INDIAN CLAIMS COMMISSION

INQUIRY INTO THE MCKENNA-MCBRIDE APPLICATIONS CLAIM OF THE MAMALELEQALA QWE'QWA'SOT'ENOX BAND

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PART I

INTRODUCTION

MAMALELEQALA QWE'QWA'SOT'ENOX BAND

The members of the Mamaleleqala Qwe'Qwa'Sot'Enox Band are Kwakwaka'wakw, or speakers of the Kwak'wala language, who traditionally used and occupied lower Knight Inlet on the British Columbia mainland and the islands at its mouth opposite northeastern Vancouver Island.[1] The Band's lengthy name represents an amalgamation of the Mamaleleqala (or Mah-ma-lilli-kulla) with a smaller number of Qwe'Qwa'Sot'Enox (Kwiksootainuk, Kwich-so-te-nos, or Kwickswotaineuks) who had come to live with them on Village Island before any reserves were set aside. Other shifts in settlement occurred during the last half of the nineteenth century, but Village Island was clearly the heart of Mamaleleqala territory in the 1880s when reserves were first set out for the Band.

Traditionally, Indians of this region "farmed" the woods, shores, salmon streams, and seas.[2] Reliance on their territory's resources required the Mamaleleqala Qwe'Qwa'Sot'Enox to move from one location to another in pursuit of eulachon, salmon, halibut, whales, clams, berries, and deer. Some resource sites were hereditary and others were communally owned.[3] Social organization and type of settlement varied according to the stage of the annual cycle. Local groups or lineages, descended from a common ancestor, were the basic units of social, political, and economic life.[4] Kin who lived in the same winter village usually controlled the region in which the village was situated.

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[1] Kwak'wala, Oweekeno, and Nuu-chah-nulth are the three dialects of the Wakashan family of languages. Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-23 and 153-55. Until the 1980s non-native scholars listed the linguistic affiliation of the Kwakwaka'wakw as "Kwakiutl." Now considered incorrect as a term to encompass the numerous Kwak'wala-speaking bands, the word "Kwakiutl" nevertheless may be more familiar to some readers.

[2] 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), 364.

[3] 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), 364.

[4] Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-27.

The chief of the highest-ranking lineage in the village tended to perform the function of village chief.[5]

The incursion of Europeans into the region in the 1800s brought the fur trade, new trade goods, missionaries, smallpox, and, eventually, seasonal work. For the Mamaleleqala Qwe'Qwa'Sot'Enox, paid seasonal work in the commercial fishery and in canning began as a supplement to, rather than as a substitute for, harvesting their own food.[6] Their rich cultural life included the potlatch tradition.

The federal government's Kwawkewlth Indian Agency was established at Fort Rupert in 1881. It was responsible for the dozen or so Kwak'wala-speaking tribes then termed "Kwakiutl." Reserves were not a fact of life for the Mamaleleqala Qwe'Qwa'Sot'Enox until Indian Reserve Commissioner Peter O'Reilly visited their lands in 1886. In 1896 the Agency office moved to Alert Bay on Cormorant Island, west of Mamaleleqala territory.[7]

Today, the Chief and Council have an office at Campbell River on Vancouver Island. The Mamaleleqala Qwe'Qwa'Sot'Enox Band has approximately 300 members. About 20 per cent of the members live on Crown land or on reserve; about 80 per cent live off reserve, mainly at locations on Vancouver Island or on the British Columbia mainland.[8] The Band's reserves are Mahmalillikullah Indian Reserve (IR) 1 (175.8 hectares) on Village Island; Apsagayu IR 1A (0.9 hectares) on Gilford Island; and Compton Island IR 6 (56.2 hectares), being all of Compton Island.[9]

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5 Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 22-25; and John Price, *Indians of Canada: Cultural Dynamics* (reprint; Salem, Wisconsin: Sheffield Publishing, 1988), 197-98.

6 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), 364.

7 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), 363.

8 Department of Indian Affairs and Northern Development (DIAND), Departmental Statistics, Indian Register, December 31, 1996. According to the 1996 Indian Register, there are 243 members off reserve, 37 on reserve, and 26 on Crown land, for a total of 396 members.

9 DIAND, *Schedule of Indian Bands, Reserves and Settlements* (Ottawa: DIAND, December 1992), 103.

MCKENNA-MCBRIDE APPLICATIONS CLAIM

The Mamaleleqala Qwe'Qwa'Sot'Enox Band's claim arises out of applications for reserve lands made in 1914 to the Royal Commission on Indian Affairs for the Province of British Columbia, commonly referred to as the McKenna-McBride Commission. The Band applied to have several of its traditional sites recognized as reserve lands. Except for its applications involving Compton Island, the rest of the Band's applications were not entertained because the lands the Band sought were deemed unavailable.

Through the McKenna-McBride process in 1914, the Mamaleleqala chiefs learned for the first time that most of the lands they applied for had been alienated through the granting of provincial timber leases and licences. The Chiefs explained to the Commissioners that the Indian Agent had failed to inform them that some of their traditional village sites had been previously alienated. Moreover, they challenged the right of the government to sell such lands without consulting them. The Commission subsequently invited the Indian Agent to recommend alternatives to these applications, but no alternative proposals were made to the Commission.

The role of the Indian Agent is at issue in this claim. To what extent was the Agent responsible for protecting the Band's traditional settlements from unlawful encroachment? And to what extent was the Agent responsible for representing the Band's interests before the McKenna-McBride Commission? In presenting its rejected claim to the Indian Claims Commission (the Commission) for investigation, the Mamaleleqala Qwe'Qwa'Sot'Enox Band also asks whether this claim fits within the scope of Canada's Specific Claims Policy.[10]

The Mamaleleqala Qwe'Qwa'Sot'Enox Band submitted its McKenna-McBride Applications claim to the Department of Indian Affairs and Northern Development (DIAND) on December 8, 1993.[11] The claim was rejected four times in ensuing correspondence with DIAND's Specific Claims

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[10] Enclosure, "List of Issues," with letter from A. Donovan to Indian Claims Commission (ICC), December 8, 1995 (ICC file 2109-21-1).

[11] Allan Donovan, Counsel for Band, to Manfred Klein, Specific Claims West (SCW), Indian Affairs, December 8, 1993, enclosing September 1993 Report by John Pritchard, "Applications for Additional Reserves Made before the Royal Commission, 1914, by the Mamalillikulla Tribe"; legal analysis by Donovan, December 6, 1993; Band Counsel Resolution, October 28, 1993 (ICC Documents, pp. 226-61.)

West: on August 17, 1994; November 18, 1994; May 26, 1995; and August 1, 1995.[12] On July 24, 1995, the Band formally asked the Indian Claims Commission to conduct an inquiry into the rejection of the claim by Indian Affairs.[13] On October 4, 1995, the Commission asked Canada to transfer all relevant documents to the Commission.[14]

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of the Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[15]

This report is an inquiry into the rejected McKenna-McBride Applications claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band.

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[12] John Hall, SCW, to Chief Sewid, August 17, 1994 (ICC Documents, pp. 291-93); John Hall, SCW, to Chief Sewid, November 18, 1994 (ICC Documents, p. 301); John Hall, SCW, to Chief Sewid, May 26, 1995 (ICC Documents, pp. 331-40); and John Hall, SCW, to Alan Donovan, August 1, 1995 (ICC Documents, p. 348).

[13] Band Council Resolution, July 24, 1995.

[14] K. Fullerton, Legal Counsel, Indian Claims Commission, to M. Bouliane, A/DG, Specific Claims, DIAND, and W. Elliot, Senior Legal Counsel, Legal Services, DIAND, October 4, 1995.

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

SPECIFIC CLAIMS POLICY

The Commission is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development (DIAND) entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[16] Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

Although the Commission is directed to look at the entire Specific Claims Policy in its review of rejected claims, legal counsel for Canada drew our attention to a number of specific passages in the Policy.[17] First, the opening sentence in *Outstanding Business*:

> The claims referred to in this booklet deal with specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets.[18]

Second, the elaboration of the term "specific claims" on pages 7 and 19 of the Policy:

> The term "specific claims" with which this booklet deals refers to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties.[19]
>
> . . .
>
> As noted earlier the term "specific claims" refers to claims made by Indians against the federal government which relate to the administration of land and other Indian assets and to the fulfillment of Indian treaties.[20]

Third, the discussion of "lawful obligation" and "beyond lawful obligation" on page 20:

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16 DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter *Outstanding Business*].

17 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 11-12.

18 *Outstanding Business*, 3.

19 *Outstanding Business*, 7.

20 *Outstanding Business*, 19.

1) Lawful Obligation

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

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

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

2) Beyond Lawful Obligation

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

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[21]

It is Canada's position that the McKenna-McBride Applications claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band does not fall within the scope of the Specific Claims Policy. We will address this issue in Part IV below.

THE COMMISSION'S REPORT

This report sets out our findings and recommendations to the Band and to Canada. Part II of the report summarizes the facts disclosed in the inquiry and the historical background for the claim; Part III sets out the relevant legal issues addressed by the parties; Part IV contains our analysis of the facts and the law; and Part V provides a succinct statement of our findings and recommendations.

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[21] *Outstanding Business*, 20.

PART II

THE INQUIRY

In this part of the report, we examine the historical evidence relevant to the claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band. Our investigation into this claim included the review of two volumes of documents submitted by the parties as well as numerous maps and exhibits. In addition, the Commission visited Village Island on May 22, 1996, and held an information-gathering session in the community of Alert Bay, British Columbia, on May 23, 1996, where we heard evidence from six witnesses. On August 29, 1996, legal counsel for both parties made oral submissions in Vancouver, British Columbia. A chronology of the Commission inquiry and a brief description of the formal record of the inquiry can be found in Appendix A.

HISTORICAL BACKGROUND

Establishment of Reserves

When British Columbia joined Canada in 1871 only a few reserves had been established in the colony under Governor James Douglas. They were located on Vancouver Island. As a new province, British Columbia refused to recognize the existence of aboriginal title, which meant that, unlike the prairie provinces, there was no post-Confederation treaty-making process to guide the establishment of reserves.[22] Establishing Indian reserves in British Columbia therefore became the task of several successive reserve commissions, all of which lacked clear guidelines for the establishment of Indian reserves because the Terms of Union by which the British Columbia joined Canada were vague on this question.

A special clause in the 1871 Terms of Union, which dealt with the respective obligations of the federal and provincial governments towards aboriginal peoples, actually impeded the evolution of Indian land policy in the province because it did not provide a clear formula for the allocation of reserves and it was too open to interpretation. Known as Article 13, this clause stated:

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[22] In 1899, the northeast corner of British Columbia was covered by Treaty 8, which also covers northern Alberta, northwest Saskatchewan, and a relatively small area of the Northwest Territories.

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land, to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[23]

The equivocal wording, "as liberal as that hitherto pursued by the British Columbia Government," would provide the source of protracted debate and controversy between the federal and provincial governments over the size and location of reserves in British Columbia.

Early on, the dominion government sought to have reserve size set at an average of 80 acres per family. The province fought to limit the acreage to 10 acres per family – an amount, it argued, that continued its "liberal" pre-Confederation policy. At one point, the two levels of government agreed to a compromise figure of 20 acres per family, but, when the province insisted that this amount apply only to future reserves, the fragile agreement collapsed.[24]

In the absence of agreement on a formula to determine the size of reserves, the provincial and federal governments attempted to address the matter of Indian reserve allotment through the establishment of a Joint Commission for the Settlement of Indian Reserves in the Province of British Columbia in 1876. Its three members included G.M. Sproat, who, by 1878, was the sole Indian Reserve Commissioner. Some of the reserves Commissioner Sproat laid out were later reduced by Peter O'Reilly, who replaced Sproat in 1880.[25]

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[23] *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 Number 87 (Toronto: McClelland & Stewart, 1975), 81; and ICC Exhibit 17.

[24] Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890,* 2d ed. (Vancouver: UBC Press, 1992), 182-83; Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), 183.

[25] Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), 50-51.

It was Reserve Commissioner O'Reilly who initiated the establishment of reserves for the Mamaleleqala Qwe'Qwa'Sot'Enox by visiting their territory in 1886. He noted that the 165 members of the Mah-ma-lilli-kulla Band were living on Village Island together with the smaller Kwich-so-te-nos Band, who numbered 50 members. Having met with Principal Chief Wy-chas and some other members of the Band and finding their principal occupation to be fishing, Commissioner O'Reilly set out five reserves as follows:

> No. 1 Mah-ma-lilli-kullah, a reserve on the Western shore of Village Island, contains three hundred and thirty-three acres[;] for the most part it is worthless, being both rocky and hilly. A small patch of land at the back of the houses is clear and might be used for gardens, and eight or nine acres close to the southern boundary can be cleared for cultivation without much labor. Two islands immediately in front of the village are included in this reserve; on them are several graves. There is a sufficient quantity of timber for fuel, and other purposes on this land.
>
> No. 2 Mee-tup, eighteen acres have been reserved at the head of Viner Sound, Gilford Island. It is only of value as a salmon stream.
>
> No. 3 Ah-ta, a fishing station at the mouth of the Ahta River, at the head of Bond Sound. It contains twenty-seven acres, three or four of which may be cultivated. Besides the fish obtained from this stream the Indians collect a large quantity of roots and berries on the land included in this reserve.
>
> No. 4 Kaw-we-ken [sic], at the head of Thompson Sound, twelve acres have been reserved at this point as a fishing station, about one acre of which may be converted into a garden without much labour.
>
> No. 5. Dead Point, on the North shore of Harbledown Island, Beware Passage; contains sixty-five acres[;] a portion of this land was cleared by some whitemen, and abandoned many years since. It is now occupied by a family of Indians who cultivate about half an acre. Twenty acres more are covered with Alder and may be easily cleared and cultivated.[26]

On July 27, 1888, the surveys and plans of these reserves, completed in 1887 and 1888, were approved by Commissioner O'Reilly and F.G. Vernon, Chief Commissioner of Lands and Works for British Columbia. Upon survey, their acreages became Mahmalillikullah IR 1, 434.25 acres;

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[26] P. O'Reilly, Reserve Commissioner for B.C., to Superintendent General of Indian Affairs, Ottawa, October 26, 1886 (ICC Documents, pp. 17-20).

Meetup IR 2, 15.75 acres; Ahta IR 3, 17.5 acres; Kakwekan IR 4, 10 acres; and Dead Point IR 5, 97 acres.[27] They were listed at these acreages in 1902 in the "Schedule of Indian Reserves in the Dominion."[28]

It is clear from the submissions that were later made to the McKenna-McBride Commission in 1914 that the allotment of these reserves did not protect all the traditional villages of the Mamaleleqala people.

Granting of Timber Leases and Licences over Indian Settlements

About the time that reserves were being established for the Mamaleleqala Qwe'Qwa'Sot'Enox, the provincial legislature passed *An Act to Amend and Consolidate the Laws affecting Crown Lands*. Commonly referred to as the British Columbia *Land Act*, it provided at least some measure of protection for Indian settlements and reserves in the rules that governed the way notice would be given for leases and licences to Crown Lands.

The *Land Act*, passed in 1888 and amended in subsequent years, is discussed in greater detail in Part IV of this report. The relevant provisions are reproduced in Appendix B. Generally speaking, the procedures for applying for a lease included giving 30 days' notice to all concerned parties through the *British Columbia Gazette* and "some newspaper circulating in the district." In the absence of any valid objection, the Chief Commissioner of Lands and Works issued the requested lease.[29] The procedures for applying for timber licences also required 30 days' notice. The *Land Act* specifically prohibited the granting of licences, leases, and pre-emptions over "the site of an Indian settlement or reserve."[30]

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[27] Plan BC 45 and Tracing TBC 45, "Plan of Village Island Indian Reserves, Coast District, British Columbia" (ICC Documents, pp. 26-29).

[28] Canada, Parliament, *Sessional Papers,* 1903, No. 27a, "Schedule of Indian Reserves in the Dominion, Supplement to Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902, Kwawkewlth Agency, British Columbia," p. 70 (ICC Documents, pp. 42-43).

[29] Excerpt from *An Act to Amend and Consolidate the Laws affecting Crown Lands* (ICC Documents, pp. 21-25).

[30] Excerpt from *An Act to Amend and Consolidate the Laws affecting Crown Lands* (ICC Documents, pp. 21-25).

In the McKenna-McBride Applications claim, the Mamaleleqala Qwe'Qwa'Sot'Enox Band provided evidence to show that Commissioner O'Reilly had taken action to correct the sale of another band's traditional lands which should have been protected by the terms of the *Land Act*.[31] In this example, two men, Thomas Pamphlet and Cornelius Booth, had purchased land that included a known Indian village named Clienna and other Indian improvements.[32] Indeed, Messrs Pamphlet and Booth's 1883 application had actually mentioned the village,[33] and its existence was also noted later by the surveyor.[34] When the province completed the sale to Messrs Pamphlet and Booth in 1884, it ignored these factors. Commissioner O'Reilly therefore wrote to the Commissioner of Lands and Works in September 1889 asking that the purchasers be induced to relinquish 50 acres to be included in the Indians' reserves. In this example, which occurred a year after the reserves for the Mamaleleqala Qwe'Qwa'Sot'Enox were approved by the provincial government, Commissioner O'Reilly explained that the Quatsino Indians were still using the site.[35]

Notwithstanding that the *Land Act* was provincial legislation, the province refused to grant the Commissioner's request on behalf of the Quatsino Indians, stating its position that the federal government was responsible for protecting Indian lands and settlements:

> The object of publishing a notice of intention to apply to purchase land is to notify any person who may consider he has a prior claim to make the same known.

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[31] Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

[32] Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

[33] Notice [in *British Columbia Gazette*?] by Thomas Pamphlet and Cornelius Booth, April 18, 1883 (ICC Documents, p. 9). An application to purchase 640 acres "[c]ommencing at stake twenty chains east of the Quatsino Indian village, at high water mark, and running north, eighty chains, to a stake thence west, eighty chains to a stake; thence south, eighty chains, to a stake placed at high water mark, thence east, as near as may be along the shore line at high water mark, to the place of beginning."

[34] Surveyor's Sketch, no date, indicating "Old Indian Village" on Winter Harbour (ICC Documents, p. 10). O'Reilly's September 23, 1889, letter states: "[T]he surveyors notes shew the position of the village to be on the land surveyed by him."

[35] Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

> No protest to these applications was made by the Indian Department on behalf of their Wards.
>
> No intimation had been received from the Indian Department that they claimed any part of the lands at or prior to the conveyance to Mr. Booth. [sic]
>
> My recollection is that Mr. Stephens [the surveyor] reported that the Indians had quite abandoned the site.
>
> The Lands & Works Department cannot guard the interests of the Indians until after the Indian Department have clearly defined the exact position of their Reserves.[36]

At least while reserves were being established, the province placed the onus on the federal Indian Department to respond to notices of applications under the *Land Act* which were detrimental to Indian lands. Commissioner O'Reilly became aware of the questionable ownership of Quatsino land in 1889 when he was first allotting reserves in the area.[37]

A few years later, in 1905 and 1907, applications for timber leases and licences were made in the vicinity of the Mamaleleqala Qwe'Qwa'Sot'Enox Band's reserves and traditional villages.[38] In 1907, the Vancouver Timber and Trading Company applied for a special timber licence for lands at Lull Bay and elsewhere in the Coast District, Range 1. Notices of a survey around Lull Bay and the application for the licence appeared in the *British Columbia Gazette* on November 7, 1907.[39] No evidence has been submitted to the Commission showing that any of these applications were challenged by Indian Affairs or by the Band on the grounds that the applications covered lands included in an Indian reserve or settlement. However, it would later be revealed that many of the Band's applications before the McKenna-McBride Commission could not be entertained since they had been alienated by the granting of these timber leases and licences.

