INDIAN CLAIMS COMMISSION

Annual Report
1994-1995

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Letter of Transmittal

Indian Claims Commission

Commission des revendications des Indiens

TO HIS EXCELLENCY
THE GOVERNOR GENERAL IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY

Over the course of 1994/95, the Indian Specific Claims Commission completed and released five Inquiry reports. As of April 1995, eight reports had been issued in total, and a further six reports were in progress. To date, ninety-eight claim requests for Inquiries or mediation have been received from First Nations. Thirty of these were made in the past year.

With this experience behind us, the Commission makes six important recommendations regarding: (1) the fundamental need for a new claims policy and process wherein Canada is not the judge of claims against itself; (2) the need (in the interim) to create a fair and equitable specific claims policy and process that provides a detailed account of Canada's interpretation of its "lawful obligation;" (3) the need for a timely and efficient response by Canada to ICC reports; (4) the increased use of the Commission's mediation services and alternative dispute resolution mechanisms; (5) the unfairness of Canada's demands for extinguishment of aboriginal rights and title as part of the settlement of specific claims; and (6) the identification, review and notification by DIAND of all First Nations whose claims are affected by the removal of the pre-Confederation bar.

It is with pleasure that we submit our Annual Report for 1994/95.

Yours truly,

Daniel Bellegarde
Co-Chair

James Prentice
Co-Chair

July 1995

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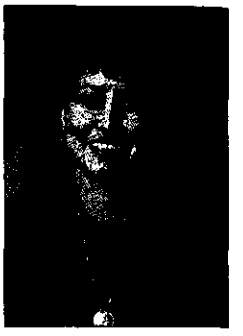
Table of Contents

Members of the Commission

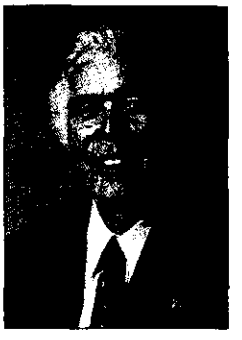
Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988, he has held the position of First Vice-Chief of the Federation of Saskatchewan Indian Nations. He was appointed Co-Chair of the Indian Claims Commission on April 19, 1994.

Co-Chair P.E. James Prentice, QC is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in Native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. He was appointed as a Queen's Counsel by the Government of Canada in 1991 and was appointed Co-Chair of the Indian Claims Commission on April 19, 1994.

Roger J. Augustine is a Micmac who has been Chief of the Eel Ground First Nation of New Brunswick since 1980. In 1982, Chief Augustine became a member of the National Native Advisory Council on Drug Abuse, and served as its Chair from 1984 to 1986. He served as the president of the Union of New Brunswick Indians from October 1990 to January 1994.



Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs. Corcoran is a lawyer with extensive experience in Aboriginal government and politics at the local, regional and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91. She was appointed as a Commissioner to the Indian Claims Commission in July 1992, as a Commissioner to the British Columbia Treaty Commission in April 1993, and to the Board of Governors of the University of Northern British Columbia in November 1993.



Aurélien Gill is a Montagnais from Mashteuiatsh (Pointe-Bleue) Quebec. He helped found many important Aboriginal organizations, starting with the Conseil Atikamekw et Montagnais, and including the Conseil de la Police amérindienne, the Corporation de Développement Économique Montagnaise and the National Indian Brotherhood (now the Assembly of First Nations). He served as Quebec Regional Director in the Department of Indian Affairs and Northern Development, and is a member of the National Aboriginal Economic Development Board. In 1991 he was named to the Ordre national du Québec. He was appointed Commissioner in December, 1994

Message from the Commissioners

It gives us great pleasure to present the second *Indian Claims Commission Annual Report*, which covers the fiscal year 1994/95. During this time, the pace of the Commission's work has increased dramatically: five reports were issued; six are currently in progress; eighteen Inquiries are underway; thirty-four cases have been accepted for Inquiries; and fifteen files are in mediation. In addition, three or four new claimants are approaching the Commission each month.

Operating under the provisions of the *Inquiries Act*, the Indian Specific Claims Commission (the Indian Claims Commission, the Commission or the ICC) is mandated to conduct impartial Inquiries when a First Nation disputes the government's rejection of its specific land claim or when a First Nation disagrees with the compensation criteria applied by the government in negotiating the settlement of a claim. In fulfilling this part of its mandate, the ICC has established an independent process which respects the dignity of all parties. The alternative dispute resolution techniques developed by the Commission differ from the adversarial processes that characterize courts of law. Throughout our Inquiries, we and our staff practice cross-cultural awareness. Cross-examination of elders is not permitted and the oral traditions and histories of First Nations that are presented by elders and other community leaders are admitted as valid information.

The ICC is mandated to find better ways of handling land claims. To this end, we have used our considerable experience to identify problem areas and recommend solutions that will assist in creating a more expedient, fair and equitable land claims policy and process. Everything that we have learned as a Commission to date indicates that it is imperative to commence the process of reform immediately. The return of Native land is central to any real progress on the wide range of problems that face First Nations today. Meaningful self-government, and true economic self-sufficiency, are dependent upon an adequate land base. It is time for a fair and equitable process. In this, our second Annual Report, we make a number of recommendations that we believe would go a long way towards creating that fair and equitable process.

The Commission to Date

For a detailed history of the Indian Claims Commission, including Inquiries conducted and Reports submitted during that period, please see the first *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994*, issued in July of 1994.

NEW FEDERAL SPECIFIC CLAIMS INITIATIVE

After a period of negotiation between the Assembly of First Nations (AFN) Chiefs' Committee on Claims and the Minister of Indian Affairs, the federal government announced a new initiative on specific claims on April 23, 1991. The initiative included:

1) *Increased Resources:* funds available for settlements were increased to $60 million annually, from $15 million; and the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice (Justice) were provided with additional staff;

2) *Administrative Policy Changes:* an increase in the size of claim that the Minister could approve without Treasury Board authority from $1 million to $7 million; creation of a "fast track" process to deal with claims under $500,000; no limit on the number of claims that could be negotiated at one time; and legal costs of claimants no longer subject to the review and approval of Justice lawyers;

3) *Pre-Confederation Claims:* the bar on pre-confederation claims was lifted;

4) *Creation of the Joint Working Group (JWG):* a joint First Nation/Government working group was proposed to review and make recommendations regarding the Policy and the process (the Joint Working Group is discussed in more detail in the next sections of this report); and

5) *Creation of the Indian Claims Commission:* on an interim basis, an independent claims body was proposed to review specific claims, to provide mediation to the parties upon request, and to provide input to the JWG on reforming the policy and process.

INDIAN CLAIMS COMMISSION CREATED

As part of the government's implementation of the new initiative on specific claims, the Indian Claims Commission was established by Order-In-Council on July 15, 1991. The wording of the Order-In-Council immediately became an issue, as First Nations felt that it provided legal entrenchment of DIAND's Specific Claims Policy and was also contrary to the recommendations of the Chiefs' Committee on Claims. The AFN passed a resolution on August 7, 1991 calling for "major changes."

After a delay of one year, a second Order-In-Council was issued which amended the mandate of the Commission to perform the following functions:

1) inquire into and report on:

   a) the rejection of a specific claim by the Minister; or

   b) which compensation criteria apply in negotiation of a settlement;

2) provide advice and information to the JWG;

3) prepare an annual report and such other reports as the Commissioners consider to be required to the Governor in Council (the federal Cabinet); and

4) provide mediation to the parties where both parties request it (Order-In-Council P.C. 1991-1329 and P.C. 1992-1730).

The Commission is what has been referred to as a "soft adjudicative tribunal," in that the recommendations of the Commission are not binding on the parties, but, rather, are only advisory in nature. This means that at the completion of an Inquiry, the parties (that is, the First Nation(s) involved and/or the government) are not bound by the recommendations of the Commission.

COMMISSION LEADERSHIP

On July 15, 1991, Harry S. LaForme was appointed Chief Commissioner of the Indian Claims Commission. Then, on September 1, 1992, an Order-In-Council was issued naming six Commissioners to the Commission: Roger Augustine, Chief of the Eel Ground First Nation of New Brunswick; Dan Bellegarde, First Vice Chief with the Federation of Saskatchewan Indian Nations (FSIN); Carole Corcoran, a lawyer from the Fort Nelson Indian Band in Northern British Columbia; Charles Hamelin (who passed away on July 29, 1993); Carol Dutcheshen (who resigned to take another position in May of 1994); and Jim Prentice, QC, with the Calgary law firm of Rooney Prentice.

On February 17, 1994, the Chief Commissioner of the Commission, Harry S. LaForme, was appointed to the Ontario Court of Justice (General Division). Commissioners Dan Bellegarde and Jim Prentice were appointed Co-Chairs of the Commission on April 19, 1994.

On December 8, 1994, Aurélien Gill was appointed as a Commissioner to the Commission.

AN INTERIM STEP

It is important to note that the Commission was created as an interim step only, not as a permanent body. It was part of an overall process of reform that was to rely heavily on the recommendations of the JWG to effect substantial change to the Policy and process.

The Commission was established to perform two functions. The first was to provide input into the overall reform process as performed by the JWG. The second was to provide a non- adversarial recourse for reviewing decisions arising from the *existing* Policy and process, as an *interim* measure, until such time as substantial reforms were realized. This was outlined in a letter dated November 8, 1991 from the Honourable Tom Siddon to then Chief Commissioner, Harry LaForme:

> To oversee the management of the current policy we agreed to establish the Indian Specific Claims Commission to assure that claimant bands would have access to a third party to pursue any concerns they might have about the fairness of the *existing* process. The order-in-council establishing the commission therefore reflects the policy components and criteria of the existing policy, adjusted as agreed to provide *interim* improvements. (emphasis added)

The JWG met thirteen times between February 1992 and June 1993. Issues discussed ranged from the nature of a claim to the form and structure of an independent claims body. Progress was made in several areas. In particular, significant agreement was reached on the details of an independent claims body.

