott, wrote that, as none of the blanks in the 1787 surrender deed were filled in, the transaction was totally invalid.

In 1798, Chief Yellowhead, through an interpreter, apparently confirmed to government officials that the lands south of Lake Simcoe, including the Carrying Place, had been sold in accordance with the government’s understanding. Some officials believed as a result that it was no longer necessary to obtain a new deed for the Toronto purchase; but the Land Board of Upper Canada was ordered to investigate and report on how Indian lands might best be acquired and disposed of. The report of the Land Board clearly stated that if the Indians were to become aware of the true value of land in Upper Canada, the cost of that land to the government would rise dramatically.

In the early 19th century, the Lieutenant Governor, now Peter Hunter, ordered his officials to obtain a new deed of surrender for the 1787 purchase at the same time that new negotiations for the Mississauga tract were to take place. The first meeting with the Mississaugas took place on July 31, 1805, at the Credit River. According to minutes, the Mississaugas were told that the exact limits of the 1787 purchase had not been adequately defined at the time of the original negotiations; the Mississaugas were then asked for their view as to the correct boundary so that a new deed could be drafted and executed. Chief Quinepenon, the spokesman for the Mississaugas, stated that the original signatories to the treaty were deceased, and the current chiefs could not confirm any boundaries. Following this, it appears that the Mississaugas were only shown the plan placing the western boundary of the Toronto purchase at Etobicoke Creek, not a second prepared plan with the boundary at the Humber River.

The formal deed of surrender confirming the Toronto purchase was drawn up and executed on August 1, 1805 (the 1805 Toronto Purchase), the date that the surrender of the Mississauga tract was negotiated. In addition to confirming the original 1787 transaction, the deed included a detailed legal description of the boundaries of the surrendered parcel, which comprised some 250,880 acres and provided for the First Nation’s right to fish in Etobicoke Creek. The total consideration for the Indians’ consent to the above was 10 shillings.

## **ISSUES**

Was the transaction that took place in 1787 valid as a surrender? Did the Crown breach its fiduciary duty to the Mississaugas to fully explain the circumstances of the 1805 treaty prior to its execution, and, in particular, did the Crown disclose that the 1787 surrender was invalid; did the Crown fail to disclose that the 1805 Toronto Purchase covered a much greater area than the 1787 transaction; and did the Mississaugas believe that the Toronto Islands were a part of the purchase, or did they believe that the islands were specifically excluded?

## **OUTCOME**

The ICC did not make findings or recommendations. On July 23, 2002, the Minister of Indian Affairs and Northern Development informed the Mississaugas of the New Credit First Nation that Canada was willing to accept for negotiation the specific claim known as the Toronto Purchase. For the purpose of negotiations, Canada accepted that the 1805 surrender amounted to a non-fulfillment of a treaty or agreement between the Indians and the Crown. Canada’s letter of acceptance is Appendix B to the report.

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**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**ICC Reports Referred To**

*Chippewa Tri-Council (Beausoleil, Chippewas of Georgina Island, and Chippewas of Mnjikaning [Rama] First Nations): Coldwater-Narrows Reservation Surrender Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 187.

**Treaties and Statutes Referred To**

*Royal Proclamation of 1763*; Surrender, September 23, 1787, in *Canada, Indian Treaties and Surrenders, from 1680 to 1890* (Ottawa, Brown Chamberlin, 1891; reprint, Saskatoon: Fifth House Publishers, 1992).

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DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994), 1 ICCP 171; E.S. Rogers, “Southeastern Ojibwa,” in *Handbook of North American Indians, vol. 15: Northeast*, vol. ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978); Donald B. Smith, “Who are the Mississauga?” in (1975) 67, no. 4 *Ontario History*; Elisabeth Tooker, “The Five (Later Six) Nations Confederacy, 1550–1784,” in *Aboriginal Ontario: Historical Perspectives of the First Nations* (Toronto: Dundurn Press, 1994); Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991); Donald B. Smith, “The Dispossession of the Mississauga Indians: a Missing Chapter in the Early History of Upper Canada,” in (1981) 73, no. 2 *Ontario History*; Olive Dickason, *Canada’s First Nations* (Toronto: McClelland & Stewart, 1992); Robert J. Surtees, “Land Cessions, 1763–1830,” in *Aboriginal Ontario: Historical Perspectives of the First Nations* (Toronto: Dundurn Press, 1994); Robert J. Surtees, “Indian Land Surrenders in Ontario: 1763–1867,” unpublished paper, February 1984; Percy J. Robinson, “The Toronto Carrying-Place and the Toronto Purchase,” in (1947) 39 *Ontario History*; Percy J. Robinson, *Toronto during the French Regime*, 2nd ed. (Toronto: University of Toronto Press, 1965); M.M. Quaife, ed., *John Long’s Voyages and Travels in the Years 1768–1788* (Chicago: Lake Side Press, 1922); Percy J. Robinson “The Chevalier de Rocheblave and the Toronto Purchase,” in (1937) 3rd ser., 31 *Transactions of the Royal Society of Canada* sec. II; E.A. Cruikshank, ed., *The Russell Papers*, vols. 1 and 2 (Toronto: Ontario Historical Society, 1925); E.A. Cruikshank, ed., *The Simcoe Papers*, vols. 2 and 3 (Toronto: Ontario Historical Society, 1924); Leo A. Johnson, “The Mississauga – Lake Ontario Land Surrender of 1805,” in (1990) 83, no. 3 *Ontario History*.

**COUNSEL, PARTIES, INTERVENORS**

K.A. Fullerton for the Mississaugas of the New Credit First Nation; P. Robinson for the Government of Canada; K.N. Lickers to the Indian Claims Commission.



## SUMMARY

### **MISTAWASIS FIRST NATION 1911, 1917, AND 1919 SURRENDERS INQUIRY Saskatchewan**

This report may be cited as Indian Claims Commission, *Mistawasis First Nation: 1911, 1917, and 1919 Surrenders Inquiry* (Ottawa, March 2002), reported (2002) 15 ICCP 333.

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

**Panel:** Chief Commissioner P. Fontaine; Commissioner R.J. Augustine

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender – Proceeds of Sale; **Indian Act** – Surrender;  
**Fiduciary Duty** – Pre-surrender; **Right of Way** – Road; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In October 1992, the Mistawasis Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that land surrenders of portions of Indian Reserve (IR) 103, taken in 1911, 1917, and 1919, were obtained as a result of undue influence, in unconscionable circumstances, and in violation of the *Indian Act*. In August 1994, the Band was informed that its claim was accepted in part, insofar as the Crown had apparently failed to administer and collect proceeds from the 1911 surrender and sale in a proper manner; the 1917 and 1919 surrender claims were also partially accepted on the same grounds in October 1994. In August 1996, the Band requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected portion of these claims; the inquiry request was accepted in September 1996, and in the same month the inquiry was placed in abeyance pending outcome of the negotiations related to the accepted part of the claim. The inquiry process was reinstated in May 1998 when these negotiations proved unsuccessful. Settlement discussions among the parties resumed in 2000, and in 2001 the Band informed the ICC that it had ratified a Surrender Settlement Agreement with Canada.

#### **BACKGROUND**

Treaty 6 was signed at Fort Carlton on August 23, 1876, with Chief Mistawasis signing for his Band and acting as a head chief, along with Ahtakakup. Chief Mistawasis chose 49,280 acres located at the Band's traditional wintering lands at Snake Plains, 20 miles northwest of Fort Carlton, and Indian Reserve (IR) 103 was surveyed in 1878 and formally set aside on May 17, 1889. At this location the Band continued its relatively well-established farming economy. Among the difficulties faced by the Band in these years was Hayter Reed's 1889 "peasant farming" policy, which dictated that an Indian farming family should possess only the amount of land it could cultivate using the most primitive of hand tools. By the early 1900s only a few people continued to farm.

Around 1910, some band members wished to return to farming, but they needed to fence in the reserve lands to keep out settlers' livestock. The Indians and the department disagreed over how the wire fencing should be paid for. Rather than use their annuities, the Indian Agent indicated that the Band preferred instead 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, and to use those funds to secure fencing. The department proposed surrender of a larger block, comprising 1,607 prime acres on both sides of the right of way. On February 22, 1911, the Agent sent the signed surrender to the department, but it rejected certain terms that the band had insisted on. On March 20, 1911, after agreeing to an amended surrender document, Chief Jacob Johnstone and 22 other band members signed the surrender, along with the Agent and the interpreter. The surrender stipulated that the department would sell the 1,607 acres and use the funds to fence the reserve, purchase three specified pieces of farm machinery, and maintain the machinery for one year. The parties eventually agreed to terms for the use of the proceeds of sale, and on April 20, 1911, the surrender was accepted by Order in Council.

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, two real estate agents, paid only the first two instalments, plus some interest on the balance, but did not make any further payments. In 1913, the department granted a right of way for a road allowance to Saskatchewan, over 17.1 acres within the surrendered land. The province paid for the right of way based on the average price realized from the other land sales within the surrendered block. In 1916, the department transferred the road allowances surrounding each section within the surrendered block to the province, without reference to any additional compensation.

Between 1911 and 1917, government officials continued to favour another surrender; at the same time, however, the Band was accruing considerable debts, owing largely to the fact that the purchasers of the lands surrendered in 1911 had not paid any instalments after 1912. In February 1917, the Indian Agent informed the department that the Band, who allegedly had “more land than they will ever ... use,” was willing to surrender 5,000 acres “outside of the reserve fence.” In April, the Agent was instructed 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, adding clauses on price and how the proceeds were to be handled. In June, the surrender was returned to the Agent because of numerous irregularities. The corrected surrender was returned in mid-June and approved by Order in Council on June 30, 1917.

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. Commissioner W.M. Graham visited the Mistawasis reserve in late June and reported that he 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.” Graham’s formal report to the Minister of the Interior advised that a joint inspection of 16,500 acres at the south end of Mistawasis IR 103 had been carried out, that the land was “a first class proposition,” and that the Band had surrendered some 5,000 acres of this land a few years before but 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.

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 second surrender, for the 11,520 acres that the Band had agreed to surrender that year, provided for proceeds of \$138,000. The distribution of the proceeds of the two surrenders were to be handled somewhat differently and were specified in the surrenders. The record indicates that all 43 eligible voters present at the meeting voted in favour of each surrender; both surrenders were approved by Order in Council dated September 10, 1919. Two weeks later, the land was transferred to the Soldier Settlement Board for the price contemplated in the surrenders.

Although the 1917 surrender had specifically included road allowances, neither the replacement surrender nor the new surrender of 11,520 acres referred to any road allowances. 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. After examining the surrender, Surveyor H.W. Fairchild concluded that no road allowance had been surrendered, and recommended that the Band be compensated for the land in question. An internal memorandum 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 the Band for the road allowances. Later that month, Chief Dreaver was advised that the land comprising the road allowance was to be expropriated under the *Indian Act* and transferred to the province of Saskatchewan. The transfer took place on February 20, 1922.

## ISSUES

Were the surrender provisions of the *Indian Act* complied with when the surrenders of part of reserve IR 103 were obtained in 1911, 1917, and 1919? If not, are any of the surrenders invalid? Did Canada owe, and fulfill, any pre-surrender fiduciary obligations to the Band in the context of the 1911, 1917, and 1919 surrenders? In particular, was any surrender exploitative in nature or obtained as a result of tainted dealings, or are there any other grounds upon which Canada breached any pre-surrender fiduciary obligations? If Canada breached any pre-surrender fiduciary obligations, do any such breaches render any of the surrenders invalid?

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 1911 surrender? In particular, 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 such equipment for the use of all the bands in the Agency, including the Mistawasis First Nation? If so, do any damages flow from the breach?

If valid surrenders were taken in 1911, 1917, and/or 1919, did they 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?

Was the First Nation properly compensated for the road allowances within the lands surrendered in 1911, and, if not, did this constitute a breach of Canada's fiduciary duty?

Did Canada properly revoke the 1917 surrender?

If valid surrenders were taken in 1919, 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?

If valid surrenders were taken in 1919, 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? In particular, was the First Nation properly compensated for any portion of a road allowance which, subsequent to the surrenders, remained within the Indian reserve and was expropriated in 1922?

If valid surrenders were taken in 1919, 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?

### **OUTCOME**

As this inquiry was suspended following the settlement of the claim, there are no findings or recommendations.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **ICC Reports Referred To**

*Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

### **Treaties and Statutes Referred To**

Treaty 6, in 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).

### **Other Sources Referred To**

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### **COUNSEL, PARTIES, INTERVENORS**

L. Ostertag for the Mistawasis First Nation; J.A. Hutchinson for the Government of Canada;  
K.N. Lickers to the Indian Claims Commission.



## SUMMARY

### **MOOSE DEER POINT FIRST NATION POTTAWATOMI RIGHTS INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Moose Deer Point First Nation: Pottawatomi Rights Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 135.

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

**Panel:** Commissioner C.T. Corcoran, Commissioner R.J. Augustine

**Pre-Confederation Claim** – Reserve Creation; **Treaties** – Robinson-Superior Treaty (1850) –Robinson-Huron Treaty (1850) – Williams Treaty (1923) – Treaty 7 (1877) – Treaty 8 (1899) –Treaty of 1836; **Treaty Interpretation** – Pre-Confederation Claim – Outside Promises; **Treaty Right** – Reserve – Annuity; **Ontario**

#### **THE SPECIFIC CLAIM**

The Moose Deer Point First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in April 1995, contending that Canada owed it an outstanding lawful obligation arising out of the Crown's invitation to its allies, including the ancestors of the First Nation, to settle permanently in Upper Canada, to be protected by the Crown, and to continue to enjoy the goods given in furtherance of the treaties of military alliance. The First Nation submitted that, as a result of these promises, it became and continues to be entitled to rights of use and occupation in the traditional territory of the Chippewas and Ojibwas of Georgian Bay, as well as the other unsurrendered "Pottawatomi rights" of annual presents and ongoing protection. The First Nation further submitted that its use and occupation of the Georgian Bay territory have been impaired, without compensation, by the development and settlement of the land without reference to, or protection of, the rights of the First Nation. Canada rejected the claim in August 1995, on grounds that the First Nation had failed to demonstrate any outstanding lawful obligation. In November 1995, the First Nation applied to the Indian Claims Commission (ICC) to conduct an inquiry into its rejected claim. By agreement of the parties, a community session was not held. The oral hearing, based on written submissions, took place in April 1998.

#### **BACKGROUND**

The members of the Moose Deer Point First Nation reside on Moose Point Indian Reserve (IR) 79, consisting of three small parcels of land on the east side of Georgian Bay in Lake Huron. After 1763, the Pottawatomi ancestors of the First Nation fought as allies of the British to defend their home territory around Lake Michigan. During the War of 1812, they again fought with the British to defend Upper Canada from American incursions, as they did during the Rebellions of 1837–38. Many of Britain's Indian allies living in the United States, including 3,000 Pottawatomi, relocated permanently to Canadian territory in the 1830s, relying, according to the First Nation, on promises made to them by the British Crown, including the annual distribution of presents. In August 1837, the Chief Superintendent of Indian Affairs, Samuel Peters Jarvis, addressed a council of 75 principal Chiefs on Manitoulin Island, explaining that, in three years, the government would give presents only to Indians living in the British Empire, and not to those "visiting Indians" resident in the United States. If those Indians wanted to continue receiving presents, they were invited to "come and live under the protection of your Great Father."

Beyond the 1836 surrenders or treaties with the Ottawa, Chippewa, and Saugeen Indians that made Manitoulin Island and the Bruce Peninsula available, no formal land base was expressly established for any of the Indian allies who left the United States between 1836 and 1843. After 1840, many immigrant Pottawatomi were classified as "wandering Indians," since they lacked reserves in Canada. Competition for a shrinking land base forced some Pottawatomi to move frequently and many married in, were adopted in, or simply moved in with Ojibwa (Chippewa) and Ottawa Indians who had reserves and treaty rights.

In 1850, the Robinson-Huron and Robinson-Superior treaties were signed with the Ojibwa at Sault Ste Marie. By means of the Robinson-Huron Treaty, the Crown acquired the entire northern shoreline of Lake Huron from Lake Superior to Matchedash Bay, south of Moose Deer Point and the Severn River near Coldwater. The treaty resulted in the establishment of 21 reserves, most selected by Chiefs at locations where their bands had fishing stations or summer camps. Although Moose Deer Point is within the treaty area, the people there were not taken into account and thus did not obtain reserve lands or annuities under the treaty.

The Pottawatomi living at Moose Deer Point, Christian Island, and Parry Island began their quest, possibly by 1871, for treaty annuities through band membership, intermarriage, or approval by Indian Affairs. Those who did not gain this status simply continued to live at Moose Deer Point or, with the consent of the bands, at their reserves on Christian Island and Parry Island. Although the question of creating a reserve for the Pottawatomi at Moose Deer Point was raised by both the Indians and Indian agents, none was provided. It was not until 1916 that the federal government secured the current Moose Point reserve of 619 acres via a provincial Order in Council. The federal government, however, failed to issue a federal Order in Council accepting the transfer of land or formally setting it apart as a reserve. Efforts by the First Nation to adhere to the Robinson-Huron Treaty in 1932 were unsuccessful. The First Nation remains a non-treaty band with a small three-parcel reserve dotting Moose Deer Point.

### **ISSUES**

Were promises made by the Crown to its allies, including ancestors of the Moose Deer Point First Nation? If so, what were the nature and the scope of the promises? Does the Crown have an outstanding lawful obligation to the Moose Deer Point First Nation?

### **FINDINGS**

Canada conceded that promises were made, and that the intended beneficiaries of those promises included ancestors of present members of the First Nation.

The principles of treaty interpretation apply to any document articulating the relationship between the Crown and Indian peoples. The agreement exists before being recorded in written form; presumably, such an agreement, once formed, can continue to exist even if the parties fail in whole or in part to reduce it to writing, but instead record some or all of it by other means, such as wampum or perhaps the collective memories of the parties. The absence of a written treaty document does not lead to the inescapable conclusion that a treaty does not exist. Having regard for the five factors for determining whether a treaty exists, set forth in *Taylor and Williams* and approved in *Sioui*, the ICC concludes that the parties intended to create binding obligations. Even if the Crown did not recognize that the council of 1837 had given rise to a treaty, it recognized its continuing obligation to provide the Indians with presents. The Crown also intended in 1852 to extinguish unilaterally its treaty obligation to provide presents.

The 1837 council gave rise to treaty rights to land; however, the ICC is unable to conclude whether the First Nation's treaty right was satisfied by the provision of 619 acres of reserve land in 1917, nor is it able to define the scope of the promises of protection and equality with other Indians, because of the lack of specificity in Jarvis's address regarding the particulars of reserve size, and because of a lack of evidence regarding the amount of treaty land received by other bands. Therefore, it is unknown if an outstanding obligation is owed to the First Nation. For similar reasons, the ICC is unable to determine whether the Specific Claims Policy has been implemented correctly. Nevertheless, it was unfair for the Crown to use presents and other promises to induce the Pottawatomi and other Indian allies to give up their lands and rights in the United States, and then to withdraw the presents, while at the same time contending that the allies had no rights to land or annuities.

### **RECOMMENDATIONS**

That Canada and the Moose Deer Point First Nation undertake research to further define Canada's obligations arising from the Crown's promises of 1837 and to verify whether those obligations have been fulfilled.

That, if Canada's obligations have not been fulfilled, the claim be accepted for negotiation under the Specific Claims Policy.

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**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Simon v. The Queen*, [1985] 2 SCR 387; *R. v. Sioui*, [1990] 1 SCR 1025; *R. v. White and Bob* (1964), 50 DLR (2d) 613 (BCCA), affirmed [1965] SCR vi; *R. v. Marshall* (1997), 146 DLR (4th) 257 (NSCA); *R. v. Côté* (1993), 107 DLR (4th) 28 (Que. CA); *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 QB 256 (Eng. CA); *Mitchell v. Minister of National Revenue*, [1997] 4 CNLR 103 (FCTD); *Francis v. R.*, [1956] SCR 618; *R. v. Vincent* (1993), 12 OR (3d) 427; *R. v. Syliboy*, [1929] 1 DLR 307 (NS Co. Ct); *R. v. Blackfoot Band of Indians*, [1982] 4 WWR 230 (FCTD); *R. v. Jones and Nadjiwon* (1993), 14 OR (3d) 421; *R. v. Badger*, [1996] 1 SCR 771; *R. v. Van der Peet* (1996), 137 DLR (4th) 289 (SCC); *R. v. Horseman*, [1990] 3 CNLR 97 (SCC); *R. v. Adams* (1996), 138 DLR (4th) 657 (SCC); *Guerin v. The Queen*, [1984] 2 SCR 335.

**Treaties and Statutes Referred To**

*Royal Proclamation of 1763*, RSC 1985; Robinson-Huron and Robinson Superior Treaties (1850); Williams Treaty (1923); Treaty of Paris (1763); Treaty of 1836; *Constitution Act, 1982*; Treaty 7; *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer and Controller of Stationery, 1966).

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; R. David Edmunds, "Potawatomi," in *Encyclopedia of North American Indians*, ed. Frederic E. Hoxie (New York: Houghton Mifflin, 1996); James A. Clifton, "Potawatomi," in *Handbook of North American Indians*, vol. 15: *Northeast*, ed. Bruce G. Trigger (Washington: Smithsonian Institution, 1978); J. Norman Heard, "Potawatomi Indians," in *Handbook of the American Frontier: Four Centuries of Indian-White Relationships*, vol. II: *The Northeastern Woodlands* (Metuchen, NJ: Scarecrow Press, 1990); Canada, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992); Robert S. Allen, *His Majesty's Indian Allies: British Indian Policy in the Defence of Canada, 1774–1815* (Toronto: Dundurn Press, 1992); Robert J. Surtees, *A Cartographic Analysis of Indian Settlements and Reserves in Southern Ontario and Southern Quebec, 1763–1867* (Ottawa: DIAND Publication QS-3414-000-EE-A1, 1985); Frederick H. Armstrong, *Handbook of Upper Canadian Chronology* (Toronto: Dundurn Press, 1985); James A. Clifton, *A Place of Refuge for All Time: Migration of the American Potawatomi into Upper Canada, 1830 to 1850*, Canadian Ethnology Service Paper No. 26 (Ottawa: National Museums of Canada, 1975); Paul Williams, "'The King's Bounty': A Short History of the Distribution of Indian Presents, 1764–1858," DIAND, Claims and Historical Research Centre, Item I-136; Catherine A. Sims, "Algonkian-British Relations in the Upper Great Lakes Region: Gathering to Give and Receive Presents, 1815–1843," PhD thesis, University of Western Ontario, 1992; Douglas Leighton, "The Compact Tory as Bureaucrat: Samuel Peters Jarvis and the Indian Department, 1837–1845" (March 1981) 72:1 *Ontario History*; Robert J. Surtees, "Indian Land Cessions in Ontario, 1763–1862," PhD thesis, Carleton University, 1982; Mrs S. Rowe, "Anderson Record from 1699 to 1896" (1905) VI Ontario Historical Society, *Papers and Records*; John Leslie, "Commissions of Inquiry into Indian Affairs in the Canadas, 1828–1858: Evolving a Corporate Memory for the Indian Department," MA research essay, Carleton University; Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992); Robert J. Surtees, *Treaty Research Report: Manitoulin Island Treaties* (Ottawa: DIAND, 1986); Sir F.B. Head to Lord Glenelg, August 22, 1837, No. 41 in *British Parliamentary Papers*, vol. 12, "Correspondence, Returns and Other Papers Relating to Canada and the Indian Problem Therein, 1839" (Shannon: Irish University Press, undated); Anna Brownell Jameson, *Winter Studies and Summer Rambles in Canada* (Toronto: McClelland & Stewart, 1990); R. Louis Gentilcore, ed., *Historical Atlas of Canada*, vol. II: *The Land Transformed, 1800-1891* (Toronto: University of Toronto Press, 1987); James A. Clifton, "Visiting Indians in Canada," manuscript for a Parks Canada booklet, 1979; John Leslie, "The Bagot Commission: Developing a Corporate Memory for the Indian Department," unpublished paper for Canadian Historical Association annual meeting, June 1982; Robert J. Surtees, *Treaty Research Report: The Robinson Treaties* (Ottawa: DIAND, 1986); Robert J. Surtees, *Indian Land Surrenders in Ontario, 1763–1867* (Ottawa: DIAND, 1984); J. Hampden Burnham, "The Coming of the Mississaugas" (1905) VI Ontario Historical Society, *Papers and Records*; G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986); Shin

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**COUNSEL, PARTIES, INTERVENORS**

G. Nelson for the Moose Deer Point First Nation; P. Robinson for the Government of Canada; D.E. Osborn, QC, R. Keesickquayash, T.A. Gould to the Indian Claims Commission.

**CANADA'S RESPONSE**

By letter dated March 29, 2001, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendations: see (2001) 14 ICCP 277.

## SUMMARY

### **MOOSOMIN FIRST NATION 1909 RESERVE LAND SURRENDER INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran, Commissioner A. Gill

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender;  
**Evidence** – Onus of Proof; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In July 1986, the Moosomin First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), asserting that the 1909 surrender of its Indian Reserves (IR) 112 and IR 112A was invalid. In March 1995, DIAND rejected the claim. In July 1995, the Moosomin First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim. The ICC held a community session in February 1996. The ICC granted Canada an extension of time for filing its submissions, but Canada subsequently advised that it had not formulated a position on the claim and would not be providing written or oral submissions. The First Nation filed written submissions in June 1996 and presented oral arguments, in the absence of Canada, in September 1996.

#### **BACKGROUND**

In 1881, 14,720 acres of agricultural land were surveyed as IR 112 for the Moosomin Indian Band, adherents to Treaty 6. In 1887, a further 1,280 acres of hay lands were surveyed as IR 112A, to be used jointly by the Moosomin and Thunderchild Bands. IR 112 and IR 112A were confirmed by Order in Council in 1889. In 1903, the Canadian Northern Railway line was built through the reserves and a station erected on IR 112.

The Band used the prime reserve land, located along the south bank of the North Saskatchewan River, for mixed farming, ranching, and timber; and transported produce to nearby markets by train. The Band of 137 people in 1909 was reported to be healthy, successful, and prosperous. Yet, pressure was building from settlers to open up some of the best reserve land for settlement. In 1902, there was a request to relocate the Moosomin and Thunderchild Bands to the other side of the North Saskatchewan River. Departmental officials initially resisted the pressure from settlers and politicians.