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[36] Department of Lands & Works, Memorandum, October 2, 1889 (ICC Documents, p. 35).

[37] The Commission has no other information on the outcome of the Pamphlet and Booth situation involving the Indian village of Clienna.

[38] *British Columbia Gazette*, Notice, January 26, 1905 (ICC Documents, p. 56); *British Columbia Gazette*, Notice, November 2, 1905 (ICC Documents, pp. 63-64); *British Columbia Gazette*, Notice, November 7, 1907 (ICC Documents, pp. 84-85).

[39] *British Columbia Gazette*, November 7, 1907 (ICC Documents, 84-85).

Role of the Indian Agent

The extent to which Indian Agents were responsible for overseeing the interests of the Indians in British Columbia is an issue that is relevant to the present inquiry. The scope of an Indian Agent's responsibilities can be determined, at least in part, by reference to the job description for British Columbia Indian Agents which existed for many years before reserves were established for the Mamaleleqala Qwe'Qwa'Sot'Enox. This job description was known, at least, to the highest departmental official in the province as well as to various officials at Indian Affairs' headquarters in Ottawa.

On December 30, 1879, Deputy Superintendent General of Indian Affairs L. Vankoughnet appointed Israel Powell Indian Superintendent for British Columbia. Superintendent Vankoughnet advised Mr Powell of the duties of the local Indian Agents or subagents, "who shall act under the instructions of the Superintendent and communicate with the Department through him," and he directed Mr Powell to supervise "by frequently visiting different parts of the Province[, to] see that the Agents are discharging their duties satisfactorily and that the Indians are protected in their rights."[40]

According to Superintendent Vankoughnet, Indian Agents were to advise Indians; to protect their lands and rights – that is, "their farming, grazing and wood lands, fishing or other rights and preventing trespasses upon or interference with the same"; and to act on the Indians' behalf. Agents were also to prohibit liquor, the potlatch and other "demoralizing" practices, and to promote agriculture where Indians wanted it. Since there were no treaty payments or presents for agents to distribute in British Columbia, Superintendent Vankoughnet observed:

> [T]here will be little other responsibility attaching to the position of Indian Agent than the ordinary care of the interests of the Indians and their protection from wrongs at the hands of those of other nationalities . . . *he should nevertheless possess such*

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[40] L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, National Archives of Canada [hereinafter NA], RG 10, vol. 3701, file 17514-1 (ICC Documents, pp. 1-8). Initially, the position was termed "Visiting Indian Superintendent for British Columbia"; Powell later requested and got the shorter title, "Indian Superintendent for British Columbia."

> *qualifications as will adapt him for properly and intelligently advising the Indians and acting energetically on their behalf . . . .*[41]

Judging by this instruction, passivity was not condoned by Indian Affairs headquarters. Mr Powell, as Indian Superintendent for British Columbia, certainly was aware that Indian Agents in the province were expected to exert themselves in their work of protecting Indian interests.

Two years after reserves had been approved for the Mamaleleqala Qwe'Qwa'Sot'Enox, headquarters reiterated the same list of duties to Powell's successor, A.W. Vowell. Mr Vowell was also required to make periodic visits to both the Indians and the Indian Agencies throughout the province to ensure that agents were discharging their duties in a satisfactory manner and that Indians were protected in their rights. Vowell's 1890 instructions were almost identical to those given to Mr Powell in 1879 except that, where protecting the Indians in possession of their farming, grazing, and wood lands was concerned, the phrase "& of the valuables therein and thereon" was added.[42]

Throughout the 1890s R.H. Pidcock was the Agent for the "Kwawkewlth Indians." He was responsible for Mamaleleqala Qwe'Qwa'Sot'Enox from his office which, for the first half of the decade, was in Fort Rupert and, for the last three years of his tenure, in Alert Bay.[43] There may have been no Agent at Alert Bay from 1899 until 1903, when G.W. DeBeck was appointed. After roughly three years under DeBeck, W.M. Halliday took over the Kwawkewlth Agency and remained there for approximately 26 years, from 1906 to his retirement in 1932. Afterwards, the position was vacant again for two years until it was filled in 1935 by Murray S. Todd, also based at Alert Bay.[44]

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[41] L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17514-1 (ICC Documents, pp. 1-8). Emphasis added. ICC Exhibit 9 is a transcript of this document, which, on page 3, reads "intelligently arousing" instead of "intelligently advising." During Oral Submissions on August 29, 1996, Counsel for the Band identified the word "arousing" as a typographical error. See page 15 of the transcript.

[42] Draft of letter, Secretary, Indian Affairs, to A.W. Vowell, Visiting Indian Superintendent for B.C., Victoria, January 24, 1890, NA, RG 10, vol. 3829, file 61939 (ICC Documents, pp. 36-41).

[43] 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), 363.

[44] "Department of Indian Affairs," *Canadian Almanac and Miscellaneous Directory,* for years 1890 to 1935 (Toronto: Copp Clark, 1890-1935).

Enclosing a copy of the "Instructions to Agents" in the letter notifying Agent Halliday of his appointment, Superintendent Vowell asked Agent Halliday to "pay particular attention to the rules, etc., therein laid down for your guidance."[45] Agent Halliday's initial instructions in 1906 were the same as those of his predecessor. Beyond the directives aimed at "improving" the Indians, the Agent's main duties were to advise the Indians and to protect them in the possession of their farming, grazing, woodlands, fisheries, or other rights. Agent Halliday was to exercise "the ordinary care of the interests of the Indians, and their protection from wrongs at the hands of those other nationalities." He was to visit the various bands in his agency and to acquaint himself with each individual in his charge. Through reading agency files, he was expected to be familiar with the instructions issued to his predecessors and to ask questions of headquarters when necessary.[46]

A more elaborate set of instructions was issued to all Indian Agents by Duncan Campbell Scott, the new Deputy Superintendent General of Indian Affairs, in 1913. Scott sent 92 points of detailed instructions with a covering note that concluded: "While the duty of an Agent is first of all to protect the interests of the Indians under his charge, the rights of citizens should be respected and the courtesy which is due to the public should always be observed."[47]

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[45] A.W. Vowell to W.M. Halliday, June 12, 1906, NA, RG 10, vol. 11139, Shannon File 3, 1906 (ICC Documents, pp. 65-66).

[46] Although the enclosed "Instructions" were not found in the Agency's file with Vowell's June 12, 1906, letter to Halliday, Vowell gave much the same direction to the Indian Agent at Metlakatla in a 1909 letter that also enclosed the Instructions. The statements in this paragraph are based on the Instructions with the 1909 letter: A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, pp. 86-95).

[47] D.C. Scott, DSGIA, to Indian Agents, Department of Indian Affairs, October 25, 1913 (ICC Documents, pp. 100-16).

Establishment of the McKenna-McBride Commission

Indian Commissioner O'Reilly retired in 1898. Mr Vowell, who by then had served as Canada's Indian Superintendent for British Columbia for eight or nine years, took on the additional duties of the Indian Reserve Commissioner. This amalgamation of offices under Mr Vowell was "with a view to a more economical arrangement in connection with the allotment and defining of Indian Reserves in British Columbia."[48] By 1909, however, he was 68 years old and felt he was "not equal to anything bordering on rough trips or exposure."[49] Being unwell, he was granted a leave of absence. On his retirement in 1910, both positions were abolished.

After 37 years of work by the Joint Commissioners, Messrs Sproat, O'Reilly, and Vowell, many issues surrounding the Indian land question in British Columbia were still unresolved.[50] The federal government had responsibility for Indians, but provincial officials and the non-Indian public in British Columbia were generally unwilling to accommodate the Indians' interests. To address these difficult problems, the Royal Commission on Indian Affairs in the Province of British Columbia, known as the McKenna-McBride Commission, was created in 1912.

An agreement between the federal and British Columbia governments towards the "final adjustment of all matters relating to Indian Affairs in the province of British Columbia" established the Commission on September 24, 1912. Subject to the approval of the federal and provincial governments, five commissioners, including Canada's Special Commissioner, J.A.J. McKenna, were empowered to adjust the acreage of Indian reserves in the province. The relevant provisions in the agreement read as follows:

> 2. The [McKenna-McBride] Commission . . . shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
> (a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as

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48 Order in Council, January 31, 1898, appended to Mr. Stewart's January 1903 Memorandum.

49 Vowell, Indian Office, Victoria, to Secretary, Indian Affairs, Ottawa, November 10, 1909, NA, RG 10, vol. 3829, file 61939.

50 Peter A. Cumming and Neil H. Mickenberg, eds., *Native Rights in Canada*, 2d ed. (Toronto: General Publishing, 1972), p. 183.

> required by the *Indian Act*, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.
> (b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.
>
> 3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.
> . . .
>
> 8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect.[51]

This general purpose of this arrangement, which contemplated additions to or reductions of existing reserves and the creation of new reserves, was intended to resolve the ongoing land question by providing for the present and future requirements of Indians in the province.[52]

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[51] McKenna-McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, pp. 96-97).

[52] Establishment of the McKenna-McBride Commission was approved by Canada's Order in Council 3277 on November 27, 1912, and British Columbia's Order in Council 1341 on December 18, 1912.

Applications to the McKenna-McBride Commission

Despite the protracted struggle between British Columbia and Canada over reserve lands in British Columbia, the McKenna-McBride Commission provided an opportunity for bands to apply for additional lands to be allocated as reserves. On June 2, 1914, the Commissioners heard the Mamaleleqala's request for additional lands at a meeting that took place in Alert Bay with Indian Agent Halliday present. The Band applied for several additional reserves, some of which included old village sites,[53] but learned for the first time that many of these lands were already taken up by others.[54] The Commission took the position that it would see what land it could acquire for the Indians "wherever the land is open."[55]

In his opening remarks on June 2, 1914, Chief Negai of the "Mahwalillikullah" welcomed the opportunity "to speak and give the location of the places that had been the homes of his ancestors and which he and his Band desired to retain. . . ." In addition to the formal applications, he pointed out that the Mamaleleqala once had a location on Cormorant Island which was now occupied by white settlers. The minutes of this meeting report that "[t]he Indian[s] of the Tribe for which he spoke wanted no more Indian reserves, but that all the land should be cut up and divided."[56] Ultimately, Chief Negai requested that 200 acres, to be selected from lands for which the Band was applying, be allocated for each man in the Band. Chief Negai delegated Mr Harry Mountain to speak to the details of the applications.[57]

The Commissioners began by inquiring into the general state of conditions for the Mamaleleqala Band. At the time of their applications, most Band members were spending about six months of the year at Village Island. The rest of the time they were either fishing at islands and other

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[53] Robert Galois, *Kwakwaka'wakw Settlements, 1775-1920: A Geographical Analysis and Gazetteer* (Vancouver: UBC Press, 1994), 160.

[54] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

[55] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

[56] Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 135).

[57] Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 136).

locations of lower Knight Inlet or working in canneries. The cannery work produced a very small amount of net cash. Trapping was not lucrative either, as many others were engaged in it and access to the trapping lands was limited. Logging on and off Indian land was problematic because of the requirement for permits or licences. Logging camps were reluctant to hire Indians.[58] There was no work as guides for prospectors or surveyors.[59]

There were no schools on the Mamaleleqala reserves in 1914. Only four children were attending the industrial school. The Band wanted either a day school on the reserve or a boarding school to accommodate the 30 or so children of school age. No missionary had visited the Band for years. Traditional marriage practices were still followed. For medical attention, Band members had to travel to Alert Bay, as no doctor had ever visited the Band's reserves. Transportation consisted of the Band's 28 canoes, 3 sailboats, and 4 gasoline boats.[60]

The Commissioners then asked representatives of the Mamaleleqala Band about their five existing reserves. The Band's main concern was that "[w]hite people are encroaching all the time on the Reserves we have. . . ." On their main reserve, Village Island Indian Reserve No. 1, they had timber and some "good ground for farming." They grew potatoes and cultivated fruit trees. The four other reserves were heavily timbered and used for fishing. Three of the Mamaleleqala's five reserves were regarded by them as belonging to Kwickswotaineuks or another tribe.[61]

Finally, the Commissioners asked questions relating to the Mamaleleqala's applications for additional land. The lengthy exchange about the specific applications reads as follows in the transcript:

> Q. [Commissioner Shaw] Now we will come to the applications for additional land.

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[58] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

[59] Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 137).

[60] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

[61] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 117-34).

No. 1 is Owakglala – will you show us on the map where this place is?

A. [Harry Mountain] He points it out on the map, and it is called Lull Bay.

Q. How much land do you want at Lull Bay?

R. At that place there is a river there, and we want enough room on that river on both sides of it to enable us to do what we want to do there.

Q. What is that?

A. Trapping and Fishing.

Q. That location is half a mile on each side of the river for the whole length of it. (Marked A on the map.)

MR. COMMISSIONER SHAW: This land is all covered by timber limits owned and paid for by whitemen, and in that case we can't give you the land you are asking for. We would like, however, to know just what improvements you have there, and what land would be necessary to carry on your fishing operations there.

CHIEF DAWSON of the Mahmalillikullah Tribe: From whom was the land purchased?

MR. COMMISSIONER SHAW: We don't know – all we know is that our map here shows that it has been purchased, and therefore we cannot give it to anyone else although we might possibly make some arrangements with the owners by which you could get a small piece of land, say five or ten acres on which your houses are built – We might be able to recommend that if you wish to state what improvements are on it.

A. We can't allow the place to go that way – We never sold it, and we want the place.

Q. How many houses have you at this point?

A. One.

Q. And do the Indians go there every year?

A. Yes.

Q. For what purpose?

A. Fishing and hunting.

Q. That is catching and drying the fish?

A. Yes.

Q. Is it a base for hunting operations?

A. Yes. The country does not belong to the Government, and they have no business to sell it. What business has anyone to go and sell that land without asking if I had no more use for it. What right have they got to sell it before I was through with it because I was the owner of it. I want to ask the Royal Commission if it is in their power to find out who sold this land without first asking me.

MR. COMMISSIONER SHAW: The Government has sold this land legally, and it is not for this Commission to question the legality of that sale.

THE CHAIRMAN: The Government is over us as well as over you, and therefore we have no right to question what they have done. They have claimed the land and granted it, and therefore we cannot meddle with that – but as Mr. Shaw has just told you we might be able to secure for you a certain amount of land there, say five or six acres where your houses are that you might use.

A. Do you mean five acres for each one of us?

Q. No, five acres in the whole block.
A. This land to us is valuable.
MR. COMMISSIONER SHAW: Now then No. 2 application, that is on Heeya Sound. (the witness points it out on the map) Are there any houses there?
A. No house there, but we have been living there.
Q. What area do you want there?
A. We want half a mile from a point marked 2 to a point marked 2A along the shore on Knight Inlet.
Q. That is already Reserve No. 4 (4). Now then we come to application No. 3 Apsagayu on Shoal Harbour – are there any houses there? (marked 3 on the Agency map).
A. There are two houses there.
Q. What is it wanted for?
A. For salmon fishing.
Q. What amount of land are they asking for there?
A. Half a mile around the Bay and up the river to its source.
Q. This land is also covered by a pulp lease.
A. We claim that place as belonging to us, and therefore we ask that it be reserved for us.
Q. The next application is No. 4 Kuthkala on Swanson Island – are there any houses there?
A. There are no houses there.
Q. What part of this Island do they want?
A. We want the whole of Swanson Island.
Q. Part of this Island is covered by a timber limit, and part of it is free, and we are in a position to recommend that they get the part that is not covered by a timber limit.
KUTWAPALAS: Who was it that told you that this is taken up by whitemen – was it Mr. Halliday?
[A. Commissioner Shaw?] We have a map here that shows every timber limit that is taken, and this map here shows that part of this land that you are asking for is already covered by a timber limit.
WITNESS: We think that Mr. Halliday ought to have given us this information – this is the first time we ever heard of it being taken up by whitemen for the timber. The charts were only given to us the other day, and we didn't know anything about it.
MR. COMMISSIONER SHAW: The plans that Mr. Halliday gave the Indians the other day does not show any of the land outside of what the Government recognizes as Indian Reserves.
A. Then why were they not given to us before this?
MR. COMMISSIONER SHAW: I want to say that these maps that show the timber limits, Mr. Halliday bought himself and he has them in his office – They don't belong to the Department, and he has asked me to say that if at any time the Indians want to know anything about the land, if they will come into his office, he will be very glad and willing to give them all information regarding the different lands.

WITNESS: If all the lands are taken up in that vicinity, where am I going to choose the 200 acres for each man?

MR. COMMISSIONER SHAW: We have not suggested to these Indians that each man is going to get 200 acres – If we do make that recommendation it will have to be taken from outside of lands already taken up by whitemen.

WITNESS: I want the Commission to tell us the one that sold it, and they should remember that the Indians have a law among themselves just as the whitemen have – and no one is allowed to take another man's land without first finding out who the land belongs to. We can't go to Mr. Halliday because we know what he is to us. The experience we have had with him in matters of that kind; he just turns us out.

MR. COMMISSIONER SHAW: Now the next is No. 5 – on Compton Island. What do they want on Compton Island?

A. We would like to get the whole of the Island.

Q. Have they any houses on this Island?

A. Yes

Q. It is used for what purpose?

A. For the halibut, trolling for salmon and for the clams.

Q. The next is No. 6, Harbledown Island. What is wanted there?

A. Half a mile on each side of the river (marked 6 on map) The part the Indians are asking for is taken up by timber limits. No. 7 is Lewis Island – They want the whole of the Island. Lewis Island is apparently open. [transcript is unclear as to who is speaking here]

Q. What do they want this for?

A. For hunting, for the clams that are there and the timber. It is pretty good for gardens too.

Q. No. 8 application is Mataltsym.

A. It is an old Indian village, and same is covered by application No. 2.

Q. No. 9, Kliquit, is the same as application No. 2.

A. We ask for an addition of 2 and 2A for half a mile along Knights Inlet, then across the Inlet on the southern shore of Gilford Island half a mile to Port Elizabeth to a point marked 2B. We want it for the timber, fishing and the clams.

Q. This area includes ten villages.

A. This last application is practically all taken up by timber limits.

CHIEF OF DAWSON [sic]: We expect that the Royal Commission will do the fair thing by us. We have given you the list, and we are sorry to hear that some of the land is already taken up by the whites. We are sorry that this Commission did not come long ago when we could have had the choice of our own land as we wish today. We beg this Royal Commission to do the best thing they can for us.

MR. COMMISSIONER SHAW: Some of the lands that have been applied for appears to be open land, and wherever the land is open, we will do the best we can and be as fair as we can for the Indians.