The mandate of the JWG expired in July 1993. With the parties unable to reach agreement regarding the extension of the JWG's mandate, the process ended. Since that time no specialized forum has existed for First Nations and Canada to discuss reform of land claims policies and processes.

Responses to Last Year's Recommendations

In our first Annual Report, submitted in July of last year, the Commission made six recommendations to the government of Canada. Overall, the response from the government has been good. Four of the recommendations have been implemented and progress has been made respecting the other two:

Quebec Commissioner Appointment: We recommended "That the government move with all due speed to appoint a Commissioner from Quebec." We are very pleased to note that Commissioner Aurélien Gill was appointed as a Commissioner in December 1994.

Historical Documents: We recommended "That the relevant departments of government expedite the delivery of documents requested by the Commission." As part of our streamlined Inquiry process, the Commission now requests a claimant First Nation to provide the Commission with a Band Council Resolution consenting to the transfer of relevant documents in the possession of the government to the Commission. The government has acted on this new process and we are now receiving documents in a timely fashion. This has assisted greatly in reducing the period of time required to move an Inquiry forward to the Planning Conference stage.

Mandate Challenges: We recommended "That government departments more fully recognize the mandate of the Commission." Since the date of our last Annual Report the government has only challenged our mandate to conduct one Inquiry. Otherwise, the government appears to have accepted our recommendation that our process be viewed as an alternative to costly court challenges and, therefore, it would appear that the government only objects to our mandate where it feels that it has not been given the opportunity to properly respond to a claim submission prior to the claimant First Nation raising it with our Commission.

Government Representation at Planning Conferences: We recommended "That the government ensure full representation at Commission Planning Conferences, and that it more fully address the potential for mediation." We made this recommendation as, at the outset of our process, only representatives from the Department of Justice were attending Planning Conferences conducted by the Commission. We felt strongly that, without a representative from the Department of Indian Affairs and Northern Development present, the potential to resolve claims at the Planning Conference stage, through mediation, was minimal. The government now sends representatives from both Departments to all Planning Conferences and a number of Inquiries have been resolved at that stage as a result.

Mediation Challenges: We recommended "That government departments recognize that refusal to mediate early in the Inquiry process necessitates a costly and time-consuming full Inquiry, often resulting in mediation in any event." As noted above, with respect to government representation, we feel that progress has been made in this regard, but we do not believe that our potential to provide mediation has been fully utilized. Please refer to our current recommendation with respect to mediation.

Response Protocol: We recommended "That the parties of an Inquiry by the Indian Claims Commission shall respond formally in writing to the Findings and Recommendations Report issued by the Commission within sixty days of the date of transmittal." Although the government is responding to our Inquiry Reports in a much more timely manner, we are not receiving responses from the government within sixty days in all cases. As a timely response is essential to the effective operation of the ICC and its independent claims review process, this report contains a recommendation for further improvements to such a protocol.

Commission Recommendations to Government

RECOMMENDATION 1

"A New Claims Policy and Process"

Canada and First Nations should develop and implement a new claims Policy and process that does not involve the present circumstances wherein Canada judges claims against itself.

RATIONALE

The problems with the present Policy and process are legion. (Please refer to *Indian Claims Commission Proceedings 2*, a special volume dealing with land claim reform, for a number of papers that detail the shortcomings of the present system and make recommendations for the implementation of a fair and equitable process.) The present system involves a fundamental flaw: Canada must judge claims against itself. This is a manifest conflict of interest, especially when Canada stands in a fiduciary relationship towards the claimant First Nations. It is imperative that an independent claims body be established to perform at least the initial assessment of the validity of First Nations land claims against Canada.

In the spring of last year, the federal government agreed to provide funding for a meeting of the Chiefs Committee on Claims. The meeting, held in Winnipeg on June 1 and 2, 1994, was chaired by the National Chief. The Chiefs present expressed concern that the Commission lacked "teeth," as its decisions were not binding. There was also concern that, at that point, the federal government had not responded to any of the recommendations made by the Commission. (The government has now responded to all but two of our Reports.) The Chiefs felt strongly that an independent body must be involved in the claims process from start to finish:

> There must be an independent body involved in facilitating claims throughout the entire process, from research and development, submission of claims and implementation of settlements. (AFN, *Draft Summary Chiefs Committee on Claims Meeting*, Winnipeg, June 1& 2, 1994)

The resolution passed June 2, at the conclusion of the meeting called for: "a bi-lateral forum (First Nations/ Canada) to prepare recommendations on acceptable policies and processes to resolve First Nation land and resource rights issues...".

As it stands, the Commission has no knowledge of any formal negotiations or discussions taking place at this time, although both First Nations and Canada have stated their desire to overhaul the existing land claim system. It is our position that there presently exists a broad consensus between First Nations and Canada on the need for at least *some* fundamental reforms, such as:

1) The creation of an Independent Claims Body (ICB);
2) The validation of claims by an ICB so as to remove the conflict of interest for Canada in the present system (where Canada validates claims against itself);
3) The facilitation of claims negotiations by an ICB to ensure fairness in the process;
4) The need for an ICB to possess the authority to break impasses in negotiations.

Vancouver Sun

Ray Silver, Sumas Elder. The Indian Claims Commission's report on the Sumas claim is in his hand.

RECOMMENDATION 2

"Fairness in the Current Claims Policy and Process"

The current specific claims policy and process must be administered by Canada in a manner that is fair and equitable towards the First Nation claimants. This practice should include: involvement of First Nation communities in the claim assessment process; disclosure of the substance of the legal opinions relied upon by the Minister to determine whether to accept or reject a claim; and, a detailed account of Canada's interpretation of its "lawful obligation" in any given claim.

RATIONALE

Until a new claims policy and process are developed and implemented, the current policy and process must be amended to ensure fairness.

Almost without exception, the Commissioners, when conducting an Inquiry in a First Nation, have been informed that this is the first time that anyone has actually visited the community and heard directly from the people regarding their claim. The Commissioners feel strongly that a lack of presence from representatives of Canada who are charged with assessing claims in the first instance leads directly to diminished cross-cultural sensitivity and to the perception that the Crown's decisions are made by faceless bureaucrats.

When First Nations submit specific claims to Canada, they are encouraged to include, for consideration, the legal opinion of their lawyer along with their historical research. However, when Canada communicates its decision to accept or reject a claim, it relies on solicitor-client privilege and refuses to disclose its legal opinion from the Department of Justice. This legal opinion is almost always critical in Canada's determination, yet it is never revealed. If reliance on solicitor-client privilege is to continue, Canada should include, as a minimum, a detailed precis of the legal opinion from the Department of Justice. To do less fails to meet the requirements of a fiduciary relationship, a relationship that has been found to exist by the Supreme Court of Canada in cases such as *Sparrow*. The substance of Canada's legal opinion must be exposed to full public scrutiny if justice is to be done and seen to be done.

During Inquiries, the Commissioners have noticed a profound reluctance on the part of Canada to provide witnesses to explain Canada's interpretation of the Policy. Canada tends to rely upon documentary materials and legal arguments to put forward its case, although fairness would require that Canada's interpretation of the Policy be provided directly by those who implement it. This would address the perception that the rejection of claims is arbitrary and would also assist First Nations generally in their understanding of Canada's position on the Policy.

RECOMMENDATION 3

"Response Protocol"

An Inquiry will be officially closed when the parties to an Inquiry by the Commission respond formally, at a meeting in the First Nation community, to the Report issued by the Commission. The Commission will arrange for this response meeting to be held within ninety days of the date of transmittal of the Report. The government response should contain detailed reasons for the acceptance or rejection of the Commission's recommendation and include a precis of any fresh legal opinion received from the Department of Justice.

RATIONALE

This recommendation furthers the one put forward in the Commission's Annual Report released last year. While the Commission is pleased that Canada has responded to its first Report, it must be noted that this response (to the Canoe Lake and Cold Lake First Nations Inquiries) involved an unacceptable eighteen month delay. To date, Canada has responded promptly to a Report only where this Commission has agreed with the Minister's rejection of a claim. At the time of the

writing of this Annual Report (April 1995), it has been over eight months since the Lax Kw'alaams Report was released to the parties and Canada has yet to make a formal substantive response. This is neither fair to the claimant First Nation nor to the people of Canada.

To date, Canada's rationale for the rejection or acceptance of the recommendations of this Commission has not been adequately explained. This results in the same unfairness, detailed in Recommendation 2, regarding legal opinions from the Department of Justice. Again, the lack of substantive detail tends to buttress the perception that Canada's decisions are arbitrary and may also give rise to concerns that Canada favours its own self interest over that of claimant First Nations. It is not sufficient for government responses to state simply "we disagree," without offering detailed reasons that are available for objective review and examination.

A formal meeting arranged and chaired by the Commission will provide a public forum for the timely presentation and discussion of government and community responses and will bring the Inquiry process to an official close.

RECOMMENDATION 4

"Mediation"

That Canada and First Nations make greater use of the Commission's mediation services and alternative dispute resolution mechanisms in the interests of reaching claim settlements in a timely and efficient manner. In order for mediation to be a viable alternative to courts and Inquiries, Canada must abandon inhibiting attitudes and policies in favour of a case by case analysis of whether mediation is appropriate in light of the facts and matters in issue. In particular, government counsel engaged on matters before the Commission should be given the same broad mandate to consider, recommend, and negotiate settlement that they would have if acting for the government in litigation over the same claim.

