

INDIAN CLAIMS COMMISSION PROCEEDINGS



(1995) 3 ICCP

REPORTS

Athabasca Denesuline Inquiry
Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations

Lax Kw'alaams Indian Band Inquiry
Claim of the the Lax Kw'alaams Indian Band

Young Chipeewayan Inquiry
Claim Regarding Stoney Knoll Indian Reserve No. 107

Micmacs of Gesgapegiag Inquiry
Claim to Horse Island

Chippewas of the Thames Inquiry
Muncey Land Claim

Responses

Responses of the Minister of Indian Affairs and Northern Development to the: Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range) Inquiry, Young Chippewayan Inquiry, Micmacs of the Gesgapegiag Inquiry, and Chippewas of the Thames Inquiry

INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION



[1995] 3 ICCP

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Daniel J. Bellegarde
P.E. James Prentice, QC

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FROM THE CO-CHAIRS

This is the third volume of the *Indian Claims Commission Proceedings* to be published and we are pleased to present it on behalf of the Commissioners and staff of the Indian Claims Commission. This volume includes five reports of the Commission. Three are reports of full inquiries. The first is the inquiry into the claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations of northern Saskatchewan (collectively known as the Athabasca Denesųłin ) regarding their rights north of the 60th parallel. This report was released in December 1993.

The second report, released in June 1994, is on the inquiry undertaken at the request of the Lax Kw'alaams Indian Band, which related to the compensation criteria in Canada's Specific Claims Policy and whether Canada was justified in demanding an absolute surrender as a condition to settling the claim.

The third report, released in December 1994, is on the inquiry into the rejection of the claim of the people called the Young Chipeewayan Band regarding Stoney Knoll Indian Reserve No. 107.

The final two reports of this volume of the *Proceedings* are on inquiries into the claims of the Micmacs of Gesgapegiag to "Horse Island" in the Cascapedia River, Quebec, and of the Chippewas of the Thames to the "Muncey" land in southern Ontario. Both these claims pre-date Confederation by many years. In both these cases, the usefulness of the Commission's planning conferences in promoting discussion and clearing up misunderstandings was demonstrated, and in neither case were full, formal inquiries required. The Commission was able to release the reports of its involvement in these two claims in December 1994. We also add here a preamble to the Chippewas of the Thames Report detailing the final settlement of the Muncey claim.

In the section Responses, we are pleased to be able to reproduce the letter dated March 3, 1995, from Ronald A. Irwin, Minister of Indian Affairs and Northern Development, in response to the Commission's report on its inquiries into the Primrose Lake Air Weapons Range claims of the Cold Lake First Nation and the Canoe Lake Cree Nation. That report was released in August 1993 and published in the first volume of the *Proceedings* in 1994. In its response the Government of Canada agreed to enter into negotiations for compensation with the two First Nations. We are encouraged that, although the government does not recognize a lawful obligation, it does accept a moral responsibility, and that some long-overdue justice may come to these people.

Also included are a letter from the Minister in response to the Commission's report on the Young Chipeewayan Inquiry and one responding to the reports on the claims of the Micmacs of Gesgapegiag and the Chippewas of the Thames.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

AFN	Assembly of First Nations
AIAI	Association of Iroquois and Allied Indians
ANQ	Archives nationales du Québec
AO	Archives of Ontario
BCJ	British Columbia Judgments
BCCA	British Columbia Court of Appeal
BCSC	British Columbia Supreme Court
CA	Court of Appeal
Can. Bar Rev.	Canadian Bar Review
Can. J. Law & Jur.	Canadian Journal of Law and Jurisprudence
CBA	Canadian Bar Association
CCC	Canadian Criminal Cases
CNLC	Canadian Native Law Cases
CNLR	Canadian Native Law Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
FCA	Federal Court Appeal Division
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
ICO	Indian Commission of Ontario
MNR	Ministry of Natural Resources (Ontario)
NA	National Archives of Canada
ONC	Office of Native Claims
OR	Ontario Reports
RSC	Revised Statutes of Canada

SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
TARR	Treaty and Aboriginal Rights Research Centre
UOI	Union of Ontario Indians
WWR	Western Weekly Reports

REPORTS



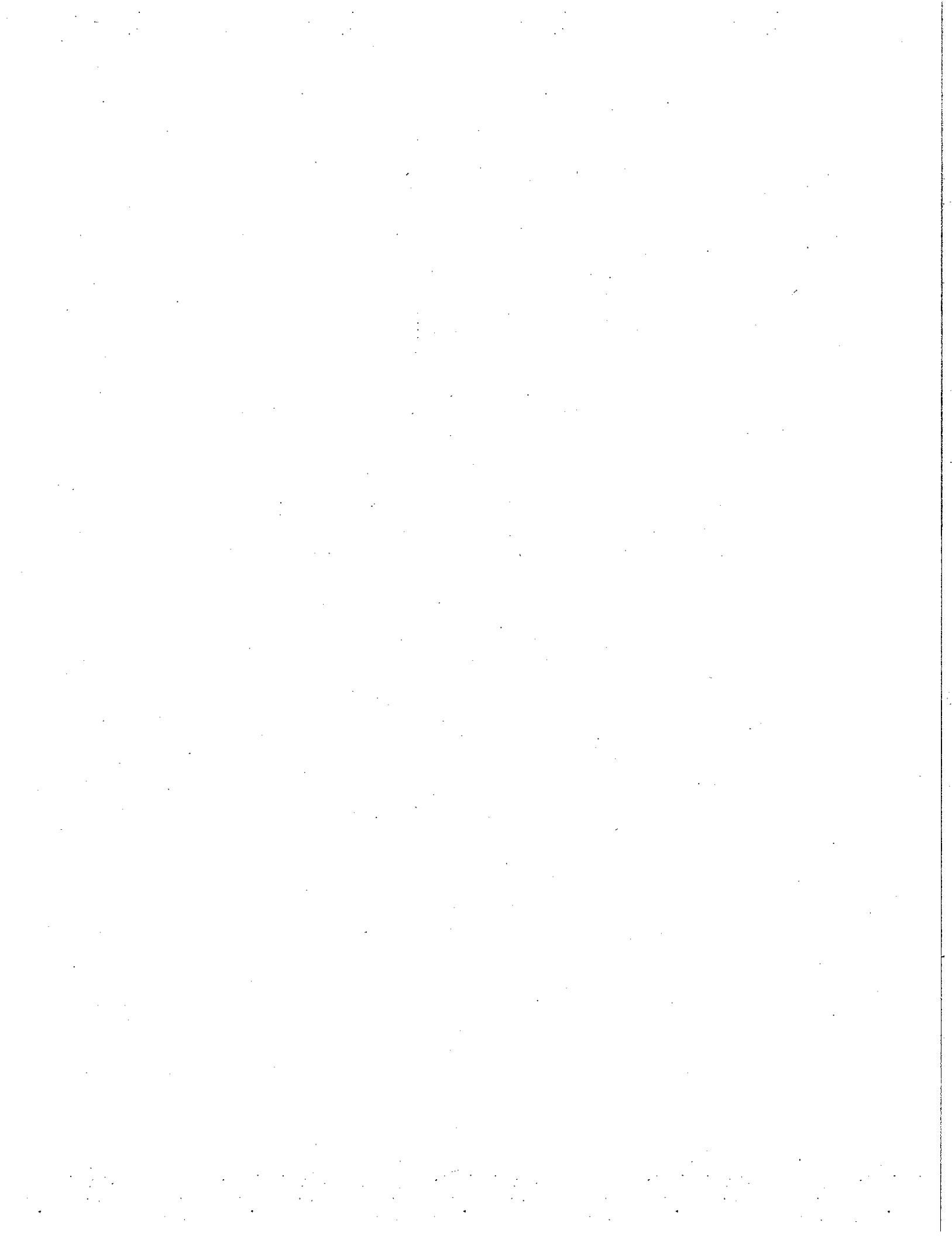
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INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINE INQUIRY

**Into the Claim of the Fond du Lac, Black Lake, and
Hatchet Lake First Nations**

PANEL

**Chief Commissioner Harry S. LaForme
Commissioner Carole Corcoran
Commissioner Carol Dutchshen**

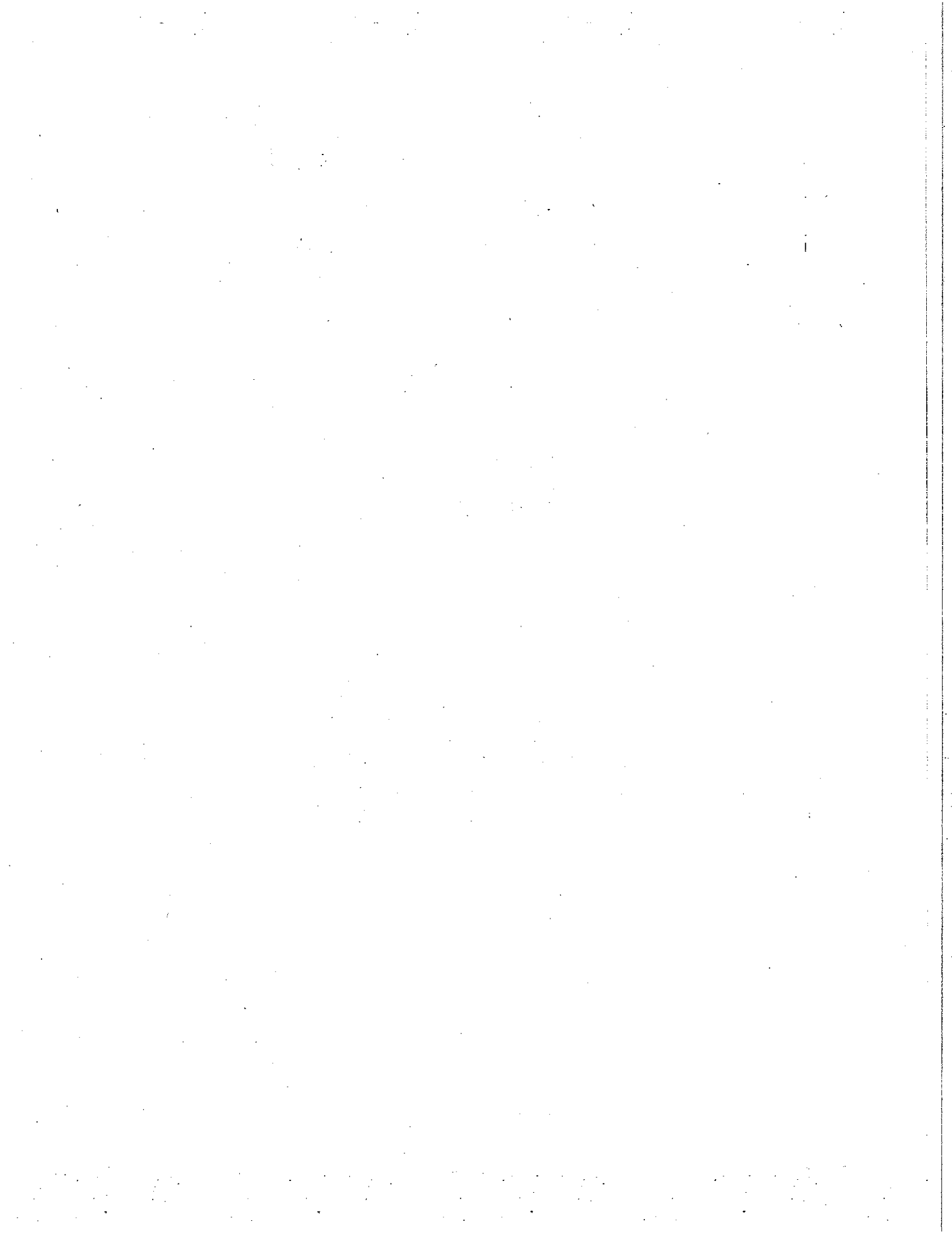
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Robert Winogron / François Daigle**

**To the Indian Claims Commission
Robert F. Reid, QC / William Henderson
Kim Fullerton / Ron S. Maurice**

DECEMBER 21, 1993



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SUMMARY

INTRODUCTION

On January 25, 1993, the Indian Claims Commission undertook to conduct an inquiry into the specific claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations, all located in northern Saskatchewan. The claimant First Nations are collectively referred to as the Athabasca Denesųłiné (which is pronounced as Den-ā-sooth-leh-nā in their native language of Chipewyan), and throughout the report the claimants are referred to as the Denesųłiné.

The claim of the Denesųłiné arises out of the Government of Canada's denial that the Denesųłiné have treaty rights north of the 60th parallel. In June 1989 and June 1992 the Government of Canada, as represented by the Department of Indian Affairs, took the position that the Denesųłiné surrendered all their rights and interests in lands north of the 60th parallel when they signed adhesions to Treaties 8 and 10 in 1899 and 1907, respectively. The Denesųłiné, on the other hand, maintain they continue to have treaty rights to hunt, fish, and trap throughout all their traditional territories, which includes lands in the Northwest Territories, above the 60th parallel.

This Commission was created in August 1991 to assist the First Nations and Canada in the negotiation and fair resolution of specific claims. One aspect of our mandate as a commission of inquiry is to inquire into specific claims that have been rejected by Canada on the basis that they are not valid claims in accordance with the Specific Claims Policy (published by the Department of Indian Affairs in 1982 in a booklet entitled *Outstanding Business*). The task of this Commission is to make a thorough investigation into such rejected claims and report our findings and recommendations to the claimant First Nation and the Government of Canada. When considering if a claim is valid, the Commission is to have regard to the Specific Claims Policy and to ascertain whether the claim discloses an "outstanding lawful obligation" on the part of the federal government. As this Commission is not a court of law, the inquiry process developed by our Commissioners seeks to ensure that our mandate is not frustrated by the application of technical rules normally applicable in a court. *Outstanding Business*

directs that all relevant historical evidence, including evidence which might not be admissible in a court of law, must be taken into account in the assessment of claims. In this inquiry we have adopted this approach.

ISSUES BEFORE THE COMMISSION

The central question which this Commission has been asked to inquire into and report on is whether the Government of Canada owes an outstanding lawful obligation to the Denesułiné. The claimants assert that Canada's blanket denial of the existence of treaty rights outside the boundaries described in Treaties 8 and 10 in lands north of the 60th parallel constitutes a non-fulfilment of the terms of these treaties. The specific issues before this Commission were framed by the parties as follows:

- 1 Does the geographical scope of Treaties 8 and 10 extend north of the 60th parallel or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?
- 2 In the alternative, do the claimants have a treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of Treaty 8 and paragraph 8 of Treaty 10?
- 3 Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize that:
 - a) the geographical scope of the treaties extends north of the 60th parallel; or that
 - b) the claimants have treaty harvesting rights north of the 60th parallel?

In the interests of expediting the inquiry process, counsel for the parties agreed that the Denesułiné had used and occupied lands north of the 60th parallel since time immemorial and that they continue to do so today. It was also agreed that the question of whether the Denesułiné have unextinguished aboriginal title to lands north of the 60th parallel was beyond the scope of this inquiry.

THE COMMISSION'S INQUIRY INTO THE CLAIM

Our investigation into this claim involved the review of over 2300 pages of documents. In addition the Commission had the privilege of visiting Fond du Lac to hear oral testimony from 18 Denesułiné elders who live in the claimant First

Nations of Fond du Lac, Black Lake, and Hatchet Lake. Their testimony was given in their native language of Chipewyan. Although almost 100 years have passed since the signing of the treaties, the Commission was impressed by the detailed accounts provided by the elders.

The Commission was also assisted in its task by counsel for the claimants and the Government of Canada, who provided thorough written and oral submissions on evidence and law. We would like to thank counsel for their able assistance throughout.

THE COMMISSION'S FINDINGS

The DenesŪliné share a special relationship with their traditional territories and identify themselves by reference to those lands. The Chipewyan word "DenesŪliné" means "people of the barrens" and refers to the open tundra, almost all of which is found north of the 60th parallel. The DenesŪliné have also been referred to as the "Ethen-eldeli" or "caribou-eaters," and it is on the barren lands that the caribou are most plentiful. The very identity of the DenesŪliné people is inextricably linked to that portion of their traditional territories north of the 60th parallel known as the "barren lands." The Government of Canada agrees that the DenesŪliné hunted, fished, and trapped on lands north of the 60th parallel since time immemorial and that they continue to do so today.

On July 25 and 27, 1899, predecessors of the Black Lake and Fond du Lac First Nations signed adhesions to Treaty 8 ("adhesion" to a treaty means that a First Nation signed a treaty which had previously been signed by other First Nations). On August 22, 1907, the forefathers of the Hatchet Lake First Nation signed an adhesion to Treaty 10. The written texts of both treaties provide for the extinguishment of aboriginal interests in specified tracts of lands in exchange for certain rights, including the right to hunt, fish, and trap over the lands surrendered.

The Crown's main purpose was to obtain a surrender over specified tracts of lands as described in metes and bounds descriptions in the treaties. In the case of Treaty 8, the Crown wished to accommodate the mining industry, maintain peaceful relations between the Indians and non-Indians, and minimize its expenses and obligations to the Indians. With respect to Treaty 10, the Crown's main purpose was to clear the title over lands situated inside the newly created provinces of Saskatchewan and Alberta.

When the Treaty Commissioners negotiated Treaty 8, the DenesŪliné were extremely apprehensive about signing the treaties. They feared their traditional way of life based upon hunting, fishing, and trapping would be curtailed. After several days of negotiation, the DenesŪliné agreed to sign only when the Treaty

Commissioners assured them that they "would be as free to hunt and fish after the treaty as they would be if they never entered into it." In Treaty 10, the Denesúłiné agreed to sign the treaty only when the Treaty Commissioners promised "they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and . . . that they had the privilege of hunting and fishing as before."

There was no evidence before the Commission that the treaty harvesting rights of the Denesúłiné were ever expressly limited to the geographic area defined by the metes and bounds descriptions in the treaties. The Denesúłiné believed that the treaties protected their rights to hunt, fish, and trap throughout all of their traditional territories, irrespective of the metes and bounds.

After the treaties were signed, they continued to hunt, fish, and trap as they always had. There were periodic enactments of hunting and fishing regulations that curtailed the harvesting activities of the Denesúłiné. However, the Department of Indian Affairs, and other federal departments, promoted and encouraged the claimants' harvesting activities in the NWT. In spite of the curtailment of the Denesúłiné's harvesting activities, the government of Canada, almost without exception, defended their exercise of these rights. In its defence of the exercise of their rights Canada referred to them as traditional rights. Canada held that any interference with their rights "contravenes the treaty."

The Denesúłiné continued to operate under the assumption that they had treaty rights to hunt, fish, and trap north of the 60th parallel until 1989. At that time the Government of Canada advised them, for the first time, that their rights to that portion of their traditional lands were extinguished.

CONCLUSIONS

Based on the evidence before the Commission, we make the following conclusions on the issues.

ISSUE 1: THE GEOGRAPHICAL SCOPE OF TREATIES 8 AND 10

- The evidence does not support the claimants' submission that the boundaries of Treaties 8 and 10 extend beyond the metes and bounds descriptions to include the traditional lands of the Denesúłiné. The traditional territory of the Denesúłiné was not delineated at the time of the signing of the treaties and, for the most part, remains undelineated to this day.

- The DenesŪliné's traditional lands outside the boundaries described in Treaties 8 and 10 were not intended to be "opened for" non-Indian settlement, mining, lumbering, and other such uses at that time. The parties did not intend the boundaries of the treaties to encompass the DenesŪliné traditional lands north of 60° latitude.

ISSUE 2: HARVESTING RIGHTS BEYOND THE BOUNDARIES OF THE TREATIES

The Text of the Treaties

- The language employed in Treaties 8 and 10 is essentially the same. The correct interpretation of the text of the treaties is that the parties intended the right to hunt, fish, and trap to apply to *all* the traditional lands surrendered by the DenesŪliné.

The Relevant Historical Evidence

- Canada's objective was to secure a specific tract of land for settlement and other purposes.
- The objective of the DenesŪliné was to protect their traditional lifestyle.
- The DenesŪliné were extremely apprehensive about entering into treaties for fear that their traditional way of life, including hunting, fishing, and trapping, would be jeopardized.
- To assuage the concerns of the DenesŪliné, oral assurances were given by the Treaty Commissioners that the DenesŪliné would be "as free to hunt and fish after the Treaty as if they had never entered into it."
- There is no cogent evidence that the Treaty Commissioners at any time told the DenesŪliné that their right to hunt, fish, and trap would be restricted to a specific geographic area.
- It is not a reasonable interpretation of the evidence to say that the DenesŪliné knowingly and deliberately gave up all their traditional territory in return for certainty of harvesting rights over a smaller area described by the metes and bounds. Further, this was not where they hunted caribou. It is unreasonable to think that a people known as the "caribou eaters" would have agreed to such an arrangement.
- While the subsequent conduct of the parties is not conclusive, nonetheless it is consistent with our interpretation of the treaties.

ISSUE 3: DOES CANADA HAVE A LAWFUL OBLIGATION?

- It is not necessary in the case of “non-fulfilment of a treaty or agreement” to show a “breach” of a lawful obligation before a claim may be considered for negotiation under the Claims Policy. Rather, the claim must disclose an “outstanding lawful obligation.”
- We find that Canada has treaty obligations in the matter before us. Canada’s lawful obligation must include, at a minimum, the requirement to recognize formally the treaty rights in issue, and to ensure that the rights of the Denesúłiné are fulfilled.
- In addition to disclosing an outstanding lawful obligation, to be eligible for negotiation a claim must show some loss or damage capable of being negotiated under the Policy.
- Currently, the Specific Claims Policy and process are ill-equipped to deal with the Denesúłiné’s claim as there appears to be no loss or damage capable of being negotiated under the Policy.
- We agree with Canada’s submission that this Commission is not entitled to grant declaratory relief. Our mandate, as prescribed by Orders in Council, directs us to inquire into and report on rejected claims and to submit our findings and recommendations to the parties. Declaratory relief is a judicial remedy which is binding on the parties, a relief which we cannot grant.

RECOMMENDATION I

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

RECOMMENDATION II

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

PART I

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this 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 upon:

- (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 of the applicable criteria.¹

This is an inquiry into a claim that has been rejected by the Minister of Indian Affairs. The claimants, who are referred to collectively as the Athabasca DenesŪliné (hereafter the DenesŪliné), are the Fond du Lac, Black Lake, and Hatchet Lake First Nations, all of which are located in northern Saskatchewan. The following correspondence provides a brief synopsis of how the present claim came before this Commission.

On June 8, 1989, the Specific Claims Branch of the Department of Indian and Northern Affairs Canada denied the DenesŪliné's request for funding to conduct historical research into their treaty rights and stated that:

[T]he question as to whether Treaties 8 and 10 extinguished hunting rights north of 60° was submitted to Legal Services for review. This review, along with a separate historical inquiry,

¹ 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 (ICC Exhibit 1).

has now been completed. It is the conclusion of Legal Services that the Treaties did, indeed, extinguish the rights of the Indians concerned, north of the 60th parallel.²

On June 4, 1992, Tom Siddon, Minister of Indian Affairs, wrote as follows to Tribal Chief A.J. Felix of the Prince Albert Tribal Council, the designated representative of the Denesúłiné:

You indicate that your fundamental objective is to secure recognition of treaty or aboriginal rights over traditionally used lands in the Northwest Territories. On this point, there continues to be a basic disagreement regarding the interpretation of Treaties 8 and 10. As I indicated previously, the Government of Canada's legal interpretation of these treaties is that they surrendered any aboriginal interests of the Saskatchewan bands in southern Keewatin, and that they did not extend treaty rights into that area. The research which you have presented to date has not changed this position.³

The Minister's position had been stated earlier in a letter dated June 12, 1991, from Harry Swain, Deputy Minister of Indian and Northern Affairs, to Tribal Chief A.J. Felix, in which Mr. Swain states that:

[O]ur legal advice is that your aboriginal rights in land north of 60° were surrendered by Treaties 5, 8 and 10 and that actual treaty harvesting rights do not extend beyond the boundary of those treaties.⁴

On December 19, 1991, the Denesúłiné filed a statement of claim in the Federal Court of Canada, Trial Division, seeking, among other things, a declaration that the Denesúłiné have existing treaty and/or aboriginal rights in lands north of the 60th parallel. This action has not yet come before the court.⁵

Counsel for the Athabasca Denesúłiné made a formal request for the Commission to conduct an inquiry into their rejected claim on December 21, 1992.⁶ The

² John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, Treaty and Aboriginal Rights Research Centre (TARR), Manitoba, June 8, 1989 (ICC Exhibit 3).

³ Tom Siddon, Minister of Indian Affairs, to Tribal Chief A.J. Felix, Prince Albert Tribal Council, June 4, 1992 (ICC Exhibit 3).

⁴ Harry Swain, Deputy Minister of Indian and Northern Affairs, to Tribal Chief A.J. Felix, Prince Albert Tribal Council, June 12, 1991. This position is further confirmed by Minister Tom Siddon in a letter dated September 10, 1991, to Tribal Chief A.J. Felix, wherein he states, "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights" (ICC Exhibit 3).

⁵ Referred to in the Indian Claims Commission Jurisdiction Report dated January 22, 1993 (ICC Exhibit 12).

⁶ David Knoll, counsel for the Athabasca Denesúłiné, to Chief Commissioner Harry LaForme, December 21, 1992 (ICC Exhibit 3).

Commissioners agreed to do so on January 25, 1993, and notice of this intention was provided to the parties on that same day.⁷

On April 13, 1993, Robert Winogron, counsel for Canada, wrote to Chief Commissioner LaForme to advise the Commission that Canada was challenging the Commission's mandate to conduct an inquiry into this claim.⁸ On May 6, 1993, a panel of six Commissioners heard legal arguments from Commission counsel and counsel for the parties on this issue. In the Commission's ruling dated May 7, 1993, a copy of which is attached as Appendix A to this Report, the panel found that this inquiry was a matter which properly fell within its mandate.

The purpose of the Commission in conducting this inquiry is to inquire into and report on whether, on the basis of Canada's specific claims policy, the Athabasca DenesŪliné have a valid claim for negotiation.

A SUPPLEMENTARY MANDATE

During the period when revisions to the original mandate of the Commission were still under discussion, the Indian Affairs Minister, the Honourable Tom Siddon, wrote to National Chief Ovide Mercredi of the Assembly of First Nations in the following terms:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.⁹

We have borne in mind the implications of our supplementary mandate in making our recommendations.

THE SPECIFIC CLAIMS POLICY

The Indian Claims 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 entitled

⁷ Four letters dated January 25, 1993, from Chief Commissioner LaForme to: the Chief and Council for the Hatchet Lake First Nation; the Chief and Council for the Fond du Lac First Nation; the Chief and Council for the Black Lake First Nation; and the Hon. Tom Siddon, Minister of Indian and Northern Affairs, and the Hon. Pierre Blais, Minister of Justice and Attorney General (ICC Exhibit 4).

⁸ Robert Winogron, Counsel, Specific Claims Branch - Ottawa, to Chief Commissioner LaForme, April 13, 1993 (ICC Exhibit 6).

⁹ The Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991.

*Outstanding Business, A Native Claims Policy: Specific Claims.*¹⁰ To date, it has been amended only by deleting the exclusion of claims "based on events prior to 1867."¹¹ Unless expressly stated otherwise, references to "the Policy" in this report are to *Outstanding Business*.

THE ISSUE OF "LAWFUL OBLIGATION"

Although the Commission is directed to look at the entire policy in its review of rejected claims, the focal point of its inquiry, in the context of this claim, is found in the following passage:

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 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.

...
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.¹²

In our view, the list of examples enumerated under the policy is not intended to be exhaustive.

¹⁰ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*] (ICC Exhibit 2).

¹¹ The exclusion is described in *Outstanding Business*, p. 30. Its removal from the specific claims policy as of 1991 is confirmed in another booklet, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, 1993), pp. iv, 22 (ICC Exhibit 7).

¹² *Outstanding Business*, p. 20 (ICC Exhibit 2).

PART II

ISSUES

The central question this Commission has been asked to inquire into and report on is whether the Government of Canada owes an outstanding lawful obligation, as defined in *Outstanding Business*, to the DenesŪliné. In particular, the claimants assert that Canada's blanket denial of the existence of treaty rights outside the boundaries of Treaties 8 and 10 in lands north of the 60th parallel constitutes a non-fulfilment of the terms of these treaties. To assist us in determining whether the evidence before this Commission discloses an outstanding lawful obligation, the parties defined the scope of the inquiry by framing the specific issues before us:

1. Does the geographical scope of Treaties 8 and 10 extend north of the 60° latitude or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?
2. In the alternative, do the claimants have a Treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?
3. Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize that:
 - a) the geographical scope of the Treaties extends north of the 60° latitude; or that,
 - b) the claimants have Treaty harvesting rights north of 60° latitude?¹³

Counsel for the parties acknowledged that the question of whether the DenesŪliné have unextinguished aboriginal rights north of 60° latitude was

¹³ The issues are set out on pages 13-14 of Submissions on Behalf of the Government of Canada.

beyond the scope of this inquiry.¹⁴ Nevertheless, during this inquiry, counsel for the claimants submitted that Treaties 8 and 10 were intended to protect, and not extinguish, aboriginal rights. Counsel for the claimants submitted that Treaty 8 was in essence "a peace treaty" and that the Denesúłiné did not intend to cede any rights, titles, or interests in their traditional territories.¹⁵ We decline to make any findings on these submissions because issues relating to unextinguished aboriginal title are beyond the scope of our present mandate.

Finally, in the interests of expediting the inquiry process, counsel for the parties were able to agree that the Denesúłiné had used and occupied lands north of the 60th parallel since time immemorial and that they continue to do so today. Counsel also agreed that it was unnecessary for the purposes of this inquiry for the Commission to make specific findings regarding the precise boundaries of the Denesúłiné's traditional land use north of the 60th parallel.¹⁶ Therefore, any references in this report relating to land use and occupation are included only for the purposes of providing a historical context for the inquiry.

¹⁴ For the sake of clarification, it is noted that, in their action before the Federal Court of Canada, the Denesúłiné raise the issue of unextinguished aboriginal title as an alternative argument to the issues before this inquiry. During a consultation conference on April 1, 1993, counsel agreed that the Commission would not consider this issue.

¹⁵ ICC Transcript of oral submissions from counsel for the claimants, September 17, 1993, p. 48 (Mr. Knoll).

¹⁶ The agreement of the parties was summarized by Commission counsel at the commencement of the community sessions at Fond du Lac on May 10, 1993 (ICC Transcript, vol. 1, p. 9, William Henderson).

PART III

THE CLAIM

THE CLAIMANTS

The claimants in this inquiry are the Fond du Lac, Black Lake, and Hatchet Lake First Nations in northern Saskatchewan. The Athabascan DenesŪliné belong to the Athapaskan linguistic group and speak the Chipewyan language.¹⁷

The DenesŪliné of the Fond du Lac and Black Lake First Nations are descendants of Maurice's Band, which signed an adhesion¹⁸ to Treaty 8 at Fond du Lac on July 25 and 27, 1899.¹⁹ The Fond du Lac First Nation has three reserves located on the eastern end of Lake Athabasca.²⁰ The Black Lake First Nation, which used to be known as the Stony Rapids Band, occupies three reserves located on the east and west sides of Black Lake.²¹

The Hatchet Lake First Nation, also known as the Lac la Hache Band, signed an adhesion to Treaty 10 at Brochet, Manitoba, on August 22, 1907. The Hatchet Lake First Nation occupies Lac la Hache Indian Reserve 220 located on the east side of Wollaston Lake. Hatchet Lake itself is located to the northwest of Wollaston Lake and is not the actual location of the Lac la Hache reserve.

DESCRIPTION OF THE CLAIM AREA

Map 1 depicts the claim area in this inquiry and a number of other significant geographical features, including the boundaries of Treaties 8 and 10 (as described

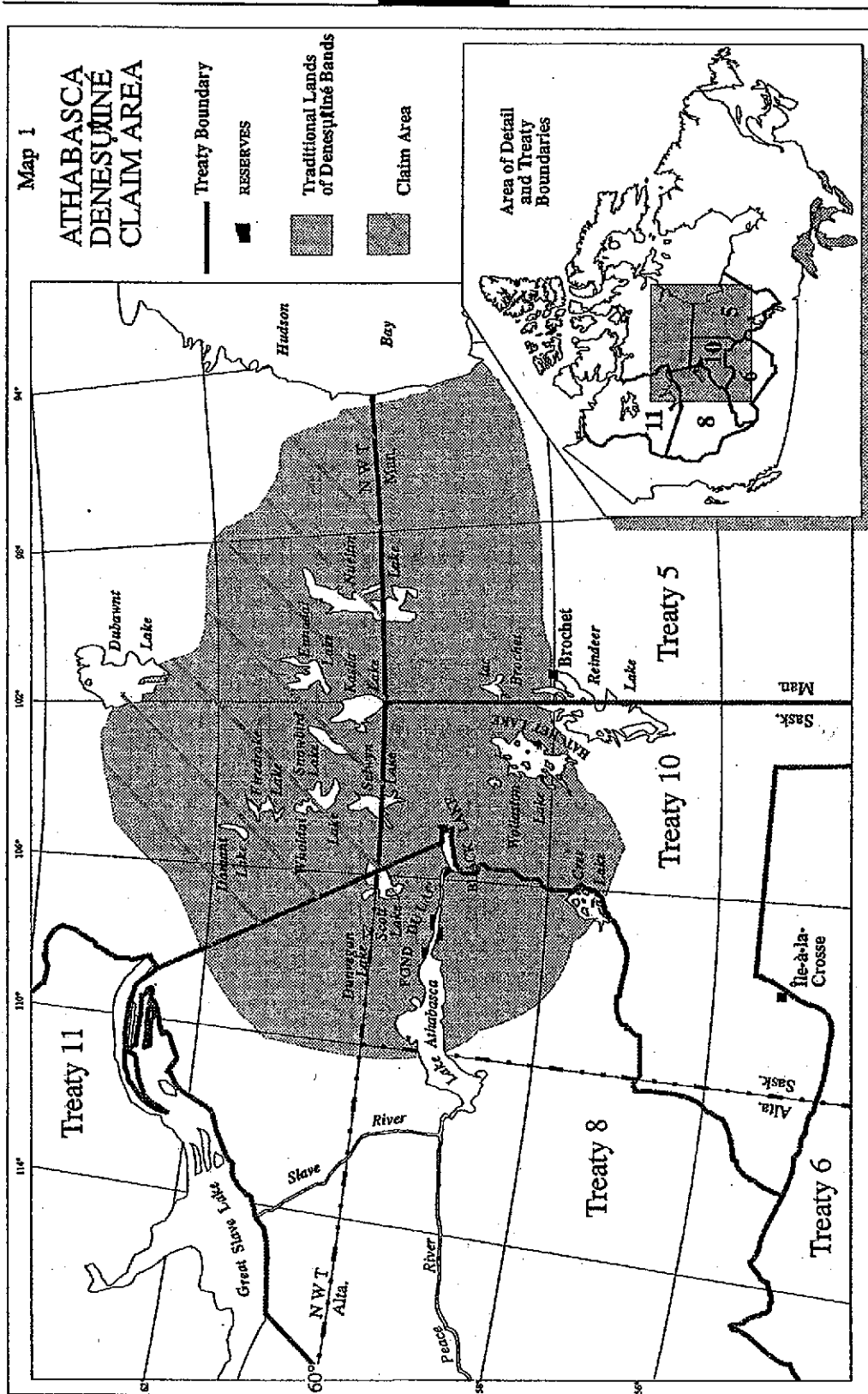
¹⁷ For general historical and anthropological information on the Chipewyan people, see James G.E. Smith, "Chipewyan," in *Subarctic*, June Helm, vol. ed., vol. 6 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1981) [hereinafter Smith, "Chipewyan"], pp. 272-73 (copy in ICC Documents, pp. 744-58).

¹⁸ The term "adhesion" is used where a First Nation agrees to enter into a treaty which has already been entered into between the Crown and other First Nations.

¹⁹ Although the headmen for Maurice's Band signed the treaty on July 25, 1899, Chief Maurice Piche did not sign the treaty until July 27, 1899.

²⁰ Fond du Lac Indian Reserves 227, 228, and 229.

²¹ Chicken Indian Reserves 224, 225, and 226.



in the written texts of the treaties), the location of the Fond du Lac, Black Lake, and Hatchet Lake First Nations, and several lakes that were commonly used by the Athabasca Denesułiné.

The traditional lands²² of all Denesułiné Bands are shown on the map as the shaded area. This includes the traditional lands of the three claimant First Nations and two other Denesułiné Bands from Manitoba – the Northlands Band and the Barren Lands Band.²³ The map demonstrates that a significant proportion of these traditional lands have been surrendered to the Crown under Treaties 5, 8, and 10.

Although there was a tendency throughout this inquiry for the parties to suggest that the claim involves “treaty rights north of the 60th parallel,” this description is somewhat misleading. In specific terms, the claim area involves that portion of the Denesułiné’s traditional lands which lies north of the 60th parallel and to the northeast of the boundaries of Treaties 8 and 10.²⁴ This area is shown on the map as the shaded and hatched area. The Denesułiné maintain they have treaty rights in the claim area even though the boundaries of Treaties 8 and 10, as described in the written texts, do not include that portion of their traditional lands.

Other significant features of the map are as follows. First, the northern boundaries of Treaty 8 include a large tract of land in the Northwest Territories, above the 60th parallel. The northwestern boundary runs along the 60th parallel to Hay River, then goes northeast along the river to the south shore of Great Slave Lake and runs along the shore line. The northeastern boundary of Treaty 8 is a straight line that runs from the eastern end of Great Slave Lake down to the eastern end of Black Lake.

Second, the northern boundary of Treaty 10 runs east to west along the 60th parallel, starting at the Saskatchewan-Manitoba border, to the point at which it intersects with Treaty 8. The eastern boundary of Treaty 10 runs from the 60th parallel south until it intersects with the Treaty 6 boundary.

²² The term “traditional lands” is defined by Peter Usher, a geographer and research consultant, as “the land base with which a group identifies itself and to which it expresses attachment in legend and belief, as well as by long-standing use which may be documented over many generations by archaeological and historical evidence in addition to map biographies. This is what aboriginal people generally mean by ‘our land,’ and is much more closely represented by occupancy than by use”: Affidavit of Peter Usher, July 31, 1992 (ICC Affidavits, Tab A, p. 209).

²³ ICC, Transcript of oral submissions from counsel for the claimants, September 17, 1993, p. 9 (Mr. Knoll).

²⁴ The information on this map is based upon a map tendered by the claimants during the inquiry (see ICC Exhibit 13). Counsel for Canada expressly stated that they did not wish to make any submissions on whether this map accurately showed the extent of the traditional lands of the Denesułiné. We reiterate that we do not intend to make any findings on this issue. It is sufficient for the purposes of this inquiry to find that the Denesułiné’s use and occupation of lands north of the 60th parallel were significant.

Third, the boundaries of Treaty 5 are defined by the Saskatchewan-Manitoba border to the west and by the 60th parallel to the north. Finally, the lakes depicted on the map were among the lakes commonly used by the Denesūłiné people.²⁵

²⁵ These lakes were either referred to in the testimony of the Denesūłiné elders during the inquiry or are referenced in the documentary record before this Commission.

PART IV

THE COMMISSION'S INQUIRY INTO THE CLAIM

Notices of this inquiry were sent to the parties by letter from Chief Commissioner LaForme on January 25, 1993. Since that date, the Commission has reviewed more than 2300 pages of documents. In addition to the review of these documents, the Commission held an information-gathering session at Fond du Lac, Saskatchewan, on May 10 and 11, 1993, and heard 18 elders from the three DenesŪliné communities of Fond du Lac, Black Lake, and Hatchet Lake. On September 17, 1993, the panel of Commissioners on this inquiry heard oral submissions from counsel for the parties on the question of whether the DenesŪliné have a valid claim for negotiation.