From the death of Chief Moosomin in 1902 until 1909, just after the surrender, the Moosomin Band was without a recognized Chief. Chief Moosomin's son wrote to the government in 1906 that the Band did not want to surrender the reserve and a poll of the voters confirmed this position. By 1907, however, Canada had instructed Indian Agent J.P.G. Day to commence talks with the Moosomin and Thunderchild Bands with a view to their surrendering their reserves in exchange for other lands. Rumours of surrender circulated, causing suspicion and resentment in the two bands. When Agent Day first met with the Bands in August 1907, they flatly rejected a surrender. Nothing further happened until 1908 when some members of the Thunderchild Band proposed a surrender of its reserves. Ultimately, Thunderchild Band agreed to a surrender, but Moosomin Band opposed surrender in separate meetings called for that purpose in August 1908. Agent Day was reprimanded for having obtained a surrender from only one of the two bands.

Subsequently, a letter of petition, purporting to represent the views of 22 Moosomin members, was written indicating a wish to surrender Moosomin's reserves. After a further discussion with the Indian Agent, a surrender meeting, at which IR 112 and IR 112A were purportedly surrendered, was held on May 7, 1909. The official record of this meeting is scanty, but Elders at the community session provided some evidence that many band members were unaware that a surrender was taking

place. The Band did not succeed on its new reserve, in large part because of the inferior land and the disruption caused by its relocation.

### ISSUES

Did the surrenders of IR 112 and IR 112A comply with the 1906 *Indian Act*? Did the Crown owe, and breach, any pre-surrender fiduciary duties to the Band? If the evidence is inconclusive, upon whom does the onus of proof rest?

### FINDINGS

The ICC is unable to reach a conclusion on the question whether the surrender provisions of the *Indian Act* were complied with, as the evidence, although it raised doubts about the validity of the surrender, is incomplete.

The Crown breached its pre-surrender fiduciary duty to the Band through tainted dealings. Notwithstanding the Band's repeated refusals to surrender the land, the department aggressively sought a surrender to serve the interests of settlers, clergy, speculators, and politicians. The department unduly influenced the Band's decision by pressuring or allowing others to pressure the Band, and by trying to insulate the Band from independent advice. In these circumstances, it would be unsafe to rely on the surrender as an expression of the Band's true understanding and intention.

The Band's decision-making autonomy was ceded for it by Crown officials, who exercised power and influence to obtain the desired surrenders. The Crown pressed for a surrender at a time when the Band had no recognized leader and was not allowed to elect a new Chief or seek independent advice.

The Crown is under a fiduciary duty to withhold its consent to a surrender, pursuant to the *Indian Act*, where a band's decision to surrender is foolish or improvident – a decision that constitutes exploitation: *Apsassin*. Here, the Band surrendered prime agricultural land on the North Saskatchewan River, where they were thriving economically and socially, in exchange for stony land to the north that led to many farming failures and a sense of dislocation. The surrender and relocation was clearly not in the Band's best interests.

The general principle on onus of proof is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations. The standard of proof is based on the civil standard, known as the balance of probabilities. The Specific Claims Policy also clearly states that the First Nation bears the burden of proof. The Moosomin First Nation has convincingly satisfied the burden of proof that the Crown breached its pre-surrender fiduciary duties. Although the evidence with respect to the allegation that the Crown breached the *Indian Act* surrender provisions is inconclusive, it is unnecessary to impose the onus of proof on either party in view of the Commission's findings on breach of fiduciary obligation.

### RECOMMENDATION

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

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1996] 2 CNLR 25 (SCC) (sub nom. *Apsassin*); *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Ont. Ct (Gen. Div.)), affirmed in *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1997), 31 OR (3d) 97 (CA); *Cardinal v. R.*, [1982] 1 SCR 508; *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 70 DLR (4th) 385 (SCC); *Quebec (Attorney-General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73 (TD); *Apsassin v. Canada*, [1993] 3 FC 28 (Fed. CA); *Norberg v. Wynrib*, [1992] 4 WWR 577 (SCC); *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); *Chippewas of Kettle and Stony Point v. Canada (Attorney General)* (1995) 24 OR (3d) 654 (Ont. Ct (Gen. Div.)); *Rex v. Findley*, [1944] 2 DLR 773 (BCCA).

### **ICC Reports Referred To**

*Cold Lake and Canoe Lake First Nations: Primrose Lake Air Weapons Range Inquiries* (Ottawa, August 1993), reported (1994) 1 ICCP 3; *Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

### **Treaties and Statutes Referred To**

*Royal Proclamation of 1763; Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1966); *An Act to Amend "The Indian Act, 1880,"* SC 1881; *Indian Act*, RSC 1906, as amended.

### **Other Sources Referred To**

DIAND, *Outstanding Business, A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994) 1 ICCP 17; 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); Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992); H.B. Hawthorn, C.S. Belshaw, and S.M. Jamieson, *The Indians of British Columbia: A Study of Contemporary Social Adjustment* (Toronto: University of Toronto Press, 1958); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989); Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990); J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991); John Leslie and Ron Maguire, eds., *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: DIAND, Treaties and Historical Research Branch, 1978); Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986); Pierre Berton, *The Promised Land* (Toronto: McClelland & Stewart, 1984).

### **COUNSEL, PARTIES, INTERVENORS**

D.J. Maddigan for the Moosomin First Nation; B. Becker for the Government of Canada; R.S. Maurice, K.N. Lickers to the Indian Claims Commission.

### **CANADA'S RESPONSE**

In December 1997, the Minister of Indian Affairs and Northern Development accepted the Moosomin claim for negotiation under the Specific Claims Policy: see (1998) 8 ICCP 373.

### **Update**

The parties negotiated a settlement of the claim with the assistance of the ICC's mediation services. The settlement was ratified by the Moosomin First Nation in September 2003: see *Moosomin First Nation: 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004).



# SUMMARY

## **MOOSOMIN FIRST NATION 1909 RESERVE LAND SURRENDER MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Moosomin First Nation: 1909 Reserve Land Surrender Mediation* (Ottawa, March 2004).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender; **Indian Act** – Surrender; **Fiduciary Duty** –Pre-surrender; **Evidence** – Onus of Proof; **Mandate of Indian Claims Commission** –Mediation; **Saskatchewan**

### **THE SPECIFIC CLAIM**

The Moosomin First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) in July 1986, alleging that the 1909 surrender of Indian Reserve (IR) 112 and IR 112A was invalid on the basis that the First Nation did not agree to the surrender and that the sale of the lands was not in its best interest. Canada agreed in 1993 to accept the claim for negotiation on the basis that Canada had breached only its post-surrender fiduciary obligations. In March 1995, Canada rejected the allegation that the surrender was invalid or that a pre-surrender fiduciary duty had been breached, whereupon the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the claim. In March 1997, the ICC released its report in which it concluded that Canada had breached its fiduciary obligations in securing the surrender, that the Band had ceded its decision-making autonomy, and that the Crown should have withheld its consent to the surrender. The ICC recommended that the claim be accepted for negotiation under the Specific Claims Policy.

In December 1997, Canada accepted the claim for negotiation of a settlement. For the first two years, the parties negotiated without the assistance of a neutral facilitator. After reaching an impasse on such questions as the applicability of Criteria 10 of the Specific Claims Policy, Canada's Additions to Reserve Policy, and how to measure the rate of development of the surrendered land, the parties requested that the ICC act as a facilitator for the negotiations.

### **BACKGROUND**

The background to this mediation may be found at Indian Claims Commission, *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

### **MATTERS FACILITATED**

The ICC chaired the negotiation sessions, kept a record of discussions, followed up on undertakings, managed the logistics for the meetings, mediated disputes, and coordinated the various land appraisals and loss-of-use and research studies undertaken by the parties.

### **OUTCOME**

The parties reached a tentative agreement in May 2002. The Moosomin First Nation ratified the settlement in September 2003, and the Settlement Agreement was implemented, providing \$41 million in compensation paid into a trust account set up for this purpose.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

**ICC Reports Referred To**

*Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

## SUMMARY

### **NAK'AZDLI FIRST NATION AHT-LEN-JEES INDIAN RESERVE 5 INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Nak'azdli First Nation: Aht-Len-Jees Indian Reserve 5 Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 81.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commissioner C.T. Corcoran, Commissioner A. Gill

**British Columbia** – Reserve Creation – Indian Reserve Commission – McKenna-McBride Commission – Ditchburn-Clark Review; **Reserve** – Reserve Creation – Surrender

#### **THE SPECIFIC CLAIM**

In June 1993, the Nak'azdli First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that Canada had failed to protect its interest in Aht-Len-Jees Indian Reserve (IR) 5 which, subsequent to its confirmation as a reserve by the McKenna-McBride Commission in 1916, was disallowed by the Ditchburn-Clark Commission and exchanged for Lot 4724 at the First Nation's request. Lot 4724 became Uzta (or Nahounli Creek) IR 7A by Order in Council. The claim was rejected by the Minister in May 1995 on the basis that it disclosed no outstanding lawful obligation of the federal government; in September 1995, the Indian Claims Commission (ICC) agreed to the First Nation's request that the Commission hold an inquiry into the rejected claim. Following a community session in November 1995, Canada offered to negotiate a settlement of the claim.

#### **BACKGROUND**

On September 30, 1892, Indian Reserve Commissioner Peter O'Reilly allotted seven reserves around Stuart Lake in central British Columbia to the 136-member Nak'azdli Indian Band. Together, these reserves represented 2,830 acres, or 20.8 acres per member. Generally, the reserves were "worthless, small portions only being suitable for cultivation, swamp from which hay can be obtained or fishing stations." Aht-Len-Jees IR 5 itself was a source of hay and some timber, but was not suitable for cultivation. In 1898, a second survey of IR 5 expanded its original 270 acres to 300 acres; in 1899, C.B. Semlin, British Columbia's Chief Commissioner of Lands and Works, and A.W. Vowell, the Indian Reserve Commissioner and Indian Superintendent for British Columbia, approved this reserve plan.

The establishment of the McKenna-McBride Commission in 1912 gave bands the opportunity to apply for additional lands. In June 1913, the McKenna-McBride Commission visited Fort St James, where the Commissioners heard from Chief Jimmy of the Nak'azdli Band, who confirmed the dire conditions on the Band's reserves and made application (Application 131) for additional lands which might be used to improve their situation. The Commission agreed to try to obtain a 240-acre lot to the west of the Band's Uzta IR 4. The Chief's testimony did not refer to reducing the size of Aht-Len-Jees IR 5 or alienating it from the Band in exchange for additional lands. The Commission's final report confirmed all seven pre-existing reserves at the acreage listed in the official "Schedule of Indian Reserves" for 1913; the report neither cut off acreage from nor added acreage to Aht-Len-Jees IR 5.

In 1920, W.E. Ditchburn and J.W. Clark were appointed as "representatives of the two governments ... for the purpose of adjusting, readjusting, confirming and generally reviewing" the report and recommendations of the McKenna-McBride Commission. The Ditchburn-Clark Review recommended many adjustments to the cut-offs and additions recommended by McKenna-McBride, including Application 131 of the Nak'azdli Band. Clark suggested that the Band surrender Aht-Len-Jees IR 5 to the provincial government, and that Lot 4724, adjacent to Uzta IR 4, become reserve land. Ditchburn did not oppose Clark's recommendation but suggested an exchange of the 300-acre Aht-Len-Jees IR 5 for 640 acres in Lot 4724 as reserve

land instead of a surrender. Canada did not take a formal surrender of Aht-Len-Jees IR 5; however, by provincial and federal Orders in Council in July 1923 and July 1924, respectively, the Ditchburn-Clark amendments to the McKenna-McBride Commission report were “approved and confirmed,” including those specifying the exchange of Aht-Len-Jees IR 5. Aht-Len-Jees IR 5 was thereby disallowed as an Indian reserve, and Lot 4724 became the Band’s new reserve of Uzta (or Nahounli Creek) IR 7A, both by federal Orders in Council.

**ISSUES**

Did Aht-Len-Jees IR 5 cease to be constituted as a “reserve” by virtue of its “disallowance” by Ditchburn and Clark, acting under the ostensible authority of the *British Columbia Land Settlement Act*?

**OUTCOME**

Following the community session, Canada reconsidered its position in light of the statements of the Elders, indicating that the request for an exchange of land relied upon by Ditchburn and Clark was false. The First Nation agreed to Canada’s offer to negotiate the Nak’azdli claim on a fast-track basis if the ICC inquiry were placed in abeyance: Canada’s offer of January 16, 1996, is reproduced at Appendix C of the report.

**References**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Treaties and Statutes Referred To**

British Columbia, Legislative Assembly, *Sessional Papers*, “Indian Affairs Settlement Act,” 1919; Canada, Parliament, *Sessional Papers*, “British Columbia Land Settlement Act,” 1920.

**OTHER SOURCES REFERRED TO**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted [1994] 1 ICCP 171; *Report of the Royal Commission on Indian Affairs for the Province of British Columbia* (Victoria, 1916).

**COUNSEL, PARTIES, INTERVENORS**

E. Woodhouse for the Nak’azdli First Nation; B. Becker, V. Cox for the Government of Canada; K. Fullerton, G. Christoff, K.N. Lickers to the Indian Claims Commission.

## SUMMARY

### **'NAMGIS FIRST NATION CORMORANT ISLAND INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *'Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commission Co-Chair D.J. Bellegarde, Commissioner A. Gill

**British Columbia** – Reserve Creation – Indian Reserve Commission – Trutch; **Fiduciary Duty** – Reserve Creation; **Reserve** – Allotment; **Specific Claims Policy** – Lawful Obligation – Scope – Fiduciary Duty – Order in Council

#### **THE SPECIFIC CLAIM**

In September 1987, the 'Namgis First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), contending that Canada had acted improperly in failing to refer the disallowance of the Indian Reserve Commissioner's allocations of reserve land to a judge of the British Columbia Supreme Court. Canada rejected the claim in April 1994; in March 1995, the Indian Claims Commission (ICC) agreed to the First Nation's request to hold an inquiry into the rejected claim. The community session was held in April 1995, and legal arguments based on written submissions were heard in September 1995.

#### **BACKGROUND**

The traditional territory of the 'Namgis First Nation (formerly Nimpkish Band) is on the northeastern coast of Vancouver Island and includes Cormorant Island, where the evidence shows that it had established a village and used the whole of the island for food, wood gathering, and burials. In 1870, a group of settlers obtained a renewable, 21-year lease covering the whole island. From 1878 to 1880, G.M. Sproat was the sole Indian Reserve Commissioner for British Columbia. After visiting the area in 1879, Sproat alerted the BC and federal governments about the lease, advising that the land not be alienated by the BC government. Sproat then allotted all of the 1,500-acre Cormorant Island to the Nimpkish Indians except for 160 acres that the Reverend Mr Hall had requested for a mission. The allotment was subject to the conditions of the lease.

One year later one of the lessees, Mr Huson, who had bought out his partners, requested either a free Crown grant of 160 acres (the lease to be terminated and the remainder of the island to be an Indian reserve) or the cancellation of Sproat's reserve allotment. British Columbia declined Huson's request for a Crown grant and proceeded to cancel Sproat's allotment of Cormorant Island, claiming that he had exceeded his mandate by visiting the coastal area, accepting Hall's request, and ignoring the terms of the lease. The federal Indian Superintendent for British Columbia was instructed by his superiors to obtain the opinion of J.W. Trutch, a confidential agent to Prime Minister John A. Macdonald. Trutch found that it was in the discretion of the BC government to cancel the lease with notice, if it was in the public interest and compensation was paid to the lessee. Trutch termed the allotment "an unauthorized appropriation of Cormorant Island as an Indian Reservation."

In 1884, the lease was transferred to two men who wished to operate a cannery. Federal officials were concerned about the transfer of the lease, given the Nimpkish claim to the island, but the province refused to cancel it. The new Indian Reserve Commissioner Peter O'Reilly visited Cormorant Island the same year and, after obtaining the support of the lessee, set out two reserves, 46.25 acres at Alert Bay and 1.87 acres containing a burial ground. In 1886, O'Reilly set out three additional reserves on the Nimpkish River. All five reserves were approved by British Columbia and Canada.

## ISSUES

Did Canada have an obligation, pursuant to the Order in Council appointing Indian Reserve Commissioner Sproat, to refer the rejection of his allotment of Cormorant Island to a judge of the BC Supreme Court? Did Canada have a fiduciary obligation to refer the rejected allotment of Cormorant Island to a judge of the BC Supreme Court? If Canada had a fiduciary obligation, did it fulfill its obligation by asking Mr Trutch to provide an opinion? If a judge had reviewed the rejection of the allotment of Cormorant Island, would the allotment have been upheld? Does this claim fall within the Specific Claims Policy?

## FINDINGS

Order in Council 170 appointing Indian Reserve Commissioner Sproat provides that, in the event of any difference between Sproat and the BC Commissioner of Lands, “the matter [is] to be referred” to a judge of the Supreme Court. Order in Council 170 also incorporates an 1877 Order in Council that states that the matter “might be referred” to a judge. A third provincial Order in Council states that any differences “could be referred” to a judge. Given the underlying objective of the reserve commission process – the speedy and final adjustment of the BC reserve question – the word “might” should be construed as mandatory, not discretionary. As there was a clear difference between Sproat and the Commissioner of Lands regarding the allotment of Cormorant Island, Canada had a mandatory duty to refer the rejection of Sproat’s allotment to a judge.

Canada also had a fiduciary duty to refer the difference between Sproat and the Commissioner of Lands to a judge of the Supreme Court. Canada had the unilateral discretion to take this action, and the exercise of this discretion had the capacity to affect the extent and locality of the claimant’s legal and practical interests in Cormorant Island. The claimant itself was thus vulnerable to the exercise of Canada’s discretion.

Canada did not fulfill its obligation by asking Mr Trutch to review the matter and provide an opinion. Both parties had chosen to refer differences to a judge, not to a person chosen unilaterally by Canada. In any event, it was imprudent to ask Trutch for an opinion when he had been Chief Commissioner of Lands at the time that the lease was signed. Canada also had evidence that, contrary to Trutch’s opinion, the lease was not an insurmountable problem.

If a judge of the Supreme Court had reviewed the matter, the evidence shows that Canada might have succeeded in having Sproat’s allotment upheld or in obtaining a larger portion of land.

The four enumerated circumstances under “Lawful Obligation” in the Specific Claims Policy are examples only and are not intended to be exhaustive. A breach of fiduciary obligation should be included in the category of “Lawful Obligation,” because the Policy was written two years before the *Guerin* decision on the fiduciary relationship. Moreover, the second enumerated circumstance, “breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians,” should be broad enough to include orders in council of the type at issue in this claim. It may be correct that orders in council arise from an exercise of the Royal Prerogative; however, at times they have been granted the same status as statutes. Since Canada had a mandatory duty pursuant to Order in Council 170 to refer differences to a judge, its failure to do so was a breach of an obligation arising out of a statute pertaining to Indians under the Policy.

## RECOMMENDATION

That the claim of the ’Namgis First Nation with respect to Cormorant Island be accepted for negotiation under the Specific Claims Policy.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

## Cases Referred To

Julius v. Lord Bishop of Oxford (1880), 5 App. Cas. 214 (HL); *Re Shaughnessy Golf and Country Club* (1967), 61 DLR (2d) 245 (BCSC); *Guerin v. R.* (1984), 13 DLR (4th) 321 (SCC); *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); *M.(K.) v. M.(H.)* (1992), 14 CCLT (2d) 1 (SCC); *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 DLR (4th) 197 (SCC).

### **ICC Reports Referred To**

*Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89; *Joseph Bighead, Buffalo River, Waterhen Lake, and Flying Dust First Nations: Primrose Lake Air Weapons Range Report II Inquiries* (Ottawa, September 1995), reported (1996) 4 ICCP 47.

### **Treaties and Statutes Referred To**

*Terms of Union, 1871*, RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994); *Land Act, 1875*, SBC 1875, No. 5.

### **Other Sources Referred To**

(DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; Robert Galois, *Kwakwaka'wakw Settlements, 1775–1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994); Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing, 1972); Robin Fisher, *Contact and Conflict*, 2nd ed. (Vancouver: UBC Press, 1992); R. Dussault and L. Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1985).

### **COUNSEL, PARTIES, INTERVENORS**

S.H. Ashcroft for the 'Namgis First Nation; B. Becker, R. Schipizky for the Government of Canada; K. Fullerton, I. Gros-Louis Ahenakew, D. Jordan to the Indian Claims Commission.

### **Canada's Response**

In May 2001, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation: see (2001) 14 ICCP 281.



## SUMMARY

### **'NAMGIS FIRST NATION MCKENNA-MCBRIDE APPLICATIONS INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *'Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commission Co-Chair D.J. Bellegarde, Commissioner A. Gill

**British Columbia** – Reserve Creation – McKenna-McBride Commission; **Fiduciary Duty** – Indian Settlement – Reserve Creation – Consultation; **Reserve** – Reserve Creation; **Specific Claims Policy** – Lawful Obligation – Scope – Fiduciary Duty; **Culture and Religion** – Potlatch

#### **THE SPECIFIC CLAIM**

The 'Namgis First Nation's specific claim, submitted in September 1987 to the Department of Indian Affairs and Northern Development (DIAND), was rejected in February 1994; in March 1995, at the First Nation's request, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim. The community session was held in April 1995, and the oral hearing, based on written submissions, took place in September 1995. Because of community evidence that the Indian Agent's actions may have been influenced by his opposition to the potlatch, Appendix B to the report reproduces a brief document, "The Potlatch and Indian Agent Halliday."

#### **BACKGROUND**

The 1912 Royal Commission on Indian Affairs for the Province of British Columbia (McKenna-McBride Commission), made up of federal and BC Commissioners, travelled throughout the province to meet with tribes and bands for the purpose of recommending adjustments to the acreage of Indian reserves. In June 1914, this Commission met with representatives of the principal tribes of the Kwawkwalth Nation in northeastern Vancouver Island. The Commission, however, realized that the tribes were not adequately prepared for the meeting, noting that Indian Agent W.M. Halliday had failed to distribute to the Chiefs the plans of their lands prior to the meeting. When the Commission met with the Nimpkish Band, now the 'Namgis First Nation, the Band put forward seven applications (later numbered 72 through 78) for additional reserve land. Three of them are at issue here: Application 73 for 100 acres at Woss; Application 76 for three large islands in the Plumper Island group; and Application 77 for all the islands in the Pearse Island group.

Later in June, Indian Agent Halliday met separately with the Commission to recommend additional lands for the Nimpkish Band that varied somewhat from the Band's request. Surveyor Ashdown Green also submitted a report on the details of the Plumper and Pearse Island groups. In 1915, however, the Commission learned that most of the land requested by the Kwawkwalth tribes was alienated and, therefore, asked Agent Halliday to reconsider his recommendations. Agent Halliday recommended that, since Application 72 had been rejected, the Nimpkish be given all of the Pearse Islands except the large island to the southwest. The Commission's final report in June 1916 allowed Applications 76 and 77 in part, and ordered the creation of two new reserves for the Nimpkish, an island of 70 acres in the Plumper group and an island of 60 acres in the Pearse group. Application 73 at Woss was rejected as not being reasonably required.

#### **ISSUES**

Did the Indian Agent owe a fiduciary duty to the Band regarding his recommendations to the McKenna-McBride Commission in relation to Applications 73, 76, and 77 for additional reserve land? Did the Commission or its agent Ashdown Green owe a

fiduciary duty to the Band in relation to the investigations into these applications? Does this claim fit within the Specific Claims Policy?

### FINDINGS

The Band would have a valid specific claim if it could establish a prima facie case that the Indian Agent failed to prepare the Band for the McKenna-McBride process, that unalienated lands were available which the Band could have applied for, and that the lands were reasonably required by the Band. The Indian Agent breached a fiduciary duty prior to the McKenna-McBride hearings to prepare the Band for this process by providing basic information and advice. Additional lands were also reasonably required by the Band; however, it is unclear that unalienated lands were available in 1914 that the Band could have applied for. Thus, the Band has not established a prima facie case on this basis.

In considering fiduciary duty during the McKenna-McBride hearings, the Band would have a valid specific claim if the relevant lands were unalienated, and the Band could establish a prima facie case that a reasonable person acting in good faith would have provided a different recommendation than that provided by the Indian Agent had that person consulted with the Band and investigated appropriately. In this regard, Agent Halliday breached the fiduciary duty to provide reasonable and well-informed recommendations to the Commission. A reasonable person acting in good faith would have consulted with the Band and, as a result, would have recommended reserve status for all the islands requested (Applications 76 and 77) because of their importance to the Band and their use. In addition, all the lands in Application 76 were available, but the Band has not provided sufficient evidence to show that the lands sought in Application 77 were unalienated. With respect to Application 73, although the Chief stated that the old village site around Woss site had not been used for several years, it was important for food gathering, trade, and 'Namgis culture. A reasonable person would have recommended Application 73 at Woss in addition to, or in the alternative to, Application 72, since it was doubtful that the Commission would have allotted Application 72 lands which were subject to a timber limit. However, the evidence is unclear that the Application 73 lands were unalienated.

Following the McKenna-McBride hearings, Agent Halliday had a continuing fiduciary duty to provide reasonable and well-informed recommendations to the Commission when he later provided to them his revised recommendations. He knew then that the Commission was unwilling or unable to allot the Application 72 lands, yet he believed that the Band needed room for expansion. Agent Halliday's revised recommendations should have included all or most of Applications 73, 76, and 77, depending on the total acreage of the island groups. It should be presumed that the Band has a valid specific claim with respect to Application 76 because the lands were available. The same should be presumed with respect to Applications 73 and 77, if the Band can show that they were unalienated.

Given the finding that Agent Halliday breached his fiduciary duty, it is unnecessary to consider whether his strict enforcement of the potlatch law had a direct bearing on the McKenna-McBride hearings.

The McKenna-McBride Commission was a commission of inquiry set up under the *Inquiries Act*. Although not a court or a quasi-judicial tribunal, the Commission was an independent body. Such bodies should not have their independence compromised by imposing on them fiduciary obligations: *Quebec (A.-G.) v. Canada (National Energy Board)*. Accordingly, the Commission and its agent, Ashdown Green, did not owe a fiduciary duty to the Band.