> CHIEF: The young men of this Tribe wish to be allowed to cut the timber off the land that is not yet taken up by the whitemen outside of the Reserves without a licence.
>
> MR. COMMISSIONER SHAW: They must have a licence to cut timber, and if at any time they wish to procure a licence, they can make application to the Government Agent or to Mr. Halliday your Indian Agent; but they must not on any account cut timber on any land without a licence.
>
> WITNESS: We don't want to do it on a big scale – just a stick here and there for our own use. I would like the Royal Commission to know that there is no section (timber section) left big enough to make it worth while for a young man to buy a licence to cut any timber.[62]

The day before the Commission held this separate meeting with the Mamaleleqala on June 2, 1914, it held a general meeting with "the principle Tribes of the Kwawkwelth Nation." At that June 1, 1914, meeting several chiefs voiced their concern that they had not been adequately prepared by Agent Halliday for the McKenna-McBride hearings. Agent Halliday had neglected to distribute plans of their reserve lands which had been available for him to distribute before the Commissioners' visit. The Chiefs did not receive the plans until the Commissioners arrived in Alert Bay. The Chairman of the Commission commented:

> I might say that in every place that we have so far visited, the Chiefs of all the different Reserves have plans . . . showing on them the land that has been reserved for them – For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took stops [sic] to have them distributed so that the Chiefs could see what lands they had – Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.[63]

On June 1, 1914, the Chief of the Nimkish Tribe drew attention to the difficulties caused by the chiefs' late receipt of the plans:

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[62] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914 (ICC Documents, pp. 129-34).

[63] Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

> You ought to have seen us in the general meeting this morning before you came – We had the plans, and one would say (referring to the Indian Reserves on the plans) "where is it" "whose is it" and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.[64]

Johnnie Scow of the Kwicksitaneau Band echoed this view:

> Another thing we want to tell you about it that you have seen how confused we are over those papers – We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head or tail of it. They can't get to learn those plans in three days – they don't know what they are, why they are or where they are.[65]

Chief Negai attended the June 1, 1914, meeting.[66] Although there is no record of him commenting on Halliday's failure to distribute the maps in advance of the meeting, he must have been in the same predicament as the other chiefs.

On June 24, 1914, Agent Halliday was summoned to meet with the Commissioners in Victoria "for examination as to the reserves and conditions in his Agency." By then he had been in charge of the Kwakewlth Agency for eight years. According to the Commission's precis of the meeting, Agent Halliday conceded that the Mamaleleqala Band needed some additional reserve land. He therefore recommended that a small amount be granted this Band, which he characterized as being "fairly well off for land as compared with other bands":

> . . . with respect to the application for Gwakulala, a timber limit covered a portion of the land applied for, but he would nevertheless recommend that five acres be granted out of the Timber Limit 10033, as these Indians went every year for fishing. With respect to Nalakglala, on Hoeya Sound, on the shoreline of Knights Inlet: A river

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64 Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

65 Chairman, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in submissions of Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

66 Chief Negai, Mahwilillikullah or Village Island, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, pp. 89-90, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band, ICC McKenna-McBride Applications Inquiry, Tab 2.

> came in at that point and the fish were very plentiful there. He therefore recommended that five acres be granted out of Timber Limit 10023. The Indians also made use of Apsugayu as a fishing station, and he recommended that five acres be granted to them on the north shore of Shoal Harbor, in Pulp Lease No. 482. That place was used annually by the Indians while fishing for salmon and they had their small houses on the Bay where it was recommended that this 5 acres be granted. With respect to Kutlgakla, Swanson Island, part of the land covered by this application was now under Timber Limit and part was an old preemption that had apparently lapsed as no one was now in occupancy. He recommended that the portion of the Island found to be free be granted; this would be approximately 400 to 500 acres. There were 85 Indians in the Band with 477 acres in all their reserves. The Mahmalillikullah were fairly well off for land as compared with other bands, but nevertheless required some additions to their Reserves. . . . As for Nuhdana, on White Beach, Compton Island . . . [where] the Indians had four houses . . . . [h]e recommended that the tract of land be confirmed as a reserve, giving the entire island of about 50 acres to these Indians. The applications for Kakwaes and for Kutlgakla (Lewis Island) were not recommended the lands concerned being found to be alienated. The application for Kliquit (No. 9) was found to be covered by Application No. 2, while the additional application of this Band was not recommended, as the lands affected were not regarded as reasonably required by these Indians.[67]

The "Applications for Additional Lands as Recommended by Agent Halliday" therefore were drafted by the Royal Commission to read:

> 1. Gwak-gla-la, on Lull Bay:
> Recommended that five (5) acres be granted if possible, as a hunting and fishing base out of T.L. [Timber Limit] No. 10033.
>
> 2. Ne-late-glala, Hoeya Sound, on the shoreline of Knights Inlet:
> Recommended that five (5) acres be granted as a fishing station out of T.L. No. 10023.
>
> 3. Ap-su-ga-yu, Shoal Harbour:
> Recommended that five (5) acres be granted as a salmon fishing station, on the north shore of Shoal Harbour on Pulp Lease No. 482. This place is used by the Indians annually and the five acres recommended should be given where the Indian houses stand, on a small bay.

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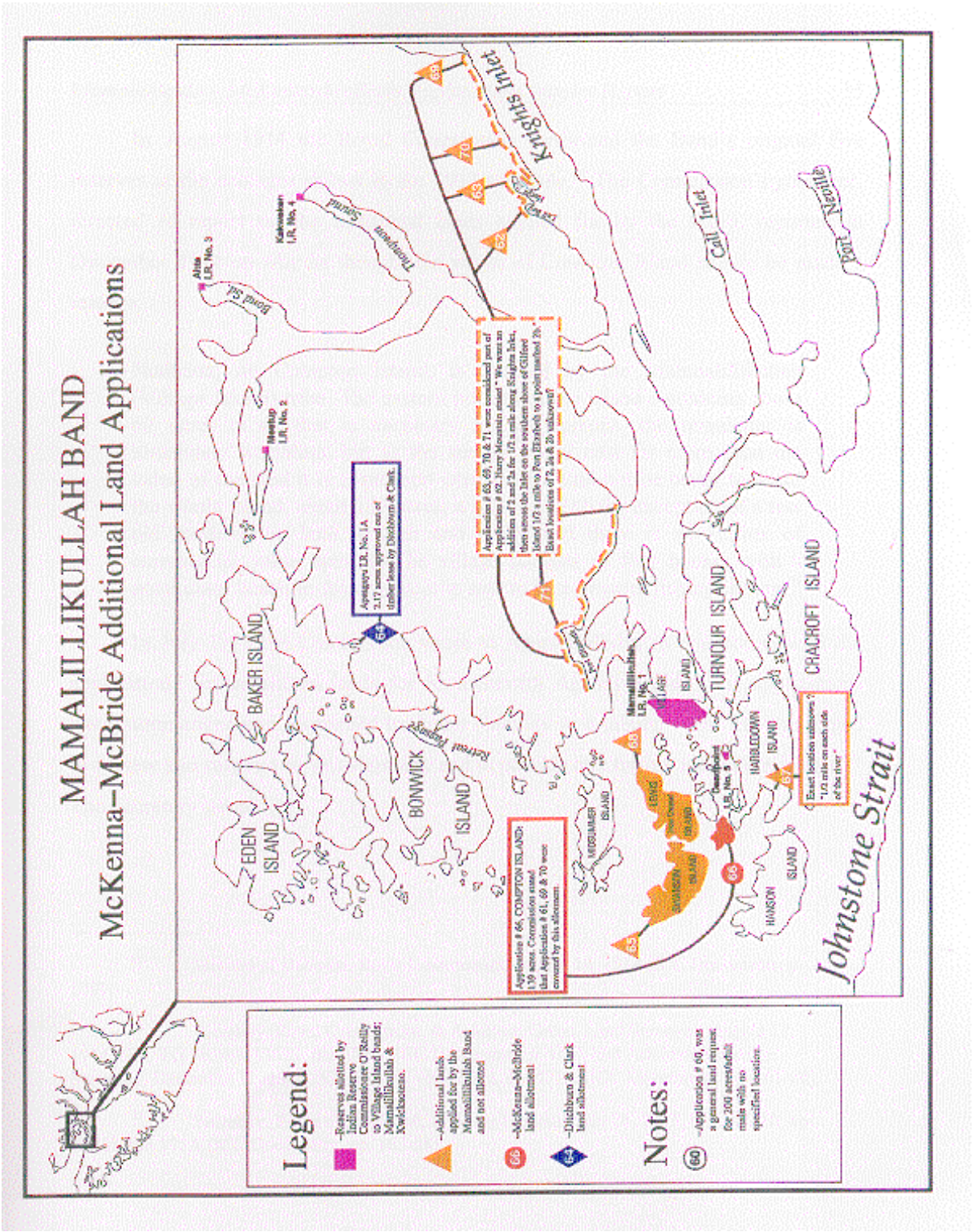
[67] Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, pp. 146-49).


MAMALILLIKULLAH BAND
McKenna–McBride Additional Land Applications
Legend:
–Reserves allotted by Indian Reserve Commissioner O'Reilly to Village Island bands; Mamalilikulah & Xwelkoteem.
–Additional lands applied for by the Mamalilikulah Band and not allotted
–McKenna–McBride land allotment
–Ditchburn & Clark land allotment
Notes:
–Application # 60, was a general land request for 200 acres/adult male with no specified locations.
EDEN ISLAND
BAKER ISLAND
BONWICK ISLAND
MISQUAMER ISLAND
SWANSON ISLAND
HANSON ISLAND
HARBLEDOWN ISLAND
TURNOUR ISLAND
CRACROFT ISLAND
Knights Inlet
Call Inlet
Port Neville
Johnstone Strait
Broad Sd
Thompson Sound
Meetup I.R. No. 2
Kakweiken I.R. No. 4
Mamalilikulah I.R. No. 1
Dawsons Point I.R. No. 5
Agreguys I.R. No. 1A
2.17 acres approved out of timber lease by Ditchburn & Clark.
Application # 64, COMPTON ISLAND: 1.39 acres. Commission stated that Application # 61, 69 & 70 were covered by this allotment.
Applications # 63, 69, 70 & 71 were considered part of Applications # 62: Harry Mountain stated "We want an addition of 2 and 2a for 1/2 a mile along Knights Inlet, then across the Inlet on the southern shore of Gilford Island 1/2 a mile to Port Elizabeth to a point marked 2b." Exact locations of 2, 2a & 2b unknown?
Exact location unknown, ? "1/2 mile on each side of the river"

> 4. Kutl-gakla, Swanson Island:
> Recommended that as a part of the island appears to be available (in certain lapsed preemptions) such part be granted, to the extent of 400 or 500 acres. (NOTE: Further note in re. a subsequent application)
>
> 5. Nudhana, White Beach, comprising the whole of Compton Island:
> (NOTE: In the blueprints the west half of this island is marked "I.R." although such reserve does not appear in the Schedule nor in any of the Departmental survey plots. The Indians regard it as a reserve and have four houses there.) Recommended that this be confirmed as an Indian reserve as it appears on the blueprint – the entire island of approximately 60 acres.[68]

In August 1914 the Royal Commission confirmed the Band's original five reserves at the acreages shown in the 1913 schedule.[69] The Commission's surveyor, directed to report on the additional lands applied for by the Band, reported in December 1914 on why he thought the whole of Compton Island should be made a reserve:

> Nudhana, on Compton Island, is claimed by the Mahmalillikullah (Village Island) tribe. The eastern portion of the island containing about 60 acres is all that is necessary for the Indians, the remainder is absolutely worthless, but as the survey would cost far more than the value of the land it is a question whether it would not be better to make the whole island, about 155 acres, a reserve. With the exception of a few old gardens the land is high and rocky and there is no timber of commercial value upon it. The village consists of four houses with a good clam beach in front of it; it is said to be a favorite fishing station.[70]

In July 1915 the Commission wrote to Agent Halliday in connection with the applications for additional lands for Kwawkewlth Agency Bands. The applications were summarized and

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[68] Royal Commission, Kwawkewlth Agency, "Applications for Additional Lands as Recommended by Agent Halliday," no date, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 151-58).

[69] Minutes of Decision, Royal Commission, August 14, 1914 (ICC Documents, p. 159).

[70] Secretary, Royal Commission, to Ashdown Green, Land Surveyor, August 17, 1914, NA, RG 10, vol. 11022, file 571A (ICC Documents, p. 160), and Ashdown Green to Secretary, December 21, 1914, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 161-66).

forwarded to Agent Halliday in a tabular form. He was urged to review and respond to this summary and to provide any further recommendations.[71] The Secretary wrote:

> You will remember that when you were examined as to the various applications and were asked for your opinion as to whether or not the land in each case applied for were necessarily and reasonably required by the applicant Indians, you in certain instances endorsed the applications, stating the respective areas in your opinion required. In numerous other instances you declined to endorse the applications, giving as a reason that other applications previously recommended would in your opinion reasonably provide for the necessities of the applicant Indians.[72]

Of the 195 applications for additional lands filed in his Agency, Agent Halliday had recommended approximately 73. Of these 73, however, only 27 were possible, because the other 46 proved to be alienated and therefore unavailable lands.[73] For the Mamaleleqala, Agent Halliday had recommended, in whole or in part, just six of their 12 applications, of which only one was available.

It is clear from the minutes of the June 2, 1914, meeting that Agent Halliday had more access to this information than Band members did at the time: "The status of these lands was shown on blueprints which Agent Halliday had himself bought and paid for out of his own pockets [sic], but the Indians might see them at any time if they desired to do so."[74] At the hearing, Chief Dawson said the Indians had no previous knowledge of the timber limits. He said they had seen the reserve maps only "a few days ago."[75]

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[71] Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

[72] Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

[73] Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

[74] Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 144).

[75] Minutes, June 2, 1914, Meeting, Mahmalillikullah or Village Island Tribe, NA, RG 10, vol. 11025, file AH6A (ICC Documents, p. 143).

Because so many of the lands Halliday had recommended were unavailable, the Secretary asked him to revisit the question and to describe accurately "such alternative lands as you may see fit to recommend . . .":

> Inasmuch as your recommendation of a number of the applications which you did not endorse was stated by you to be withheld because you thought the requirements of the Indians would be sufficiently met by the granting of the lands applied for which you did recommend; and inasmuch as many of these are now found to be unavailable, the Commission would be glad to know if you desire to reconsider your opinion with regard to any of the applications which were not endorsed, in order that alternative lands may possibly be obtained under such applications to meet the requirements of the Indians which would otherwise not be met.[76]

For the whole Agency, Agent Halliday recommended a few alternative lands, but his August 11, 1915, response offered little to the Mamaleleqala Band. In connection with their applications 60 to 70, inclusive, he stated: "With the exception of application 65 which includes application 60, all lands recommended are apparently alienated. The whole of Compton Island is recommended."[77] In other words, Agent Halliday supported the only application for land which had not been alienated by timber lease or licence. He did not recommend any alternative sites as a substitute for the other applications for lands that had already been alienated. Correspondence from the McKenna-McBride Commission indicates that Agent Halliday's overall response met "the requirements of the Commission" to the extent that Halliday was relieved of the necessity of visiting Victoria "for re-examination as at first proposed."[78] On February 25, 1916, the Commission ordered that Compton Island be made an Indian Reserve:

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[76] Secretary, Royal Commission, to Agent Halliday, July 28, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 167-68).

[77] Agent Halliday to Secretary, Royal Commission, August 11, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, pp. 169-73).

[78] Secretary, Royal Commission, to Agent Halliday, September 1, 1915, NA, RG 10, vol. 11022, file 571A (ICC Documents, p. 175).

> The Commission having under consideration Kwawkelth [sic] Agency Application No. Sixty-six (66) of the Village Island or Mahmalillikullah Tribe, for Compton Island (Kuthdana or White Beach), for Fishing Station purposes, it was
>
> ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant . . . Compton Island, in its entirety, . . . One Hundred and Fifty (150) acres, more or less, subject to survey and to any rights under the "Mineral Act" which may have been acquired prior to constitution of the same as a Reserve.[79]

In the 1916 *Final Report* of the McKenna-McBride Commission,[80] the applications numbered 60 to 71 are listed as follows:

Tribe or Band	Land Applied for	Status of Land Desired	Decision of Commission
60. Mahmahlillikullah Tribe. (Village Island).	200 ac., undefined land, for each adult male of the Tribe.		Not entertained, as not reasonably required.
61. Do [Ditto]	Village, Nuhdana or Compton Island.		Covered in fifth following application for Compton Island, Item 66 allowed.
62. Do	Kwakglala, Lull Bay: 1/2 mile on each side of the river for its total length.	Reported by Lands Committee as alienated.	Not entertained, land applied for not being available.
63. Do	Nalakglala, Hoeya Sound, 1/2 mile from point marked "2" to point marked "2a," along the shore to Knight's Inlet.	Do	Do

[79] Minutes of Decision, Royal Commission, February 25, 1916 (ICC Documents, p. 178).

[80] Royal Commission on Indian Affairs for the Province of British Columbia, *Final Report* (Victoria, 1916) (ICC Documents, pp. 176-77).

64.	Do	Apsagayu, Shoal Harbour: 1/2 mile around the bay and up the river to its source.	Do	Do
65.	Do	Kutlgakla or Swanson Island. (See special note on last of the Tanockteuch applications.)	Do	Do
66.	Do	Compton Island (Kuthdana or White Beach).	Apparently vacant and available.	Allowed: Compton Island in its entirety, approximately 150 acres . . . .
67.	Do	Harbledown Island: Kahwaes, 1/2 mile on each side of the river, marked "6" on Agency map.	Alienated.	Not entertained, land applied for not being available.
68.	Do	Kuhglaka or Lewis Island.	Do	Do
69.	Do	Matalsyn.		Covered by allowance of Compton Island, Item 66.
70.	Do	Kliquit.		Do
71.	Do	One half mile along Knight's Inlet, thence across the Inlet to the southern shore of Gilford Island and ½ mile to Point Elisabeth to the point marked "2B" on the map. Including 10 ancient villages.	Covered by sundry Timber licences. Alienated.	Not entertained, land applied for not being available.

Ditchburn-Clark Adjustments

The 1916 final recommendations of the McKenna-McBride Commission received only qualified approval a few years later in the form of provincial and federal legislation that paved the way for further negotiations and adjustments. British Columbia passed the *Indian Affairs Settlement Act* in 1919, which empowered the Lieutenant Governor in Council to give effect to the Report of the Royal Commission and to "carry on such further negotiations . . . as may be found necessary for a full and final adjustment of the differences between . . . the Governments."[81]

The province's Minister of Lands, T.D. Patullo, was convinced there were "innumerable errors" in the Commission's Final Report and that "a large number of additions . . . were selected for the strategic or controlling location and not that they will actually be required by the Indians for settlement purposes." He therefore approached the Minister of Indian Affairs, Arthur Meighen, in April 1920 to propose a thorough review of the whole Report.[82]

Canada passed legislation in 1920 acknowledging the 1916 recommendations of the McKenna-McBride Commission but permitting the Governor in Council to order reductions or cut-offs from reserves. The *British Columbia Indian Lands Settlement Act* states:

> 3. For the purpose of adjusting, readjusting or confirming the reductions or cut-offs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any provisions of the *Indian Act* to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments.[83]

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81 British Columbia, Legislative Assembly, *Sessional Papers,* 1919, "Indian Affairs Settlement Act" (ICC Documents, pp. 181-82).

82 Patullo to Meighen, April 21, 1920, cited in Indian Claims Commission, *Nak'azdli First Nation Report on Aht-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, pp. 191-92).