In this part of the report, we examine the relevant historical evidence. In addition to the transcripts of the community sessions at Fond du Lac, the Commission considered the extensive documentation, the written and oral submissions of the parties, and the balance of the record of this inquiry. Details of the inquiry process and the formal record of documents and testimony considered in this inquiry can be found in Appendices B and C of this report.

ATHABASCA DENESŪLINÉ LAND USE AND OCCUPATION

The historical relationship that the claimant First Nations share with their traditional lands north of the 60th parallel is reflected in the fact that they refer to themselves as the "Athabasca DenesŪliné," which means "people of the barrens" in their native language of Chipewyan.²⁶ The location of "the barrens" is described in a recent decision of the Federal Court of Appeal:

The "barren lands" is the name applied to that part of the interior of mainland Canada lying north and east of the tree line which meanders from Hudson Bay, north of Churchill,

²⁶ ICC, Athabasca DenesŪliné Transcript, vol. 1, p. 19 (Mr. Benoanie).

Manitoba, to the Mackenzie River Delta north of Inuvik, N.W.T. They are strewn with lakes and laced by rivers and streams.²⁷

Anthropological evidence confirms that the Chipewyan people, of which the Denesúłiné are members, historically occupied "the northern transitional zone of the boreal forest and the barren grounds beyond."²⁸ The barren lands are located almost entirely north of 60° latitude.

The Denesúłiné are also known as the "Ethen-eldeli," which is Chipewyan for "caribou-eaters."²⁹ This description of the Denesúłiné is significant because, in addition to the various fur-bearing animals of the boreal forest region,

the Barren Ground caribou was of overwhelming importance to the Chipewyan, structuring their seasonal cycle, seasonal distribution, socioterritorial organization, and technology; it was the focus of religious beliefs and oral literature. It is readily apparent why those Chipewyan who clung to their traditional lands . . . were still known in the 1970s as the "caribou eaters."³⁰

In the first half of the nineteenth century, trading posts were established in Chipewyan territory on Lake Athabasca. James G.E. Smith, an anthropologist, writes that "[t]he demand for furs in the competitive period [about 1763-1821] and the low prices for trade goods were significant in the shift of some Chipewyans from the forest-tundra ecotone into the full boreal forest."³¹ In 1821 Hudson's Bay Company Governor George Simpson wrote regarding Fort Wedderburn on Coal Island, near the western extremity of Lake Athabasca:

The Chipewyans do not consider this part of the Country to be their legitimate Soil; they come in large Bands from *their own barren Lands situated to the North of this Lake*, extending to the Eastern extremity of Gt. Slave Lake and embracing a large Track of Country towards Churchill . . . they shook off their indolent habits, became expert Beaver hunters, and now penetrate in search of that valuable animal into the Cree and heaver Indian hunting

²⁷ This passage is taken from Mahoney J's decision in *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1979] 3 CNLR 17 at 21 (Fed. CA).

²⁸ Smith, "Chipewyan," 271 (ICC Documents, at 745).

²⁹ Ibid.

³⁰ Ibid., pp. 272-73 (ICC Documents, pp. 746-47). The historical record indicates that the term "caribou-eater" was commonly used by government officials and missionaries as a reference to the Denesúłiné: see, for example, George Simpson, *Journal of Occurrences in the Athabasca Department, 1820 and 1821, and Report*, ed. E.E. Rich, Hudson's Bay Record Society Publications, 1 (London: Hudson Bay Record Society, 1938) [hereinafter *Simpson's Athabasca Journal*], p. 361 (ICC Documents, p. 39); "Missions de la Congrégation des Missionnaires Oblats de Marie-Immaculée," December 1870, p. 25 (ICC Documents, p. 91); René Fumoleau, *As Long As This Land Shall Last* (Toronto: McClelland & Stewart, 1975), p. 80 (ICC Documents, p. 296); and Treaty Commissioner J.A. Macrae to Superintendent General of Indian Affairs, December 11, 1900, in *Treaty No. 10 and Reports of Commissioners* (1907; repr. Ottawa: Queen's Printer, 1966), p. 20 (ICC Documents, p. 393).

³¹ Smith, "Chipewyan," p. 273 (ICC Documents, p. 747).

Grounds, making a circuit easterly by Carribeau Lake; to the South by Île-à-la-Crosse; and Westerly to the Banks of Peace River . . . The greater proportion of them however remain *on their own barren Lands*, where they procure sustenance with little exertion as the Country abounds with Rein Deer, and some years nearly the whole of them retire thither.³²

Simpson also noted that Harrison's House, located on the eastern end of Lake Athabasca, was established "to attract the Chipewyans who generally reside on their Lands (usually called Carribeau Eaters) towards the Rich hunting Grounds to the Southward and Westward."³³

In the 1840s the Oblates of Mary Immaculate began to establish missions in the north for the purpose of converting the Denesułiné. The centre of their operations was at Île-à-la-Crosse, but they also set up a mission at Brochet, on the north end of Reindeer Lake.³⁴ The records of the Oblate missionaries confirm that it was not enough simply to wait for the Denesułiné to come to them; the missionaries had to travel great distances into the barren lands to preach the gospel to the people.³⁵

In 1881, several years prior to the signing of the treaties, Denesułiné guides directed A.S. Cochrane of the Geological Survey of Canada, Department of Interior, from Reindeer Lake to Hatchet (Wollaston) Lake and from there to Lake Athabasca. In his field-book entries, Cochrane makes several references which indicate that the Denesułiné travelled in, and were very familiar with, lands north of the 60th parallel.³⁶ In 1893 and 1894 Joseph Tyrrell, another surveyor with the Geological Survey of Canada, explored lands occupied by the Denesułiné.³⁷ The information collected by these surveyors, which was conveyed back to Ottawa via the Geological Survey of Canada, confirmed that the Denesułiné depended upon their traditional lands north of the 60th parallel.³⁸

³² *Simpson's Athabasca Journal*, 355 (ICC Documents, p. 33). Emphasis added.

³³ *Ibid.*, 361 (ICC Documents, p. 39).

³⁴ Smith, "Chipewyan," 273 (ICC Documents, p. 747), and Father Arsene Turquetil in *Missions de la Congrégation des Missionnaires Oblats*, No. 198, June 1912 (Morrison translation) [hereinafter cited as Turquetil, *Missions*], pp. 177-85 (ICC Documents, pp. 49-71).

³⁵ See, generally, Turquetil, *Missions* (ICC Documents, pp. 49-71). Also see *Missions de la Congrégation des Missionnaires Oblats de Marie Immaculée*, Tome Sixième (Paris, 1867), p. 521, in which a report of the Oblate missionaries confirms that the Denesułiné had no natural tendency to migrate south but did so only for the purposes of trade (ICC Documents, p. 84).

³⁶ A.S. Cochrane, Field Notes, National Archives of Canada [hereinafter NA], RG 45, vol. 138, Field Books 1168 to 1771 (ICC Documents, pp. 216-19).

³⁷ See, generally, "Summary Report of the Geological Survey Department for the year 1894," in Canada, House of Commons, *Sessional Papers*, No. 13A, 1895, pp. 11-16 (ICC Documents, pp. 237-42); J.W. Tyrrell, *Across the Sub-Arctic of Canada, A Journey of 3,200 Miles by Canoe and Snowshoe through the Barren Lands* (London: T. Fisher Unwin, 1898), p. 78 (ICC Documents, p. 248); Geological Survey of Canada, Field Notebooks, 1892, NA, RG 45, vol. 174, Field Books 1926 to 1940 (ICC Documents, pp. 773-96). The extent of Tyrrell's explorations are depicted in a 1901 map (ICC Documents, p. 395).

³⁸ See, generally, Canada, House of Commons, *Sessional Papers*, No. 13A, 1895, pp. 40-50 (ICC Documents, pp. 252-63), and *Sessional Papers*, No. 15, 1898, p. 161 (ICC Documents, p. 265).

The evidence of the Denesułiné elders was that, for most of the year, the Denesułiné lived and travelled north of the 60th parallel. Many Denesułiné elders testified during the community sessions on May 10 and 11, 1993, that, even today, they continue to hunt, fish, and trap in their traditional territories and that many of them live north of 60° latitude for as much as half the year or more. They testified they will continue to do so for as long as they can.

A lot of the people lived on this land for a long time. There's all kinds of people: there's Inuit, there's Cree, there's Dene as well too. You have to remember that the land that we're talking about was Dene lands. A lot of the people live most of the year out in the barren lands and they're called barren lands people, Denesułiné. You have people, First Nations people, living all over the place.

... And some of the people even though they live in the south here, they would still travel north for trapping, hunting, to carry on traditional practices. That's how people lived on the land in those days; there were no boundaries. They travelled all over. Because we were told in the treaties that this was your land, you are to live on the land as you feel. That's what we were told and that's what we continue to do.³⁹

— Louis Benoanie

You see this road that's coming here and that's the road that travels way up north, if you could get on this road that's travelling north, that's people's trap line. They can go way up the Territories on the same route here.

I would not give up my land where I am. I don't care where it is up north where my trap line is going to be. I'll never give up my land. My land is there and that's the land I'm living off and that's the land I'm raising my family on. And if wasn't for that land I would have starved to death already.

... And now like today, I told my kids and my grandchildren, they're going to follow what I said and they're going to believe what I tell them. I believe that I would not give up my land and my kids and my grandchildren, they're going to follow my footstep and they're going to do the same thing. That's the only way. We live off the land and we will continue doing that.⁴⁰

— Norbert Deranger

TREATY 8

Background

As railway construction and public works projects expanded northward in the 1880s, the Indians to the north of Treaty 6 and Hudson's Bay Company officials

³⁹ ICC Transcript, vol. 1, pp. 19 and 24 (Louis Benoanie).

⁴⁰ ICC Transcript, vol. 1, pp. 31-32 (Norbert Deranger).

made numerous petitions for a treaty covering that area.⁴¹ The government declined the petitions for a treaty "on the ground that the lands within the regions inhabited by them were not required for settlement."⁴²

Interest in the treaty-making process was renewed when the discovery of gold in the Yukon in 1896 caused a large influx of non-Indians – largely gold-miners, prospectors, and traders – to pass through what is now northern Alberta and Saskatchewan. In 1898 the government appointed David Laird, J.H. Ross, and J.A.J. McKenna as Treaty Commissioners to negotiate Treaty 8 with the Indian inhabitants to the north of Treaty 6. An order in council dated June 27, 1898, gave the Treaty Commissioners the discretion to decide what territory would be included within the treaty.⁴³ Commissioner Laird explained how the Treaty Commissioners decided upon the actual treaty boundaries:

The scope of the Commissioners' instructions was to obtain the relinquishment of the Indian and Halfbreed title in that tract of territory north of Treaty 6 to which Governmental authority had to some extent been extended by sending Northwest Mounted Police there to protect and control whites who were going into the country as traders, travellers to the Klondike, explorers, and miners. The territory watered by the Lesser Slave Lake, the Peace and Athabasca Rivers, the Athabasca Lake, the South of Great Slave Lake and their tributaries, was where these whites were finding their way, and the Commissioners did not deem it necessary to extend Treaty 8 farther than they did.⁴⁴

The description of the treaty area offered by Commissioner Laird roughly corresponds with the metes and bounds description contained in Treaty 8.⁴⁵

⁴¹ The northern boundary of Treaty 6 runs east to west across the northern half of the provinces of Saskatchewan and Alberta, slightly south of the 55th parallel.

⁴² Superintendent of Indian Affairs to Privy Council of Canada, January 19, NA, RG 10 vol. 4006, file 241, 209-1 (ICC Documents, p. 222).

⁴³ Richard Daniel, "The Spirit and Terms of Treaty Eight," in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Montreal: Institute for Research on Public Policy, 1979), p. 71, n. 90 (ICC Documents, p. 302).

⁴⁴ Fumoleau, *As Long As This Land Shall Last*, p. 60 (ICC Documents, p. 289).

⁴⁵ The metes and bounds description in Treaty 8 is as follows:

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the island in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said Lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement. (*Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* [1899; repr. Ottawa: Queen's Printer, 1966], p. 12, ICC Documents, p. 355).

In January 1899 Clifford Sifton, Superintendent General of Indian Affairs, wrote to the Reverend Charles Weavers, a missionary who had made inquiries on behalf of the Indians regarding the upcoming treaty negotiations. In that letter, Sifton commented:

2. The game and fishery laws will, of course, apply to the country; but as the manner and extent of their enforcement must necessarily depend upon conditions of settlement so, there is not likely to be any marked change on account of the making of the treaty.

3. There will be reserves set aside for the Indians and in doing so everything possible will be done to meet their wishes to the selection of localities. There will be no general prohibition in consequence of the treaty of the freedom of the Indian in roaming and hunting over the country. Of course when settlement advances, there will be the restriction which necessarily follows, and it is to that such contingencies that reserves are set aside.⁴⁶

In February 1899 Commissioner Laird provided the following instructions to the government's field representatives in an effort to clarify the "misleading reports . . . being circulated among the Indians" of the Athabasca and Peace River area about the proposed treaty:

You may explain to them that the Queen or Great Mother while promising by her Commissioners to give them Reserves, which they can call their own, and upon which white men will not be allowed to settle without payment and the consent of the Indians before a Government officer, yet the Indians will be allowed to hunt and fish over all the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season; and also as long as the Indians do not molest or interfere with settlers, miners or travellers.⁴⁷

The Relevant Terms of Treaty 8

On June 21, 1899, negotiations between the Treaty Commissioners and the Indians at Lesser Slave Lake culminated in the signing of Treaty 8.⁴⁸ The claimants in this inquiry were not parties to the original treaty signing at Lesser Slave Lake. After the signing of the treaty, the Treaty Commissioners split up for the purposes of obtaining adhesions to the treaty with other Indian bands.⁴⁹ On July 25 and 27, 1899, Maurice's Band signed an adhesion to Treaty 8 at Fond du Lac. Maurice's

⁴⁶ Clifford Sifton to the Reverend Charles Weaver, January 26, 1899, NA, RG 10, vol. 3848, file 75236-1 (ICC Documents, p. 268).

⁴⁷ Commissioner D. Laird to "Sir," February 3, 1899, NA, RG 10, vol. 3848, file 75236-1 (ICC Documents, p. 271).

⁴⁸ See, generally, Fumoleau, *As Long As This Land Shall Last*, pp. 58-63 and 77-82 (ICC Documents, pp. 286-300).

⁴⁹ During the summer of 1899, the Treaty 8 Commissioners obtained adhesions to the treaty at eight different locations with various bands who agreed to sign the treaty based on the terms concluded at Lesser Slave Lake.

Band was named after Maurice Piche (also known as Moberley), the Chief who signed Treaty 8 in 1899; it later split into the Fond du Lac and Black Lake (Stony Rapids) Bands.

Treaty 8, which was drafted by the Treaty Commissioners on June 20, 1899, contained the following provisions dealing with the surrender of Indian land rights. The preamble to the treaty reads:

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian People may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

The operative clauses dealing with the surrender of Indian rights and titles over specified tracts of land are as follows:

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: —

[Metes and bounds description of the treaty area]

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia or in any other portion of the Dominion of Canada.⁵⁰

Of particular importance is the clause dealing with the harvesting rights of the Treaty 8 Indians:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time

⁵⁰ *Treaty No. 8*, p. 12 (ICC Documents, p. 355). A copy of Treaty 8 is attached as Appendix D to this report.

be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.⁵¹

The Treaty Negotiations and Oral Assurances

In his report on the treaty negotiations, Commissioner Laird wrote the following account of the discussions that took place at various stages throughout the treaty tour:

As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import . . . There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life.⁵²

Charles Mair, a secretary to the Half-Breed Commission for the Treaty 8 area, wrote this eyewitness account of Laird's statements to the Indians assembled at Lesser Slave Lake for the signing of the original treaty:

We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that you will be just as free after signing a treaty as you are now . . . Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.⁵³

⁵¹ Ibid.

⁵² Report of the Commissioners for Treaty No. 8, September 22, 1899, in *Treaty No. 8*, pp. 6-7 (ICC Documents, p. 362).

⁵³ Charles Mair, *Through the MacKensie Basin* (London, 1908), p. 56 (ICC Documents, p. 278).

Mair also related the following statements made by the Reverend Father Lacombe, who acted as adviser to the Treaty Commissioners during the negotiations at Lesser Slave Lake:

I consented to come here because I thought it was a good thing for you to take the Treaty. Were it not in your interest I would not take part in it . . . Your forest and river life will not be changed by the Treaty . . . as long as the sun shines and the earth remains. Therefore, I finish my speaking by saying, Accept!⁵⁴

After further discussions on June 21, 1899, the Chiefs and headmen agreed to sign Treaty 8.

Father Breynat, a missionary who assisted the Treaty Commissioners in their negotiations with Maurice's Band at Fond du Lac on July 18, 1899, noted that similar concerns were raised by the DenesŪliné in respect of their harvesting rights:

Right after the text of the proposed treaty had been read, translated and explained, the Honorable Laird knocked at my door.

"Complete failure!" he said. "We must fold down our tents, pack our baggage and leave."

He explained that as soon as the discussion started, Chief Moberley⁵⁵ . . . nearly got into a fight with the interpreter, good-natured Robillard . . .

"Evidently there is nothing we can do," added Laird pitifully, with tears in his eyes. He was a good man with a sensitive heart. I offered him my sympathy:

"Let me try," I said, "everything might turn out all right."

Chief Moberley was the very best hunter of the entire tribe . . . He feared that the treaty might restrain his freedom. His pride could only despise the yearly five-dollar bait offered to each of his tribesmen in return for the surrender of their rights, until then undisputed, and which, one must admit, rightly so — he held incontestable.⁵⁶

During the community sessions at Fond du Lac, this Commission heard the testimony of DenesŪliné elders from Fond du Lac and Black Lake. It illustrates their understanding of Treaty 8 and the significance of the oral assurances given by the Treaty Commissioners that their rights to live on the land would not be affected if they signed the treaty. This testimony, which is based on information handed down to them by DenesŪliné elders who were present at the treaty negotiations, is almost unanimous and tends to corroborate the documentary evidence on this subject.

⁵⁴ Ibid.

⁵⁵ Chief Moberley was also known as Maurice Piche, the original Chief of Maurice's Band (Fond du Lac and Stony Rapids).

⁵⁶ Fumoleau, *As Long As This Land Shall Last*, pp. 79-80 (ICC Documents, pp. 295-96).

When the treaty negotiations began there were heavy discussions. And people were very apprehensive in even taking treaty money at first because the people could see that this was a deal that would more than likely create hardships for their people in the future.

And the negotiations went on for almost a week and then the treaty commissioners, along with the other people, the people on our side were very apprehensive, like I was just mentioning. And it seemed like the treaty commissioners were going to outrightly cry to try and convince us.

And the treaty commissioners told the people that as long as you see the big rock across the waters there, that this river flows here, and the sun shines, as long as those three things don't move or are not changed at all, and as long as this land shall last, that you will not be deterred from exercising your right to live on the land in any way in the future.⁵⁷

— Leon Fern (Samuel)

... the treaty commissioners said, that if you take this paper called money that your rights, your freedom to live on the land would be protected right to the last person, right to the last Dene person who is living on this earth.

As far as maps and writing down the details of the negotiations, those were all foreign to us because we were not even familiar with that concept of writing and maps and that type of detail.⁵⁸

— Celeste Randhile

At the time that the treaty was going to be signed, everybody was out on their trap lines, and words had travelled that there was going to be some kind of a meeting in Fond du Lac. So they were told to travel back to Fond du Lac because there was going to be an important meeting.

... They sat around 10 days before that they decided that they would take the money. And then they were told that as long as that rock across the lake is there and the sun is shining, the river is flowing, that they would never be broken, the treaties were made.⁵⁹

— Norbert Deranger

... when you look at harvesting rights, use of the land, all those types of things, there's more and more regulations and restrictions being placed upon us. That's why we're being told now.

In the treaties we didn't agree to those terms. Why is it happening now? We didn't ask for it, like I said. What we asked for was the complete opposite. We wanted to live on the land. To move freely on the land. To live as a people on the land.

⁵⁷ ICC Transcript, vol. 1, p. 92 (Leon Fern [Samuel]).

⁵⁸ Ibid., vol. 1, p. 108 (Celeste Randhile).

⁵⁹ Ibid., vol. 1, pp. 127-29 and 130-31 (Norbert Deranger).

And the treaty commissioner was even crying when they tried to get us to go along with the treaty. He said, my children, you're taking this treaty here so that you can have a better life for your people. That's what he told us and we agreed to it under our conditions . . .⁶⁰

— Senator Louis Chicken

At the Treaty negotiations, the Commissioner told us "This money is for the future." He had tears in his eyes. He wanted to strike a deal so badly. Chief Maurice Piche spoke for the DenesŪliné. "We need our rights to our land." That is what he told the Treaty Commissioner. Our people were afraid that there would be talk of land, fish and all we need to survive. The Government said "No, there's no need to feel that way. Those things will not be taken from you. This land from here to where the muskox roam will never be talked about. As long as the sun shines, and that rock does not move, things will not be different for you. Do not be afraid of that.

The people were not shown a map of the Treaty area. There were no maps. The leaders agreed to the terms as outlined by the Treaty Commissioner. Land was never discussed in the treaty. Now, they've pretty well divided us up. That's not what our Chief agreed to. If we had known how it would be, our leaders would likely have rejected the deal. The government would have been sent back.⁶¹

— Affidavit of John Laban

The testimony of the DenesŪliné elders respecting the negotiations at Fond du Lac in 1899 is also consistent with accounts of the discussions which took place at the treaty adhesion at Fort Chipewyan. Father Breynat, who was present at the Fort Chipewyan adhesion negotiations, described the discussions as follows:

Crees and Chipewyans refused to be treated like the Indians of the South, on the Prairies, and be parked on Reserves. The country around Lake Athabasca was not propitious for farming. It was essential that they keep their freedom of movement, which they had always enjoyed in the past. Hunting and fishing had always provided sustenance for them and their families. They categorically refused to submit to any other kind of lifestyle. Nomads they were, nomads they would stay. White people could come to take the gold and silver from these lands. They would not be molested. They themselves had no use for gold and silver. But leave them the caribou, the fish and the fur animals.

The High Commissioner, in the name of Queen Victoria, — Grandmother, as the Indians called her — gave them assurances that their wishes would be respected.⁶²

⁶⁰ Ibid., vol. 2, pp. 4 and 18 (Senator Louis Chicken). Louis Chicken, who was once Chief of the Stony Rapids Band, is currently a Senator of the Federation of Saskatchewan Indians and a member of the Black Lake First Nation.

⁶¹ Affidavit of John Laban, June 22, 1992, ICC Affidavits, Tab D, paras. 4 and 5.

⁶² Gabriel Breynat, *Cinquante ans au pays des neiges: I — Chez les Mangeurs de Caribous* (Montreal, 1945), pp. 186-87 [ICC translation] (ICC Documents, p. 352).

TREATY 10

Background

Subsequent to the negotiation of Treaty 8, the Department of Indian Affairs received numerous petitions to extend the treaty provisions to include the Indians at Portage la Loche and Île-à-la-Crosse.⁶³ On July 12, 1906, the government authorized by Order in Council the making of Treaty 10 and appointed J.A.J. McKenna as the Treaty Commissioner. The Order in Council stated that:

[I]t is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines.⁶⁴

When Indian Affairs officials in Ottawa began preparations in 1906 to have a new treaty negotiated in northwestern Canada, the Deputy Superintendent General expressed the opinion that the government should not extend the boundaries of the proposed treaty any further than the 64th parallel (which is roughly parallel with the northern boundary of Treaty 8). That was because the surrender of Indian title over lands which had limited agricultural potential would entail a significant outlay of funds by the government.⁶⁵

The boundary of Treaty 10, as set out in the metes and bounds description, roughly encompasses the northeastern third of the Province of Saskatchewan, with a small jog into northeastern Alberta near Cold Lake.⁶⁶ We

⁶³ The communities of Portage la Loche and Île-à-la-Crosse are located in Saskatchewan just south of the Treaty 8 boundary and are close to one another. Map 1 shows Île-à-la-Crosse. Deputy Superintendent General Frank Pedley to Superintendent General of Indian Affairs, April 7, 1906, NA, RG 10, vol. 4006, file 241, 209-1 (ICC Documents, p. 405).

⁶⁴ Order in Council PC 1459, July 12, 1906, cited in ICC, "Primrose Lake Air Weapons Range Report on Canoe Lake Inquiry and Cold Lake Inquiry," August 1993, p. 11.

⁶⁵ Frank Pedley to Superintendent General of Indian Affairs, April 7, 1906, NA, RG 10, vol. 4006, file 241, 209-1 (ICC Documents, p. 407).

⁶⁶ The metes and bounds description of Treaty 10 reads as follows:

Commencing at the point where the northern boundary of Treaty Five intersects the eastern boundary of the province of Saskatchewan, thence northerly along the said eastern boundary of four hundred and ten miles, more or less, to the sixtieth parallel of latitude and northern boundary of the said province of Saskatchewan; thence west along the said parallel one hundred and thirty miles more or less, to the eastern boundary of Treaty Eight; thence southerly and westerly following the said eastern boundary of Treaty Eight to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary of Treaty Six to its intersection with the western boundary of the addition to Treaty Six; thence northerly along the said western boundary to the northern boundary of the said addition; thence easterly along the said northern boundary in the eastern boundary of the said addition; thence southerly along the said eastern boundary to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary and the northern boundary of Treaty Five to the point of commencement. (*Treaty No. 10*, ICC Documents, pp. 435-36).

find that one of the main reasons the government entered into Treaty 10 was because:

Unlike previous treaties, the lands identified in Treaty 10 were delimited for purely political reasons as they "cleared title in the newly formed provinces of Saskatchewan and Alberta."⁶⁷

The Relevant Terms of Treaty 10

Negotiations between Treaty Commissioner McKenna and the Indians at Île-à-la-Crosse and Canoe Lake culminated in the signing of Treaty 10 at those sites on August 28 and September 19, 1906, respectively. The claimants were not signatories to the original treaty signed on those dates. However, on August 22, 1907, the Chiefs and headmen of the Lac la Hache Band (now known as the Hatchet Lake First Nation) signed an adhesion to Treaty 10 at Brochet, Manitoba. The text of Treaty 10, drafted in Ottawa by the Department of Justice, was based on the terms of Treaty 8 and is essentially identical in its construction.⁶⁸ The relevant provisions of Treaty 8 are set out in Appendix D of this report for reference purposes.

The Treaty Negotiations and Oral Assurances

On January 18, 1907, Commissioner McKenna reported to Ottawa on the negotiations that took place during the original signing of Treaty 10 with the Indians at Île-à-la-Crosse and Canoe Lake. In his report, McKenna made the following comments:

There was a general expression of fear that the making of the treaty would be followed by the curtailment of their hunting and fishing privileges, and the necessity of not allowing the lakes and rivers to be monopolized or depleted by commercial fishing was emphasized . . .

... I pointed out to them that the government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty was made as existed before it; and that Indians would be expected to make as good use of them in the future as in the past . . .

I guaranteed that the treaty would not lead to any forced interference with their mode of life . . . I dwelt upon the importance, in their own interest, of the observance of the laws respecting the protection of fish and game . . .

The Indians were given the option of taking reserves or land in severalty, when they felt the need of having land set apart for them. I made it clear that the government had no desire to interfere with their mode of life or to restrict them to reserves and that it

⁶⁷ G.J. Fedirchuk and E.J. McCullough, "Historical Context: Treaties 6, 8, 10" (Indian Claims Commission, 1993) [hereinafter cited as Fedirchuk and McCullough], p. 63.

⁶⁸ Acting Deputy Minister, Department of Justice, to Secretary, Department of Indian Affairs, August 2, 1906, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents, p. 409). The entire text of Treaty 10 is set out in Appendix E to this report.

undertook to have land in the proportions stated in the treaty set apart for them, when conditions interfered with their mode of living and it became necessary to secure them possession of land.⁶⁹

In 1907 Thomas Borthwick was appointed Treaty Commissioner to negotiate adhesions to Treaty 10 at Reindeer Lake and Stanley Lake.⁷⁰ Commissioner Borthwick was instructed by Indian Affairs that the written terms of the treaty provided to him "should not be added to or curtailed; and you should be careful not to make any verbal promises as varying or extending the terms of the treaty."⁷¹

On August 19, 1907, Commissioner Borthwick met with the Denesúliné of the Lac la Hache and Barren Lands Bands⁷² at Lac du Brochet on the north end of Reindeer Lake to negotiate an adhesion to Treaty 10.⁷³ Borthwick provided the following account of his discussions with the Denesúliné:

[O]ne of their elderly men, Petit Casimir, by name, representing the Barren Lands' Band spoke and said that this was the first time they were told of the value of money, but they were glad to hear what the Commissioner had told them, they, however, he said were anxious to know to what extent the Treaty if they accepted it would effect their present system of hunting and fishing in their country. This query was satisfactorily answered and explained by the Commissioner. The spokesman, Casimir, then asked that the terms of the Treaty be read and explained to them. That was then done sentence by sentence, effectively by the Rev. Father Turquetil, in their own language, the Chipewyan. After which was done and a few interrogations were answered by the Commissioner, the spokesman, Petit Casimir, said that so far as the Barren Lands Indians for whom he was then speaking, were concerned, they were willing to accept the Treaty on the terms offered them . . . the Chief [of the Barren Lands Band] said that on behalf of his people he would like to know if in the event of another person coming to deal with them from time to time, he would or could change the agreement which they were now entering into. The Commissioner answered in the negative . . .

. . . Chief, Petit Casimir, addressing the Commissioner said that his people after they left the meeting at noon, complained to him that the money which he (the Commr) was giving them, viz:— \$12.00 each this year and \$5.00 for every year hereafter, was not enough to

⁶⁹ Treaty Commissioner J.A.J. McKenna to Superintendent General of Indian Affairs, Frank Oliver, January 18, 1907, in *Treaty No. 10*, pp. 7-8 (ICC Documents, pp. 423-24). Emphasis added.

⁷⁰ The Lac la Hache Band, one of the claimants in this inquiry, adhered to this treaty at Reindeer Lake on August 22, 1907.

⁷¹ Secretary, Department of Indian Affairs, to Indian Agent T.A. Borthwick, April 29, 1907, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents, p. 426).

⁷² The Barren Lands Band is now known as the Lac Brochet First Nation in Manitoba. Although the people of Lac Brochet are members of the Athabasca Denesúliné, they are not claimants in this inquiry.

⁷³ It should be noted that Lac du Brochet is simply called Brochet today and is not to be confused with Lac Brochet, Manitoba, which is north of Reindeer Lake where the adhesion to Treaty 10 was signed. It is also interesting to note that Brochet is situated within the boundaries of Treaty 5 and not Treaty 10. Please refer to Map 1 for location of Brochet.

support them. *The Commissioner explained to them that the money which the Government was giving them was a gift, and did not expect them to be pendent [sic] or live upon it, as they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and added that they had the privilege of hunting and fishing as before . . . Thus, the terms of the Treaty in all its bearings having been fully explained to them in their own language, the Commissioner asked them if they understood what was required of them by the Treaty, and they answered that they did. The Chief and Headmen then signed the Treaty.*⁷⁴

Before signing the treaty, the Lac la Hache Band required three additional days to consult with those band members who were not present during the above discussions. On August 22, 1907, the Lac la Hache Band reassembled with the Treaty Commissioner after selecting their Chief and headmen. Commissioner Borthwick's account of the discussions on that day indicates that the terms of the treaty were

read and explained clause by clause to them, the Rev. Pere Turquetil acting as Interpreter in the Chippewyan language. After the reading and translating of the terms of the Treaty was done for them, the Commissioner asked them if they understood the terms of the Agreement that they were being asked to enter into and they answered in the affirmative. They were then asked to come forward and sign the Treaty, which was done by the Chief and his two Headmen on behalf of the Band.⁷⁵

As with Treaty 8, the understanding of the DenesŪliné with respect to the treaty negotiations is illustrated in the following excerpts from the testimony of elders from Hatchet Lake. The testimony given by the elders during the inquiry supports the conclusion that the DenesŪliné agreed to sign the treaty only after Treaty Commissioner Borthwick provided solemn assurances that their rights to hunt, fish, and trap throughout their lands would not be curtailed.

So when the people started to discuss this amongst themselves, they said that this treaty is only going to bring hardships to our people. So then they had great apprehension to take the treaties then because they knew that what the land provides for them, the freedom on that land, is all that they required when the treaties were being negotiated, to live as a people.

So after some more discussions and negotiations . . . the treaty commissioner told the people that this land that we're talking about here is your land; we're not talking to you about that, we're talking to you about, you know, the freedom to live on the land, the freedom to hunt, fish, hunt fowl, whatever you live off of today, those are the things that are not on the discussion table here.

⁷⁴ Treaty Commissioner T.A. Borthwick to Department of Indian Affairs, August 19, 1907, NA, RG 10, vol. 4006, file 241.209-1 (ICC Documents, pp. 428-31). Emphasis added.

⁷⁵ Treaty Commissioner T.A. Borthwick to Department of Indian Affairs, August 22, 1907, NA, RG 10, vol. 8595, file 1/1-11-6 (ICC Documents, pp. 432-34).

... You have to understand that we didn't read or write in those days, we just spoke the language. We didn't have too many people who spoke English or understood it.

...
Over at Brochet . . . there's a big rock that sat in the water out there. As long as that rock sits there, your rights would not be discussed in any way in the future. So once the people were told that and they were affirmed that the government was sure on their word, then the people decided to go with the treaties.

The documents were to last forever according to the sun. The sun still shines today, there's still water today, the rivers flow, and that rock is still sitting out in the lake at Brochet.⁷⁶

— Louis Benoanie

The treaty commissioners came in, the priest was interpreting. And what the priest said was that if you take this money here, even though you're taking the money, your rights, whatever how you use the land, would not be questioned in the future.

The money is just basically an understanding between us and the government on how we could use the land. That's what it was all about. So when we were affirmed of that about five days into the negotiations, that was the government position, then the people were assured that their rights would not be tampered with in any way, that they decided to go along with the treaties.

So the negotiations, from what I heard, went on for about five days, like I just said. The treaty commissioner said that as long as there's water down there on the shore or out on the lake, as long as the sun shines, as long as the rocks do not move, these rights would last forever because what they agreed to with us was meant to last forever.⁷⁷

— Jimmy Dzeylion

[T]he treaty negotiations must have went on for about a week, then just near the end of the negotiations, it was hard to determine which way the people would go. There was, I guess, great hesitation to go along with it . . .

So the treaty commissioner said to the people that these rights that you're talking about, you would be able to retain those rights into the future as long as there's a rock out there, as long as there's water and the sun shines that your rights would be protected as long as that. That's what my mother said. That's what she said that the treaty commissioner had told the people.⁷⁸

— Bart Dzeylion

⁷⁶ ICC Transcript, vol. 1, pp. 16-17 (Louis Benoanie).

⁷⁷ Ibid., vol. 1, pp. 42-43 (Jimmy Dzeylion).

⁷⁸ Ibid., pp. 55-57 (Bart Dzeylion).

POST-TREATY CONDUCT OF THE PARTIES

The Regulation of Hunting and Trapping

The DenesŪliné changed their traditional way of life little after their adherence to Treaties 8 and 10. They continue to live as and where they had before and they continue to hunt, fish, and trap throughout their traditional territory.

Beginning in the 1920s, hunting and trapping regulations were enacted and enforced in Saskatchewan and the Northwest Territories. These regulatory regimes were established by the provincial and territorial jurisdictions. The evidence before us establishes that they occasioned confusion and dismay among the DenesŪliné, who were accustomed to exercising their harvesting rights without any interference from government institutions.⁷⁹

During the 1920s the Northwest Territories administration, the Royal Canadian Mounted Police, and officials within the Department of Indian Affairs had discussions about how best to "license" those Indians living within Saskatchewan south of 60° latitude for hunting in the Northwest Territories.⁸⁰ Eventually, on October 15, 1927, the decision was made by the Director of the Northwest Territories and Yukon to allow the DenesŪliné to hunt and trap in the Northwest Territories without having to pay for a non-resident game licence.⁸¹

In the late 1940s the implementation of registered traplines for both groups and individuals in the Northwest Territories became a serious topic for discussion among federal and territorial government officials.⁸² Eventually, in 1949, the Superintendent for Indian Affairs met with trappers from Fond du Lac and Stony

⁷⁹ Indian Agent G. Card to Department of Indian Affairs, July 17, 1922, NA, RG 10, vol. 6921, file 779/28-3, part 2 (ICC Documents, p. 458). Also see Indian Agent's Report on Annuity Payments, completed by Gerald Card, August 1, 1927, NA, RG 10, vol. 6921, file 779/28-3, part 2 (ICC Documents, p. 492).

⁸⁰ Director O.S. Finnie, Department of Interior, to J.D. McLean, Indian Affairs, March 10, 1924, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 464); Inspector H.L. Fraser, RCMP, to Commanding Officer Edmonton, July 14, 1925, NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 466); O.S. Finnie to J.D. McLean, August 15, 1925: "Even if Mr. Card is correct in considering that the Treaty can be so construed as to give Indians from another part of Canada the right to enter the North West Territories and hunt in contravention of a game regulation, he would hardly state that such action can be taken against the provisions of the North West Game Act itself," NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 467); O.S. Finnie to T.R.E. McInnes, August 22, 1925, NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 469); Cortlandt Starnes to D.C. Scott, August 27, 1926, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 470). Also see Starnes to Director, North West Territories & Yukon, Department of Interior, August 27, 1926, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 486); O.S. Finnie to D.C. Scott, October 15, 1927, NA, RG 10, vol. 6742, file 420-6-2 (ICC Documents, p. 493).

⁸¹ O.S. Finnie to D.C. Scott, May 1, 1928, and May 25, 1928, NA, RG 10, vol. 6742, file 420-6-2 (ICC Documents, pp. 495-97), and R.A. Gibson, Deputy Commissioner for Administration of the Northwest Territories, to Dr. H.W. McGill, Director, Indian Affairs, July 18, 1938, NA, RG 10, vol. 6744, file 420-6-5 (ICC Documents, p. 514), confirm the view that Indians and half-breeds who did not reside near the NWT border were not allowed to avail themselves of the 1927 ruling which exempted the DenesŪliné.

⁸² R.A. Hoey to R.A. Gibson, Director, Lands & Development Services, August 12, 1948, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 545); R.A. Gibson to R.A. Hoey, August 20, 1948, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 544).

Rapids to identify their traplines on maps for the purposes of registering the group traplines of the Bands.⁸³ These traplines were eventually registered in the Northwest Territories in 1951.⁸⁴ It was clear at this time that many of the traplines of the Denesúliné people were situated north of the 60th parallel and outside the treaty boundaries.⁸⁵

During the 1960s the government implemented a number of conservation measures to try to preserve the caribou herds.⁸⁶ The historical record shows that the Department of Indian Affairs was concerned about the deleterious effect which the curtailment of caribou hunting would have on the Dene. There were discussions among department personnel with respect to economic opportunities for those people.⁸⁷ Generally speaking, these discussions were directed towards development of a management program for the Fond du Lac and Stony Rapids Bands in such areas as tourism, camp trade, and fishing, as well as the continuation of hunting, fishing, and trapping in the Northwest Territories.⁸⁸

A letter written by the Assistant Deputy Minister for Indian Affairs, R.F. Battle, to Commissioner B.G. Sivertz of the Northwest Territories Council on August 3, 1965, summarizes usefully the federal government's understanding at that time of the circumstances of the Denesúliné. At issue was whether the Denesúliné at Fond du Lac and Stony Rapids would qualify for the \$40 wolf bounty offered by the Northwest Territories government.⁸⁹

I have been advised that Indian trappers from Fond-du-Lac and Stony Rapids who trap, hunt and fish in the Northwest Territories will not qualify for the recently announced wolf bounty on the grounds that they are not bona fide residents of the Northwest Territories. While I can appreciate your position on the matter, I find it difficult to accept this reason.