RATIONALE

ICC Commissioners have been given a broad mandate "to provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim." From its inception, the Commission has vigorously sought to advance mediation as an alternative to the courts and Inquiries, both of which tend to be adversarial in nature. In the interests of helping First Nations and Canada negotiate agreements which reconcile their competing interests in a fair, expeditious and efficient manner, the Commission is prepared to offer the parties a broad range of mediation services tailored to meet their particular goals and objectives. However, the ability of the Commission to provide such mediation services is severely limited by the policies and attitudes of the government of Canada.

Canada views the specific claims process in terms of six distinct stages. The critical stage appears to be the acceptance/rejection stage, wherein Canada decides whether it shall accept the claim for negotiation or reject it. If the claim is accepted for negotiation, the process of settling compensation begins. However, one of the greatest obstacles in the settlement of specific claims is the fact that the Department of Justice typically regards its own legal opinion as being determinative on the question of whether an outstanding lawful obligation exists on the part of government. If the lawyers conclude that no such obligation exists, the government assumes that there is no place for mediation. Since mediation is essentially consensual, and both parties must request it, an opinion unfavourable to the claim ends the prospect for mediation before it can begin. Moreover, counsel representing Indian Affairs in mediation attempts have no authority to discuss or negotiate on the basis of risk assessment, or to consider any other factors, outside the existing legal opinion, which might justify reconsideration. As a consequence, Canada's participation in mediation efforts is almost wholly confined to the negotiation stage.

The result is that the government has severely limited the Commission in the performance of a mandate granted to it in broad and unrestricted terms. Until government is willing to abandon these limitations, and adopt a more constructive and pragmatic attitude towards the negotiation of specific claims, the Commission's mediation function will continue to be hobbled with the result that much time and energy and many resources will be wasted and the First Nation's sense of injustice prevails.

RECOMMENDATION 5

"Notice of Removal of the Pre-Confederation Bar"

Canada needs to identify and review all claims that were rejected based on the ban of pre-Confederation claims and notify all affected First Nations. This bar was lifted in 1991 and at least some First Nations claims have not been reviewed in light of this change.

RATIONALE

Until 1991, pre-Confederation claims were barred for consideration under the Specific Claims Policy. In that year, as part of a number of reforms that included the creation of this Commission, the bar on pre-Confederation claims was lifted. Following this Commission's experiences with the Inquiry into the claim to Horse Island by the Micmacs of Gesgapegiag, it became apparent that DIAND had not conducted an exhaustive review of all claims that were rejected pursuant to this pre-Confederation bar. Instead, it would appear that Canada had responded reactively, and reviewed only those claims by First Nations claimants who have issued a specific request. It should not be incumbent upon the First Nations to ask Canada to review claims which were rejected prior to the alteration of the Specific Claims Policy in 1991.

RECOMMENDATION 6

"Extinguishment"

Canada should stop insisting on the express extinguishment of aboriginal rights and title as part of the settlement of specific claims.

RATIONALE

The Policy expressly forbids the consideration of claims based on "unextinguished aboriginal title." In the course of conducting the Lax Kw'alaams Inquiry, the Commission discovered that Canada insisted upon the express written extinguishment of aboriginal title and rights as a precondition to settling that claim. This is grossly unfair. The Policy is not meant to deal with aboriginal title and/or rights, and Canada ought not to insist upon their extinguishment as part of the settlement of a specific claim.

Responses to Reports

To date the Commission has accepted twenty-nine claims for Inquiry. Seven reports have been released that deal with eight Inquiries (the Canoe Lake Cree Nation Inquiry and the Cold Lake First Nations Inquiry were dealt with in one Report). The government has formally responded now to all but two of those Reports: 1) The Lax Kw'alaams First Nation Report, released on June 28, 1994 and 2) the Sumas Indian Band Report, released on February 22, 1995.

ATHABASCA DENESULINE INQUIRY

In a letter dated August 5, 1994, Minister Irwin responded to Co-Chairs Prentice and Bellegarde with respect to the Athabasca Denesuline Inquiry Report, which had been released to the parties on December 21, 1993. In that report the Commission had found that the claim of the Athabasca Denesuline regarding Treaty hunting rights outside of the metes and bounds descriptions contained in Treaty 8 and Treaty 10, should be dealt with outside of the specific claims process by way of an "Administrative Referral." Minister Irwin asked his Parliamentary Secretary, Mr. Jack Anawak, to meet with all Aboriginal parties interested in this matter, to see if practical solutions can be found to the concerns of the Athabasca Denesuline. At the time of writing, no such "practical solutions" have been found.

YOUNG CHIPEEWAYAN INQUIRY

In a letter dated February 23, 1995, Minister Irwin wrote to the Commissioners who released this report (Commissioners Corcoran, Bellegarde and Prentice). In the report, which was released on December 19, 1994, the Commissioners had found that the claim could not be dealt with under the Policy as the claimants were not a Band. However, the Commission found that Canada had contravened the terms of Treaty 6 in disposing of Stoney Knoll Indian Reserve #107 without accounting for the proceeds of the disposition and recommended that this matter be fully investigated. At the time of writing, a proposal submitted by the Young Chipeewayan proponents for funding the costs of research, analysis, and meetings with affected First Nations, was under review by DIAND officials.

MICMACS OF GESGAPEGIAG (HORSE ISLAND CLAIM) INQUIRY

This report dealt with an Inquiry that was resolved at the Planning Conference Stage, and was released by the Commission in December, 1994. The claim had originally been rejected by Canada as a result of the pre-Confederation bar on claims. This bar had been lifted as a result of reforms to the process in 1991, but the claimant First Nation had not been made aware of the fact that the initial basis for the rejection of the claim had since been lifted. At the Planning Conference for this claim, Canada agreed to have a fresh look at the claim. It is presently in abeyance at the request of the First Nation, pending the result of a Supreme Court of Canada decision in a related case. Minister Irwin responded to this Report in a letter dated March 1, 1995. He noted that the progress on this claim was due, in large measure, to the advice provided by this Commission.

CHIPPEWAS OF THE THAMES (MUNCEY LAND CLAIM) INQUIRY

This report was also released by the Commission in December of 1994, and also dealt with an Inquiry that was resolved at the Planning Conference stage. An offer of settlement had been rejected twice by the members of the claimant First Nation as result of the government's insistence on an *Indian Act* surrender for the lands in issue. At the Planning Conference it was revealed

Governor General's Northern Tour. Governor General Georges P. Vanier and Mrs. Pauline Vanier seated (right) with Indian Agent S.C. Knapp during payment of treaty money to Indians, Cold Lake Reserve, Alberta, June 1961. Photo by G. Lunney

that the First Nation was in a position to purchase the lands in issue, obviating the need for the surrender. The Commission then facilitated negotiations on a fresh settlement agreement between the parties, which the members of the First Nation ratified on January 28, 1995. In the letter of March 1, 1995 referred to in the Micmacs of Gesgapegiag Inquiry summary (above), the Minister gave credit to the Commission for the progress made in settling this claim.

COLD LAKE FIRST NATIONS AND CANOE LAKE CREE NATION (PRIMROSE LAKE AIR WEAPONS RANGE) INQUIRY

In a letter dated March 2, 1995, Minister Irwin responded to this report, which had been released in August 1993. He stated:

> I was very impressed by the care and attention that the ISCC [the Commission] gave to the handling of the issues involved and the public hearings. The historical facts were clearly presented and the personal testimony you recorded from many of the individuals affected by the establishment of the PLAWR were compelling. These facts have convinced the Government of Canada that steps should be taken to resolve the grievances of the Cold Lake and Canoe Lake Cree First Nations documented in your report.

He went on to say that he was writing to the Chiefs of the claimant First Nations to initiate negotiations to achieve a settlement. Although Canada did not agree with our recommendation that a breach of fiduciary or treaty obligations had occurred, we are heartened that the claim was accepted for negotiation nevertheless.

Mediation

The Commissioners have been given a broad mandate "to provide or arrange, at the request of the parties, such mediation services as may in their opinion assist the Government of Canada and an Indian band to reach an agreement in respect of any matter relating to an Indian specific claim." From its inception, the Commission has interpreted its mandate broadly and has vigorously sought to advance mediation as an alternative to the courts and Inquiries, both of which tend to be adversarial in nature. For example, the Planning Conferences conducted as an adjunct to Inquiries have enabled First Nations and government representatives to communicate more effectively and have improved the prospects for a resolution of claims. In the case of the Chippewas of the Thames Inquiry, the Commission held two Planning Conferences which led to a resumption of negotiations chaired by the Commission and the parties ultimately settled the claim for $5.4 million dollars in compensation.

While it is patently obvious that both First Nations and Canada prefer negotiation to litigation as a means of resolving disputes, unassisted negotiations on specific claims tend to be unduly protracted and inefficient. Reaching final agreements can be an elusive goal when one considers the historical and legal complexities of specific claims, the uncertainty of the law relating to aboriginal and treaty rights, and the cross-cultural dynamic within which the parties exchange their views and positions. Where the parties are unable to reach agreement, which is often the case, the result is that much time, energy and resources are wasted and the First Nation's sense of injustice prevails. Even if the parties later resume negotiations, the result is additional delay, expense and damages in terms of loss of use, land values, and so forth. In the interests of helping First Nations and Canada negotiate agreements which reconcile their competing interests in a fair, expeditious and efficient manner, the Commission is prepared to offer the parties a broad range of mediation services tailored to meet their particular goals and objectives.