83 Canada, Parliament, *Sessional Papers,* 1920, "British Columbia Indian Lands Settlement Act" (ICC Documents, pp. 183-84).

This process was carried out through the vehicle of a joint commission co-chaired by W.E. Ditchburn, Canada's Chief Inspector of Indian Agencies in British Columbia,[84] and J.W. Clark, Superintendent of Soldier Settlement in British Columbia, the province's representative from the Department of Lands. Correspondence from Mr Clark to Mr Patullo reveals that Clark was opposed in principle to any widely scattered additions to reserve lands. He believed they would interfere with the "progress of white settlers" and with the education of Indians.[85]

For the Mamaleleqala Band, the result of the Ditchburn-Clark review was that the Band received two reserves: Compton Island, thought to be approximately 150 acres, under Application 66; and Apsagayu, approximately 2 acres, under Application 64.[86] This recommendation was confirmed by a British Columbia Order in Council in July 1923 and a federal Order in Council in July 1924.[87]

Reserve Lands Conveyed to the Federal Crown

In 1938, when the title to Indian Reserve lands was conveyed by the British Columbia government to the federal Crown, the accompanying list included the Mamaleleqala Band's five original reserves with the acreages unchanged. The newer reserves were shown at their surveyed acreages: Apsagayu IR 1A, Lot 1514, 2.17 acres subject to a pulp lease of November 30, 1906, to Canadian Industrial (Lot 482); and Compton Island IR 6, Lot 1508, 139 acres.[88]

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84 Ditchburn to Patullo, October 20, 1920, cited in Indian Claims Commission, *Nak'azdli First Nation Report on Aht-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, p. 196).

85 Clark to Minister of Lands, April 1 1920, cited in Indian Claims Commission, *Nak'azdli First Nation Report on Aht-Len-Jees Indian Reserve No. 5 Inquiry* (Ottawa, March 1996) (ICC Documents, pp. 185-87).

86 W.E. Ditchburn, Chief Inspector of Indian Agencies, to D.C. Scott, DSGIA, March 27, 1923 (ICC Documents, pp. 197-206); J.W. Clark to Minister of Lands, n.d. 1923 (ICC Documents, pp. 185-86).

87 British Columbia, Order in Council 911, July 26, 1923 (ICC Documents, pp. 207-11), and Canada, Order in Council 1265, July 21, 1924 (ICC Documents, pp. 212-17).

88 British Columbia, Order in Council 1036, July 29, 1938 (ICC Documents, pp. 218-21). Compton Island, described before survey as "approximately 150 acres," amounted to only 139 acres after survey.

Indian Affairs' "Schedule of Reserves" for the year ending March 31, 1943, lists only three reserves for the Band: Mahmalillikulla IR 1, Apsagayu IR 1A, and Compton Island IR 6.[89] The Commission has no information about the other reserves that evidently were lost to the Band between 1938 and 1943.

TESTIMONY FROM THE COMMUNITY SESSION

Several members of the Mamaleleqala Qwe'Qwa'Sot'Enox Band had the opportunity, on May 23, 1996, to speak to these events when the Commission held a community session on the rejection of the Band's McKenna-McBride claim at the U'mista Cultural Centre in Alert Bay. The elders' comments that relate to issues in this claim are summarized here.

Ethel Alfred remembered Indian Agent Halliday and his reputation. Through an interpreter, she said that Agent Halliday treated all native people very badly – people in her tribe as well as others. She said the Chiefs and the Mamaleleqala people were scared of Agent Halliday because he would not cooperate with or listen to them.

Agent Halliday told Ethel Alfred's newly married sister that she could not build a house on Village Island because the village would soon be gone. He wanted all the members of various bands in his Agency "to move here [Alert Bay], to be one, to amalgamate, to move to Alert Bay, and he promised them that there would be one people, they would have one office, and they would work together . . . ." She went on to say that "one of the major reasons why William Halliday wanted all of the people to move here was because the Indian Agent office was located in Alert Bay, because at that time, that's when they stopped the potlatching, and he wanted them close by so he could keep an eye on them and he wanted this to be the centre. And he encouraged people to leave their villages and move here, and promised them things which he never ever kept." As Ms. Alfred put it, Agent Halliday "built, with his influence and the missionaries," the girls' school that later became a residential school.

Ms. Alfred, who was a schoolgirl in 1925, moved to Alert Bay from Village Island in 1927 when she married. Her parents had no formal education and did not speak much English. There were

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[89] Canada, Department of Mines and Resources, Indian Affairs Branch, Schedule of Indian Reserves in the Dominion of Canada, to March 31, 1943 (ICC Documents, pp. 223-24).

no newspapers in her Village Island home, and she did not see any when she first moved to Alert Bay.[90]

Vera Neuman, who was born in 1944, knew of Agent Halliday from her grandparents, who she said feared him and white people in general. Her grandmother spoke no English and her grandfather only "very broken English." Newspapers were not read on Village Island by either her parents or her grandparents.[91]

Chief Robert Sewid, who was born in 1935 and now lives on the Campbell River Reserve, also moved from Village Island to Alert Bay as a child. His father had been Chief before him. Agent Halliday is known to Robert Sewid as "an awful man" whom his people feared. Chief Sewid attributed the eventual forced move from Village Island to Alert Bay to Agent Halliday and his successors, Mr. Todd and Mr. Findlay. "[T]hey cut the school off" at Village Island and used the schools and hospital on Cormorant Island as the incentive to move to Alert Bay on Cormorant Island. In general, Chief Sewid felt that the agents pressured people like his father to move from villages like Village Island to Cormorant Island. "It's full now," he said, "there's no more space."

Before most of the Mamaleleqala came to live on Village Island, they had five or six clans that lived in various locations within their territory. "I don't know if it was the work of Halliday at that time," said Chief Sewid, but "everybody got together on Village Island and lived." The other localities were "where our homesteads were, the different clans, different chiefs and their own clan used to live there. And they'd get together in the wintertime and they'd have a potlatch in one place. That's why we say that belongs to us and that belongs to us, because we had Mamaleleqala different clans there." During the community session, Chief Sewid pointed out some of these locations on a map, as well as those of various smokehouses.[92]

Today, the Mamaleleqala people are scattered. Chief Sewid told the Commissioners they are at Alert Bay, Port Hardy, Campbell River, Victoria, Vancouver, and "all over the place." He spoke

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90 ICC Transcript, May 23, 1996, pp. 10-26 (Ethel Alfred).

91 ICC Transcript, May 23, 1996, pp. 26-42 (Vera Neuman).

92 ICC Transcript, May 23, 1996, pp. 42-56 (Chief Robert Sewid).

of a 50-year effort "to get relocation," the difficulties of bringing the people together, and the Band's lack of land.[93]

David Mountain, the last person to move from Village Island to Cormorant Island, also spoke at the community session. Born on Village Island, he observed that it was not until he left Village Island that he had to eat "the white man's food" such as hamburger and bologna. "I never used to eat that before because I used to eat fish. Fish or deer meat, everything." His grandparents did not speak English. His feelings about Agent Halliday and government officials in general were dislike and distrust.[94]

Harry Mountain, 75 years old and one of the Hereditary Chiefs from Village Island, also spoke. He emphasized the "complete control" that Agent Halliday had over their lives. Harry Mountain's father spoke a little English, but his mother did not know any English. He does not remember seeing any newspapers in their home, and he gave evidence that only his native language was spoken on Village Island when he left in 1929 to attend school on Cormorant Island.[95]

Bobby Joseph, presently Band manager but not a member of the Band, also appeared because he is very familiar with the history and circumstances of the Mamaleleqala people. He came to the school at Alert Bay in 1946 not knowing English, but has "worked now for almost 30 years politically with my people, with Mamaleleqala, [and] other tribes." He stated that the now rootless Mamaleleqala "were the second highest ranking tribe of the 18 tribes." He believes that Agent Halliday would have preferred not to give the Mamaleleqala any land at all. He asked: "So if he was intent on breaking their spirit, in taking away their foundation of their societies, how could he be at all interested before the McKenna-McBride Commission in saying we want this for their well-being? He would sooner dismiss all of those places, the sacred places I talked about where the first ancestors transformed, dismissed them out of hand and dismissed out of hand in the interest of forest

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93 ICC Transcript, May 23, 1996, pp. 42-56 (Chief Robert Sewid).

94 ICC Transcript, May 23, 1996, pp. 56-70 (David Mountain).

95 ICC Transcript, May 23, 1996, pp. 70-73 (Harry Mountain).

companies or logging interests, settlements where there were [sic] evidence of harvesting places and smokehouses."[96]

[96] ICC Transcript, May 23, 1996, pp. 74-81 (Bobby Joseph).

PART III

ISSUES

To facilitate the Commission's review of this claim, legal counsel for the Band and for Canada[97] agreed on the following list of issues relevant to this inquiry:

1. Does the Claim fall within the scope of the Specific Claims Policy?

    a. Has the claimant established an outstanding "lawful obligation" or "beyond lawful obligation" owed by the Crown to the Mamaleleqala Qwe'Qwa'Sot'Enox Band?

    b. Is the list of types of claim found at page 20 of the Government of Canada's booklet *Outstanding Business* exhaustive, or simply a list of examples of outstanding lawful obligation?

2. Did Canada, through its Indian Agent for Kwawkewlth Agency, have a fiduciary duty to protect the Band's interests, if any, in the settlement lands?

    a. Are these lands "settlement lands" within the meaning of the *Land Act*?

3. If Issue 2 is answered in the affirmative, did Canada, through its Indian Agent, breach this duty? Specifically,

    a. Did the Indian Agent fail to make himself aware of the location of the Band's settlement lands within his Agency, and, if so, was this a breach of Canada's duty?

    b. Did the Indian Agent fail to make himself aware of the applications for timber leases over Indian settlements within his agency, and, if so, was this a breach of Canada's duty?

    c. Did the Indian Agent fail to take steps to protect the Band's settlement lands from illegal alienation, and, if so, was this a breach of Canada's duty?

4. Alternatively, if these lands are not "settlement lands" within the meaning of the *Land Act*, did Canada, through its Indian Agent, nonetheless owe a fiduciary obligation to the Band?

5. Did Canada, through its Indian Agent, have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission?

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[97] C. Allan Donovan to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, February 15, 1996 (ICC file 2109-21-1); Sarah Kelleher, Counsel, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, February 22, 1996 (ICC file 2109-21-1).

6. If Issue 5 is answered in the affirmative, did Canada, through its Indian Agent, breach this fiduciary duty? Specifically,

   a. Did the Indian Agent fail to assist the Band in developing its application to the McKenna-McBride Commission for additional reserves, and, if so, was this a breach of Canada's duty?

   b. Did the Indian Agent fail to provide the Band with information in his possession necessary for the Band's preparation of successful applications, and, if so, was this a breach of Canada's duty?

   c. Did the Indian Agent undermine the Band's claim by recommending a land base that was significantly reduced from what the Band applied for, and, if so, was this a breach of Canada's duty?

   d. Was the Indian Agent's statement to the McKenna-McBride Commission that the Band was "fairly well off for land as compared with other Bands" a misrepresentation, and, if so, was this a breach of Canada's duty?

   e. Did the Indian Agent fail to consult with the Band to prepare alternative recommendations after being advised by the Commission of the rejection of the original applications and being invited to submit altemative recommendations, and, if so, was this a breach of Canada's duty?

   f. Did the Indian Agent fail to submit alternative land applications to the Commission, and, if so, was this a breach of Canada's duty?

   g. Did the Indian Agent fail to recommend any alternative arrangements with respect to lands alienated for timber purposes, and, if so, was this a breach of Canada's duty?

7. If Canada is found to have breached a fiduciary duty to the Band, did such breach result in damage to the Mamaleleqala Band?

8. In the alternative, does Canada owe a duty to care to the Band? If so, do the allegations of breach of fiduciary duty set out above establish a breach of Canada's duty of care, through its Indian Agent, owed to the Band?

We will respond to the issues raised by the parties by addressing four main questions as follows:

ISSUE 1 **Did Canada have a fiduciary obligation to protect the Band's settlement lands, and, if so, was there a breach of this obligation?**

ISSUE 2 **Did Canada have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission and, if so, was there a breach of this obligation?**

ISSUE 3 **In the alternative, does Canada owe a duty of care to the Band?**

ISSUE 4 **Does Canada owe an outstanding lawful obligation to the Band in accordance with the Specific Claims Policy?**

PART IV

ANALYSIS

ISSUE 1 FIDUCIARY OBLIGATION TO PROTECT INDIAN SETTLEMENT LANDS

Did Canada have a fiduciary obligation to protect the Band's settlement lands, and, if so, was there a breach of this obligation?

The essence of the Band's argument is that Canada owed a fiduciary obligation to the Band to protect its interests in the settlement lands. In *Guerin v. The Queen*,[98] the Supreme Court of Canada held that "the Crown has historically assumed both a power over Indian interests in land, and the role of protector of those interests."[99] Mr Donovan, on behalf of the Band, submitted that a fiduciary relationship exists between the Crown and aboriginal peoples which

> . . . finds its roots in the earliest expression of colonial policy, and has existed since at least the date of the *Royal Proclamation of 1763*. The Crown therefore has owed, and continues to owe Indian peoples an obligation at law to protect their interests in land, whether that interest be in reserve lands or "unrecognized aboriginal title in traditional lands".[100]

The Band submits that the content of the duty owed to the Band, which varies from case to case depending on the circumstances, was for the Crown to exercise its discretion "honestly, prudently and for the benefit of the Indians."[101] Counsel for the Band submitted that the duty of care

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98 *Guerin v. The Queen,* [1984] 2 SCR 335.

99 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 12.

100 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 12.

101 *Kruger v. The Queen* (1985), 17 DLR (4th) 591 (Fed. CA). Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 13.

described by Addy J in the trial decision of *Blueberry River Band v. Canada*[102] (endorsed by Marceau JA in the Federal Court of Appeal) applies to the facts in this case:

> I must hasten to state, however, that, wherever advice is sought or whenever it is proferred, regardless of whether or not it is sought or where action is taken, *there exists a duty on the Crown to take reasonable care in offering the advice to or in taking any action on behalf of the Indians.* Whether or not reasonable care and prudence has been exercised will of course depend on all of the circumstances of the case at that time and, among those circumstances, one must of course include as most important any lack of awareness, knowledge, comprehension, sophistication, ingenuity or resourcefulness on the part of the Indians of which the Crown might reasonably be expected to be aware. Since this situation exists in the case at bar, *the duty on the Crown is an onerous one, a breach of which will bring into play the appropriate legal and equitable remedies.*[103]

Thus, the Band argues that the instructions issued to Indian Agents "to protect [aboriginal peoples] in the possession of lands and rights, to be responsible for the ordinary care of their interests, to intelligently advise them and to act energetically on their behalf" provided a reasonable standard on which to measure the conduct of the Indian Agents.[104]

Finally, Mr Donovan argued that the Crown's fiduciary obligation towards the Band was "further enhanced by the reality that the Mamaleleqala people, at the time, did not possess the requisite schooling, experience, or literacy to defend their interests against third party encroachment or before the McKenna-McBride Commission."[105] To substantiate this factual premise, the Band pointed to evidence that there was no school at the Village Island reserve (although four children did attend an industrial school in Alert Bay); the Mamaleleqala people did not speak much English and

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102 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [also referred to as *Apsassin v. Canada*], [1988] 1 CNLR 73, 14 FTR 161 (Fed. TD); [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (Fed. CA); [1996] 2 CNLR 25 (SCC).

103 *Apsassin*, [1993] 3 FC 28 (Fed. CA) at 79. Emphasis added.

104 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 16.

105 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 16.

received little, if any, formal education; and the community of Village Island was, and continues to be, isolated.[106] In view of these circumstances, the Band argued that "the Indian Agent was the only bulwark of the Mamaleleqala people against alienation of their settlements and their only advisor with respect to the McKenna-McBride process. To paraphrase Justice Wilson [in *Frame v. Smith*], the Mamaleleqala, and their practical and legal interests, were peculiarly vulnerable to the exercise of the Agent's discretion."[107]

Canada argues that, if the Band had or has any "interest" in the settlement lands, it arose or arises out of an aboriginal right or title to the lands in question, a matter outside the scope of the Specific Claims Policy.[108] Moreover, Canada argues that the Band has not established that the lands at issue in this claim were "Indian settlements" within the meaning of the provincial *Land Act* at the time timber licences were granted over the lands.[109] However, even if some or all of the lands were "Indian settlements" at the relevant time, Canada contends that it did not have a fiduciary duty to protect the lands.

Canada submits that there was no statute, agreement, or unilateral undertaking on the part of Canada which gave rise to an obligation to act on behalf of the Band in protecting the Band's "settlement" lands.[110] According to Canada, a general fiduciary duty in relation to aboriginal interests in non-reserve lands cannot be extracted from the Supreme Court of Canada's decision in *Guerin*. In addition, the instructions to Indian Agents were not a statute or an agreement between the Band and Canada, and they did not create a unilateral undertaking on the part of Canada.

In the alternative, Canada argues that, if the instructions to Indian Agents did constitute an agreement or a unilateral undertaking, they did not require Canada to act on the Band's behalf with respect to non-reserve lands, since Canada did not have any jurisdiction or control over provincial

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106 ICC Transcript, May 23, 1996, pp. 17, 18, 41 and 70; ICC documents, p. 122.

107 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 17.

108 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 15.

109 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 15-18.

110 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 24-26.

lands. Canada also notes that the trespass provisions in the 1886 and 1906 versions of the *Indian Act* did not require the Indian Agent to seek out trespassers. It submits that "given that the Crown did not have a proactive duty to seek out trespassers in respect of reserve lands, there was certainly no such duty with respect to the Band's 'settlement' lands."[111]

Canada goes on to argue that it did not have any unilateral power or discretion with respect to the granting of timber licences or other interests over provincial Crown lands. It submits that it only had the ability, in common with the Band and others, to protest the inclusion of an Indian settlement in a timber licence. Canada states:

> The fact that the Band could have taken the same action which it is asserted Canada ought to have taken, indicates that such power or discretion was not unilateral vis-a-vis the Band. Further, it indicates that the Band was not vulnerable to any power or discretion which Canada might have had in this situation.[112]

Finally, Canada argues that even if it did have an obligation to protect the Band's interests in its "settlement lands," these interests were not affected by the reserve creation process in British Columbia. Accordingly, it cannot be said that Canada, through its Indian Agents, breached its duty to protect any interests that may have existed.[113]

Statutory Protection of Indian Settlement Lands

Although the British Columbia government refused to recognize the existence of aboriginal title or to enter into treaties with the Indians after joining Confederation in 1871, section 56 of the provincial *Land Act* provided at least some measure of protection for Indian settlement lands:

> **56.** No timber licence shall be granted in respect of lands forming the site of an Indian settlement or reserve, and the Chief Commissioner may refuse to grant a

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111 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

112 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

113 Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 15 and 27.

> licence in respect of any particular land if, in the opinion of the Lieutenant-Governor in Council, it is deemed expedient in the public interest so to do.[114]

Unfortunately, the term "Indian settlement" is not expressly defined in the Act. Therefore, it is necessary to interpret this section by reference to external sources and other sections of the Act which help shed light on the legislative intention of this provision.