⁸³ J.W. Stewart, Superintendent, Athabasca Agency, to G.H. Gooderham, Regional Supervisor of Indian Agencies, January 7, 1950, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 554).

⁸⁴ Jean Lesage, Minister, Northern Affairs and National Resources, to John H. Harrison, MP, July 24, 1956, NA, RG 10, vol. 483, file 40-6-1, part 2 (ICC Documents, p. 566).

⁸⁵ ICC Exhibit 13.

⁸⁶ J.G. McGilp, Regional Supervisor, Mackenzie District, Department of Indian Affairs, memorandum to Indian Affairs Branch, Ottawa, October 24, 1960, NA, RG 10, vol. 8862, file 1/18-11-6, part 3 (ICC Documents, p. 586).

⁸⁷ N.J. McLeod, Regional Supervisor (Saskatchewan), Department of Indian Affairs, to J.G. McGilp, Regional Supervisor, Indian Agencies, Fort Smith, August 17, 1961, NA, RG 10, vol. 8406, file 601/20-10, part 1 (ICC Documents, p. 587); N.J. McLeod, Regional Supervisor of Indian Agencies (Saskatchewan), in memorandum to Indian Affairs Branch, Ottawa, August 22, 1961, NA, RG 10, vol. 8406, file 601/20-10 (ICC Documents p. 589); R.F. Battle, Chief, Economic Development Branch, Indian Affairs, to Regional Supervisor, Saskatchewan, August 19, 1961, NA, RG 10, vol. 8406, file 601/20-10, part 1 (ICC Documents, p. 596); H.M. Jones, Director, Indian Affairs, to W.J. Brennan, Acting Regional Supervisor of Indian Agencies, Saskatchewan, June 5, 1962 [no file reference available] (ICC Documents, p. 601).

⁸⁸ J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to N.K. Ogden, Superintendent, Meadow Lake Agency, September 5, 1962, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 606); Jules D'Astous, Chief, Economic Development Division, Indian Affairs, to Regional Supervisor of Indian Agencies, Saskatchewan, November 9, 1962, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 617).

⁸⁹ R.T. Smith, Superintendent, Meadow Lake Agency, Department of Indian Affairs, to Regional Supervisor of Indian Agencies, Saskatchewan, June 23, 1965, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 642).

These Indians are occupying their traditional hunting grounds which they occupied long before the Saskatchewan boundary was established. Geographic and economic conditions have made it necessary for these people to trade in northern Saskatchewan because stores, schools and administrative centres have not been established within their hunting areas in the Northwest Territories. The trappers concerned hold valid and subsisting resident hunting licences for the Northwest Territories and royalty is paid on the fur which they harvest. They have always been recognized, for hunting purposes, as residents of the Northwest Territories and most of them maintain winter homes in the area.

A parallel to this exists where Indians from Seven Islands, Quebec have traditionally hunted in Labrador. The Government of Newfoundland has extended full resident privileges to the Indians concerned including permits to take caribou, fur and game normally restricted to local residents. Indians from Manitoba, whose trapping grounds extend into Ontario, are also afforded full resident privileges and are serviced each year by Ontario Game Branch officials who visit the settlements of Island Lake, Red Sucker Lake and Shamattawa in Manitoba.⁹⁰

The Border A licensing system was introduced by the NWT government in 1984. Counsel for Canada provided the following summary of the territorial enactments:

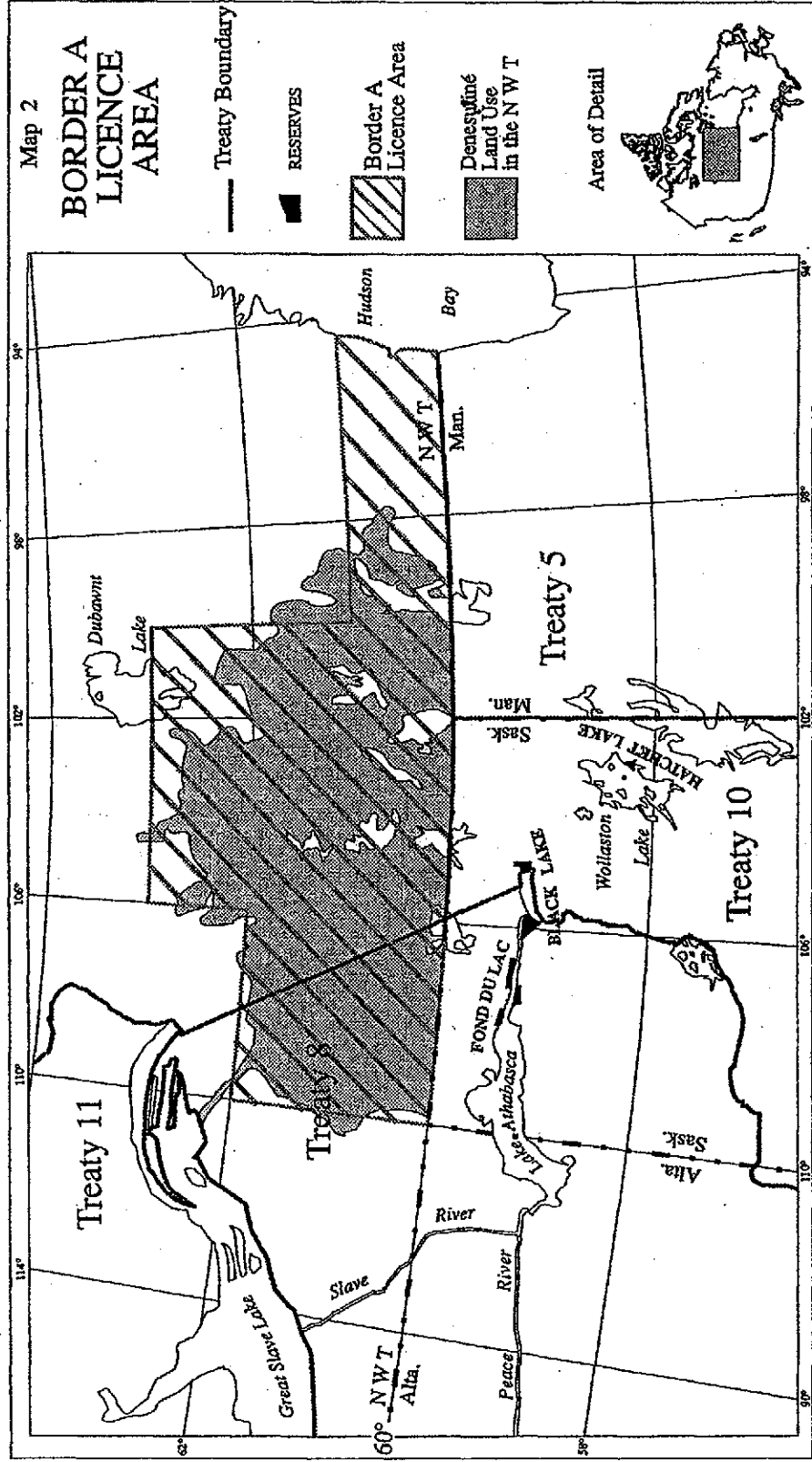
S. 11(1) of the regulations allows the Superintendent of Wildlife to issue Border A licences to an applicant who "resides in the northern half of Saskatchewan and Manitoba" and depends on, or has depended in the past, on hunting in the Territories "as a means of livelihood," if that person was either a holder of a general licence prior to 1979 or, establishes his or her eligibility to the satisfaction of the Superintendent. The holder of a Border A licence may hunt game only in that area of the Territories as set out in the Schedule to the regulations.⁹¹

The area in which Border A licence holders are entitled to hunt is depicted in Map 2. It would appear that this area corresponds generally with lands used by the DenesŪliné in the Northwest Territories.⁹²

⁹⁰ R.F. Battle to B.G. Sivertz, August 3, 1965, DIAND file 601/20-10, vol. 2 (ICC Documents, pp. 644-45). The practice of offering wolf bounties was introduced as a conservation measure to protect caribou herds from being depleted by this predator.

⁹¹ Submissions on Behalf of the Government of Canada, pp. 25-26.

⁹² Counsel for the claimants tendered a map in evidence which showed the Border A licensing area in relation to the "recent and current land use area" of the DenesŪliné in the NWT (ICC Exhibit 13). This map was based on a land-use study conducted by Peter Usher in 1989 (ICC Affidavits, Tab A, p. 218).



The Creation of Reserves

In the 1930s, government officials began to discuss the possibility of setting aside reserves for the DenesŪliné Bands. The creation of reserves was, however, complicated by the fact that the DenesŪliné spent much of their time hunting and trapping in the Northwest Territories. It is clear from the historical record that this reality was recognized by government officials at the time. In 1935 the Indian agent, H.W. Lewis, commented on how the people of Maurice's Band at Fond du Lac made their living:

These Indians trap almost altogether in the Barrens and live in tents. Their food is largely fish and wild game. They do not have much contact with others, coming to the Trading posts at Treaty time and at New Years.⁹³

The 1938 report of the Indian agent contains the following notations on Maurice's Band:

Nomads. No Reserve. Living in Northern Saskatchewan and the N.W.T.

...
Maurice Band, Fond du Lac & Stony Rapids. The Indians in this area are demanding a restricted area with the base on the 59th parallel and extending across the whole of the northern part of Saskatchewan. I do not hold with this although a small area might be considered. The majority of these Indians are N.W.T. Indians and do most of their trapping in that area.⁹⁴

In 1944 the Indian agent reported that:

The chief [of Fond du Lac] stated that his band was anxious to have an area in northeastern Saskatchewan and the Northwest Territories set aside for their exclusive use which is bounded roughly by the 59° parallel of latitude on the south, the 108° longitude on the west and extending northward to the Thelon Game Sanctuary in the N.W.T. This area has been under consideration for some years as a trapping preserve for the Maurice Band, and I would recommend that the province be consulted on this matter.⁹⁵

⁹³ Harry W. Lewis to the Secretary, Department of Indian Affairs, August 6, 1935, NA, RG 10, vol. 6921, file 779/28-3, part 3 (ICC Documents, p. 512).

⁹⁴ P.W. Head, Indian Agent, to H.W. McGill, Director, Indian Affairs Branch, August 25, 1938, NA, RG 10, vol. 6921, file 779/28-3 (ICC Documents, pp. 517, 519, and 521).

⁹⁵ Memorandum from J.L. Grew to the Director of Indian Affairs Branch, August 26, 1944, NA, RG 10, vol. 6922, file 779/28-3, part 6 (ICC Documents, p. 539).

The possibility of creating reserves for the Denesu4iné was revisited in 1952, 1956, and again in the early 1960s.⁹⁶ On January 11, 1960, the Department of Indian Affairs acknowledged an outstanding treaty land entitlement to the Denesu4iné Bands.⁹⁷ In the years that followed, land selections were made by the Denesu4iné Bands, including the claimants. It is important to note that even at this time, in the early to mid 1960s, "the Chief of the Stony Rapid Bands" sought assurances that his people would not be confined to reserves but would retain the right to travel, hunt, trap, and fish as before.⁹⁸ In a letter dated October 30, 1964, Mr. J.G. McGilp, the Regional Supervisor for Saskatchewan, Indian Affairs, provided the following assurance to Chief Louis Chicken of the Stony Rapids Band:

In accordance with your request, I am writing once more to assure you that the movements of the people of the Stony Rapids Band of Indians will not be restricted in any way by the reserve lands being set aside for you.

You and your people continue to have the same rights to camp, live, hunt, fish, trap, and travel as you did before your reserve lands were set aside.⁹⁹

Federal Position on Harvesting Rights

On June 8, 1989, John F. Leslie, chief of the Treaties and Historical Research Centre for the Department of Indian Affairs, wrote to Ralph Abramson, Treaty and Aboriginal Rights Research – Manitoba, to inform him that the federal government was taking the position that the Denesu4iné harvesting rights in the Northwest Territories had been extinguished by the blanket extinguishment clauses in the treaties.¹⁰⁰ Based on the evidence before the Commission, this letter represents the first mention by the Government of Canada to the Denesu4iné that the harvesting rights of the Denesu4iné in the Northwest Territories are not protected by the terms of Treaties 8 and 10.

⁹⁶ G.H. Gooderham, Regional Supervisor of Indian Agencies, to J.W. Stewart, Superintendent, Athabasca Agency, November 12, 1952, DIAND file E-5673-06501, vol. 1 (ICC Documents, p. 562); Jean Lesage, Minister, Northern Affairs and National Resources, to John H. Harrison, MP, July 24, 1956, NA, RG 22, vol. 483, file 40-6-1, part 2 (ICC Documents, p. 566); also see the letter of N.J. McLeod, Regional Supervisor, Indian Affairs, to W.H. Antag, Assistant Indian Agent, Stony Rapids, Saskatchewan, November 25, 1959, NA, RG 10, vol. 6971, file 671/20-2, part 1 (ICC Documents, pp. 577-79), which confirms that many families from Fond du Lac had built cabins at Taltson River and Damant Lake for the winter and intended to establish a permanent residence in the NWT, on the condition that a trading post was established in the area.

⁹⁷ N.J. McLeod, Regional Supervisor of Indian Agencies, Saskatchewan, to Chief, Reserves & Trusts, Department of Indian Affairs, February 26, 1960, DIAND file 601/30-1, vol. 2 (ICC Documents, p. 581).

⁹⁸ R.T. Smith, Superintendent, Meadow Lake Agency, Department of Indian Affairs, to Regional Supervisor of Indian Agencies, Saskatchewan, DIAND file E-5673-06538, vol. 1 (ICC Documents, p. 623); Stony Rapids Band Council, Saskatchewan, to Indian Affairs, Ottawa, August 20, 1964 [no file reference available] (ICC Documents, p. 625); J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to Indian Affairs, Ottawa, August 25, 1964 [no file reference available] (ICC Documents, p. 627).

⁹⁹ J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to Chief Louis Chicken, Stony Rapids Band, October 30, 1964, DIAND file E5673-06538 (ICC Documents, p. 635).

¹⁰⁰ Letter from John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, TARR, Manitoba, dated June 8, 1989 (ICC Exhibit 3).

PART V

ANALYSIS AND CONCLUSIONS

PRINCIPLES OF TREATY INTERPRETATION

The issues before this Commission involve the interpretation of Treaties 8 and 10. Before considering the substantive arguments on the question of whether Canada owes an outstanding lawful obligation to the DenesŪliné, we will outline the analytical framework we have adopted in the interpretation of Treaties 8 and 10.

Counsel for the parties referred to a number of authorities on the principles of interpretation for Indian treaties and dedicated a substantial amount of time and effort to arguments on this subject. In the Commission's report into the Primrose Lake Air Weapons Range Inquiry, the panel members concluded that, as we are not a court of law, this Commission is not bound exclusively by the principles of treaty interpretation that have been developed by the courts.¹⁰¹ Our mandate, which is found in Order in Council PC 1991-1329 as amended by PC 1992-1730, directs us to inquire into land claims, using as a basis the Specific Claims Policy, *Outstanding Business*. As a result, and as we said in the Primrose Lake claim, rules of evidence must be considered with all other evidence as prescribed by the Policy. Nevertheless, the parties made extensive arguments on the case law in support of their positions on the appropriate methodology to be adopted in the interpretation of the treaties. In the following analysis we shall consider the legal authorities in the context of their consistency with the rules, intent, and purpose established by the Specific Claims Policy.

The Specific Claims Policy

In the Primrose Lake Report, the Commission concluded that we are directed to follow the guidelines of the Specific Claims Policy in the course of making our deliberations and findings on the merits of a claim rejected by the federal

¹⁰¹ ICC, "Primrose Lake Air Weapons Range Report," pp. 192-96.

government. Guideline 6 relating to the "submission and assessment of specific claims" states that:

All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law.¹⁰²

This guideline clearly provides that all relevant historical evidence, irrespective of admissibility in a court of law, must be taken into account in determining whether a First Nation has submitted a valid claim for negotiation. The Policy states that the guidelines "form an integral part of the Government's policy on specific claims."¹⁰³ The Policy also provides that claims will not be rejected "because of the technicalities provided under the statutes of limitation or under the doctrine of laches."¹⁰⁴

Outstanding Business states that:

The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.¹⁰⁵

It is clear that one of the central purposes of the Policy is to offer a viable alternative to the courts. The Policy therefore ensures that the resolution of outstanding specific claims will not be frustrated by the strict application of technical rules of evidence.¹⁰⁶

When a First Nation submits a specific claim to the government, the Department of Indian Affairs is directed by the Policy to consider all relevant historical evidence in assessing whether it is a valid claim for negotiation. The Policy does not state any exceptions to this general principle. In our view, the objectives of the Policy would be seriously undermined if common law rules on the admissibility of evidence were adopted in the assessment of claims. Incorporating technical rules of evidence into the claims policy and review process would simply duplicate

¹⁰² *Outstanding Business*, p. 30.

¹⁰³ *Ibid.*, p. 29.

¹⁰⁴ *Ibid.*, p. 21.

¹⁰⁵ *Ibid.*, p. 19.

¹⁰⁶ *Ibid.*, p. 30.

the evidentiary difficulties First Nations face in the courts – one of the barriers the Policy was designed to eliminate.

The Policy states that the Department of Justice shall determine whether a First Nation's claim discloses an outstanding lawful obligation by considering all "pertinent facts and documents" provided to the department by the Specific Claims Branch.¹⁰⁷ In its legal review of specific claims submissions, the Department of Justice is likewise obliged to consider all relevant historical evidence, including evidence that would otherwise be considered inadmissible in a court of law.

In light of the foregoing, we have considered all relevant historical evidence in reaching our findings on the proper interpretation of Treaties 8 and 10. The procedures adopted at the community sessions were designed to ensure that the oral traditions of the DenesŪliné people were respected and taken into account in interpreting the treaties they signed with the Crown. We find that this approach regarding the assessment of claims is required by the Policy.

During the oral submissions, counsel for both Canada and the claimants acknowledged that guideline 6 of the Policy instructs the Department of Indian Affairs, the Department of Justice, and this Commission to consider all relevant historical evidence in determining whether the DenesŪliné's claim discloses an outstanding lawful obligation.¹⁰⁸ However, the manner in which Canada wishes to apply this guideline raises some concerns in our minds.

Canada maintains it has taken all relevant evidence into account in its interpretation of Treaties 8 and 10. However, counsel for Canada submit that where the written terms of a treaty are not ambiguous they should be relied on as "the best evidence we have of the intention of the parties."¹⁰⁹ In effect, counsel for Canada submit that the intentions of the parties to Treaties 8 and 10 are clearly expressed in the written treaties and, accordingly, little or no consideration should be given to the Treaty Commissioners' oral promises and guarantees or to other forms of evidence.¹¹⁰

The approach Canada takes regarding "best evidence" is one this Commission has commented upon before and one we find disconcerting.¹¹¹ As we have stated on several occasions, the Policy requires that all relevant evidence submitted in support of a specific claim must be admitted and assessed. Again, this is not only

¹⁰⁷ Ibid., p. 23.

¹⁰⁸ ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, p. 140 (Mr. Daigle).

¹⁰⁹ Ibid., pp. 139-40 (Mr. Daigle).

¹¹⁰ When Treaties 8 and 10 were negotiated, the Government of Canada appointed Treaty Commissioners to act as their agents in the negotiations with the Indians.

¹¹¹ See ICC, "Primrose Lake Air Weapons Range Report," pp. 191-96.

the prescribed approach for this Commission, but also for the Specific Claims Branch and the Department of Justice. We agree with the submission of counsel for Canada when they say:

In assessing this claim, Canada will consider the evidence and legal arguments submitted by the claimants and determine whether the claim discloses an outstanding "lawful obligation, i.e., an obligation derived from the law on the part of the federal government." This assessment will consider not only the applicable law, but also, as provided by criterion 6 at page 30 of the Policy "all relevant historic evidence . . . and not only evidence which, under strict legal rules, would be admissible in a court of law."¹¹²

Accordingly, we have followed this rule of assessment in this claim.

In reaching our findings and conclusions, we have, as required by the law and *Outstanding Business*, reviewed the treaties themselves and given appropriate weight to the promises and guarantees of the Treaty Commissioners. We have also examined the historical documentation, listened to the arguments of all counsel, and considered the oral testimony of the Denesúliné elders and Band members, based primarily as it is upon knowledge passed down from generation to generation.

We would note in closing that we have carefully considered the arguments submitted by the parties with respect to the principles of law that apply in a court of law concerning the use of extrinsic evidence as an aid to the interpretation of treaties. However, in our view, Treaties 8 and 10 are ambiguous in describing the geographical boundaries that pertain to the harvesting rights clause. In such cases the law of Canada is clear: extrinsic evidence is to be considered. Thus we would reach the same conclusions based upon the legal principles.

ISSUE 1: THE GEOGRAPHICAL SCOPE OF TREATIES 8 AND 10

1 Does the geographical scope of Treaties 8 and 10 extend north of the 60° latitude or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

The claimants assert that the boundaries of Treaties 8 and 10 extend beyond the metes and bounds descriptions in each of those treaties to include the

¹¹² ICC, Submissions on Behalf of the Government of Canada, p. 14.

traditional lands of the DenesŪliné north of 60° latitude. It is their submission that:

The DenesŪliné submit that the treaty boundaries of Treaties 8 and 10 are not as described in the written versions of those treaties. On the contrary, Treaties 8 and 10 extend beyond those written boundary descriptions to cover the traditional lands of the DenesŪliné. The evidence of the DenesŪliné's relationship with the land and of what occurred at the time the treaties were made supports this conclusion, as does the evidence of the parties' conduct after the treaties were made.¹¹³

Counsel for Canada, on the other hand, submit that the metes and bounds descriptions in the treaties correctly describe the geographical scope of Treaties 8 and 10. They say that:

[A]fter considering *all the evidence relevant to the issue of boundaries*, including the metes and bounds description in each of the treaties, the most reasonable interpretation is that the treaty area is limited to the metes and bounds description in Treaty 8 and 10.¹¹⁴

Notwithstanding the express metes and bounds description in the treaties, the claimants submit that the parties intended the DenesŪliné's traditional lands north of 60° latitude to be included within the treaty boundaries.¹¹⁵ This, they say, is the conclusion to be reached when consideration is given to: "evidence of the DenesŪlinés' relationship with the land," and "the knowledge of the parties at the time the treaties were made, the representations made by the parties and [their] subsequent conduct."¹¹⁶

The evidence, as set out at pages 20 to 23 and again at pages 31 to 33, demonstrates that the primary object and purpose of the treaties, from Canada's perspective, was to obtain a surrender over certain specified tracts of land as defined by the metes and bounds descriptions in the treaties. Indeed, the treaties themselves make it clear that Canada's purpose was to get a surrender of specific territory to accommodate non-Indian settlement, as well as such things as trade, mining, and lumbering.

We agree with Canada's submission on this point:

With respect to Treaty 8, it is clear from the Orders in Council empowering the Treaty 8 Commissioners, and from reports prepared by Dennis F.K. Madill for DIAND and by Gloria Fedirchuk and Edward McCullough for the Commission, that the government's intention at

¹¹³ ICC, Submissions on Behalf of the Claimants, p. 10.

¹¹⁴ ICC, Submissions on Behalf of the Government of Canada, p. 26. Emphasis added.

¹¹⁵ ICC, Submissions on Behalf of the Claimants, p. 11, para. 34.

¹¹⁶ Ibid., pp. 9-10, para. 29 and para. 36.

the time of Treaty 8 was to acquire ownership of a specifically bounded tract of land. The reasons underlying the delineation of Treaty 8 lands are summarized in Fedirchuk's report at pages 51 and 52:

"The boundaries of Treaty 8 were determined largely on the basis of the location and potential intensity of mining, the routes of prospector/miner traffic into this vast area, and the necessity of achieving and maintaining amicable relations with the native inhabitants as well as "minimizing expenses and obligations of the government restricting the area that might be reached in one summer by the commissioners."

With respect to Treaty 10, three sides of the lands incorporated in that Treaty were set by the boundaries of earlier treaties. Fedirchuk states at page 63 that:

"Unlike previous treaties, the lands identified in Treaty 10 were delineated for purely political reasons as they 'cleared title in the newly formed provinces of Saskatchewan and Alberta.'"

As in the case of Treaty 8, the Order in Council empowering the Commission for Treaty 10 instructs the Commissioner to acquire ownership of a specific tract of land.¹¹⁷

We find that the evidence in this matter demonstrates that Canada knew that the Denesúłiné occupied, hunted, trapped, and fished much of the time north of 60° latitude.

It was to this end that the Denesúłiné sought, and believed they obtained, guarantees and promises from Treaty Commissioners and senior government officials to the effect that their *traditional lifestyle* based on hunting, fishing, and trapping would be protected by the treaties. This is admitted by Canada.

We are unable to find that the evidence supports the claimants' argument. Indeed, counsel for the claimants were unable to point to any evidence that would put the boundaries anywhere other than as described in the treaties.

The parties agree that the traditional territory of the claimants was not delineated at the time the treaties were negotiated and signed and, for the most part, remains undelineated to this day.

In our view, the Denesúłiné were aware of Canada's intention to acquire specific tracts of land. The Denesúłiné's traditional lands outside the boundaries described in Treaties 8 and 10 were not intended, at the time the Treaties were negotiated and signed, to be "opened"¹¹⁸ for non-Indian settlement, mining, lumbering, and the like. We are unable to agree with the claimants that "the boundaries of

¹¹⁷ ICC, Submissions on Behalf of the Government of Canada, p. 22.

¹¹⁸ Excerpt taken from the *Whereas* clauses in *Treaty No. 8*, p. 11 (ICC Documents, p. 354), and *Treaty No. 10*, p. 10 (ICC Documents p. 435).

Treaties 8 and 10 are not as described in the written versions of those treaties.”¹¹⁹ As a result of the foregoing, we find that there was no intention on the part of the parties to include the DenesŪliné traditional lands north of 60° in the boundaries of the treaties.

ISSUE 2: HARVESTING RIGHTS BEYOND THE BOUNDARIES OF THE TREATIES

2 In the alternative, do the claimants have a treaty right to “pursue their usual vocations of hunting, trapping and fishing” beyond the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

The claimants submit that if this Commission finds, as we have done, that the boundaries of Treaties 8 and 10 are as described in the text of the treaties, we should consider an alternative argument. They contend that:

The DenesŪliné possess treaty rights, extending beyond the borders of the treaties, in respect of their traditional lands.¹²⁰

These rights include those lands north of the 60th parallel, the subject matter of this inquiry.

Canada, in response, says:

[T]he treaty right to hunt, fish, and trap extends only to the lands within the metes and bounds description in each treaty.¹²¹

In dealing with this issue, we will consider all historical evidence, including the treaties, as well as the submissions of counsel. To that end we now turn to an examination of the treaties, followed by an analysis of the historical evidence. The relevant historical evidence may be divided into two categories: 1) conduct of the parties leading up to and during the signing of the treaties; and 2) conduct of the parties after the treaties were signed.

¹¹⁹ ICC, Submission on Behalf of the Claimants, p. 9.

¹²⁰ Ibid., p. 38, para. 96.

¹²¹ ICC, Submissions on Behalf of the Government of Canada, p. 26.

The Text of the Treaties

As set out previously, Treaties 8 and 10 are essentially identical in construction and wording. For ease of reference, we have set out below and will examine only the relevant paragraphs of Treaty 8. In the interests of clarity, we will refer to the following six clauses as:

- 1 Purpose preamble;
- 2 Surrender clause;
- 3 Metes and Bounds description;
- 4 Blanket Extinguishment clause;
- 5 Grant to the Crown; and
- 6 Harvesting Rights clause.

. . . .

- 1 AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open up for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem to meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.
- 2 AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say. -
- 3 Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains . . . and along the said boundary easterly, northerly and southwesterly, to the place of commencement.
- 4 AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia or in any other portion of the Dominion of Canada.

- 5 TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.
- 6 And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the *tract surrendered as heretofore described*, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.¹²²

The question to consider in this matter lies in determining what geographical scope the parties intended for the application of the Harvesting Rights clause. In particular, the question is whether the words “tract surrendered as heretofore described” were intended to include only those lands described by the Metes and Bounds description in clause 2, or were intended also to include lands surrendered pursuant to the Blanket Extinguishment clause?

Counsel for Canada submit the correct interpretation of the Harvesting Rights clause is that the words “tract surrendered” are expressly modified by the words “as heretofore described.” We agree. However, the question is what lands are included within the phrase “as hereinafter described.” Canada argues that the phrase must refer back to the Metes and Bounds description. In support of this contention Canada emphasizes the Purpose preamble, which refers to “a tract of country bounded and described as hereinafter mentioned.” Counsel for Canada argue that the Purpose preamble contains the first reference to the term “tract.” They say this term must be interpreted consistently in the treaty with reference to the use which is made of it in the Purpose preamble, namely, the reference to “a tract of country bounded and described.” Canada’s argument continues that the harvesting rights of the DenesŪliné on these lands were to be affected as settlement occurred and as other purposes were fulfilled. As a result, Canada says, as settlement is confined to the metes and bounds lands, so are the harvesting rights of the DenesŪliné.

The claimants, on the other hand, submit that the words “tract surrendered as heretofore described” in the Harvesting Rights clause refer to both those lands surrendered under the Metes and Bounds clause and those lands surrendered under the Blanket Extinguishment clause. Their argument appears to be based on two grammatical points.

First, they contend that in order to interpret the phrase “tract surrendered” properly, one must look to where the surrender takes place – in a grammatical

¹²² *Treaty No. 8*, p. 12 (ICC Documents, p. 355), and *Treaty No. 10*, pp. 10-11 (ICC Documents, pp. 435-36). Clause numbers and emphasis added.

sense. They argue that the "surrender" arises from the Surrender clause and not from the Metes and Bounds description. Therefore, they submit the subsequent reference must be to all the land surrendered by the Surrender clause.

Second, they argue that the proper grammatical construction of the treaty is that the Metes and Bounds description and the Blanket Extinguishment clause are both subparagraphs of the Surrender clause. This contention, they say, is supported by the sentence structure and grammar of the three clauses:

([I]n fact they are not proper sentences without one another – (a) [the Surrender clause] lacks an object, and (b) [the Metes and Bounds description] and (c) [the Blanket Extinguishment clause] lack a subject and a verb). Put another way, the main clause incorporates the surrender clauses by reference.¹²³

Thus, claimants' counsel say, the Blanket Extinguishment clause is a part of the clause describing which lands are to be surrendered. Therefore the Harvesting Rights clause, which refers to the "tract surrendered," must by definition apply equally to both the specific and the blanket surrenders.

It is our view that the structure of these paragraphs in the treaties makes it clear that the reference in the Harvesting Rights clause to the "tract surrendered as heretofore described" applies to all lands surrendered by the Denesūḡiné under the treaties. Although there is some merit in the submissions of Canada on this point, those arguments are not supported by either the grammar or the language of the treaties. Furthermore, the Surrender clause and the Blanket Extinguishment clause both state, in identical language, that the Indians are surrendering "all their rights, titles and privileges whatsoever" to the lands described in the Metes and Bounds clause and to "all other lands wherever situated."

In assessing the language of the treaties and in listening to the submissions of counsel, we find that the interpretation offered by Canada is not the preferred construction. We find that a reasonable interpretation of the written text of the treaties is that the right to hunt, fish, and trap was intended by the parties to apply to all the traditional lands of the Denesūḡiné, regardless of whether they were located within the Metes and Bounds description of the treaty or whether they were lands surrendered under the Blanket Extinguishment clause. No distinction is made in the treaty Harvesting Rights clause between these lands.

To agree with Canada would mean that, if settlement and other activities in the metes and bounds lands were someday to encompass all those lands, and if those same lands are the only lands where the Denesūḡiné could exercise their

¹²³ ICC, Submissions on Behalf of the Claimants, p. 41, para. 102.

harvesting rights, then the effect would be that the Denesuliné would lose forever their means of livelihood, which was based on hunting, fishing, and trapping. In our view it is inconceivable that such a result was intended by Canada or that the Denesuliné would have ever agreed to such a potentially devastating arrangement. This is clear from the historical evidence, to which we now turn.

The Relevant Historical Evidence¹²⁴

We now consider this interpretation of the treaties in light of the historical evidence. We find them to be consistent. We will examine the evidence in two parts. First, we will consider the conduct and representations of the parties up to the negotiation and signing of the treaties. Second, we will examine the conduct of the parties after the treaties were concluded, up to the present.

We were advised at the outset of this inquiry that the factual question of whether or not the Denesuliné carried out harvesting activities north of 60° latitude is not in dispute. At the commencement of this inquiry, counsel for this Commission set out the agreement as follows:

[T]hrough the agreement of counsel on behalf of the government and for the Athabasca Denesuliné, the issue of harvesting rights north of 60° is not in dispute. In other words . . . it will not be necessary (for the Commission) to inquire into how far beyond the boundary or the southern boundary of the Northwest Territories the Athabasca Denesuliné have exercised their rights in the past. It is undisputed that there was significant use that it dates back into the mists of history and that it continues today.¹²⁵

Conduct prior to the Treaties

We have reached the following conclusions based upon our review of the full body of historical evidence:

- Canada's objective was to secure a specific tract of land for settlement and other purposes.
- The objective of the Denesuliné was to protect their traditional way of life.
- The Denesuliné were extremely apprehensive about entering into treaties for fear that their traditional way of life, including hunting, fishing, and trapping, would be jeopardized.

¹²⁴ The evidence before this inquiry has been more fully set out in Part II. This section is meant simply to highlight some of the more pertinent findings of fact.

¹²⁵ ICC, Athabasca Denesuline Treaty Harvesting Rights Inquiry (transcript), May 10, 1993, p. 9 (Mr. William Henderson).

- To assuage the concerns of the Denesúłiné, oral assurances were given by the Treaty Commissioners that the Denesúłiné would be “as free to hunt and fish, after the Treaty as if they had never entered into it.”
- There is no cogent evidence that the Treaty Commissioners at any time told the Denesúłiné that their right to hunt, fish, and trap would be restricted to a specific geographical area.

The thrust of the Crown’s argument is that the Denesúłiné deliberately gave up all of their traditional hunting, fishing, and trapping territory in return for the certainty of treaty harvesting rights within a smaller area, namely, the area defined in the Metes and Bounds description contained in the treaties.

In our view this is not a reasonable construction of the evidence because the metes and bounds area is not only smaller than the full traditional land area, but it was not where they hunted caribou. It is unlikely that a people known as the “Caribou Eaters” would have agreed to this arrangement. In addition, we note that the metes and bounds area provided no real guarantee for the Denesúłiné since those lands were subject to the Crown’s right to take them up for settlement and other purposes – to the exclusion of the Denesúłiné.

Taking into account all the evidence surrounding the negotiation of the treaties, and the adhesions to those treaties, we conclude that the parties did not intend to limit treaty harvesting rights to the lands described in the Metes and Bounds description in the treaties. No distinction was made between lands surrendered under the Metes and Bounds descriptions and lands surrendered under the Blanket Extinguishment clause for the purposes of defining the territorial scope of Indians’ treaty harvesting rights.

Post-Treaty Conduct of the Parties

The parties accept that after the signing of Treaties 8 and 10, the Denesúłiné continued to hunt, fish, and trap throughout their traditional territories, including the lands north of 60°, as they had for many generations before the treaties were signed. The evidence also confirms that the Government of Canada knew at all times that the Denesúłiné continued to make their livelihood from the lands and resources north of the 60th parallel after the treaties were signed.¹²⁶

¹²⁶ For example, in 1935 the Indian Agent for Fond du Lac noted that the band “trap almost exclusively in the Barrens and live in tents. Their food is largely fish and wild game. They do not have much contact with others, coming to the Trading posts at Treaty time and at New Years.” H.W. Lewis to Secretary, Indian Affairs, NA, RG 10, vol. 6921, file 779/28-3, part 3 (ICC Documents, p. 512).

Indeed, it is acknowledged by Canada that the claimants continue to this day to rely on those traditional lands for that purpose. Therefore, Canada submits:

[T]he mere fact that the Claimants have continued their harvesting activities on their claimed traditional harvesting lands after the signing of the treaties does not mean that they have been carrying on those activities pursuant to any treaty right.¹²⁷

Therefore, the issue for this Commission to consider is the *source* of the rights being exercised by the DenesŪliné.

Canada submits that harvesting activities are exercised pursuant to treaty rights when the harvesting occurs within those lands described by the Metes and Bounds description in the treaty, but that any harvesting rights being carried on outside that description are "rights" which "appear" to be "derived from federal or territorial legislation."¹²⁸

The claimants say:

In the present case, the evidence of [the] historical context is overwhelming: both the Treaty Commissioners and the DenesŪliné understood that the DenesŪliné would be entitled to exercise their treaty rights throughout all their traditional lands. The Claimants will not repeat the evidence discussed in Part II above, but all of that evidence applies equally to the present argument by demonstrating the mutual understanding of the parties that the DenesŪliné could continue to hunt, fish and trap as they always had.¹²⁹

The claimants further submit that:

Government records from prior to the commencement of this dispute disclose that Canada has consistently acknowledged the Treaty or aboriginal rights of the DenesŪliné/Chipewyan throughout their traditional lands, and has at various times encouraged and promoted their use of these areas north of the 60th parallel in the Northwest Territories.¹³⁰

The evidence shows that after the establishment of provincial boundaries, regulatory regimes were introduced respecting game and fish. And, although these regulatory regimes tended to curtail the harvesting activities of the DenesŪliné, it is also clear from the historical record that the Department of Indian Affairs and other federal departments promoted and encouraged the claimants' harvesting activities in the Northwest Territories.

¹²⁷ ICC, Submissions on Behalf of the Government of Canada, p. 26.

¹²⁸ Ibid., p. 26.

¹²⁹ ICC, Submissions on Behalf of the Claimants, p. 43, para. 107.

¹³⁰ Ibid., p. 30, para 81.

It is our view that Canada's submissions that such regulatory schemes "conferred" hunting, fishing, and trapping privileges are not persuasive. In effect, Canada says that if the claimants had treaty rights, they would not have had to obtain licences as they did and as they continue to do pursuant to the "Boundary A Licensing Scheme" in place in the Northwest Territories. At the same time, the evidence shows that the same licensing requirements were imposed on those Indians within the Metes and Bounds description area set forth in Treaty 8, an area that extends well into the Northwest Territories (lands north of the 60th parallel). We fail to see how such a scheme, in the face of the evidence, supports Canada's submissions, and, accordingly, cannot agree with them.