The Specific Claims Policy sets out four circumstances of "lawful obligation"; however, they are only examples of Canada's lawful obligations and are not intended to be exhaustive. Canada's fiduciary obligations are "lawful obligations" within the meaning of the Policy. The claim falls within the Specific Claims Policy if it is based on a cause of action recognized by the courts, if it is not based on unextinguished Aboriginal rights or title, and if it alleges a breach of a legal or equitable obligation that gives rise to a claim for compensation or other relief within the contemplation of the Policy. Given the finding that Agent Halliday breached his fiduciary obligation to the Band, this claim fits within the Policy.

### RECOMMENDATIONS

That the McKenna-McBride Applications Claim of the 'Namgis First Nation, with respect to lands included in Application 76 only, be accepted for negotiation under the Specific Claims Policy.

That the 'Namgis First Nation's claims related to Applications 73 and 77 not be accepted for negotiation under the Specific Claims Policy.

That the 'Namgis First Nation and Canada conduct further research to determine whether there were unalienated lands available which the Band could have applied for during the 1914 McKenna-McBride hearings. Specific research should

also be conducted with respect to lands included in Applications 73 and 77 to determine whether such lands were unalienated and available. At the request of the parties, the Commission is willing to offer its assistance in the completion of additional research.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Delgamuukw v. British Columbia*, [1991] 3 WWR 97 (BCSC), rev'd [1993] 5 WWR 97 (BCCA); *Ryan v. British Columbia (Ministry of Forests – District Manager)*, [1994] BCJ No. 2642 (SC); *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC); *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (FCA); *R. v. Sparrow* (1990), 70 DLR (4th) 385 (SCC); *Apsassin v. Canada (Department of Indian Affairs and Northern Development)* (1993), 100 DLR (4th) 504 (FCA); *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC); *Quebec (A.-G.) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC).

### ICC Reports Referred To

*'Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3.

### Treaties and Statutes Referred To

*Constitution Act, 1867*; *Terms of Union, 1871*, RSC 1985; *Indian Affairs Settlement Act*, SBC 1919; *The British Columbia Indian Lands Settlement Act*, SC 1920.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) reprinted (1994) 1 ICCP 171; Robert Galois, *Kwakwaka'wakw Settlements, 1775–1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994); Robin Fisher, *Contact and Conflict*, 2nd ed. (Vancouver: UBC Press, 1992); Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing, 1972); Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871–1913* (Vancouver: UBC Press, 1974); E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986); Frank Iacobucci, QC, “Commissions of Inquiry and Public Policy in Canada,” in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990); Russell J. Anthony and Alastair R. Lucas, *A Handbook on the Conduct of Public Inquiries in Canada* (Toronto: Butterworths, 1985); Gordon F. Henderson, QC, “Abuse of Power by Royal Commissions,” in Special Lectures of the Law Society of Upper Canada, *The Abuse of Power and the Role of an Independent Judicial System in its Regulation and Control* (Toronto: Richard De Boo Ltd, 1979); A. Wayne MacKay, “Mandates, Legal Foundations, Powers and Conduct of Commissions of Inquiry,” in A. Paul Pross, Innis Christie, and John A. Yogis, eds., *Commissions of Inquiry* (Toronto: Carswell, 1990); Gerald E. Le Dain, “The Role of the Public Inquiry in Our Constitutional System,” in Jacob S. Ziegel, ed., *Law and Social Change* (Toronto: Osgoode Hall Law School, 1973); *Potlatch: A Strict Law Bids Us Dance*, 1975 (video produced by U'mista Cultural Centre); W.M. Halliday, *Potlatch and Totem and the Recollections of an Indian Agent* (Toronto: J.M. Dent and Sons, 1935); Douglas Cole and Ira Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990).

### COUNSEL, PARTIES, INTERVENORS

S.H. Ashcroft for the 'Namgis First Nation; B. Becker, R. Schipizky for the Government of Canada; R.S. Maurice, K. Fullerton, I. Gros-Louis Ahenakew to the Indian Claims Commission.

**CANADA'S RESPONSE**

In December 1999, the Minister of Indian Affairs and Northern Development rejected the ICC's recommendation to accept the claim for negotiation: see (2000)12 ICCP 395.

# SUMMARY

## NEKANEET FIRST NATION AGRICULTURAL AND OTHER BENEFITS UNDER TREATY 4 INQUIRY Saskatchewan

The report may be cited as Indian Claims Commission, *Nekaneet First Nation: Agricultural and Other Benefits under Treaty 4 Inquiry* (Ottawa, March 1999), reported (1999) 11 ICCP 91.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Treaty Right** – Agricultural Benefits – Economic Benefits – Reserve; **Mandate of Indian Claims Commission** – Delay – Constructive Rejection – Mediation; **Saskatchewan**

### THE SPECIFIC CLAIM

In February 1987, the Nekaneet First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), seeking compensation under Treaty 4 for outstanding provisions of agricultural and other benefits, and for failing to provide a reserve at the time of the treaty's signing in 1874. After nine years without a response from Canada, the First Nation requested an inquiry into its claim by the Indian Claims Commission (ICC), on the basis that Canada's failure to respond was tantamount to a rejection of the claim. The department took the initial position that the claim continued to be under review and had not been rejected; however, it committed to provide a response by May 1997. With the consent of the parties, the ICC agreed to act as facilitator on the claim. In August 1997, the department provided its preliminary position, rejecting the claim except for the entitlement to receive farming and agricultural implements, which would be subject to additional research. In November 1997, the ICC commenced the inquiry process and requested additional research.

### BACKGROUND

Ne-can-ete (Foremost Man) and his followers were the ancestors of the Nekaneet First Nation. Ne-can-ete's name appears on the 1875 and 1876 Treaty 4 paylists for the Kahkewistahaw Band, and he and his followers were given annuity payments in 1881 and 1882. The First Nation claimed, however, that Ne-can-ete was not at Fort Qu'Appelle when the treaty was signed in 1874, was not a member of the Kahkewistahaw Band, and was instead living at Cypress Hills.

In 1882, Canada established a policy whereby only those bands that left the Cypress Hills and settled on reserves farther north would receive their treaty benefits. Ne-can-ete and his followers refused to relocate north, taking the position that Canada had given them a reserve near Maple Creek in 1881. Thus, from 1882 to 1975 the Nekaneet Band received no annuity payments.

Until 1913, Canada denied that the Band had a reserve, but in that year set aside a reserve of 1,440 acres for this "band of Indians living in the vicinity of Maple Creek." The Chief Inspector of Indian Agencies recommended that a farm instructor be stationed on the reserve but the department declined. The Nekaneet Band made two requests in 1914 for assistance because they were destitute. The Inspector, however, advised against rations and against attempts to help the Indians start farming, believing that their land was unsuitable for agriculture. The evidence showed, however, that some farming was taking place. Canada repeatedly recommended relocating the Band because of the unsuitability of the land, but the Band consistently refused.

In 1958, additional lands suitable for crop growing were set aside as reserve lands adjacent to the reserve, and funding was provided for farming equipment and livestock. The evidence regarding the subsequent decades is incomplete; however, it indicates that the Band was successful in raising cattle. In 1961, the Band requested but did not receive horses, nor had it ever received hunting and fishing supplies pursuant to the treaty. After 1975, Canada paid the Band treaty annuities and, in 1981, reported that the Band was entitled to Treaty 4 benefits.

### **ISSUES**

Was there an outstanding lawful obligation by Canada, pursuant to Treaty 4, to provide agricultural, economic, and other benefits to the First Nation? Did Canada breach a lawful obligation to the First Nation by failing to establish a reserve until 1913? In particular, did the First Nation exist as a Band separate from the Kahkewistahaw in 1874, thereby entitling the Nekaneet to treaty land and other benefits? Did the Nekaneet take up agriculture, thereby entitling them to treaty agricultural benefits?

### **OUTCOME**

In October 1998, during the inquiry process, Canada offered to accept the First Nation's claim to agricultural benefits under Treaty 4 and to negotiate ammunition and twine benefits. As a result, the Commission suspended the inquiry, made no findings on the merits or on the question of its mandate to conduct the inquiry, and made no recommendations.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

#### **Cases Referred To**

*Guerin v. The Queen*, [1984] 2 SCR 355.

#### **ICC Reports Referred To**

*Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Kahkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21.

#### **Treaties and Statutes Referred To**

"The Qu'Appelle Treaty, Number Four," September 15, 1874, reprinted in A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979); A.E. St. Louis, "Stragglers of Cypress Hills and Vicinity," nd [c. 1945] (Specific Claims Branch Report, Appendix A, doc. 191).

#### **Other Sources Referred To**

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

#### **COUNSEL, PARTIES, INTERVENORS**

T.J. Waller, QC for the Nekaneet First Nation; P. Rowe for the Government of Canada; D.E. Osborn, QC, K.N. Lickers to the Indian Claims Commission.

## SUMMARY

### **OPASKWAYAK CREE NATION STREETS AND LANES INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Opaskwayak Cree Nation: Streets and Lanes Inquiry* (Ottawa, February 2007).

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

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman, Commissioner S.G. Purdy

**Treaties** – Treaty 5 (1876); **Reserve** – Proceeds of Sale – Streets and Lanes; **Compensation** – Damages; **Band** – Trust Fund; **Manitoba**

#### **THE SPECIFIC CLAIMS**

In September 1976, The Pas Band (now the Opaskwayak Cree Nation) submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that the streets and lanes delineated in the subdivision of land surrendered in 1906 from Indian Reserve (IR) 21A to establish The Pas townsite had been alienated without adequate compensation. The claim also alleged improper use of \$2,000 of the Band's capital funds to clear trees and brush from the streets and lanes in the surveyed subdivision. The claim was rejected by the Minister of Indian Affairs in June 1977, and the rejection was confirmed in June 1978. The portion of the claim relating to the use of band funds for clearing the streets and lanes was rewritten and submitted by the First Nation in May 1986. The claim was again rejected by DIAND in 1994. In June 2002, the Opaskwayak Cree Nation asked the Indian Claims Commission (ICC) to conduct inquiries into the two claims and, in September 2002, the ICC notified the First Nation and Canada of its intention to conduct an inquiry. A planning conference was held in December 2002, after which Canada conducted new research into both claims. As a result of the new facts established in that research, the Opaskwayak Cree Nation acknowledged that there was no basis for either specific claim and withdrew the two claims from the ICC inquiry.

#### **BACKGROUND**

In August 1906, The Pas Band surrendered 500 acres in IR 21A to the Crown for railway and townsite purposes. The land was subdivided into lots to create the townsite of The Pas, and the lots were sold at public auction. Some of the streets and lanes were cleared of trees and brush in 1912 to enhance the value of the adjacent lots. A Band Council Resolution and an order in council authorized the use of \$2000 of the Band's funds to defray the costs of this clearing, but, as research conducted during the ICC inquiry demonstrated, no band funds were actually used for this purpose. The streets and lanes shown in the subdivision survey were transferred to the town of The Pas by order in council in September 1916. Research conducted during the ICC inquiry concluded that compensation would not normally be paid for streets and lanes and that no compensation was owing to the Opaskwayak Cree Nation.

#### **ISSUES**

Was there an expenditure of \$2000 from the Band's capital account used to clear the lands comprising streets and lanes? Did Canada permit or cause the streets and lanes to be alienated without adequate compensation?

#### **OUTCOME**

The ICC made no findings. Prior to the completion of the inquiries, the two specific claims were withdrawn by the Opaskwayak Cree Nation when supplementary research conducted in the course of the inquiry effectively removed the basis for the claims.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Treaties and Statutes Referred To**

*Treaty 5* (1876); *Indian Act*, RSC 1906, c. 81; *The Manitoba Boundaries Extension Act, SC 1912, c. 32*; *An Act to provide for the Further Extension of the Boundaries of the Province of Manitoba*, SM 1912, c. 6; *An Act to incorporate The Town of The Pas*, SM 1912, c. 93; *Dominion Lands Act*, RSC 1906, c. 55; *Land Titles Act*, RSC 1906, c. 110; *Manitoba Supplementary Provisions Act*, RSC 1906, c. 99; *The Municipal Act*, RSM 1902, c. 116.

**Other Sources Referred To**

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

**Counsel, Parties, Intervenors**

P.B. Forsyth for Opaskwayak Cree Nation; V. Russell for the Government of Canada; J.B. Edmond to the Indian Claims Commission.

# SUMMARY

## **PAUL FIRST NATION KAPASIWIN TOWNSITE INQUIRY Alberta**

The report may be cited as Indian Claims Commission, *Paul First Nation: Kapasiwin Townsite Inquiry* (Ottawa, February 2007).

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

**Panel:** Commissioner D.J. Bellegarde (Chair), Commissioner A.C. Holman, Commissioner S.G. Purdy

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender – Disposition; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender – Post-surrender – Minerals; **Compensation** – Criteria; **Alberta**

### **THE SPECIFIC CLAIM**

The Paul First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) on June 4, 1996, alleging mismanagement of the sales of the surrendered lands. This claim was partly validated and accepted for negotiation on July 10, 1998. Negotiations subsequently broke down, and the First Nation asked the Indian Claims Commission (ICC) to hold an inquiry into compensation criteria. The Commission agreed to conduct an inquiry into compensation criteria as well as the rejected aspects of the claim in October 2001.

On June 2, 2000, the First Nation submitted another claim for the same lands, challenging the validity of the 1906 surrender. Canada rejected that claim in July 2003, on the grounds that it did not reveal a lawful obligation on the part of the Crown to the First Nation. At the request of the First Nation, the ICC agreed to incorporate the surrender claim into the ongoing inquiry.

### **BACKGROUND**

The ancestors of the Paul First Nation adhered to Treaty 6 at Edmonton in 1877, when Chief Alexis signed the adhesion. About half his band lived at Wabamun, on the east shores of White Whale Lake, under the leadership of Headman Ironhead. Eventually, the department recognized this group of Stoney people as a separate band, and after Peter Ironhead's death in 1887, Paul assumed leadership and the Band became known as Paul's Band. In 1890, the Sharphead Band surrendered its reserve, and about 70 members of the Sharphead Band went to live with the Paul Band.

Two reserves were surveyed for the Band on the shores of White Whale Lake: Indian Reserve (IR) 133A and IR 133B. IR 133B, which was the much smaller of the two, was the Band's primary fishing station, with access to both the lake and Moonlight Bay. The Band also used a wagon trail through IR 133B, as a way of travelling north to Ste Anne. Chief Paul remained as Chief until 1901, when he was deposed by the department. The Band remained without a Chief until May 1906, when David Bird became Chief.

The reserves were a short distance from Edmonton and had been noted for their fine sand beaches. In addition, there was a marl deposit on IR 133A. On June 20, 1906, the band members voted to surrender the marl deposit, to be leased for their benefit.

In late 1905, it became obvious that the Canadian Northern Railway (CNR) was approaching from Edmonton and would likely pass through the Paul Band Reserves. The department advised the railway that it could not enter the reserve until it had received permission and had paid for both the right of way and any other damage that the band members would suffer.

There was also interest in IR 133B from local real estate companies because of the fine sand beaches. Shortly after the marl surrender, the Agent reported that he had been asked by the band members about the advisability of surrendering IR 133B. James Gibbons held a meeting of the band and determined that it was willing to grant the surrender, for the purpose of establishing a railway townsite or a resort community. On September 11, 1906, the Paul Band voted to surrender IR 133B.

There are 10 names on the surrender document; it is fairly certain that nine voted in favour of the surrender, with one opposed. Two days later, on September 13, 1906, Chief David Bird and Indian Agent Gibbons swore the Affidavit of Surrender. One of the oral terms of the surrender, as reported by the Surveyor, J.K. McLean, was that the fine sand beach was to be reserved from sale.

A lengthy correspondence between the department and the CNR began, with Crown officials asking repeatedly for assurances from the railway that it would build a railway station on the surrendered lands. The CNR had not yet received permission from the Railway Commission for its right of way, but indicated that as soon as it had permission it would take up the matter of the station. In the meantime, it asked the department to reserve lands from sale, both for the right of way and for a station.

In 1908, the Grand Trunk Pacific Railway (GTPR) received permission for a right of way through the Paul Band's IR 133A and through the surrendered lands. However, the GTPR did not consider building a station on the surrendered lands, sometimes known as the Kapasiwin Townsite, because, it claimed, the grade was too steep. It located a station about a mile west of the surrendered lands, across the narrows that connected Moonlight Bay to White Whale Lake. The GTPR did eventually build a summer station.

The Crown held the first sale of lots in May 1910, after the GTPR had built its rail line. The CNR asked that a block of land be reserved from sale for a possible station. Forty-two lots of a total of 161 sold, all at or slightly above the upset price.

In July 1911, the CNR acknowledged that the Railway Commission had refused permission for its proposed rail line. The CNR line was moved to the north.

The second sale of lots was held in June 1912, at the same time as the Crown was selling lots from the Paul Band's surrender of a portion of land at and near the Duffield townsite on the much larger IR 133A. The Crown put up 357 lots at Wabamun; 49 lots sold, again at or above the upset prices. Several of the sales were later cancelled because the buyers failed to make the required payments.

In 1913, Alberta incorporated the Village of Wabamun Beach, later renamed Kapasiwin. In 1931, the village council wrote to the Department of Indian Affairs and requested that the department transfer the streets and lanes within the village to the Province of Alberta. Included within that transfer, in 1932, was Wapumeg Avenue, which had been surveyed between the beach and the beachfront lots, and the beach itself. The village then applied to the province for the closure of Wapumeg Avenue. The province did as requested, and at the same time granted an easement to each beach owner of all the land between the owner's lot and the water's edge, effectively preventing public access to the beach.

From 1912 to 1936, the Crown did not sell any more of the surrendered lands, and in 1936 returned all the land east of Burntstick Avenue to reserve status. During the 1950s, there were sporadic sales of lots west of Burntstick Avenue; some surrendered lands are still unsold.

The transfer of the road allowances and the subsequent transfer of the beach are part of the accepted claim for negotiation, as is the Crown's management of land sales from 1912 to 1936, and are not a part of this inquiry.

## ISSUES

Was the surrender of IR 133B void for not having included an oral term regarding the beach? Did the surrender meet the requirements of the *Indian Act*? Was there a breach of the Crown's fiduciary duty with regard to the surrender, both in failing to meet the requirements and in a failure to follow its own policy? Did the Crown fail to reserve the mines and minerals underlying IR 133B from sale? Did the Crown properly manage the sales of the lots on IR 133B, particularly with regard to the establishment of a railway station? What are the proper compensation criteria?

## FINDINGS

The panel finds that the surrender of IR 133B was valid, in that it met the terms of the *Indian Act*. The panel concludes that, although the documentation of the vote was minimal, the circumstances show there was the required majority of a majority of eligible electors, called at a meeting for the purpose of surrender, and that the vote met the test as set out in *Cardinal*. The panel also finds that there was no breach of fiduciary duty on the part of the Crown in the taking of the surrender. With regard to the Band's access to the beach, the panel concludes that the oral term regarding the reservation of the beach was a reservation from sale, not from surrender, and that it had been incorporated into the surrender and respected by the Crown until 1932.

The panel finds that there had been no failure on the part of the Crown to follow its own policy regarding surrenders, as there was no written policy in place at the time.

The panel concludes that the Band had intended to surrender the mines and minerals, and that the surrender met the test set out in *Apsassin*, whereby a surrender includes all interests in land unless there is a specific exclusion.

The panel finds that the Band had been well informed about the potential of the surrendered lands for use either as a resort community or as a railway station, and that, although both the Band and the Crown did what it could to encourage the railway to build a station, the fact that it did not happen was not a breach of fiduciary duty on the part of the Crown.

The panel finds that there was no breach of fiduciary duty by the Crown in its management of the lot sales between 1906 and 1912; that it did what a reasonable, prudent fiduciary would do in the circumstances; and that it acted in what it reasonably concluded were the best interests of the Band in the management of the sale.

With regard to compensation criteria, although the claim was accepted initially on that basis, the parties did not provide sufficient legal argument that would have allowed consideration of this issue in this inquiry.

#### **RECOMMENDATION**

That the claim of the Paul First Nation regarding the surrender of IR 133B and the mismanagement of sales of IR 133B from 1906 to 1912 not be accepted for negotiation under Canada's Specific Claims Policy.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*Chippewas of Sarnia v. Canada (Attorney General)*, [2000] 51 OR (3d) 641 (CA); *Chippewas of Kettle and Stony Point v. Attorney General of Canada* (1995), 25 OR (3d) 654 (CA); *Enoch Band of Stony Plain Indian Reserve No. 135 v. Canada*, [1982] 1 SCR 508 (sub nom. *Cardinal*); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Guerin v. The Queen*, [1984] 2 SCR 335; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

#### **ICC Reports Referred To**

*Kabkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Duncan's First Nation Inquiry, 1928 Surrender Claim* (Ottawa, September 1999), reported (2000) 12 ICCP 53; *Moosomin First Nation: 1909 Reserve Land Surrender* (Ottawa, March 1997), reported (1998) 8 ICCP 101.

#### **Treaties and Statutes Referred To**

*Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carleton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1966); *Indian Act*, RSC 1886, c. 43.

#### **Other Sources Referred To**

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

#### **COUNSEL, PARTIES, INTERVENORS**

R. Jeerakathil for the Paul First Nation; D. Faulkner for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.



## SUMMARY

### **PEGUIS FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Peguis First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 2001), reported (2001) 14 ICCP 183.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commission Co-Chair D.J. Bellegarde, Commission Co-Chair P.E.J. Prentice, QC

**Treaties** – Treaty 1 (1871); **Treaty Land Entitlement** – Date of First Survey; **Reserve** – Surrender; **Manitoba**

#### **THE SPECIFIC CLAIM**

In November 1983, the Peguis First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the lands set aside as St Peter's Indian Reserve (IR) 1 were insufficient and did not fulfill the Band's treaty land entitlement (TLE) pursuant to Treaty 1. In July 1991, DIAND informed the First Nation that the federal government's position was that the reserve set aside for the Band after the 1907 surrender of St Peter's Reserve was intended to and did satisfy the Band's entitlement. The claim was resubmitted in March 1992 but was again rejected. The First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejected claim, and, in September 1994, the ICC agreed to the request. After several planning conferences and further research, Canada advised the First Nation in June 1998 that its TLE claim had been accepted for negotiation.

#### **BACKGROUND**

Chief Peguis and his followers migrated west and established a permanent settlement on the banks of the Red River sometime after 1790. In 1810, the Earl of Selkirk, who was a major shareholder in the Hudson's Bay Company (HBC), launched a plan to resettle dispossessed Scottish tenant farmers in the Red River area. In 1811, the first Selkirk settlers established an agricultural colony on land formerly owned by the HBC, a few miles upstream from Peguis's settlement. As the result of friction between the settlers and the rival North West Company (NWC), the Earl of Selkirk entered into an agreement in 1817 with Chief Peguis and other chiefs whereby 300,000 square kilometres of land were granted to the Crown for the use of the colony. When Chief Peguis expressed concern over loss of access to the river, he got back some lands along the Red River.

In 1821, the HBC and NWC merged and peace was restored to the colony. By the mid-19th century, several thousand Métis had settled on narrow river lots within the settlement, called ecclesiastical parishes. One parish, St Peter's, was located on the "Indian Settlement" lands occupied by Peguis and his followers

In 1836, the Earl of Selkirk's heirs reconveyed the settlement to the HBC, who in turn conveyed title to individual lots by way of long-term leases. The Métis settlers, however, protested having to pay for the land they occupied. As a result, the HBC backed down and permitted occupiers of lots to remain undisturbed. In 1860, Chief Peguis also asserted the right to sell river lots within the "Indian Settlement." By 1870, when Manitoba entered Confederation, St Peter's Parish was occupied by white and Métis settlers who had purchased land from Chief Peguis. Some of his followers had also acquired land for their own use. Treaty 1, signed with the Peguis Band on August 3, 1871, promised to set aside reserve lands. Certain promises not written into the treaty, or "outside promises," were also made that would allow Peguis members to retain ownership of their river lots. Some Peguis band members began to sell their river lots to non-Indians. For the purpose of the 1873 survey, however, the river lots were included in the boundaries of the reserve and represented 17,331 acres of the total 55,246 acres of the reserve. The population of the Peguis Band at the date of first survey (DOFS) entitled them to 60,000 acres under the terms of Treaty 1.

Under the *Indian Act*, however, Indians could not legally possess or sell property as individuals, nor could they sell land as a collective without a surrender. Although the department tried to evict all non-Indians who had purchased lots from the Peguis Band after the signing of Treaty 1, the residents refused to leave. In 1896, federal officials advocated surrendering the St Peter's Reserve and relocating it in order to solve an increasingly complex issue of property rights of the different river-lot claimants. The Chief Justice of the Manitoba Court of Appeal was appointed in 1906 to investigate the extent of reserve lands that should have been set aside for the Peguis Band and determine the compensation owed to the Band for the patented lands within the reserve. Furthermore, he disallowed the claims issued by those non-Indians who had purchased river lots.

In September 1907, a surrender vote was held, and the surrender was passed. A new reserve of 75,000 acres was established near Fisher River. In order to satisfy any claims by Peguis band members regarding their patents to river lots, special legislation, the *St. Peter's Reserve Act*, was enacted. It required that purchasers of the surrendered reserve lands would pay an additional \$1 per acre to secure title; this amount would be added to the St Peter's Band trust account.

### ISSUES

Was there a treaty land entitlement (TLE) shortfall? If so, was that shortfall satisfied by the setting aside of a new reserve for the Peguis Band after the 1907 surrender of the St Peter's Reserve?

### OUTCOME

The ICC made no findings or recommendations, as Canada accepted the Peguis First Nation's TLE claim for negotiation by letter dated June 29, 1998: see Appendix B to the report.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*The Queen v. Thomas* (1891) 2 Ex. CR 246.