The Commission's mediation activities are on the upswing in the area of Planning Conferences and the facilitation of claims in negotiation and the results obtained are cause for optimism. There is a real and growing demand for Commission personnel to provide "process facilitation" of claims negotiations by managing the exchange of information, setting agendas, chairing negotiation sessions, recording progress, analyzing and clarifying positions adopted or asserted by the parties, and assisting them to resolve disagreements as they arise. At the request of the parties, we have become involved in facilitating negotiations of broad scope and great complexity. The parties have freely acknowledged that the presence of a skilled and impartial member of the Commission's mediation team at the bargaining table has proven to be of real benefit to them. Progress which has eluded them for perhaps a very long time has been achieved.

However, the Dispute Resolution aspect of our mediation function with respect to claims which are in other stages of the claims process continues to be underutilized. Up until recently, Canada's representatives almost routinely refused to participate in mediation requested by claimants (see *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* for commentary) but it appears that attitudes have softened and we are now receiving government requests to provide mediation on claims both within and outside the Inquiry process. While government personnel recognize the desirability of negotiated settlements and are generally willing to participate in mediation, they continue to be severely limited by traditional policies and attitudes which pre-date the advent of the Commission.

A chart prepared by the Department of Indian Affairs (see inset) demonstrates that the government's policies tend to minimize the importance of the Commission's broad mediation function. The chart shows that Canada views the specific claims process in terms of six distinct stages. The critical stage appears to be the acceptance/rejection stage, wherein Canada decides

Chart 1

Stages of the Specific Claims Process: When Mediation is Appropriate*

Stages	Commentary	Mediation
1. Research	• Rarely confrontational	Exceptional cases only
2. Submission of claim to Canada	• All documentation believed relevant by a Band or by the Department is submitted to Justice for consideration.	No
3. Acceptance/rejection of claim for negotiation: determination of lawful obligation and compensation criteria by Justice Canada	• ISCC already mandated to review Justice decisions to accept/reject claims, and basis of compensation awarded. • Mediation is neither required nor appropriate unless purpose is to mediate ISCC–Justice disputes.	*No*
4. *The negotiation phase*	• *Developing Negotiation Protocol* • Discount Factor • Appraisal Values • Share of compensation by Bands (if more than one claimant) • *Terms of Agreement-in-Principle, including* Ratification Procedures	• *No* • Yes • Yes • Yes • Yes
5. Submission of final settlement agreement for ratification by Band	• Negotiations have concluded. The choice is with the Band	No
6. Implementation of Agreement	• Implementation issues sometimes arise many years after a settlement is achieved.	Exceptional cases only

* During the final stages of preparing this Annual Report for production, the Commission was informed by DIAND — Legal Services that this chart is "an internal working document and should not be considered or referred to as an official government position with respect to the mediation of specific claims with the ICC." In the months following publication of this report, the Commission will attempt to clarify with government officials whether the chart properly reflects DIAND policy and practice or whether other considerations apply.

whether it shall accept the claim for negotiation or reject it. If the claim is accepted for negotiation, the process of settling compensation begins. The chart shows that there is little or no place at all for mediation in the claims process, particularly in those stages leading up to the acceptance or rejection of the claim. As a consequence, Canada's participation in mediation efforts is almost wholly confined to the negotiation stage.

This policy is entirely inconsistent with the attitude prevailing in the private sector. In the interests of ending the waste of time, money, and effort, private sector disputes of every conceivable type (including some which have been locked in litigation for years) are settled daily with the help of private and court-appointed mediators. There is a veritable wave of enthusiasm for Alternate Dispute Resolution (ADR) — of which mediation is a type — sweeping across not only Canada, but Great Britain and the United States. The courts, and the litigation process, are no longer regarded as the only effective means of settling disputes.

The success of mediation depends upon the existence of two factors: the parties' sincere desire to settle their differences, and their willingness to adopt a practical approach to settlement. It is safe to assume that both parties have been assured by their lawyers that they have a strong, or at least reasonable, case. However, this does not terminate the prospects for negotiation and settlement. The risk involved in losing in court, the quantum of damages that could be ordered by the court, the costs of litigation (win or lose), the time and energy consumed by the process, the possibility of appeals and consequent delay, the anxiety generated, and the continuance of the animosity litigation almost ensures are all factors which must be taken into consideration. When approached in this way, a mutually agreeable settlement can be achieved without litigation.

In contrast, these practical considerations are conspicuously absent in the specific claims process. One of the greatest obstacles in the settlement of specific claims is the fact that the Department of Justice typically regards its own legal opinion as being determinative on the question of whether an outstanding lawful obligation exists on the part of government. If the lawyers conclude that no such obligation exists, the government assumes that there is no place for mediation. Since mediation is essentially consensual, and both parties must request it, an opinion unfavourable to the claim ends the prospect for mediation before it can begin. Moreover, counsel representing Indian Affairs in mediation attempts have no authority to discuss or negotiate on the basis of risk assessment, or to consider any other factors outside the existing legal opinion which might justify reconsideration.

Ironically, it would appear that government lawyers have considerably more latitude to negotiate when the same issues arise in the context of claims in litigation. Counsel engaged to defend the government in court against a First Nation's land claim are no doubt expected to advise in the course of the litigation on the desirability of a settlement over a trial. This is a general function of counsel engaged in litigation for any client. The factors they consider are the factors set out above. The legal opinion is an important factor to be taken into account, but it is not the only factor which should be considered. Without taking this approach, the settlement of litigation without a full-blown trial would be virtually impossible.

Yet government counsel appearing before the Commission on the very same issue are not apparently expected or permitted to evaluate the desirability of settlement. By adhering to policies and attitudes which antedate the introduction of the Commission's mediation function, the government has severely limited the Commission in the performance of a mandate granted to it in broad and unrestricted terms. Unless Canada is willing to abandon these limitations, and adopt a more constructive and pragmatic attitude towards the negotiation of specific claims, the Commission's mediation function will continue to be hobbled.

None of the foregoing is a criticism of any person. The Commission has been fortunate in the government personnel assigned to work regularly on Commission business. It is a comment on policies, not people.

Claims Summary

STREAMLINED INQUIRY PROCESS

The process used by the Commission for handling claims submitted for Inquiry and/or mediation has been streamlined to increase efficiency and effectiveness in processing these requests. There are four stages to the process, which begins when a request is received from a Band. Each of these stages is summarized below. (Please also refer to Chart 2: ICC Mediation and Inquiry Process.)

Stage 1: Initial Request

A request is received by the Commission, core documents are obtained, a Planning Conference is scheduled, a Preliminary Planning Conference is arranged and a legal opinion prepared (if necessary), documents are compiled and annotated, and a history of the claim is prepared.

Stage 2: Planning Conference (will commence prior to completion of Stage 1)

The Planning Conference date and location is arranged. Prior to this, parties are requested to exchange statements of issues, and ICC Legal and Research prepares and delivers a kit to each party. The purpose of the first Planning Conference is to establish issues, determine the position of the parties on the issues, determine what documents parties intend to rely on and what witnesses they propose (including experts), request copies of any such documents not yet received and set deadlines for receipt. Dates are set for a community visit, "will says" and, if there is no prospect for settlement, an Inquiry. Following the Planning Conference, an ICC Lawyer prepares a Planning Conference Summary, which is then sent to each of the parties. If necessary, subsequent Planning Conferences are held during which the ICC mediates, if possible.

Chart 2

ICC Mediation and Inquiry Process

Mediation

It should be noted that, from the outset, mediation is always an option. Often, mediation flows from the Planning Conference, where the parties meet to identify and narrow issues of the claim. It is at this stage that claims initially accepted for Inquiry can be resolved informally. With the consent of both parties, mediation may be used as an alternate route towards resolving the claim. If the impasse cannot be broken at the Planning Conference, the parties continue with the more formal steps of the Inquiry process.

Stage 3: Inquiry

During the Inquiry stage, a Community Visit is arranged by Liaison, a briefing kit is prepared for the ICC Panel and an Inquiry is conducted. The Inquiry involves a Community Session, Expert Evidence Sessions, and Oral Arguments.

Stage 4: Reports (Full Inquiry)

On direction from the ICC Panel, a Legal Opinion is prepared, reviewed and presented to the Panel. A final report on findings and recommendations is prepared and released.

STATUS OF REQUESTS FOR INQUIRY AND MEDIATION

In 1994/95 the Commission was involved in 42 Inquiries. Of these, five were completed and reports issued. The remaining Inquiries are in various stages of the process. The following section provides a status report of requests for Inquiry and mediation, a brief summary of each of the 42 Inquiries in progress, and a more detailed account of completed Inquiries.