The Department of Indian Affairs was at all times aware that the Denesúliné occupied, hunted, fished, and trapped north of the 60th parallel. We find no evidence to support the conclusion that Treaties 8 and 10 were interpreted by the officials of Canada to limit the treaty harvesting rights of the Denesúliné to lands within the Metes and Bounds descriptions of the treaties. We are struck by the frequency with which the historical record shows the Government of Canada as recognizing those lands being used outside the treaties as the Denesúliné's "traditional lands" or "territory" or "traditional hunting grounds." Canada now, in essence, asks us to give no significance to its repeated use of such terms. Counsel for Canada submit that there is nothing in the historical record to suggest that Canada either expressly or by implication acknowledged "treaty rights" in the Northwest Territories. Their submission is:

While Canada may have encouraged and promoted the Denesúliné harvesting activities in the NWT, Canada has never recognized, promoted or defended, as is alleged by the Claimants, any **treaty rights** to harvest outside of the metes and bounds descriptions in the treaties.¹³¹

With respect, we cannot completely agree with Canada's submission. The historical evidence demonstrates quite clearly that the Government of Canada, and the Department of Indian Affairs specifically, not only encouraged the Denesúliné to use the claim area for years after the treaties were signed, but, whenever there were attempts to curtail the exercise of the Denesúliné's harvesting activities, the Government of Canada, almost without exception, rose to defend their exercise of these rights. In its defence of the exercise of their rights, Canada referred to

¹³¹ ICC, Submissions on Behalf of the Government of Canada, p. 24. Original emphasis.

them as traditional rights. Canada held that any interference with those rights "contravenes the treaty."¹³²

It was not until June 8, 1989, that the Government of Canada took a different position. On this date the Department of Indian and Northern Affairs first informed the DenesŪliné that the Blanket Extinguishment clause was being interpreted to extinguish their harvesting rights outside the lands defined in the Metes and Bounds descriptions of the treaties.¹³³

In our view, the subsequent conduct of the parties is not conclusive, but is consistent with the interpretation of the treaties we have adopted.

ISSUE 3: DOES CANADA HAVE A LAWFUL OBLIGATION?

- 3 *Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize either that:*
- a) *the geographical scope of the treaties extends north of 60° latitude; or that*
 - b) *the claimants have treaty harvesting rights north of 60° latitude?*¹³⁴

Having found previously under Issue 1 that the geographical scope of the treaties does not extend outside the Metes and Bounds description contained in the treaties, it follows that the answer to a) above must be no.

Having found previously under Issue 2 that the claimants do have treaty harvesting rights outside the Metes and Bounds description contained in the treaties north of 60° latitude, we now examine if the failure to recognize those rights by Canada can or should be redressed through the Specific Claims process.

Canada submits that what the claimants are seeking from this Commission is not a validation of any "specific claim" as prescribed in *Outstanding Business*, but rather a form of *declaratory relief*.¹³⁵ This, they say, takes the claimants' request outside the scope of the Policy "as it does not involve an *outstanding lawful obligation*."¹³⁶ The Policy, Canada submits, "envisions instead negotiating claims where . . . Canada may have breached a lawful obligation which it owes to an Indian Band resulting in some loss to that Band."¹³⁷

¹³² H.L. Fraser, RCMP, to Jas Ritchie, RCMP, July 14, 1925 [no file reference available] (ICC Documents, p. 466).

¹³³ ICC Affidavits, Tab B, Morrison's affidavit at para. 8.13 referring to a letter from John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, TARR, Manitoba, which states that "the question as to whether Treaties 8 and 10 extinguished hunting rights north of 60° was submitted to Legal Services for review. This review, along with a separate historical inquiry, has now been completed. It is the conclusion of Legal Services that the Treaties did, indeed, extinguish the rights of the Indians concerned, north of the 60th parallel."

¹³⁴ See ICC, Submissions on Behalf of the Government of Canada, p. 14.

¹³⁵ See *ibid.*, p. 9.

¹³⁶ See *ibid.*, p. 7. Emphasis added.

¹³⁷ See *ibid.*, p. 9.

As we follow Canada's argument, it submits that finding a breach of a lawful obligation does not in and of itself give rise to a specific claim as set out in *Outstanding Business*. There is, it says, the further and necessary requirement that compensation in the nature of "land and/or money" must be apparent.¹³⁸ Put another way, Canada submits that, even if this Commission were to find that Canada is in breach of a lawful obligation, the Specific Claims Policy cannot assist the claimants since money or land or both is not the requested (or actual) settlement result.¹³⁹

In summary, the Government of Canada submits that this Commission should find that the claim of the Denesųłiné is not a proper claim for negotiation pursuant to *Outstanding Business* for the following reasons:

1. The Policy requires that the Government of Canada must be in breach of a lawful obligation before a specific claim can be validated as a specific claim for negotiation.
2. Even if there is found to be a breach of a lawful obligation on the part of Canada, there must also be damages which can be quantified in either money or land or both.
3. The claim in issue here does not meet the requirements of either 1 or 2 above. The claimants are seeking declaratory relief under the Policy, which cannot be granted.

We propose to deal with each of the above submissions separately and in the order set out above.

Breach of a Lawful Obligation

We are of the view that most parties to the resolution of claims through the Government of Canada's Specific Claims Policy spend considerable time and attention on whether or not the government has "breached" some "lawful obligation." Canada's submissions respecting this particular claim demonstrate that it adheres to that line of thinking and analysis.

¹³⁸ See *ibid.*

¹³⁹ See *ibid.*, p. 10. They say, "The Claimants have candidly admitted that this matter does not involve monetary loss." Further on they conclude that "[t]he claim of the Athabasca Denesųłiné is clearly one not contemplated by the Specific Claims Policy and consequently... cannot fall within the Commission's jurisdiction."

¹⁴⁰ *Outstanding Business*, p. 19.

Remaining mindful that the Policy must be read as a whole, we have undertaken a careful review of the literature, including *Outstanding Business*, related government publications, and counsels' submissions both written and oral. Having done so, we are unable to conclude that a "breach" of a lawful obligation is necessary in this case to establish a valid claim. The literature states that the "primary objective [of government] with respect to specific claims is to discharge its lawful obligation."¹⁴⁰

More specifically, *Outstanding Business* states that:

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-fulfilment of a treaty or agreement between Indians and the Crown.¹⁴¹

We are unable to find that in the case of "non-fulfilment of a treaty or agreement," the only time a claim may be considered for negotiation under the Policy is where the Government of Canada must first be in "breach" of a lawful obligation.¹⁴²

The first step required by the Policy in this case is to determine whether Canada has an outstanding lawful obligation in the circumstances. We adopt the submission of the claimants:

In order to establish a valid claim for negotiation under the Policy, the Claimants need to establish that Canada has an outstanding lawful obligation, which may arise from, among other things, the "non-fulfilment of a treaty agreement between Indians and the Crown."¹⁴³

Both the claimants and Canada agree that the claimants are continuing their harvesting activities, although they are accepted by Canada as rights or privileges other than treaty rights.¹⁴⁴ The claimants submit that the failure to recognize the existence of a treaty right "must always amount to non-fulfilment of the treaty."¹⁴⁵

We do not deem it necessary to examine in detail the emerging body of law and the constitutional protection afforded to the aboriginal and treaty rights of Indians.¹⁴⁶ We think it sufficient to say that such constitutionally protected rights now have a significant impact on, at least, government conduct and policy. Treaty

¹⁴¹ Ibid., p. 20.

¹⁴² Although the *Federal Policy for Settlement of Native Claims*, p. 29, states that "[t]he Specific Claims Policy does not accept claims where actions have not been in breach of the federal government's lawful obligations."

¹⁴³ ICC, Submissions on Behalf of the Claimants, p. 44, para. 114.

¹⁴⁴ ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, pp. 151-55.

¹⁴⁵ ICC, Submission on Behalf of the Claimants, p. 45, para. 115.

¹⁴⁶ See *Constitution Act, 1982; R. v. Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] 3 CNLR 160.

rights of Indians entail a fiduciary obligation which, if breached, will give rise to government responsibility and obligation.¹⁴⁷

As we have found under Issue 2, Canada has treaty obligations in the matter before us. Canada's lawful obligation surely must include, at a minimum, the requirement to recognize formally the treaty rights in issue, and to ensure that the rights of the Denesúłiné are fulfilled, or, perhaps more specifically, exercised within the protection afforded by the *Constitution Act* and the law.¹⁴⁸

However, although it is necessary for a claimant to establish that Canada has an outstanding lawful obligation, that will not, in and of itself, necessarily mean that there is a valid claim for negotiation under the Policy. We turn then to the next issue.

Does the Policy Require Damages Compensable by Land or Money?

Outstanding Business throughout its text makes it clear that "the term 'specific claims' refers to claims made by Indians against the federal government which relate to . . . the fulfilment of Indian treaties."¹⁴⁹ The Policy document itself is divided into separate sections that direct Indian claimants first to a validation process, then to a settlement negotiation process.

In order to assist Indian Bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the *submission and assessment* of specific claims and on the *treatment of compensation*. While the guidelines form an integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.¹⁵⁰

Two separate sets of guidelines, entitled *Submission and Assessment of Specific Claims and Compensation*, follow the above statement. The submission guidelines consist of 10 rules, none of which stipulates or suggests that a band is

¹⁴⁷ *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570, 83 DLR (4th) 381, [1991] 3 CNLR 79. Both the Crown and the Court accepted that treaty obligations were fiduciary duties. Where the Crown failed to comply with some of the treaty obligations, the court held that "[the Crown] thereby breached its fiduciary obligations to the Indians."

¹⁴⁸ We believe that such a view is consistent with *Sparrow*, [1990] 1 SCR 1075 at 1105, where the court said: "s.35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights . . . Section 35(1), at least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against legislative power."

¹⁴⁹ *Outstanding Business*, pp. 3, 19, and 20.

¹⁵⁰ *Ibid.*, p. 29. Emphasis added.

required to show damages in the nature of financial loss or loss of land. The second set of guidelines respecting compensation commences as follows:

The following criteria shall govern the determination of specific claims compensation:

- 1) As a *general rule*, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered . . . This compensation will be *based on legal principles*.¹⁵¹

In our view, the process, as contemplated by the Policy, does not require the claimant band to show damages in the nature of the loss of money, land, or both in order to have a valid claim. Indeed, this Commission has been established to consider and inquire into the matters of validation separate from the question of compensation.¹⁵²

Canada argues that the language of *Outstanding Business*, such as “the Minister . . . accepts . . . such claims as are eligible for negotiation,” “the claim and the type of compensation being sought,” and “the criteria for calculating compensation,”¹⁵³ demonstrates that the only claims which can fall within the Policy are those with:

some kind of loss that is compensable, that can be calculated.¹⁵⁴

...
The policy envisions . . . negotiating claims . . . resulting in some loss to that Band. The . . . Policy is designed to compensate a claimant through land and/or money.¹⁵⁵

We cannot agree with Canada’s submissions. It may well be the case that in most land claims, under the Policy, proper compensation will, of necessity, result in compensation in the form of money, land, or both, but in some claims the loss or damage may well be compensable by some other means.

The test is not whether there are damages compensable by land or money, but, rather, the test is that, to be eligible for negotiation, a claim must show *some loss or damage that is capable of being negotiated under the Policy*. Having found that Canada has an outstanding obligation to the claimants in this matter, we now

¹⁵¹ Ibid., p. 30. Emphasis added.

¹⁵² Pursuant to Order in Council PC 1991-1329, July 15, 1991, the terms of reference of the Indian Claims Commission includes: “. . . 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 of the applicable criteria.” Emphasis added.

¹⁵³ *Outstanding Business*, p. 24.

¹⁵⁴ ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, p. 120 (Mr. Daigle).

¹⁵⁵ ICC, Submissions on Behalf of the Government of Canada, p. 9.

examine whether the claimants have sustained a loss or damage that is capable of being negotiated under the Policy.

We are not satisfied that negotiation pursuant to the Policy is a prescribed remedy in this matter given that the only substantiated complaint by the claimants in this process is that Canada refuses to *recognize* their Treaty rights north of 60° latitude. There is no evidence before this Commission that the claimants are being prevented from exercising their treaty harvesting rights.

We believe the phrase "acceptance of a claim for negotiation"¹⁵⁶ found throughout the Policy and supporting literature must mean something. After carefully reviewing the literature and listening to the submissions of counsel on this point, we believe that it means the loss or damage must be capable of being negotiated under the Policy. Currently the Policy and process are ill-equipped to deal with the Denesúliné's claim because, in the matter before us, there appears to be no loss or damage capable of being negotiated under the Policy.

Are the Claimants Seeking Declaratory Relief?

Canada submits that the claimants in this case are seeking a *declaration of rights*, which is not a remedy this Commission can grant.¹⁵⁷ As we follow Canada's argument at this time we are mindful of the fact that it is a return to the challenge first advanced prior to the commencement of this inquiry, heard by this Commission on May 6, 1993.¹⁵⁸ At that time we rejected Canada's challenge and concluded that this Commission was properly exercising its mandate. We then proceeded through our inquiry process. That decision is set out in full in Appendix A. We have not been convinced to alter our previous decision.

We would remind the parties that our mandate, as prescribed by our Orders in Council, includes to "inquire into and report on" and "to submit [our] findings and recommendations to the parties."¹⁵⁹ Declaratory relief is a judicial remedy that is binding on the parties, a relief we cannot grant. We cannot make binding decisions of that nature.

¹⁵⁶ Ibid., p. 30, and elsewhere in the Policy. The mandate of this Commission also states that we shall, by "considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon: (a) whether a claimant has a *valid claim for negotiation under the Policy* where that claim has already been rejected by the Minister." Emphasis added.

¹⁵⁷ See generally, ICC, Submissions on Behalf of the Government of Canada, pp. 6-11. Canada states that "the type of remedy which the claimants are seeking, being recognition of rights by a declaration, is not provided for in this forum."

¹⁵⁸ ICC, "Athabasca Denesuline Treaty Harvesting Inquiry, Ruling on Government of Canada Objection," May 6, 1993.

¹⁵⁹ See ICC Orders in Council.

Canada accepts that the claimants are entitled to regard certain conduct of the federal government as a rejection of their claim.¹⁶⁰ The claimants have requested that this Commission inquire into the rejection of its claim by the Minister of Indian Affairs. Thus, the claimants are seeking precisely what this Commission has been charged with providing.

We agree with counsel for Canada in the following exchange:

CHIEF COMMISSIONER: Are you telling us that if the Department of Indian Affairs rejects the claim on the basis that it is not a specific claim, that we don't have any capacity . . . to conduct an inquiry like we're doing here; just on the basis that you say it is not a specific claim, that by itself is sufficient to cause this Commission not to be able to conduct an inquiry?

MR. DAIGLE: No, but what Canada would expect the Commission to do is to look at that claim and decide whether it has jurisdiction to inquire into it. And it would make the same assessment that Canada did when it first submitted to it; it would look at the Policy and see if that is a matter that the Policy was designed to handle.¹⁶¹

We think Mr. Daigle has captured the essence of our mandate.

Our recommendation with respect to submissions and arguments of this nature is that participants to the specific claims process should exercise caution lest they replace those technical arguments that have been rejected under this process, such as limitation periods, with what some might observe as even more technical ones. Justice and fairness will be better served if all parties to the process adhere to the spirit and intent of the Policy captured in *Outstanding Business*:

In order to make [the negotiation] process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.¹⁶²

¹⁶⁰ ICC Transcript, vol. 1, p. 4.

¹⁶¹ See, ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, pp. 12 and 13.

¹⁶² *Outstanding Business*, p. 19.

PART VI

FINDINGS AND RECOMMENDATIONS

In Part V we dealt extensively with the principles of treaty interpretation applicable to claims submitted under the Policy. We noted that we are not a court of law and are not bound by principles of treaty interpretation developed by the courts. This is so because the Policy, in guideline 6, specifically rejects technical rules of admissibility with respect to historical evidence. Guideline 6 sets out that "all relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law."

We note that the Department of Indian Affairs and Northern Development and the Department of Justice are bound by the Policy in assessing claims, as are we in conducting our inquiry.

Having noted that we are bound by the Policy to consider all relevant historical evidence, we also examined the case law argued by the parties. We concluded that the law would compel us to examine "extrinsic evidence" in this matter, as there is ambiguity on the face of the treaties.

We wish to pay particular attention to the meaning of guideline 6. We believe it was intended to do exactly what it says: *to require consideration of all relevant historical evidence when interpreting treaties bearing on specific claims.*

A word or phrase must be construed in the context of the document in which it occurs. It makes sense to read the terms of a treaty in light of the whole treaty, and in light of its historical context.

The objective of *Outstanding Business* is to provide an alternative to the law courts and to adopt "a more liberal approach eliminating some of the existing barriers to negotiations."¹⁶³ The government states that "its primary objective . . . is to discharge its lawful obligation as determined by the courts if necessary. However, negotiation remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants."¹⁶⁴ To facilitate

¹⁶³ Ibid., p.19.

¹⁶⁴ Ibid.

the process of settlement by negotiation, the Policy provides a process under which claims may be brought and dealt with without resort to the courts.

It is wholly consistent with that objective for the government to free the process from the technical rules of evidence. That is hardly surprising, since the technical rules of evidence have led the courts to produce a number of complicated and contradictory decisions on the admissibility of extraneous evidence. In guideline 6, the government has sought to free the Office of Native Claims from having to struggle with this difficult area of law.

Since the Commission is directed by the Policy, we are obliged to consider the historical evidence in seeking the meaning of the treaties before us.

Counsels' submission on extraneous evidence is based on court decisions about how courts should treat such evidence in interpreting treaties. But for us to accept the courts' way of doing things would not only be contrary to the objectives proclaimed in *Outstanding Business*, it would be contrary to the terms and spirit of our mandate. We are authorized "to adopt such methods . . . as we may consider expedient for the proper conduct of the inquiry."

We therefore make the following recommendation:

RECOMMENDATION I

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

With respect to the three issues set out in Part V, we made a number of findings. Regarding Issue 1, dealing with the geographical scope of Treaties 8 and 10, we found that the geographical scope of the treaties is as set out in the Metes and Bounds descriptions contained in the treaties. We found no evidence to support the claimants' position that the treaty boundaries in fact ought to be extended northward to include all of the DenesŪliné's traditional lands.

Regarding Issue 2, dealing with the applicability of the Harvesting Rights clause beyond the boundaries of the treaties, we made a number of findings. We found that Treaties 8 and 10 are essentially identical in construction and wording and that, based on the grammar and language of both treaties, the Treaty Harvesting clause applies to all lands surrendered by the claimants. Therefore the

Treaty Harvesting clause applies to those lands surrendered pursuant to both the Metes and Bounds description and the Blanket Extinguishment clause. This means that the claimants have treaty harvesting rights in the Northwest Territories, outside the Metes and Bounds descriptions contained in the treaties.

We considered the above findings in light of the historical evidence, and found both the conduct and representations leading up to the negotiation and signing of the treaties, and the conduct of the parties after the treaties were signed, to be consistent with our interpretation of the treaties.

Regarding Issue 3, dealing with lawful obligation, we found that a *breach* of lawful obligation is not required by the Policy. Instead, we found that what is required by the Policy is that Canada must have an outstanding lawful obligation to the claimants. We further found that Canada does have an outstanding lawful obligation to recognize the treaty harvesting rights of the claimants in this matter.

Dealing with Canada's submission that this means the claimants are seeking declaratory relief, we found that this is not the case, a finding consistent with our previous interim ruling in this matter.¹⁶⁵ Declaratory relief is a judicial remedy that we cannot grant, as we are not a court of law.

With respect to the submission of Canada that the claimants must also have damages compensable by land or money, we found that was an overly narrow interpretation of the Policy. We found that the proper test set out in the Policy is that the claimants must have some loss or damage that is capable of being negotiated under the Policy. We found that the claimants do not at present have such a loss or damage, as their treaty harvesting rights have not, as yet, been interfered with.

Counsel for the Government of Canada, at least by implication, suggest in their oral submissions that Article 40 of the Tungavik Federation of Nunavut Agreement (TFN Agreement)¹⁶⁶ protects any treaty or aboriginal rights the claimants may have to the area in issue.¹⁶⁷ Further Canada states that, "the Claimants are

¹⁶⁵ See Appendix A.

¹⁶⁶ This agreement between the Inuit of the Eastern Arctic and the Government of Canada, together with the Government of the Northwest Territories, creates the Nunavut territory. It is said by the Inuit who live there to settle and bring certainty to the question of ownership and management of lands and resources in the Nunavut territory. See Canada, House of Commons, Standing Committee on Aboriginal Affairs, *Minutes of Proceedings and Evidence*, No. 37 (March 10, 1993), Hon. Thomas E. Siddon, Minister of Indian and Northern Affairs Canada. Section 40 deals with overlapping interests or claims of other aboriginal peoples.

¹⁶⁷ ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, p. 131 (Mr. Daigle).

continuing their harvesting activities and that the claimants have not suggested otherwise.”¹⁶⁸ The claimants, on the other hand, express the following concern:

[T]he DenesŪliné fear that, once the T.F.N. Agreement is in place, that Agreement will become irreversible, and it will be difficult, if not impossible, for the DenesŪliné to attain any recognition of their treaty rights in respect of lands covered by the Agreement.¹⁶⁹

While there appears to be a serious disagreement as to whether or not the treaty rights of the claimants are sufficiently protected by the above clause, that issue was not placed before this Commission to make findings upon, *at this time*. Accordingly, we make no findings on that issue, but we do recommend that the parties before this Commission make a serious effort to find some means to discuss this matter and resolve it to their mutual satisfaction.

In our view this would be an appropriate time for Canada to exercise its policy of “Administrative Referral.”¹⁷⁰ This matter appears to us to be a case where there is “a problem [that] can and should be redressed by direct administrative action” by the federal government.¹⁷¹

As we have said several times herein, the treaty harvesting rights of the claimants extend north of 60° latitude. The question whether they are adequately protected in accordance with the prevailing law is a matter for the parties. It is our view that should the claimants be denied the exercise of their rights, as provided by treaty and law, there would then be a “non-fulfilment of a treaty . . . capable of being negotiated” pursuant to the Specific Claims Policy. Part of Canada’s “lawful obligation” is to ensure that doesn’t occur.

¹⁶⁸ ICC, Submissions on Behalf of the Government of Canada, p. 39.

¹⁶⁹ Indian Claims Commission Jurisdiction Report, Fond du Lac, Black Lake, and Hatchet Lake First Nations, January 22, 1993, p. 2.

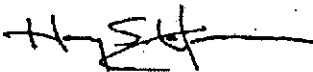
¹⁷⁰ See *Federal Policy for the Settlement of Native Claims*, p. 25; Administrative Referral claims are described as being “[a]dministrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process.” And at page 29 the publication reads, “[h]owever, in (cases where the federal government has not breached its lawful obligation) there may, nonetheless, be legitimate grievances that could be negotiated in a negotiated settlement. An example is the situation at Kanesatake.”

¹⁷¹ See *ibid.*, p. 25. See also ICC, Submissions on Behalf of the Government of Canada, p. 11, where Canada states that claims such as those before us are dealt with through litigation or on an *ad hoc* basis. Further, in oral submissions, counsel for Canada stated that *ad hoc* claims were “claims where the litigator feels that they shouldn’t go to court for some reason or other.” ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, p. 125 (Mr. Daigle).

RECOMMENDATION II

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

For the Indian Claims Commission



Harry S. LaForme
Chief Commissioner



Carol Dutcheshen
Commissioner



Carole T. Corcoran
Commissioner

December 21, 1993

APPENDIX A

INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINE TREATY HARVESTING INQUIRY

RULING ON GOVERNMENT OF CANADA OBJECTION

Background

On December 21, 1992 the Athabasca Denesuline, comprising Black Lake, Hatchet Lake and Fond du Lac First Nations (the "Claimants"), requested that the Indian Claims Commission "conduct an inquiry into the denial of our Specific Claim by Canada". The Athabasca Denesuline argue that the terms of Treaties 8 and 10 include provision for, and protection of, their rights to hunt, fish and trap in areas of the Northwest Territories which are north of the 60th Parallel and outside the fixed boundaries described in those treaties.

The Athabasca Denesuline further contend that the Minister of Indian Affairs and Northern Development (the "Minister") has rejected their claim. On June 8, 1989 Mr. John F. Leslie of the Department advised the Denesuline that "your proposal [for funding] does not constitute a specific or comprehensive claim". On June 12, 1991 then Deputy Minister Harry Swain wrote to Tribal Chief A.J. Felix saying, "our legal advice is that your aboriginal rights in land north of 60 [degrees] were surrendered by Treaties 5, 8 and 10 and that

actual treaty harvesting rights do not extend beyond the boundary of those treaties". On September 10, 1991 the Minister wrote to the same effect: "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights . . . ".

On January 22, 1993 the Commission agreed to conduct this inquiry and notices of that decision were sent to the parties on January 25, 1993.

The Commission is not being asked to investigate any claim based on unextinguished aboriginal or native title; nor is the Commission being asked to review the Nunavut Agreement. The fact that the Commission would not pursue such lines of inquiry was communicated to the parties at a meeting held in Toronto on April 1, 1993.

At that meeting, Mr. Winogron, counsel for the Government of Canada in this matter, indicated that Government may object to the jurisdiction of the Commission to conduct this inquiry. He was advised by Commission Counsel at that time, and subsequently by letter dated April 5, 1993, that any objection should be made to the Commissioners in a timely fashion (the date of April 13 was suggested) setting out detailed grounds for the objection coupled with a request for a ruling from the Commissioners.

Timeliness is a factor in this matter since a panel of the Commission, consisting of Chief Commissioner Harry S. LaForme, Commissioner Carole Corcoran and Commissioner Carol A. Dutcheshen, is scheduled to commence the community phase of this inquiry at Fond du Lac, Saskatchewan on Monday, May 10, 1994.

On May 6, 1993, a panel consisting of Chief Commissioner Harry S. LaForme together with Commissioners Carole Corcoran, Carol A. Dutcheshen, James Prentice, Dan Bellegarde and Roger Augustine, convened to hear the jurisdictional objection raised by the Government of Canada.

The Objection

Mr. Winogron wrote to the Chief Commissioner on April 13, 1993 to formally advise of the [Government's] objection. His letter is attached. The grounds of objection may be summarized as follows:

(1) The Claimants seek a declaration of rights as opposed to compensation or damage arising from a breach of lawful obligation on the part of Government. Such a declaration is not envisioned, defined or otherwise provided for by the Specific Claims Policy (the "Policy") and is not the proper subject matter of a specific claim;

(2) The Claimants' request does not involve an "outstanding lawful obligation" as contemplated by the Policy;

(3) The Claimants have not submitted this claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

The mandate of this Commission is set out in Order-in-Council P.C. 1992-1730, which states the following:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:

(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 of the applicable criteria.

Ruling

Mr. Winogron submits that the Commission should stop this inquiry.

His first objection is that we have no power to make a declaration of rights or to grant declaratory relief. In our view, we have not been asked to do that. The Commission has in fact been asked only to conduct an inquiry into the denial of the Bands' specific claim. Reference may be had in that regard to the December 21, 1992 letter from the Bands' legal counsel.

Our mandate is to inquire into and report on "whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister." When we have conducted an inquiry, we are "directed" by the Order-in-Council "to submit our findings and recommendations to the parties" and to report to the Governor in Council. We propose to do that and nothing more.

Mr. Winogron then argues that we should not consider the claim because the Claimants have not submitted it to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development. The Order-in-Council creating this Commission refers expressly to a rejection of a claim by the Minister. There is nothing in those terms of reference that confines the Commission to claims rejected in a particular way. Moreover, Mr. Winogron acknowledges that the Bands are entitled to regard the Department of Indian and Northern Affairs response of June 8, 1989 as a rejection of their claim.

Apart from that, the above argument is a somewhat extraordinary submission in the circumstances of this claim. The Department's rejection resulted from a request for funding to pursue the claim through the very process to which Mr. Winogron points. The Department refused to provide funds to allow the claim to go through the process. Mr. Winogron now argues that because the claim has not gone through the process we cannot consider it. With respect, we disagree.

Finally, Mr. Winogron submits that the claim is not one provided for in the Policy because it does not involve an "outstanding lawful obligation" as contemplated by that Policy.

We have been asked by the Claimants to inquire into their claim that they have rights under Treaties 8 and 10 to harvest by hunting, fishing and trapping in areas of the Northwest Territories north of the 60th parallel.

The term "Specific Claim" is defined in the booklet setting out the 1982 Policy, "*Outstanding Business*," which is incorporated into our terms of reference. Mr. Winogron accepts that the definition of "specific claim" is found in *Outstanding Business*. On page seven of *Outstanding Business* "Specific Claim" is defined as referring "to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties". This definition is repeated on page nineteen under the general heading "The Policy: A Renewed Approach to Settling Specific Claims".

On page 20, *Outstanding Business* states "the government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation'."

Outstanding Business goes on to say "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".

The Claimants' position is that the Government has refused on more than one occasion to "recognize" this claim to treaty rights and that the Minister has specifically rejected the Bands' claim that these treaty rights exist. They rely on letters written by the Minister or on his behalf which they have filed to demonstrate this.

The Government position is that in order to fall within the Policy, as stated in *Outstanding Business*, a claim must be one that can be compensated by way of land or money. Mr. Winogron argues that because *Outstanding Business* contemplates compensation for a breach of lawful obligation in terms of land or money, that is the only kind of claim into which the Commission is authorized to inquire. Mr. Winogron submits that this is not such a claim.

This Commission has been mandated to inquire into and report on whether Claimants have a valid claim under the specific claims policy in circumstances where the Minister has rejected the claim. We consider it premature to dispose of Mr. Winogron's argument that this claim does not fall within *Outstanding Business* until such time as we have completed the inquiry. The very purpose of the inquiry is to decide whether or not there is a valid specific claim and whether it has been rejected. The issue which Mr. Winogron raises we regard as an important issue which we must consider as part of the overall inquiry.

Mr. Winogron argues that this Commission must be satisfied that the facts of this case fall squarely within the Policy before this Commission proceeds to an inquiry. We disagree. In our view, the Commission must, at this juncture, examine the circumstances of the case and need only be satisfied that:

- 1. The claim has been advanced to the government;**
- 2. The Claimants allege non-fulfilment of federal obligations under Treaties 8 and 10, to which they are parties;**
- 3. The claim has been rejected by the Minister as a specific claim;**
- 4. The claim has been advanced before this Commission by the Claimants as a matter still in dispute; and**
- 5. The Claimants have an arguable case that their claim falls within the Policy.**

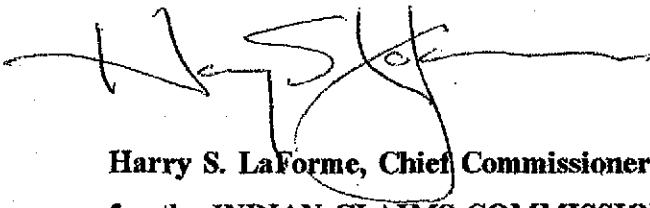
The Commissioners take the view that these requirements have been met and that the Commission has properly embarked upon its inquiry.

Throughout the inquiry, the Commission will keep in mind the points Mr. Winogron has raised, and it may be that we will have to return to them at a later point.

This matter was considered in Saskatoon on May 6, 1993 by the following Commissioners:

Chief Commissioner Harry S. LaForme
Commissioner Roger Augustine
Commissioner Daniel Bellegarde
Commissioner Carole Corcoran
Commissioner Carol A. Dutchshen
Commissioner James Prentice

Dated this 7 May 1993

A handwritten signature in black ink, appearing to read 'H. S. LaForme', with a large, stylized flourish at the end.

Harry S. LaForme, Chief Commissioner
for the INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINÉ REPORT

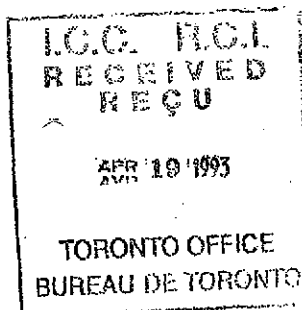
Department of Justice Ministère de la Justice
Canada Canada

Ottawa, Canada
K1A 0H8

Specific Claims Ottawa
DIAND Legal Services
Trebla Building, Room 1157
473 Albert Street

April 13, 1993

Harry S. LaForme
Chairman and Chief Commissioner
INDIAN CLAIMS COMMISSION
110 Yonge Street, Suite 1702
Canada Trust Building
Toronto, Ontario, M5C 1T4



Dear Mr. LaForme:

Athabaska Denesuline Claim - Indian Claims Commission

Further to our attendance at the consultation conference on the above matter on April 1, 1993, we are writing to formally advise of our objection to the Commission's jurisdiction to inquire into the Athabaska Denesuline matter.

The claimants have asked the Commission "to review Canada's blanket denial of the existence of any Denesuline treaty rights, including harvesting rights, in the N.W.T.". They claim to have treaty rights in their traditional territories in the N.W.T. and argue that "Treaties 8 and 10 cover all of the traditional lands of the Denesuline, notwithstanding that the descriptions of the treaty boundaries contained in the written versions of those treaties would exclude those traditional lands". Alternatively, they argue that their treaty rights to hunt, trap and fish extend beyond the current boundaries of these treaties in areas covered by the "blanket extinguishment clause" in the treaties.

The operative provision of the Order in Council establishing the Commission under Part I of the Inquiries Act states:

"AND WE DO HEREBY advise that our commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development, 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 the claim has already been rejected by the Minister;"

Canada

INDIAN CLAIMS COMMISSION PROCEEDINGS

- a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

The Government's policy on specific claims states 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-fulfilment 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."

Based upon the above, our objections are as follows:

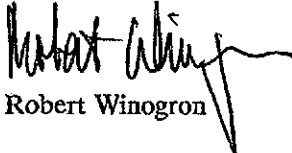
- 1) The claimant is not claiming any compensation or damage arising from the breach of a lawful obligation by the Crown. The claimant's request is not one which can be defined as a claim under the policy, but rather, they seek a declaration of treaty rights. Declaratory relief is properly a subject matter for the Federal Court of Canada and is not properly the subject matter of a specific claim under the Specific Claims Policy. The Commission's empowering Order-in-Council authorizes it to inquire into and report on whether the claimants have a valid claim on the basis of the policy. On the basis of the policy there can be no claim for declaratory relief since the policy does not provide for it, define it nor envision it.
- 2) The claimant's request is not a claim as provided for in the Specific Claims Policy. This request does not involve an "outstanding lawful obligation" as contemplated by the Policy.
- 3) The claimant has not submitted a claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

ATHABASCA DENESŪLINÉ REPORT

As a result the Commission is without jurisdiction to inquire into and report on a matter which is not a claim.

As per the instruction in Mr. Henderson's letter of April 5, 1993, we are requesting a ruling from the Commissioners with respect to this matter.

We look forward to hearing from you.


Robert Winogron

c.c. Carol A. Dutcheshen
Carole Corcoran
Bill Henderson
David Knoll

RW/nvc

APPENDIX B

ATHABASCA DENESUŁINÉ INQUIRY

- 1 **Decision to conduct inquiry** January 25, 1993
- 2 **Notices sent to parties** January 25, 1993
- 3 **Consultation conference** April 1, 1993

The consultation conference was held with representatives of the Athabasca Denesułiné First Nation, Canada, and the Indian Claims Commission at our Toronto office. Matters discussed included the mandate of the Commission, hearing dates, translation/transcription of information, consolidation of documents, procedural and evidentiary rules, the scope of the inquiry, the presentation of legal argument by the participants, and other matters related to the conduct of the inquiry.

- 4 **Hearing on Mandate of Commission, Saskatoon** May 6, 1993
- 5 **Community sessions**

The panel held community sessions at Fond du Lac, Saskatchewan, on May 11-12, 1993, hearing from 18 members of the Fond du Lac, Black Lake, and Hatchet Lake First Nations.

May 11: Louis Benoanie, Jimmy Dzeylion, Bart Dzeylion, John Besskaytsare, Edward Tsannie, Martin Josee, Leon Fern (Samuel), Celeste Randhile, Fred Adams, and Norbert Deranger.

May 12: Senator Louis Chicken, Charlie Throssie, Joe Cheba, J.B. Bigeye, Isaac Skull, Napoleon McKenzie, Moise Yooya, and John Lidguerre.

6 Oral submissions, Saskatoon

September 17, 1993

7 Content of formal record

The formal record for the Athabasca DenesŪliné Inquiry consists of the following materials:

- Documentary record (3 volumes of documents, 1 addendum volume, 1 index and 1 volume of affidavits)
- Athabasca DenesŪliné transcript from community sessions
(2 volumes)
- Written submissions of counsel for Canada and the claimants
- Transcripts of oral submissions (2 volumes dated May 6, 1993, and September 17, 1993)
- Ruling of the Commission on mandate to conduct the inquiry, May 7, 1993
- Book of Authorities and
- Exhibits tendered during the inquiry.

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

APPENDIX C

PROCEDURES OF THE ATHABASCA DENESUŁINÉ INQUIRY

At the beginning of the community sessions, Chief Commissioner LaForme called the session to order and invited an elder to open the meeting with a prayer. Chief Joe Marten of Fond du Lac then made some introductory comments. The Chief Commissioner followed with a brief explanation to the community of what the role of the Commission is and what the scope of the inquiry would be. Commission counsel introduced all other counsel and provided the Commissioners with notice that documents relating to the mandate of the Commission would be included in the formal record. Other formalities would be dealt with in the course of the inquiry.

Commission counsel then briefly described the procedures that the parties had agreed to in advance of the community session, subject to approval of the panel, which was given. It was noted for the record that the Commissioners have the authority to prescribe any procedure they deem appropriate in the circumstances of the inquiry.

Simultaneous translation of the proceedings was provided to give the elders an opportunity to give information and to follow the proceedings in their own languages. The interpreters were later given the opportunity to review the tapes of their translation to ensure that the written transcript would be as complete and accurate as possible.

Witnesses were called and assisted by Commission counsel. They were not sworn in or asked to affirm their evidence on oath. All questions were directed through Commission counsel, with the Commissioners reserving the right to interject at any time. When other counsel wished to raise questions, this was done by providing them in writing to Commission counsel, who would then direct the questions to the witness. Witnesses were not subject to cross-examination.

The Commissioners did not adopt any formal rules of evidence in relation to the community information or documents they were prepared to consider.

APPENDIX D

TREATY No. 8.

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:—

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her

Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:—

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River; thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves,

Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper

for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, HAVE HEREUNTO SET THEIR HANDS at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Albert Tate and Samuel Cunningham, Interpreters.

Father A. LACOMBE,
GEO. HOLMES,
†E. GROUARD, O.M.I.
W. G. WHITE,
JAMES WALKER,
J. ARTHUR COTÉ,
A. E. SNYDER, Insp. N.W.M.P.,
H. B. ROUND,
HARRISON S. YOUNG,
J. F. PRUD'HOMME,
J. W. MARTIN,
C. MAIR,
H. A. CONROY,
PIERRE DESCHAMBEAULT,
J. H. PICARD,
RICHARD SECORD,
M. McCAULEY.

DAVID LAIRD, *Treaty Commissioner*,
J. A. J. MCKENNA, *Treaty Commissioner*,
J. H. ROSS, *Treaty Commissioner*,
his
KEE NOO SHAY OO x *Chief*,
mark
his
MOOSTOOS x *Headman*,
mark
his
FELIX GIROUX x *Headman*,
mark
his
WEE CHEE WAY SIS x *Headman*,
mark
his
CHARLES NEE SUE TA SIS x *Headman*,
mark
his
CAPTAIN x *Headman*, from Sturgeon
mark Lake.

In witness whereof the Chairman of Her Majesty's Commissioners and the Headman of the Indians of Peace River Landing and the adjacent territory, in

ATHABASCA DENESULINÉ REPORT

behalf of himself and the Indians whom he represents, have hereunto set their hands at the said Peace River Landing on the first day of July in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Boucher, interpreters.

DAVID LAIRD, *Chairman of Indian Treaty Commissioners,*
his
DUNCAN x TASTAOOSTS, *Headman of Crees*
mark

A. LACOMBE,
†E. GROUARD, O.M.I., Ev. d'Ibora,
GEO. HOLMES,
HENRY MCCORRISTER,
K. F. ANDERSON, Sgt., N.W.M.P.
PIERRE DESCHAMBEAULT,
H. A. CONROY,
T. A. BRICK,
HARRISON S. YOUNG,
J. W. MARTIN,
DAVID CURRY.