### Treaties and Statutes Referred To

Treaty 1, reprinted in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991); *Manitoba Act*, SC 1870, SC 1880; *An Act Respecting the Establishment of Provinces in the Dominion of Canada*, 34–35 Vict.; *Indian Act*, SC 1868, SC 1876; *St. Peter's Reserve Act*, SC 1916; *An Act to Amend Certain Laws Respecting Indians, and to Extend Certain Laws Relating to Matters Connected to Indians to the Provinces of Manitoba and British Columbia*, SC 1874; *An Act for the Final Settlement of Claims to lands in Manitoba by Occupancy, under the Act thirty-third Victoria, Chapter Three*, SC 1880.

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; *Chief Peguis* ([Winnipeg]: Manitoba, Department of Culture, Heritage, and Recreation, 1984); Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991); Gerhard J. Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Metis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996); T.C.B. Boon, "St. Peter's Dynevour: The Original Indian Settlement of Western Canada," in (1954) ser.3, 9 *Transactions of the Historical and Scientific Society of Manitoba*; John Warkentin et al., *Historical Atlas of Manitoba* (Winnipeg: Manitoba Historical Society, 1970); W.L. Morton: *Manitoba: A History*, 2nd ed. (Toronto: University of Toronto Press, 1967); George F.G. Stanley, *The Birth of Western Canada* (Toronto: University of Toronto Press, 1961); Barry Potyondi, *Selkirk: The First Hundred Years* (Winnipeg: Jostens, 1981); Thomas Flanagan, *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991).

**COUNSEL, PARTIES, INTERVENORS**

P. Forsyth for the Peguis First Nation; R.H. Irwin for the Government of Canada; K.N. Lickers to the Indian Claims Commission.



# SUMMARY

## **PEEPEEKISIS FIRST NATION FILE HILLS COLONY INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Peepeekisis First Nation: File Hills Colony Inquiry* (Ottawa, March 2004).

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

**Panel:** Commissioner A. Holman (Chair), Chief Commissioner R. Dupuis, Commissioner S. Purdy

**Treaties** – Treaty 4 (1874); **Treaty Interpretation** – Reserve Clause; **Reserve** – Disposition; **Indian Act** – Subdivision – Allocation – Band Membership; **Fiduciary Duty** – Protection of Reserve Land; **Band** – Membership; **Defences** – Res Judicata; **Mandate of Indian Claims Commission** – Constructive Rejection – Delay; **Evidence** – Oral History – Onus of Proof – Admissibility; **Specific Claims Policy** – Beyond Lawful Obligation; **Compensation** – Criteria; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In April 1986, the Peepeekisis First Nation submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) seeking compensation for Canada's actions in creating and implementing the File Hills Scheme on its Indian Reserve (IR) 81. After 15 years without a decision by the Minister, the First Nation requested and was granted an inquiry by the Indian Claims Commission (ICC). The ICC panel ruled that it had the jurisdiction to inquire into the claim on the basis of constructive rejection and subsequently declined Canada's request to reconsider its decision: see interim rulings at Appendices A and B of the report. In December 2001, Canada rejected the claim. The community session was held at the Peepeekisis community in September 2002. The panel ruled in March 2003 to admit further documents from Canada; see Appendix C of the report. The oral hearing, based on written submissions, took place in April 2003.

### **BACKGROUND**

The Peepeekisis Band descended from a Cree band whose Chief, Can-ah-ha-cha-pew, signed Treaty 4 in 1874. The Peepeekisis reserve, IR 81, is located in the File Hills region of Saskatchewan, about 20 miles northeast of Fort Qu'Appelle. The reserve of 26,624 acres is the southernmost end of four contiguous reserves. Peepeekisis members farmed productively on the reserve until the late 1800s, when the population started to decline. From 1894 to 1935, the Band had no recognized leadership. In 1898, Indian Agent William Graham established a plan, called the File Hills Scheme, to bring Indian graduates of industrial schools, who were members of other bands, to live and farm on the Peepeekisis reserve. The File Hills Scheme was a unique experiment in Canada to further the education of Indians and their assimilation into the non-Indian way of life. Indian Agent Graham strictly controlled the everyday lives of Peepeekisis band members.

In 1902, the Crown subdivided 7,680 acres of prime agricultural land at the southeast end of the reserve into 96 lots of 80 acres each. This area became known as the File Hills Colony. By then, 15 industrial school graduates were settled and farming on these lots. The Department of Indian Affairs knew of Graham's Scheme and actively encouraged it, as evidenced by departmental correspondence, approvals for two subdivisions, and the transfer to Graham of the majority of funds set aside to assist Indian graduates in farming.

In 1906, a second subdivision of the reserve for the purpose of the Colony left only 29 per cent, or 7,784 acres of the original 26,624 acres, not subdivided. By then, the Colony had absorbed most of the good agricultural land on the reserve. By 1906, male industrial school graduates started to outnumber male *original* Peepeekisis band members, gradually enabling the transferees to control band decisions.

Graham arranged meetings of band members to obtain approval for the transfer of memberships of the graduates into the Band. In 1911, the department and Graham presented the Band with the "Fifty Pupil Agreement," whereby, upon payment

of \$20 to each band member, the department would have the exclusive right to transfer into the Band up to 50 more industrial school graduates and their families and to locate them on any quantity of unoccupied land, anywhere on the reserve. The 1911 Agreement, approved after two or more meetings, stated that the Band itself was now known as the File Hills Colony.

The File Hills Colony prospered for several years, but the *original* members, now a minority living in the northwest corner of the reserve, complained to officials about their treatment and protested the validity of the transferees' memberships in the Band. As a result, four investigations into Peepeekisis band membership took place during the 1940s and 1950s. In 1955, the Bethune, Cory, and McCrimmon Committee, having found that Graham and the department had breached Treaty 4 and the *Indian Act*, recommended compensation to the *original* members.

Settlement negotiations failed, and the department's registrar ruled in favour of the validity of the transferees' memberships. The *original* members requested a review of this decision, whereupon Judge McFadden conducted a hearing in 1956 and confirmed the validity of all the protested memberships.

## ISSUES

Has Canada breached a lawful obligation to the Peepeekisis First Nation in respect of Canada's decision to undertake and implement the File Hills Scheme? If yes, what is the nature of the breach or breaches, and what are the appropriate criteria to compensate the Peepeekisis First Nation and its members for the breach or breaches? If no, do Canada's actions give rise to a claim under the heading "Beyond Lawful Obligation," as outlined in the Native Claims Policy? If they do, what would be the appropriate criteria to compensate the Peepeekisis First Nation and its members?

## FINDINGS

### **The Crown's Decision to Undertake the Scheme on the Peepeekisis Reserve**

When the Crown decided to create a farming scheme on the Peepeekisis reserve in 1898, it breached the terms of Treaty 4. The treaty provides that reserve land can be sold, leased, or "otherwise disposed of" only with the prior consent of the Indians entitled to it. The words of a treaty are to be given the sense that they would naturally have had for the parties. The Crown intended a disposition when it created a scheme that necessitated giving exclusive use and control of reserve land to non-band individuals. There is no evidence that Graham received prior consent of the Band before establishing the Scheme on its reserve.

By its decision to create the Scheme at Peepeekisis without prior consent, the Crown also breached the *Indian Act*. The Act is based on the policy of general inalienability of Indian lands, except to the Crown, in order to prevent the erosion of the Indian land base. The File Hills Scheme was intended to be permanent and its success was premised on the need to separate the Colony of industrial school graduates from the perceived negative influences of the *original* band members. By focusing entirely on the interests of the graduate farmers, the Crown neglected to protect the interests of the Band from the erosion of its land base. Without the collective consent of the Band, the Crown was in breach of its statutory obligations.

Where there has been no surrender of a reserve, the Crown is also under a fiduciary duty to use ordinary diligence to avoid invasion or destruction of a band's quasi-proprietary interest by an exploitative bargain with third parties or the Crown itself. The lack of recognized band leadership during the critical years enhanced the Crown's obligation to protect this Band from an exploitative arrangement. In 1898, the Band's understanding of the Crown's decision to create the Scheme and of its potential impact on the Band's land base and identity was largely non-existent. Thus, no valid consent to the Scheme itself did or could exist. The Scheme was devised to benefit other Indians; in contrast, the *original* members became gradually dispossessed of almost three-quarters of their reserve land. They were pressured to relocate to inferior land in the northwest corner of the reserve and, compared to the graduate farmers, suffered economically. The Scheme also resulted in the gradual take-over and control of band affairs by the graduates as they transferred into the Band. The Crown used the Band's farm land for the Scheme, instead of non-reserve, Crown land, primarily for financial reasons. For all these reasons, the Crown breached its fiduciary obligation to the Band.

## **THE CROWN'S METHODS OF IMPLEMENTING THE FILE HILLS SCHEME**

### ***Placement of non-band members:***

By bringing Indians who were not members of the Peepeekisis Band to settle and farm on the Peepeekisis reserve without first having received permission from the superintendent general, the Crown, through Graham, breached the *Indian Act*.

***Subdivisions:***

When the Crown proceeded to subdivide the reserve lands in 1902 and 1906 without the Band's consent, it did not breach its lawful obligation to the Band. Although the treaty is silent on the question of subdivision, the *Indian Act* gave the superintendent general the unilateral authority to subdivide the whole or any portion of a reserve.

***Allocations:***

The Crown's actions in allocating lots to the graduate farmers transformed the Band's collective interest in land to an individual interest, contrary to the principle in Treaty 4 that preserves a band's right to decide collectively on the disposition of its land. The *Indian Act* reflects the treaty's objectives by providing that reserve land could be allocated to individual members in only one of two ways, either by Location Ticket or, for lots of 160 acres or less, by Certificate of Occupancy. The former required band or band council consent and the superintendent general's approval; the latter required only approval of the Indian Commissioner. The Crown allocated lots to the graduate farmers without meeting or trying to meet these statutory requirements. No evidence exists that Location Tickets or Certificates of Occupancy were issued to the graduates before they were located on lots.

The Crown also breached its fiduciary obligation to the Band when it allocated reserve land to the graduates, by failing to protect the Band's interest in its reserve from invasion or destruction. The right of a band to use and occupy its reserve land is a legal, collective right and requires the band's consent if that right is to be shifted to an individual right. Each allocation amounted to a *de facto* disposition of reserve land, and each disposition therefore affected the legal interest of the Band in its reserve. The Band permanently lost its collective right to use and occupy the land allocated to the graduates.

***Special assistance:***

Although the Crown provided special assistance to the graduate farmers that was not available to farmers outside the Colony, the evidence suggests that it was in the nature of a loan, not a gift. Further, there is insufficient evidence to conclude that, by providing special assistance, the Crown breached a fiduciary obligation to the original Band.

***Membership transfers:***

The validity of the graduates' memberships in the Peepeekisis Band, reviewed by Judge McFadden in 1956, is not open to investigation by the ICC, based on the doctrine of *res judicata* or issue estoppel (the matter having already been decided). Judge McFadden rendered a judicial judgment that was a final, *in rem* decision on membership validity. *Res judicata*, however, does not prevent the ICC from inquiring into Graham's conduct in procuring membership transfers and the 1911 Fifty Pupil Agreement in order to determine if the Crown breached its fiduciary obligation. By taking advantage of a vulnerable band without leadership, by controlling membership meetings, and by following highly questionable practices in procuring the transfers and the 1911 Agreement – thereby artificially increasing the membership in the Band – the Crown, through Graham's actions, breached its fiduciary obligation to the Band.

The defence of *res judicata* has no application to the issues of breach of treaty, *Indian Act* (other than the membership provisions), and the Crown's fiduciary obligation in creating the File Hills Scheme. These issues were either not before Judge McFadden or, at best, collateral to the main question. Consent of the Band was consent to the membership transfers only; it was not retroactive consent to the creation of the farming Scheme and the disposition of the Band's reserve land. *Res judicata* should be applied narrowly in a land claims process created by the government to resolve specific claims in a fair and equitable manner.

These findings make it unnecessary to address the claim under the heading "Beyond Lawful Obligation." Further, the panel declines to make findings on applicable compensation criteria without more extensive argument.

**RECOMMENDATION**

That the Peepeekisis First Nation's File Hills Colony claim be accepted for negotiation under Canada's Specific Claims Policy.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Marshall*, [1999] 3 SCR 456; *Opetchesabt Indian Band v. Canada*, [1998] 1 CNLR 134; *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Badger*, [1996] 1 SCR 77; *R. v. Cote*, [1996] 3 SCR 139; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 (sub nom. *Apsassin*); *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Kingfisher v. Canada*, [2002] FCA 221; *Johnstone v. Mistawasis First Nation*, [2003] 3 CNLR 117 (Sask. QB); *Joe v. Findlay* (1981), 122 DLR (3d) 377 (BCCA); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460; *Henderson v. Henderson*, [1843–60] All. ER Rep. 378 (Ch.); *Maynard v. Maynard*, [1951] SCR 34; *Angle v. Minister of National Revenue*, [1975] 2 SCR 248; *Schweneke v. Ontario* (2000), 47 OR (3d) 97 (Ont. CA); *Minott v. O'Shanter Development Co.* (1991), 42 OR (3d) 321; *Law v. Hansen* (1895), 25 SCR 69; *Re Indian Act*; *Re Poitras* (1956), 20 WWR 545 (Sask. Dist. Ct.); *In Re Wilson* (1954), 12 WWR 676 (Alta Dist. Ct).

**ICC Reports Referred To**

*Roseau River Anishinabe First Nation: Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Carry the Kettle First Nation: Cypress Hills Inquiry* (Ottawa, July 2000), reported (2000) 13 ICCP 209; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Kabkewistahaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Alexis First Nation: TransAlta Utilities Rights of Way Inquiry* (Ottawa, March 2003), reported (2004) 17 ICCP 21.

**Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *Constitution Act, 1982*; *Indian Act*, RSC 1886, SC 1887, SC 1890, SC 1894, SC 1895, RSC 1906, RSC 1951, RSC 1952, SC 1956, RSC 1970; *Inquiries Act*, RS 1952.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; Marion Dinwoodie, “William Morris Graham, His Career from Clerk to Commissioner, 1885–1932: A Summary Prepared for the File Hills Agency,” 1996; Sarah Carter, “Demonstrating Success: The File Hills Farm Colony” (fall 1991) 16 no. 2 *Prairie Forum*; Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000); John Sopinka, Sydney N. Lederman, and Alan W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1999); George Spencer Bower, Alexander K. Turner, and K.R. Handley, *The Doctrine of Res Judicata*, 3rd ed. (London: Butterworths, 1996).

**COUNSEL, PARTIES, INTERVENORS**

T.J. Waller, QC, for the Peepeekisis First Nation; U. Ihsanullah for the Government of Canada; J.B. Edmond, D. Boissoneau-Thunderchild to the Indian Claims Commission.

**CANADA'S RESPONSE**

In June 2006, the Minister of Indian Affairs and Northern Development rejected ICC's recommendation.

## SUMMARY

### **QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY (MUSCOWPETUNG, PASQUA, STANDING BUFFALO, SAKIMAY, COWESSESS, AND OCHAPOWACE FIRST NATIONS) FLOODING INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159.

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

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran, Commissioner R.J. Augustine

**Treaties** – Treaty 4 (1874); **Flooding** – Dam; **Right of Way** – Dam – Permit – Expropriation – Trespass; **Indian Act** – Permit; **Fiduciary Duty** – Right of Way – Consultation; **Reserve** – Riparian Rights; **Band Council** – Band Council Resolution; **Mandate of Indian Claims Commission** – Constructive Rejection; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In 1986, the Qu'Appelle Valley Indian Development Authority (QVIDA) First Nations submitted specific claims to the Department of Indian Affairs and Northern Development (DIAND) for compensation arising from “the illegal alienation and flooding” of their respective reserves along the Qu'Appelle Valley. DIAND closed the claim file in 1992 owing to lack of activity since 1989, with the understanding that it could be reopened when QVIDA was ready. QVIDA viewed this as a “constructive rejection” of the claim by Indian Affairs. Accordingly, in October 1994, the QVIDA First Nations requested that the Indian Claims Commission (ICC) conduct an inquiry into their claims. After it agreed to the inquiry in late 1994, the ICC held four community sessions between September 1996 and April 1997, and the oral hearing, based on written submissions, took place in June 1997.

#### **BACKGROUND**

Treaty 4, or the Qu'Appelle Treaty, was entered into on September 15, 1874, by representatives of the Government of Canada and by the chiefs of four bands that became part of QVIDA, namely Chiefs Cowessess, Pasqua, Kahkewistahaw, Kakisheway, and Chacachas. The last two were Chiefs of bands that later merged to become Ochapowace. The bands settled on reserves and took up farming and cattle-ranching. During the 1930s, water in the Qu'Appelle Valley became a critical resource owing to the extensive drought and economic depression. In response to these events, the federal government created the Prairie Farm Rehabilitation Administration (PFRA) to rehabilitate the drought and soil-drifting areas and assist in water conservation.

In 1941, the PFRA investigated a number of water conservation and dam projects, including a dam at the east end of Pasqua Lake which would flood portions of the Muscowpetung and Pasqua reserves. P.A. Fetterly, an engineer with the Department of Mines and Resources, estimated the damages to the Muscowpetung and Pasqua Bands at \$8,050. The proposed Pasqua Lake dam was deferred; instead, a dam was built on Echo Lake to control the water levels of both lakes. The proposed compensation of \$8,050 was never paid to the Muscowpetung and Pasqua Bands for damage to their reserve lands. There is no evidence that they authorized the project or were even consulted. Federal officials did not recognize that the Standing Buffalo reserve would be damaged at all by the Echo Lake dam.

The PFRA also commenced construction in 1941 of two dams on Crooked and Round Lakes, apparently proceeding on the advice of an Indian Affairs' official that band consent was not necessary because the PFRA had powers of expropria-

tion. In February 1942, Fetterly recommended that, in addition to paying damages of \$3,300 to the Sakimay, Cowessess, and Ochapowace Bands, the PFRA should also construct a bridge west of the flooded area on Crooked Lake to replace a submerged ford. Payment of \$3,330, including \$30 in respect of the Cowessess Indian Residential School, was made to the respective bands in May 1943. The construction of these dams resulted in continuous flooding of parts of the reserves, occasional flooding in other parts, and damage by capillary action and salinization. Some trees, plants, and grasses were replaced by saline plants, and the loss of shelter and food resulted in a loss of small game.

In July 1977, the PFRA reached a settlement with the three western bands, Muscowpetung, Pasqua, and Standing Buffalo, for \$265,000 in consideration for a permit authorizing future use of reserve lands for flooding purposes, and a release of liability for all past and future damages caused by the Echo Lake dam. In October 1977, the new Chief of the Muscowpetung First Nation questioned the “perpetual” nature of the settlement, which he equated to a surrender; nevertheless, all three bands had spent their settlement money. Muscowpetung issued a Band Council Resolution (BCR) in February 1978 rescinding its 1977 BCR accepting the settlement. Indian Affairs and the Department of Regional Economic Expansion also argued for years over which lands were to be covered by the permits promised in the 1977 settlement. As a result, no permits were ever issued.

Meanwhile, QVIDA was formed in 1979 to represent the interests of its eight-member First Nations. Standing Buffalo issued its own rescinding BCR on November 10, 1980, and Pasqua followed suit on February 10, 1982. In mid-1986, the QVIDA Bands issued BCRs in favour of filing specific claims for compensation arising from “the illegal alienation and flooding” of their respective reserves.

## ISSUES

Could the Crown authorize the PFRA under section 34 of the 1927 *Indian Act* to use and occupy reserve lands for flooding purposes? If so, was the PFRA authorized? If not, did Canada breach a fiduciary duty to the First Nations by failing to obtain proper authorization? If Canada could and did properly authorize the PFRA to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary duty to consult or otherwise consider the best interests of the First Nations before proceeding? Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act* or otherwise require the consent of the First Nations when it authorized the PFRA to use and occupy reserve lands for flooding purposes?

Did the BCRs of the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s release the Crown and the PFRA from all past and future damages caused by the Echo Lake dam?

Did the First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights? If so, did the Crown have an obligation under the *North-West Irrigation Act* and the *Dominion Power Act* to ensure that these water rights were protected and to act in the First Nations' best interests when those rights might be affected? Did the Crown act in the best interests of the First Nations when it authorized the PFRA to construct dams that altered the First Nations' riparian interests and caused losses?

## FINDINGS

Canada acknowledged that it had not acquired the right to use and occupy reserve lands of the QVIDA First Nations by way of expropriation or surrender; however, even if section 34 of the 1927 *Indian Act* enabled the Superintendent General of Indian Affairs to authorize the use and occupation of reserve land, the rights conveyed to the PFRA were too extensive, exclusive, and permanent for a section 34 authorization. Moreover, unlike subsection 28(2) of the later *Indian Act*, section 34 does not contemplate consent by either the band or band council, meaning that it should be interpreted more narrowly than subsection 28(2). The PFRA should have acquired by surrender or expropriation the right to use and occupy reserve lands for flooding purposes. Having failed to do so, it trespassed on the reserves of all six participating First Nations from the early 1940s to at least 1977, and on the Sakimay, Cowessess, and Ochapowace reserves to this day. Since section 34 did not form an appropriate basis in this case for authorizing use and occupation of reserve lands for flooding purposes, it is not necessary to consider whether Canada actually did authorize the PFRA to use and occupy reserve lands or whether Canada breached a fiduciary or treaty obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding.

For the same reasons that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. Moreover, the 1977 settlement was void from the beginning under subsection 28(1) of the *Indian Act*, either entirely or at a

minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation. Thus, the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves after 1977. The question whether any pre-1977 trespasses were settled depends on whether the Band Councils had the power to enter into binding settlements with respect to the unauthorized use of reserve lands and whether the release clause in the 1977 BCRs can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*. In light of the positions of the parties, it would be premature to decide these questions in this inquiry.

The BCRs by which the Muscowpetung, Standing Buffalo, and Pasqua Bands purported to rescind the 1977 BCRs and the settlement are irrelevant, as the 1977 settlement was void from the beginning. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the 1977 BCRs were merely evidence of the intention to enter into a contract. As such, it would be contrary to the principles of contract law to permit the First Nations to withdraw unilaterally from the 1977 settlement without the concurrence of the PFRA.

It is unnecessary to address the First Nations' Aboriginal, treaty, and riparian water rights in light of the above findings. Nevertheless, to the extent that the interference with such water rights constitutes an alternative cause of action, and if the PFRA and its successors can be shown to have interfered with the First Nations' water rights, they are entitled to claim compensation for damages, taking into account the compensation already paid to the First Nations.

The evidence is insufficient to link conclusively the pollution in the Qu'Appelle River to the construction and use of the Echo Lake, Crooked Lake, and Round Lake dams. No evidence exists that Canada's failure to license the First Nations' consumptive rights under the 1894 *North-West Irrigation Act* caused any damage to the First Nations. Thus, the ICC refrains from deciding whether the First Nations' riparian or other water rights were extinguished by that statute, or whether the Crown failed to protect those rights.

## RECOMMENDATIONS

That Canada immediately commence negotiations with the QVIDA First Nations to acquire by surrender or expropriation such interests in land as may be required for the ongoing operation of the control structures at Echo Lake, Crooked Lake, and Round Lake or, alternatively, remove the control structures.

That the flooding claims of the Sakimay, Cowessess, and Ochapowace First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to (a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and (b) compensation for (i) the value of any interest that Canada may acquire in the reserve lands, and (ii) future damages to reserve lands, subject to set-off of compensation of \$3,270 paid to those First Nations in 1943.

That the flooding claims of the Muscowpetung, Pasqua, and Standing Buffalo First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to (a) damages caused to reserve lands (i) since the original construction of the dams in the early 1940s, or (ii) alternatively, since 1977, if these First Nations can be bound by the 1977 BCRs and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and (b) compensation for (i) the value of any interest that Canada may acquire in the reserve lands, and (ii) future damages to reserve lands, subject to set-off of compensation of \$265,000 paid to those First Nations in 1977.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

## Cases Referred To

*Opetchesabt Indian Band v. Canada* (1997), unreported, May 22, 1997; *Nowegijick v. The Queen*, [1983] 1 SCR 29; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 14 FTR 161 (TD); *Apsassin v. Canada*, [1993] 3 FC 28 (FCA); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 130 DLR (4th) 193 (SCC); *Guerin v. The Queen*, [1985] 1 CNLR 120 (SCC); *Chippewas of Kettle and Stony Point v. Canada* (1996), 31 OR (3d) 97 (Ont. CA); *Kruger v. The Queen*, [1985] 3 CNLR 15 (FCA); *R. v. Badger*, [1996] 4 WWR 457 (SCC); *Semiabmoo Indian Band v. Canada*, [1997] FCJ No. 842 (unreported, June 24, 1997); *R. v. McMaster*, [1926] Ex. CR 68; *Easterbrook v. The King*, [1931] SCR 210; *The Queen v. Devereux*, [1965] SCR 567; *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 DLR (4th) 449 (BCCA); *Re Attorney-General of Nova Scotia and Millbrook Indian Band* (1978),

93 DLR (3d) 230 (NSSA); *Springbank Dehydration Ltd. v. Charles*, [1978] 1 FCR 188 (TD); *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan* (1982), 135 DLR (3d) 128 (Sask. CA); *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1993] 1 WWR 373 (Alta. QB); *Joe v. Findlay and Findlay* (1987), 12 BCLR (2d) 166 (BCSC); *Wewayakum Indian Band v. Wewayakai Indian Band* (cited as *Roberts v. R.*), [1991] 3 FC 420 (TD); *Gitanmaax Indian Band v. British Columbia Hydro and Power Authority* (1991), 84 DLR (4th) 562 (BCSC); *Bennett v. Bennett*, [1952] 1 KB 249 (CA); *Goodinson v. Goodinson*, [1954] 2 QB 118 (CA).

### ICC Reports Referred To

*Kawacatoose First Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1996), reported (1996) 5 ICCP 73; *Kabkewistabaw First Nation: Treaty Land Entitlement Inquiry* (Ottawa, November 1996), reported (1998) 6 ICCP 21; *Lucky Man Cree Nation: Treaty Land Entitlement Inquiry* (Ottawa, March 1997), reported (1998) 6 ICCP 109; *Eel River Bar First Nation: Eel River Dam Inquiry* (Ottawa, December 1997), reported (1998) 9 ICCP 3; *Kabkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP 3; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), reported (1998) 8 ICCP 101; *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3.