The Band relies on subsection 4(12) of the *Land Act* to assist in interpreting the term "Indian settlement." Section 4 of the Act sets out various instructions for land surveyors, including instructions for their field-books. Subsection 4(12), in particular, stipulated that "Indian villages or settlements, houses and cabins, fields or other improvements, shall be carefully noted."[115] The Band concludes that these instructions confirm that the legislature contemplated the protection of a broad range of Indian habitation.[116]

Canada relies on a number of sources external to the *Land Act* to define the term "settlement." First, Canada's submissions cite a number of selected dictionary definitions for the words "settlement" and "settle" as follows:

> The Concise Oxford Dictionary provides a number of meanings for the word "settlement," the most relevant being:
>
> > "settlement" – The act or instance of settling; the process of being settled. The colonization of a region. A place or area occupied by settlers. A small village.
>
> The 1944 edition of the Shorter Oxford English Dictionary includes in the definition of a "settlement" the following:

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[114] *Land Act*, RSBC 1897, c. 113, s. 56. Although section 56 refers only to timber licences, both parties appeared to accept for the purposes of this inquiry that both leases and licences were prohibited over an Indian settlement. See, for example, Mr Becker's comments at ICC Transcript, August 29, 1996, p. 60: "settlement lands are basically, the idea came from the *Lands Act* where the Province . . . provided that certain companies and individuals could . . . get timber leases or licenses over areas but not over Indian settlement lands."

[115] *Land Act*, RSBC 1897, c. 113, s. 4(12).

[116] Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 28.

> Establishment in a permanent abode. The act of settling as colonists or new-comers; the act of peopling or colonizing a new country, or of planting a colony. An assemblage of persons settled in a locality. A community of the subjects of a state settled in a new country; a tract of country so settled, a colony. In the outlying districts of America and the Colonies: A small village or collection of houses.

Additionally, the following definitions of the word "settle" may be found:

> "settle" – Establish or become established in a more or less permanent abode or way of life (The Concise Oxford Dictionary)
>
> "settle" – To fix or establish permanently (one's abode, residence, etc). To lodge, come to rest, in a definite place after wandering. To establish a permanent residence, become domiciled (Shorter Oxford English Dictionary)[117]

Second, Canada refers to a number of statements and documents made by government officials in the latter part of the nineteenth century. In correspondence dated 1874, James Douglas, former Governor of British Columbia, was asked whether there was any particular basis of acreage used in setting apart Indian reserves during the period of his governorship. He replied that the surveying officers had instructions

> to meet [the Indians'] wishes in every particular, and to include in each Reserve, the permanent Village sites, the fishing stations, and Burial Grounds, cultivated land and all the favorite resorts of the Tribes; and, in short, to include every piece of ground, to which they had acquired an equitable title, through continuous occupation, tillage, or other investment of their labor.[118]

Less than two years later, the provincial and federal governments established the Joint Reserve Commission. In his report "for the year ended 30th June, 1876," David Mills, Minister of the Interior, stated that the Commissioners

> were officially enjoined as little as possible to interfere with any existing tribal arrangements; and, particularly, that they were to be careful not to disturb the Indians

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117 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 16.

118 James Douglas to Lt. Col. Powell, Indian Commissioner, October 14, 1874, NA, RG 10, vol. 10031 (ICC Exhibit 15).

> in the possession of any villages, fishing stations, fur trading posts, settlements or clearings which they might occupy, and to which they might be specially attached.[119]

Similar instructions were given to Commissioner O'Reilly in 1880:

> [Y]ou should . . . interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached. . . . You should in making allotments of lands for Reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land . . .[120]

Canada submits that the above statements and documents may assist in determining the meaning of "Indian settlement" and the intent of the *Land Act*.[121]

Finally, Canada suggests that portions of Chief Justice McEachern's decision in *Delgamuukw v. B.C.*[122] may help in interpreting the meaning of the word "settlement." In his decision, Chief Justice McEachern quotes from an address made by Governor Douglas to the House of Assembly on February 5, 1859. Governor Douglas stated that the Indians "were to be protected in their original right of fishing on the coasts and in the Bays of the Colony, and of hunting over all unoccupied Crown lands; and they were also to be secured in the enjoyment of their village sites and cultivated fields."[123] Chief Justice McEachern also quotes from a dispatch dated October 9, 1860, in which Governor Douglas described his visit at Cayoosh with a large number of Indian tribes. Governor Douglas said that he "*explained to them that the magistrates had instructions to stake out, and*

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119 Sarah Kelleher, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Specific Claims Commission, May 8, 1996, enclosing Report of the Department of the Interior, for the Year Ended 30th June, 1876, p. xvi, January 15, 1877 (ICC file 2109-21-1).

120 Letter to Patrick [sic] O'Reilly, Indian Reserve Commissioner, August 9, 1880 (ICC Exhibit 13).

121 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 16.

122 *Delgamuukw v. B.C.* [1991] 5 CNLR 1 (BCSC).

123 *Delgamuukw v. B.C.* [1991] 5 CNLR 1 at 101 (BCSC).

reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support . . ."[124]

Based on these references, Canada submits that an "Indian settlement" under the *Land Act* can best be described as

1. dwellings in the proximity of each other which are occupied by a group of Indians;
2. land immediately adjacent to such dwellings that the Indians used for their support including cooking and daily living and for their animals; and
3. fields cultivated by the Indians immediately adjacent to or in the proximity of such dwellings.[125]

The term "settlement" can, of course, have many different meanings. The task before us, however, is to ascertain which lands would or could have been protected under section 56 of the *Land Act* at the time leases and licences were being granted over Crown lands in the late 1800s and early 1900s. In other words, our task is to determine the intention of the legislature at the time section 56 was enacted. We agree with Canada that statements made by government officials in the nineteenth century provide some evidence of the legislature's intention. However, we find Canada's three-point definition of "Indian settlement" too restrictive. The sources provided by Canada do not, for instance, indicate that cultivated fields had to be "immediately adjacent to" or "in the proximity of" dwellings to qualify as settlement lands. Canada's proposed definition also fails to take into account the unique forms of land use and occupation practised by aboriginal peoples on the British Columbia coast.

Given the limited amount of information available to us on this inquiry, we do not purport to offer any exhaustive definition of the term "Indian settlement." However, as we see it, when section 56 was enacted 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, fishing 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,

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124 *Delgamuukw v. B.C.* [1991] 5 CNLR 1 at 105 (BCSC). Emphasis in original.

125 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 18.

in our view, 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. The question that remains to be answered is whether any of the lands at issue in this claim were, in fact, Indian settlement lands.

Settlement Lands of the Mamaleleqala Qwe'Qwa'Sot'Enox Band

In its written submissions, the Band states that out of the 12 applications submitted by the Band to the McKenna-McBride Commission, "only ten were site-specific enough to be considered by the Commission. Of these ten, two were seen to be redundant because they related to areas already contained within a prior application. Accordingly, a total of eight effective applications were made."[126] According to the Band, these eight effective applications were

1. Kwakglala / Lull Bay (Application 62);
2. Nalakglaia / Hoeya Sound (Application 63);
3. Apsagayu / Shoal Harbour (Application 64);
4. Kutlgakla on Swanson Island (Application 65);
5. Compton Island (Application 66);
6. Kahwaes at Harbledown Island (Application 67);
7. Kuklaga / Lewis Island (Application 68); and
8. Knights Inlet (Application 71).[127]

The Band goes on to state:

> Of the eight applications, four (Lull Bay, Hoeya Sound, Shoal Harbour, and Knight's Inlet) were for areas which either had houses standing on them, or were inhabited in some way. They were, therefore, "Indian settlement lands" and fell within the

[126] Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 18-19.

[127] Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 19-24.

> protection of the *Land Act.* The Commission, however, rejected applications for at least three of these settlements (Lull Bay, Shoal Harbour and Knight's Inlet) on the basis that they were covered by timber leases.[128]

In assessing whether any of the lands encompassed by the Band's applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamaleleqala Qwe'Qwa'Sot'Enox used the land and the type of houses they built and used during the early part of this century. As the Band points out in its written submissions, "[o]ne traditional house could house a number of families."[129] Therefore, in our view, the existence of even one house provides ample evidence that an Indian settlement existed at that location.

In terms of the Band's applications, we have evidence from the McKenna-McBride hearings on June 2, 1914, that one house existed at Lull Bay (Application 62),[130] two houses existed at Apsagayu on Shoal Harbour (Application 64),[131] and 10 villages existed in the area encompassed by Application 71 ("half a mile along Knights Inlet, then across the Inlet on the southern shore of Gilford Island half a mile to Port Elizabeth to a point marked 2B").[132] In our opinion, these improvements provide concrete evidence that an Indian settlement existed at each of these locations.

In his oral submissions, Mr Becker, counsel for Canada, argued that it was unclear whether any of the 10 villages in the Knight's Inlet area belonged to the Band.[133] On this point, we agree with Mr Donovan, counsel for the Band, who stated that it would have been entirely out of character for

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128 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 27.

129 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 28.

130 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, pp. 131-32 (ICC Documents, pp. 129-30).

131 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 133 (ICC Documents, p. 131).

132 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 135 (ICC Documents, p. 133).

133 ICC Transcript, August 29, 1996, pp. 73-74 (Bruce Becker).

the Band to claim another band's villages.[134] The testimony of Mr Harry Mountain before the McKenna-McBride Commission lends credence to the Band's reply. When Mr Mountain gave evidence about the Band's existing reserves, he explicitly disclaimed ownership of IR 3:

> [COMMISSIONER SHAW:] No. 3, Do you know that Reserve?
> [HARRY MOUNTAIN:] We don't claim this. That place is called Ahta - That belongs to another Tribe.
> Q. Does the man that lives on that Reserve, is he a member of that Mahmalillikullah Tribe?
> A. No, he belongs to another Tribe.
> Q. Do you know anything regarding that Reserve – have you ever been there?
> A. Yes, our people often go there – but we don't claim it as belonging to us.[135]

In addition, there is evidence that Agent Halliday identified lands claimed by other bands where there was potential for competing claims to the same lands.[136] Since Canada has not offered any cogent evidence to support the allegation that these lands may have belonged to another band, in our view the evidence on balance favours the conclusion that the 10 villages did, in fact, belong to the Mamaleleqala.

With respect to Application 63 (Hoeya Sound), Harry Mountain testified that, although there were no houses, the Band had been living there.[137] The fact that the Band had been living in the area suggests a certain degree of settlement. This conclusion is strengthened by Harry Mountain's testimony for Mataltsym (Application 69). He said that Mataltsym was "an old Indian village" and

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134 ICC Transcript, August 29, 1996, p. 163 (C. Allan Donovan).

135 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 130 (ICC Documents, p. 128).

136 When Commissioner Shaw asked Harry Mountain for information regarding IR 2, Agent Halliday interjected: "With respect to Meetup Reserve No. 2 – while this is on the Agency map and in the Schedule as belonging to the Village Island or Mahmalillikullah Tribe, it and two other of the Reserves are also claimed by the Kwickswotaineuks, who are here to press their claims": Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 129 (ICC Documents, p. 127).

137 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 133 (ICC Documents, p. 131).

that it was "covered by application No. 2" (i.e., the application for Hoeya Sound).[138] Since Mataltsym was included in the application for Hoeya Sound, it stands to reason that the "old Indian village" was also included in the application for Hoeya Sound.

Canada, in its written submissions, takes issue with the fact that the evidence available to us for the lands described above comes from the testimony of Band members during the McKenna-McBride hearings in 1914. The timber leases and licences covering those lands were granted several years earlier. Canada asserts that the Band's testimony "provides us with little or no information on what use the Band was making of the land when the timber licence was granted." Canada also contends that "the Band [has not] provided any other evidence to establish that the lands constituted an 'Indian settlement' at the time the timber licenses were granted."[139] In our view, however, the Band has established that the lands included within these applications were Indian settlements when the timber leases and licences were granted. With respect to Application 71, it is important to observe that the 10 villages along Knight's Inlet were described in the 1916 Final Report of the McKenna-McBride Commission as "ancient villages," which lends credence to the Band's argument. With respect to the other applications, the Band has met this argument, since it is reasonable to assume that, if particular tracts of land were being used by the Mamaleleqala as "Indian settlements" in 1914, they were also being used as "Indian settlements" when the timber leases or licences were granted over them. In our view, the record establishes that there were traditional villages located at these sites, and Canada has not provided evidence to the contrary.

In sum, we agree with the Band that the lands encompassed by the Band's applications for Lull Bay (Application 62), Hoeya Sound (Application 63), Shoal Harbour (Application 64), and Knight's Inlet (Application 71) included Indian settlements. Since the Band did not specifically argue that the four remaining "effective" applications included Indian settlements, we make no findings with respect to those applications.

It is important to keep in mind, however, that it was *only* the Band's "Indian settlements" and "reserves" that were protected by section 56 of the *Land Act*. Therefore, it is necessary to consider

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138 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 135 (ICC Documents, p. 133).

139 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 18.

how much of the lands encompassed by Applications 62, 63, 64, and 71 were Indian settlement lands at the time the leases and licences were granted. Unfortunately, we have very little evidence on this point. With respect to Application 64 (Shoal Harbour), Mr Becker argued as follows:

> [I]n the case of [Application] 64 these lands, while not given by the McKenna-McBride Commission, I understand that 2.17 acres were in fact provided as reserve for the Band by the Ditchburn-Clark Commission, which succeeded the McKenna-McBride Commission, and therefore while I don't have positive information I submit that it's likely that the area of the settlement comprising the houses was, in fact, turned into reserve in the case of Application 64.[140]

We take from Mr Becker's comments that, according to Canada, the Band's settlement lands covered only 2.17 acres. However, Agent Halliday's testimony before the McKenna-McBride Commission on June 24, 1914, suggests that the Band's settlement might have covered a larger area:

> The Indians also made use of Apsagayu as a fishing station, and he [Halliday] recommended that five acres be granted them on the north shore of Shoal Harbor, in Pulp Lease No. 482. That place was used annually by the Indians while fishing for salmon and they had their small houses on the Bay where it was recommended that this 5 acres be granted.[141]

Thus, it appears that Agent Halliday was of the opinion that 5 acres were required to protect the Band's settlement. Although we acknowledge that it is unclear how large the Indian settlement would have been, we assume that if Agent Halliday was prepared to recommend 5 acres, the settlement would have covered at least that amount of acreage. Accordingly, without further evidence, we find that the Band's settlement lands at Shoal Harbour were, at a minimum, 5 acres rather than 2.17 acres.

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140 ICC Transcript, August 29, 1996, p. 71 (Bruce Becker).

141 Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

Similarly, Agent Halliday recommended that 5 acres be granted out of Applications 62 (Lull Bay) and 63 (Hoeya Sound).[142] Therefore, without the benefit of further evidence on the extent of the settlements at Lull Bay and Hoeya Sound, it is reasonable to conclude that the Band's settlement lands at each location were at least 5 acres in size.

Agent Halliday did not make a positive recommendation with respect to Application 71 (Knight's Inlet). However, the fact that 10 villages were included in the application suggests a fairly large area. Since Agent Halliday made no reference to the area covered by the 10 villages, it would not be prudent for the Commission to make any conclusions with respect to the size of the Band's settlements at these locations. Rather, it is our view that this is a matter that is better left for resolution between the parties through further research and negotiation.

Existence of a Fiduciary Obligation to Protect Indian Settlements

Given our finding that the Band had Indian settlement lands in the areas of Lull Bay, Hoeya Sound, Shoal Harbour, and Knight's Inlet, the question is whether Canada, through its Indian Agents, had a fiduciary obligation to protect those settlements from encroachment caused by the granting of timber licences and leases. The Band submits that it did. In support of its position, the Band relies on Madam Justice Wilson's reasons for judgment in *Frame v. Smith*[143] and on several court decisions relating specifically to the Crown-aboriginal relationship.[144]

Canada denies that it had a fiduciary obligation to protect the Band's settlement lands. In reaching this conclusion, Canada proposed the following test to determine whether the facts in this claim support the existence of a fiduciary relationship between the Crown and the Band:

> [I]n order for Canada to have a fiduciary relationship which may give rise to a fiduciary obligation, the following three elements must be present:

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142 Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

143 *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

144 Cases cited by the Band include the following: *Guerin v. The Queen*, [1984] 2 SCR 335; *R. v. Sparrow* (1990), 56 CCC (3d) 264 (SCC); and *R. v. Van der Peet*, [1996] 4 CNLR 177 (SCC).

(a) a statute, agreement or unilateral undertaking to act for, on behalf of or in the interests of another person;

(b) power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and

(c) reliance or dependence by that person on the statute, agreement or undertaking and vulnerability to the exercise of power or discretion.[145]

Canada proposed the same test in two of our other inquiries: the *Cormorant Island Claim of the 'Namgis First Nation* and the *McKenna-McBride Applications Claim of the 'Namgis First Nation*. As we discussed in those inquiries, we are not convinced that every element of Canada's test must be satisfied in order for a fiduciary obligation to arise. Even if we were to accept Canada's proposed test, we are of the view that a fiduciary relationship exists between the Crown and the Band in the circumstances of this claim.

First of all, the very fact that Canada posted Indian Agents in the various 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. As early as 1879, the duties of the Indian Agents were described in the following terms:

> The duties of the Agents will mainly consist in advising the Indians and in protecting them in the possession of their farming, grazing and wood lands; fishing or other rights; and protecting trespasses upon or interference with the same. . . .
>
> . . .
>
> As the Department has no Treaty payments to make to the Indians of British Columbia and it proposes doing away entirely with the system of giving presents to them there will be little other responsibility attaching to the position of Indian Agent than the ordinary care of the interests of the Indians and their protection from wrongs at the hands of those of other nationalities . . .[146]

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145 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 23.

146 L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17,514-1 (ICC Documents, pp. 4, 6-7).

Substantially the same language was still being used 30 years later in the general instructions issued, on their appointment, to Indian Agents.[147] Thus, as we see it, the whole tenor of the Indian Agents' instructions reflected an underlying commitment or undertaking on the part of Canada to protect, or at least to assist in protecting, Indian settlement lands from unlawful intrusions.

Canada argues, however, that there is no evidence that the Band knew of the instructions, or that they had been provided to the Band. It submits that "it is difficult to conceive of an undertaking which is not communicated to the recipient giving rise to any obligations."[148] We are not persuaded by Canada's argument because it is clear from the Supreme Court of Canada's decision in *K.M. v. H.M.*[149] that an undertaking need not be communicated to the recipient for a fiduciary obligation to arise. The specific issue considered by the Court in the *K.M.* case was whether or not incest constitutes a breach of fiduciary duty by a parent. Mr Justice La Forest held that it does. After suggesting that fiduciary obligations may be imposed in some situations even in the absence of a unilateral undertaking, he went on to say that, in the case before him, it was "sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature."[150] It almost goes without saying that parents do not typically communicate their undertaking to their children. Yet parents still have a fiduciary obligation to refrain from incestuous assaults on their children, since there is a tacit understanding that parents will act in the best interests of their children.

We find the reasoning in *K.M.* particularly useful in the circumstances of this claim, considering the nature of the relationship between the Indian Agent and the Indians under his charge. It is also important to observe that the relationship between the Indian Agent and the Band was characterized by the McKenna-McBride Commission as similar to that of a parent and child:

> The Indian Agent's [sic] are appointed and paid by the Dominion Government. Their duty is to stand by and protect the Indians in all their rights – to visit the Reserves from time to time and see that no one is interfered with them in their privileges; To

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147 A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360,377 (ICC Documents, pp. 86-90).