In witness whereof the Chairman of Her Majesty's Commissioners and the Chief and Headmen of the Beaver and Headman of the Crees and other Indians of Vermilion and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at Vermilion on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Bourassa, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
AMBROSE x TETE NOIRE, *Chief Beaver Indians.*
mark
his
PIERROT x FOURNIER, *Headman Beaver Indians.*
mark
his *Headman*
KUIS KUIS KOW CA POOHOO x *Cree*
mark *Indians.*

A. LACOMBE,
†E. GROUARD, O.M.I., Ev. d'Ibora,
MALCOLM SCOTT,
F. D. WILSON, H. B. Co.,
H. A. CONROY,
PIERRE DESCHAMBEAULT,
HARRISON S. YOUNG,
J. W. MARTIN,
A. P. CLARKE,
CHAS. H. STUART WADE,
K. F. ANDERSON, Sgt., N.W.M.P.

In witness whereof the Chairman of Her Majesty's Treaty Commissioners and the Chief and Headman of the Chipewyan Indians of Fond du Lac (Lake Athabasca) and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at the said Fond du Lac on the twenty-fifth and twenty-seventh days of July, in the year of Our Lord one thousand eight hundred and ninety-nine.

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Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Pierre Deschambeault, Reverend Father Douceur and Louis Robillard, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
LAURENT x DZIEDDIN, Headman,
mark
his
TOUSSAINT x Headman,
mark

(The number accepting treaty being larger than at first expected, a Chief was allowed, who signed the treaty on the 27th July before the same witnesses to signatures of the Commissioner and Headman on the 25th.)

his
MAURICE x PICHE, Chief of Band.
mark
Witness, H. S. YOUNG.

G. BREYNAT, O.M.I.,
HARRISON S. YOUNG,
PIERRE DESCHAMBEAULT,
WILLIAM HENRY BURKE,
BATHURST F. COOPER,
GERMAIN MERCREDI,
his
LOUIS x ROBILARD,
mark

K. F. ANDERSON, Sgt., N.W.M.P.

The Beaver Indians of Dunvegan having met on this sixth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Headman of the said Beaver Indians have hereunto set their hands at Dunvegan on this sixth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses, after the same had been read and explained to the Indians by the Reverend Joseph Le Treste and Peter Gunn, Interpreters.

J. H. ROSS,
J. A. J. MCKENNA, } Commissioners,
his
NATOOSSES x Headman,
mark

A. E. SNYDER, Insp. N.W.M.P.
J. LE TRESTE,
PETER GUNN,
F. J. FITZGERALD.

The Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River and Gull River, and the Cree Indians of Gull River and Deep Lake, having met at Fort Chipewyan on this thirteenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first

ATHABASCA DENESULINÉ REPORT

day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chiefs and Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort Chipewyan on this thirteenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Peter Mercredi, Chipewyan Interpreter, and George Drever, Cree Interpreter.

A. E. SNYDER, *Insp., N.W.M.P.*,
 P. MERCREDI,
 GEO. DREVER,
 L. M. LE DOUSSAL,
 A. DE CHAMBOUR, O.M.I.
 H. B. ROUND,
 GABRIEL BREYNAT, O.M.I.,
 COLIN FRASER,
 F. J. FITZGERALD,
 B. F. COOPER,
 H. W. McLAREN,

J. H. ROSS,	} <i>Treaty</i>
J. A. J. MCKENNA,	
his	} <i>Commissioners,</i>
ALEX. x LAVIOLETTE, <i>Chipewyan Chief,</i>	
mark	}
his	
JULIEN x RATFAT,	} <i>Chipewyan</i>
mark	
his	} <i>Headmen,</i>
SEPT. x HEEZELL,	
mark	}
his	
JUSTIN x MARTIN, <i>Cree Chief,</i>	}
mark	
his	} <i>Cree Headmen.</i>
ANT. x TACCARROO,	
mark	}
his	
THOMAS x GIBBOT,	}
mark	

The Chipewyan Indians of Slave River and the country thereabouts having met at Smith's Landing on this seventeenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country, set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chief and Headmen of the said Chipewyan Indians have hereunto set their hands at Smith's Landing, on this seventeenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by John Trindle, Interpreter.

A. E. SNYDER, *Insp. N.W.M.P.*,
 H. B. ROUND,
 J. H. REID,
 JAS. HALY,
 JOHN TRINDLE,
 F. J. FITZGERALD,
 WM. McCLELLAND,
 JOHN SUTHERLAND.

J. H. ROSS,	} <i>Treaty</i>
J. A. J. MCKENNA,	
his	} <i>Commissioners,</i>
PIERRE x SQUIRREL, <i>Chief,</i>	
mark	}
his	
MICHAEL x MAMDRILLE, <i>Headman,</i>	}
mark	
his	}
WILLIAM x KISCORRAY, <i>Headman,</i>	
mark	}

INDIAN CLAIMS COMMISSION PROCEEDINGS

The Chipewyan and Cree Indians of Fort McMurray and the country thereabouts, having met at Fort McMurray, on this fourth day of August, in this present year 1899, Her Majesty's Commissioner, James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort McMurray, on this fourth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by the Rev. Father Lacombe and T. M. Clarke, Interpreters

J. A. J. MCKENNA, *Treaty Commissioner,*
his
ADAM x BOUCHER, *Chipewyan Headman,*
mark
his
SEAPOTAKINUM x CREE, *Cree Headman,*
mark

A. LACOMBE, *O.M.I.,*
ARTHUR J. WARWICK,
T. M. CLARKE,
J. W. MARTIN,
F. J. FITZGERALD,
M. J. H. VERNON.

The Indians of Wapiscow and the country thereabouts having met at Wapiscow Lake on this fourteenth day of August, in this present year 1899, Her Majesty's Commissioner, the Honourable James Hamilton Ross, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Chief and Headmen of the Indians have hereunto set their hands at Wapiscow Lake, on this fourteenth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Alexander Kennedy.

A. E. SNYDER, *Insp. N.W.M.P.,*
CHARLES RILEY WEAVER,
J. B. HENRI GIROUX, *O.M.I., P.M.,*
MURDOCH JOHNSTON,
C. FALHER, *O.M.I.,*
ALEX. KENNEDY, *Interpreter,*
H. A. CONROY,
(Signature in Cree character).
JOHN McLEOD,
M. R. JOHNSTON.

J. H. ROSS, *Treaty Commissioner,*
his
JOSEPH x KAPUSEKONEW, *Chief,*
mark
his
JOSEPH x ANSEY, *Headman,*
mark
his
WAPOOSE x *Headman,*
mark
his
MICHAEL x ANSEY, *Headman,*
mark
his
LOUISA x BEAVER, *Headman,*
mark

APPENDIX E

TREATY No. 10.

Articles of a treaty made and concluded at the several dates mentioned therein, in the year of our Lord one thousand nine hundred and six between His Most Gracious Majesty the King of Great Britain and Ireland by His commissioner, James Andrew Joseph McKenna, of the city of Winnipeg, in the province of Manitoba, Esquire, of the one part, and the Chipewyan, Cree and other Indian inhabitants of the territory within the limits hereinafter defined and described by their chiefs and headmen hereunto subscribed of the other part.

Whereas the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by His Majesty's said commissioner in the year 1906, been convened to meet His Majesty's said commissioner representing His Majesty's government of the Dominion of Canada at certain places in the said territory in this present year 1906 to deliberate upon certain matters of interest to His Most Gracious Majesty on the one part and the said Indians of the other.

And whereas the said Indians have been notified and informed by His Majesty's said commissioner that it is His Majesty's desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to His Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned and to obtain the consent thereto of his Indian subjects inhabiting the said tract and to make a treaty and arrange with them so that there may be peace and good will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council at the respective points named hereunder and being requested by His Majesty's said commissioner to name certain chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon and to become responsible to His Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several chiefs and headmen who have subscribed hereto.

And whereas the said commissioner has proceeded to negotiate a treaty with the Chipewyan, Cree and other Indians inhabiting the said territory hereinafter defined and described and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder;

Now therefore the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada for His Majesty the King and His successors for ever all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say:—

All that territory situated partly in the province of Saskatchewan and partly in the province of Alberta, and lying to the east of Treaty Eight and to the north of Treaties Five, Six and the addition to Treaty Six, containing approximately an area of eighty-five thousand eight hundred (85,800) square miles and which may be described as follows:—

Commencing at the point where the northern boundary of Treaty Five intersects the eastern boundary of the province of Saskatchewan; thence northerly along the said eastern boundary four hundred and ten miles, more or less, to the sixtieth parallel of latitude and northern boundary of the said province of Saskatchewan; thence west along the said parallel one hundred and thirty miles, more or less, to the eastern boundary of Treaty Eight; thence southerly and

westerly following the said eastern boundary of Treaty Eight to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary of Treaty Six to its intersection with the western boundary of the addition to Treaty Six; thence northerly along the said western boundary to the northern boundary of the said addition; thence easterly along the said northern boundary to the eastern boundary of the said addition; thence southerly along the said eastern boundary to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary and the northern boundary of Treaty Five to the point of commencement.

And also all their rights, titles and privileges whatsoever as Indians to all and any other lands wherever situated in the provinces of Saskatchewan and Alberta and the Northwest Territories or any other portion of the Dominion of Canada.

To have and to hold the same to His Majesty the King and His successors for ever.

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And His Majesty the King hereby agrees and undertakes to set aside reserves of land for such bands as desire the same, such reserves not to exceed in all one square mile for each family of five for such number of families as may elect to reside upon reserves or in that proportion for larger or smaller families; and for such Indian families or individual Indians as prefer to live apart from band reserves His Majesty undertakes to provide land in severalty to the extent of one hundred and sixty (160) acres for each Indian, the land not to be alienable by the Indian for whom it is set aside in severalty without the consent of the Governor General in Council of Canada, the selection of such reserves and land in severalty to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that His Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band or bands as He may see fit; and also that the aforesaid reserves of land; or any interest therein, may be sold or otherwise disposed of by His Majesty's government of Canada for the use and benefit of the Indians entitled thereto, with their consent first had and obtained.

It is further agreed between His Majesty and His said Indian subjects that such portions of the reserves and lands above mentioned as may at any time be required for public works, buildings, railways or roads of whatsoever nature may be appropriated for such purposes by His Majesty's government of Canada due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area so appropriated.

And with a view to showing the satisfaction of His Majesty with the behaviour and good conduct of His Indians and in extinguishment of all their past claims, He hereby through His commissioner agrees to make each chief a present of thirty-two (32) dollars in cash, to each headman twenty-two (22) dollars and to every other Indian of whatever age of the families represented at the time and place of payment twelve (12) dollars.

ATHABASCA DENESULINÉ REPORT

His Majesty also agrees that next year and annually thereafter for ever He will cause to be paid to the Indians in cash, at suitable places and dates of which the said Indians shall be duly notified, to each chief twenty-five (25) dollars, each headman fifteen (15) dollars and to every other Indian of whatever age five (5) dollars.

Further His Majesty agrees that each chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year and every third year thereafter each chief shall receive a suitable suit of clothing, and that after signing the treaty each headman shall receive a bronze medal and next year and every third year thereafter a suitable suit of clothing.

Further His Majesty agrees to make such provision as may from time to time be deemed advisable for the education of the Indian children.

Further His Majesty agrees to furnish such assistance as may be found necessary or advisable to aid and assist the Indians in agriculture or stock-raising or other work and to make such a distribution of twine and ammunition to them annually as is usually made to Indians similarly situated.

And the undersigned Chipewyan, Cree and other Indian chiefs and headmen on their own behalf and on behalf of all the Indians whom they represent do hereby solemnly promise and engage to strictly observe this treaty in all and every respect and to behave and conduct themselves as good and loyal subjects of His Majesty the King.

They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace between each other and between their tribes and other tribes of Indians and between themselves and other of His Majesty's subjects whether whites, Indians, half-breeds or others now inhabiting or who may hereafter inhabit any part of the territory hereby ceded and herein described, and that they will not molest the person or trespass upon the property or interfere with the rights of any inhabitant of such ceded tract or of any other district or country or interfere with or trouble any person passing or travelling through the said tract or any part thereof and that they will assist the officers of His Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty or infringing the law in force in the country so ceded.

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Isle à la Crosse this twenty-eighth day of August in the year herein first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by Magloire Maurice, interpreter.

J. V. BEGIN,
Supt., R.N.W.M. Police.
I. RAPET, ptre, O.M.I.,
CHAS. FISHER,
CHAS. MAIR,
ANGUS MCKAY,
D. MCKENNA,
T. DAVIS.

J. A. J. MCKENNA,
Commissioner.

his
WILLIAM X APISIS,
mark
Chief of the English River Band.

his
JOSEPH X GUN,
mark
Headman.

his
JEAN BAPTISTE X ESTRAL-
SHENEN, mark
Headman.

his
RAPHAEL X BEDSHIDEKKGE,
mark
Chief of Clear Lake Band.

Signed by the Chief and Headman of the Canoe Lake band, this 19th day of September, A.D. 1906. The treaty having been read over and explained by Archie Park, interpreter, in the presence of the undersigned witnesses.

J. V. BEGIN,
Supt., R.N.W.M.P.,
L. COCHIN, ptre, O.M.I.,
J. E. TESTON, ptre, O.M.I.,
F. E. SHERWOOD,
Const., R.N.W.M. Police,

his
ARCHIE X PARK, Interpreter.
mark
CHARLES MAIR,

his
JOHN X IRON,
mark
Chief of Canoe Lake Band.

his
BAPTISTE X IRON,
mark
Headman, Canoe Lake Band.

his
JEROME X COUILLONEUR,
mark
Headman, Canoe Lake Band.

Articles of a treaty made and concluded at the several dates mentioned therein, in the year of our Lord one thousand nine hundred and seven, between His Most Gracious Majesty the King of Great Britain and Ireland by His Commissioner Thomas Alexander Borthwick, of Mistawasis, in the province of Saskatchewan, Esquire, of the one part, and the Chipewyan, Cree and other Indian inhabitants of the territory within the limits hereinafter defined and described by their chiefs and headmen hereunto subscribed of the other part.

* * * * *

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Lac du Brochet this 19th day of August, in the year first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by A. Turquetil.

CHARLES LA VIOLETTE,
Interpreter.

W. J. MCLEAN, Witness.
A. W. BELL, Witness.
THOMAS BORTHWICK,
Commissioner, Treaty No. 10.

his
PETIT X CASIMIR,
mark
Chief of Barren Land Band.

his
JEAN X BAPTISTE,
mark
Headman of Barren Land Band.

his
ANDRE X ANTSANEN,
mark
Indian of Barren Land Band.

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Lac du Brochet this 22nd day of August in the year first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by E. S. Turquetil, interpreter.

Witness A. W. BELL,
" W. J. MCLEAN.

his
THOMAS X BENAOUNI,
mark
Chief of Hatchet Lake Band.
Witness A. W. BELL,

his
PIERRE X AZE,
mark
Headman of Hatchet Lake Band.

THOS. BORTHWICK,

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE LAX KW'ALAAMS INDIAN BAND

PANEL

Commissioner P.E. James Prentice, QC
Commissioner Carole T. Corcoran

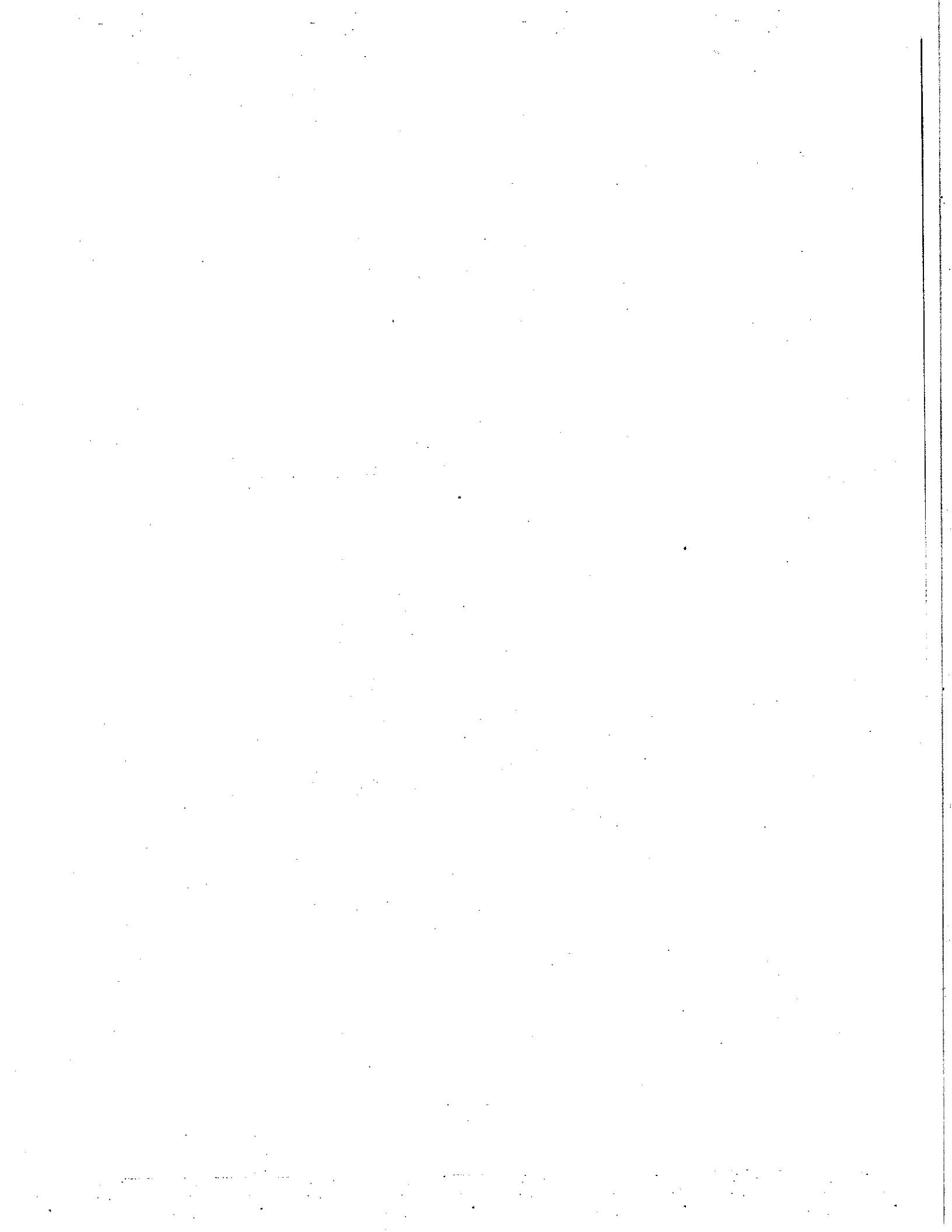
COUNSEL

For the Lax Kw'alaams Indian Band
Harry Slade / Bob Freedman

For the Government of Canada
Bruce Becker / Ian Gray

To the Indian Claims Commission
Robert F. Reid, QC / Kim Fullerton / Ron S. Maurice

JUNE 29, 1994



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PART I

INTRODUCTION

OVERVIEW

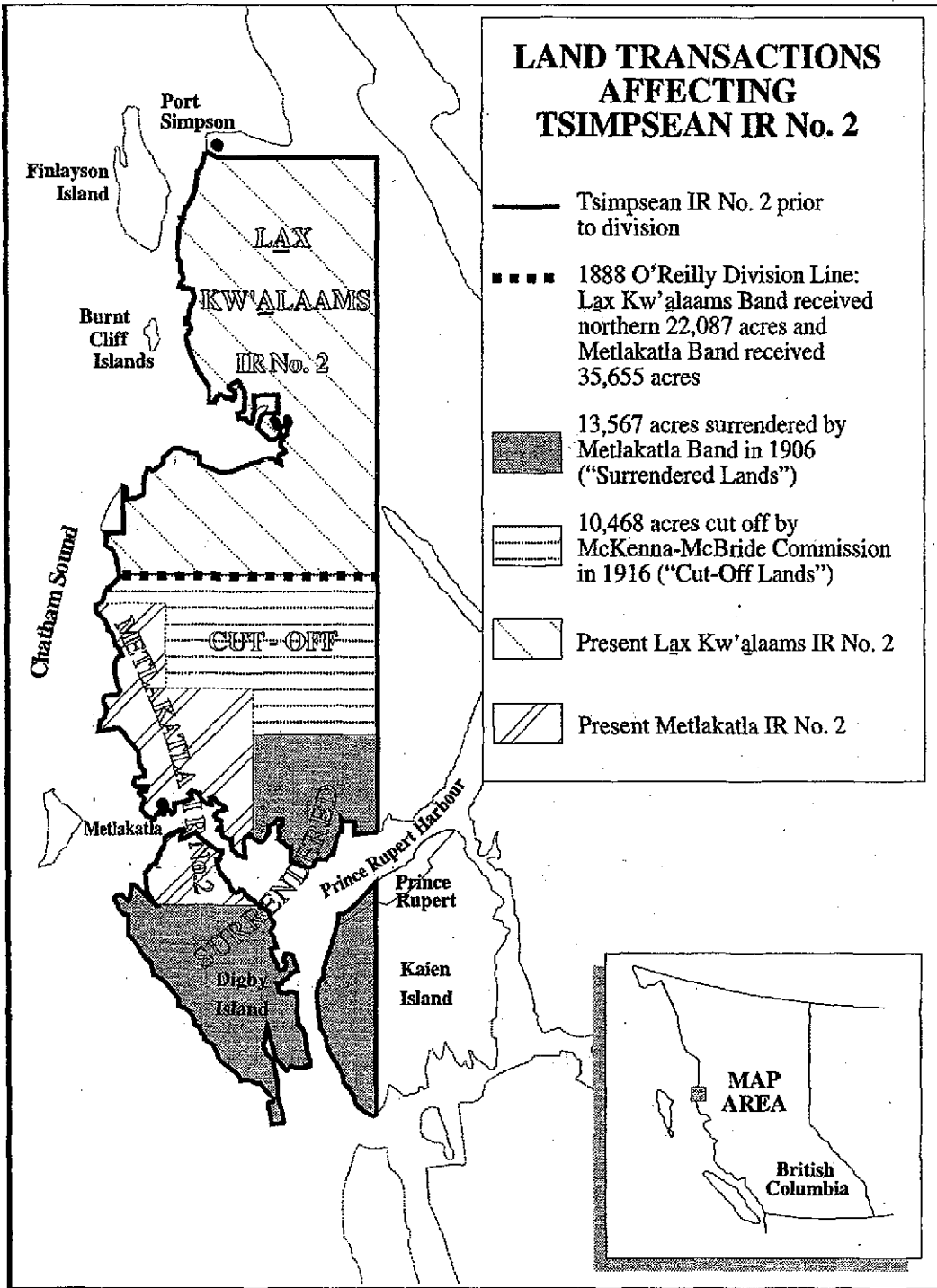
On December 5, 1979, the Port Simpson Indian Band, now referred to as the Lax Kw'alaams (pronounced with a silent "x") Indian Band,¹ submitted a specific claim to the Minister of Indian and Northern Affairs asserting that Tsimpsean Indian Reserve No. 2 (hereinafter "Tsimpsean IR No. 2") had been illegally split into two separate reserves by government officials in 1888. The Port Simpson Band claimed damages for the loss of its unsurrendered interest in the southern portion of Tsimpsean IR No. 2.²

Tsimpsean IR No. 2 had been allotted to the Port Simpson and Metlakatla Bands for their joint use and benefit by Indian Reserve Commissioner Peter O'Reilly in 1884. A map of the claim area on page 104 depicts the various land transactions that have affected Tsimpsean IR No. 2 since it was allotted in 1884. The original boundaries of Tsimpsean IR No. 2 are marked by a solid black line.

The reserve, which was surveyed in 1887, consisted of 57,742 acres along the northwest coast of British Columbia. Owing to religious and political differences among the Tsimpsean Indians at Metlakatla and Port Simpson, Commissioner O'Reilly decided in 1888 to divide the reserve into two parts so that each band could have its own reserve and band council (the division is marked by a dashed line on the map). The northern portion of Tsimpsean IR No. 2, containing 22,087 acres, was allotted to the Port Simpson Band for its exclusive use and benefit. The Metlakatla Band received the southern portion of the reserve, consisting of 35,655 acres, on

¹ We wish to note that "Indian Band" is a defined term in the *Indian Act* and is used for the sake of clarity. Although "First Nation" is generally preferred to the term "Band," we use the latter throughout this report because the Lax Kw'alaams Band made an important distinction in its arguments before the Commission between the traditional form of government and the *Indian Act* form of government.

² The spelling of Tsimpsean is one of a number of variants: Tsimshian, Chimseyans, Chymshean, Chimpsain, Shimshyans, Simseans, Simpsian, Tsimsean, Tsimseyans, Tsimsheeans, Tsimpshean, and (German) Zimshian" (Margaret Seguin Anderson, Submission to the Indian Claims Commission, September 28-30, 1993, ICC Documents, p. 537, n.1). In this report, the terms Tsimpsean and Tsimshian are used interchangeably.



the same basis.³ Although the population at Port Simpson in 1889 was at least four-and-a-half times that of Metlakatla, the Port Simpson Band received only 38 per cent of the original reserve acreage for its exclusive use and benefit.

After the 1888 division, two parcels of land in the southern part of the reserve were alienated to the Crown without the consent of the Port Simpson Band. First, in 1906, the Metlakatla Band surrendered 13,567 acres to the federal Crown for sale to the Grand Trunk Railway Company (shown on the map as the "Surrendered Lands"): Secondly, in 1923 and 1924, the federal and provincial governments passed orders in council confirming the McKenna-McBride Commission's recommendation of 1916 to cut off an additional 10,468 acres from Tsimpsean IR No. 2 (shown on the map as the "Cut-Off Lands"). The present reserves of the two bands are marked on the map as Lax Kw'alaams IR No. 2 and Metlakatla IR No. 2.

The Port Simpson Band objected to the division of the reserve both before and after Commissioner O'Reilly's decision. The Band claimed that Commissioner O'Reilly failed to comply with the surrender provisions of the 1880 *Indian Act*⁴ requiring the assent of a majority of the male band members to validate a surrender. They asserted that O'Reilly's failure to obtain the required assent constituted a violation of the *Indian Act* and a violation of the Crown's trust relationship with the Port Simpson Band. Based on these allegations, the Port Simpson Band sought the following remedy from the Department of Indian Affairs:

We therefore call for a return of the 10,468 acre cut-off to its original status as Indian Reserve land held for the joint use and benefit of the Port Simpson and Metlakatla Bands. We also call for compensation in land for the loss of the Port Simpson Band's unsurrendered interest in those parcels of land from the southern portion of Tsimpsean I.R. #2 that were sold to the Grand Trunk Pacific Railway Company.⁵

The claim was considered by the Department of Indian Affairs and on April 15, 1985, the Band was notified by David Crombie, then Minister of Indian Affairs and Northern Development, that its claim had been accepted for negotiation under Canada's Specific Claims Policy. Over the next six years, the parties were involved in the lengthy and intensive process of negotiating a settlement. In 1991 the parties came to an agreement in principle on the major terms of settlement. The claim, however, was never settled because a dispute arose between the parties over Canada's demand for an absolute surrender as a condition to settling the

³ For ease of reference we shall refer to the two reserves as Lax Kw'alaams IR No. 2 and Metlakatla IR No. 2 throughout the report.

⁴ *Indian Act*, 1880, SC 1880, c. 28, s.37.

⁵ Port Simpson Band, "A Specific Claim Regarding Tsimpsean I.R. #2," December 5, 1979 (ICC Exhibit 17, p. 2).

claim. The Band was concerned that the absolute surrender might have the effect of extinguishing the Tsimpsean peoples' aboriginal title in the Surrendered Lands.

It is important to note that this inquiry relates solely to Canada's request for an absolute surrender of the Surrendered Lands. The Commission was informed that the parties agreed to negotiate the claim for the Cut-Off Lands in separate discussions and that those lands were never the subject of negotiations in this claim. Therefore, the sole issue before us is whether Canada is justified in demanding an absolute surrender of the Surrendered Lands from the Lax Kw'alaams Band as a condition to settlement.

A second map on page 106 of this report shows the traditional lands of the Tsimpsean peoples as asserted by the Allied Tsimshian Tribes.⁶ These areas are shaded grey. The territories used and occupied by each of the nine tribes are designated and marked by reference to the tribe(s) that occupied the area. The map shows an area of land that the Tsimpsean Chiefs originally requested in 1881 to be set aside as reserve for the joint use and benefit of the Metlakatla and Port Simpson Indians. This area, described on the map as the "Tsimpsean Peninsula" and marked by dashed lines, amounted to approximately 350 square miles of land. The boundaries of Tsimpsean IR No. 2, as allotted in 1884, are also set out on the map to show the area that was ultimately set aside as reserve by Indian Commissioner O'Reilly.

It is clear that the map is intended to demonstrate that the Tsimpsean peoples assert aboriginal rights over a much larger area than that encompassed by Tsimpsean IR No. 2. However, the Commission makes no findings on whether this map represents the true nature and extent of the Tsimpsean peoples' traditional territories.

THE REPORT

The Indian Claims Commission was established in 1991 as an independent body with authority to inquire into and report on which compensation criteria apply in the negotiation of a claim settlement in situations where the First Nation and the Minister of Indian Affairs disagree on the applicable criteria.

In the course of our inquiry, the Commission reviewed approximately 600 pages of documentary material and heard oral evidence from seven witnesses at an information-gathering session conducted in the community of Prince Rupert, BC, on March 15, 1994. The witnesses who appeared before this Commission provided

⁶ The traditional territories as asserted by the Allied Tsimshian Tribes were set out in a map tendered by the Lax Kw'alaams Band during the community sessions on March 15, 1994 (ICC Exhibit 10).

information that was of great assistance in the preparation of this report. We thank them.

We heard from the traditional Chiefs of the Tsimpsean Nations on the significance of this specific claim and how it relates to their claim for unextinguished aboriginal title over their traditional territories. Chief James Bryant, who serves in a dual capacity as Chief of the Lax Kw'alaams Band and Speaker for the Allied Tsimshian Chiefs, spoke about the claim negotiations between the Band and Canada and the reasons why the parties are at an impasse today. Sandra Littlewood, a member of the Lax Kw'alaams Band, provided a detailed historical background of the claim. Professor Hamar Foster, a professor of law at the University of Victoria, appeared before the Commission as an expert on the legal history of British Columbia in relation to aboriginal title, the creation of reserves, and the treaty-making process. Fred Walchli, a senior Indian Affairs official in the 1980s, explained the differences between the policies of the federal government with respect to comprehensive claims (based on unextinguished aboriginal title) and specific claims (based on breaches of obligations relating to the management of reserve lands and other band assets). Finally, the Commission was furnished with a written report by Dr. Margaret Anderson on the anthropological history of the Tsimpsean people and their social organization.

On March 16, 1993, the Commission heard oral submissions from legal counsel for both parties on the merits of the issues before us. In Part V of the report we will consider the written and oral submissions made by legal counsel with respect to the substantive questions before us.

We would observe that Canada chose not to place any evidence before the Commission in a number of crucial areas. Canada's decision not to support its position with the best available evidence undoubtedly hampered the Commission in its investigatory and decision-making process.

This problem stemmed in part from Canada's position that the settlement negotiations for this claim were conducted on a "without prejudice" basis and from Canada's intention to preserve the privilege attached to those communications.⁷ Consequently, counsel for Canada framed their arguments in a generalized manner without reference to the facts specific to this claim. Canada's submission that it had not waived any privilege was based on three reasons: (1) Canada had not

⁷ The legal terms "without prejudice" and "privilege" require some explanation. Negotiations conducted "without prejudice" allow the parties to make admissions of law or fact in the interest of compromise. "Without prejudice" notifies the opposition that such admissions cannot be used against them in subsequent court proceedings. Where certain admissions are made or documents are disclosed during negotiations on a without prejudice basis, it is arguable that those communications and documents are "privileged" and cannot be introduced in a court of law without the consent of the parties.

produced any documents relating to the settlement negotiations; (2) Canada had not consented to the Band producing such documents; and (3) Canada expressly reserved privilege over any documents submitted in relation to this matter.⁸ The Commission was not asked to, and did not, make any ruling with respect to the admissibility of any documents tendered in evidence by the Band. The Commission declined to make any findings on the efficacy of Canada's express refusal to waive privilege. Whether any such documents are impressed with a privilege remains a matter for the courts to determine in subsequent proceedings.

This report represents the culmination of the Commission's efforts to consolidate the information obtained from these various sources and to make recommendations to the parties on how they might resolve their differences in a fair and expeditious manner. We hope that the parties will consider our recommendations carefully and that they will make an earnest effort to settle this claim.

The structure of the report is as follows. Part II relates to the mandate of the Commission to conduct an inquiry into this matter. Part III provides a summary of the historical background, the nature of the claim submitted by the Port Simpson Band, and an account of the settlement negotiations that followed acceptance of the claim by the Minister of Indian Affairs. Part IV sets out the issues before the Commission in this inquiry. Part V contains our analysis and conclusions on the facts and the law. Part VI states our findings and recommendations. Attached as Appendices A and B to this report are two summaries regarding the particulars of the inquiry and the procedures followed. A copy of an interim ruling on the mandate of the Commission is attached as Appendix C. Appendix D lists the 11 "compensation criteria" contained in Canada's Specific Claims Policy.

The Commission wishes to thank counsel for Canada and the First Nation for their assistance throughout this inquiry. We also wish to extend our thanks to the Chief and Council of the Lax Kw'alaams Band and the nine Simooygit (male hereditary chiefs) and Sem a'gidem (female hereditary chiefs) of the Allied Tsimshian Tribes for their commitment and patience.

⁸ Submissions on Behalf of the Government of Canada, March 11, 1994, p. 6.

PART II

THE COMMISSION MANDATE

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal of Canada on September 1, 1992. The preamble clauses to the enabling orders in council outline the rationale underlying the creation of the Indian Claims Commission:

WHEREAS a Joint First Nations/Government Working Group will review and recommend changes to the Government of Canada's Specific Claims Policy and process to the Minister of Indian Affairs and Northern Development and to the Assembly of First Nations; and

WHEREAS the Government of Canada and the First Nations agree that an interim process to review the application by the Government of Canada of the Specific Claims Policy to individual claims is desirable; . . .⁹

The operative provisions of the Commission's mandate are:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), 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.¹⁰

⁹ Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (ICC Exhibit 3).

¹⁰ Ibid.

The Commissioners are further directed:

[T]o submit their findings and recommendations to the parties involved in a specific claim where the Commissioners have conducted an inquiry and to submit to the Governor in Council in both official languages an annual report and any other reports from time to time that the Commissioners consider required in respect of the Commission's activities and the activities of the Government of Canada and the Indian bands relating to specific claims . . .¹¹

On January 26, 1993, the Lax Kw'alaams Band requested that the Indian Claims Commission conduct an inquiry into whether Canada's request for an absolute surrender "is within the claims acceptance and compensation criteria" set out in Canada's Specific Claims Policy (set out in a 1982 booklet published by the Department of Indian and Northern Affairs entitled *Outstanding Business, A Native Claims Policy: Specific Claims*).¹² Chief Commissioner LaForme, now the Hon. Justice LaForme of the Ontario Court (General Division), notified the Government of Canada and the Lax Kw'alaams Band by letters dated May 4 and 5, 1993, that the Commission would conduct an inquiry into this matter.¹³

By letter dated September 13, 1993, Canada raised an objection to the Commission's jurisdiction to conduct an inquiry into Canada's request for an absolute surrender as a condition to settling the Band's specific claim.¹⁴ At the request of the Commissioners, legal counsel for the parties provided written submissions to the Commission on whether the issue in dispute between the parties was within our mandate.¹⁵

The thrust of Canada's objection was that the Commission's mandate "is fundamentally linked and limited to" the 11 enumerated compensation criteria set out in Canada's Specific Claims Policy under the heading "Compensation" (see Appendix D to this report). Canada argues that since the requirement for a surrender is not expressly referred to in those compensation criteria, the Commission does not have a mandate to conduct this inquiry.¹⁶ Counsel for Canada contend

¹¹ Ibid.

¹² Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*].

¹³ Chief Commissioner LaForme to the Ministers of Justice and Indian and Northern Affairs dated May 4, 1993 (ICC Exhibit 2); Chief Commissioner LaForme to Chief and Council of Lax Kw'alaams First Nation, May 5, 1993.

¹⁴ Bruce Becker, Department of Justice Canada, to Ron Maurice, Indian Claims Commission, September 13, 1993.

¹⁵ Both parties provided written submissions on the mandate of the Commission on November 10, 1993. Supplementary submissions were provided by the Lax Kw'alaams Band on December 10, 1993, and by Canada on December 13, 1993.

¹⁶ Submissions on Behalf of the Government of Canada with Respect to the Mandate of the Indian Claims Commission, November 10, 1993, p. 5.

that the compensation criteria are intended to address the amount of compensation the Band will receive out of any settlement and that they do not deal with what Canada receives in return.

Counsel for the Band submitted that the Commission has a mandate to conduct this inquiry for two reasons. First, they contend that because the Commission was created to facilitate the negotiation of claims in a fair and expeditious manner and to provide an alternative to the adversarial process of the courts, it was intended to have a broad mandate to "inquire [into] and report on any matter that arises in the presentation and negotiation of a specific claim."¹⁷ Secondly, the Band argues that Canada's requirement of an absolute surrender of interests that were not the subject matter of the negotiations is tantamount to and has the same effect as a rejection of the Band's claim.¹⁸ The Band also submitted that the interpretation of our terms of reference should be governed by a "pragmatic and functional analysis" approach that focuses on all the terms read in their entirety rather than on the interpretation of an isolated provision.¹⁹

In their supplementary submissions, counsel for Canada submitted that the Commission does not have a broad mandate to examine any matter in dispute between Canada and the Band in respect of a specific claim. They submit that "such a result would render meaningless the reference to 'compensation criteria' establishing the mandate of the Commission" and that "if that result was intended, nothing would have been easier than to say so in the Order-in-Council."²⁰

After considering the written submissions of legal counsel for both parties, we issued an interim ruling on the objection raised by Canada on March 15, 1994 (attached as Appendix C to this report). We concluded that, on a plain and ordinary reading of our Orders in Council, the Commission's mandate is remedial in nature and that it has a broad mandate to inquire into disputes which arise in the application of Canada's Specific Claims Policy. Therefore, we found that the issues brought before us by the Lax Kw'alaams Band disclosed an arguable

¹⁷ Lax Kw'alaams Band, Memorandum of Argument on Mandate of Indian Claims Commission, November 10, 1993, p. 6.

¹⁸ *Ibid.*

¹⁹ Lax Kw'alaams Band, Supplementary Submissions on Mandate, December 10, 1993, p. 2. Canada submitted that the "pragmatic and functional analysis" approach endorsed by the Supreme Court of Canada in *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1049, is not the proper approach to be adopted by the Commission in interpreting its own mandate. They submit that the ordinary rules of statutory interpretation ought to be relied upon for this purpose: see Supplementary Submissions on Behalf of the Government of Canada with Respect to the Mandate of the Indian Claims Commission, December 13, 1993, p. 1. We did not find it necessary to consider whether the "pragmatic and functional analysis" approach is the proper interpretive test in this instance.

²⁰ Supplementary Submissions on Behalf of the Government of Canada with Respect to the Mandate of the Indian Claims Commission, December 13, 1993, p. 4.

case that the Minister of Indian Affairs had incorrectly determined the applicable compensation criteria in the negotiation of the Band's claim.