Overview of Requests

98	requests submitted to the Commission
8	completed Inquiries
6	requests in the final phases of completion
4	requests at the Oral Argument stage
12	requests at the Community Session stage
10	at the Planning Conference stage
8	in abeyance

Completed Inquiries

Date	First Nation
1993	Cold Lake
	Canoe Lake
	Athabasca Denesuline
1994	Lax Kw'alaams Band
	Chippewas of the Thames
	Micmacs of Gesgapegiag Band
	Young Chipeewayan Band
1995	Sumas Indian Band

Reports in Progress

Buffalo River Band
Flying Dust # 105
Joseph Bighead Band
Lac La Ronge Indian Band
Washagamis Bay First Nation
Waterhen Lake First Nation

Inquiries at Oral Argument Phase

Chippewas of Kettle and Stony Point
Fort McKay First Nation

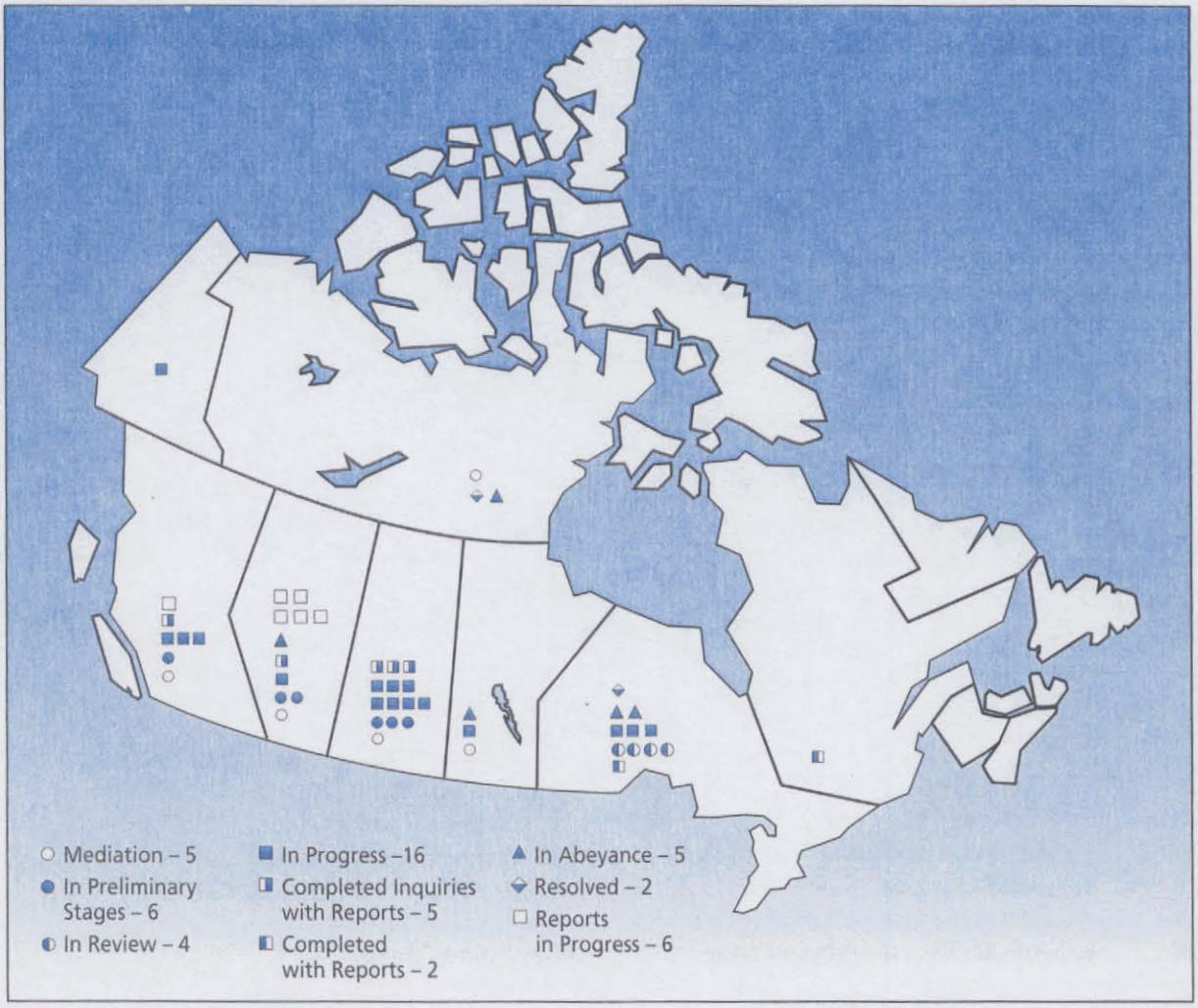
Inquiries at Community Session Phase

Fishing Lake First Nation
Homalco Indian Band
Kahkewistahaw First Nation (1907 Surrender)
Kahkewistahaw First Nation (Treaty Land Entitlement)
Kawacatoose First Nation
Lac La Ronge (Candle Lake)
Lac La Ronge (School Lands)
Namgis Indian Band (Cormorant Island)
Namgis Indian Band (1914)
Peguis Indian Band
Qu'Appelle Valley Indian Development Authority (QVIDA)
Chippewas of Beausoleil, Rama & Georgina Island

Inquiries at Planning Conference Phase

Alexander First Nation
Carry the Kettle Band
Duncan's Indian Band
Homalco Indian Band
Key Band
Kwanlin Dun First Nation
Micmacs of Gesgapegiag (Highway #6 Expropriation)

STATUS OF CLAIMS AND INQUIRIES — January 31, 1995



Ocean Man Band
Qu'Appelle Valley Indian Development Authority
Squamish Nation
United Indian Councils (Crawford Purchase)
United Indian Councils (Gunshot Treaty)
United Indian Councils (Toronto Purchase)

Inquiries in Abeyance

Roseau River Anishinabe
Moose Deer Point and Mississaugas of New Credit (1923 Williams)
Walpole Island First Nation
Wauzhushk Onigum Nation
Yellowknives Dene Band

Claims in Active Mediation

Athabasca Chipewyan Band 201
Lax Kw'alaams Band
Little Black Bear Band
Roseau River Anishinabe
Treaty 8 Tribal Council

SUMMARY OF INQUIRIES

Alexander First Nation

The Alexander Band alleges that the 1905 surrender of a large portion of the Alexander Reserve was taken under questionable circumstances, and that the Government failed to exercise its fiduciary responsibility in executing the surrender. A Planning Conference showed the need for further research. The Band requested documents from Government, which they received on January 31. The Band is reviewing these documents and a second Planning Conference may follow.

Athabasca Denesuline: Fond Du Lac, Black Lake, Hatchet Lake Bands

At issue is whether rights granted to Bands under Treaties 8 and 10 extend to lands traditionally used by Bands in the Northwest Territories. A portion of these lands are included in the proposed comprehensive claim settlement with the Inuit (The TFN Agreement). The Commission conducted an Inquiry and issued a report on December 21, 1993. (Please refer to the *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* for a fuller account of the Commission's deliberations and findings.) The Bands then became involved in bilateral negotiations with the Inuit, and requested a response from Canada to the ICC report. On August 5, 1994, the Minister of Indian Affairs responded: "We have seen 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."

Buffalo River Band

At issue is the loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range. More specifically, the claim involves the interpretation of Treaty 10; fiduciary obligations; conflict of interest with other Departments; various compensation related issues; and access to and reversion of lands. The Inquiry process began on October 20, 1993. A draft final report is in process.

Canoe Lake Cree Nation

The claim relates to loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range. Please see the *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* for a digest of the Commission's final report, which was released August 17, 1993. The government responded to the report 18 months later, on March 1, 1995.

Carry the Kettle Band

The claim relates to the surrender of lands from the Assiniboine Reserve in 1905. The Band alleges that the Crown breached its fiduciary obligations by obtaining a surrender under duress and undue influence, unconscionable agreement and negligent misrepresentation. The Commission has reviewed the historical documents provided by the Band. A Planning Conference is be held in the near future.

Chippewas of Beausoleil, Rama and Georgina Island

The claimants assert that lands covered by the "Collins Treaty" of 1785 were never properly surrendered and that they suffered damages when the lands were included in the 1923 Williams Treaty. A Community Session is scheduled for June 15, 1995 at Beausoleil (Christian Island).

Chippewas of Kettle and Stony Point

At issue is the validity of surrender and sale of an 88-acre beachfront property in the late 1920s. Two Planning Conferences have been held. At the first Planning Conference, Canada expressed the view that the Inquiry should be delayed, and the "property owners affected by the claim" be involved. The Commission agreed to permit the property owners to observe the Community Session, with the permission of the

First Nation. At the second Planning Conference, the parties agreed to a Community Session. It was held March 8, 1995.

Chippewas of the Thames

This Inquiry concerned the "Muncey Village" land claim submitted in 1974 by the Chippewas of the Thames First Nation to two lots of land in Caradoc Township. For a summary of this claim and final report, please see "Inquiries Completed by the ICC in 1994/95."

Cold Lake First Nations

The claim relates to loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range (PLAWR). The Commission's final report was released August 17, 1993. (Please see the *Indian Claims Commission Annual Report 1991-1992 to 1993/94* for a digest of this report.) Canada did not respond to the PLAWR Report until 18 months later, on March 1, 1995.

Duncan's Indian Band

The claimant argues that surrenders of Indian Reserves Nos. 151 and 151B to 151H were null and void because they were not taken in compliance with the *Indian Act*. The claim centres around the validity of the Indian version of events as opposed to the documented version in the Department's archives. Documentation is being collected and a Planning Conference will be called early in 1995.

Fishing Lake First Nation

The claimant maintains that the 1907 surrender was null and void because it was obtained through duress and undue influence, as an unconscionable agreement, without strict compliance to the *Indian Act*. The claimant further maintains that the Crown breached its trust or fiduciary obligation in obtaining the surrender. A Community Session is set for May 16, 1995.

Flying Dust No. 105

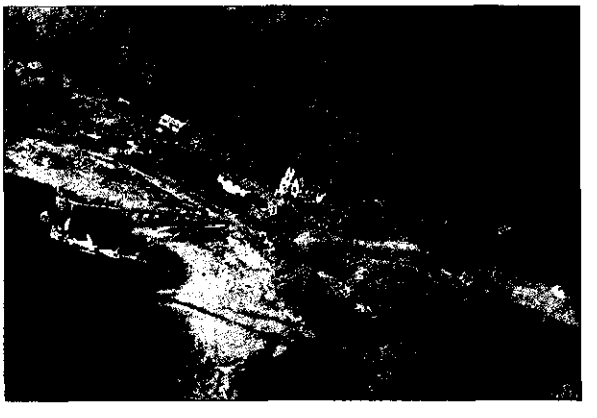
The claim relates to loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range (PLAWR). Documentation has been collected and a Planning Conference was held on July 8, 1994. The research was completed and oral arguments took place in November 1994. A draft final report is in preparation.