148 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 26.

149 *K.M. v. H.M.* (1992), 142 NR 321 (SCC).

150 *K.M. v. H.M.* (1992), 142 NR 321 at 383 (SCC).

> be their friend and to give them good advice; To tell them what it is best for them to do *and to look after them as a father would his children*.[151]

We acknowledge that these comments were made in 1914, but there is no evidence to suggest that the relationship was different in any material respect before 1914 and during the time when timber leases and licences were being granted over the Band's settlement lands. In fact, the protective role of the federal Crown with respect to Indians was articulated in the 1871 Terms of Union between Canada and British Columbia in Article 13, which states: "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union."[152] Therefore, just as Mr Justice La Forest found that "being a parent comprises a unilateral undertaking that is fiduciary in nature," there is considerable merit in Mr Donovan's argument that, in view of the Indian Agent's instructions to provide advice and look after the Indians "as a father would his children," being an Indian Agent comprised a unilateral undertaking that was fiduciary in nature.[153] Obligations could arise from that undertaking whether or not it was communicated to the Band.

Canada also argues that, even if the Indian Agents' instructions were a unilateral undertaking, they did not require Canada to act on the Band's behalf with respect to non-reserve lands, since Canada did not have any jurisdiction or control over provincial Crown lands.[154] The difficulty we have with Canada's argument is that it ignores the fact that, under the Terms of Union, Canada assumed "the trusteeship and management of the lands reserved for [the Indians'] use and benefit" as well as "[t]he charge of the Indians." Furthermore, the Terms of Union suggest not only that Canada had a trust-like responsibility with respect to reserve lands but that it would also pursue a

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151 Chairman, Royal Commission, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 89, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2. Emphasis added.

152 *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 Number 87 (Toronto: McClelland & Stewart, 1975), 81; and ICC Exhibit 17.

153 ICC Transcript, August 29, 1996, pp. 173-74 (C. Allan Donovan).

154 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 26.

"liberal" policy by requesting additional reserve lands from the province on behalf of the Indians. In light of the broad wording contained in the Terms of Union, it is only reasonable to conclude that Canada's "charge of the Indians" included a duty to use available options for the protection of Indian settlement lands, particularly when the reserve creation process was still incomplete. In any event, the instructions clearly stipulated that the Indian Agent was to protect the Indians "in the possession of their farming, grazing and wood lands; fishing or other rights." The instructions did not, by their terms, limit the Indian Agent's duties to reserve lands. Nor do we accept that Canada was completely powerless to protect the Band's settlement lands, because the provincial *Land Act* provided a clear statutory mechanism for the protection of these lands. Accordingly, we find that the first element of Canada's test for the existence of a fiduciary obligation is met, since there was, in essence, a unilateral undertaking on the part of the federal Crown and its agents to protect Indian lands and to pursue a liberal policy on behalf of Indians in the allocation of additional reserve lands required for their use and benefit.

We are also satisfied that the second element of Canada's test is met ("power or discretion can be exercised unilaterally to affect that person's legal or practical interests"). As part of its review, the Commission has before it documentary evidence of notices from the *British Columbia Gazette* for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas. At the time these *Gazette* notices appeared in 1905, section 41 of the provincial *Land Act* provided that leases of Crown lands could be granted by the Chief Commissioner of Lands and Works for any purpose for a maximum of 21 years (a 10-year limit applied to leases granted for the purposes of cutting hay). However, any person who wanted to lease Crown lands had to satisfy a number of procedural steps before such leases could be granted. First, before entering into possession of the applicable land, the lease applicant had to place a stake or post at one angle or corner of the land. The post had to be at least 4 inches square and it had to stand not less than 4 feet above the surface of the ground. On the post, the applicant had to inscribe his name and the angle represented by the post; for example, "A.B.'s N.E. corner" (meaning northeast corner). The applicant was also required to notify interested parties of his intention to apply for the lease through a number of methods: (1) he had to post a written or printed notice on some conspicuous part of the land and on the Government Office (if any) in the district for 30 clear days; and (2) he had to publish a notice for 30 days in the *British Columbia*

Gazette as well as in some newspaper published and circulating in the district. After the expiration of the 30 days' notice, and within two months from the date of its first publication in the *British Columbia Gazette*, the lease applicant was required to apply in writing to the Chief Commissioner of Lands and Works for a lease over the land. If there appeared to be no valid objection to the lease, the Chief Commissioner of Lands and Works could issue it, provided the applicant had the land surveyed within six months.

Pursuant to sections 44 and 45 of the Act, any person who wished to object to the granting of the lease could do so by filing written reasons with the Commissioner of the District before the day fixed by the notice in the *British Columbia Gazette* or within some other appointed time. If any objection was entered, the Chief Commissioner of Lands and Works had power to settle the matter.[155]

In addition to the *Gazette* notices mentioned above for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas, the Band also submitted a *Gazette* notice dated 1907 for a special timber licence in the Lull Bay area. The procedure for obtaining a special timber licence at that point in time was similar to the procedure outlined above for leases.[156]

In short, the provisions of the *Land Act* clearly provided a process for the Indian Agent to raise a conscientious objection to the grant of a timber lease or licence to Indian settlement lands. In this sense, the Indian Agents could have exercised their power or discretion to inform themselves of impending leases or licences by checking the notices in the *British Columbia Gazette* or in local newspapers and, if any of the leases or licences were likely to interfere with an Indian settlement, to enter an objection. The Act, of course, did not impose any restrictions as to who could enter an objection, but clearly an ability to exercise this power or discretion was contingent on some knowledge and understanding of the process – a knowledge and understanding more likely to be held by Indian Agents than by Band members.

In tandem with the procedural provisions of the *Land Act*, section 56, it will be recalled, prohibited the granting of timber licences over an Indian settlement or reserve. In his oral

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[155] For the full text of the relevant provisions of the provincial *Land Act*, see Appendix B of this report.

[156] See sections 50-52 of the provincial *Land Act* in Appendix B of this report.

submissions, Mr Becker agreed that it should be assumed that the province would have complied with its own statute and that, if the province determined that certain lands were in fact settlement lands, it would not have provided timber licences over those areas.[157] If this protective provision had been used by Indian Agent Halliday, it is reasonable to assume that the provincial Chief Commissioner of Lands and Works would have properly exercised his discretion and excluded the Indian settlement lands from the area included in the timber lease or licence. Accordingly, it seems to us that the exercise of the Indian Agents' discretion had the potential to affect the Band's interests, since, as will be discussed below, the Band's ability to have its settlement lands set aside as reserve lands in the McKenna-McBride process was profoundly limited by the existence of timber leases and licences over those lands.

Canada argues, however, that the Band as well as Canada could have protested the inclusion of an Indian settlement within a timber licence. It contends that, since the Band could have taken the same action as Canada, any power or discretion that Canada might have had was not unilateral vis-à-vis the Band.[158] In our opinion, Canada's argument completely ignores the practical reality of the situation. Any power or discretion the Band might have had was illusory, considering that its members did not have the requisite knowledge, experience, or literacy to effectively protect the Band's interests.

The third element of Canada's test is vulnerability. There can be little doubt that the Band was vulnerable. Witnesses at the community session told us that their parents and grandparents could speak and read little, if any, English and had little, if any, formal education. This evidence is consistent with the testimony of Harry Mountain in 1914. He told the McKenna-McBride Commission that there were no schools on the Band's reserves and that only four of the Band's children were attending the industrial school at Alert Bay.[159]

We also heard evidence that, even if the Mamaleleqala people had been able to read English during the time that leases and licences were being granted over their settlement lands, newspapers

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157 ICC Transcript, August 29, 1996, p. 61 (Bruce Becker).

158 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

159 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 124 (ICC Documents, p. 122).

were unavailable to them. Clearly, the Mamaleleqala people were in no position to monitor the notices in the *British Columbia Gazette* and in newspapers and, as a result, they could not protect their settlement lands without the assistance of the Indian Agent. Furthermore, there is no evidence that the Mamaleleqala people were even aware of the British Columbia *Land Act*, the process for obtaining leases and licences under the Act, or the fact that they had a right to object when such leases and licences included Indian settlement lands.

When viewed from a broader perspective, it should be noted that it was virtually impossible for Indians to pre-empt land under the provisions of the *Land Act*. The pre-emption provisions of the Act were designed to encourage settlement of the province by allowing settlers to acquire up to 160 acres of unoccupied Crown lands for a nominal sum of money, providing that improvements were made to the land and that certain residency requirements were met. However, section 5 of the Act provided that the right to record land for the purposes of pre-emption did not extend "to any of the aborigines of this continent, except to such as shall have obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council."[160] Such permission was rarely forthcoming. Professor Robin Fisher's study of Indian land policy in British Columbia notes that the ability of Indians to pre-empt land was restricted in 1866 and, although Indians could, in theory, pre-empt lands with the written permission of the Governor, "*there was only a single subsequent case of an Indian pre-empting land under this condition*."[161]

Unlike ordinary citizens, the aboriginal peoples of British Columbia could not effectively obtain lands through the generous pre-emption provisions of the *Land Act*. Nor were there any treaties with the Indians which provided a clear formula or agreement for the allocation of reserve lands. Instead, the Indians were forced to rely on the goodwill of the provincial and federal governments and the effectiveness of reserve creation processes like the McKenna-McBride Commission to ensure that they obtained an adequate land base for their present and future development. In such circumstances, there can be little doubt that the Band was vulnerable.

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160 *Land Act*, RSBC 1897, c. 113, s. 5.

161 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), 161. Emphasis added.

Accordingly, we find that Canada, through its Indian Agents, had a fiduciary obligation to protect the Band's settlement lands from unlawful encroachments by objecting to the granting of leases and licences over those lands. We appreciate that this conclusion implies that the Indian Agents had a positive duty to examine the notices in the *British Columbia Gazette* on a regular basis and to be aware of the operative provisions of the *Land Act*. However, in our opinion, these would not have been unduly onerous responsibilities, given the skills and qualifications required of Indian Agents. It is to be remembered that they had magisterial powers under the *Indian Act*. Thus, if they had the ability to interpret and apply the provisions of the *Indian Act* and other Acts respecting Indians, they must surely have had the ability to comprehend the provisions of the *Land Act* and notices in the *Gazette*. To suggest that the Agent also had a duty to file an objection where the circumstances warranted this approach is not to place an unduly onerous responsibility on the federal Crown, which had accepted the "charge of the Indians" in the 1871 Terms of Union.

We have not forgotten Canada's argument regarding the comparative obligations of the Indian Agents in relation to acts of trespass on reserve lands. Canada points out in its written submissions that neither the 1886 or the 1906 versions of the *Indian Act* required the Indian Agents to seek out trespassers in an active way, but only to respond to a trespass when it was brought to their attention. Section 22 of the 1886 *Indian Act* provided as follows:

> **22.** If any person, or Indian other than an Indian of the band, without the license of the Superintendent General (which license he may at any time revoke), settles, resides or hunts upon, occupies, uses, or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh, or fishes in any marsh, river, stream or creek on or running through a reserve, or settles, resides upon or occupies any such road, or allowance for road, on such reserve, – or if any Indian is illegally in possession of any land in a reserve – the Superintendent General, or such officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises . . .[162]

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[162] *The Indian Act*, RSC 1886, c. 43, s. 22.

Section 34 of the 1906 Act was virtually identical.[163] Canada submits that, "given that the Crown did not have a proactive duty to seek out trespassers in respect of reserve lands, there was certainly no such duty with respect to the Band's 'settlement' lands."[164] We disagree. In our view, there was a qualitative difference between the activities described in the trespass provisions of the *Indian Act* and an application for a lease or a licence. The activities described in section 22 were all overt activities and, as a consequence, they would have been visible to the Mamaleleqala people as an encroachment on the Band's lands. In contrast, an application for a lease or a licence (as opposed to the actual timber operations) would not have been visible or readily identifiable as an encroachment. It is true that an applicant for a lease or a licence was required to post a written or printed notice of his intention to apply for the lease or a licence on some conspicuous part of the land. However, without an ability to read English, the posting of such a notice would have been of little help to the Mamaleleqala people.

It is also true that the applicant was required to place a stake or post at one angle or corner of the land. It is unclear, however, whether the Mamaleleqala people would have appreciated the significance of such a stake being posted on the land (i.e., that it represented an alienation of the land). In fact, the evidence leads us to the opposite conclusion. When Harry Mountain submitted the Band's application for land at Lull Bay, Commissioner Shaw stated that the land was "all covered by timber limits owned and paid for by whitemen . . ."[165] The exchange that ensued with Chief Dawson suggests that the Band did not realize that the land had been alienated:

> CHIEF DAWSON of the Mahmalillikullah Tribe: From whom was the land purchased?
> MR COMMISSIONER SHAW: We don't know – all we know is that our map here shows that it has been purchased, and therefore we cannot give it to anyone else although we might possibly make some arrangements with the owners by which you could get a small piece of land, say five or ten acres on which your houses are built – We might be able to recommend that if you wish to state what improvements are on it.

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163 *Indian Act*, RSC 1906, c. 81, s. 34.

164 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 27.

165 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 132 (ICC Documents, p. 130).

> A. We can't allow the place to go that way – We never sold it, and we want the place.
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> . . .
>
> . . . The country does not belong to the Government, and they have no business to sell it. What business has anyone to go and sell that land without asking if I had no more use for it. What right have they got to sell it before I was through with it because I was the owner of it. I want to ask the Royal Commission if it is in their power to find out who sold this land without first asking me.[166]

Presumably the land would have been staked as required under the provisions of the *Land Act*, yet clearly the Band was unaware that the land had been alienated. Therefore, it is not unreasonable to apply a different standard between acts of trespass and applications for leases and licences (assuming that Canada did not, in fact, have a proactive duty to seek out trespassers in respect of reserve lands, a matter on which we express no opinion). In our view, a proactive duty to protect Indian settlement lands from unlawful leases and licences is consistent with the Indian Agents' instructions. The 1879 description of the Indian Agents' duties stated that the Indian Agent "should . . . possess such qualifications as will adapt him for properly and intelligently advising the Indians and *acting energetically on their behalf* in the respects described in the previous part of this letter . . ."[167] Presumably the phrase "in the respects described in the previous part of this letter" included the Agent's duty to protect the Indians "in the possession of their farming, grazing and wood lands; fishing or other rights; and protecting trespasses upon or interference with the same." The instructions issued to newly appointed Indian Agents in 1909 did not specify that the Agents were to act energetically on behalf of the Indians, but they did provide that the Agents were to "*take measures* to prevent trespass or intrusion by white people or Indians of other tribes or bands on the reserves, fisheries, etc., within their Agencies, etc."[168]

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[166] Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 132 (ICC Documents, p. 130).

[167] L. Vankoughnet, DSGIA, Indian Affairs, Ottawa, to I. Powell, Visiting Indian Superintendent for British Columbia, Victoria, British Columbia, December 30, 1879, NA, RG 10, vol. 3701, file 17514-1 (ICC Documents, p. 7). Emphasis added.

[168] A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, p. 89). Emphasis added.

Finally, we note in passing that it appears to have been the province's understanding that Canada would act on behalf of the Indians if any leases, licences, or other forms of land alienation were likely to interfere with an Indian settlement. In the case of an 1883 purchase application involving some of the traditional lands of the Quatsino Indians, Commissioner O'Reilly attempted to reverse, in part, a sale of land that had occurred over an old Indian village named Clienna. The land had been purchased in 1884 by Thomas Pamphlet and Cornelius Booth. When O'Reilly discovered that the Quatsino Indians were still using the land, he wrote to the Commissioner of Lands and Works in September 1889 to request that the purchasers be induced to relinquish 50 acres to be allocated as Indian reserve.[169] The province, in its reply to Commissioner O'Reilly, placed full responsibility for the protection of the Indians' interests on the shoulders of the federal government:

> The object of publishing a notice of intention to apply to purchase land is to notify any person who may consider he has a prior claim to make the same known.
>
> *No protest to these applications was made by the Indian Department on behalf of their Wards.*
>
> No intimation had been received from the Indian Department that they claimed any part of the lands at or prior to the conveyance to Mr. Booth. . . .[170]

In our view, the province's perception of the respective roles of the federal and provincial governments gives added weight to our conclusion that Canada had an obligation to protect Indian settlement lands from unlawful encroachments. Anything less than this interpretation defies common sense. Moreover, it does not do honour to the Crown to suggest that the Indian Agent was entitled to do nothing while third parties encroached on the traditional settlements and villages of the Mamaleleqala Qwe'Qwa'Sot'Enox.

Breach of Fiduciary Obligation

As part of their duties, Indian Agents were instructed to "make periodical visits to the various bands of Indians" in their Agencies and to give particular attention "to the sanitary condition of the Indians

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169 Peter O'Reilly, Indian Reserve Commissioner, to Chief Commissioner of Lands & Works, B.C., September 23, 1889 (ICC Documents, pp. 30-34).

170 Department of Lands & Works, Memorandum, October 2, 1889 (ICC Documents, p. 35).

villages and camps."[171] It is therefore reasonable to assume that Agent Halliday and his predecessor, G.W. DeBeck, were, or ought to have been, aware of the locations of the Band's settlement lands. In fact, Mr Becker stated in his oral submissions that he was "confident that Agent Halliday knew where the major settlements of this Band were, and to that extent was aware of where the Indian settlements were."[172]

Given that the Agents were, or ought to have been, aware of the locations of the Band's settlement lands, there was virtually no excuse for their failure to review the notices in the *British Columbia Gazette* and local newspaper and to protest the granting of timber leases and licences over those lands. However, the Band's researcher, Dr. John Pritchard, was unable to find any letters of protest emanating from the Kwawkewlth Agency during the time period in question.[173] We therefore find that Canada, through its Indian Agents, breached its fiduciary obligation to the Band in respect of those leases and licences that (1) covered Indian settlement lands, and (2) were gazetted during the tenure of Agents Halliday and DeBeck (or one of their predecessors in office).

As stated earlier in this report, without further evidence we are of the view that the Band's settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The Band also had settlement lands in the Knight's Inlet area (Application 71), but the precise area has yet to be determined.

The *Gazette* notices submitted by the Band in this inquiry appear to cover

- the Band's settlement lands in Application 62 (Lull Bay);[174]

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171 A.W. Vowell to J.A. McIntosh, December 22, 1909, NA, RG 10, vol. 4948, file 360377 (ICC Documents, pp. 89-90).

172 ICC Transcript, August 29, 1996, p. 89 (Bruce Becker).

173 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 27.

174 Agent Halliday recommended that "five acres be granted out of Timber Limit 10033. . .": Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148). Presumably the lands described in the *Gazette* notice dated November 7, 1907, included Lot 641, which appears to have encompassed T.L. 10033. See ICC Documents, pp. 82 and 85.

- the Band's settlement lands in Application 64 (Shoal Harbour);[175] and
- some of the Band's settlement lands in Application 71 (Knight's Inlet).

We therefore find that the Band has a valid claim for negotiation for

- a minimum of 5 acres in the Lull Bay area;
- a minimum of 2.83 acres in the Shoal Harbour area (5 acres minus the 2.17 acres eventually made into a reserve on the recommendation of the Ditchburn-Clark Commission); and
- the Band's settlement lands in the Knight's Inlet area which were included in Application 71 and which are covered by the *Gazette* notices submitted by the Band.