On March 16, 1994, counsel for the Band and for Canada made oral submissions before the Commission on the substantive issues before us. As a preliminary issue, counsel for Canada essentially repeated their arguments with respect to the Commission's mandate to conduct this inquiry. Canada's additional submissions disclose no compelling reasons for this panel to alter the decision made in the interim ruling. Accordingly, we find that the Commission was within its mandate to conduct an inquiry into Canada's request for an absolute surrender as a condition precedent to settling the Band's claim.

We draw special attention to the following excerpt contained in our interim ruling:

In our view one cannot meaningfully determine "which compensation criteria apply in negotiation of a settlement" unless one examines the proposed settlement agreement in its totality. In other words, before one can address whether the compensation criteria applied by Canada were appropriate, one must determine what Canada is offering the compensation for (ie. compensation for the loss of reserve lands, compensation for loss of use, extinguishment of aboriginal title, etc.).²¹

The simple fact is that the compensation offered by Canada is inextricably linked to the release or surrender demanded as a condition of settling the claim. It appears that Canada is prepared to offer the compensation only in return for an absolute surrender of the Band's interests in the Surrendered Lands. The surrender constitutes the *quid pro quo* for the compensation Canada is prepared to offer.²²

Furthermore, we have examined the 11 compensation criteria and, in our opinion, criterion 1 supports the proposition that the Commission is entitled to examine the settlement agreement in its totality. Criterion 1 states that:

As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.²³

²¹ Indian Claims Commission, "Lax Kw'alaams (Port Simpson) Inquiry: Ruling on Government of Canada Objection," March 15, 1994, p. 6.

²² The term *quid pro quo* is defined in Black's Law Dictionary as "What for what; something for something. Used in law for the giving one valuable thing for another." In this case, Canada expects a surrender of certain interests in land in return for the compensation paid to the Band.

²³ *Outstanding Business*, p. 30.

One of the fundamental "legal principles" in the law of damages requires that "the party complaining should be put in as good a position as would have been occupied if the wrong had not been done . . ." ²⁴ What we have endeavoured to do in this inquiry is to examine the settlement agreement in its totality and to consider whether its terms and conditions are consistent with the legal principles on damages. The question then is whether the agreement places the Lax Kw'alaams Band in the same position it was in before Tsimpsean IR No. 2 was divided without a surrender from the Port Simpson Band members. Canada's demand for an absolute surrender undoubtedly has a bearing on whether the compensation offered by Canada is consistent with the "legal principles" in the law of damages.

Finally, it is important to recognize that this Commission was created to provide non-binding recommendations to the parties on the issues in dispute between them. The preamble to our Orders in Council states that "the Government of Canada and First Nations agree that an interim process to review the application by the Government of Canada of the Specific Claims Policy to individual claims is desirable . . ." It is clear that the Commission was created to facilitate the negotiation of specific claims and that it was necessary to create an independent claims body to respond to concerns that Canada's role with respect to the validation and negotiation of specific claims is too pervasive. ²⁵ A restrictive interpretation of our mandate would undermine the ability of the Commission to provide meaningful assistance to the parties in the negotiation and settlement of specific claims.

²⁴ S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book, 1991), pp. 1-5.

²⁵ The Indian Commission of Ontario described Canada's pervasive role in the negotiation of specific claims in these terms: "Through these [specific claims] policies the federal government sets itself up as the judge and jury in dealing with claims against itself. It sets the criteria, decides which claims are acceptable and controls the entire negotiation process, including funding support." See Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: ICO, September 24, 1990), p. 32.

PART III

THE INQUIRY

In this section of the report we provide a synopsis of the facts that form the historical basis for the claim submitted by the Lax Kw'alaams Band. We then provide a brief summary of the negotiations entered into by the parties and the nature of the dispute between them. Because there was no dispute on the facts, we feel free to rely on those set out in the claim submitted by the Port Simpson Band Council to the Minister of Indian Affairs on December 5, 1979, entitled "A Specific Claim Regarding Tsimpsean I.R. #2" (hereinafter referred to as "the Claim").²⁶ The facts in this section have also been supplemented by reference to the documentary record and our own research into the matter.

HISTORICAL BACKGROUND

Tsimpsean Use and Occupation of Traditional Lands

The Port Simpson and Metlakatla Bands comprise the descendants of nine tribes of the Tsimpsean nation.²⁷ The entire area of Tsimpsean IR No. 2, as it was originally allotted, falls within the boundaries of the territories traditionally occupied by these tribes. Prior to contact with Europeans, each of the Tsimpsean tribes established permanent winter villages in the Prince Rupert Harbour area, including locations on Digby Island, fronting on Metlakatla Pass, on the shores

²⁶ ICC Exhibit 17.

²⁷ The nine tribes collectively make up the Allied Tsimshian Tribes (ICC Exhibit 9). There are nine Hereditary Chiefs of the Allied Tsimshian Tribes:

Tribe	Simooygit / Sem a'gidem	Current Holder of Name
Gitwilgiots	Simooygit Shashaak	Harold Dudoward
Gitzaxlaal	Simooygit Niisho'at	Arnold Brooks
Gitsees	Simooygit Niis-yahanaat	Lawrence Helin
Ginaxangiik	Simooygit Khaghass	Fred Dudoward, Sr.
Gitnadoiks	Simooygit Niiswexe	Clyde Dudoward
Gitandoah	Simooygit Niiswibass	Henry Kelly
Gitspaxloats	Sem a'gidem Hanax Dioks	Marietta Helin
Gitluzau	Sem a'gidem Hamax Halidem Ha'yetsk	Merle Alexcee
Gitlan	Simooygit Niislaghanuus	Barry Helin

of the adjacent mainland, and on the east coast of Kaien Island where Prince Rupert is presently situated.²⁸

Dr. Margaret Anderson's written report relating to the extent of the territories occupied by the Tsimshian peoples at the time of the assertion of British sovereignty in 1846 reveals the following:

Ten groups of Coast Tsimshian had winter villages on the lower Skeena River below its canyon: Gitwilgyots, Gitzaklalth, Gitsees, Ginakangeek, Ginadoiks, Gitandau, Gispakloats, Gilutsau, Gitlan, and Gitwilksaba (Duff 1964:18). In late prehistoric times, they extended their territories coastward and built new villages on the islands of Venn (Metlakatla) Pass, where the weather was milder. There is evidence of some 5,000 years of occupation in the Prince Rupert Harbour areas. They continued to return to their territories on the Skeena in the summers for salmon fishing. After the Hudson's Bay Company moved Fort (later Port) Simpson to its present location in 1834, nine groups moved to the area surrounding the fort (the Gitwilksaba were extinct by this time).²⁹

At the community session on March 15, 1994, the Band tendered a map which shows that the Tsimshian peoples occupied village sites throughout a large area of land around the Prince Rupert Harbour area and extending far up the Skeena River. The map on page 103 shows the traditional lands of the Tsimpsean peoples as asserted by the Allied Tsimshian Tribes.

The oral traditions of the Tsimpsean peoples lend support to the assertion that they were an organized society at the time of British sovereignty and that they traditionally used and occupied the lands around Prince Rupert Harbour for a long period before contact with Europeans. This Commission heard testimony from members of the Tsimpsean peoples with respect to their traditional territories.

Chief James Bryant testified that the Tsimpsean tribes occupied specific territories along the northwest coast of British Columbia "from time immemorial."³⁰ Mr. Lawrence Helin, Simooygit Niis-yahanatt of the Gitsees tribe, told us that the word "Tsimpsean" literally means "in the Skeena," which suggests that the Tsimpsean peoples used and occupied lands along the Skeena River long before contact with non-Indians.³¹ Simooygit Niis-yahanatt indicated that, in addition to their lands along the banks of the Skeena, the Tsimpsean eventually asserted control of the coastal areas in and around the mouth of the river. The area around

²⁸ The Claim (ICC Exhibit 17), p. 7.

²⁹ Margaret Seguin Anderson, Submission to the Indian Claims Commission, September 28-30, 1993, p. 11 (ICC Exhibit 8), citing Marjorie Halpin and Margeret Seguin Anderson, "Tsimshian Peoples..." in *Handbook of North American Indians*, vol. 7: *The Northwest Coast* (Washington: Smithsonian Institution, 1990).

³⁰ ICC Transcripts, vol. 1, p. 26, March 15, 1994.

³¹ *Ibid.*, p. 43.

the present site of Lax Kw'alaams was also referred to by Simooygit Niis-yahanatt as "the cradle of our civilization."³²

By the middle of the 1800s, the nine Tsimpsean tribes had settled at Port Simpson, or Lax Kw'alaams, as it had been traditionally known. In 1857 an Anglican missionary named William Duncan established a Christian mission in Port Simpson. Five years later, Duncan and a number of his converts relocated to Metlakatla in an effort to construct a model Christian community. Over the next few years, Duncan's following at Metlakatla grew. Although the religious differences between the Metlakatla and Port Simpson Bands were a significant factor leading to the division of Tsimpsean IR No. 2, "the two communities have a common origin, adhere to the same culture, speak the same native language, belong to the same tribes, and hold tribal territories in common."³³

Development of Reserve Policy in British Columbia

From 1846 until the province of British Columbia entered the Dominion of Canada in 1871, the colonial government grappled with the question of aboriginal title while simultaneously attempting to open up lands for non-Indian settlement. Professor Foster stated that the colonial government initially embarked on a policy of obtaining title to aboriginal lands through purchase and sale under treaty. Acting under instructions from the imperial government to extinguish Indian title in the same way as "Her Majesty would have had to do had she retained title in her own name," Governor James Douglas entered into 14 treaties between 1850 and 1854 on Vancouver Island.³⁴ However, during the mid-1850s the colony

³² ICC Transcripts, vol. 1, p. 79, March 15, 1994, Mr. Henry Kelly, Simooygit of the Gitandoah tribe, told the Commission of the legend associated with the origin of his name title – Niiswibass. Simooygit Niiswibass said that his name means "Grandfather of all that is scary." Niiswibass earned his name from a prince who was about to become successor to the Chief. The prince, after being led into a mountain and spending several days with many fierce-looking supernatural people, frightened the people of his village, as they sensed something different about him. As the legend goes, this young prince fell on a large rock, leaving an impression of his body on the rock. The prince lay motionless for some time. When he sat up, people ran from him because he was fearsome looking. Simooygit Niiswibass said that the legendary rock at Metlakatla Pass is still there today and that it can be seen when the water is at about half-tide (ICC Transcripts, vol. 1, pp. 36-39, March 15, 1994).

³³ The Claim (ICC Exhibit 17), p. 8. The Port Simpson and Metlakatla Bands continue to share ownership of seven of the eleven reserves originally allotted to the two bands jointly in 1882-84. This claim relates only to Tsimpsean IR No. 2.

³⁴ ICC Transcripts, vol. 1, p. 47, March 15, 1994, "Outline of Evidence," by Hamar Foster, University of Victoria, September 11, 1993 (ICC Exhibit 13), p. 1. Professor Foster stated that the treaties were in essence land conveyances modelled after the deeds of conveyance used by the New Zealand Company to purchase Moari lands. He expressed the view that the treaties "acknowledge, or appear to on their face, the pre-existing title of native people to vast tracts of land ..." (ICC Transcripts, vol. 1, p. 47, March 15, 1994.)

abandoned this policy of entering into treaties as the means of obtaining title to Indian lands.³⁵

The historical record suggests that this shift in policy may have been prompted by the imperial government's decision to place financial responsibility for land cessions in the hands of the colonial government.³⁶ Alternatively, the change in policy may have simply reflected the view of colonial officials that it was unnecessary to acknowledge or extinguish aboriginal title. Professor Foster stated that, whatever the motivations of the colonial government at the time, the policy of successive colonial and provincial governments in British Columbia from 1864 to 1992 was expressly to deny the existence of aboriginal title of Indians in their traditional lands.³⁷

Richard H. Bartlett, a professor of law at the University of Saskatchewan and a recognized authority on Indian land rights in Canada, supports Professor Foster's opinion that the Indian policy of the colonial government in British Columbia contrasted sharply with the Canadian policy of the time:

British Columbia came to deny aboriginal title to land and to follow a pattern of allocating small reserves close to white settlements without any agreement with the Indians. Such a policy was contrary to the express requirements of the imperial administration. British Columbia was able to contradict imperial policy because of the remoteness of the colony and because imperial direction of such matters was in its last days. While the colony was developing its policy, the imperial administration was seeking to place all responsibility for treating with the Indians upon the local authorities to the detriment of substantial provision for Indian lands.³⁸

On entering Confederation in 1871, the provincial government agreed to allot reserve lands for the use and benefit of the Indians. The obligation of the province to

³⁵ The last treaty to be entered into during the colonial period was the Salequam Treaty in 1854. Both before and after British Columbia entered Confederation in 1871, no other treaties were entered into with the exception of Treaty 8 in the northeastern quarter of the province. In Treaty 8, the federal Crown included the lands of the Dene which lay inside the boundaries of British Columbia to the east of the Rocky Mountains. The government of British Columbia, however, was not involved in the negotiation of Treaty 8 (ICC Transcripts, vol. 1, pp. 48-49, March 15, 1994).

³⁶ Secretary of State for the Colonies to Governor Douglas, October 19, 1861, in *BC Sessional Papers*, 39 Vict., 1875, Papers Relating to Indian Land Question, p. 19 (ICC Documents, p. 2).

³⁷ See ICC Exhibit 13, p. 1.

³⁸ Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990), p. 15.

convey lands to the federal government for Indian reserves is defined in Article 13 of the *Terms of Union*:

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 a 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.³⁹

Shortly after the province entered Confederation, the federal government became aware that the policy of the colonial government was not "as liberal" as that adopted in other parts of Canada, where the usual means of extinguishing aboriginal title was to enter into treaties with the Indians.⁴⁰ The vague nature of the province's obligations under Article 13 quickly led to disputes between the two levels of government with respect to the size of reserve allotments.⁴¹

The unresolved dispute between the province and Canada over the acreage necessary to discharge the province's obligations to provide lands for reserves led to the creation of a federal-provincial Joint Reserve Commission in 1876. Indeed, it was in furtherance of the recommendations of William Duncan, the missionary at Metlakatla, that Canada wrote to the province proposing that the Indian reserve question be referred to a commission, comprising one member each from the province and the Dominion and a third commissioner appointed jointly

³⁹ *Constitution Act, 1982*, RSC 1985, App. II, No. 10; *The Claim* (ICC Exhibit 17), pp. 14-15; ICC Documents, p. 5.

⁴⁰ ICC Exhibit 13, p. 1; Bartlett, *Indian Reserves*, p. 35.

⁴¹ In 1874 the federal government was urging the province to provide 80 acres of reserve land per family of five. The province "positively declined to grant such an extent of land for the use of the Indians, as being far in excess of the quantity previously allowed the Indians by the local Government, and under the Terms of Union the local Government are only bound 'to give tracts of land of such extent as had hitherto been the practice of the local Government to appropriate for that purpose' — ten acres for every family of five persons." The province's offer to double this figure to 20 acres was unacceptable to Canada: see Minister of Interior D. Laird to Governor General in Council, March 1, 1874, and November 2, 1874, in *BC Sessional Papers*, 39 Vict., 1875, *Papers Relating to Indian Land Question*, pp. 130, 151 (ICC Documents, pp. 14-20).

by the parties. Canada's proposal of November 5, 1875, set out three additional recommendations that are of particular interest:

2. That the said Commissioners shall . . . make arrangements to visit . . . each Indian nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia, and, after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation, separately, the number, extent and locality of the Reserve or Reserves to be allowed to it.
3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
4. That the Commissioners shall be guided generally by the spirit of the Terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians, and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.⁴²

By Order in Council dated January 6, 1876, the province agreed to all the proposals made by the federal government because it regarded "a final settlement of the land question as most urgent and most important to the peace and prosperity of the Province."⁴³

Three Commissioners were originally appointed to carry out the mandate of the Commission, but as a cost-saving measure Canada and the province agreed to proceed with one joint commissioner. Gilbert Malcolm Sproat served as the sole Commissioner for what became known as the "Indian Reserve Commission" after 1878.⁴⁴ When Sproat was appointed, he expressly sought instructions on whether he was to enter into treaties for the cession of aboriginal lands. He received no response from the province. Sproat took this silence to mean that his duty was to allot reserves without reference to aboriginal title or rights to the land. By 1879 the provincial government's reluctance to set aside adequate reserve lands caused Sproat to speculate that "no government of the province will effectually recognize that the Indians have any rights to land."⁴⁵ Indeed, Sproat's comment was prophetic; it was not until 1992 that the British Columbia government formally acknowledged the existence of aboriginal title.

⁴² R.W. Scott, Acting Minister of Interior, to Governor General in Council, November 5, 1875 (ICC Documents, p. 88); ICC Exhibit 16, tab 2.

⁴³ British Columbia Order in Council No. 1138, January 6, 1876 (ICC Documents, p. 56); ICC Exhibit 16, tab 3.

⁴⁴ ICC Transcripts, vol. 1, p. 54, March 15, 1994.

⁴⁵ ICC Exhibit 13, p. 2.

Allotment of Tsimpsean IR No. 2 (1881-84)

Around 1880 Peter O'Reilly succeeded the retiring Sproat as Indian Reserve Commissioner.⁴⁶ On October 5, 1881, O'Reilly met with the Tsimpsean Chiefs at Lax Kw'alaams, where the Chiefs urged the government to take cognizance of their aboriginal title to the land:

The whole country, from the Naas River to the Skeena River, has been in the possession of our nation from time immemorial. No treaty has ever been made with us, and we earnestly hope that the Government will not deprive us of our ancient rights, and wrest from us the lands which God gave to our fathers, thus leaving us in poverty.⁴⁷

In his report on the meetings with the Tsimpsean Chiefs, O'Reilly took into account the close relationship between the two bands: "A portion of the Tsimpsean Indians reside here [Port Simpson], the remainder at Metlakatla, sixteen miles south; and in dealing with their reserves, I propose to treat them as one tribe."⁴⁸ O'Reilly stated that the Chiefs requested a large area – "the entire Tsimpsean peninsula between Works Canal and Chatham Sound down to the Skeena river, containing about 350 square miles"⁴⁹ – be reserved for them. At Port Simpson the Chiefs requested "the whole of the said peninsula to be divided into two portions for the people of Metlakatla and ourselves respectively, according to the population of each place."⁵⁰ At Metlakatla they "asked for the Peninsula for themselves, & their brothers at Simpson."⁵¹ The area of land requested by the Chiefs to be set aside as reserve is depicted on the map on page 103 of this report.

Commissioner O'Reilly's decision respecting the allocation of reserves for the Tsimpsean Indians is reflected in his report to Prime Minister Sir John A. Macdonald, who also served as Superintendent General of Indian Affairs:

I explained to the Indians that while the Dominion Government is anxious that they should be dealt with in a liberal manner, it is not their intention to lock up so large an extent of country of no practicable use to them; that I considered their application unreasonable, but that before defining their reserve I would make a thorough examination. Having made such

⁴⁶ ICC Transcripts, vol. 1, p. 54, March 15, 1994.

⁴⁷ Chief Bryant quoting a statement made by the Tsimshian Chiefs to Peter O'Reilly on October 5, 1881 (ICC Documents, p. 74); ICC Transcripts, vol. 1, p. 27, March 15, 1994.

⁴⁸ The Claim (ICC Exhibit 17), p. 9; Reserve Commissioner O'Reilly to Superintendent General of Indian Affairs, April 8, 1882, National Archives of Canada [hereinafter NA], RG 10, vol. 1275 (ICC Documents, p. 75).

⁴⁹ The Claim (ICC Exhibit 17), p. 10; Reserve Commissioner O'Reilly to Superintendent General of Indian Affairs, April 8, 1882, NA, RG 10, vol. 1275 (ICC Documents, p. 77).

⁵⁰ The Claim (ICC Exhibit 17), p. 11; Chief Paul Scowgate et al., Port Simpson, to P. O'Reilly, October 5, 1881, NA, RG 10, vol. 3605, file 2806.

⁵¹ The Claim (ICC Exhibit 17), p. 12; W.H. Collinson to William Duncan, October 28, 1881, NA, Williams Duncan Papers, microfilm C-2146, p. 5669.

an examination I reserved for the use of the Tsimpsean tribe resident at Fort Simpson and Metlakatla the entire coast line from the boundary of the Hudson's Bay Company land, as previously described, to the south end of, and including Digby Island . . . with an average depth of five miles.⁵²

The lands described by O'Reilly roughly conform to the boundaries of what later became Tsimpsean IR No. 2. Although O'Reilly's recommendation to set aside Tsimpsean IR No. 2 for the use and benefit of the "Tsimpsean Indians" was submitted for approval in 1882, minor boundary alterations delayed confirmation of the reserve by provincial Order in Council until February 29, 1884.⁵³

Division of Tsimpsean IR No. 2 (1884-92)

After Tsimpsean IR No. 2 was confirmed in 1884, tension continued to mount among the Tsimpsean. Dismayed by previous attempts to have the government address their concerns respecting land, the Tsimpsean sent a delegation to Ottawa in June 1885 to meet with Prime Minister Macdonald. The deputation wanted to discuss matters related to the reserves and, before these reserves were surveyed, they wanted to have their "land matters reconsidered and readjusted on several particulars."⁵⁴ Macdonald met with the deputation and promised to deal with its concerns when the next session of Parliament began in three months. However, the evidence suggests that the Tsimpsean people received no response.⁵⁵

In August 1885 Canada's surveyor, S.P. Tuck, arrived in Metlakatla to complete the survey of Tsimpsean IR No. 2. To protest the fact that a reserve had been set aside without a treaty, the Tsimshian people systematically prevented the government from surveying the reserve. Tuck reported that one Indian leader "made a heated speech in which he went over much of the old story of the Government's intention to rob them of their inheritance, and their firm determination to resist the plundering to the last."⁵⁶ Eventually, on November 2, 1886, the government

⁵² The Claim (ICC Exhibit 17), p. 10; Reserve Commissioner O'Reilly to Superintendent General of Indian Affairs, April 8, 1882, NA, RG 10, vol. 1275 (ICC Documents, p. 77).

⁵³ Surveyor General A.S. Gore to BC Executive Council, February 24, 1884 (ICC Documents, p. 92). O'Reilly submitted Amended Minutes of Decision on February 26, 1884, which describe Tsimpsean IR No. 2 as: "A Reserve of 70,400 acres approximately, situated on the Tsimpsean Peninsula between Fort Simpson and the southern end of Digby Island" (ICC Documents, p. 96). The government confirmed 10 smaller reserves from 1882 to 1884 pursuant to O'Reilly's original Minutes of Decision in 1882: The Claim (ICC Exhibit 17), pp. 14-17.

⁵⁴ ICC Transcripts, vol. 1, p. 86, March 15, 1994.

⁵⁵ *Ibid.*, p. 87.

⁵⁶ Surveyor S.P. Tuck to Indian Superintendent I.W. Powell, October 2, 1886, NA, RG 10, vol. 7793, file 27168-2 (ICC Documents, p. 121). There were numerous pieces of correspondence from Tuck in which he recounts how he was prevented from carrying out the survey; see, for example, Tuck to P. O'Reilly, October 5, 1886 (ICC Documents p. 123); Tuck to Dr. Powell, October 6, 1886, and Tuck to O'Reilly, September 21, 1886, NA, RG 10, vol. 7793, files 27168-2 and 27162-2 (ICC Documents, pp. 125, 128, 130); Tuck to O'Reilly, November 1, 1886, NA, RG 10, vol. 11008 (ICC Documents, p. 133).

dispatched HMS *Cormorant* to the area to enforce the survey and to arrest a number of Indians who were preventing it from being completed.⁵⁷

Sandra Littlewood suggested that this event proved to be too much for the Tsimpsian people to tolerate. She testified that the arrests at Metlakatla compounded the effect of a court case in August 1886, in which five Metlakatla Indians trespassed on a parcel of land owned by the Church Missionary Society, to force a test case on who owned the contested lands. The court ruled that the Indians had no right to land "except as grace and intelligent beneficence of the Crown may allow, and has always allowed."⁵⁸ In response to these events, Duncan and his religious followers sought asylum in the United States. In 1887 Duncan and the majority of the Metlakatla Band, numbering between 600 and 700, moved to Annette Island in Alaska to establish a new village.⁵⁹

In the wake of the arrests at Metlakatla, the Port Simpson Chiefs sent a deputation to Victoria to make yet another effort to have the government address their land concerns by entering into a treaty. The contingent from Port Simpson met with Premier William Smithe and other representatives of the federal and provincial governments on February 3, 1887, at the Premier's residence in Victoria. Richard Wilson, a spokesman for the Band, asked whether the government would allow the Tsimpsian people to "be free under the laws of Queen Victoria on the top of our land" and requested that the government "make it right with us by what in English you might call a treaty among the Indians; and that is all in the world we ask you."⁶⁰ The Attorney General for British Columbia, Alex Davie, responded that the government would accede to any reasonable requests for fishing stations to be set aside as reserves, but "if you go beyond that and speak about treaties, and think that this government, or the Dominion Government are going to say that all the land belongs to the Indians it is a very different thing. We cannot do that."⁶¹

The provincial government sent a Commission of Inquiry later the same year to inquire into "the state and condition of the Indians of the North-West Coast of British Columbia."⁶² The instructions provided to Commissioners C.F. Cornwall

⁵⁷ ICC Transcripts, vol. 1, pp. 88-89, March 15, 1994. Also see Tuck to O'Reilly, November 9, 1886, and December 20, 1886, NA, RG 10, vol. 11008 (ICC Documents, pp. 135, 138). Sandra Littlewood informed the Commission that an American gumboat was sent to Metlakatla on a previous occasion in 1883 to enforce a survey of two acres of land in the reserve for the Church Missionary Society. She explained that the granting of Tsimshian territory on the Nass River to the Nisga'a "initiated an organized resistance to surveying" and triggered the so-called Metlakatla Riots of 1883 (ICC Transcripts, vol. 1, p. 85, March 15, 1994).

⁵⁸ ICC Transcripts, vol. 1, p. 89, March 15, 1994.

⁵⁹ The Claim (ICC Exhibit 17), p. 25.

⁶⁰ BC Premier Smithe to Band members, Port Simpson, and Naas River Indians, February 3, 1887, in *BC Sessional Papers*, 50 Vict., 1887, Fort Simpson and Naas River Indians, p. 254 (ICC Documents, p. 142).

⁶¹ *Ibid.*, p. 262 (ICC Documents, p. 150).

⁶² Her Majesty the Queen to Commissioners C.F. Cornwall and J.P. Planta, September 30, 1887, *BC Sessional Papers*, 51 Vict., 1888, Report of Commission - N.W. Coast Indians, p. 145 (ICC Documents, p. 158).

and J.P. Planta with respect to their visit to Naas River and Fort Simpson were very clear:

[Y]ou will please be careful – while assuring the Indians that all they say will be reported to the proper authorities – not to give undertakings or make promises, and in particular you will be careful to discountenance, should it arise, any claim of Indian title to Provincial lands. I need not point out that the Provincial Government are bound to make, at the request of the Dominion, suitable reserves for the Indians; and it will be advisable, should the question of title to land arise, to constantly point this out, and that the Terms of Union secure to the Indians their reserves by the strongest of tenures.⁶³

The Commissioners reported that the Metlakatla Band wanted “a line drawn north of Metlakatlah [sic], defining their reserve from the Fort Simpsons’.”⁶⁴ There is no evidence on whether the majority of the Band members favoured a division of the reserve.

In 1888 Commissioner O’Reilly returned to the area to follow up on the report of Commissioners Planta and Cornwall. He visited Metlakatla on August 21, 1888, where the people asked that Tsimpsean IR No. 2 be divided:

... I met the Metlakatla Indians, and was cordially received by them. They one, and all, expressed their loyalty and gratitude to the Government for the efforts that were made to assist them... They expressed their desire to have the [Indian] *Advancement Act*⁶⁵ applied to them, and stated that they had already petitioned to be incorporated under its provisions.

With this object in view they urged me to divide the Tsimpsean Reserve No. 2, upon which stand the villages of Fort Simpson, and Metlakatla. This they stated they desired, not because of any ill feeling on their part towards the Indians of Fort Simpson, but solely to enable them (the Metlakatlans) to manage their own affairs without hindrance.⁶⁶

O’Reilly told them that the reserves that had been allotted to them “were for the Tsimpsean tribe; no difference was made between the respective bands at Metlakatla and Fort Simpson.”⁶⁷ One of the principal men for the Metlakatla Band, Matthew Auckland, reiterated their request to have the reserve divided and told O’Reilly that they wanted to establish a band council, whereas the Fort Simpson Indians did not. O’Reilly asked, “Do I understand you all agree on this point?” And

⁶³ Attorney-General Alex E.B. Davie to Commissioner J.P. Planta, September 29, 1887, *BC Sessional Papers*, 51 Vict., 1888, Report of Commission - N.W. Coast Indians, p.146 (ICC Documents, p. 157).

⁶⁴ The Claim (ICC Exhibit 17), p. 27.

⁶⁵ *Indian Advancement Act, 1884, SC 1884*, 47 Vict., c. 28, in Sharon H. Venne, *Indian Acts and Amendments, 1868-1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981), pp. 102-6.

⁶⁶ Peter O’Reilly to Superintendent General of Indian Affairs, October 4, 1888, NA, RG 10, vol. 3776, file 37373-2 (ICC Documents, p. 218).

⁶⁷ The Claim (ICC Exhibit 17), p. 25.

Auckland replied, "We have talked it over, and we all agree."⁶⁸ Beyond this statement, there is no evidence that the division had been agreed to by a vote of the Metlakatla Band or that the members had been informed of the proposed division. O'Reilly informed them that he would consult with the Port Simpson Indians before making his decision.

On August 25 O'Reilly met with 52 Indians at Port Simpson, where his visit differed substantially from that at Metlakatla. Much of the discussion centred on the Indians' demands that the government recognize their aboriginal title to Tsimpsean lands. When O'Reilly informed them of his proposal to divide IR No. 2, the Port Simpson spokesman, Herbert Wallace, replied that they objected to any division of the reserve. O'Reilly answered:

At Metlakatla they want the *Indian Act*; you won't have it. They have applied to be incorporated, and empowered to have a legal council; you don't want either. You cannot be allowed to stand in the way of those who wish to carry out the law; a division of the reserve cannot do you any harm your villages are 16 miles apart. I shall return from the Nass in a week, or ten days, think this matter over in the meantime.⁶⁹

Before O'Reilly departed, Wallace put these closing words to him:

You see all the deserted villages along the coast, they belong to us. We allow the Metlakatla people to use them, what more do they want. Let them use them; let any Indian use them. I say this, because I don't want any more trouble. The Metlakatlans are watching the Skeena part of our land, and the Nass people are watching the other part. We do not wish Reserve No. 2 to be divided. The same land was given to both parties, only religion separates us, let them go to their church, and we go to ours.⁷⁰

On September 10 O'Reilly returned to Port Simpson, where he met with 28 members of the Band. The Port Simpson Chiefs presented a letter to O'Reilly in which they reiterated their objections to the division of the reserve. They also offered to accept the *Indian Advancement Act* once the entire Tsimpsean peninsula had been reserved, commonage on the Naas had been extended, their right to cut

⁶⁸ *Ibid.*, p. 26.

⁶⁹ The Claim (ICC Exhibit 17), p. 28. In another account of the meeting, O'Reilly acknowledged that the Port Simpson Band was "strongly opposed" to the division of IR No. 2 and that it had a number of other complaints:

While in no way disrespectful to me personally, the Indians reiterated their demands on the Government in a very vociferous manner, claiming that the whole country belongs to them; that no treaty has been made with them, that they have not been paid for the lands, and that until they were paid they would not accept any reserves or allow any interference by the Indian Agent, nor would they be governed by the *Indian Act*. (O'Reilly to Superintendent General of Indian Affairs, October 4, 1886, NA, RG 10, vol. 3776, file 37373-2 [ICC Documents, p. 222]).

⁷⁰ The Claim (ICC Exhibit 17), pp. 28-29.

timber for various fishing-related purposes had been acknowledged, and their fishing and hunting places on the Skeena had been set aside.⁷¹

O'Reilly reiterated the government's position that they should not expect treaties, nor would they be compensated for land not included in the reserve. He also informed them that they had advanced no good reason why he should not divide Tsimpsean IR No. 2. He asserted that the Port Simpson people had refused to accept the Act and that they could not be allowed to stand in the way of the Metlakatla Band, who wished to obey the law.⁷² O'Reilly concluded the meeting by informing the Port Simpson people that he was going to divide the reserve at a point about a mile below St. Arnaud's claim, which he suggested would give them more land than they had asked for in 1881.⁷³ The Port Simpson Band claimed in 1979 that this was a misrepresentation of their views because the 1888 division left them with considerably less land than they had requested in 1881.⁷⁴

O'Reilly sent a plan of the divided reserve to the Superintendent General of Indian Affairs on March 7, 1892. In his covering letter, O'Reilly advised that the reserve had finally been surveyed in the previous year and that the survey had been approved by the Chief Commissioner for Lands and Works in British Columbia. As for the division, O'Reilly stated that:

[T]he portion of Reserve No. 2 North of the dividing line was given to the band of Tsimpsean Indians resident at Fort Simpson, and the portion lying south of the line to those of the same tribe resident at Metlakatla.⁷⁵

The survey plan for Tsimpsean IR No. 2 shows the two divided reserves of Metlakatla and Port Simpson, an area that originally comprised 57,742 acres in total. After the division, the Port Simpson Band was given exclusive possession of 22,087 acres, while the Metlakatla Band received the remaining 35,655 acres in the southern part of the reserve. The map on page 102 illustrates this division. In their 1975 claim submission, the Port Simpson Band alleged that the 1888 division was unfair. Census figures for 1889 (no figures were available for 1888)

⁷¹ Ibid., p. 33; Alfred Dudoward, Port Simpson Band, to Reserve Commissioner O'Reilly, August 31, 1888, NA, RG 10, vol. 11009 (ICC Documents, p. 214).

⁷² The Claim (ICC Exhibit 17), pp. 30-32.

⁷³ Peter O'Reilly to Superintendent General of Indian Affairs, October 4, 1888, NA, RG 10, vol. 3776, file 37373-2 (ICC Documents, p. 218). On September 11, 1888, Acting Indian Agent Todd planted a post "at about the middle of the shore line of the bay" immediately south of St. Arnaud's pre-emption claim, as designated by O'Reilly. See letter from Todd to O'Reilly, September 15, 1888, and S.Y. Wootton to "Sir," October 17, 1888, NA, RG 10, vol. 11009 (ICC Documents, pp. 216, 232). In 1890 surveyor E.M. Skinner was instructed to extend the line eastward across the reserve; see Reserve Commissioner O'Reilly to Deputy Superintendent General Vankoughnet, November 22, 1890 (ICC Documents, p. 236).

⁷⁴ The Claim (ICC Exhibit 17), p. 39.

⁷⁵ Ibid., pp. 41-42.

show that Port Simpson had a population of 625 people, while Metlakatla's population was only 137. Although Port Simpson's population was at least four-and-a-half times larger than the Metlakatla population, the former received only 38 per cent of the reserve. The claimant asserts:

... that the choice of a dividing line was made, not only without the consent of the Port Simpson Band, but arbitrarily and without due consideration for the differences in the population sizes and land requirements of the two Bands.⁷⁶

Surrender and Sale of 13,567 Acres (1906)

In 1904 the Grand Trunk Pacific Railway Company acquired a substantial block of land on the east side of Prince Rupert Harbour. Requiring additional land on the other side of the harbour for rail and wharf facilities and for the development of a townsite, the company applied to the Superintendent General of Indian Affairs to buy 13,519 acres of Tsimpsean IR No. 2 on Kaien Island, Digby Island, two smaller islands, and the Tsimpsean peninsula.⁷⁷

In 1906 A.W. Vowell, the Indian Superintendent for British Columbia, was instructed to proceed to Metlakatla to obtain a surrender of the land in question from the Metlakatla Band. Vowell met with the people of Metlakatla at a Band meeting on August 17, 1906. At that meeting, Chief Albert Leighton and the majority of the adult men present voted to surrender the land applied for by the company to the federal Crown for a price of \$7.50 per acre.⁷⁸

The surrender was confirmed by federal Order in Council on September 21, 1906.⁷⁹ The Surrendered Lands were surveyed and the area determined to be 13,567 acres. The City of Prince Rupert is presently located on a portion of the reserve surrendered on Kaien Island. The Surrendered Lands were sold on June 24, 1907, by the federal Crown to the Grand Trunk Pacific Town and Development Company, an affiliate of the Grand Trunk Pacific Railway Company. The proceeds of the sale were provided to the Metlakatla Band in accordance with the manner prescribed in the surrender.⁸⁰

Because all the Surrendered Lands were located south of the 1888 dividing line in the Metlakatla Reserve, the Department of Indian Affairs neither consulted

⁷⁶ Ibid., pp. 42-44.

⁷⁷ Ibid., pp. 46-47.

⁷⁸ Ibid., p. 47; F. Pedley, Deputy Superintendent General of Indian Affairs, to A.W. Vowell, Indian Superintendent, July 18, 1906, and Vowell to Deputy Superintendent General of Indian Affairs, August 25, 1906, NA, RG 10, vol. 7675, file 22168-3, pt. 1 (ICC Documents, pp. 269, 278); Surrender, Metlakatla Band to the Crown, August 17, 1906, in DIAND, Reserve General Register, # 15643 (ICC Documents, p. 272).

⁷⁹ Order in Council, September 21, 1906 (ICC Documents, p. 281).

⁸⁰ The Claim (ICC Exhibit 17), pp. 47-48.

nor sought the consent of the Port Simpson Band before completing the sale to the railway company. Not long after the lands were sold to the railway company, the Metlakatla Band offered to share the proceeds of the sale with the Port Simpson Band. The Port Simpson Band rejected the offer as a matter of principle because it had been excluded from the negotiations to sell the land.⁸¹

The McKenna-McBride Commission (1916)

In 1912 J.A.J. McKenna was appointed by the federal government as a special commissioner to investigate land claims made by the Indians of British Columbia and other issues in dispute between the federal and BC governments. After conducting an extensive study of the issue, he wrote to Premier Richard McBride and reiterated that the Indians were claiming aboriginal title to the lands. In his letter to McBride he wrote:

... I understand that you will not deviate from the position which you have so clearly taken and frequently defined, i.e. that the Province's title to its land is unburdened by any Indian title, and that your Government will not be a party, directly or indirectly, to a reference to the Courts of the claim set-up. You take it that the public interest, which must be regarded as paramount, would be injuriously affected by such reference in that it would throw doubt upon the validity of titles to land in the Province. As stated at our conversations, I agree with you as to the seriousness of now raising the question, and so far as the present negotiations go, it is dropped.⁸²

The agreement reached between the province and Canada on the question of aboriginal title spawned the Royal Commission on Indian Affairs for the Province of British Columbia (commonly known as the McKenna-McBride Commission), whose task was to resolve the on-going dispute between the federal and provincial governments by providing for "the adjustment of the acreage of reserve lands and for the conveyance of reserves, as finally fixed by the commissioners, to the Dominion."⁸³ Although the Commission issued its report in 1916, it was not until 1938 that the reserve lands were conveyed to Canada by Order in Council 1036 dated July 29, 1938.⁸⁴

⁸¹ Ibid., p. 49

⁸² Excerpt taken from Justice McEachern's judgment at trial of *Delgamuukw v. B.C.*, [1991] 3 WWR 97 at 326 (BCSC).

⁸³ Bartlett, *Indian Reserves*, p. 37. Although the Indians were not a party to this agreement, it is noteworthy to observe that the enabling legislation for its implementation dispensed with the need to obtain a surrender under the *Indian Act* to change the reserve acreage.

⁸⁴ Ibid., pp. 37-38.