Fort McKay First Nation

The issue is the outstanding Treaty Land Entitlement of landless transferees currently on the First Nation's membership list, but not counted at date of first survey. Documents were gathered, and a Community Session was held on November 8, 1994. Oral arguments are scheduled in the First Nation for May 8 and 9, 1995.

Homalco Indian Band

The Band claims that inadequate lands were provided at both Aupe Indian Reserve #6 and Aupe Indian Reserve #6A; and that Canada breached its fiduciary responsibility and other lawful obligations. Documents were gathered and a Planning Conference was held on September 20, 1994, at which the ICC proposed mediation. A second Planning Conference took place in Vancouver on December 9, 1994, after which Canada and the First Nation were to coordinate a statement of



Homalco site, April 18, 1995.

facts. A third Planning Conference was held on February 24, 1995 and a viewing of the reserve took place April 19, 1995.

Joseph Bighead Band

The claim relates to loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range (PLAWR). A research study was contracted, and a Community Session held on June 20, 1994. Further research was necessary before the Oral Arguments were held in November 1994. A draft report is in progress.

Kahkewistahaw First Nation: Surrender

The claim concerns 33,281 acres surrendered by the Band in 1907. The proposal to surrender was rejected by the Band once before being accepted. The Band alleges that the surrender and subsequent sale of lands were taken under unconscionable circumstances and are therefore invalid. Further, the Band alleges that the Crown breached its fiduciary duty and trust; that the surrender did not comply with the *Indian Act*, and that the Kahkewistahaw Indian Band did not validly surrender the road allowances in the relevant area. Documents have been collected and are undergoing verification. The Community Session will be held on May 3, 1995.

Kahkewistahaw First Nation: T. L. E. Claim

This claim concerns the date of first survey and the base paylist to be used in determining the Band's date of first survey population. A Planning Conference was held on February 1, 1995 and Expert Evidence is scheduled for May 24, 25 and 26, 1995.

Kawacatoose First Nation

The questions at issue are: first, whether two families were paid Treaty annuities in 1876 at Fort Walsh as members of the Kawacatoose (Poorman Band) First Nation; second, whether the additional persons since then should be counted in the population base for determining an outstanding Treaty Land Entitlement claim; and third, whether the First Nation has established an outstanding Treaty Land Entitlement. A Planning Conference was held, documents collected and a Community Session held on November 16, 1994. Expert witnesses will be heard on May 24, 25 and 26, 1995.

Elder Phillip Kahpeepatow (sitting) gives testimony at the Joseph Bighead Cree Nation community session in Saskatchewan on June 24, 1994. (L to R) Cree Translator, Ernie Peiche; Counsel for Canada, Bruce Becker; and Ron Maurice, Counsel for the Indian Claims Commission.

Key Band: 1909 Surrender

The Band requested the ICC's involvement on September 6, 1994. A Planning Conference will be set following the submission of requested documentation.

Kwanlin Dun First Nation

The First Nation contends that Canada is in breach of its lawful obligations to the Band by "...denying or refusing to admit that Whitehorse Indian Reserve No. 8, Whitehorse, Yukon is a reserve within the meaning of the *Indian Act*" and "...wrongfully alienating portions of Whitehorse Indian Reserve to third parties." A Planning Conference was held in Vancouver on

January 31, 1994 and the historical portion of the report was completed January 23, 1995. We believe a mediated settlement is close.

Lac La Ronge Indian Band: Candle Lake Claim and School Lands Claim

The issues are: the rejection of a claim to lands alleged to have been reserved at Candle Lake; the rules governing the establishment of a reserve; and the effect of Natural Resources Transfer Agreement on establishing a reserve. At a Planning Conference on January 26, 1995, the parties agreed to have the Candle Lake and School Lands claims heard together. Canada challenged the ICC's mandate to hear the two claims on the grounds that they have not been submitted as a specific claim, and are therefore not 'specific claims.' The Commissioners decided, however, that the Inquiry shall proceed on the understanding that Canada shall be afforded an opportunity to respond to the merits of the claim in the course of the Inquiry. A Community Session is scheduled for June 13, 1995.

Lac La Ronge Indian Band: T. L. E. Claim

At issue is the rejection of the Band's specific claim to an outstanding Treaty Land Entitlement, specifically the effect of multiple surveys on entitlement calculations; the legal effect of a Band Council Resolution accepting entitlement settlements; and the validity of the "compromise formula" in calculating an entitlement. After a Consultation Conference, close to 10,000 pages of documents were submitted. A Community Session was held in Lac La Ronge on February 16, 1994. Oral submissions were made in Saskatoon on June 14, 1994. A final report on the Inquiry is being drafted.

Namgis, B.C. Community Session. Left to right: Bill Cranmer, Peggy Svanvik, Commissioner Aurélien Gill, Legal Counsel Kim Fullerton, Elder Ethel Alfred.

Lax Kw'alaams Band

This Inquiry dealt with a claim that arose from the Crown unilaterally arranging for a portion of the Lax Kw'alaams Band lands to pass to the Grand Trunk Railway Company. For a summary of this claim and final report, please see "Inquiries Completed by the ICC in 1994/95."

Micmacs of Gesgapegiag Band

The Micmacs of Gesgapegiag have claimed Horse Island at the mouth of the Cascapedia River in the Baie des Chaleurs since non-Indians began settling the area. For a summary of this claim and final report, please see "Inquiries Completed by the ICC in 1994/95."

Namgis Indian Band: Cormorant Island

The claim concerns the nature and extent of the authority of the Three Indian Reserve Commissions that operated during the last decades of the nineteenth century; and the process by which the reserves were allocated, disallowed and finally re-allocated. A Planning Conference was held on January 31, 1995. Documents are being collected, and a Community Session was held April 20 and 21, 1995.

Namgis Indian Band: McKenna-McBride Applications

The Namgis Band alleges that the request they brought before the McKenna-McBride Commission in 1914 was wrongfully denied. Their grounds include inherent conflict of interest, dereliction of duty and a breach of fiduciary duty. Canada maintains that there was no

Elder George Cook presenting information at the Namgis Community Session.

such breach of lawful obligations. Documents are being processed. A Planning Conference was held on January 31, 1995 in Vancouver. A Community Session was held April 20 and 21, 1995.

Ocean Man Band

One of the issues is the date of the first population survey used to determine quantum for the Treaty Land Entitlement. A Planning Conference on December 6, 1994 raised questions about the constitution of the Ocean Man Band. ICC research was completed and a historical summary prepared. The Band's lawyer is reviewing documentation from the Department of Justice. A second Planning Conference is scheduled for May 17, 1995.

Peguis Indian Band

The Band maintains that there was a shortfall in the amount of land set aside at the initial survey under the terms of Treaty 1. They want this issue to be considered separately from their contention that the surrender taken in 1907 was unjust. A Planning Conference was held on January 12, 1995 and a second Planning Conference is scheduled for May 18, 1995.

Qu'Appelle Valley Indian Development Authority (QVIDA)

At issue is the flooding and degradation of 14,000 acres of unsurrendered reserve lands as a result of the building of four major and 150 smaller dams on the Qu'Appelle River system. A Planning Conference on January 30, 1995 established that DIAND had never requested a Department of Justice opinion on the QVIDA claim. A second Planning Conference will be held in June 1995. Community Sessions for both the Eastern and Western Bands are set for the end of August and the beginning of September, respectively.

Roseau River Anishinabe

The claimant contends that there are grounds for compensation as the Crown wrongfully handled the 1903 surrender of approximately 12 sections of land. Specifically the claimant contends that there was a failure of fiduciary obligation, that the sale of individual lands violated that obligation, and that the surrender itself was invalid. A special meeting at Roseau River on September 16, 1994 led to the Inquiry being held in abeyance until the claim was re-submitted to Canada.

Squamish Nation

The issue is the preemption of the Bouillon claim. A Planning Conference held in Vancouver on December 8, 1994 led to an agreement to hold the Inquiry in abeyance until Canada reviews its position. A second Planning Conference is scheduled for April 13, 1995.

Sumas Indian Band

The Sumas Band claim concerns a railway right of way expropriated in 1910. For a summary of this claim and final report, please see "Inquiries Completed by the ICC in 1994/95."

Moose Deer Point and Mississaugas of New Credit: 1923 Williams Treaty

The issue is Canada's rejection of the Moose Deer Point and New Credit First Nations who claim aboriginal interests in the Williams Treaty lands, but never signed

the treaty. No Inquiry shall be conducted into this claim unless the First Nations provide notice of their intention to proceed.

United Indian Councils: Crawford Purchase

The claimants allege that the Crawford Purchase lands were never properly surrendered, and that the Crown breached its fiduciary duty to the Mississauga Nation. An exchange of letters and documents is under way, with the claimant to respond. A Planning Conference is scheduled for May 25, 1995.

United Indian Councils: Gunshot Treaty

The claimants allege that the 1788 "Gunshot Treaty" is not a legally binding agreement; that Lt. Col. John Butler had no authority for taking a surrender under the Royal Proclamation of 1763; that the Mississauga Nation has suffered damages; and that the Crown breached its fiduciary duties. An exchange of letters and documents is under way, with the claimant to respond. A Planning Conference is scheduled for May 25, 1995.