With respect to the Band's settlement lands in Application 63 (a minimum of 5 acres in the Hoeya Sound area) and the Band's remaining settlement lands in Application 71, we are of the opinion that there is insufficient evidence in this inquiry to establish that a *Gazette* or newspaper notice appeared during the time that an Indian Agent was assigned responsibility for the Indians in those areas.[176]

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[175] Agent Halliday recommended that "five acres be granted . . . on the north shore of Shoal Harbor, in Pulp Lease No. 482": Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148). The *Gazette* notice dated January 26, 1905, pertained to a pulp lease over Lot 482. See ICC Documents, p. 56.

[176] We note that there may be *some* evidence that the lease/licence over the Band's settlement lands in Application 63 (Hoeya Sound) was gazetted in 1907. Agent Halliday recommended that "five acres be granted out of Timber Limit 10023": Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148). The Band submitted a document that lists "T.L. 10.023" as coming under "Lot 632." Under the column "Date Gazetted as Surveyed," the date "1.Nov.1907" is noted: ICC Documents, p. 80. However, the Band did not submit a *Gazette* notice dated November 1, 1907, as part of its documentary evidence in this inquiry.

ISSUE 2 FIDUCIARY OBLIGATION TO REPRESENT BAND'S INTERESTS

Did Canada have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission and, if so, was there a breach of this obligation?

The Band submits that Indian Agent Halliday further breached his fiduciary obligations to the Band by failing to represent its interests adequately before the McKenna-McBride Commission. It divides the Crown's breaches of duty into the following categories:

- failure to assist the Band in formulating its applications;
- failure to adequately represent the Band's needs; and
- further breaches of fiduciary obligation, including Agent Halliday's failure to consult with the Band and to provide alternative recommendations after he was advised by the Commission that most of the Band's original applications had been rejected.[177]

Canada contends that it did not have a fiduciary obligation to represent the Band's interests before the McKenna-McBride Commission. It therefore does not consider it necessary to examine whether Canada, through its Indian Agent, breached any fiduciary duty.[178]

We considered the same issues in our inquiry into the *McKenna-McBride Applications Claim of the 'Namgis First Nation*. In our report into that claim, we examined the nature of the relationship between Agent Halliday and the Nimpkish Band (now known as the 'Namgis First Nation) from the perspective of three different points in time – prior to, during, and after the McKenna-McBride hearings – to determine whether any particular fiduciary duties arose under the circumstances of that claim. Given the similarities in the claims, we adopt the same approach and the same reasoning in the context of this claim.

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[177] Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, pp. 29-37.

[178] Submissions on Behalf of the Government of Canada, August 22, 1996, pp. 3, 28-33.

Fiduciary Duty prior to the McKenna-McBride Hearings

In our report into the 'Namgis claim, we were of the view that, prior to the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to prepare the Band for the McKenna-McBride process by providing basic information and advice. A failure to do so was a breach of that obligation. We were mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. Therefore, if all alternative lands were alienated, the Band probably would not have fared any better in the process even if Agent Halliday had provided basic information and advice.

Bearing in mind the constraints on the McKenna-McBride Commission with respect to alienated lands, we proposed the following guidelines for determining whether the Band had a valid specific claim against Canada as a result of the Indian Agent's conduct prior to the McKenna-McBride hearings. In our view, the same approach applies in this case. Therefore, Canada breached a fiduciary duty to the Band prior to the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

Applying the same guidelines to this claim, we are satisfied that Agent Halliday failed to prepare the Mamaleleqala for the McKenna-McBride process. As we discussed in our 'Namgis report, the Commission held a general meeting with "the principal Tribes of the Kwawkewlth Nation" on Monday, June 1, 1914 (the day before the Commission held its separate meeting with the Mamaleleqala). At that meeting, several Chiefs expressed concern that they were not adequately prepared for the McKenna-McBride hearings. Although plans of their reserve lands were available for distribution before the Commissioners' visit, they did not actually receive these plans until the Commissioners arrived in the community. The Chairman of the Commission blamed Agent Halliday for the mix-up, stating:

> I might say that in every place that we have so far visited, the Chiefs of all the different Reserves have plans . . . showing on them the land that has been reserved for them – For some reason, however, these plans had not been distributed, and when the Commission arrived they discovered that the Chiefs had never received any plans, and they immediately took stops [sic] to have them distributed so that the Chiefs could see what lands they had – Apparently they were lying in the office of the Indian Agent who failed to distribute them to you as ought to have been done.[179]

Chief Willie Harris of the Nimkish Tribe discussed the difficulties caused by the chiefs' late receipt of the plans:

> You ought to have seen us in the general meeting this morning before you came – We had the plans, and one would say (Referring to the Indian Reserves on the plans) "where is it" "whose is it" and we cannot tell you. We want to show you how helpless we are, and we think the Indian Agent should have told us about all these things.[180]

Johnnie Scow of the Kwicksitaneau Band held similar views:

> Another thing we want to tell you about is that you have seen how confused we are over those papers – We cannot help it because we don't know much. It was given to us only a short time ago, and we cannot make head nor tail of it. They can't get to learn those plans in three days – they don't know what they are, why they are or where they are.[181]

Chief Negai "of the Mahwalillikullah" did not, himself, comment on the havoc wreaked by Agent Halliday's failure to distribute the plans. He was, however, in attendance at the general

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[179] Chairman, Royal Commission, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 86, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

[180] Willie Harris, Chief of the Nimkish Tribe, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 89, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

[181] Johnnie Scow, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, p. 92, in Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, Tab 2.

meeting.[182] Given the general nature of the comments made by the Chiefs and the Chairman of the Commission, it is safe to say that the Mamaleleqala were in the same predicament as the other Kwawkewlth bands.

In addition to the plans of the Band's reserve lands, there is evidence that Agent Halliday failed to disclose information in his possession regarding the various timber limits in the area. During the Commission's meeting with the Mamaleleqala on June 2, 1914, Commissioner Shaw stated that the Commissioners had a map showing every timber limit that was taken up. The map indicated that part of the land sought by the Band on Swanson Island was already covered by one of these timber limits. To this the Band representative replied: "We think that Mr. Halliday ought to have given us this information – this is the first time we ever heard of it being taken up by whitemen for the timber. The charts were only given to us the other day, and we didn't know anything about it."[183] Commissioner Shaw clarified that the plans given to the Band "the other day" only showed the land recognized by the government as Indian reserves. The maps showing the timber limits were bought by Agent Halliday himself and did not belong to the Department. He continued: "[Mr. Halliday] has asked me to say that if at any time the Indians want to know anything about the land, if they will come into his office, he will be very glad and willing to give them all information regarding the different lands."[184]

As the Band points out in its written submissions, Agent Halliday's comment must be taken in context and "balanced against the Mamaleleqala perspective on Agent Halliday's open door policy."[185] The Band representative explained to Commissioner Shaw: "We can't go to Mr. Halliday because we know what he is to us. The experience we have had with him in matters of that kind; he

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182 Chief Negai, Mahwalillikullah or Village Island, Transcript of Evidence, Royal Commission on Indian Affairs, June 1, 1914, pp. 89-90, in Submissions of the Mamaleleqala Qwe'Qwa'Sot Enox'Band: McKenna-McBride Applications Inquiry, Tab 2.

183 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

184 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

185 Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 30.

just turns us out."[186] We heard similar evidence at the Commission's community session on May 23, 1996:

> MS. GROS-LOUIS AHENAKEW: . . . has anybody told you or do you know if the people, the Mamaleleqala people, would have then felt comfortable asking the help of the Indian agent for such things as preparation of the applications at the McKenna-McBride in terms of determining – if they wanted help from Agent Halliday, determining which lands were available, which land they wanted, do you think there was enough cooperation between the two people that they could have done that?
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> MS. ALFRED: (Through Interpreter) No, the Chiefs and the people of the Mamaleleqala were scared of him because he would not cooperate with them. Anything that they asked him, he made it very difficult for the Native people of Village Island.[187]

It is also useful to remember that, in the early 1900s, Agent Halliday was deeply involved in a campaign to stamp out the potlatch, a campaign that further alienated him from the bands under his charge. Thus, Agent Halliday's declared willingness to provide information to the Mamaleleqala was less than helpful, given his strained relationship with the Band at the time. Considering the importance of the McKenna-McBride process and the fact that it was, in effect, the last realistic opportunity the Band would have for several decades to acquire additional reserve lands, Agent Halliday should have been proactive in taking reasonable steps to ensure that the Band received information about the timber limits and he should have taken these steps well in advance of the McKenna-McBride hearings.[188]

We are also satisfied that additional lands were reasonably required by the Band. As we noted in the 'Namgis inquiry, the reserves of the Kwawkewlth Agency, as described in the Official Schedule of 1913, numbered 91, with an aggregate area of 16,600.99 acres. This gave a per capita

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186 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

187 ICC Transcript, May 23, 1996, p. 11 (Ethel Alfred).

188 In oral submissions, Canada took the position that the McKenna-McBride Commission was not the last opportunity for the Band to obtain an adequate land and resource base since there is currently a comprehensive treaty negotiation process under way: ICC Transcript, August 29, 1996, p. 96. In our view, this is beside the point since we are not concerned with whether the Band has some recourse available through the British Columbia treaty process; rather, the issue before us is whether the Crown breached its fiduciary obligations in relation to the McKenna-McBride hearings, which took place in 1914.

average of 14.03 acres for the Agency population of 1183. In contrast, the Mamaleleqala had a per capita average of 6.75 acres.[189] Even after the Band received 150 additional acres on Compton Island, it still had a per capita average of only 8.52 acres.[190] Thus, given the disparity between the Band's per capita acreage and that of the Agency as a whole, it seems reasonable to conclude that the Band was left with insufficient lands.

Finally, it appears that there were unalienated lands available for which the Band could have applied. During the course of the Inquiry, the Band submitted a map showing numerous areas of land that were available at the time of the McKenna-McBride hearings.[191] Counsel for Canada indicated that they were "in substantial agreement with the information as reproduced on the map."[192] Therefore, we find that there is sufficient evidence to establish that Canada breached its fiduciary obligations towards the Band as a result of Agent Halliday's conduct *prior to* the McKenna-McBride hearings. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter that could provide a valid basis for negotiations under the Specific Claims Policy.

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189 Royal Commission on Indian Affairs for the Province of British Columbia, *Final Report* (Victoria, 1916) (ICC Documents, p. 176). In fact, 6.75 acres may be an overly generous estimate of the Band's per capita acreage. At the McKenna-McBride hearings, Agent Halliday told the Commissioners that Meetup Reserve No. 2 and two of the Band's other reserves were claimed by the Kwickswotaineuks: Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 129 (ICC Documents, p. 127). If the acreage of these three reserves is subtracted from the Band's total reserve acreage, its average per capita acreage was even less.

190 When the McKenna-McBride Commission examined Agent Halliday on June 24, 1914, he reported that the population of the "Mahmahlilikullahs" was 85: see Precis of Meeting with Agent Halliday, Royal Commission on Indian Affairs, June 24, 1914 (ICC Documents, p. 148).

191 See ICC Exhibit 4.

192 Sarah Kelleher, Counsel, Department of Justice, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, Indian Specific Claims Commission, May 8, 1996 (ICC file 2109-21-1).

Fiduciary Duty during the McKenna-McBride Hearings

In our report into the 'Namgis claim, we found that, during the McKenna-McBride hearings, Agent Halliday had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. A failure to do so was a breach of that obligation. As before, however, we were mindful that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. We therefore outlined the following guidelines for determining whether or not the Band had a valid specific claim against Canada as a result of the Indian Agent's conduct during the McKenna-McBride hearings. In our view, Canada breached a fiduciary duty to the Band during the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that provided by the Indian Agent if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut this presumption on a balance of probabilities.

The difficulty in this claim relates to the second requirement outlined above (i.e., "the relevant lands were unalienated"). The Band states in its written submissions that, of the eight effective applications made by the Band, "seven were turned down on the basis that the land was unavailable."[193] The one remaining "effective" application was the Band's application for Compton Island, which Agent Halliday recommended, and the Commission allowed, in its entirety. Therefore, the Band has not established that Canada breached its fiduciary obligations by virtue of Agent Halliday's conduct *during* the McKenna-McBride hearings, since the lands in question were not available in any event.

Fiduciary Duty after the McKenna-McBride Hearings

When the McKenna-McBride Commission returned to Agent Halliday after the hearings and asked if he wished to reconsider his opinion with regard to any of the applications he had not endorsed, we

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[193] Submissions of the Mamaleleqala Qwe'Qwa'Sot'Enox Band: McKenna-McBride Applications Inquiry, p. 25.

found in the 'Namgis inquiry that Agent Halliday had, at the very least, the same fiduciary obligation as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

In the circumstances of this claim, we are left with the same difficulty as that discussed above if Agent Halliday was restricted to the Band's original applications when making his revised recommendations; namely, a lack of available lands. None of the relevant lands were unalienated with one, possibly two, exceptions: (1) Compton Island, which Agent Halliday recommended; and (2) the undefined lands in the Band's general application for a per capita acreage allotment (200 acres for each adult male of the tribe). Although, as argued by Mr Donovan in his oral submissions,[194] it may have been possible for Agent Halliday to carve additional recommendations out of the Band's general application, it appears that the Commission was reluctant to entertain such applications. Commissioner Shaw cautioned at the McKenna-McBride hearings on June 2, 1914: "We have not suggested to these Indians that each man is going to get 200 acres – If we do make that recommendation it will have to be taken from outside of lands already taken up by whitemen."[195] Therefore, it is unlikely that the Commission would have been willing or able to allow any of the original applications of the Band (except for Compton Island), even if Agent Halliday had changed his mind and endorsed the applications in full. In addition, it would not have been a reasonable and well-informed recommendation for Agent Halliday to suggest alienated lands for reserve status, given the Commission's position on the issue of alienated lands.

There was considerable debate during oral submissions about whether Agent Halliday was, in fact, restricted to the Band's original applications when making his revised recommendations, or whether he could submit new applications.[196] We found it unnecessary to decide this point in the 'Namgis inquiry and, for the same reason, we find it unnecessary to do so here. Even if Agent Halliday could only make revised recommendations in relation to the Band's original applications,

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194 ICC Transcript, August 29, 1996, p. 154.

195 Transcript of Evidence, Royal Commission on Indian Affairs, June 2, 1914, p. 134 (ICC Documents, p. 132).

196 ICC Transcript, August 29, 1996, pp. 103-10, 131-34, 154-55.

this simply returns us full circle to his obligation to prepare the Band for the McKenna-McBride process to ensure that the Band was in a position to apply for lands which were available for reserve purposes. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

ISSUE 3 NEGLIGENCE

In the alternative, does Canada owe a duty of care to the Band and, if so, was there a breach of this duty of care?

As an alternative argument, the Band submits that the facts set out in support of its argument for breach of fiduciary obligation also establish a claim in negligence. Given our findings and conclusions with respect to fiduciary obligation above, we do not consider it necessary to address whether the Band has a valid claim based on negligence.

ISSUE 4 CANADA'S SPECIFIC CLAIMS POLICY

Does Canada owe an outstanding lawful obligation to the Band in accordance with the Specific Claims Policy?

In several of our past reports, we have taken the position that the four enumerated examples of "lawful obligation" in *Outstanding Business* are not intended to be exhaustive. More specifically, we have found that Canada's fiduciary obligations are "lawful obligations" and that a claim based on a breach of fiduciary duty or obligation falls within the scope of the Policy.[197] For ease of reference, we repeat the relevant passage from *Outstanding Business* here:

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[197] See, for example, Indian Claims Commission, *Homalco Indian Band Report on Aupe Indian Reserves No. 6 & 6A Inquiry* (December 1995), 7; Indian Claims Commission, *'Namgis First Nation Report on Cormorant Island Inquiry* (March 1996), 96-97, 100; and Indian Claims Commission, *'Namgis First Nation Report on McKenna-McBride Applications Inquiry* (February 1997), 92-94.

1) Lawful Obligation

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

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

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

2) Beyond Lawful Obligation

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

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[198]

In this claim, Canada argues that the words "lawful obligation" are not, in and of themselves, the scope of the Specific Claims Policy. In other words, the fact that Canada may have a lawful obligation is not enough to bring the claim within the scope of the Policy. Canada explains as follows in its written submissions:

> For example, Canada may be found to have a "lawful obligation" in the case of a claim based upon aboriginal title, yet it is clear that this claim does not fall within the policy. The policy is also intended to deal with claims of bands, rather than claims of individuals. Yet in either case, Canada may have a "lawful obligation".
>
> This analysis does not distinguish between claims arising out of a motor vehicle accident in 1965 in which the Crown is at fault, and an historical claim arising from the "administration of land and other Indian assets and to the fulfilment of Indian treaties". Finally, the specific claims policy is not limited to dealing with matters for

198 *Outstanding Business*, 20.

> which there is a "lawful obligation" inasmuch as the policy expressly deals with two specific situations expressed to be "beyond lawful obligations".
>
> Clearly, there must be more to finding a claim to be within the scope of the policy than a finding that a "lawful obligation" is owed by the Crown.[199]

Canada appears to find this something "more" in certain passages extracted from the Policy which refer to the term "specific claims" as "those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties." Thus, as we understand Canada's argument, a claim will fall within the Policy if it discloses an outstanding lawful obligation (or beyond lawful obligation) *and* it relates to the "administration of land and other Indian assets and to the fulfillment of treaties."

In our view, the type of claim at issue in this inquiry *is* contemplated under the Specific Claims Policy. The opening sentence on page 20 of *Outstanding Business* clearly states that the government "will recognize claims by Indian bands which disclose an outstanding 'lawful obligation', i.e., an obligation derived from the law on the part of the federal government." These words do not, on their face, indicate that the claim must *also* "relate to the administration of land and other Indian assets and to the fulfillment of treaties." Even if there is ambiguity in the Policy as to the matters falling within its scope, in our opinion the ambiguity should be resolved in favour of the claimants, given that the underlying purpose of the Policy, as we understand it, is remedial in nature and is intended to settle legitimate, long-standing grievances without resort to the courts.

We are not deterred by Canada's argument that claims based on aboriginal title do not fall within the Policy. In our view, this argument actually supports a broad interpretation of the Policy rather than detracting from it. Claims based on aboriginal title are explicitly excluded from the Policy on page 30 of *Outstanding Business*. If the scope of the Policy was meant to be as restrictive as Canada suggests, there would have been no need to exclude explicitly such claims from the Policy. Similarly, the Policy clearly spells out that claims must be brought by a band or a group of bands, thus excluding claims by individuals.[200] In other words, as we see it, it is not so much that a "lawful

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199 Submissions on Behalf of the Government of Canada, August 22, 1996, p. 13.

200 See, for example, Guidelines 1 and 2 on p. 30 of *Outstanding Business*:

> Guidelines for the submission and assessment of specific claims may be summarized as follows:

obligation" is insufficient to bring a claim within the scope of the Policy, but that Canada has explicitly carved specific exceptions out of an otherwise broad policy.