Professor Bartlett summarizes the debate surrounding the creation of Indian reserves and the nature of the province's reversionary interests in those lands in the following passage:

By 1897 a total of 718,568 acres had been "fixed" by survey as reserves by commissioners acting under the terms of the agreement. The lands were not, however, set apart by order in council by the province, nor conveyed by grant to the federal government. Title remained in the Crown in right of the province. Moreover, under the terms of the agreement, the province retained some form of reversionary interest. The province sought an amendment to the *Indian Act* to provide for the diminution of a reserve without the requirement of a surrender by the Indians. However, the instructions of the federal government to the commissioners declared: "... no part of any Indian reserve once appropriated can be surrendered or alienated without the sanction of the Indians to whom it has been assigned." Throughout the work of the commissioners, the question of excess land and the province's rights to it was a source of friction between the federal and provincial governments.⁸⁵

On September 29, 1915, the McKenna-McBride Commission met with the Port Simpson Band to discuss issues related to its reserve. These discussions quickly broke down because the Commission did not have a mandate to discuss the question of the Band's unextinguished aboriginal title to land and other resources. As a consequence, the parties never discussed the McKenna-McBride Commission's proposal to reduce or "cut-off" a portion of Tsimpsean IR No. 2.⁸⁶

The record suggests that the McKenna-McBride Commission decided to further reduce the southern part of Tsimpsean IR No. 2 at a meeting with the Indian agent for the Nass Agency on December 17, 1915. This decision appears to have been made on the basis of erroneous information, in that the Commission thought the original reserve of 57,742 acres had been divided into two equal portions of 28,871 acres each for the Port Simpson and Metlakatla Bands. In fact, the Port Simpson Band had been allotted only 22,087 acres. The Lax Kw'alaams Band submitted that a more equitable division of the land might have been recommended by the Commission if it had had the proper information before it.⁸⁷

In 1916 the Commission's Minute of Decision formally provided for Tsimpsean IR No. 2 to be reduced by 10,468 acres.⁸⁸ The Minute of Decision stated that the remaining 33,707 acres of the reserve were confirmed as "Tsimpsean Indian

⁸⁵ *Ibid.*, pp. 36-37.

⁸⁶ *The Claim* (ICC Exhibit 17), p. 49.

⁸⁷ *Ibid.*, pp. 50-51.

⁸⁸ *The Report of the Royal Commission on Indian Affairs for the Province of British Columbia*, 4 vols. (Victoria, 1916), vol. III, confirms that the lands were cut off as of March 20, 1916 (ICC Exhibit 15).

Reserve No. Two (2), of the Tsimpsian Tribe, Port Simpson and Metlakatla Bands . . .⁸⁹ The Commission's decision was ultimately confirmed by parallel legislation of the provincial and federal governments in 1923 and 1924.⁹⁰

Shortly after the Commission's recommendations were implemented by legislation, 115 members of the Port Simpson Band sent a petition to the federal government objecting to the 10,468 acres being cut off by the McKenna-McBride Commission from the reserve and requesting that the government reconsider its decision. There is no evidence that a reply to its petition was ever received.⁹¹

The 1927 Parliamentary Committee

Professor Foster pointed out that the provincial government refused again to address the aboriginal title question in 1927 when a federal parliamentary inquiry was conducted into the aboriginal title claims of the Allied Tribes of British Columbia. In fact, the provincial government refused to attend the inquiry on the ground that aboriginal title had already been extinguished.⁹² Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs, summarized the province's position on the matter by saying that the provincial government had been "ever constant in the stand that there is no Indian title in the Provincial lands, and the Dominion Government [for its part, had been] uncertain of its position on that question . . ."⁹³

Emergence of the British Columbia Treaty Commission (1993)

Although the British Columbia government has consistently denied the existence of aboriginal title, it appeared to modify this policy in 1990 when it agreed to participate in land claims negotiations, albeit without acknowledging pre-existing aboriginal title.⁹⁴

On June 28, 1991, the British Columbia Claims Task Force presented its report, making 19 recommendations for the Province of British Columbia, the Government

⁸⁹ The Claim (ICC Exhibit 17), p. 52.

⁹⁰ The Commission's recommendations were confirmed by federal Order in Council 1265, dated July 19, 1924, and by British Columbia Order in Council 911, dated July 26, 1923. These orders in council were enacted pursuant to the *British Columbia Indian Lands Settlement Act*, SC 1920, c. 51, and the *Indian Affairs Settlement Act*, SBC 1919, c. 32. See The Claim (ICC Exhibit 17), p. 52.

⁹¹ The Claim (ICC Exhibit 17), p. 54.

⁹² The province took the position that section 109 of the *British North America Act, 1867*, paragraphs 10 and 13 of the *Terms of Union*, and the McKenna-McBride Agreement excluded any claims based on aboriginal title (ICC Exhibit 13, p. 4).

⁹³ *Ibid.*, p. 3.

⁹⁴ *Ibid.*, p. 4.

of Canada, and the First Nations of British Columbia to enter into a new era of treaty negotiations.⁹⁵ In the preamble to the report, the task force promoted a "new relationship" based on recognition of aboriginal peoples as self-determining nations with their own distinct cultures and heritage:

To the First Nations, their traditional territories are their homelands. British Columbia is also home to many others who have acquired a variety of interests from the Crown. In developing the new relationship these conflicting interests must be reconciled.⁹⁶

The preferred means of reconciling the practical interests of the parties was said to be through political resolution and negotiations in good faith.

All 19 recommendations of the task force, including the proposal to create a British Columbia Treaty Commission to facilitate the treaty negotiations, were accepted by the parties. In 1992 the provincial government formally announced a new policy that recognized the existence of aboriginal title. Representatives of all three parties signed an agreement in September 1992 to create the British Columbia Treaty Commission and in May 1993 legislation was enacted which established the Commission.⁹⁷ Professor Foster summed up these developments by stating that "[t]he effect of all this is to create a comprehensive land claims policy specific to B.C. and intended to be free of the encumbrances – such as the one claim at a time rule – that marred the federal process in the past."⁹⁸

It is, therefore, extremely important to bear in mind that Canada, British Columbia, and the First Nations of the province are now poised to embark on the negotiation of treaties under the auspices of the British Columbia Treaty Commission. The Province of British Columbia's long-awaited recognition of aboriginal title provided the impetus for this historic process. On behalf of the

⁹⁵ ICC Documents, pp. 358-444. The members of the task force, which was created on December 3, 1990, were nominated as follows: two from Canada, two from the province, two from the First Nations Congress, and one from the Union of British Columbia Indians. The terms of reference gave the task force a mandate to make recommendations on the scope of the treaty negotiations, the organization and process of negotiations, interim measures, and public education.

⁹⁶ *The Report of the British Columbia Claims Task Force*, June 28, 1991 (ICC Documents, p. 376).

⁹⁷ ICC Exhibit 13, pp. 4-5. In May 1993, Bill 22, also known as the *Treaty Commission Act*, was enacted and proclaimed.

⁹⁸ *Ibid.*, p. 5.

Hereditary Chiefs for the nine Tsimpsian tribes, Chief Bryant underlined the significance of this recent development:

We want to preserve our option of participation in the process toward treaty making, now that Canadian governments have acknowledged aboriginal title. Perhaps through treaty our territorial rights can be properly reconciled with the reality of non-Indian occupation of our territories. This remains to be seen.⁹⁹

To achieve this end, the Allied Tsimshian Tribes have filed a Statement of Intent to Commence Treaty Negotiations with the governments of British Columbia and Canada.¹⁰⁰

CLAIM OF THE PORT SIMPSON BAND

The 1979 specific claim of the Port Simpson Band is based on the Band's allegation that the 1888 division of Tsimpsian IR No. 2 into two reserves was illegal. The basis of the claim is that, when British Columbia confirmed Tsimpsian IR No. 2, the lands "constituted an Indian Reserve pursuant to Article 13 of the 1871 *Terms of Union and the Indian Act*." As a consequence,

[T]he Federal Crown acquired an obligation to hold Tsimpsian I.R. #2 in trust for the joint use and benefit of the Port Simpson and Metlakatla Bands, to whom O'Reilly had allotted the reserve, subject to the provisions of the Indian Act concerning the administration of reserve lands.¹⁰¹

The Band further alleged that the 1888 division of the reserve was illegal and in violation of the Crown's trust relationship with the Port Simpson Band because section 37 of the 1880 *Indian Act* was not complied with.¹⁰² Not only was there

⁹⁹ ICC Transcripts, vol. 1, pp. 29-30, March 15, 1994.

¹⁰⁰ See written argument by Harry Slade (counsel for the Lax Kw'alaams Band), pp. 11 and 12.

¹⁰¹ The Claim (ICC Exhibit 17), p. 22.

¹⁰² Section 37 of the *Indian Act*, SC 1880, 43 Vict., c. 28, reads as follows:

37. No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band or of any individual Indian, shall be valid or binding, except on the following conditions:—

1. The release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose according to their rules, and held in the presence of the Superintendent-General, or of an officer duly authorized to attend such council by the Governor in Council or by the Superintendent-General: Provided, that no Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near and is interested in the reserve in question.

2. The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or Stipendiary Magistrate, by the Superintendent-General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote, and when so certified as aforesaid shall be submitted to the Governor in Council for acceptance or refusal.

substantial opposition to the division of Tsimpsean IR No. 2, but there is no indication in the historical record that any of the Port Simpson Band members supported the proposal. Nor is there any evidence that O'Reilly attempted to put the matter to a vote among the Band members.¹⁰³ The division of Tsimpsean IR No. 2 purported to extinguish the interest of the Port Simpson Band in the southern portion of the reserve. Yet none of the steps contemplated by the *Indian Act* were carried out. Consequently, it is alleged that O'Reilly exceeded his authority and that the 1888 division of the reserve is not valid and has no binding effect on the Port Simpson Band.¹⁰⁴

The Band further alleged that the Crown violated its trust relationship with the Port Simpson Band because it failed to administer the reserve in the best interests of the Band. The historical evidence suggests that Tsimpsean IR No. 2 was divided not only without the consent of members of the Band, but also against their will. Furthermore, the reserve was divided unequally and without due consideration for the respective populations and land requirements of the two bands. Finally, it is alleged that O'Reilly misrepresented the views of members of the Port Simpson Band and denied them the opportunity of having their opposition to the division fairly considered by the Superintendent General of Indian Affairs when he reported that the Band would receive more land than it had requested in 1881.¹⁰⁵

The Port Simpson Band put forth the following three proposals for settlement:

1. That the existing boundaries of Tsimpsean I.R. #2 be confirmed under the terms of the Indian Act, with the Port Simpson Band maintaining the exclusive use and benefit of the northern part of the reserve and the Metlakatla Band maintaining the exclusive use and benefit of the remaining southern part of the reserve.
2. That the Federal Crown, as represented by the Department of Indian and Northern Affairs, take action to return the 10,468 acres that were cut off Tsimpsean I.R. #2 to their original status as Indian Reserve land held for the joint use and benefit of the Port Simpson and Metlakatla Bands.
3. That the Federal Crown, as represented by the Department of Indian and Northern Affairs, compensate the Port Simpson Band for the loss of its unsurrendered interest in the 13,567 acres from the southern part of Tsimpsean I.R. #2 that were surrendered to the Federal Crown by the Metlakatla Band on August 17, 1906, and subsequently sold to the Grand Trunk Pacific Railway Company. We suggest that the Port Simpson Band be compensated with land in the vicinity of Port Simpson Harbour.¹⁰⁶

¹⁰³ The Claim (ICC Exhibit 17), p. 35.

¹⁰⁴ *Ibid.*, pp. 54-57.

¹⁰⁵ *Ibid.*, pp. 57-60.

¹⁰⁶ *Ibid.*, pp. 61-62.

CLAIM SETTLEMENT NEGOTIATIONS

By letter dated April 15, 1985, David Crombie, then Minister of Indian Affairs, accepted the Band's claim for negotiation under Canada's Specific Claims Policy. The Minister's letter acknowledged:

[T]hat the southern half of the former Tsimpsean I.R. #2 was alienated in 1888 without the consent of the Lax Kw-Alaams Band. The Tsimpsean Reserve #2 had been set aside for the joint use of both the Lax Kw-Alaams (Port Simpson) and Metlakatla Bands. According to the provisions of the *Indian Act* then in effect, the consent of both Bands was required for the surrender of that portion of the reserve.¹⁰⁷

The acceptance letter also suggests that because the present reserves were confirmed by federal legislation enacted in 1920, compensation for loss of use would be paid only from 1888 to 1920. Although there was some question of how the Supreme Court of Canada's decision in *Guerin v. The Queen*¹⁰⁸ might affect compensation, the Minister advised that negotiations could proceed on the basis of compensation criteria 1 and 2 as set out in the Specific Claims Policy.¹⁰⁹

In the exchange of correspondence that followed the acceptance of the claim, the parties attempted to clarify which compensation criteria would apply in the settlement negotiations. In a letter dated September 24, 1985, from Harry Slade, counsel for the Band, to Manfred Klein, the negotiator for the Specific Claims Branch of Indian Affairs, Mr. Slade questioned whether the Band would be compensated for the entire parcel of land south of the 1888 dividing line and whether compensation would be based on loss of the land, loss of use, or both. Mr. Slade suggested that compensation criterion 3 of the Specific Claims Policy should be applied because the lands were initially taken without a surrender or under any other legal authority.¹¹⁰

In a letter from Joanne Kellerman, Canada's legal adviser, to Harry Slade dated December 5, 1985, Canada agreed to base the negotiation of compensation on the following principles:

1. The current unimproved value of the surrendered lands. Compensation will be based on the Band's joint interest in I.R. No. 2, the proportion of which has not been finally determined.

¹⁰⁷ Indian Affairs Minister David Crombie to Chief Leonard Reece, April 15, 1985 (ICC Documents, p. 352).

¹⁰⁸ *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, [1984] 6 WWR 481, [1985] 1 CNLR 120 (SCC).

¹⁰⁹ *Outstanding Business*, pp. 30-31. The compensation criteria listed in the policy are set out in Appendix D of this report.

¹¹⁰ Harry Slade to Manfred Klein, September 24, 1985 (ICC Exhibit 18). Compensation criterion 3 of the Specific Claims Policy is quoted in Appendix D of this report.

2. The Lax Kw'alaams demonstrated loss of use of the south half of I.R. No. 2 from 1888 to 1924. Any net gain to the Band due to its exclusive possession of the north half must be taken into account. Loss of use of the surrendered lands from 1924 to 1985 may also be negotiated.
3. The status of the cut-off lands must be addressed in consultation with both the Lax Kw'alaams and Metlakatla Bands.
4. There may be a set-off between the value of the Lax Kw'alaams Band of the Metlakatla Band interest in the north half of I.R. No. 2, and the value of the land lost by the Lax Kw'alaams Band (its share in the south half of I.R. No. 2).
5. Compensation criterion No. 10, that degree of doubt will be reflected in the compensation offered, may also be applied. . . .¹¹¹

Canada's position on compensation appears to be based on three assumptions: (1) that the 1888 O'Reilly division of the reserve was carried out without lawful authority; (2) that the 10,468 acres cut off from the Metlakatla reserve by the McKenna-McBride Commission were authorized by law because the provincial and federal governments passed orders in council in 1923 and 1924 which confirmed the existing reserves; and (3) that the 13,567 acres surrendered by the Metlakatla Band in 1906 for sale to the Grand Trunk Railway were not validly surrendered by the Port Simpson Band or otherwise taken under legal authority. It is important to reiterate that the claim for the McKenna-McBride Cut-Off Lands (item 2 above) was dealt with under separate negotiations and does not form the basis of the claim before our Commission.

After several years of negotiations, the Band and Canada arrived at an agreement in principle for the settlement of the claim arising from the 1888 O'Reilly division and the 1906 surrender and sale to the Grand Trunk Railway. On August 19, 1991, the Band Council notified Canada that it was prepared to "recommend to the membership of the band that the outstanding claim be settled by the payment by Canada to the Band of \$11,000,000, plus an additional 5% for negotiation expenses and legal fees."¹¹² On August 30, 1991, Canada's negotiator, Manfred Klein, responded to Harry Slade that he was authorized to settle on the basis of the Band's offer to accept "\$11,550,000 in full and final settlement of the band's Tsimpsean I.R. No. 2 specific claim." Mr. Klein identified the following steps to be taken before the settlement agreement could be finalized: "initializing of the settlement; call for a referendum and vote by band members; preparation

¹¹¹ Kellerman to Slade, December 5, 1985 (ICC Documents, pp. 356-57).

¹¹² These excerpts from the August 19, 1991, Band Council Resolution are quoted verbatim in a letter from Manfred Klein to Harry Slade dated August 30, 1991 (ICC Documents, pp. 445-46).

of Treasury Board Submission, order-in-council and other instruments required; ratification by Canada of the settlement agreement; transmittal of funds to the band."¹¹³ It is worth noting that Mr. Klein's letter confirms the parties' agreement in principle, but does not expressly mention Canada's requirement of an absolute surrender as a condition of settlement.

A draft settlement agreement dated September 27, 1991, was prepared by Canada for discussion purposes. The agreement provided for the payment of \$11,550,000 in compensation and contained the other essential terms agreed to by the parties. The following condition was inserted in the draft agreement:

1.1 It is a condition precedent to the coming into force of this Agreement that the Band shall surrender absolutely to Canada, all of its rights and interests of whatsoever nature and kind, if any, it may have in and to the Surrendered Land conditional upon Canada entering into and making payment pursuant to Section 3 of this Agreement.¹¹⁴

Clause 4.1 of the agreement also provided that "the Band hereby releases any and all claims to any right, title or interest whatsoever which the Band ever had, now has or hereinafter can, shall or may have to the Surrendered Land and the Metlakatla Land. . . ."

The Lax Kw'alaams Band expressed immediate concerns about Canada's requirement of an absolute surrender as a condition precedent to settling the claim. The main cause for concern appears to be that the Lax Kw'alaams Band did not want to prejudice its ability to enter into treaty negotiations under the auspices of the newly created British Columbia Treaty Commission. The position taken by the British Columbia government on the legal implications of an absolute surrender lends credence to the Band's apprehensions:

[I]t is our view that the practical legal ramifications of the absolute surrender under the Specific Claim Settlement Agreement are that any "aboriginal interest" in those lands surrendered disappears. In this context, therefore, any legal recognition of "aboriginal interests" by the Province would not have application to the land surrendered pursuant to the Specific Claim Settlement Agreement . . .¹¹⁵

In the months that followed, the Band and Canada attempted to negotiate mutually acceptable revisions to the settlement agreement. In a draft dated November 20, 1992, the Band proposed that the surrender provision be removed in its entirety. In exchange for this concession, the Band proposed to amend the

¹¹³ Manfred Klein to Harry Slade, August 30, 1991 (ICC Documents, p. 445).

¹¹⁴ Draft Specific Claim Settlement Agreement, September 27, 1991 (ICC Documents, p. 449).

¹¹⁵ Geoffrey Moyse, Ministry of Attorney General, to Harry Slade, November 13, 1992 (ICC Documents, p. 472).

release clause to ensure that the Band would be absolutely barred from bringing a claim against Canada in respect of the 1888 O'Reilly division "to the extent that such claim relates to the loss of the Band of the past use and any present use or future right of occupation of the Metlakatla land and the surrendered land as reserve under the *Indian Act*."¹¹⁶

Canada did not accept the Band's proposed amendments. In a December 3, 1992, letter to Mr. Klein, Mr. Slade suggested that the surrender recommended by the Department of Justice should exclude the aboriginal interest. Mr. Slade requested a meeting with senior officials at the Department of Justice to discuss the matter. In the event that this meeting failed to resolve the issue, Mr. Slade sought the Crown's agreement to refer the matter to the Indian Claims Commission for mediation or, if necessary, to an inquiry. Finally, Mr. Slade suggested a meeting with the Minister of Indian Affairs, Tom Siddon, if these proposals failed to settle the matter to the satisfaction of the parties.¹¹⁷

Mr. Klein responded on December 11, 1992:

The preliminary oral indication I had received from DOJ [Department of Justice], that it is Canada's position that an absolute surrender includes the surrender of any aboriginal interests has now been confirmed. There is a long established and well developed position as to what is accomplished by reserve creation or surrenders under the *Indian Act*. To be consistent with past and future surrenders, as well as between different parts of the country, this position must and will be applied consistently.¹¹⁸

With respect to the proposal to refer the matter to the Commission for mediation, Mr. Klein had this to say:

[I]t is difficult to see what would be accomplished through mediation, because we are basically dealing with legal considerations that don't lend themselves to mediation. As noted above, there is no room for flexibility on our part regarding this matter. I will not recommend mediation on the surrender/aboriginal interest issue, should it be requested.

You also make the point that failing mediation the matter should be considered by the ISCC through a hearing with a view of making recommendations. However, the ISCC has no mandate to deal with such an issue. It is empowered to deal only with issues that bear upon the acceptance of the claim or upon the criteria for determining compensation. The negotiations on this claim have proceeded to the point where a settlement offer has been made. The ISCC has no mandate to make recommendations in this stage of the process or regarding the legal requirements the federal government may have.¹¹⁹

¹¹⁶ Draft Specific Claim Settlement Agreement, November 20, 1992, Paragraph 4.2 (ICC Documents, p. 485).

¹¹⁷ ICC Documents, p. 497.

¹¹⁸ Manfred Klein to Harry Slade, December 11, 1992 (ICC Documents, p. 499).

¹¹⁹ *Ibid.* (ICC Documents, p. 500). ISCC or Indian Specific Claims Commission refers to the Indian Claims Commission.

Mr. Klein further denied the Band's request to meet directly with Mr. Siddon on the grounds that Canada's position "is clear, firm and is based on legal requirements" over which the Minister of Indian Affairs has no power of discretion.¹²⁰

The parties pressed on in an attempt to reconcile their differences by drafting amendments to the agreement. The following clauses were endorsed by Canada as a compromise:

- 9.8.1 This agreement is not a land claim agreement with the meaning of section 35 of Constitution Act, 1982 and nothing in this agreement will in any way affect the compensation or other benefits the Tsimpsean Nation, the Tribes or the Tsimpsean Nations, or the Lax Kw'alaams Band may be entitled to as part of a land claim agreement.
- 9.8.2 This agreement is not intended to affect the existing aboriginal rights of the Tsimpsean Nation or the Tribes of the Tsimpsean nation or the Lax Kw'alaams Band; it is only intended to affect any interest in the lands referred to herein held in common by the members of the Lax Kw'alaams Band under the *Indian Act*, as a reserve.
- 9.8.3 For greater certainty, Paragraph 9.8.2 does not constitute an acknowledgement by the Band that any existing aboriginal right or interest it may have in the land is, in fact or in law, the same as its interest in reserve land.¹²¹

The Band agreed to these clauses with one exception; it sought to amend clause 9.8.2 by expressly confining the surrender's effect to whatever interest was created by the reserve allotment.¹²² By letter dated January 22, 1993, Canada advised that it was prepared to include the following phrase in the agreement: "This Agreement is not a land claim Agreement within the meaning of Section 35 of the *Constitution Act, 1982*."¹²³ This letter indicates that Canada would not agree to include the remainder of clauses 9.8.1 and 9.8.2 above in the Agreement, even though Canada's negotiator and legal counsel had endorsed these clauses a few days earlier.¹²⁴

¹²⁰ Ibid. (ICC Documents, p. 499).

¹²¹ Excerpt from draft settlement agreement dated January 20, 1992. Attached as Appendix C of letter from Slade to Henderson, April 15, 1993 (ICC file 2109-02-1, vol. 1).

¹²² Attached as Appendix D of letter from Slade to Henderson, April 15, 1993 (ICC file 2109-02-1, vol. 1).

¹²³ Manfred Klein to Harry Slade, January 22, 1993 (ICC Documents, p. 504).

¹²⁴ In a letter to Manfred Klein dated January 28, 1993, Harry Slade states that "you have advised that Canada is not prepared to include certain paragraphs which preserve the ability of the Band to pursue a negotiated land claim agreement, in relation to a comprehensive claim. This, notwithstanding the fact that those paragraphs appeared in a form of agreement which Canada earlier considered acceptable" (ICC Documents, p. 514).

Further requests by the Band to bring the matter to the direct attention of Minister Siddon were rejected by Canada.¹²⁵ Nor did Canada agree to alter its position on the requirement of an absolute surrender as a condition precedent to settling the claim. In light of this impasse, the Lax Kw'alaams Band Council made a request on January 26, 1993, for the Indian Claims Commission to conduct an inquiry into whether Canada's request for an absolute surrender "is within the claims acceptance and compensation criteria" set out in the Specific Claims Policy.¹²⁶

Any prospect for mediation was ended by Mr. Klein's letter to Mr. Slade dated February 19, 1993, wherein Mr. Klein stated:

The position of the federal government with respect to the requirement of an absolute surrender is firm.

With regard to the Band Council Resolutions you have shared with me, the request of the band to have the Indian Specific Claims Commission play a role would seem reasonable. In this case there would appear to be much value in asking the Commission to help us assure that our respective positions on the surrender issue are clearly understood. I have also confirmed, with my principals, the federal view that the mandate of the Commission does not extend to advising on the content of an Agreement-in-Principle, nor upon a legal issue on which Canada has taken a firm position . . .¹²⁷

By letter dated March 4, 1993, Mr. Slade wrote to Chief Commissioner LaForme to inform him that the limited scope of the Commission's role as proposed by Canada was unacceptable in that it would fail "to assist the parties in coming to reasonable terms over this important issue."¹²⁸ In light of the fact that the Band's request for mediation was not acceded to by Canada, Mr. Slade advised that the Band was prepared to proceed with a formal inquiry into the matter.

¹²⁵ See, generally, Harry Slade to Ken Clancy, January 25, 1993 (ICC Documents, p. 508); Clancy to Slade, January 27, 1993 (ICC Documents, p. 511); Slade to Clancy, January 28, 1993 (ICC Documents, p. 512); and Manfred Klein to Slade, February 19, 1993 (ICC Documents, p. 517).

¹²⁶ Lax Kw'alaams Band Council Resolution, dated January 26, 1993 (ICC Exhibit 1).

¹²⁷ Manfred Klein to Harry Slade, February 19, 1993 (ICC Documents, p. 517).

¹²⁸ Slade to LaForme, March 4, 1993 (ICC file 2109-02-1, vol. 1).

PART IV

THE ISSUE

The historical background reveals that the Lax Kw'alaams Band and the Government of Canada have reached an impasse in the negotiation of a settlement agreement pursuant to the Specific Claims Policy. As a condition to settling the claim, Canada demands an absolute surrender of all the Band's interests, rights, and title in the 13,567 acres surrendered by the Metlakatla Band in 1906. The Lax Kw'alaams Band has stated that it is not willing to accept this condition if the effect of an absolute surrender is to extinguish the aboriginal title of the Tsimpsean tribes over that portion of their traditional lands.

The central question before this Commission is whether it is reasonable for Canada to demand an absolute surrender of all rights and interests of the Lax Kw'alaams Band, including aboriginal title, over lands settled pursuant to the negotiation of their specific claim.

Part V of the report is intended to address the substantive issue before this Commission. The end result of this report will be to offer practical recommendations to the parties which may assist them in finding a mutually acceptable means of settling this claim.

PART V

ANALYSIS AND CONCLUSIONS

CANADA'S DEMAND FOR AN ABSOLUTE SURRENDER

Form of Release Contemplated by the Specific Claims Policy

In their written argument, counsel for Canada described how the Specific Claims Policy contemplates the negotiation of claims where Canada has acknowledged that it owes an "outstanding lawful obligation" to the band. Although the policy contains specific guidelines for the negotiation of compensation, there is little guidance on what Canada is entitled to as a condition of settlement.¹²⁹ Canada, however, referred to the following provision of the policy which contemplates some form of release as a condition to settling a claim:

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that the negotiations on the same claim cannot be reopened at some time in the future.¹³⁰

Mr. Becker submits on behalf of Canada that the requirement of a surrender is an issue which bears directly on the efficacy of the "formal release" sought by Canada. We agree that under the Specific Claims Policy Canada is entitled to insist on a release which ensures that the claimants cannot assert a subsequent claim for the same grievance. In that sense, Canada is entitled to "closure" of the claim that has been advanced, accepted, and settled.

Therefore, we must examine the nature of the release being sought by Canada and whether it is appropriate in the circumstances. Canada submits that in cases such as this one, where the claim is based on an allegation by the Band that a portion of its reserve was alienated without a lawful surrender, the only effective

¹²⁹ Submissions on Behalf of the Government of Canada, March 11, 1994, p. 8.

¹³⁰ *Outstanding Business*, p. 24 (ICC Documents, p. 348).

form of release is an absolute surrender under section 38(1) of the *Indian Act*.¹³¹ Whether Canada is justified in demanding an absolute surrender necessarily depends on the nature of the grievance addressed in the claim negotiations. To answer this question we must identify the subject matter of the negotiations.

The claim submitted by the Band in 1979 was based on three main allegations. First, that the allotment and confirmation of Tsimpsean IR No. 2 by the provincial government invoked the protection of the *Indian Act* surrender provisions relating to reserve lands. Second, that Indian Reserve Commissioner O'Reilly's division of the reserve in 1888 was unlawful because he did not obtain a surrender of the Port Simpson Band's interest in the southern part of Tsimpsean IR No. 2. Third, that the Crown sold 13,567 acres in the southern part of Tsimpsean IR No. 2 to the Grand Trunk Railway Company without obtaining a valid surrender from the Port Simpson Band.

The Minister of Indian Affairs accepted the claim in 1985 on the basis that the southern part of Tsimpsean IR No. 2 was alienated in 1888 without the consent of the Port Simpson Band and that Canada failed to comply with the surrender provisions of the *Indian Act* in force at that time. An examination of the correspondence exchanged by the parties after Canada accepted the claim for negotiation suggests that compensation was based on the following heads of damage: (1) the current, unimproved value of the Surrendered Lands; (2) loss of use of those lands on the south side of the O'Reilly division line from 1888 to 1924; and (3) loss of use of the Surrendered Lands from 1924 to 1985.¹³²

Based on the evidence, it would appear that the figure of \$11,550,000 was negotiated by the parties based on these three heads of damage. That is, the compensation offered by Canada and accepted by the Band was intended to address the Band's grievance arising from the unlawful division of Tsimpsean IR No. 2 by O'Reilly in 1888.

Mr. Slade submits that a simple release would provide sufficient protection to Canada and interested third parties and that no surrender of any kind is required. He submits that a release would forever bar the Band from commencing an action in which it asserts a legal interest in reserve lands because Canada would be added as a defendant in the action.¹³³ Mr. Becker, however, submitted that a simple contractual release does not achieve finality of settlement because the terms and

¹³¹ Submissions on Behalf of the Government of Canada, March 11, 1994, p. 8.

¹³² M.J. Kellerman to Harry Slade, December 5, 1985 (ICC Documents, p. 355). Compensation for the Cut-Off Lands was not dealt with in these negotiations.

¹³³ ICC Transcripts, vol. 2, p. 185, March 16, 1994.

conditions of a contract are not binding on persons who are not party to that agreement:

Even if a formal release does assure that there will be no future litigation between the band and Canada, it arguably would have no impact on the relationship between a band and third parties (such as current holders of the fee simple title to the lands), since such third parties are not privy to the settlement agreement, and may not, therefore, be able to rely upon the formal release contained therein.¹³⁴

We find Canada's arguments on the requirement of an absolute surrender persuasive. We agree that an absolute surrender under the *Indian Act* appears to be the only effective means of removing the Band's reserve interest from the Surrendered Lands. The compensation offered by Canada, which was based partly on the current, unimproved value of the Surrendered Lands, was clearly intended to provide compensation in lieu of returning the Surrendered Lands to the Band. Accordingly, we find that it is reasonable for Canada to demand an absolute surrender under the *Indian Act* to ensure that the Band's reserve interest in the Surrendered Land is terminated.¹³⁵

We find, therefore, that Canada's demand for an absolute surrender under the *Indian Act* is justified because the only effective means of releasing the Band's legal interest in the reserve lands is to obtain a valid surrender from a majority of the Band's eligible voters. It remains to be considered whether Canada is entitled to an absolute surrender of the underlying aboriginal title the Band asserts. For reasons we are about to explain, this type of surrender is to be distinguished from a surrender under the *Indian Act*.

Form of the Surrender Demanded by Canada

Chief Bryant testified that the Band's negotiators were aware that a release would be required as a condition of settling the claim but that they considered the form

¹³⁴ Submissions on Behalf of the Government of Canada, March 11, 1994, pp. 8-9. Canada was afforded an opportunity to provide additional evidence to support the proposition that there are numerous instances where a surrender was required as a condition to settling a specific claim. In a letter dated March 23, 1994, Mr. Becker provided the Commission with a list of claims settlements where a surrender was obtained. Without further evidence on how the reserve interests of these various bands were created, the Commission declines to make any comment on whether Canada's policy of demanding a surrender is justified in all instances.

¹³⁵ In claims such as this, where it may not be feasible to return the lands to the aggrieved Band because there are significant third-party interests on the lands, the policy appears to contemplate providing compensation as a substitute for restoring the lands to reserve status. Furthermore, we acknowledge that claims settlement agreements routinely make provision for the Band to purchase lands with their compensation and to apply under Canada's "Additions to Reserve Policy" to have a corresponding amount of land designated as reserve. We suggest that such a clause might be appropriate in these circumstances because the compensation would roughly place the Band in the same position it was in before the breach.

of the release to be open to negotiation.¹³⁶ It is clear to us that the Band's negotiators were not aware that Canada was seeking an absolute surrender of all aboriginal interests in the Surrendered Lands until after the parties arrived at an agreement-in-principle based on \$11,550,000 in compensation. Only after the parties had agreed to the substantial terms of the settlement agreement did Canada seek to insert the following clause in the September 27, 1991, draft settlement agreement:

1.1 It is a condition precedent to the coming into force of this Agreement that the Band shall surrender absolutely to Canada, all of its rights and interests of whatsoever nature and kind, if any, it may have in and to the Surrendered Land conditional upon Canada entering into and making payment pursuant to Section 3 of this Agreement.¹³⁷

Paragraph 4.1 further provided that "the Band hereby releases any and all claims to any right, title or interest whatsoever which the Band ever had, now has or hereinafter can, shall or may have to the Surrendered Land and the Metlakatla Land. . . ." ¹³⁸

An earlier draft of the agreement contemplated a "surrender," whereas this draft extended the effect of the surrender by adding the word "absolute" throughout.¹³⁹ While section 38(1) of the *Indian Act* provides for an absolute surrender, it is clear that the "absolute surrender" clause, as drafted, was intended by Canada to effect a surrender not only of the Band's reserve interests, but also of its aboriginal interests in the Surrendered Lands. Canada's position in this respect is confirmed by Mr. Klein's letter to Mr. Slade dated December 11, 1992.¹⁴⁰

Chief Bryant testified that Canada did not notify the Band that it required any form of surrender until after the compensation was agreed to by the parties.¹⁴¹ However, Mr. Becker produced a letter from Mr. Slade to Mr. Klein dated September 24, 1985, wherein Mr. Slade acknowledged that the rationale behind criterion 3 of the

¹³⁶ ICG Transcripts, vol. 1, p. 136, March 15, 1994.

¹³⁷ Draft Specific Claim Settlement Agreement, September 27, 1991 (ICG Documents, p. 447).

¹³⁸ *Ibid.*, p. 447.

¹³⁹ ICG Transcripts, vol. 1, p. 143, March 15, 1994.

¹⁴⁰ Mr. Klein stated that: "The preliminary oral indication I had received from DOJ [Department of Justice], that it is Canada's position that an absolute surrender includes the surrender of any aboriginal interests, has now been confirmed. There is a long established and well developed position as to what is accomplished by reserve creation or surrenders under the *Indian Act*. To be consistent with past and future surrenders, as well as between different parts of the country, this position must and will be applied consistently." Manfred Klein to Harry Slade, December 11, 1992 (ICG Documents, p. 499).

¹⁴¹ ICG Transcripts, vol. 1, p. 130, March 15, 1994.

Specific Claims Policy, which provides for the payment of current, unimproved value for lands that have not been lawfully surrendered,

... appears to contemplate situations where the physical possession of lands has been lost, but the Band has retained legal possession. Presumably, this criterion is intended to cover a situation where physical possession of the land cannot be returned due to third party interests, and the settlement includes the surrender by the Band of its legal possession.¹⁴²

We agree with Canada's submission that the Band's negotiators were aware that some form of surrender might be required as a condition to settling the claim. However, we find that the Band's negotiators and legal counsel were not notified that Canada was seeking an absolute surrender of all interests, including the Band's aboriginal interests, in the subject lands until after the amount of compensation had been agreed to and the surrender clause was inserted in the draft settlement agreement drawn by Canada. The form of surrender introduced by Canada could not have been contemplated by the Band because the value of its aboriginal interests was never the subject of the specific claim negotiations. Nor, as we will see, could it be.

As we have observed, the Specific Claims Policy states in no uncertain terms that "[c]laims based on unextinguished native title shall not be dealt with under the specific claims policy."¹⁴³ The position of the Band on this matter is clear:

[T]he request for an absolute and unconditional surrender, in circumstances in which both Canada and the Province would assert the consequence of extinguishment of aboriginal title, seeks to achieve an objective which is not mandated by the Specific Claims Policy. The Policy specifically prohibits the negotiation of comprehensive claims . . .¹⁴⁴

Mr. Becker submitted that this provision of the policy was intended only to set the parameters for the negotiation of the claim and that it would be unreasonable to conclude that nothing in a specific claims agreement can ever impact on aboriginal rights or title.¹⁴⁵ Mr. Slade countered that Canada's demand for a surrender went beyond an incidental effect because Canada's stated intention was to extinguish aboriginal interests in the Surrendered Lands.¹⁴⁶ With respect, we do not accept Mr. Becker's argument. The purpose of this provision in the policy

¹⁴² ICC Exhibit 18.

¹⁴³ *Outstanding Business*, p. 30 (ICC Documents, p. 349).

¹⁴⁴ Harry Slade to Ken Clancy, January 22, 1993 (ICC Documents, p. 506).

¹⁴⁵ Submissions on Behalf of the Government of Canada, March 11, 1994, p. 9.

¹⁴⁶ ICC Transcripts, vol. 2, p. 230, March 16, 1994.

is expressly to exclude claims based on unextinguished aboriginal title. Canada's demand for an absolute surrender extends far beyond any incidental effect on aboriginal rights.

With respect, Mr. Becker's argument is contrary to the clear words and intent of the policy. Nothing in the policy contemplates such an impact. The guidelines governing the "submission and assessment" of specific claims expressly exclude claims based on unextinguished aboriginal title.

There is nothing in the guidelines, or in the criteria that follow, or anywhere else in *Outstanding Business* that qualifies or modifies this blanket preclusion in any way. Simply put, there is no room for negotiation of compensation for aboriginal title or unextinguished native title in the negotiation of specific claims. It therefore follows that there is no basis for demanding an absolute surrender of aboriginal rights and interests to land as a condition of settling a specific claim.

It must also be kept in mind that the "formal release" contemplated by the policy is sought only in relation to the "particular grievance dealt with." The particular grievance dealt with here was one within the Specific Claims Policy. It was for the value of reserve lands taken without a lawful surrender and for damages arising from the lost use of those lands. The federal government's acceptance of the claim acknowledged that compensation would be based on those heads of damage. There was never any claim submitted by the Band that was based on unextinguished native title. If that had been included, it would not, indeed could not, have been accepted. There is thus no basis for demanding a surrender of such rights, and such a demand is contrary to the policy.