### Treaties and Statutes Referred To

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966); *North-West Irrigation Act, 1894*, 57–58 Vict.; *North-West Irrigation Act, 1898*, 61 Vict.; *Irrigation Act*, RSC 1906, RSC 1927; *Prairie Farm Rehabilitation Act*, SC 1935, amended SC 1937, SC 1941; *Indian Act*, RSC 1927, RSC 1952, RSC 1970.

### Secondary Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171–85; E.S. Archibald, "Prairie Farm Rehabilitation," in *Canadian Geographical Journal*, October 1940; G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto/Calgary/Vancouver: Carswell, 1986).

### COUNSEL, PARTIES, INTERVENORS:

D. Knoll for the Qu'Appelle Valley Indian Development Authority; B. Becker for the Government of Canada; R.S. Maurice, K.N. Lickers, T.A. Gould to the Indian Claims Commission.

### Canada's Response

By letters dated December 3, 1998, the Minister of Indian Affairs and Northern Development agreed to accept the flooding claims of the six QVIDA First Nations for negotiation: see (1999) 11 ICCP 304.

### UPDATE

Standing Buffalo Dakota Nation opted to negotiate its claim separate from the QVIDA table, and the Commission acted as facilitator to the negotiations. An agreement was formally approved in March 2003: see ICC, *Standing Buffalo Dakota Nation: Flooding Mediation* (Ottawa, March 2004). In October 1999, Canada and QVIDA requested that the ICC provide mediation services to the negotiations. No settlement was reached, and, in August 2003, Canada gave QVIDA the notice required to cease negotiations, adding that it was prepared to enter into negotiations with the individual First Nations whose claims it had accepted: see ICC, *Qu'Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation* (Ottawa, August 2005).

# SUMMARY

## **QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY (QVIDA) FLOODING MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Qu'Appelle Valley Indian Development Authority (QVIDA): Flooding Mediation* (Ottawa, December 2005).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 4 (1874); **Flooding** – Dam; **Right of Way** – Dam – Permit – Expropriation – Trespass; **Indian Act** – Permit; **Fiduciary Duty** – Right of Way – Consultation; **Reserve** – Riparian Rights; **Band Council** – Band Council Resolution; **Mandate of Indian Claims Commission** – Constructive Rejection – Mediation; **Saskatchewan**

### **THE SPECIFIC CLAIM**

For the purposes of this claim, eight First Nations comprise the Qu'Appelle Valley Indian Development Authority (QVIDA), established in 1979. Piapot, Muscowpetung, Pasqua, and Standing Buffalo in the west, and Sakimay, Cowessess, Kahkewistahaw, and Ochapowace in the east alleged that reserve land was subject to flooding and illegal alienation. In May 1986, QVIDA submitted a historical report and legal analysis to the Department of Indian Affairs and Northern Development (DIAND) along with Band Council Resolutions for a specific claim submission on the basis of illegal alienation and flooding of reserves. In January 1988, DIAND responded that the claim was not adequate, and subsequently the Specific Claims Branch closed the file. In September 1994, QVIDA asked ICC to conduct an inquiry. The 1998 inquiry report showed that the six First Nations were owed a lawful obligation by Canada with respect to flooding. Piapot and Kahkewistahaw were not part of the inquiry.

By letters dated December 3, 1998, the Minister of Indian Affairs and Northern Development agreed to accept the flooding claims of the six QVIDA First Nations for negotiation: see (1999) 11 ICCP 304–9. Standing Buffalo Dakota Nation opted to negotiate its claim separate from the QVIDA table: see Indian Claims Commission, *Standing Buffalo Dakota Nation: Flooding Mediation* (Ottawa, March 2004), 11. In October 1999, Canada and QVIDA requested that the ICC join the negotiation process.

### **BACKGROUND**

The background to this mediation is contained in the ICC's inquiry report, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159.

### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussion, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for meetings.

### **OUTCOME**

In August 2003, Canada gave QVIDA the 90-day notice required by the November 2002 Memorandum of Understanding to cease negotiations, adding that it was prepared to enter into negotiations with the individual First Nations whose claims were accepted by Canada.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



# SUMMARY

## **ROSEAU RIVER ANISHINABE FIRST NATION MEDICAL AID INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Roseau River Anishinabe First Nation: Medical Aid Inquiry* (Ottawa, February 2001), reported (2001) 14 ICCP 3.

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

**Panel:** Commissioner C.T. Corcoran (Chair), Commission Co-Chair D.J. Bellegarde

**Treaties** – Treaty 1 (1871); **Treaty Right** – Medical Aid; **Treaty Interpretation** – Outside Promises; **Band** – Trust Fund; **Defences** – Detrimental Reliance; **Evidence** – Oral History –Parol Evidence Rule; **Mandate of Indian Claims Commission** – Supplementary Mandate; **Manitoba**

### **THE SPECIFIC CLAIM**

The Roseau River Anishinabe First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in September 1981, claiming that Canada breached its treaty obligations by deducting medical aid payments from the First Nation's trust accounts between 1909 and 1934. In March 1984, Canada rejected the First Nation's claim. In October 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim. The ICC held a community session in July 1998 and an oral hearing, based on written submissions, took place in March 1999.

### **BACKGROUND**

The chiefs at Roseau River signed Treaty 1 on August 3, 1871, at the Stone Fort on the Red River. There was considerable confusion during the negotiations over promises made but not recorded in the treaty, and soon the Indian signatories from several bands were pressing for fulfillment of alleged unwritten commitments, or "outside promises."

The First Nation's oral history of the treaty promises, as recollected by its "promise keeper" Assiniwinin and recounted by Elder Oliver Nelson at the community session, includes a promise that "[w]hen the Indians got sick the Queen promised she would provide medicines for the sick." Elder Nelson also stated that the medicine men were upset because they believed their medicines to be superior, but that some Indians from other reserves had wanted the promise of medicine. Further, the oral history includes the chiefs' understanding that the treaty commissioner would return and put the outside promises on another piece of paper.

After much pressure, Lieutenant Governor A.G. Archibald, Indian Commissioner W.M. Simpson, Métis interpreter James McKay, and possibly Indian Agent M. St John formalized the outside promises in a memo in October 1871, but it did not refer to any form of medical aid. Yet, by September 1872, the Roseau River Indians presented Agent St John with a list of demands that they believed arose from the treaty negotiations. Item 9 in the Agent's record is the first indication in Crown records of medical aid as a possible outside promise: "9. D [demand] – Sick men. R [reply] – Must take care of their own sick." Other Indians complained to their Member of Parliament, Dr John Schultz, about broken promises, and at about the same time, the Reverend Henry Cochrane, who had participated in the treaty negotiations, requested on behalf of the Indian parties to the treaty "medical aid for the indigent poor." An affidavit sworn by David Prince and other members of St Peter's Band, attested that they were present at the treaty signing, and that the chiefs enumerated the articles that they demanded in addition to treaty money, including "on each reserve, medical aid and a school and school master." Secretary of State Joseph Howe was apparently surprised by the claim to medical aid but St John denied that it had been promised. In July 1873, however, Deputy Superintendent of Indian Affairs William Spragge advised the new Indian Commissioner, J.A.N. Provencher, that a number of items promised to the Indians could now be acted upon, including "medicines for the sick" to be provided.

A Board of Indian Commissioners appointed to review the Indians' concerns concluded that outside promises were made, although they were somewhat overstated, and that, without recognizing the alleged promises in their entirety and without interfering with the terms of the treaty, the Crown should give the Indians, among other things, a supply of simple medicines for each reserve. The Board's recommendations were never acted upon.

In April 1875, the Minister of the Interior, David Laird, negotiated a resolution of the dispute over "outside promises" with the Indians of Treaty 1 and Treaty 2, whereby a memorandum attached to the treaty set out terms for the payment of increased annuities and certain items, while preventing any future claim to any "outside promises" not contained in the memorandum. It was silent on medical aid. In 1903, the Band surrendered part of its reserve. In 1909 the government began applying funds from the Band's interest trust account to pay the Band's medical expenses.

## **ISSUES**

Did the terms of Treaty 1 include a promise to provide "medical aid" and, if so, has that promise survived the 1875 amendment to the treaty? Did the deductions constitute a breach of any statutory provision by Canada? Did Canada breach the terms of the 1903 surrender by deducting amounts for medical aid from the Band's interest account? Did Canada induce Roseau River to rely on free medical aid to the detriment of the Band's own traditional healing methods (detrimental reliance), and, if so, does Canada owe Roseau River a lawful obligation for unilaterally withdrawing medical aid by charging medical expenses to the Band's trust account from 1909 to 1934?

## **FINDINGS**

### **Reasons of Commissioner Bellegarde**

The question of whether there was a treaty promise of medical aid stands or falls on the events of 1871. The documentary evidence both supports and opposes medical aid as a treaty promise, but Elder Oliver Nelson's persuasive testimony breaks this deadlock. As stated in *Delgamuukw*, in interpreting treaties, this type of oral evidence should be "accommodated and placed on an equal footing" with the documentary evidence. The treaty signatories understood medical aid in some form or other to have been included in the terms of the treaty. Even if there is some question whether such a promise expressed the common intention of the parties, the treaty should be interpreted generously, according to *Sioui* and *Badger*, with ambiguities or doubtful expressions resolved in favour of the Indians. Here, the Crown's officials also recognized that the government's obligations constituted more than just the written form of the treaty.

Medical aid became a treaty right as of 1871 and its status between 1871 and 1875 should not have been in doubt. In 1875, the First Nation would have believed that it was not necessary to deal with medical aid in the 1875 memorandum attached to the treaty, as the matter was already settled. Canada's duty as a fiduciary would have been to disclose to its principals enough information to allow them to make an informed decision about what they were signing, in particular that the memorandum, by barring any claim to "outside promises" not listed in it, prevented any future claim to medical aid. Since the treaty right to medical aid was not expressly extinguished by the 1875 amendment, that right continued to exist after 1875. As such, the deductions for medical aid from Roseau River's interest trust account from 1909 to 1934 were improper.

### **Reasons of Commissioner Corcoran**

The principles of treaty interpretation are to interpret the treaty liberally, to resolve ambiguities in favour of the Indians, and to have regard to extrinsic evidence. In applying these principles, we must choose the interpretation of the common intention of the parties that best reconciles the Indians' interests and the Crown's interests: *Sioui*. Further, determining the common intention requires considering the context in which the treaty was negotiated and the parties' limitations, but the resulting interpretation must be a realistic one: *Marshall*.

There is little evidence before the ICC to indicate that the Indians of Treaty 1 were ravaged by the epidemics preceding the treaty in the manner that Indians of other treaty areas were. Elder Oliver Nelson confirmed that Roseau River's leaders did not want Canadian medical aid, and that they accepted it only to satisfy the members of other bands. Further, Canadian medical aid on the Prairies was virtually non-existent and likely not something the Indian negotiators would have fought for as a promise. It is inappropriate to impose modern-day notions of medical aid on the parties in 1871, when there were likely no hospitals, few if any doctors, and limited access to medicine. Given the equivocality of the evidence, the First Nation has not established medical aid as a treaty promise. This is not a situation in which ambiguities should be resolved in favour of

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the Indians. It is only when a term has been found to exist in the treaty, albeit ambiguously, that the liberal principles of treaty interpretation can be applied to resolve the ambiguity.

The 1875 amendment clearly provided that all promises other than those contained in the memorandum of outside promises were deemed to be abandoned. The amendment amounted to a clarification of uncertain treaty terms rather than an extinguishment of existing terms. Further, there is no evidence that the 1875 transaction was unconscionable or procured through undue influence. The Indian negotiators had already gained experience in previous treaty discussions in the United States, and had pushed Canada's negotiators to make concessions at the 1871 treaty talks. They knew the purpose of the 1875 amendment and must be presumed to have known that for any outside promise to remain as a treaty right, it would have to be included in the memorandum. Canada did not breach a fiduciary duty to Roseau River by not disclosing that the 1875 amendment would "extinguish" a treaty right to medical aid, as there may have been no reason for Canada's officials to think that medical aid had been promised in 1871. The facts appear to support the argument that Canada has always treated medical aid as a matter of policy, with those bands having the financial means being required to some extent to pay for their own medical care.

The *Indian Act* provisions speak not of providing Indians with "relief" in a specialized sense, but in the general sense of providing "sufficient aid from the funds of the band for the relief of such sick, disabled, aged or destitute Indians." In this case, the term "relief" can include relief in a medical sense. Parliament's intent was to provide for such band members, by using the band's trust account, when the band was otherwise unable to provide for them. Also, the legislation did not require the Superintendent General to seek the band's consent to use its funds for this purpose. Here, Canada did not use the funds for non-band purposes; they were applied strictly for the care of sick band members. As such, they were in the Band's best interests. When Canada made deductions for medical aid, it did not breach the terms of the 1903 surrender or any fiduciary duties arising from it.

Regardless whether "detrimental reliance" is an equitable defence or an independent cause of action, the First Nation did not tender any evidence of the impact of government policies on this First Nation's traditional healing practices. Evidence of the Elders suggests that traditional healers were still practising in 1937, three years after Canada's deductions for medical aid had ceased.

**Supplementary Mandate :** Pursuant to the ICC's supplementary mandate, although the deductions for medical aid were not contrary to Treaty 1, statute, or the 1903 surrender, and did not give rise to detrimental reliance by the Band, the outcome was nevertheless unfair, because the policy of requiring those bands with sufficient financial resources to pay their own medical expenses was implemented inconsistently and arbitrarily for the Roseau River Band. The evidence shows that Canada made deductions in some years when the Band clearly had insufficient funds, while in other years, when adequate funds existed, deductions were not made.

## RECOMMENDATIONS

**Commissioner Bellegarde:** That, because Canada breached its lawful obligation to provide medical aid under Treaty 1 by making the deductions from the interest trust account of the Roseau River Anishinabe First Nation from 1909 to 1934, it should immediately commence negotiations with Roseau River to reimburse the First Nation for those deductions, together with interest.

**Commissioner Corcoran:** That, unless Canada can establish that the deductions from the interest trust account of the Roseau River Anishinabe First Nation from 1909 to 1934 were made in a manner that was fair and consistent with its treatment of other First Nations, it should immediately commence negotiations with Roseau River to reimburse the First Nation for those deductions, together with interest.

**Commissioners Bellegarde and Corcoran:** That, in the event that the parties are unable to resolve this issue through negotiation, they should be able to return to the Commission, on the motion of either party, to inquire into the compensation payable to the First Nation.

That Canada, in tandem with representative First Nation organizations, should undertake a comprehensive review of medical aid to Indians, with a view to establishing a fair and consistent approach to dealing with this issue, both historically and prospectively.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*R. v. Sioui*, [1990] 1 SCR 1025; *R. v. Taylor and Williams* (1982), 34 OR (2d) 360 (Ont. CA); *Simon v. The Queen*, [1985] 2 SCR 387; *R. v. Van der Peet*, [1996] 2 SCR 507; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Marshall*, [1999] 3 SCR 456; *R. v. Badger*, [1996] 1 SCR 771; *R. v. Côté* (1993), 107 DLR (4th) 28 (Que. CA); *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *Guerin v. The Queen*, [1984] 2 SCR 335; *Dreaver v. The King* (1935), 5 CNLC 92 (Ex. Ct); *R. v. Johnston* (1966), 56 DLR (2d) 749 (Sask. CA); *R. v. Swimmer* (1970), 17 DLR (3d) 476 (Sask. CA); *Manitoba Hospital Commission v. Klein and Spence* (1969), 67 WWR 440 (Man. QB); *Wuskwi Sipik Cree Nation v. The Queen* (unreported, January 21, 1999, Docket No. T-383-98) (FCTD); *R. v. Sparrow*, [1990] 1 SCR 1075; *R. v. Sundown*, [1999] 1 SCR 393; *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] 2 CNLR 5 (FCTD); *Coalition of Manitoba Motorcycle Groups Inc. v. Manitoba (Public Utilities Board)* (1995), 102 Man. R (2d) 155 (CA); *Canada (Attorney General) v. Fillion* (1995), 189 NR 308 at 313 (Fed. CA); *R. v. Lewis*, [1996] 1 SCR 921.

**ICC Reports Referred To**

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**Treaties and Statutes Referred To**

*Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957); *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964); *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869; *Indian Act*, SC 1876, RSC 1886, RSC 1906, RSC 1927; *An Act further to amend the Indian Act*, SC 1895; *Saskatchewan Hospitalization Act*, RSS 1953, RSS 1965; *Unsatisfied Judgment Fund Act*, SM 1965.

**Other Sources Referred To**

R.D. Francis, R. Jones, and D.B. Smith, *Origins: Canadian History to Confederation*, 2nd ed. (Toronto: Holt, Rinehart and Winston of Canada, 1992); W.L. Morton, ed., *Alexander Begg's Red River Journal and Other Papers Relative to the Red River Resistance of 1869–70* (Toronto: Champlain Society, 1956), 431, as cited in N. Ronaghan, "The Archibald Administration in Manitoba, 1870–1872," PhD dissertation, University of Manitoba, 1987; DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted (1994) 1 ICCP 171; D.J. Hall, "A Serene Atmosphere? Treaty 1 Revisited" (1984) 4 *Canadian Journal of Native Studies* 321; Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880; reprinted Saskatoon: Fifth House Publishers, 1991); Canada, *Indian Treaties and Surrenders*, vol. 3 (Ottawa: King's Printer, 1905–12; reprinted Edmonton: Fifth House Publishers, 1993), 375–76; Donna Gordon, Bennett McCardle, Don McMahon, and Bill Russell, "Indian Health Care in Alberta: An Historical Study" (Ottawa: Treaty and Aboriginal Rights Research (TARR) of the Indian Association of Alberta, June 1979); Peter Alan Barkwell, "The Medicine Chest Clause in Treaty No. 6," [1981] 4 CNLR 1; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727; Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

**COUNSEL, PARTIES, INTERVENORS**

R.W. Jones, A.P. Kelly for the Roseau River Anishinabe First Nation; R. Winogron for the Government of Canada; K.N. Lickers, T.A. Gould to the Indian Claims Commission.

**CANADA'S RESPONSE**

On September 17, 2003, the Minister of Indian Affairs and Northern Development wrote to advise the Commission that Canada rejects the ICC's recommendations: see (2004) 17 ICCP 359.



## SUMMARY

### **ROSEAU RIVER ANISHINABE FIRST NATION TREATY LAND ENTITLEMENT MEDIATION Manitoba**

The report may be cited as Indian Claims Commission, *Roseau River Anishinabe First Nation: Treaty Land Entitlement Mediation* (Ottawa, March 1996), reported (1998) 6 ICCP 3.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commission Co-Chair D.J. Bellegarde, Commission Co-Chair P.E.J. Prentice, QC

**Treaties** – Treaty 1 (1871); **Treaty Interpretation** – Reserve Clause – Treaty Land Entitlement; **Mandate of Indian Claims Commission** – Mediation; **Manitoba**

#### **THE SPECIFIC CLAIM**

The Roseau River Anishinabe First Nation, the successor to the followers of signatories to Treaty 1, and the Manitoba Indian Brotherhood filed a specific claim with the Department of Indian Affairs and Northern Development (DIAND) in March 1978, alleging that the obligations under Treaty 1 regarding beneficial land allocation along the banks of the Roseau River had not been met by the Crown. In November 1982, the then Acting Minister of Indian Affairs and Northern Development accepted the claim for negotiation. Substantive negotiations did not begin until 1993; however, by March of that year, the parties had reached an impasse. Negotiations commenced again in October 1994 but again disagreements arose. In February 1995, at the invitation of the parties, the Indian Claims Commission (ICC) commenced a mediation pursuant to its mandate. With the assistance of the ICC mediator, negotiations resumed and an Agreement in Principle (AIP) was reached within a few months. The AIP was ratified by the First Nation in November 1995.

#### **BACKGROUND**

The ICC's involvement in this claim related only to its mediation mandate. As such, the ICC did not receive historical records or legal submissions from the parties.

The terms of Treaty 1, signed in 1871, included the provision that the Crown would set aside reserves for the Indian signatories of 160 acres for each family of five, or in that proportion for larger or smaller families, beginning at the mouth of the Roseau River. Immediately after signing the treaty, however, the Anishinabe Chiefs complained about the lack of protection of their lands, including delays in surveying the promised reserve, encroachment of settlers, and timber permits given to third parties. The Anishinabe also wanted a reserve that straddled the Roseau River and ran along its length.

The proposed site was marked off at the mouth of the Roseau River in 1874, but the official survey was not performed until 1887. The result was a block-shaped reserve that ran back from the mouth of the river rather than along its length. The lands ultimately allocated as reserve were set out in 1887 and 1888, but by this time much of the land that the Anishinabe understood to be their own had been alienated. As a result, the Roseau River Anishinabe alleged that Canada had not set aside the reserve promised to them by the terms of Treaty 1.

#### **RECOMMENDATIONS (MEDIATION)**

[W]e recommend to the Government of Canada that it amend its present policies so as to include mediation as a normal aspect of the Specific Claims Process. We further recommend that Canada instruct departmental counsel and other representatives engaged in matters before the Commission to seek opportunities for mediation or to agree to participate meaningfully in mediation when it is sought by claimants.

**REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

**Treaties and Statutes Referred To**

Treaty 1, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991).

**Other Sources Referred To**

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

# SUMMARY

## **SANDY BAY OJIBWAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Manitoba**

The report may be cited as Indian Claims Commission, *Sandy Bay Ojibway First Nation: Treaty Land Entitlement Inquiry* (Ottawa, June 2007).

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

Panel: Chief Commissioner R. Dupuis, C.M., Ad.E. (Chair), Commissioner D.J. Bellegarde, Commissioner A.C. Holman

**Treaties** – Treaty 1 (1871, 1876); **Treaty Interpretation** – Outside Promises; **Treaty Land Entitlement** – Land Occupied Prior to Treaty, Landless Transfer, Late Adherent, Marriage, Policy, Population Formula, Quality of Land, **Band** – Membership; **Manitoba**

### **THE SPECIFIC CLAIM**

In 1982, the Sandy Bay Ojibway First Nation submitted a treaty land entitlement (TLE) claim that was rejected by the Department of Indian Affairs and Northern Development (DIAND) in 1985. In 1991, following further research analyzing paylists, Canada again advised the First Nation that there was no outstanding treaty land entitlement. In 1998, the Sandy Bay First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE; this request was accepted. At issue in this inquiry is whether the First Nation has an outstanding treaty land entitlement.

### **BACKGROUND**

The Sandy Bay Ojibway First Nation makes its home on the southwest shore of Lake Manitoba. Originally, the Sandy Bay Ojibway First Nation was referred to as the White Mud River Band, which was part of the Portage Band that signed Treaty 1 on August 3, 1871. Shortly after Treaty 1 was signed, the Portage Band was divided into three distinct bands: the Portage Band, the Long Plain First Nation, and the Sandy Bay Ojibway First Nation. A revision to Treaty 1 was then signed in 1876, on which the Sandy Bay Ojibway First Nation signed in its own name. Each of the three bands was to receive a reserve as well as a proportional share of the original Portage reserve, which had not yet been surveyed but was originally intended for all three bands.

In July 1876, Dominion Land Surveyor J. Lestock Reid reported that the Sandy Bay Ojibway First Nation wanted to settle on the western shore of Lake Manitoba. Included in this area were five farms previously occupied by Sandy Bay members; two of these farms were within the reserve. Township 18, range 9, originally surveyed by Dominion Land Surveyor C.P. Brown in 1873 and located on the western shore of Lake Manitoba, was set aside as a reserve for the Sandy Bay Ojibway First Nation. After a period of flooding and a time during which many members withdrew from the treaty and later were readmitted, the reserve was confirmed as Sandy Bay Indian Reserve (IR) 5 by Order in Council 2876 on November 21, 1913.

In the 1920s, questions arose regarding the Sandy Bay Reserve's eastern boundary, which bordered the shore of Lake Manitoba. To clarify the situation, Order in Council 1004, dated May 13, 1930, was issued, which set apart six square miles of marsh, or 3,840 acres (more or less), for the Sandy Bay Indian Reserve.

In 1970, Order in Council 1970-2030 set apart approximately 495 acres of former road allowances for the use and benefit of the First Nation.

### **ISSUES**

What is the amount of land in I.R. No. 5 which can be credited toward TLE? What is the amount of land originally set apart for Sandy Bay Ojibway First Nation in Treaty 1 and in 1876? What amount of land was provided to Sandy Bay in 1930 (OIC P.C. 1004 dated May 13, 1930) and 1970 (OIC P.C. 1970-2030 dated Nov. 24, 1970)? Can the lands provided in 1930 and 1970

be credited toward TLE? What amount of land, if any, should not be credited toward TLE on the grounds that it was land improved and occupied prior to Treaty? What is the population number for Sandy Bay Ojibway First Nation to calculate the amount of land to which it is entitled pursuant to Treaty?

### **FINDINGS**

This inquiry focuses on whether the Sandy Bay Ojibway First Nation has an outstanding treaty land entitlement claim. Part of answering this question involves determining how much land was originally set aside for the First Nation. In examining the 1913 Order in Council setting aside the reserve, the panel concludes that 12,102 acres of dry land were set aside and that no marshland was included as part of the reserve. The panel further concludes that the 1930 Order in Council was issued to clarify and confirm that the six square miles of marsh were intended to be part of the reserve. However, while the marshland was intended to be part of the reserve, the panel finds that the marshlands cannot be attributed to TLE since a fundamental goal of Treaty 1 was to encourage the development of an agriculturally based economy among First Nations. Marshland could not have fulfilled this goal; therefore, even though marsh may be considered land, it cannot be credited toward TLE.

With respect to the issue of land improved and occupied prior to treaty, the panel concludes that the two farms which fell within reserve boundaries at the date of first survey were occupied by members of the Sandy Bay Ojibway First Nation. As a result, the Band is entitled to count these two members as part of the date of first survey population; however, the lands of these two farms should not be credited toward TLE. In other words, lands occupied and improved prior to treaty should not diminish the Band's land entitlement.

As for the issue dealing with the population number for the Sandy Bay Ojibway First Nation, which is required to calculate its TLE, the panel first had to determine where 17 people – claimed by both the Sandy Bay Ojibway First Nation and the Long Plain First Nation – should be counted. Based on the evidence presented, the panel concludes that these 17 people must be deducted from Sandy Bay's TLE population count and should be counted with the Long Plain First Nation. In addition, with respect to Sandy Bay's TLE population count, the panel notes that additional research is required to determine whether any of the 38 non-treaty women may be added to the Sandy Bay population count. Based on the evidence presented, the panel has determined that the population count is 207. There are an additional seven people whom the panel cannot conclude, based on the evidence, whether to add to the population count.