United Indian Councils: Toronto Purchase

The claimants allege that the lands in question were never properly surrendered by the Mississaugas, because the Department of Indian Affairs did not adhere to the Crown's instructions with respect to negotiations and conclusions of treaties. The 1805 lands, named for an indenture signed and executed in that year, include the Regional Municipality of York, the Townships of York, Vaughn, and King including Metropolitan Toronto — an area supposedly exceeding that proposed in the 1787 provisional surrender. The Mississauga Tribal Council maintains that there has been an extensive and continuing breach of fiduciary obligations owed them by the Crown. The claimants have been asked to show how this claim falls into the mandate of the ICC. They are willing to give Canada more time, since the positions here are essentially the same as the Collins Treaty Claim.

Walpole Island First Nation

The Band maintains that Canada has failed to honour the spirit or terms negotiated in the original Treaty of 1848 regarding 300 acres in Anderson Township. Specifically, the Band alleges that they never received the "oxen, farming implements, seed grain ..." they were promised in compensation for the loss of livelihood resulting from the Treaty. The Crown states that the Band received full compensation in 1866 and 1877, when they received $1376. This Inquiry is in abeyance at the request of the parties so that Canada may reconsider a resubmission of this claim.

Washagamis Bay First Nation

The issues in this claim include reserve establishment, the alleged taking of Indian Reserve 38D in 1914 without expropriation or surrender, the procedural fairness in Canada's handling of the claim and whether the reserve was properly established or wrongfully alienated. Alternatively, the First Nation questioned whether Canada failed to set the reserve aside in the first place. After five Planning Conferences, Canada notified the First Nation by letter dated April 13, 1995 that the claim would be accepted for negotiation.

Waterhen Lake

The claim relates to loss of traditional hunting, trapping and fishing lands due to the establishment of the Primrose Lake Air Weapons Range (PLAWR). A research study was contracted, Community Sessions held in June, 1994, and Oral Arguments completed in Saskatoon on November 2 and 3, 1994. The draft final report is in process.

Wauzhushk Onigum Nation

This Inquiry is in abeyance at the request of the First Nation. The First Nation is currently negotiating compensation with the Governments of Canada and Ontario, under the auspices of the Indian Commission of Ontario.

Yellowknives Dene Band

The Federal government and Dogrib Treaty 11 Council announced an interim protection agreement for lands that infringe on the traditional territories of the Yellowknives, Tusel K'e and Lutsel K'e Dene First Nations. The Yellowknives Dene communities of Dettah, Ndilo and Enodah are covered by this competing claim area. None of the Treaty 8 Dene First Nations affected were consulted or agreed to this infringement of their territory. The Federal government refuses to alter the agreement. The Dogrib First Nations refuse to change their "settlement area" boundaries. The claimants have asked that the Inquiry be held in abeyance until they receive a response from DIAND regarding their request that the Minister intervene.

Young Chipeewayan Band

At issue in this Inquiry was whether the"Young Chipeewayan Band" reserve was taken without lawful surrender as required by the *Indian Act* and whether the Government of Canada therefore owed an outstanding lawful obligation to the "Young Chipeewayan Band." For a summary of this claim and final report, please see "Inquiries Completed by the ICC in 1994/95."

INQUIRIES COMPLETED BY THE ICC IN 1994/95

In 1994/95, the Commission released five reports. These reports dealt with the following: the Chippewas of the Thames Inquiry, the Lax Kw'alaams Band Inquiry, the Micmacs of Gesgapegiag Report, the Sumas Inquiry and the Young Chipeewayan Band Inquiry.

The Chippewas of the Thames Inquiry

This Inquiry concerned the "Muncey Village" pre-Confederation land claim. The claim, submitted in 1974 by the Chippewas of the Thames First Nation, involves two lots of land in Caradoc Township, on which the village of Muncey is located. In 1987, an Agreement-In-Principle was reached, but was rejected by the Band membership in a sequence of three referendum votes. The Band's subsequent attempts to re-open negotiations were not successful until 1990, when the government agreed to re-negotiate under certain conditions. A proposed settlement was rejected by referendum in 1990. The Band then sought the ICC's assistance to mediate. When the government refused to consent to mediation, the ICC launched an Inquiry in November 1993.

The major impediment to settlement of the claim was the inclusion of a surrender clause in the agreements. After two Planning Conferences and two meetings mediated by the Commission, the government withdrew its demand for an absolute surrender and negotiations resumed. The Inquiry was suspended, although the Commission remained involved as a mediator in case bilateral negotiations ran into difficulty. A letter from the Assistant Deputy Minister, Claims and Indian Government, DIAND, confirmed that government was willing to re-open the claim for settlement, without the requirement for a surrender. At the parties' request, the Commission monitored the negotiations and within six months an Agreement-In-Principle was reached. The agreement, which was ratified by Band membership, provided for $5.4 million in compensation. The Band is now able to invest monies and purchase its lands back from innocent third parties.

This claim is an excellent instance of mediation bringing a satisfactory conclusion without the expense of either an Inquiry or litigation. This 150 year old claim, which had been in dispute for over 20 years, was resolved after six months of negotiation. (Please see Recommendation 2.)

The Lax Kw'alaams Band Inquiry

In the first quarter of this century, the Crown unilaterally divided Tsimpsean I. R. #2 between the Lax Kw'alaams people and the Metlakatla Band. No surrender was obtained at this time. A few years later, Metlakatla surrendered lands to the Grand Trunk Railway Company without the consent of Lax Kw'alaams. In 1985 the Band made a claim to Canada for compensation because this arrangement was made without

a valid surrender of the Band's interest. Negotiations continued over the next six years. In 1991, the parties reached an agreement in principle but the claim was not finalized because of disagreement about the final wording, which included an "absolute surrender."

In 1993, the Indian Claims Commission began an Inquiry. Canada demanded an "absolute surrender" that extinguishes aboriginal interest in the lands in question as a condition of the Crown compensating the Band. However, for the Band to surrender aboriginal title to the land at issue would place at risk the aboriginal interest of the Allied Tsimshian Tribes even though no compensation was offered.

The Commission found that it was reasonable for the Crown to seek a surrender of the Band's reserve interest to ensure that third party interests were adequately protected. However, the ICC report recommends that the surrender clause be modified to expressly exclude the aboriginal interests of the Lax Kw'alaams Band and the Tsimshian people from the surrender so that these interests can be dealt with in the British Columbia Treaty process. The report further recommended that clauses respecting release, indemnity and set-off be included to satisfy Canada's concerns regarding overcompensation. The report also recommended that the parties re-draft the terms of the settlement, and that the Band, Canada and the Commission meet one month after the release of the report to discuss its findings and recommendations.

Since January 1995, the parties have met with the ICC's Mediation group in an attempt to resolve the impasse on this claim. Although a number of options have been tabled, the claim has not yet been settled.

The Commissioners presented a general submission on surrender and extinguishment to Justice Alvin Hamilton, an independent fact finder appointed by government to look into the question of extinguishment of aboriginal rights as a means of achieving certainty in land claims agreements.

This Inquiry raises two issues addressed by the Recommendations. The first of these concerns extinguishment (see Recommendation 5); the second, mediation (see Recommendation 2).

The Micmacs of Gesgapegiag Report

The Micmacs of Gesgapegiag have claimed Horse Island at the mouth of the Cascapedia River in the Baie des Chaleurs since non-Indians began settling the area. The modern history of the claim began in 1986 and the Indian Claims Commission became involved in 1993. As a result of the first Planning Conference, the government agreed to consider the claim on its merits. The Commission contributed to this process in two ways: through its objective summary of the history and legal background of the claim, and through the mediative effect of the Planning Conference.

The Commission was able to suspend the Inquiry and recommend to the Department of Indian Affairs and Northern Development that it write to all affected First Nations whose claims were rejected because of the pre-Confederation bar, informing them that if they wish their claim reconsidered, they should notify the Department.

An important consideration in this Inquiry was the removal, in 1991, of the pre-Confederation bar. This bar had previously excluded consideration of pre-Confederation claims. (Please see Recommendation 4.)

The Sumas Band Inquiry

The Sumas Band claim concerns a railway right of way expropriated in 1910. In 1927, the railway company abandoned the line and subsequently sold the land to non-Indians. One third was purchased by the Band. At issue was the Band's contention that the *Railway Act* and the *Indian Act* allowed the railway company only a limited interest, and hence the right of way should have been restored to reserve status when it was no longer used for railway purposes. DIAND rejected the claim in 1988. In 1993, the ICC was asked by the Band to conduct an Inquiry into the rejection of the claim.

The Commission itemized the issues as: first, what interest the railway took, and what, if any, was taken by the Band or Canada; second, what obligation does Canada have after the railway ceased to function; third, if the railway did acquire absolute title, did this breach Canada's fiduciary obligation; and fourth, was the Order-In-Council valid for all or part of the parcel of land.

The Commission found Canada had failed on all counts to meet its fiduciary obligations to the Sumas Band. More specifically, the Commission found that the railway acquired its interest only as long as the lands were used for railway purposes; consequently, that the Band and Canada retained a reversionary interest in the right of way. When the right of way ceased to be used for railway purposes, Canada failed in its fiduciary duty to protect the Band's reversionary interest and return the land to reserve status. Moreover, if the letters patent to the railway company were effective to transfer full ownership, then the Crown breached its fiduciary duty in failing to limit the transfer of interest appropriately. Finally, the Commission found that the Order-In-Council was valid for the original expropriation in 1910. This did not affect the Commission's finding that the land in question ought to have been returned to reserve status when abandoned by the railway in 1927.

The ICC report, issued in December 1994, recommends that the claim of the Sumas Band be accepted for negotiation under Canada's Specific Claim Policy.