We also have difficulty with Canada's argument that our analysis in past reports does not distinguish between a claim arising out of a motor vehicle accident in recent years and a historical claim arising from the "administration of land and other Indian assets and to the fulfillment of treaties." As Mr Donovan pointed out in his oral submissions, Canada's approach does not make such a distinction either, if the motor vehicle in question is considered an Indian asset. We can do no better than to repeat his comments:

> If the Crown by breach of lawful obligation, by negligence or fiduciary breach, destroyed band assets or destroyed, in that case a car – I mean, in that case maybe it would be within the policy as Mr. Becker outlines it because it would be an asset.
>
> So ironically the car accident in 1951, according to Mr. Becker's description of the policy, would be within the policy, whereas a breach of fiduciary obligation that fundamentally undercut the Band's reserve base and prevented it from getting an adequate reserve base on which to live and prosper, that would be outside.[201]

Finally, the fact that the Policy deals with two specific situations expressed to be "beyond lawful obligation" is of no consequence. It is not our position that *only* lawful obligations fall within the scope of the Policy, but that *at least* lawful obligations fall within the scope of the Policy.

Accordingly, we maintain our position that Canada's fiduciary obligations are "lawful obligations" and that a claim alleging a breach of those obligations falls within the scope of the Policy. As we stated in our inquiry into the McKenna-McBride Applications Claim of the 'Namgis First Nation, "a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or

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1) Specific claims shall be submitted by *the claimant band* to the Minister of Indian Affairs and Northern Development.
2) The claimant bringing the claim shall be *the band* suffering the alleged grievance, or *a group of bands*, if all are bringing the same claim. [Emphasis added.]

201 ICC Transcript, August 29, 1996, p. 157 (C. Allan Donovan).

other relief within the contemplation of the Policy."[202] Given our conclusions above that Canada, through its Indian Agents, breached its fiduciary obligations to the Band, we find that this claim falls within the scope of the Policy.

[202] Indian Claims Commission, '*Namgis First Nation Report on McKenna-McBride Applications Inquiry* (February 1997), 94.

PART V

FINDINGS AND RECOMMENDATIONS

FINDINGS

We have been asked to inquire into and report on whether the Government of Canada properly rejected the McKenna-McBride Applications Claim submitted by the Mamaleleqala Qwe'Qwa'Sot Enox'Band. Our findings in relation to the issues raised by the parties in this inquiry are set out below:

Indian Settlement Lands

- Section 56 of the provincial *Land Act* expressly provided that no timber licences were to be granted "in respect of lands forming the site of an Indian settlement or reserve." Although we do not purport to offer any exhaustive definition of the term "Indian settlement," when section 56 was enacted 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, fishing stations, fur-trading posts, clearings, burial grounds, and cultivated fields – regardless of whether or not 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, providing there is evidence of collective use and occupation by the band.

- In assessing whether any of the lands encompassed by the Band's McKenna-McBride applications were Indian settlement lands, it is essential to take into account the distinctive way in which the Mamaleleqala Qwe'Qwa'Sot'Enox used the land and the type of houses they built and used during the early part of this century. Since one traditional house could house a number of families, the existence of even one house provides ample evidence that an Indian settlement existed at that location.

- We agree with the Band that the lands encompassed by the Band's applications for Lull Bay (Application 62), Hoeya Sound (Application 63), Shoal Harbour (Application 64), and Knight's Inlet (Application 71) included Indian settlements. Since the Band did not specifically argue that the four remaining "effective" applications included Indian settlements, we make no findings with respect to those applications.

- It is important to keep in mind that it was only the Band's "Indian settlements" and "reserves" that were protected by section 56 of the *Land Act*. Therefore, it is necessary to consider how much of the lands encompassed by Applications 62, 63, 64, and 71 were Indian settlement lands at the time the leases and licences were granted. Without further evidence, we find that the Band's settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The size

of the Band's settlement lands at Knight's Inlet (Application 71) is a matter that is better left for resolution between the parties through further research and negotiation.

Fiduciary Obligation to Protect Indian Settlement Lands

- Canada, through its Indian Agents, had a fiduciary obligation to protect the Band's settlement lands from unlawful encroachments by objecting to the granting of leases and licences over those lands.

- Agent Halliday and his predecessor, G.W. DeBeck, were, or ought to have been, aware of the locations of the Band's settlement lands. However, no evidence was presented in this inquiry that they ever objected to the granting of leases and licences over those lands. Therefore, Canada, through its Indian Agents, breached its fiduciary obligation to the Band in respect of those leases and licences which (1) covered Indian settlement lands, and (2) were gazetted during the tenure of Agents Halliday and DeBeck (or one of their predecessors in office).

- As stated earlier, without further evidence, the Band's settlement lands at each of Lull Bay (Application 62), Hoeya Sound (Application 63), and Shoal Harbour (Application 64) were, at a minimum, 5 acres. The Band also had settlement lands in the Knight's Inlet area (Application 71), but the precise area has yet to be determined. The *Gazette* notices submitted by the Band in this inquiry appear to cover
  - the Band's settlement lands in Application 62 (Lull Bay);
  - the Band's settlement lands in Application 64 (Shoal Harbour); and
  - some of the Band's settlement lands in Application 71 (Knight's Inlet).
- Therefore, the Band has a valid claim for negotiation for
  - a minimum of 5 acres in the Lull Bay area;
  - a minimum of 2.83 acres in the Shoal Harbour area (5 acres minus the 2.17 acres eventually made into a reserve on the recommendation of the Ditchburn-Clark Commission); and
  - the Band's settlement lands in the Knight's Inlet area which were included in Application 71 and which are covered by the *Gazette* notices submitted by the Band in this inquiry.

- With respect to the Band's settlement lands in Application 63 (a minimum of 5 acres in the Hoeya Sound area) and the Band's remaining settlement lands in Application 71, there is insufficient evidence in this inquiry to establish that a *Gazette* or newspaper notice appeared during the time that an Indian Agent was assigned responsibility for the Indians in those areas.

- Although it was raised as an issue whether Canada, through its Indian Agents, nonetheless owed a fiduciary obligation to the Band if the lands were not "settlement lands" within the meaning of the *Land Act*, this line of argument was not strenuously pursued by the Band. Our conclusion that Canada, through its Indian Agents, had a fiduciary obligation to protect the Band's settlement lands was strongly influenced by the fact that the provincial *Land Act* specifically protected Indian settlements from alienation and provided a mechanism for such

protection. The Indian Agents, therefore, had a defined process within which they could protect the Band's settlement lands. On the submissions before us, we do not see a similar situation with respect to non-settlement lands.

Fiduciary Duty prior to the McKenna-McBride Hearings

- In our view, Canada breached a fiduciary duty to the Band prior to the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) the Indian Agent failed to prepare the Band for the McKenna-McBride process; (2) unalienated lands were available which the Band could have applied for; and (3) the lands were reasonably required by the Band. If these conditions are satisfied, it should be presumed that the Commission would have allotted the lands as additional reserve lands. Although the presumption is rebuttable, the onus should be on Canada to demonstrate on a balance of probabilities that the McKenna-McBride Commission would not have allotted the lands as additional reserve lands if the lands had been requested by the Band.

- In the circumstances of this claim, we are satisfied that Agent Halliday failed to prepare the Band for the McKenna-McBride process. At the McKenna-McBride Commission's general meeting with the principal Tribes of the Kwawkewlth Nation on June 1, 1914, several chiefs expressed concern that they were not adequately prepared for the McKenna-McBride hearings. Although plans of their reserve lands were available for distribution before the Commissioners' visit, they did not actually receive these plans until the Commissioners arrived in the community. The Chairman of the McKenna-McBride Commission noted that the plans were "lying in the office of the Indian Agent who failed to distribute them . . . as ought to have been done." Moreover, there is evidence that Agent Halliday failed to disclose information in his possession regarding the various timber limits in the area.

- We are also satisfied that additional lands were reasonably required by the Band. Compared with a per capita average of 14.03 acres for the Kwawkewlth Agency as a whole, the Mamaleleqala had a per capita average of only 8.52 acres even after receiving 150 additional acres on Compton Island. Given the disparity between the Band's per capita acreage and that of the Agency, it seems reasonable to conclude that the Band was left with insufficient lands.

- Finally, we are satisfied that there were unalienated lands available for which the Band could have applied. Therefore, there is sufficient evidence to establish that Canada breached its fiduciary obligations towards the Band as a result of Agent Halliday's conduct *prior to* the McKenna-McBride hearings. Although it is not clear how much land the Commission would have allotted to the Band in 1914, this is a matter that could provide a valid basis for negotiations under the Specific Claims Policy.

Fiduciary Duty during the McKenna-McBride Hearings

- In our view, Canada breached a fiduciary duty to the Band during the McKenna-McBride hearings if the Band can establish a *prima facie* case that (1) a reasonable person acting in good faith would have provided a different recommendation to the Commission than that

provided by the Indian Agent, if that person had consulted with the Band and made other appropriate investigations; and (2) the relevant lands were unalienated. If these conditions are satisfied, it should be presumed that the Commission would have allotted some or all of the lands encompassed by that different recommendation, providing that the lands were reasonably required by the Band. The onus is on Canada to rebut this presumption on a balance of probabilities.

- The difficulty in this claim relates to the second requirement outlined above. Of the eight "effective" applications made by the Band, seven were rejected because the land was unavailable. The one remaining "effective" application was the Band's application for Compton Island, which Agent Halliday recommended, and the Commission allowed, in its entirety. Therefore, the Band has not established that Canada breached its fiduciary obligations by virtue of Agent Halliday's conduct *during* the McKenna-McBride hearings.

Fiduciary Duty after the McKenna-McBride Hearings

- Agent Halliday had the same fiduciary obligation at this stage of the process as he had during the hearings; that is, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission.

- If Agent Halliday was restricted to the Band's original applications when making his revised recommendations, we are left with the same difficulty as that discussed above in relation to his duty *during* the McKenna-McBride hearings; namely, a lack of available lands.

- It is unnecessary for us to decide whether Agent Halliday was restricted to the Band's original applications when making his revised recommendations, for any such restriction simply returns us full circle to his obligation to prepare the Band for the process. If the Band had been properly prepared for the process and had asked for more available lands, Agent Halliday would have had a larger land base from which to make his revised recommendations.

- Canada's breaches of fiduciary duty did result in damage to the Band. If Canada had taken proper steps to protect the Band's settlement lands and taken reasonable steps to provide the Band with basic information and advice during the McKenna-McBride Commission process, we are confident that the Band would have received additional reserve land.

These breaches resulted not only in a loss of additional reserve lands, but also in a loss of resources and economic opportunities.

Negligence

- Given our findings and conclusions with respect to fiduciary obligation above, we do not consider it necessary to address whether the Band has a valid claim based on negligence.

Scope of the Specific Claims Policy

- The four enumerated examples of "lawful obligation" in *Outstanding Business* are not intended to be exhaustive. More specifically, Canada's fiduciary obligations are "lawful obligations" and a claim based on a breach of fiduciary duty or obligation falls within the scope of the Policy.

- Given our conclusions that Canada, through its Indian Agents, breached its fiduciary obligations to the Band, this claim falls within the scope of the Policy.

RECOMMENDATIONS

We therefore make the following recommendations to the parties:

RECOMMENDATION 1

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.**

RECOMMENDATION 2

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.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde	**Roger J. Augustine**	**Carole T. Corcoran**
Commission Co-Chair	**Commissioner**	**Commissioner**

Dated this 27th day of March, 1997

APPENDIX A

MAMALELEQALA QWE'QWA'SOT'ENOX BAND MCKENNA-MCBRIDE APPLICATIONS CLAIM INQUIRY

1	Planning conference	December 13, 1995
2	View and community session	May 22-23, 1996

The Commission viewed Village Island on May 22. On May 23 the Commission heard from the following witnesses at the U'mista Cultural Centre in Alert Bay, British Columbia: Ethel Alfred, Vera Neuman, Chief Robert Sewid, David Mountain, Chief Harry Mountain, and Chief Bobby Joseph.

3	Legal argument	August 29, 1996
4	Content of the formal record	

- documentary record
- exhibits (18 documents)
- transcripts (2 volumes, including transcript of legal argument)

This report of the Indian Claims Commission and letters of its transmittal to the parties complete the record for this Inquiry.

APPENDIX B

RELEVANT PROVISIONS OF THE BRITISH COLUMBIA *LAND ACT*

When notices appeared in the *British Columbia Gazette* in 1905 for timber and pulp leases in the Shoal Harbour and Knight's Inlet areas, sections 41, 44, and 45 of the provincial *Land Act* provided as follows:

> **41.** (1.) Leases (containing such covenants and conditions as may be thought advisable) of Crown lands may be granted by the Chief Commissioner of Lands and Works for the following purposes:
>
> (*a.*) For the purposes of cutting hay thereon, for a term of not exceeding ten years:
> (*b.*) For any purpose whatsoever, except cutting hay as aforesaid, for a term not exceeding twenty-one years.
>
> (2.) Any person desirous of procuring a lease for any of the purposes referred to above, shall before entering into possession of the particular part of said lands he or they may wish to acquire, place at one angle or corner of the land to be applied for a stake or post at least four inches square, and standing not less than four feet above the surface of the ground, and upon such initial post he shall inscribe his name, and the angle represented thereby, thus: "A.B.'s N.E. corner" (meaning north-east corner), or as the case may be, and shall cause a written or printed notice of his intention to apply for such lease to be posted on some conspicuous part of the land applied for by him, and on the Government Office, if any, in the district, for thirty clear days. He shall also publish a notice of his intention to apply for such lease thirty days in the British Columbia Gazette, and in some newspaper published and circulating in the district where such land is situate, or, in the absence of such newspaper, in the one nearest thereto.
>
> (3.) After the expiration of the thirty days' notice, and within two months from the date of its first publication in the British Columbia Gazette, he shall make application in writing to the Chief Commissioner of Lands and Works for a lease over such land. Such application shall be in duplicate, and shall be illustrated by plans and diagrams showing approximately the position thereof and shall give the best practicable written description of the plot of land over which the privilege is sought. The Chief Commissioner of Lands and Works may, if there appears to be no valid objection, give notice to such applicant that a lease will issue as desired, provided the applicant has the land surveyed in a legal manner within six months from the date of such notification: . . .[1]

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[1] *Land Act*, RSBC 1897, c. 113, s. 41, as am. SBC 1899, c. 38, s. 6, SBC 1901, c. 30, s. 6, SBC 1903, c. 15, s. 2.

44. Any person desirous of objecting to the granting of any lease under this Act shall give his written reasons therefor, addressed to the Commissioner of the District within which the lands affected are situate before the day fixed by the notice in the British Columbia Gazette for the application to the Commissioner for such lease, or within such further or other time as the Commissioner may appoint, and the Commissioner shall, as soon as possible, forward the same, with his report thereon, to the Chief Commissioner of Lands and Works.[2]

45. In the event of any objections being entered as provided for above, the Chief Commissioner of Lands and Works shall have power to hear, settle, and determine the rights of the adverse claimants, and to make such order in the premises as he may deem just.[3]

When a *Gazette* notice appeared in 1907 for a special timber licence in the Lull Bay area, sections 50-52 of the provincial *Land Act* provided as follows:

50. The Chief Commissioner of Lands and Works may grant licences, to be called special licences, to cut timber on Crown lands . . .[4]

51. Any person desirous of obtaining such special licence shall comply with the following provisions:–

(*a.*) He shall first place at one angle or corner of the limit he wishes to acquire a legal post and upon such post he shall inscribe his name and the angle represented thereby, thus: "A.B.'s N.E. corner," meaning north-east corner (*or* as the case may be), and shall cause a written or printed notice to be posted thereon giving a description, in detail, of the length and direction of the boundary lines of the claim and date of location, and of his intention to apply for permission to obtain the special licence. Such notice shall be in the following form:–

"I, *A.B.*, intend to apply for a special licence to cut timber upon acres of land bounded as follows:–Commencing at this post; thence north chains; thence east chains; thence south chains; thence west chains (*or* as the case may be).

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2 *Land Act*, RSBC 1897, c. 113, s. 44.

3 *Land Act*, RSBC 1897, c. 113, s. 45.

4 *Land Act*, RSBC 1897, c. 113, s. 50, as am. SBC 1903-4, c. 30, s. 5.

"Name (*in full*).

"Agent for (*name in full*).

"Date ."

Land may be staked or located by an agent under this section. After the land is so staked and marked the applicant shall, within thirty days of the location thereof, if located within ten miles of the office of the Commissioner, post a notice in writing, in the office of the Commissioner for the district in which the land is situate, of his intention to apply for such licence. One additional day shall be allowed for posting such notice for every additional ten miles, or fraction thereof. Such notice shall be in the Form No. 13 of the Schedule hereto, and shall describe as accurately as possible the land over which he seeks to obtain such licence, especially with reference to the nearest known point, or to some creek, river, stream or other water, and shall state the name of the land district within which the said land is situate, the boundaries and extent of such land, the date of location, and the name, residence and occupation of the applicant. The applicant shall also make a declaration, in duplicate, in the Form No. 12 of the Schedule hereto attached, and deposit the same with the Commissioner at the time of posting the notice hereinbefore referred to. Within thirty days after the staking of the said land, or within such further period as the Commissioner may, under special circumstances, determine, the applicant shall commence the publication of the notices in said Form No. 13, at his own expense, for the period of one month, in the British Columbia Gazette and in a local newspaper published and circulating in the district in which the land is situated, or in the absence of such local newspaper in the one nearest thereto. The applicant shall, within two months from the date of the first publication in the British Columbia Gazette, make application, in duplicate, to the Commissioner for such special licence, which application shall be made upon the printed form supplied, and shall conform to all the requirements of said form, and the applicant shall also file a statutory declaration, in duplicate, of the publication of the notice, and shall deposit with the Commissioner the licence fee provided by section 53 of this Act. The Commissioner shall forward one copy of the application and declarations, together with his report thereon, to the Lands and Works Department, Victoria.

(*b.*) The Commissioner for each Land District shall keep a register of all applications filed under the provisions of this section. Such register shall be indexed as to names of applicants and localities, and every such application shall be numbered and such number shall be registered. Such register shall be open for search by the public during office hours, and a fee of twenty-five cents shall be charged for such search.

(*c.*) The applicant shall, within two months from the date of the first publication in the British Columbia Gazette, deposit with the Commissioner the licence fee provided by section 53 of this Act, and also file a statutory declaration, in duplicate, that he has published the notices required under this section. Such

> deposit may be held and dealt with by the Commissioner as hereinafter provided, provided there is no objection filed against the said application; and if any objection has been filed, provided the same is settled as hereinafter provided. The Commissioner shall forthwith forward one copy of the application and declaration as to publication of notices and deposit of licence fee, together with his report thereon, to the Lands and Works Office at Victoria. All deposits of licence fees under this section shall be made by cheque, which shall be certified and payable at par at Victoria.[5]

52. The Chief Commissioner shall take into consideration any objections, protests, or adverse claims that may be lodged with him, and shall decide whether such applicant is entitled to the first right to obtain such licence. In case of any dispute as to the staking and location of the land under the provision of section 51, the right to completion of the application shall be recognised according to priority of such location, subject to the applicant having complied with the terms and conditions relating to application.[6]

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[5] *Land Act*, RSBC 1897, c. 113, s. 51, as am. SBC 1903-4, c. 30, s. 6, SBC 1906, c. 24, s. 11, SBC 1907, c. 25, s. 15.

[6] *Land Act*, RSBC 1897, c. 113, s. 52, as am. SBC 1903-4, c. 30, s. 7, SBC 1907, c. 25, s. 16.