### **RECOMMENDATION**

We therefore recommend that this claim not be accepted for negotiation.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*R. v. Marshall*, [1999] 3 SCR 456. *Merritt v. Toronto (City)* (1913) 48 SCR 1.

#### **ICC Reports Referred To**

*Fort McKay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, December 1995), reported (1996) 5 ICCP 3.

#### **Treaties and Statutes Referred To**

Canada, *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions*, August 3, 1871 (Ottawa: Queen's Printer, 1957); Copy of Revision to Treaty No. 1, June 20, 1876, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1876*, xxviii–xxix.

#### **Other Sources Referred To**

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

**COUNSEL, PARTIES, INTERVENORS**

J.R.N. Boudreau for the Sandy Bay Ojibway First Nation; P. Robinson for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.



# SUMMARY

## **SAKIMAY FIRST NATION TREATY LAND ENTITLEMENT INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Sakimay First Nation: Treaty Land Entitlement Inquiry* (Ottawa, February 2007).

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

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

**Treaties** – Treaty 4 (1874); **Treaty Land Entitlement** – Amalgamation – Policy; **Saskatchewan**

### **THE SPECIFIC CLAIM**

In 1984, the Sakimay First Nation's treaty land entitlement (TLE) claim was rejected by the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND). The First Nation completed further research and re-submitted the claim in 1997. Following the rejection of this submission in 2002, the First Nation requested that the Indian Claims Commission (ICC) review its rejected specific claim. In September 2003, the ICC accepted the request for inquiry. At issue in this inquiry is whether the First Nation has an outstanding treaty land entitlement.

### **BACKGROUND**

The Sakimay First Nation is a Cree-speaking nation located east of Regina, Saskatchewan, near the community of Grenfell. Today's Sakimay First Nation is a combination of the Sakimay or Mosquito Band and the Little Bone Band. Historically, the Sakimay Band was part of the Fort Ellice Band led by Waywayseecappo, who signed Treaty 4 in 1874 on behalf of the Fort Ellice Band. Following the signing, Sakimay and his followers were paid treaty annuities with Waywayseecappo and were listed under his payroll.

In 1875, W.J. Christie travelled to Fort Ellice and Qu'Appelle to meet with the treaty bands to select reserves. Christie later reported that a few of the families that were part of Waywayseecappo's Band had settled at the Round and Crooked Lakes on the Qu'Appelle River and did not wish to move. As a result, a reserve for Sakimay (Mosquito) was originally surveyed in 1876 on the north shore of Crooked Lake; however, the survey of the southern boundary was never completed, and the reserve was never confirmed. In 1881, a separate payroll was created for the Sakimay Band, and Indian Reserve (IR) 74 was surveyed for the Band on the south side of Crooked Lake. After Sakimay's death in 1881, the Band split into two groups. One group, led by Yellow Calf, occupied the south side of the reserve, while the other, led by Shesheep, occupied the north side of the reserve. IR 74A, consisting of 1,651.2 acres on the north side of Crooked Lake, was set aside in 1884 after a re-survey of the area. The two groups had separate paylists until 1883, when they were recombined under one payroll. In 1889, additional lands were added to this reserve and its size was confirmed as 3,584 acres.

By 1887, the Sakimay First Nation had developed close ties with the Little Bone Band, which occupied IR 73A, near the Sakimay reserve. Little Bone and his followers were paid annuities under the Sakimay payroll from 1887 on. By 1907, the Department of Indian Affairs acknowledged that the two bands had amalgamated, an arrangement it formalized. A surrender of the Little Bone reserve resulted.

### **ISSUES**

What is the date of first survey for the Sakimay First Nation? What are the appropriate paylists to use for determining the Sakimay First Nation's treaty land entitlement population? Should Little Bone and his followers be counted with the Sakimay First Nation for the purpose of calculating its treaty land entitlement? If Little Bone or any of his followers were counted elsewhere for purposes of treaty land entitlement, does that preclude such individuals from being included in the Sakimay

First Nation population for TLE purposes? What is the Sakimay First Nation's population for Treaty land entitlement purposes? Does the Sakimay First Nation have an outstanding treaty land entitlement?

**OUTCOME**

The specific claim was accepted for negotiation by Canada in September 2006. The Sakimay First Nation accepted this offer and requested the ICC conclude its inquiry, which the ICC did by issuing a declaration on February 21, 2007.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**ICC Reports Referred To**

*Gamblers First Nation: Treaty Land Entitlement Inquiry* (Ottawa, October 1998), reported (1999) 11 ICCP 3.

**Treaties and Statutes Referred To**

*Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966).

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171–85.

**COUNSEL, PARTIES, INTERVENORS**

R.S. Maurice for the Sakimay First Nation; V. Russell for the Government of Canada; J.B. Edmond, D. Kwan to the Indian Claims Commission.

# SUMMARY

## **SAULTEAU FIRST NATION TREATY LAND ENTITLEMENT AND LANDS IN SEVERALTY INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Saulteau First Nation: Treaty Land Entitlement and Lands in Severalty Inquiry* (Ottawa, April 2007).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Chief Commissioner R. Dupuis, C.M. (Chair), Commissioner D.J. Bellegarde, Commissioner J. Dickson-Gilmore

**Treaties** – Treaty 8 (1899); **Fiduciary Duty** – Treaty Land Entitlement; **Treaty Land Entitlement (TLE)** – Severalty; **British Columbia**

### **THE SPECIFIC CLAIM**

In August 1997, the Treaty 8 Tribal Association submitted two specific claims to the Government of Canada on behalf of the Saulteau First Nation. The First Nation claimed that Canada breached its legal and fiduciary duties by failing to perform its obligations under the land entitlement provisions of Treaty 8 and claimed a shortfall of 4,898 acres. The First Nation also maintained that a claim to land known as Deadman Creek should be recognized as entitlement under the severalty provisions of Treaty 8.

In 2003, the Indian Claims Commission (ICC) accepted these claims as having been constructively rejected by the Minister of Indian Affairs and Northern Development. In February 2006, in anticipation of the claims' acceptance for negotiation by the Minister, the Saulteau First Nation requested the inquiry into their claims be concluded. As a result of the First Nation's request, the Commission panel declared the inquiry closed on June 1, 2006.

### **BACKGROUND**

On June 21, 1899, the dominion government signed Treaty 8 with the Cree, Chipewyan, and Beaver Indians at Lesser Slave Lake. The land provisions of the treaty stated that signatory bands would receive reserves with areas equal to 640 acres for each family of five (i.e., 128 acres per capita), and families or individuals who wished to live apart from the reserves would receive 160 acres of lands in severalty.

Based on the land provisions of Treaty 8, the First Nation claimed a treaty land entitlement shortfall of 4,898 acres for a number of band members who were late adherents, absentees, or landless transfers at the date of first survey. In 1974, Saulteau band member Jim Gauthier applied for a disposition of 91.06 hectares of Crown land based on his great-grandfather Charles Gauthier's claim for lands in severalty.

### **OUTCOME**

The First Nation requested the inquiry into their claims be concluded before the parties had agreed to a joint statement of issues.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research that is fully referenced in the report.

### **Treaties and Statutes Referred To**

*Treaty No. 8, Made June 21, 1899 and Adhesions, Reports, Etc.* (1899; reprint, Ottawa: Queen's Printer, 1966).

**Other Sources Referred To**

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

**COUNSEL, PARTIES, INTERVENERS**

C.G. Devlin for the Saulteau First Nation; P. Robinson for the Government of Canada; J.B. Edmond, J. McGregor to the Indian Claims Commission.

## SUMMARY

### **STANDING BUFFALO DAKOTA NATION FLOODING MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Standing Buffalo Dakota Nation: Flooding Mediation* (Ottawa, March 2004).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 4 (1874); **Flooding** – Dam; **Right of Way** – Dam – Permit – Expropriation – Trespass; **Indian Act** – Permit; **Fiduciary Duty** – Right of Way – Consultation; **Reserve** – Riparian Rights; **Band Council** – Band Council Resolution; **Mandate of Indian Claims Commission** – Constructive Rejection – Mediation; **Additions to Reserves Policy; Saskatchewan**

#### **THE SPECIFIC CLAIM**

Standing Buffalo Dakota Nation, together with seven other members of the Qu'Appelle Valley Indian Development Authority (QVIDA), submitted a claim to the Department of Indian Affairs and Northern Development (DIAND) resulting from the recurrent and, in some cases, continuous flooding of reserve lands bordering the Qu'Appelle River. The flooding was caused by the construction in the 1940s of a number of water control structures throughout the Qu'Appelle River Valley. In 1994, the QVIDA First Nations requested that the Indian Claims Commission (ICC) conduct an inquiry into their claim. The ICC completed its inquiry and issued a report in February 1998, recommending that the QVIDA First Nations claims be accepted for negotiation by Canada. In December 1998, Canada agreed to negotiate the Standing Buffalo Dakota Nation's flooding claim "on the basis that Canada did not properly authorize the flooding of reserve lands" (see the letter at (1999) 11 ICCP 306). Standing Buffalo decided to negotiate its claim separate from the other QVIDA First Nations. With the parties' agreement, the Commission acted as facilitator to the negotiations.

#### **BACKGROUND**

The background to this mediation may be found at Indian Claims Commission, *Qu'Appelle Valley Indian Development Authority (Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159.

#### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide a record of the discussions, follow up on undertakings, and oversee the logistics for the meetings. The Commission was responsible for mediating disputes and acting as a coordinator for the various studies undertaken by the parties to support negotiations. The parties worked with the ICC to establish negotiating principles and guiding protocol agreements, in particular, a bilateral (Standing Buffalo and Canada) negotiation protocol and a trilateral (Standing Buffalo, Canada, and the Commission) mediation/facilitation protocol. Other elements of the negotiation included quantification of the land damaged by flooding; identification of damages and compensation criteria; valuation of economic losses; and alternatives to surrender.

#### **OUTCOME**

A Settlement Agreement was finalized in late 2002. It provided \$3.6 million in compensation to the Band and the ability to acquire up to 640 acres of agricultural land, which would be set apart as reserve land pursuant to Canada's Additions to Reserves Policy. After the First Nation ratified the Settlement Agreement, it was formally approved by Canada in March 2003.

**REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

**ICC Reports Referred To**

*Qu'Appelle Valley Indian Development Authority (Muscoupetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace First Nations): Flooding Inquiry* (Ottawa, February 1998), reported (1998) 9 ICCP 159.

## SUMMARY

### **STURGEON LAKE FIRST NATION RED DEER HOLDINGS AGRICULTURAL LEASE INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Sturgeon Lake First Nation: Red Deer Holdings Agricultural Lease Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 3.

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Panel:** Commission Co-Chair P.E.J. Prentice, QC, Commissioner C.T. Corcoran

**Treaties** – Treaty 6 (1876); **Reserve** – Lease; **Indian Act** – Permit; **Specific Claims Policy** –Fifteen-year Rule;  
**Saskatchewan**

#### **THE SPECIFIC CLAIM**

In 1994, the Sturgeon Lake First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the federal Crown breached its lawful obligations concerning a failed lease of reserve land to Red Deer Holdings Ltd (RDH) in 1982. The Crown, it argued, had allowed, among other things, cropping and harvesting of part of the reserve without an agricultural permit as required by the *Indian Act*. In October 1995, the department informed the First Nation that it would not consider the claim because it did not constitute a “longstanding historical grievance,” and therefore, in DIAND’s opinion, fell outside the intended scope of the Specific Claims Policy. In May 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the claim.

Because the claim for compensation for lost revenues was only \$73,000 in 1982, the ICC agreed to the parties’ request to place the inquiry into abeyance, pending a review of the claim by DIAND. DIAND agreed to consider the claim as a “fast-track” claim, which is an expedited process to settle specific claims of \$500,000 or less. The department agreed to accept the claim for negotiation in August 1977, after the First Nation resubmitted it in order to comply with the department’s policy of addressing specific claims only after 15 years have passed since the claim arose (the “15-year rule”).

#### **BACKGROUND**

The Sturgeon Lake First Nation people are descendants of Cree Chief Ah-yah-tus-kum-ik-im-am (William Twatt) and four headmen who signed Treaty 6 on August 23, 1876. In 1878, a 34.4-square-mile reserve, Indian Reserve (IR) 101, was surveyed and confirmed for the William Twatt Band at Sturgeon Lake, northwest of Prince Albert, Saskatchewan. All cultivated reserve land was used for a band-operated farm, except for some small areas farmed by individual band members.

In the spring of 1981, the Band entered into a lease arrangement for approximately 1,600 acres of reserve land. When the “Lessee” declared bankruptcy in the fall of 1981, RDH paid the arrears and offered to enter into a similar lease arrangement with the Band. On May 21 and June 9, 1982, the Sturgeon Lake Band issued two Band Council Resolutions to request formally that Indian Affairs issue an agricultural permit to RDH under subsection 28(2) of the *Indian Act* for a lease of reserve lands. A draft permit providing for the use of some 1,813 acres of reserve land was prepared by DIAND and presented to RDH, which failed to confirm the terms of the permit. RDH subsequently entered the reserve land and planted crops without an executed agricultural permit. At the end of October 1982, a representative of RDH met with the band council and asked to renegotiate the fall payment owing to a crop failure which was not covered by the company’s insurance.

Sturgeon Lake’s lawyer wrote a letter in November 1982 indicating that it was the responsibility of DIAND to collect the moneys owed by RDH. In December 1982, DIAND directed the Department of Justice to approach RDH regarding execution of the permits and assignment of Saskatchewan Crop Insurance moneys to the Band; these efforts were unsuccessful. In February 1983, the Department of Justice informed the First Nation that it could do nothing more, and recommended that the Band take action against RDH. The Band reiterated that only the department could take such action; the Crown commenced

legal action but later abandoned the lawsuit. The Band subsequently initiated efforts to recoup its losses from DIAND, but was unsuccessful.

### **ISSUES**

Does the Specific Claims Policy apply only to “historical grievances”? Did Canada breach its lawful obligation by failing to comply with the *Indian Act* in leasing the reserve lands around 1982?

As Canada accepted the claim during the inquiry, the ICC was not required to address the above-named issues; nevertheless, it decided to address the question whether there is valid justification for Canada’s refusal to address specific claims until 15 years have passed since the claim arose [the 15-year rule].

### **FINDINGS**

With regard to the 15-year rule, there are no specific references to such a waiting period in the 1982 Specific Claims Policy as set out in *Outstanding Business*; had Canada intended to impose such a limitation, it could have done so clearly and expressly in the Policy. A fair reading of *Outstanding Business* suggests that there is no room for such a limitation because it was intended to address all outstanding claims “between Indians and government which for the sake of justice, equity and prosperity now must be settled *without further delay*.” Imposing a waiting period is tantamount to asking the First Nation to assume the risk that first-hand knowledge, salient evidence, and important documents may be lost. A First Nation claiming an outstanding legal obligation under the Policy would have no other option but to pursue litigation. This option would increase both the time and costs dramatically and is contrary to the objective of *Outstanding Business*, which was specifically designed to avoid unnecessary litigation.

### **RECOMMENDATION**

That Canada withdraw the “15-year rule” and notify any First Nation claimants whose claims have been refused for consideration on this basis.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### **Treaties and Statutes Referred To**

Treaty 6 (1876); *Indian Act*, RSC 1970.

### **Other Sources Referred To**

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

### **COUNSEL, PARTIES, INTERVENORS**

D.C. Knoll for the Sturgeon Lake First Nation; B. Becker, R. Irwin for the Government of Canada; R.S. Maurice, K.N. Lickers to the Indian Claims Commission.

## SUMMARY

### **SUMAS BAND INDIAN RESERVE 6 RAILWAY RIGHT OF WAY INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Sumas Band: Indian Reserve 6 Railway Right of Way Inquiry* (Ottawa, February 1995), reported (1996) 4 ICCP 3.

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

**Panel:** Commissioner D.J. Bellegarde, Commissioner C.T. Corcoran, Commissioner P.E.J. Prentice, QC

**Reserve** – Surrender – Disposition – Proceeds of Sale; **Right of Way** – Abandonment – Expropriation – Railway – Reversionary Interest; **Indian Act** – Expropriation – Surrender; **Fiduciary Duty** – Pre-surrender – Post-surrender – Right of Way; **Compensation** – Damages; **British Columbia**

#### **THE SPECIFIC CLAIM**

In March 1984, the Sumas Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND), alleging that the *Railway Act* and the *Indian Act* permitted the Victoria, Vancouver and Eastern Railway and Navigation Company (VV&E) to acquire only a limited interest in Sumas Indian Reserve (IR) 6 and that the right of way should have been restored to reserve status when no longer used for railway purposes. Canada rejected the claim in 1988 on the basis that the expropriation had terminated the Indian interest in the right of way lands, and that consequently there was no legal obligation to restore the lands to reserve status. In September 1993, the Band requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected claim; in January 1994, the ICC agreed to the Band's request. The ICC conducted a community session and the oral hearing, based on written submissions, in September 1994.

#### **BACKGROUND**

In July 1910, the VV&E forwarded survey plans to the Department of Indian Affairs showing a proposed 41.95-acre railway right of way across Sumas IR 6, along with a request to “allow the Company to proceed with the work at once.” Pursuant to section 46 of the 1906 *Indian Act*, the request was approved by federal Order in Council in August, whereby VV&E “was allowed to acquire from the Department of Indian Affairs the Indians’ interest in the right of way.” On August 8, the Sumas Band passed a resolution approving the sale of 41.95 acres to VV&E for a right of way, for \$12,668.25, including \$5663.25 for the land (41.95 acres at \$135.00 per acre) plus payments for clearing the land and improvements. After the company objected to the valuation as excessive, the Inspector of Indian Agencies and Indian Agent R.C. McDonald revised the plan by reducing the width for almost the entire length of the right of way and setting a new price of \$3,892.05 (28.83 acres at \$135.00 per acre), plus amounts for clearing and improvements. There is no evidence of a Band Council Resolution (BCR) consenting to the adjusted area and price; the Inspector, however, reported that “the Indians have all agreed to the above amounts.” On February 11, 1911, letters patent were issued to VV&E.

In 1927, the VV&E ceased to use the right of way for railway purposes and removed the tracks on Sumas IR 6. Thereafter, the company applied for and succeeded in having a crown grant to the right of way land registered; in September 1927, it received a certificate of title. In December, however, the Indian Agent at the time was contacted by the Chief of the Sumas Band, objecting to a sale to non-Indians. He argued that “because this land is right between our Reserve, they should give us the first chance to buy this land.” But the VV&E had already contracted to sell 12.08 acres to Samuel Maclure, who received certificate of title in February 1928 and subdivided the land into three lots. The remainder was sold, and certificate of title issued, to the Clayburn Brick Company, an assignee of the lease obtained by Maclure in 1910.

Meanwhile, the Sumas Band passed a BCR in January 1928 petitioning the Department of Indian Affairs to purchase nine acres of abandoned right of way from Maclure for \$40.00 per acre; however, the Indian Agent did not forward its appli-

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cation to Ottawa until March. In June, when the Department of Indian Affairs enquired why the Band was seeking only part of Maclure's 12.08 acres, the Agent replied that the remaining portion was "not desired by the Indians," and that the requested land, "while of no particular value in itself, allows the Reserve to remain in one piece." On July 30, 1928, a certificate of title for the nine-acre lot was issued to the department, for which the Band paid \$343.00. In 1965, a federal Order in Council confirmed this land to be part of IR 6. Two-thirds of the right of way on the reserve remains in private hands.

### ISSUES

What interest in IR 6 was taken by VV&E, and what interest, if any, remained in the Band or Canada? What obligation, if any, did Canada have when it learned that VV&E no longer needed the right of way for railway purposes? If VV&E did acquire absolute title to the right of way, did Canada breach its fiduciary obligation to the Sumas Band by executing the Order in Council or issuing letters patent to the railway company? In the alternative, was the Order in Council valid only for the taking of the 41.95-acre parcel as set out in the original plan of right of way, and, if so, did Canada breach section 46 of the *Indian Act* by failing to obtain the consent of the Governor in Council for the taking of 28.83 acres?

### FINDINGS

The evidence indicates that the Department of Indian Affairs was aware of the injurious effect of the right of way. Indian Agent McDonald had noted that it was to be taken from the best part of the reserve; further, most of the Band's improvements and its burial ground were there. It was apparent that the right of way deprived the Band of a substantial tract of its only good reserve land, the rest being flood plain, and severed the core of the reserve into two.

VV&E acquired a fee simple interest in the right of way across the Sumas reserve as long as it was used for railway purposes. The Band and the Crown retained a reversionary interest in the right of way, through which the Crown, as intermediary, should have ensured that the land reverted to the Band.

Where reserve land taken for public purposes is no longer used for those purposes and may be restored to the Crown, the Crown has a fiduciary duty to exercise its discretion in favour of restoring the land to the band. Canada had an obligation to act on behalf of the Band to restore its interest and breached that duty when it issued a Crown grant to VV&E.

If the letters patent were effective to transfer absolute title to VV&E, the Crown failed in its fiduciary duty to the Band by granting the right of way lands for railway purposes without limitation. Although the Crown had a duty to consider the public interest in a railway as well as the Band's interest, its obligation in this context was to do as little injury as possible to the Indians' interest. Any grant to the company beyond a right of way for railway purposes was a gratuitous disposition of Indian lands.

The original consent of the Governor in Council to the taking of a 41.95-acre right of way was a valid consent to the smaller 28.83-acre parcel, as the lands actually taken were within the lands for which the consent was obtained.

### RECOMMENDATION

That the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claims Policy.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Canadian Pacific Railway Limited v. Paul*, [1988] 2 SCR 654; *A.G. Canada v. Canadian Pacific Limited and Marathon Realty Company Limited*, [1986] 1 CNLR 1 (BCSC), aff'd BCCA, May 14, 1986 (unreported); *Metropolitan Realty Company v. Fowler*, [1893] AC 416; *Norton v. London and Northwestern Railway Co.* (1878), 9 Ch.D. 623; *St. Mary's Indian Band v. City of Cranbrook*, [1994] 3 CNLR 187 (BCSC); *Kruger v. R.*, [1985] 17 DLR (4th) 591 (FCA); *Guerin v. R.*, [1984] 2 SCR 335; [1985] 1 CNLR 120; *St. Ann's Island Shooting and Fishing Club Ltd. v. R.*, [1950] SCR 211.

### Statutes and Regulations Referred To

*Railway Act*, RSC 1906; *Indian Act*, RSC 1906, RSC 1927.

### **Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171; P.W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985); P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Yvon Blais, 1992); E.H. Burn, *Cheshire & Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988).

### **COUNSEL, PARTIES, INTERVENORS**

L. Pinder, C. Ostrove for the Sumas Band; B. Becker, L. Senechal for the Government of Canada; K. Fullerton, R.F. Reid, QC, D. Belevsky to the Indian Claims Commission.

### **CANADA'S RESPONSE**

By letter dated December 20, 1995, the Minister of Indian Affairs and Northern Development indicated that the department would await the outcome of several railway court actions concerning the same issues raised in the ICC report, but that, once the courts have provided some direction, Canada would be pleased to consider the recommendation further: see (1996) 4 ICCP 205.

By letter dated June 16, 2005, the Minister of Indian Affairs and Northern Development reported that, in light of current case law, Canada accepted the claim for negotiation.



# SUMMARY

## **SUMAS INDIAN BAND 1919 INDIAN RESERVE 7 SURRENDER INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry* (Ottawa, August 1997), reported (1998) 8 ICCP 281.

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

**Panel:** Commission Co-Chair D.J. Bellegarde, Commissioner C.T. Corcoran

**Reserve** – Surrender – Disposition – Proceeds of Sale; **Indian Act** – Surrender; **Fiduciary Duty** – Pre-surrender – Post-surrender; **Compensation** – Damages; **British Columbia**

### **THE SPECIFIC CLAIM**

In December 1987, the Sumas Indian Band filed a specific claim with the Department of Indian Affairs and Northern Development (DIAND), alleging a wrongful surrender of lands within Indian Reserve (IR) 7 in 1919 for the purpose of sale to the Soldier Settlement Board. In December 1990, DIAND informed the Band that Canada had rejected the Band's claim, but offered to negotiate on the basis that Canada may have breached its fiduciary duty to the Band when it agreed to reimburse the Soldier Settlement Board for 9.865 acres taken up by the Sumas River within the surrendered lands. The Band submitted additional evidence to DIAND on the other aspects of the claim, but, in November 1992, the department again declined to accept it for negotiation. In March 1995, the Band requested that the Indian Claims Commission (ICC) conduct an inquiry into the alleged wrongful surrender. The ICC held the community session and the oral hearing, based on written submissions, on the Sumas Indian reserve in April 1996.

### **BACKGROUND**

The Sumas Band was allotted IR 6 and IR 7 by the Indian Reserve Commissioner in 1879. Most band members lived on IR 6; two band members lived on IR 7. Unlike IR 6, IR 7 had good agricultural land and was rarely flooded, although it was heavily forested. There were several offers to purchase the timber on IR 7, but the Band or Indian Affairs refused. In 1917, however, with the department's agreement, the Band consented to cut the timber under a permit of sale to P.A. Devoy.

Following the First World War, the Soldier Settlement Board (the Board) approached Indian Affairs with a request to purchase IR 7 for returning soldiers. Indian Agent Peter Byrne visited the reserve, spoke with the Band regarding surrender, and examined the soil. He and the local Member of Parliament decided that \$80 per acre was a fair value to place on the land after deducting the railway right of way and the highways, although Agent Byrne believed it was worth \$100 per acre.

Agent Byrne reported that the Indians were "divided in regard to this surrender." In July 1919, after the Board agreed to pay \$80 per acre, Agent Byrne was authorized to submit the surrender to the Band. He was authorized to distribute \$100 for each band member, provided the surrender was granted. The *Indian Act* permitted a cash advance of up to 50 per cent of the proceeds of the land at the time of surrender. In October 1919, Agent Byrne reported that all nine band members on the voters list had attended the meeting and voted in favour of the surrender of IR 7. In February 1923, after a subdivision survey showed that only 135.9 of 153.5 acres purchased were usable for soldier settlement, the Board received \$1,088 as an adjustment of the \$12,280 purchase price. There was no evidence that the Band was consulted or made aware of these negotiations to refund a portion of the purchase price.