The Young Chipeewayan Inquiry

In 1993, the Commission began an Inquiry into the specific claim of the Stoney Knoll Indian Reserve by the Young Chipeewayan "Band." At issue was whether the Government of Canada owes an outstanding lawful obligation to the Young Chipeewayan "Band" with respect to whether their reserve was taken from them without lawful surrender as required by the *Indian Act*. The parties defined the issues of the Inquiry as follows: first, are the claimants descendants of the original Young Chipeewayan Band; second, were the claimants entitled to bring the claim; third, was the 1897 Order-In-Council valid; and fourth, would participation by the claimants in Treaty Land Entitlement settlements disentitle the claimants from raising the claim.

The Commission found, and Canada agreed, that the government transferred administration of Indian Reserve No. 107 without surrender in 1897. Canada further conceded that the claimants are descendants of the original Young Chipeewayan Band. However, the Commission found that, based on the *Indian Act* and the common law, the claimants are not a Band, and therefore that the policy does not allow for the acceptance of this claim.

Under its supplementary mandate, as broadened in 1993, the Indian Claims Commission may conclude that a policy was implemented correctly, *but the outcome is nonetheless unfair*. Under this supplementary mandate, the Commission concluded that the issues surrounding the transfer of Young Chipeewayan Band members to the 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.

Streamlining the Commission

OPERATIONAL OVERVIEW

Staffing and Staff Training

The Commission employs 37 staff persons. Approximately 40 per cent of staff are Aboriginal.

The policy of the Commission is to provide staff with cross-cultural and mediation training courses, and to offer opportunities for individuals to further their personal development.

Administration

The Commission has developed internal guidelines with respect to finances, contract management, security, confidentiality, terms and conditions of employment, inventory management and other general administrative issues. Automated systems provide communication of messages, documents and data through a computer network. A database of information on First Nations, Associations, government contacts, media, and researchers can be used for information, research and the management of claim files.

Organizational Development

During 1994, the Commission has been concerned with these organizational matters: (1) reorganizing its activities and offices to be more responsive to the needs of the client community, and (2) streamlining the Inquiry process.

(1) Reorganizing: In 1994, the Commission's leadership was reduced from six regional part-time Commissioners and a full-time Chief Commissioner, to five part-time Commissioners, two of whom were appointed Co-Chairs. For reasons of fiscal responsibility and improved efficiency, the Commission closed its Toronto office and consolidated staff in Ottawa. The Commission has set up the communications and office services necessary for the Co-Chairs to function effectively at their locations in Saskatchewan and Alberta. Corporate memory was preserved through the relocation of the Legal Counsel and Mediation positions from Toronto to Ottawa.

Although it involved some lost time, moving costs, and office enlargement expenses, this consolidation will increase efficiency and effectiveness in processing requests and will generate substantial long term savings.

(2) Streamlining: When the Commission was created, it estimated its annual workload on the basis of receiving approximately 30 requests for assistance, leading to perhaps eight Inquiries. In its first year of full operation, the Commission received double (59) the anticipated requests. New applications arrive at the rate of approximately 30 each year. On this basis, the Commission predicts the need to hold at least 12 Inquiries and nine full-scale mediation efforts annually. Consequently, while the Commission recognizes the need for an overhaul of the Claims Policy and process and stands ready to assist in this reform, it has been working to streamline its submission and Inquiry processes in the interim.

OPERATING BUDGET 1991–1995/96

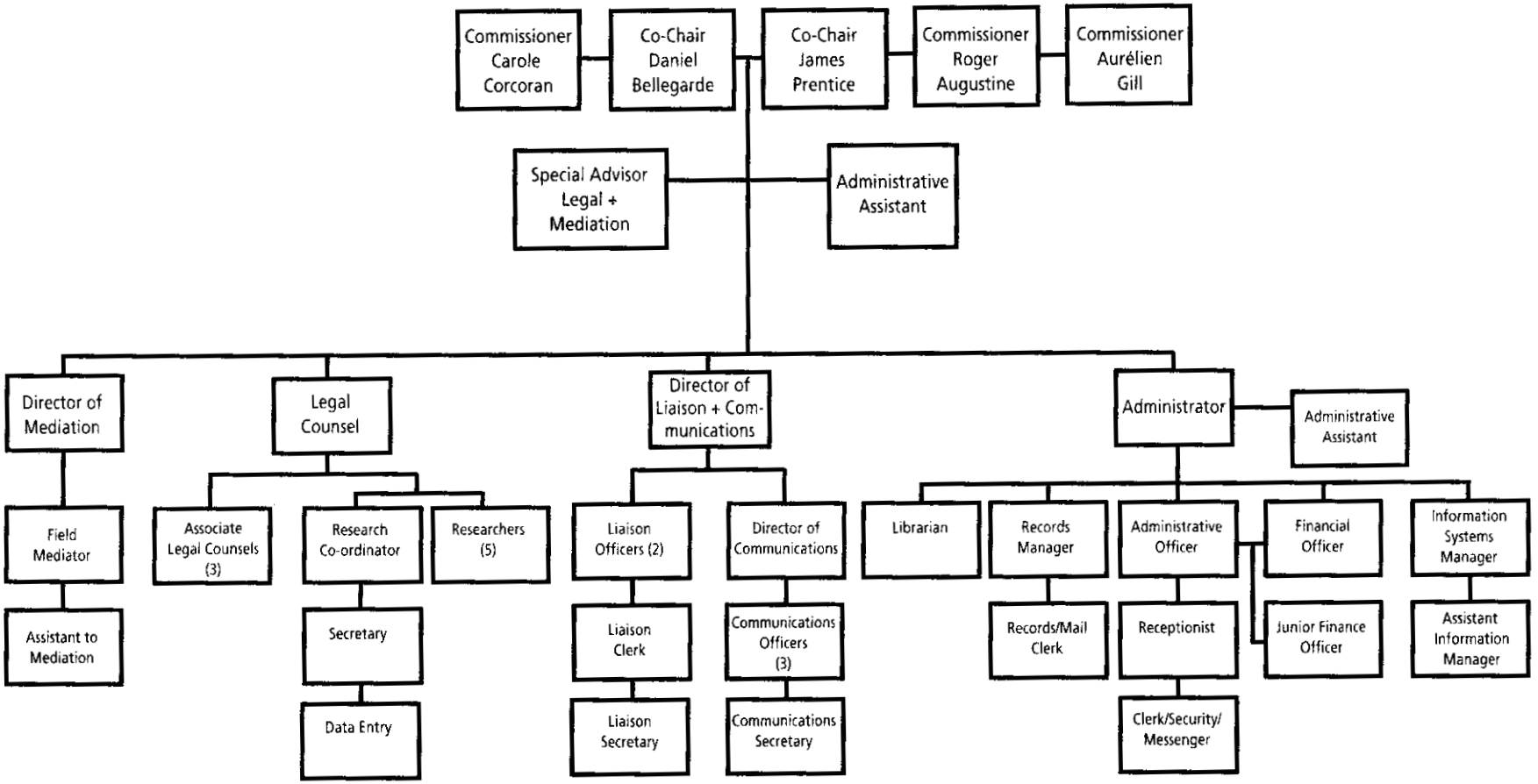
1991/92	$1.2 M.
1992/93	$3.8 M.
1993/94	$4.4 M.
1994/95	$6.5 M.
1995/96	$6.5 M.

Due to prudent fiscal management, the Commission is forecasting that total expenditures for 1994/95 will be far below the $6.5 M. allocated.

As a result of the increase in Commission activity and the appointment of a new Commissioner, the Commission has received an allocation of $6.5 M. for 1995/96.

Chart 3

Organizational Chart



Communications

During the course of the fiscal year, the Commissioners, along with the Director of Liaison and Communications, continued to attend regional First Nations forums. In addition, a number of new publications were established and distributed, including a quarterly newsletter entitled *The Indian Claims Review / Revendications territoriales* and Volume One of *The Indian Claims Commission Proceedings*.

The newsletter is aimed at providing First Nations and others with up to date information on the Commission's activities and on land claims issues in general. To date, four editions have been published and distributed to First Nations across Canada.

To further raise awareness and understanding of the Commission and specific claims process, the Commission published the first volume of *The Indian Claims Commission Proceedings*, a compendium of information on the specific claims process. Volume One includes the Commission's report on the Cold Lake and Canoe Lake Inquiry (also known as the Primrose Lake Air Weapons Range Report), and the interim ruling on the Athabasca Denesuline Inquiry. Related material on the specific claims process is also included.

PUBLICATIONS ENQUIRIES

For information on these and other ICC publications, please contact the Communications Unit at:

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GENERAL ENQUIRIES

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COMMISSION LOGO

"I have heard the elders say that when the terms of the treaties were deliberated the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."

Ernest Benedict, Mohawk Elder
Akwasasne, Ontario, June 1992

Traditionally, the pipe was smoked to bring a spiritual dimension to human affairs, to seal an agreement, to bind the smokers to a common task or to signal a willingness to discuss an issue. It is still being used today for the same reasons. For this reason, the pipe was chosen as the centre of the Indian Claims Commission logo.

The wisps of smoke rising upward to the Creator lead to a tree-covered island representing Canada, where claims are being negotiated.

The four eagle feathers, symbolizing the races of the earth, represent all parties involved in the claims process. Elements of water, land, and sky etched in blue and green indicate a period of growth and healing.

Centre figure design by **Kirk Brant**

Kirk Brant, a member of the Mohawks of the Bay of Quinte, has completed two years of graphic design at Algonquin College in Ottawa, Ontario.

Background design by **David Beyer**