By August 1920, it was becoming apparent to the Board that IR 7 might not be suitable for soldier settlement and it began to consider selling the land to civilians; but, in January 1923, the Board advised Indian Affairs that it was having difficulty selling the surrendered land. The following year, the Board recommended that the lands be returned to Indian Affairs. No action was taken, and, by 1930, the lots had been sold to civilians and one returned soldier.

**ISSUES**

Did the Crown have any fiduciary or trust obligations to the Band prior to the surrender, and if so, were they fulfilled? In obtaining the surrender, did the Crown comply with the surrender requirements of the *Indian Act*? In particular, did the Crown or its agents exercise undue influence or duress over the band members in order to obtain the surrender? Was the Crown's receipt of an advance on the purchase price prior to the completion of the surrender contrary to the *Indian Act* or the Crown's fiduciary obligations, if any, in managing the reserve or surrendered land?

If the surrender is valid, did the Crown fulfill its fiduciary obligations to the Band subsequent to the surrender? Did the subsequent disposition of IR 7 violate the terms of the surrender, the *Indian Act*, the *Soldier Settlement Act*, or the Crown's fiduciary obligation to the Band?

**FINDINGS**

The Crown did not breach its fiduciary duty to the Band. Although Agent Byrne was persistent in seeking the surrender, there is insufficient evidence that he applied undue pressure on the Band to consent to surrender against its will, and no evidence that the Band ceded its decision-making power to the Crown. Agent Byrne met with the Band on at least three occasions to discuss surrender. Ultimately, the Band made a full and informed decision to surrender all its interests in IR 7 to the Crown and expressed its intention to do so by voting unanimously in favour and signing the surrender documents. In these circumstances, the Crown had no duty to substitute its own decision for the Band's, or to withhold its own consent to the surrender under section 49(4) of the *Indian Act*. Although it is not clear why some band members changed their views and agreed to the surrender, there is insufficient evidence to establish that the surrender was foolish, improvident, or exploitative. When viewed from the perspective of the Band at the time, it may have made good sense to surrender IR 7, since it was not actively used and the proceeds would have benefited the Band.

The Department of Indian Affairs owed a post-surrender fiduciary duty to the Band to ensure that it received fair market value for the lands, but the Crown failed to exercise its discretion in a reasonable and prudent manner for the benefit of the Band. The department unilaterally undertook to negotiate the purchase price for the land, and Agent Byrne had the sole discretion to negotiate on behalf of the Band. If \$80 per acre was the fair market value of the land in 1919, it cannot be said that the Band suffered any damages. If, however, the purchase price of \$80 per acre was lower than the fair market value, the discrepancy between these two figures would provide a valid basis for a claim for compensation. The evidence before the Commission is insufficient to determine if the Band suffered any damages.

The Crown did not violate the *Indian Act* when it received an advance on the purchase price for distribution to band members prior to the completion of the surrender. Section 89 of the Act was intended to give Crown officials the authority to offer a greater incentive to bands to surrender their reserve lands. Notwithstanding this authority, it is necessary to scrutinize the circumstances in which a cash payment is used in surrender cases because the abuse of this authority and discretion by Crown officials can result in a breach of fiduciary duty towards the band in question. There is no evidence of tainted dealings on the part of the Crown, however, and therefore no breach of the Crown's fiduciary duty by having made an advance on the purchase price.

The Crown did not have a post-surrender fiduciary duty to return the land to the Band, when it was offered by the Soldier Settlement Board, because the surrender was absolute and unconditional. There was no right of reversion in the Band.

A breach of section 51 of the *Indian Act*, governing the disposition of surrendered reserve land, did not occur because the reserve lands were disposed of in accordance with the terms of the surrender. The Crown, in providing a rebate on the purchase price to the Board, did not violate section 10 of the *Soldier Settlement Act* because it did not amount to an alteration of the terms of the surrender. The Crown did not have any continuing obligation to the Band with respect to the land, since there had already been a complete transfer and alienation of the reserve land to the Board by the time it became known that the lands would not be sold to returning soldiers.

The surrender of IR 7 by the Sumas Band in 1919 was valid, as the Crown did not breach any statutory or fiduciary obligations. Nevertheless, the Commission is not satisfied that the Crown acted reasonably in trying to obtain fair compensation for the Band in exchange for the surrender.

**RECOMMENDATION**

That the Sumas Indian Band and Canada conduct joint research to determine whether fair market value was paid for IR 7 in 1919 having regard to the various considerations we have identified in this report. If the studies confirm that the fair market

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value was higher than the \$80.00 per acre obtained by the Band, it is our view that the Band is entitled to be compensated for any such discrepancy. Any compensation owed to the Band would be a matter of negotiation between the parties.

#### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### Cases Referred To

*Cardinal v. R.*, [1982] 1 SCR 508; *Chippewas of Kettle and Stony Point v. Canada* (1995), 24 OR (3d) 654 (Gen. Div.); affirmed in *Chippewas of Kettle and Stony Point v. Canada* (1997), 31 OR (3d) 97 (Ont. CA); *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 70 DLR (4th) 385 (SCC); *Blueberry River Band v. Canada (Department of Indian Affairs and Northern Development)* (sub nom. *Apsassin*) (1995), 130 DLR (4th) 193, [1996] 2 CNLR 25 (SCC); *R. v. Badger*, [1996] 2 CNLR 77 (SCC); *Wewayakum Indian Band v. Canada*, [1989] 1 SCR 322; *Delgamuukw v. British Columbia*, [1993] 5 WWR 97 (BCCA); *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Quebec (Attorney General) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC); *M.(K.) v. M.(H.)*, [1992] 3 SCR 6; *Norberg v. Wynrib*, [1992] 2 SCR 226; *Hodgkinson v. Simms*, [1994] 9 WWR 609 (SCC); *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1988] 14 FTR 161 (Fed. TD); *Apsassin v. Canada*, [1993] 3 FC 28 (FCA); *Apsassin*, [1988] 14 FTR 161 (TD); *Kruger v. The Queen*, [1985] 3 CNLR 15 (FCA); *R. v. Horseman*, [1990] 3 CNLR 95 (SCC).

#### ICC Reports Referred To

*Kabkewistabaw First Nation: 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), reported (1998) 8 ICCP.

#### Treaties and Statutes Referred To

*Royal Proclamation of 1763*; *Indian Act*, RSC 1906; *An Act to assist Returned Soldiers in settling upon the Land and to increase Agricultural production*, 7–8 George V, 1917; *Soldier Settlement Act, 1919*, 9–10 George V, 1919.

#### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Robin Fisher, *Contact and Conflict*, 2nd ed. (Vancouver: UBC Press, 1992); Frankel, “Fiduciary Law” (1983), 71 Calif. L. Rev. 795.

#### COUNSEL, PARTIES, INTERVENORS

C. Ostrove, E.A. Gilmour for the Sumas Indian Band; B. Becker, K. Kobayashi for the Government of Canada; R.S. Maurice, K.N. Lickers to the Indian Claims Commission.

#### CANADA’S RESPONSE

By letter dated January 21, 1998, the Minister of Indian Affairs and Northern Development agreed to explore possible additional joint research to determine if the Band is entitled to greater compensation for the sale of its surrendered reserve land. The Minister also reiterated DIAND’s commitment to negotiate a settlement with the Band for compensation for the 9.865 acres of surrendered land taken up by the Sumas River. See (1998) 8 ICCP 375.



## SUMMARY

### **TAKU RIVER TLINGIT FIRST NATION WENAH SPECIFIC CLAIM INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Taku River Tlingit First Nation: Wenah Specific Claim Inquiry* (Ottawa, March 2006).

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

**Panel:** Commissioner J. Dickson-Gilmore (Chair), Commissioner D.J. Bellegarde, Commissioner S.G. Purdy

**British Columbia** – Reserve Creation – McKenna-McBride Commission – Indian Settlement; **Culture and Religion** – Burial Site; **Fiduciary Duty** – Reserve Creation; **Reserve** – Reserve Creation; **Specific Claims Policy** – Fiduciary Duty

#### **THE SPECIFIC CLAIM**

On August 22, 1997, the Taku River Tlingit First Nation submitted the historical part of its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND); legal arguments followed on June 15, 1998. These arguments asserted that the federal Crown failed to carry out its legal obligations with respect to the Taku River Tlingit First Nation and its lands at Wenah. The Taku River Tlingit allege a breach of the fiduciary duty owed by the Crown through its Indian Agent to the First Nation before the creation of reserves.

On October 29, 1998, the First Nation was informed by the Minister of Indian Affairs and Northern Development that its “case does not fit within the criteria for Specific Claims”; this rejection was confirmed by the Specific Claims Branch on January 15, 2001.

On June 18, 2002, the Taku River Tlingit First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into its rejected specific claim. The request for inquiry was accepted by the ICC on August 20, 2002. In November 2002, Canada took the position that the claim fell outside of the Specific Claims Policy and refused to participate. In June 2003, the ICC panel confirmed its mandate to conduct this inquiry, and, in September 2003, Canada provided its documents to the ICC but advised that it would not participate any further in the inquiry. The Taku River Tlingit First Nation proceeded with the inquiry without funding from Canada.

#### **BACKGROUND**

The Taku River Tlingit First Nation has a long history in northern British Columbia, with a village established around Atlin Lake, referred to as “Wenah” by the Taku people. The oral history of the Elders suggests that, at one time, the Taku occupied the entire area around Atlin Lake.

In 1898, gold was discovered in the fields surrounding Atlin Lake, drawing settlers to the area. The Province of British Columbia appointed Joseph Graham as the first Gold Commissioner and Government Agent of Atlin. The Taku people then moved to a small area on the southern edge of the Atlin townsite. Their presence was noted by Provincial Surveyor J.H. Brownlee, who completed an official survey plan of Atlin in October 1899, depicting an Indian village.

In 1904, another survey of Atlin was completed by a provincial land surveyor named Taylor. His survey did not note the “Indian Village” previously surveyed by Brownlee. Taylor’s survey divided the Atlin townsite and surrounding area into lots and blocks. The area that Brownlee had previously identified as an Indian village was subdivided into block 52 (lots 1–6), block 53 (lots 1–2), and block 54. However, the Taku continued to live in their village in the Atlin townsite.

By July 1907, Father Joseph Allard, OMI, had established a Roman Catholic mission in Atlin. Father Allard opened a day school (funded by an education grant from the Department of Indian Affairs until the school was closed in 1912). In July 1908, Superintendent A.W. Vowell and the Inspector of Indian Schools, A.H. Green, visited the Atlin day school. Vowell also reported that, according to Chief Taku Jack, there were 86 Taku band members living in Atlin. In his annual report, Vowell

wrote that a reserve was required in Atlin. In July 1909, Indian Agent G.D. Cox visited the town and provided a description and population count of the Atlin Band in the department's 1910 annual report.

In 1912, the McKenna-McBride Commission was established to facilitate the final resolution of the Indian lands question and it travelled throughout the province, setting aside lands for reserve purposes. The Commission arrived in Atlin in June 1915 and met with the Atlin Board of Trade as well as Chief Taku Jack. The minutes of decision of the McKenna-McBride Commission, dated April 1916, confirmed all eight of the BC reserves suggested by Indian Agent W. Scott Simpson, as well as an additional three-acre reserve covering the graveyard near Atlin. No reserves were recommended for the land occupied by the Atlin Indians within the Atlin townsite.

Although the Taku people did not have a reserve set aside for them in the Atlin townsite, they continued to live in their village in the face of more settlers obtaining Crown grants to the land. From 1923 to 1926, Crown grants were issued on lots 1 and 2 of block 53 and on block 54. The Taku asked Indian Agent Harper Reed about their legal standing with respect to the land in their village. Reed advised Indian Commissioner W.E. Ditchburn of these queries, adding that the Taku had been living on the land before the townsite was surveyed. Ditchburn, however, believed that Reed was mistaken, based on information he had obtained from the Provincial Lands Branch. Reed had inquired about purchasing the lots for reserve purposes but was advised that a provincial ruling prevented the sale of land to Indians. The matter was put into abeyance.

In 1945, a band member was refused funding to repair her house on the basis that it was not located on reserve land. Indian Agent R.H.S. Sampson investigated and concluded that the Taku people living in the townsite should be moved to the Five Mile Point reserve. When the Taku refused to move, Sampson investigated the history in Atlin more thoroughly. He reported that the village was a permanent camp from which parties hunted and fished, and, at the time of the first survey, the Atlin Indians had brush huts or wigwams on the Indian townsite. Sampson also stated that the Indians had protested the disturbance by the surveyor and requested recognition of their rights to the Indian village site. He subsequently concluded that the Taku people should have a reserve in Atlin, and, furthermore, that they should have had their village site set aside by the McKenna-McBride Commission. He reported his findings to Indian Commissioner W.S. Arneil.

Following this report, the Department of Indian Affairs began negotiations with the province to acquire the land and establish the area as a reserve. The province, however, refused to transfer the land because the Atlin Board of Trade was opposed to a reserve in the townsite. In 1949, the province sold lots 4, 5, and 6 of block 52 to private purchasers. Over the next decade, the Department of Indian Affairs' attempts to acquire the lots in the Wenah village site were continually opposed by the province. In 1958, the proposal to acquire lots 1, 2, and 3 of block 52 in exchange for the surrender of a portion of land at McDonald Lake Indian Reserve (IR) 1 was raised. The Department of Indian Affairs met with the Taku, who apparently agreed to the exchange. The province also agreed to the exchange of reserve lands for lots 1, 2, and 3 in block 52.

Order in Council 1963-927 was passed on June 20, 1963, transferring the surrendered land at McDonald Lake to the province, and on October 22, 1963, provincial Order in Council 2675 was passed, transferring lots 1, 2, and 3, block 52, to the federal government, for the purpose of creating a reserve in the Atlin townsite for the Taku.

The federal government had also purchased some of the lots in Atlin. In 1961, Canada purchased the southeast portion of lot 1 (parcel A), block 53, from the church. Also, in 1970, lots 4, 5, and 6 of block 52 were purchased. Finally, in 1985, lots 1-6 of block 52 and lot 1 (parcel A) of block 53 were set aside as a reserve and confirmed for the Atlin Band as Indian Reserve (IR) 10 by Order in Council 1985-472.

## **ISSUES**

Did Canada breach a lawful obligation within the meaning of the Specific Claims Policy? Did Canada have a fiduciary or statutory obligation or duty of care to the Taku River Tlingit First Nation (the "TRTFN") in any of the following circumstances: the selection of reserve lands by the McKenna-McBride Commission; the alienation of Wenah lands to private landholders; and the surrender of a portion of McDonald Lake Indian Reserve 1? If Canada had a fiduciary or statutory obligation or duty of care with respect to anything in the circumstances outlined, did Canada breach this obligation?

## **FINDINGS**

The panel concludes that the Taku River Tlingit claim is a specific claim, and that Canada's participation in this inquiry would have been warranted.

The panel concludes that the Taku had a specific interest in Indian Town. Because Canada undertook to act on behalf of the Taku people in the reserve-creation process, Canada owed the First Nation a fiduciary duty to act, in the words of

*Wewaykum*, with “loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.”

With respect to the selection of reserve lands by the McKenna-McBride Commission, the panel finds that Indian Agent W. Scott Simpson failed to fulfill his mandate to protect the Indians and advise them properly. He failed to prepare the Taku River Tlingit First Nation properly to meet the Commission, and failed to represent its interests at the hearings in Atlin and in Victoria. Implicit in these failures is a breach of fiduciary duty.

With respect to the alienation of Wenah lands to private landholders, the panel has examined the actions of Indian Commissioner W.E. Ditchburn and Indian Agent Harper Reed, and concludes that they could have pursued remedies for the First Nation through provincial legislation. However, the course of action chosen was to put the issue in abeyance. This action was a continuance of the initial breach of not setting aside the Wenah village site in Atlin for the Taku River Tlingit.

With respect to the surrender of McDonald Lake IR 1 land, the panel finds the surrender valid; however, this surrender is deemed to be a direct result of the initial breach of the Crown’s duty. The Band was given only one option to acquire its village lands: to trade part of McDonald Lake reserve for the lots in the village in Atlin. The basis for the surrender was part of the Crown’s original breach of its basic fiduciary duties.

### RECOMMENDATION

That the specific claim of the Taku River Tlingit First Nation be accepted for negotiation.

### REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Guerin v. The Queen*, [1984] 2 SCR 335; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 3 SCR 377; *R. v. Sparrow*, [1990] 1 SCR 1075; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *M. (K) v. M. (H)* (1992) 96 DLR (4th) 289 at 326 (SCC); *Blueberry River Indian Band v. Canada* (sub nom. *Apsassin*), [1995] 4 SCR 344; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746; *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245.

### ICC Reports Referred To

*Kluane First Nation: Kluane Game Sanctuary and Kluane National Park Reserve Creation Inquiry Interim Ruling* (Ottawa, December 2000), reported (2003) 16 ICCP 75; *Namgis First Nation: Cormorant Island Inquiry* (Ottawa, March 1996), reported (1998) 7 ICCP 3; ICC, *Namgis First Nation: McKenna-McBride Applications Inquiry* (Ottawa, February 1997), reported (1998) 7 ICCP 109; *Mamaleleqala Qwe’Qwa’Sot’Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199.

### Treaties and Statutes Referred To

*Land Act* RSBC 1911.

### Other Sources Referred To

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

### COUNSEL, PARTIES, INTERVENORS

A. Noda, A. Donovan for the Taku River Tlingit First Nation; J.B. Edmond, D. Kwan to the Indian Claims Commission.



# SUMMARY

## **THUNDERCHILD FIRST NATION 1908 SURRENDER MEDIATION Saskatchewan**

The report may be cited as Indian Claims Commission, *Thunderchild First Nation: 1908 Surrender Mediation* (Ottawa, March 2004).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Treaties** – Treaty 6 (1876); **Reserve** – Surrender – Surrender for Exchange; **Mandate of Indian Claims Commission** – Compensation Criteria – Mediation; **Additions to Reserve Policy; Saskatchewan**

### **THE SPECIFIC CLAIM**

The Thunderchild First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in February 1986, alleging that the Thunderchild surrender of August 1908 was invalid. In July 1993, the claim was accepted for negotiation under Canada's Specific Claims Policy. When the parties' negotiations reached an impasse after two years, the First Nation requested that the Indian Claims Commission (ICC) hold an inquiry into the issue of the proper approach to quantifying the loss of use under compensation criteria 3(ii) of Canada's Specific Claims Policy. With the agreement of the parties, however, the inquiry was transformed into a mediation. The ICC took on the role of mediator and facilitator.

### **BACKGROUND**

During the late 1880s, 10,572 acres, consisting of Indian Reserve (IR) 115, IR 115A, and half of IR 112A (land shared with the adjacent Moosomin First Nation), were surveyed and set aside in 1889 as reserve lands for the Thunderchild First Nation under Treaty 6. The Thunderchild lands were ideally situated and suited for mixed farming, containing some of the best farm land in the region. Following the construction of the Canadian Northern Railway, there was a growing demand for the First Nation's reserve lands, and the Band faced pressure to surrender its land and relocate farther north. Initial efforts were unsuccessful but the pressure on Thunderchild band members for a surrender remained strong, particularly from local clergy.

On August 26, 1908, Commissioner David Laird and Indian Agent J.P.G. Day attended a meeting at the Thunderchild reserve to discuss the surrender. They offered the First Nation rations for a full year rather than just six months, as well as an immediate cash payment of \$15,000. In Commissioner Laird's report to Ottawa, he describes meeting with the Band over two days, during which he initially got three or four negative votes before finally obtaining a vote that approved the surrender by a narrow majority of one vote. At the time of the surrender, the location of a replacement reserve was undetermined and the selection of replacement lands was made after the surrender was obtained.

The Band was ultimately forced to relocate to the site of the new reserve known as IR 115B, which consisted of rugged terrain with largely non-arable, extremely rocky soils. The new reserve was located quite a bit north of the surrendered lands, in an area having a shorter growing season. In comparison to the surrendered reserve lands, the new reserve was unsuitable for agricultural development, leaving the Band with extremely limited economic opportunities.

### **MATTERS FACILITATED**

The Commission's role was to chair the negotiation sessions, provide a record of the discussions, follow up on undertakings, and oversee the logistics of the meetings. At the request of the parties, the Commission was also responsible for mediating disputes. The Thunderchild First Nation and representatives of DIAND worked to establish negotiating principles and a guiding protocol agreement. Studies supporting the negotiations, including a forestry loss-of-use study and mineral valuation study were conducted. Independent consultants assessed the losses of use from forestry, oil, and gas to estimate the net

economic losses to the First Nation as a result of the 1908 surrender. The amount of compensation for the losses and the final payment schedule were issues that needed to be resolved between the parties.

**OUTCOME**

After several years of negotiations, Canada requested in late 2001 that the First Nation present a settlement offer. Following a series of offers and counteroffers, an informal agreement was reached on the amount of compensation and terms of settlement. Canada presented its formal written offer to the Thunderchild First Nation on October 18, 2002, and a final settlement was reached on October 2, 2003. The Settlement Agreement provided \$53 million in compensation to the Band. Settlement capital was paid into a trust account set up for this purpose by the First Nation. In addition, the First Nation was given the ability to acquire up to 5,000 acres of land to be set apart as reserve, within 15 years of the settlement, subject to DIAND's Additions to Reserve Policy.

**REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.

# **SUMMARY**

## **TOUCHWOOD AGENCY MISMANAGEMENT (1920-24) CLAIM MEDIATION Saskatchewan**

The report may be cited as Indian Claim Commission, *Touchwood Agency: Mismanagement (1920-24) Claim Mediation* (Ottawa, August 2005).

*This summary is intended for research purposes only.  
For greater detail, the reader should refer to the published report.*

**Band – Trust Fund; Fraud; Mandate of Indian Claims Commission – Mediation; Saskatchewan**

### **THE SPECIFIC CLAIM**

For the purposes of this claim, five Saskatchewan First Nations – Day Star, Fishing Lake, Gordon, Kawacatoose, and Muskowekwan – reconstituted themselves as the Touchwood Agency Tribal Council (TATC). The First Nations allege that they suffered considerable financial losses because of the mismanagement of the Touchwood Agency from about 1920 to 1924. The claim was submitted to the Department of Indian Affairs and Northern Development (DIAND) in March 1993 and was conditionally accepted for negotiations in March 1998. The parties worked together to commission additional research to clarify the nature and extent of the financial mismanagement. In September 2000, when the research was completed, the parties invited the ICC to facilitate the negotiations.

### **BACKGROUND**

In April 1923, Inspector M. Christianson visited the Touchwood Agency to investigate complaints that Indian Agent John B. Hardinge had made about his clerk. Christianson discovered instead that Agent Hardinge had not been following proper accounting procedures for the agency's books. Hardinge was reprimanded by Commissioner W.M. Graham but no further inquiry was made. In September, Christianson investigated further complaints by Hardinge against his clerk but discovered, after a review of the books, that Hardinge had mismanaged the Bands' accounts and lied about debts that he had incurred. Hardinge was removed from his job.

By 1923, Hardinge had accumulated a debt of \$60,000. Although DIAND payed one-half of this debt, representing the expenditures for which Hardinge had signed orders, it refused to honour any of Hardinge's other debts or reimburse money that he had diverted from the Bands' accounts. Instead, in October 1924, Graham asked four of the agency's Bands to repay the outstanding debts from their own funds, which they agreed to do.

### **MATTERS FACILITATED**

The ICC's role was to chair the negotiation sessions, provide an accurate record of the discussions, follow up on undertakings, and consult with the parties to establish acceptable agendas, venues, and times for meetings.

### **OUTCOME**

Despite the creative solutions put forward by the parties and the assistance of the ICC, the parties were unable to reach a settlement agreement. Negotiations concluded in March 2002. In August 2003, the Touchwood Agency Tribal Council asked the ICC to conduct an inquiry into the unresolved issues. That inquiry is ongoing.

### **REFERENCES**

The ICC does no independent research for mediations and draws on background information and documents submitted by the parties. The mediation discussions are subject to confidentiality agreements.



# SUMMARY

## **WALPOLE ISLAND FIRST NATION BOBLO ISLAND INQUIRY Ontario**

The report may be cited as Indian Claims Commission, *Walpole Island First Nation: Boblo Island Inquiry* (Ottawa, March 2000), reported (2000) 13 ICCP 117.

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

**Panel:** Commission Co-Chair D.J. Bellegarde; Commissioner R.J. Augustine

**Royal Proclamation of 1763; Pre-Confederation Claim – Surrender – Purchase; Fiduciary Duty – Pre-Confederation Claim; Aboriginal Title – Extinguishment; Defences – Estoppel; Mandate of Indian Claims Commission – Aboriginal Title; Ontario**

### **THE SPECIFIC CLAIM**

In August 1992, the Walpole Island First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in relation to the First Nation's claim to Boblo Island in the Detroit River. The Walpole Island First Nation alleged, among other things, that Surrender 116, dated May 15, 1786, had breached the terms of the *Royal Proclamation of 1763* and that the surrender was made without compensation to the Walpole Island First Nation. On March 31, 1995, Canada rejected the claim. In April 1996, the First Nation approached the Indian Claims Commission (ICC) to conduct an inquiry into their rejected claim, which it agreed to do. A planning conference was held in July 1996. In 1998 Canada challenged the mandate of the ICC to conduct an inquiry into some of the issues, arguing that if the claimant was not a signatory to the 1786 surrender, the claim would be based on unextinguished Aboriginal title, thereby falling outside the ICC's jurisdiction. The Commission found that it had jurisdiction, as the claim had been rejected not on the basis that the evidence disclosed unextinguished Aboriginal title but, rather, that the 1786 surrender was valid. A pre-hearing conference was held in January 1999, followed by legal argument in April 1999.

### **BACKGROUND**

The *Royal Proclamation of 1763* provided that Aboriginal peoples in the area reserved for Indian use possessed Aboriginal title to their lands, which could only be extinguished by negotiation with the Crown. When land was required and if an Indian group was willing to sell its land, Crown representatives were to meet the concerned Indians in a public meeting to make the purchase in the name of the Crown. Further, Crown officials stated that purchases from Indians were to be taken only from the proper chiefs, in public.

In May 1786, Deputy Indian Agent Alexander McKee obtained a surrender from Chippewa and Ottawa Chiefs of both Bois Blanc Island (Boblo Island) and a seven-mile-square block across the channel. The deed, dated May 15, 1786, confirmed to the King the surrender of the island and the mainland tract, "for and in consideration of the good will, friendship and affection which we have for Alexander McKee." The deed, witnessed by three persons, was signed by four Chippewa Chiefs and five Ottawa Chiefs. The lands were at the time deemed to be held by "the Hurons, Ottaways, Chippeways & Pottawattomies." Extensive research conducted on behalf of both Canada and the First Nation, however, concluded that none of the signatories to the surrender could be specifically linked to the Walpole Island First Nation. Further, the research failed to produce the documents usually associated with a purchase of land from the Indians or evidence of payment and plans for a survey.

When McKee became a member of the Land Board of Hesse after 1788, he apparently withheld information about his deed to the lands included in the 1786 surrender; in 1789, following directions from Governor Guy Carleton to establish George Town on lands directly opposite Bois Blanc Island, McKee informed the board that none of the lands in the District of

Hesse had been surrendered to the Crown. The Governor wrote to the Superintendent of Indian Affairs shortly after, stating that previous purchases or grants from the Indians by individuals were totally void. In late 1789, McKee unsuccessfully petitioned to have the lands included in the 1786 surrender transferred into his name. By May 1790, McKee had relinquished his interest in or claim to the land by letter, stating that the surrender was made to him to ensure that the Huron were protected from encroachments by others.

In the same period, McKee was directed to take a treaty with the Indians in the District of Hesse to obtain the tract needed for settlement. The surrender was obtained on May 19, 1790, following weeks of negotiations. Present were the Commanding Officer of the fort, McKee, 14 named army and navy officers, and several officers of the militia, magistrates, and general citizens. The Indians were represented by 35 Chiefs. Of those, three of the Chippewa Chiefs and one of the Ottawa Chiefs had also signed the 1786 deed/surrender. Two areas in the ceded tract were reserved for the Indians – a small area near Sandwich and a larger block in the same place at the River Canard described in McKee's 1786 deed, which was reserved for the Huron and other Indians. Bois Blanc Island was not included in the surrender. Much of the same land purportedly surrendered in 1786 (the mainland tract) was in fact reserved for the Huron and other Indians in 1790.

### ISSUES

Does the Surrender of May 15, 1786, contravene the provisions of the *Royal Proclamation of 1763*? In particular, were the Chiefs and principal men of the Walpole Island First Nation signatories to the alleged surrender of May 15, 1786? If they were not, does this make the surrender invalid with respect to the Walpole Island First Nation? Was there consideration for the transfer? If there was not, does this render the surrender invalid?

Did the Crown and/or Indians regard the surrender of 1786 as invalid when they entered into the surrender of 1790? If so, what is the effect of the 1790 surrender on the alleged surrender of 1786? Is the Crown estopped from relying upon the surrender of 1786?

Did the Crown breach its fiduciary obligations in obtaining the surrender?

### FINDINGS

The parties agreed that if the surrender were found to be invalid, it would result in a finding of unextinguished Aboriginal title.

McKee had no authority in 1786 to take a surrender; no consideration passed in the form of gifts or other compensation; and the formalities of a surrender, in terms of a public meeting with representatives present from every tribe with an interest in the land, were not complied with. There is ample authority that the *Royal Proclamation* applies to this geographical area; thus, the terms of the *Proclamation* apply and were not, in this case, respected. However, to determine whether this noncompliance is sufficient to invalidate the surrender, it is necessary to consider the parties' intentions. The evidence as to what McKee intended is unclear. He had no authority to take a surrender, and his comments that the lands were to be reserved for the Huron are inconsistent with the terms of the surrender itself, which is unconditional. As well, his application for the transfer of the lands into his own name four years later is troubling. Thus, the surrender did not reflect the Sovereign's "clear and plain" intention to extinguish any Aboriginal interest in the lands.

It is apparent from the statements of Crown officials that the Aboriginal parties to the transaction in 1786 intended to reserve lands. As such, the surrender not only fails to comply with the formalities of the *Royal Proclamation*, but also fails to accord with the Crown's policy that lands must be voluntarily ceded. The surrender is therefore invalid.

As well, the 1790 surrender is necessarily inconsistent with the 1786 surrender and may be interpreted as revoking it, in that it reserves the mainland lands, which were supposedly surrendered in 1786. There is no basis on which to draw a distinction between the mainland and the island in terms of the 1786 "surrender," since both were dealt with together. The 1790 surrender did not include the island, so whatever Aboriginal title was held to the island in 1786 continues to this day.

Although evidence of who signed the surrender is not complete, it is sufficient to determine that the ancestors of the Walpole Island First Nation probably did not sign it. By contrast, they were present in 1790. On the issue of whether the Crown is estopped from relying on the surrender, in light of the representations of McKee that the surrender he obtained in 1786 was intended to reserve lands for the use of the Huron, the Crown would be estopped from relying on the surrender document as reflecting an intention to surrender lands.

## RECOMMENDATION

That the Walpole Island First Nation resubmit its claim to the federal government under the Comprehensive Claims Policy.

## REFERENCES

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

### Cases Referred To

*Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73; *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406 (Gen. Div.); *R. v. McCormick* (1859) 18 UCQB; *R. v. Ireland*, [1990] 1 OR (3d) 577 (Gen. Div.); *R. v. Jones and Nadjiwon*, [1993] 14 OR (2d) 421 (Prov. Div.); *R. v. Sioui*, [1990] 1 SCR 1025; *R. v. Marshall*, [1999] SCJ no. 55, file 26014; *Gallie v. Lee and Another*, [1971] AC 1004 (House of Lords); *R. v. Sparrow*, [1990] 1 SCR 1075; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010; *R. v. Simon*, [1985] 2 SCR 387; *R. v. Taylor* (1981), 34 OR (2d) 360 (Ont. CA); *R. v. Badger*, [1996] 1 SCR 771.

### Treaties and Statutes Referred To

*Royal Proclamation*, October 7, 1763; King George III and United States of America, September 3, 1783, Treaty of Paris; *An Act respecting the Ordnance and Admiralty Lands transferred to the Province*, June 19, 1856, 22 Vict., c. 24; Surrender No. 116, May 15, 1786, in Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971).

### Other Sources Referred To

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) 20; reprinted (1994) 1 ICCP 171; Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960); E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New-York ...*, 15 vols. (Albany, NY: Weed, Parsons & Co., 1856–87); D.G.G. Kerr, ed., *A Historical Atlas of Canada* (Don Mills, Ont.: Nelson, 1966); Douglas Leighton, *The Historical Development of the Walpole Island Community*, Occasional Paper No. 22, March 1986 (Wallaceburg: Walpole Island Research Centre, 1986); James Sullivan et al., eds., *The Papers of Sir William Johnson*, 14 vols. (Albany, NY, 1921–65); *Michigan Pioneer and Historical Society* 20 (1892); *Report of the International Waterways Commission* (Ottawa, 1916); *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906); David P. Botsford, "The History of Bois Blanc Island," *Ontario History* 47 (summer 1955); Dennis Carter-Edwards, "Fort Malden: A Structural Narrative History, 1796–1976," Parks Canada Manuscript Report No. 401, 1980; Bernard W. Funston and Eugene Meehan, eds., *Canadian Constitutional Documents Consolidated* (Scarborough, Ont.: Carswell Publishing, 1994).

### COUNSEL, PARTIES, INTERVENORS

R. Raikes for the Walpole Island First Nation; R. Winogron for the Government of Canada; D.E. Osborn, QC, R. Keesickquayash to the Indian Claims Commission.



# SUMMARY

## **WILLIAMS LAKE INDIAN BAND VILLAGE SITE INQUIRY British Columbia**

The report may be cited as Indian Claims Commission, *Williams Lake Indian Band: Village Site Inquiry* (Ottawa, March 2006).

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

**Panel:** Commissioner A.C. Holman (Chair), Commissioner D.J. Bellegarde

**British Columbia** – Indian Settlement – Pre-emption – Reserve Creation – Indian Reserve Commission – McKenna-McBride Commission; **Culture and Religion; Fiduciary Duty** – Pre-Confederation Claim – Reserve Creation – Protection of Reserve Land – Indian Settlement; **Reserve** – Reserve Creation

### **THE SPECIFIC CLAIM**

On February 8, 1994, the Williams Lake Indian Band submitted its claim to the Specific Claims Branch of the Department of Indian Affairs and Northern Development (DIAND), and, on August 23, 1995, the claim was rejected. On June 3, 2002, the Band requested that the Indian Claims Commission (ICC) review its rejected specific claim. At issue in this inquiry is the pre-emption of two village sites, one located at Missioner Creek, or Glendale, and the other located at the foot of Williams Lake.

### **BACKGROUND**

The Williams Lake Indian Band has a long history in the Williams Lake area. The traditional way of life for its members was based on a seasonal round: they would move or camp in regular cycles, depending on the resources that were available in the area, and, each winter, they would return to their permanent villages, where they lived in sunken structures known variously as “pithouses,” “kickwillie” houses, or “quigly” houses.

In the fall of 1859, Governor Douglas instructed the Gold Commissioner and Magistrate to reserve the sites of all Indian villages and lands. Douglas’s instructions were formalized when *Proclamation No. 15* was issued on January 4, 1860. The pre-emption policy set out in this proclamation allowed settlers to acquire unoccupied, unreserved, and unsurveyed Crown land in British Columbia. Sites constituting an Indian reserve or settlement were prohibited from being occupied or acquired.

The first pre-emptions at Williams Lake were recorded in 1860. In 1861, Gold Commissioner Philip Nind reported that the Williams Lake Indians were starving, and he asked about a reserve being marked out for them. In response, Douglas instructed Nind to set aside a 400- or 500-acre reserve. These instructions were not carried out. Around this time, as well, the Band succumbed to a smallpox epidemic, which decimated its population.

The pre-emptions in the Williams Lake area continued. By 1878, William Pinchbeck had acquired all the lots at Missioner Creek and at the foot of Williams Lake, and, in 1885, Crown grant no. 2923 for lots 71 and 72 was issued to William Pinchbeck Sr.

When British Columbia joined Confederation in 1871, the province retained control over its lands and resources, while acknowledging the Dominion of Canada’s jurisdiction over Indians and their lands. The intention was for the province to convey to the dominion lands set aside for the use and benefit of Indians. However, this issue became the source of considerable conflict between the two levels of government. In 1875, British Columbia and Canada agreed to form the Joint Indian Reserve Commission (JIRC) to address the Indian land question and to allot reserves. It would have three members: a federal appointee, a provincial appointee, and an appointee agreed to by both levels of government. G.M. Sproat was the joint appointee on this commission. When the JIRC was dissolved in 1878, Sproat was retained as the sole Indian Reserve Commissioner. Neither the JIRC nor Sproat met with the Williams Lake Band.

In 1879, the Williams Lake Indian Band still did not have any land set aside for it. Justice of the Peace William Laing-Meason wrote twice to Sproat, advising him of the pre-emptions, the impact on the Band, and the fact that land still had not yet been set aside for the Band. Chief William wrote a letter to the editor of the *British Daily Colonist* describing the poverty of the Williams Lake Band and the effects of pre-emption on his people. His letter also requested land. In reporting to more senior officials, Sproat stated that the Band's situation was the fault of the province, not the dominion. In addition, Father C.J. Grandidier wrote to the Superintendent General of Indian Affairs in January 1880, documenting the Williams Lake Indian Band's history in the area from the 1850s and outlining how the pre-emptions had occurred. Father Grandidier also emphasized the need for an Indian Agent in the area.

Sproat's successor, Peter O'Reilly, was the sole Indian Reserve Commissioner from 1880 to 1898. During his tenure, he experienced difficulty working with the BC government. However, in June 1881, O'Reilly was able to visit the Williams Lake Band. In his report, he described the Chief's complaints regarding the delay in setting aside land for his people. He also noted the presence of an "old Indian Church," winter houses, and burial grounds at the Pinchbeck farm at Missioner Creek. O'Reilly set aside 14 reserves for the Williams Lake Indian Band. Three reserves were set aside for habitation and farming (reserves 1–3), three for fishing (reserves 4–6), and eight for graveyards (reserves 7–14). The total acreage of the reserves was 5,634 acres, including 1,464 acres of pre-empted land purchased from settlers. None of the allocated reserves were located in the two areas that are the subject of this inquiry. In 1894, an additional reserve (reserve 15) at Carpenter Mountain, consisting of 168.76 acres, was allotted.

In 1912, the McKenna-McBride Commission was established to address all of the outstanding Indian land issues between the dominion and the provincial governments. The McKenna-McBride Commission was intended to be definitive and, to this end, travelled throughout the province, setting aside lands for reserve purposes. In 1914, Chief Baptiste William appeared before the Commission, requesting that more land be allotted to the Band, owing to the rocky nature of the existing reserves, and outlining past grievances related to the pre-emption of its village sites. The McKenna-McBride Commission confirmed all 15 reserves for the Williams Lake Indian Band in 1915.

Provincial Order in Council PC 911, dated July 26, 1923, transferred the lands for the 15 reserves set aside for the Williams Lake Band to the federal Crown. By the time provincial Order in Council 1036 was passed in 1938, only reserves 1–6 and 15 for the Williams Lake Band were transferred for the Williams Lake Band. Reserves 7–14 (the graveyards) were deleted from the list and not allotted, because the burial sites were on pre-empted lands and the government was unwilling to purchase them. With respect to the relative locations of the reserves set aside and the village sites at issue in this inquiry, Indian Reserve (IR) 6 is located at the foot of Williams Lake, east of lot 71, and Indian Reserves 9–11 are south of lot 72.

## ISSUES

In or about 1861 what lands, if any, did the Williams Lake Indians occupy as villages at: Missioner Creek, foot of Williams Lake, and north shore of Williams Lake? Were any of the villages "Indian Settlements" within the meaning of the colonial and provincial land ordinances and legislation? Was the pre-emption of the Indian Settlements in and around 1861 valid pursuant to pre-emption legislation? If not, would the Indian Settlements have been "lands reserved for the Indians" within the meaning of the *Terms of Union, 1871* and/or the *Constitution Act, 1867* and/or the *Indian Act*? If so, does the Band continue to have a reserved interest under the *Constitution Act, 1867* and/or the *Indian Act*? Did the Colony of British Columbia and Canada have a fiduciary obligation to protect the Indian Settlements for the use and benefit of the Band? If so, was such an obligation breached?

## FINDINGS

The panel concludes that the Williams Lake Indian Band occupied the village sites at Missioner Creek and the foot of Williams Lake at the time of pre-emption and that these village sites were "Indian settlements" within the meaning of the legislation in operation at the time. The claim for the village site on the north shore of Williams Lake has been withdrawn by the Band.

The panel concludes that the pre-emption of the Indian settlements around 1861 was not valid pursuant to the pre-emption legislation.

With respect to this issue, the panel finds that the Williams Lake Indian Band had an interest in the use and occupation of the village sites at Missioner Creek and the foot of Williams Lake prior to the pre-emptions and after the pre-emptions. The panel does not draw any conclusions on whether this interest falls under the definition of "lands reserved for Indians" and prefers to examine the Band's interest in its village sites in the context of a fiduciary analysis.

The panel concludes that Canada had a fiduciary obligation to the Williams Lake Indian Band. This fiduciary obligation is based on the interest the Band had in the village sites at Missioner Creek and at the foot of Williams Lake; it is a pre-reserve-creation fiduciary duty limited to the basic duties of loyalty, good faith, full disclosure, and ordinary prudence or diligence.

The panel finds that these duties were breached by Peter O'Reilly in 1881 and were not rectified by the allotment of more reserve lands than was originally intended. The panel concludes that these village sites should also have been set aside and recommended as possible reserves.

#### **RECOMMENDATION**

That Canada accept the village site claim of the Williams Lake Indian Band.

#### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

#### **Cases Referred To**

*Farmer v. Livingstone*, [1982] 8 SCR 13; *Ross River Dena Council Band v. Canada*, [2002] 2 SCR 816; *Delgamuukw v. B.C.*, [1997] 3 SCR 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; *Guerin v. The Queen*, [1984] 2 SCR 335; *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Frame v. Smith*, [1987] 2 SCR 99; *Hodgkinson v. Simms*, [1994] 3 SCR 377; *R. v. Sparrow*, [1990] 1 SCR 1075; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 SCR 159; *Blueberry River Indian Band v. Canada* (1995), 130 DLR (4th) 193; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 SCR 746.

#### **ICC Reports Referred To**

*Mamaleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry* (Ottawa, March 1997), reported (1998) 7 ICCP 199; *Homalco Indian Band: Aupe Indian Reserves 6 and 6A Inquiry* (Ottawa, December 1995), reported (1996) 4 ICCP 89; *Athabasca Chipewyan First Nation: W.A.C. Bennett Dam and Damage to Indian Reserve 201 Inquiry* (Ottawa, March 1998), reported (1998) 10 ICCP 117; *Esketemc First Nation: Indian Reserves 15, 17, and 18 Inquiry* (Ottawa, December 2001), reported (2002) 15 ICCP 3.

#### **Treaties and Statutes Referred To**

*Colonial Proclamation No. 15* (151), January 4, 1860; *Pre-emption Consolidation Act*, August 27, 1861; *Land Ordinance, 1865*, April 11, 1865; *Land Ordinance, 1870*; *Land Act, 1875*, April 22, 1875; *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, s. 91, ss. 24, reprinted in RSC 1985, App. II, No. 5.

#### **COUNSEL, PARTIES, INTERVENORS**

C. Ostrove for the Williams Lake Indian Band; V. Russell for Canada; J.B. Edmond and D. Kwan to the Indian Claims Commission.



## SUMMARY

### **YOUNG CHIPEEWAYAN STONEY KNOLL INDIAN RESERVE 107 INQUIRY Saskatchewan**

The report may be cited as Indian Claims Commission, *Young Chipeewayan: Stoney Knoll Indian Reserve 107 Inquiry* (Ottawa, December 1994), reported (1995) 3 ICCP 175.

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

**Panel:** Commissioner C.T. Corcoran, Commissioner D.J. Bellegarde, Commissioner P.E.J. Prentice, QC

**Treaties** – Treaty 6 (1876); **Specific Claims Policy** – Band; **Mandate of Indian Claims Commission** – Supplementary Mandate; **Band** – Status; **Treaty Land Entitlement** –Saskatchewan TLE Framework Agreement; **Reserve** – Abandonment; **Indian Act** – Surrender; **Saskatchewan**

#### **THE SPECIFIC CLAIM**

In June 1982, Chief Alfred Snake, on behalf of the Young Chipeewayan Band and other claimants, asked the Department of Indian Affairs and Northern Development (DIAND) to examine a specific claim regarding the alleged illegal disposition of their reserve lands in 1897. The claim was rejected in September 1985. In March 1985, the claimants filed a statement of claim in the Federal Court of Canada, seeking a declaration that Canada owed a fiduciary duty to them and that Canada had breached its duty, as well as damages. Canada's statement of defence denied that the claimants are descendants of members of the original Young Chipeewayan Band. The court action was placed in abeyance and, in June 1993, the Indian Claims Commission (ICC) agreed to the claimants' request to conduct an inquiry into the rejected claim. In January 1994, the ICC conducted a community session in Saskatoon to hear witnesses from surrounding communities and a separate hearing to take the evidence of two expert witnesses for the claimants. The oral hearing, based on written submissions, took place in Saskatoon in February 1994.

#### **BACKGROUND**

Treaty 6 was signed on August 23, 1876, by Chief Chipeewayan and four headmen on behalf of the Chipeewayan Band. From the 1870s through to the 1890s, the Chipeewayan Band had difficulty sustaining itself on the allotted lands of Stoney Knoll Indian Reserve (IR) 107 while awaiting treaty assistance to help start farming. Consequently, they left IR 107 and stayed at Maple Creek for the winter. Chief Chipeewayan and others died from sickness. Only two band members returned to IR 107 but could not survive there alone. Future attempts to regain the reserve by Albert Snake, son of Young Chipeewayan and grandson of Chief Chipeewayan, were unsuccessful.

Treaty paylists show that from 1879 to 1885, the Young Chipeewayan band members were paid annuities at locations other than Stoney Knoll and that their numbers had diminished from 52 Indians in 25 families to 18 Indians in 2 families. The Young Chipeewayan Band was implicated in the North-West Rebellion of 1885, though its involvement was not conclusively proven. Annuity payments for 1885 were withheld for this Band (and others) to offset damages caused by the rebellion.

By 1888, the Young Chipeewayan Band was no longer identified as a separate band by the Department of Indian Affairs. Young Chipeewayan himself appeared on the Thunderchild treaty payroll as a member of the Young Chipeewayan Band but was not paid in his capacity as Chief. The Stoney Knoll IR 107 had to be resurveyed as it had not been identified in a previous survey as an Indian reserve. It was confirmed as such by Order in Council in 1889.

By 1895, government efforts were underway to regain control over the lands of Stoney Knoll Reserve as prime land for settlement. The difficulty in tracing members of the Young Chipeewayan Band, the Band's participation in the North-West Rebellion, the abandonment of the reserve, the informal transfers of band members to other bands, the move by some to the United States, were all cited as reasons for transferring control of the reserve lands without a surrender. In May 1897, an

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Order in Council authorized the transfer of control of the reserve from the Department of Indian Affairs to the Department of the Interior. In the following years, the land was deeded out to private purchasers.

### **ISSUES**

Are the claimants descendants of the original Young Chipeewayan Band? If so, are they entitled to bring this claim on behalf of the Young Chipeewayan Band? In particular, who constitutes the Young Chipeewayan Band, and does the Young Chipeewayan Band exist today? If no, when did it cease to exist?

Pursuant to the ICC's supplementary mandate, is the 1897 Order in Council valid or was it necessary to obtain a surrender under the *Indian Act* or Treaty 6? Would participation in recent treaty land entitlement (TLE) settlements disentitle the claimants from bringing this claim?

### **FINDINGS**

In January 1994, Canada conceded that the Higgins and Chickness families are direct descendants of the original Young Chipeewayan Band. The claimants, however, do not constitute a band under the *Indian Act* or common law and are therefore not entitled to advance this claim in accordance with the Specific Claims Policy. The only indicia that link these two claimant families as a "band" is descendancy, which alone is not sufficient. The Band as a collectivity or a tribe, band, or body of Indians had effectively dispersed or disbanded by 1889; some members began dispersing soon after the date of the signing of Treaty 6, and the treaty paylists disclose that the dissolution of the Band occurred gradually over time and not as a single act. In addition, all the claimant families, except the Higgins family, intermarried with members of other Saskatchewan bands, making them equally the descendants of other bands.

### **Supplementary Mandate**

Regarding the validity of the 1897 Order in Council, authorizing the transfer of the reserve without surrender, Canada could not have complied strictly with the surrender provisions of the *Indian Act*, even if it had chosen to follow this course of action. As the Band ceased to exist by 1897, no one was entitled to vote at a band meeting, by virtue of the residency requirements. Under Treaty 6, however, the prior consent "of the said Indians entitled thereto" was required before reserve lands could be sold or otherwise disposed of. The Indians entitled to give consent were all former members of the Band alive in 1897. Thus, as transfer of Stoney Knoll IR 107 was done in contravention of Treaty 6, Canada owes a lawful obligation to account for the proceeds of disposition of the reserve. The treaty is also clear that the lands must be sold for the use and benefit of the Indians entitled thereto, yet there is no evidence that either the former members of Young Chipeewayan Band or the absorbing bands received any benefit from the sale of IR 107. Those bands who absorbed members of the Young Chipeewayan Band should have received compensation in terms of lands or money for the additional members received. They should pursue claims within the 1992 Treaty Land Entitlement Agreement of Saskatchewan; if any such bands are not signatories of that agreement, they may have a separate specific claim based on TLE. To allow Canada to sell IR 107 without providing compensation to the absorbing bands would result in unjust enrichment.

### **RECOMMENDATIONS**

The Policy does not allow for the validation of this claim brought by these claimants, as they are not a Band.

The issues surrounding the transfer of Young Chipeewayan Band members to the treaty paylists of other First Nations need to be explored in detail by Canada and the various First Nations that absorbed members of the Young Chipeewayan Band, on a case-by-case basis, including the effects, if any, of the 1992 Treaty Land Entitlement Agreement, to ensure that the provisions of Treaty 6 are honoured.

### **REFERENCES**

In addition to the various sources noted below, ICC inquiries depend on a base of oral and documentary research, often including maps, plans, and photographs, that is fully referenced in the report.

**Cases Referred To**

*Mabo v. Queensland*, [1992] 5 CNLR (Aust. HC); *The Queen v. Blackfoot Band of Indians et al.*, [1982] 4 WWR 230; *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85; *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 (Ont. CA); *R. v. Sparrow*, [1990] 1 SCR 1075.

**Treaties and Statutes Referred To**

Treaty 6, August 23, 1876; *Indian Act*, RSC 1886, SC 1895, SC 1951, RSC 1985.

**Other Sources Referred To**

DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994), 1 ICCP 171; Harvey A. McCue, “Indian Reserve,” *The Canadian Encyclopedia* (Edmonton: Hurtig Publishers, 1985); Jack Woodward, *Native Law* (Toronto: Carswell, 1990); David Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study*, Canadian Plains 9 (Regina: Canadian Plains Research Center, University of Regina, 1979).

**COUNSEL, PARTIES, INTERVENORS**

J. Griffin, QC, A. Angus for the Young Chipeewayan Claimants; B. Becker, B. Hilchey for the Government of Canada; K. Fullerton, K. Goodtrack to the Indian Claims Commission.

**CANADA’S RESPONSE**

By letter dated February 23, 1995, the Minister of Indian Affairs and Northern Development noted, with reference to the second recommendation, that former band members who joined other First Nations would likely have been eligible to be counted as landless transfers for TLE purposes. To verify this conclusion, the department is considering a proposal by the Federation of Saskatchewan Indian Nations to carry out the necessary research with affected First Nations. See (1995) 3 ICCP 321.