This reading of the policy is supported by the record of negotiations. There is no evidence in the documentary record that the Band's aboriginal interests in the Surrendered Lands were ever the subject of negotiations between the parties. The Claim submitted by the Band did not seek to engage Canada in negotiations to obtain compensation for its unextinguished aboriginal title in its traditional territories. Chief Bryant, who was involved in the negotiations from the outset, told the Commission that the parties never discussed the aboriginal title or rights of the Tsimshian peoples at any stage of the negotiations. Nor was any attempt made by the parties to value that interest for the purposes of negotiating compensation.¹⁴⁷

Thus, while we agree that Canada's insistence on a surrender is justified, the form of surrender demanded in the draft settlement agreement of September 27, 1991, goes beyond the effect of an absolute surrender under the *Indian Act*. There is no doubt that the form of surrender requested purports to extinguish aboriginal interests in land and is not strictly confined to a surrender of the Band's

¹⁴⁷ ICC Transcripts, vol. 1, p. 129, March 15, 1994.

reserve interest. In our view, the surrender clause should be expressly limited to the Indian reserve interest created by the allotment of Tsimpsean IR No. 2.

There is another aspect of this issue. Counsel for the Band emphasized that "there exists today a tribal system of government and a system of tribal ownership of territories" and that this form of government is distinct from the Lax Kw'alaams Band Council, which is the form of government recognized under the *Indian Act*.¹⁴⁸ Furthermore, the Lax Kw'alaams Band asserts that its membership is not co-extensive with membership in the Tsimpsean tribes.¹⁴⁹ Mr. Slade submitted that if an absolute surrender under the *Indian Act* extinguished aboriginal interests in the Surrendered Lands:

[T]he consequence would be that the Tsimshian Nation, whose rights and title based on aboriginal occupation may be recognized by the common law of Canada, and who is presently engaged in treaty negotiations on the strength of its assertion of aboriginal rights and title, would be extinguished by the actions of the Lax Kw'alaams Band. *The Band, of course, is an entity defined by the statute, not by tradition. Neither its territorial rights (the reserves, within the meaning of the Indian Act) or its membership, are co-extensive with the territory or membership of the Tsimshian Nation.*¹⁵⁰

Therefore, it is important to bear in mind that the reserve interest is separate and distinct from the aboriginal interest and, indeed, that these interests may belong to different aboriginal groups. Where it is the Crown's intention to extinguish aboriginal title or rights, caution should be exercised to ensure that the appropriate form of assent has been provided by the aboriginal group asserting the interest. In the case of Indian reserves, the surrender provisions of the *Indian Act* set out the procedural requirements necessary to obtain a valid surrender. In the case of aboriginal title, it is doubtful that the *Indian Act* surrender provisions have any application. In any event, they appear to be inadequate because they do not address who is an eligible voter for the purposes of obtaining a surrender of aboriginal title.¹⁵¹

¹⁴⁸ Ibid., p. 13.

¹⁴⁹ We accept Chief Bryant's assertion that factors such as intermarriage have led to a situation where some Band members are not necessarily of Tsimshian ancestry (ibid., p. 131). We also have the evidence of Dr. Anderson, which suggests that membership in the Tsimpsean tribes follows along matrilineal lines whereas Band membership was patrilineal in nature up until 1985 when the membership provisions in the *Indian Act* were amended. See Margaret Seguin Anderson, Submission to the Indian Claims Commission, September 1993 (ICC Documents, p. 542).

¹⁵⁰ Lax Kw'alaams Band, Draft Outline of Argument, n.d., pp. 13-14. Emphasis added.

¹⁵¹ Canada's Comprehensive Claims Policy does not expressly mention ratification procedures for a land claim settlement. The policy does state, however, that the primary objective of entering into land claims agreements under the policy "is to conclude agreements with *Aboriginal groups* that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title" (ICC Exhibit 17, tab 1, p. 5). Conversely, the primary objective of the Specific Claims Policy "is to discharge its lawful obligation to *Indian Bands*" (ICC Exhibit 17, tab 1, p. 19). Emphasis added.

The Crown should be ever mindful of its fiduciary obligations with respect to the surrender and alienation of Indian lands. In *Guerin v. The Queen*, the Supreme Court of Canada provided this statement on the nature of the fiduciary relationship:

[W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.¹⁵²

In *Delgamuukw*, Mr. Justice Macfarlane undertook an ambitious review of the case law dealing with the extinguishment of aboriginal rights in land. He stated that the proper test was laid down in *R. v. Sparrow*, where the court ruled that "the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."¹⁵³

The principles enunciated by the courts on the fiduciary obligations of the Crown suggest that Canada should exercise caution to ensure that it is negotiating with the proper representatives of the aboriginal group that owns the aboriginal interest Canada is seeking to obtain. This is of particular importance in light of the fact that the Crown must demonstrate a "clear and plain intention" to extinguish aboriginal title and rights.¹⁵⁴ The particular type of problem that Canada ought to be wary of is that referred to by Mr. Slade in his argument:

The membership is not co-extensive. Therefore we have the spectre of people being permitted to vote on a surrender that would extinguish aboriginal interests who have no aboriginal interest; and at the same time the spectre of people who have the aboriginal interest as members of one or more of the Allied Tribes not being able to vote on a question that might result in the extinguishment of their interest – not only not being able to vote, but taking no benefit from the result.¹⁵⁵

In fact, there would appear to be a parallel between the problem anticipated by Mr. Slade and the facts which formed the basis of the present claim, in the sense that the Crown failed to obtain a valid surrender from all eligible band members who had an interest in Tsimpsean IR No. 2. Therefore, we suggest that Canada,

¹⁵² [1985] 1 CNLR 120 at 137 (SCC). In *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108, 70 DLR (4th) 385 at 408, [1990] 3 CNLR 160 at 180, the Supreme Court of Canada held that section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights, must be read in the light of the Crown's "fiduciary responsibility to act in a fiduciary capacity with respect to aboriginal peoples."

¹⁵³ *Delgamuukw v. British Columbia*, [1993] 5 WWR 97 at 154, 104 DLR (4th) 470 at 521, citing *R. v. Sparrow*, [1990] 1 SCR 1075 at 1099.

¹⁵⁴ *Delgamuukw and Sparrow*.

¹⁵⁵ ICC Transcripts, vol. 2, p. 169, March 16, 1994.

in its role as a fiduciary, ought to be cautious to ensure that the settlement of this claim does not form the basis for another.

Canada suggested that the negotiation of specific claims is often an extremely complex and lengthy process and that, through the benefit of experience, Canada has become more sensitive to the need to raise issues relating to surrenders and extinguishment at an earlier stage in the negotiations.¹⁵⁶ We acknowledge that many of the issues which arise in the negotiation of a specific claim can not be anticipated by the parties. However, because issues relating to the extinguishment of aboriginal rights are of critical importance to First Nations, Canada ought to adopt the practice of clarifying what type of release or surrender will be required at the commencement of negotiations to ensure that both parties are not operating under any misconceptions. To leave this important issue to the end of the negotiations can seriously jeopardize settlement of the claim and leave Canada open to charges of unfairness or impropriety.

In conclusion, we suggest that if it is Canada's intention to extinguish the aboriginal interests of the Tsimpsian peoples, the proper vehicle to achieve this objective is through negotiations pursuant to Canada's Comprehensive Claims Policy or under the auspices of the British Columbia Treaty Commission.

Appropriate Form of Surrender

Having concluded that Canada is not justified in demanding an absolute surrender of all reserve and aboriginal interests in the Surrendered Lands as a condition to settling the Lax Kw'alaams Band's specific claim, we must consider what the appropriate form of surrender is in these circumstances. In order to do so, it is important to recognize the distinction between the interest in land sometimes described as "aboriginal title" and the interest in land created by the allotment of a reserve under the *Indian Act*. The following statement by Chief Bryant goes to the heart of the matter:

The rights of the Tsimshian Peoples to the land included in Tsimpsian I.R. No. 2 and a far more extensive territory . . . do not depend upon the government's recognition of our title and the allotment of the land as reserve. Any interest that is created by the *Indian Act* is additional to our aboriginal rights and title.¹⁵⁷

¹⁵⁶ *Ibid.*, p. 190.

¹⁵⁷ ICC Transcripts, vol. 1, p. 28, March 15, 1994.

In the recent BC Court of Appeal decision of *Delgamuukw v. British Columbia*,¹⁵⁸ Mr. Justice Macfarlane reviewed the leading decisions on the nature and existence of aboriginal rights and summarized his findings as follows:

Aboriginal rights in respect of land arise from "the Indians' historic occupation and possession of their tribal lands": *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 376. Thus, proof of presence amounting to occupation is a threshold question. The nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as "an integral part of their distinctive culture": *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099.

Aboriginal rights arise by operation of law, and do not depend on a grant from the Crown: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. This was adopted by the trial judge [in the present case] at p. 209. In *Guerin*, at p. 378, Indian title was described as an independent legal right pre-dating the *Royal Proclamation of 1763*.¹⁵⁹

It is clear from these decisions that aboriginal rights in respect of land are derived from the historical use and occupation by aboriginal peoples of their traditional territories. The common-law aboriginal title of the Tsimpsean tribes, therefore, is not dependent on a grant from the Crown or a legislative enactment.

Although it is unnecessary for us to decide whether the Tsimpsean tribes have aboriginal title and rights in this case, the historical evidence supports a *prima facie* argument that they do.¹⁶⁰

The nature of the Band's legal rights in Tsimpsean IR No. 2 are of a different nature and character and flow from the allotment of Tsimpsean IR No. 2 as an Indian reserve. We accept Mr. Slade's submission that "[s]uccessive Indian acts, from 1868 to the present, have established a comprehensive code governing the management of reserved lands. Indian rights to reserved lands may only be disposed of in accordance with the provisions of the *Indian Act*."¹⁶¹ The enactment of laws respecting the management of Indian reserve lands flows from the exercise

¹⁵⁸ [1991] 3 WWR 97 (BCSC), varied [1993] 5 WWR 97, 104 DLR (4th) 470 (BCCA).

¹⁵⁹ At 124 and 492.

¹⁶⁰ Based on the limited evidence before us, we find that the Tsimpsean people used and occupied lands around the Tsimpsean peninsula for approximately 5000 years prior to contact with Europeans. Moreover, Canada did not contest the Band's assertion that the Tsimpsean tribes had aboriginal rights over the area in question. Furthermore, Canada tendered no evidence to suggest that the aboriginal rights of the Tsimpsean peoples had ever been extinguished by colonial or legislative enactments, by adverse dominion or otherwise.

¹⁶¹ Submissions on Behalf of the Lax Kw'alaams Band, p. 10.

of federal legislative jurisdiction.¹⁶² The protection afforded by this Act flows from the federal Crown's legislative jurisdiction over Indian reserve lands.

It would appear, therefore, that the allotment of Tsimpsean IR No. 2 in 1884 created legal rights that are managed pursuant to and protected by statutory enactments of the federal Crown, namely the *Indian Act*. These statutory rights are quite distinct from aboriginal rights, which derive from the common law.

Counsel for Canada implied in their written submissions that, owing to the uncertainty over the nature and content of aboriginal rights, it may not be legally possible to except these rights from the absolute surrender clause in the settlement agreement.¹⁶³ Mr. Becker referred to the majority decision of the court in *Guerin v. The Queen* wherein Mr. Justice Dickson states:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. *The Indian interest in the land is the same in both cases.*¹⁶⁴

Mr. Slade argued that, if that is the case, a surrender of reserve lands under the *Indian Act* could extinguish all aboriginal interests in those lands.¹⁶⁵ Mr. Slade submitted that this is a risk that the Band is not prepared to assume.

Although the law is far from settled on what similarities or differences there are between aboriginal rights and Indian reserve interests, we do not believe that the *Guerin* decision can be read to mean that aboriginal and reserve interests in land are the same in all cases. Accordingly, we are not persuaded that an absolute surrender under the *Indian Act* extinguishes aboriginal interests in reserve lands.

It should be noted that Mr. Justice Dickson's statement is *obiter dicta* because the nature and extent of aboriginal title was not the crucial issue before the court

¹⁶² In 1868 Canada passed *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, SC 1868, 31 Vict., c. 42, which provided for the management of "reserved lands" pursuant to its legislative jurisdiction respecting "Indians and lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*. In 1874, the provisions of this Act were extended to apply to British Columbia by *An Act to amend certain Laws respecting Indians, and to extend certain Laws relating to matters connected with Indians to the Provinces of Manitoba and British Columbia*, SC 1874, 37 Vict., c. 21.

¹⁶³ In Canada's written argument, Mr. Becker expressed the view that "[i]t is far from clear...what the precise differences are between an interest in a reserve and aboriginal title to those same lands" (Submissions on Behalf of the Government of Canada, March 11, 1994, p. 10).

¹⁶⁴ [1985] 1 CNLR 120 (SCC) at 134. Emphasis added.

¹⁶⁵ Mr. Slade referred to *Smith v. The Queen* (1983), 147 DLR (3d) 237 at 258-59 (SCC), as support for the proposition that upon the surrender of reserve lands to the federal Crown "the burden of Section 91(24) [or the *Constitution Act, 1867*] disappeared and the legal and beneficial interest, unencumbered thereby, continued in the Province of New Brunswick."

in the *Guerin* case. In any event, Mr. Justice Dickson qualified his statement when he endorsed this cautious approach to defining Indian title to lands:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. *Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.*¹⁶⁶

The courts have also determined that it is important to consider the specific facts involved in every claim where aboriginal title is asserted. In *R. v. Taylor and Williams*, the Ontario Court of Appeal said that:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of primary importance to consider the history and oral traditions of the tribes concerned . . .¹⁶⁷

The facts before us suggest that reserves were allotted by the province of British Columbia as a matter of executive grace and that this policy was not undertaken for the purpose of extinguishing aboriginal interests in land. Accordingly, we agree with Professor Foster's suggestion that, while there are conceptual similarities between reserve and aboriginal interests in land, it is inaccurate to say that the two interests are identical in nature and extent.¹⁶⁸

In our view, we find that the term "absolute surrender" is potentially misleading. Our interpretation of the surrender provisions in the *Indian Act* leads us to conclude that they were designed to deal exclusively with the surrender of

¹⁶⁶ [1985] 1 CNLR 120 at 136. Emphasis added.

¹⁶⁷ (1981), 62 CCC (2d) 227 at 232. Also see *Kruger v. R.* (1978), 75 DLR (3d) 434 at 437 (SCC) where Mr. Justice Dickson (as he then was) stated that:

Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claims of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis.

¹⁶⁸ ICC Transcripts, vol. 1, pp. 64-65, March 15, 1994.

reserve lands. Section 38 of the Act defines "absolute surrenders" and "designations" of reserve lands in these terms:

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all the rights and interests of the band and its members in all or part of a reserve.

(2) A band may, conditionally or unconditionally, designate by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

It is important to distinguish between an "absolute surrender" of reserve lands under the *Indian Act* and an "absolute surrender" of all aboriginal interests. Both forms of surrender may be "absolute" in the sense that they effectively extinguish any further claims to the same interest. The nature and scope of the claim governs the appropriate form of surrender.

We have already observed that a band's interest in reserve lands is governed by the *Indian Act* and is dependent on a legislative enactment for its existence. Aboriginal title or rights, however, arise from "the Indians' historic occupation and possession of their tribal lands" and "arise by operation of law, and do not depend on a grant from the Crown."¹⁶⁹ It does not follow that an absolute surrender of reserve lands under the *Indian Act* would have any effect on the underlying aboriginal interests, which are not dependent on that statute for their existence and protection.

In light of the uncertainties regarding the legal effect of a surrender under the *Indian Act*, the surrender clause must be carefully drafted to describe exactly what rights and interests are being surrendered and what rights and interests will survive. *Stamata* suggests that it may not be possible to expressly exclude aboriginal interests from the surrender clause.¹⁷⁰ Such a conclusion is not warranted. The test for extinguishment endorsed by the courts is that the Crown must show a clear and plain intention to extinguish aboriginal rights. The distinctions between aboriginal interests and reserve interests in the facts of this case suggest that a surrender clause could be drafted to ensure that only the reserve interest, and not the aboriginal interests of the Tsimpsan tribes, are to be surrendered.

¹⁶⁹ *Guerin v. The Queen and Calder v. Attorney-General of British Columbia*, [1973] SCR 313, 4 WWR 1, 34 DLR (3d) 145. In *Guerin*, [1985] 1 CNLR 120 at 378, Indian title was described as an independent legal right predating the *Royal Proclamation of 1763*.

¹⁷⁰ Submissions on Behalf of the Government of Canada, March 11, 1994, p. 10.

Possibility of Double Compensation

It remains for us to consider the potential problem that arises from a surrender of the reserve interest, leaving intact a claim to the underlying aboriginal title. Canada describes this as a risk of overcompensation.

Mr. Becker submitted that even if it is possible to except aboriginal interests from the surrender clause, it is not practical for Canada to follow this course of action because of the uncertainty over the nature and extent of aboriginal title.¹⁷¹ Canada's concern again stems from the reasoning of Mr. Justice Dickson in *Guerin* which suggests that all Indian interests in land are the same.

The following summary of Mr. Becker's argument reveals Canada's concerns with respect to double compensation:

To the extent the reserve and aboriginal title in such lands is co-extensive, compensating a band for a surrender of a reserve, and then compensating the band again for an aboriginal title in the same lands, will result in over-compensation.

Further, in order to properly deal with the issue of valuation, this approach would require that the parties negotiating a specific claim evaluate the worth of a "reserve interest" only, since the aboriginal interest would continue to subsist in the lands after the surrender. It is submitted that the value of this interest cannot be ascertained without knowing the nature and extent of the residual aboriginal interest. If the nature of the aboriginal right with respect to the land is relatively less valuable, then the reserve interest may be worth more than if the aboriginal right is extremely valuable.

For example, if the band or aboriginal community maintains an aboriginal title to the surrendered area which is tantamount to the right to use and occupy the entire area, it is highly doubtful that the surrender of the reserve is of significant value.¹⁷²

In *Delgamuukw*, the majority for the Court of Appeal held that the nature and content of aboriginal rights are dependent on what can be regarded as integral to the distinctive culture of the aboriginal claimants at the time of British sovereignty in 1846. Macfarlane JA provided guidance on how the courts should deal with claims based on recognition of aboriginal rights or title:

The essential nature of an aboriginal right stems from occupation and use. The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty. Rights of occupancy are usually exclusive. Other rights, like hunting or fishing, may be shared. *What is an aboriginal use may vary from case to case. Aboriginal rights are fact and site specific. They are rights which are integral to the distinctive culture of an aboriginal society. The nature and content of the right, and the area within which the right was exercised are questions of fact.*

¹⁷¹ Ibid.

¹⁷² Submissions on Behalf of the Government of Canada, March 11, 1994, pp. 10-11.

The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors including the nature, kind and purpose of the use or occupancy of the land by the aboriginal community in question, and the extent to which such use or occupancy was exclusive or non-exclusive. Activities may be regarded as aboriginal if they formed an integral part of traditional Indian life prior to sovereignty.¹⁷³

This decision underscores the fact that a detailed examination of the history of the Tsimpsian peoples would have to be undertaken to determine the nature and scope of their aboriginal interests. The British Columbia Treaty Commission was created to assist the parties in defining the nature of aboriginal rights through negotiation rather than litigation.

The question of whether the Tsimpsian tribes can establish an exclusive right to ownership over their traditional territories is beyond the scope of this inquiry. However, it is an extremely important consideration because it could be subsequently determined by the courts or through negotiations that aboriginal title does confer an exclusive right of occupation with respect to the Surrendered Lands, the subject matter of a claim over which Canada would have already paid \$11,550,000 in compensation. This could lead to double compensation if the Tsimpsian tribes were able to assert a right to exclusively occupy the same lands that were the subject matter of a specific claims settlement agreement.

We have considered Canada's position in this matter carefully and agree that it is a legitimate concern. However, we must bear in mind that both parties have invested a significant amount of time and money over the course of the last 12 years to negotiate an agreement in principle. The parties have agreed on the substantial terms of the settlement, and there is no dispute over the quantum of the settlement. Canada should not allow uncertainty over the nature of aboriginal interests to thwart the settlement of a claim that it has acknowledged as a legitimate grievance. Furthermore, the passage of time will only serve to increase the amount of compensation demanded by the Band as restitution for the unlawful surrender of its interest in the Surrendered Land.

We suggest that Canada's concerns with respect to double compensation should be clearly addressed in the settlement agreement. For example, the parties can include a clause which provides that any compensation paid in the settlement of this claim shall be taken into account in subsequent treaty negotiations. Alternatively, Canada's concerns regarding double compensation could be addressed

¹⁷³ [1993] 5 WWR 97 at 128-29, 104 DLR (4th) 470 at 496-97.

by including clauses in the agreement respecting release, indemnity, and set-off.¹⁷⁴ The wording of the set-off clause should foreclose the possibility of overcompensation. The release and indemnity clauses could be drafted to ensure that the Band is foreclosed from commencing an action asserting an exclusive right of occupation, flowing from a recognition of its unextinguished aboriginal title, over the Surrendered Lands.

CONCLUSION

Counsel for the Band submits that it is manifestly unfair for Canada to demand a surrender that extinguishes or asks the Band to place at risk the aboriginal interest of the Allied Tsimshian Tribes as a condition to settling a specific claim with the Lax Kw'alaams Band. The remedy sought by the Band was threefold in nature. First, that the Crown withdraw its demand for a surrender in connection with the settlement of the Band's specific claim. Secondly, that the Crown proceed to settle the claim on the basis of a settlement agreement containing the following clauses:

11.9 The following provisions shall govern the interpretation and limit the scope of this Agreement:

11.9.1 This agreement is not a land claim agreement with the meaning of section 35 of the Constitution Act, 1982 and nothing in this agreement will in any way affect the compensation or other benefits of the Tsimpsen Nation, the Tribes or the Tsimpsen Nations, or the Lax Kw'alaams Band, or any member of the said Nation, Tribe or Band may be entitled to as part of a land claim agreement.

11.9.2 This agreement is not intended to affect any Aboriginal Interest of the Tsimpsen Nation or the Tribes of the Tsimpsen Nation or the Lax Kw'alaams Band or any member of the said Nation, Tribe or Band; it is only intended to affect any interest in the lands referred to herein held in common by the members of the Lax Kw'alaams Band under the Act, as a reserve.

¹⁷⁴ Contractual documents often contain clauses relating to release, indemnity, and set-off to protect against future contingencies. A release typically provides for the relinquishment of one party's rights or claims against the other. An indemnity clause can be used to protect one party from the potential of future legal expenses by having the other reimburse it for any costs incurred. Finally, a set-off clause simply allows the parties "to cancel or offset mutual debts or cross demands": *Black's Law Dictionary*. For examples of elaborate clauses dealing with release and indemnity, the parties may wish to refer to the clauses incorporated in the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (Federation of Saskatchewan Indian Nations) or the 1993 Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Indian and Northern Affairs Canada/Tungavik Federation of Nunavut).

11.9.3 For greater certainty, paragraphs 11.9.1 and 11.9.2 do not constitute an acknowledgement by the Band that any Aboriginal Interest it may have in the land is, in fact or in law, the same as its interest in reserve land.¹⁷⁵

And thirdly, that the Commission "mediate any disputes that might arise in negotiations to finally settle the form of agreement in accordance with the foregoing recommendations."¹⁷⁶

In the alternative, the Band submitted that if the Commission was not prepared to recommend that Canada withdraw its demand for a surrender, that we recommend that "any surrender specifically relate to a surrender of the legal protection afforded by the *Indian Act* and further that specific provision be made in the agreement that neither the agreement nor the surrender will have any effect on aboriginal rights or title."¹⁷⁷

For the reasons explained above, we agree that it is reasonable in these circumstances for Canada to demand a surrender of the Band's reserve interest in the Surrendered Lands. Accordingly, we are not prepared to recommend that Canada withdraw its demand for a surrender. However, the surrender provision must be drafted to draw a clear distinction between reserve-based and aboriginal interests in land. Canada is entitled to a surrender of the reserve interest only. Moreover, the settlement agreement must be drafted to include appropriate safeguards to address Canada's concerns regarding overcompensation. This would involve drafting set-off and indemnity clauses along with making amendments to the existing release.

The Commissioners are prepared to serve in a mediation capacity to assist the parties in finalizing the settlement agreement, in the event that they are unable to reach agreement through bilateral negotiations.

¹⁷⁵ Draft Specific Claim Settlement Agreement, November 20, 1992 (ICC Documents, pp. 492-93).

¹⁷⁶ Lax Kw'alaams Band, Draft Outline of Argument, n.d., p. 16.

¹⁷⁷ ICC Transcripts, vol. 2, p. 231, March 16, 1994.

PART VI

FINDINGS AND RECOMMENDATIONS

The Commission was obliged to examine two issues in the course of its inquiry into the claim of the Lax Kw'alaams Indian Band. The first issue related to Canada's objection that the Commission did not have a mandate to conduct this inquiry. The second issue related to the substantive question of whether Canada is entitled to demand an absolute surrender of all interests, rights, and title in the Surrendered Lands, including aboriginal rights and interests, as a condition to settlement.

MANDATE OF THE COMMISSION

Canada objected to the Commission conducting this inquiry on the ground that the Commission's mandate is limited to the 11 compensation criteria set out in Canada's Specific Claims Policy (see Appendix D). Canada argues that, since the criteria do not expressly refer to surrenders, the Commission does not have a mandate to examine the issue of whether Canada is justified in demanding one. The Band argued for a broad interpretation of the Commission's mandate on the basis that the Orders in Council allow the Commission to inquire into any matter in relation to the submission and negotiation of a specific claim.

On an ordinary reading of our Orders in Council, we have concluded that the Commission's mandate is remedial in nature and that it has a broad mandate to conduct inquiries into a wide range of issues which arise out of the application of Canada's Specific Claims Policy. In our view, this Commission was created to assist the parties in the negotiation of specific claims. This interpretation is supported by a statement by Minister Tom Siddon, as he then was, in which he suggested that the Commission's mandate is not strictly limited to the four corners of the Specific Claims Policy.¹⁷⁸

¹⁷⁸ In a letter from the Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, November 22, 1991, the Minister suggested that: "If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would welcome its recommendations on how to proceed."

Furthermore, even if we were to interpret the Orders in Council by a strict reading of the Specific Claims Policy, we would come to the same conclusion. In order to determine which compensation criteria properly apply in the negotiation of a specific claim, we must examine the settlement agreement in its entirety. That is, one can only determine which compensation criteria are applicable by examining the facts that give rise to the claim and the subject matter of the proposed settlement agreement. Moreover, the general rule of the policy with respect to compensation is that it will be "based on legal principles."¹⁷⁹ Canada's demand for an absolute surrender undoubtedly has a bearing on whether the compensation offered by Canada is consistent with the law of damages.

Therefore, we conclude that the issue in this inquiry, namely, whether Canada is justified in demanding an absolute surrender as a settlement condition, is one that properly falls within the mandate of this Commission. A restrictive interpretation of our mandate would undermine the ability of the Commission to provide meaningful assistance to the parties in the negotiation and settlement of specific claims.

CANADA'S DEMAND FOR AN ABSOLUTE SURRENDER

The Specific Claims Policy provides no guidance on whether Canada is entitled to demand an absolute surrender of the reserve interest as a settlement condition. The policy does, however, contemplate some form of release in the interests of ensuring certainty or "closure" of the specific claim:

The significance of a claim settlement is that it represents final redress of the particular grievance dealt with; a formal release will be sought from the claimants so that the negotiations on the same claim cannot be reopened at some time in the future.¹⁸⁰

Canada argued that, in cases such as this where the claim has been accepted on the basis that there was an unlawful surrender of reserve lands, an absolute surrender is necessary to ensure that the claimants cannot assert a subsequent claim for the same grievance. The Band argued that a surrender was unnecessary because a release would provide sufficient protection to Canada and to interested third parties.

To consider the merits of these arguments properly, we examined the subject matter of the negotiations. We concluded that the claim was accepted by Canada on the basis that the southern portion of Tsimpsean IR No. 2 was alienated in

¹⁷⁹ See criterion 1 of the Specific Claims Policy at Appendix D to this report.

¹⁸⁰ *Outstanding Business*, p. 24 (ICC Documents, p. 348).

1888 without a valid surrender. We found that a component of the compensation offered by Canada was for the current, unimproved value of the Surrendered Lands and that it was intended to provide compensation in lieu of the lands being restored to reserve status.

Under these circumstances, we concluded that it was reasonable for Canada to demand an absolute surrender of the Band's reserve interest in the Surrendered Lands. A surrender under section 38(1) of the *Indian Act* appears to be the only effective means of removing the Band's reserve interest and ensuring closure of the claim. We were not satisfied that a contractual release would provide sufficient protection to Canada and interested third parties.

Despite our finding that Canada is justified in demanding an absolute surrender of the reserve interest, we found that the effect of the surrender clause, as drafted by Canada, extended beyond a surrender under the *Indian Act* because it also purported to extinguish aboriginal interests in the Surrendered Lands. Although the Band appeared to have been aware that some limited form of surrender might be sought by Canada, the Band could not have anticipated that Canada would also seek a surrender of its aboriginal interests as a condition to settling its claim.

Accordingly, we conclude that Canada is not justified in demanding an absolute surrender of the Band's aboriginal interests for the following reasons:

- the Band's aboriginal interests in the Surrendered Lands were never the subject matter of negotiations and it would appear from the evidence before us that no attempt was made to place a value on these interests;
- the Band's negotiators were not informed of Canada's demand for an absolute surrender until after the amount of compensation had been agreed to, and the surrender clause was inserted into the draft settlement agreement drawn by Canada;
- the Band's aboriginal interests could not have been the subject matter of the negotiations because Canada's Specific Claims Policy expressly excludes claims based on unextinguished aboriginal title; and
- the release contemplated by the policy must be related to the nature of the claim, which was based on an unlawful surrender and compensation for the value of reserve lands taken without a valid surrender and for damages arising from the lost use of those lands.

Therefore, we find that the surrender clause should be expressly limited to the reserve interest created by the allotment of Tsimpsean IR No. 2 in 1881. Furthermore, the surrender should expressly exclude aboriginal rights and interests to ensure that they are not extinguished without compensation.

With respect to Canada's concerns regarding the risk of overcompensation, we find that clauses respecting release, indemnity, and set-off could be included in the draft settlement agreement to foreclose this possibility. In the event that the parties are unable to reach agreement through bilateral discussions, the Commissioners are prepared to assist the parties in finalizing the terms of the settlement agreement. We emphasize that both parties have invested 12 years of time and expense in these negotiations and that there is substantial agreement on the major terms of the settlement agreement. A failure to resolve this impasse would be both unnecessary and unfortunate.

We feel obliged to make one final point. At the conclusion of the community session in Prince Rupert, the Hereditary Chiefs of the Tsimshian Nation informed us that they would not perform their "talking stick" ceremony to conclude the hearing. Chief Bryant explained why they would not perform the ceremony:

To the Commissioners, to the representatives from Ottawa representing the federal government, the feeling of the hereditary chiefs this afternoon in conclusion of this hearing here, there seems to be no agreement between us [Canada and the Band] as set forth of what we came here for. We had thought there was going to be some kind of an answer in principle that would lead us to where we would go back to our people and say to them, but it seems like we're in a deadlock.

Therefore, we will not do the talking stick ceremony, which is the custom of my people when they agree to issues. They make it strong. They use their traditional issue of the talking stick.¹⁸¹

In the interests of trying to "break the deadlock," Chief Bryant, on behalf of the Hereditary Chiefs, requested that the Commissioners reconvene a meeting with the same representatives in this inquiry to deliver our findings and recommendations to the parties. In light of the amount of time and effort put into these negotiations over the last 12 years, we feel that Chief Bryant's request should be respected.

¹⁸¹ ICC Transcripts, vol. 2, p. 244, March 16, 1994.

We, therefore, respectfully make the following recommendations:

RECOMMENDATION 1

That the surrender clause be modified to expressly provide that the aboriginal interests of the Lax Kw'alaams Band and the Tsimshian people are excluded from the effect of the surrender and that clauses respecting releases, indemnity, and set-off be included to satisfy Canada's concerns regarding overcompensation.

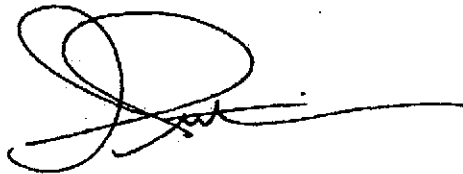
RECOMMENDATION 2

That the parties redraft the terms of the settlement agreement to give effect to our conclusions, engaging, if necessary, the mediation services of the Commission.

RECOMMENDATION 3

That a meeting be held at Lax Kw'alaams within one month of the release of this report and that the same representatives from the Band, Canada, and the Commission attend that meeting to discuss the findings and recommendations of this report.

FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC
Commissioner



Carole T. Corcoran
Commissioner

June 29, 1994

APPENDIX A

LAX KW'ALAAMS INQUIRY

- 1 **Decision to conduct inquiry** April 29, 1993
- 2 **Notices sent to parties** May 4 and 5, 1993
- 3 **Consultation conference** May 28, 1993

The consultation conference was held with representatives of the Lax Kw'alaams Band, Canada, and the Indian Claims Commission by conference call. Matters discussed included the mandate of the Commission, hearing dates, translation/transcription of information, consolidation of documents, procedural and evidentiary rules, the scope of the inquiry, the presentation of legal argument by the participants, and other matters related to the conduct of the inquiry.

- 4 **Hearing on mandate of Commission** March 10, 1994

Commissioner Roger Augustine participated in the mandate hearing as an original member of the panel on the inquiry. He was not able to sit as a member of the panel for the remainder of the inquiry, however, owing to an unexpected tragedy in his community on March 15, 1994.

- 5 **Community session** March 15, 1994

The panel held a community session at Prince Rupert, British Columbia, on March 15, 1994, hearing from the Hereditary Chiefs of the Allied Tsimshian Tribes and four additional witnesses as follows:

- Nine Hereditary Chiefs of the Allied Tsimshian Tribes
- Chief James Bryant of the Lax Kw'alaams Band and Speaker for the Hereditary Chiefs

- Sandra Littlewood, Land Claims Coordinator for the Lax Kw'alaams Band
- Professor Hamar Foster, University of Victoria, Faculty of Law
- Fred Walchli, senior official with Indian Affairs in the 1980s.

6 Oral submissions: Prince Rupert

March 16, 1993

7 Content of formal record

The formal record for the Lax Kw'alaams Inquiry consists of the following materials:

- Documentary record (2 volumes of documents and 1 index)
- Transcripts from community sessions (1 volume)
- Written submissions of counsel for Canada and the claimants on both the mandate and the substantive issue
- Transcripts of oral submissions (1 volume)
- Ruling of the Commission on its mandate to conduct the inquiry, March 15, 1994
- Authorities submitted by counsel along with their written submissions
- 18 exhibits tendered during the inquiry
- academic writings the Commission used as reference materials.

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

APPENDIX B

PROCEDURES OF THE LAX KW'ALAAMS INQUIRY

At the beginning of the community sessions, Commissioner Prentice called the session to order and invited an elder to open the meeting with a prayer. Chief James Bryant and two of the Hereditary Chiefs of the Allied Tsimshian Tribes, Henry Kelly and Lawrence Helin, then made some introductory comments. Commissioners Prentice and Corcoran followed with a brief explanation to the community of what the role of the Commission is and what the scope of the inquiry would be.

Counsel for the parties were then invited to make some brief introductory comments. Commission counsel followed by tendering copies of documents relating to the mandate of the Commission into the formal record.

Simultaneous translation of the proceedings was provided to give the elders an opportunity to give information and to follow the proceedings in their own languages. The interpreters were later given the opportunity to review the tapes of their translation to ensure that the written transcript would be as complete and accurate as possible.

Non-expert witnesses were called and assisted by Commission counsel. They were not sworn in or asked to affirm their evidence on oath. All questions were directed through Commission counsel, with the Commissioners reserving the right to interject at any time. When other counsel wished to raise questions, this was done by providing them in writing to Commission counsel, who would then direct the questions to the witness. Witnesses were not subject to cross-examination.

In the case of the expert witnesses, counsel for the Band who had called the witnesses conducted the direct questioning of the witnesses. Counsel for Canada were then given an opportunity to cross-examine. Again, these witnesses were not asked to swear or affirm their evidence, nor were they asked to provide their qualifications to give opinion evidence.

The Commissioners did not adopt any formal rules of evidence in relation to the community information or documents they were prepared to consider.

APPENDIX C

INDIAN CLAIMS COMMISSION

**LAX KW'ALAAMS (PORT SIMPSON) INQUIRY
RULING ON GOVERNMENT OF CANADA OBJECTION**

PANEL

Commissioner Roger Augustine
Commissioner Carole Corcoran
Commissioner James Prentice, Q.C.

COUNSEL

For Lax Kw'alaams First Nation
Harry S. Slade

For the Government of Canada
Bruce Becker

To the Indian Claims Commission
Kim Fullerton / Ron Maurice

March 15, 1994

FACTS

On December 5, 1979, the Lax Kw'alaams First Nation submitted a specific claim to the Government of Canada arising as a result of the division of Tsimpsean Indian Reserve No. 2 in 1888. The Band asserts that the 1888 division of the reserve between the Lax Kw'alaams and Metlakatla Bands was unlawful, and that it deprived the Lax Kw'alaams Band of the use and benefit of the southern portion of Tsimpsean I. R. No. 2.

The Band's specific claim was accepted for negotiation by Canada on April 15, 1985. Negotiations proceeded, and by a Band Council Resolution dated August 19, 1991, the Council of the Lax Kw'alaams advised Canada of its willingness to refer Canada's settlement offer to the membership of the Band for a ratification vote, in that the claim be settled for \$11,000,000 compensation plus 5% for negotiation and legal expenses. Canada then insisted that the agreement take the following form:

1. A cash payment of \$11,000,000 plus \$550,000 for the Band's negotiating expenses.
2. The absolute surrender by the Lax Kw'alaams Band of all interest in the surrendered 13,567 acres; and
3. The conditional surrender by the Lax Kw'alaams Band of any interest in the existing Metlakatla Reserve (the condition being that the Metlakatla Band makes no legal claim to the northern portion on the divided Tsimpsean I.R. No. 2).

The Band expressed the concern that a surrender under the *Indian Act* may extinguish all aboriginal rights and title, and requested that the requirement of the surrender be withdrawn. Canada has taken the position that the effect of the surrender would be to extinguish all aboriginal interests, but has maintained its position that a surrender is a "legal requirement" and must be given as a condition of the settlement.

The Band objected to Canada's requirement for an absolute surrender because it could effectively extinguish not only the Band's "reserve" interest in the lands but also any aboriginal title that they may have in these lands. Its concern was that a global surrender of all aboriginal interests in the land may prejudice the Lax Kw'alaams Band in treaty negotiations under the auspices of the newly created B.C. Treaty Commission.

In September of 1992, the Band requested that this Commission mediate the matters in issue. The province of British Columbia indicated its willingness to participate in a mediation process in November of 1992. By December of 1992, Canada was stating that there was no flexibility regarding its position on the absolute surrender and therefore it would not accede to mediation. In January of 1993 the Band requested that this Commission conduct an Inquiry into whether Canada can properly demand an absolute surrender in the circumstances of this claim. The Commissioners accepted this claim for Inquiry and notice was sent to the parties dated May 4, 1993.

By letter dated September 13, 1993, Canada objected to the Commission's mandate to conduct an inquiry into this claim. Canada submits that this Commission does not have the mandate to conduct an inquiry into a request by Canada for a surrender as a condition of Canada settling a claim.

Both parties have submitted written submissions to this Commission with respect to the mandate issue, and both parties responded in writing to the other party's submission. During a conference call with counsel and Commissioner Corcoran and Commissioner Prentice on March 10, 1994, it was agreed by all parties that the Panel would give this ruling based on the written submissions, subject to any clarification the Commissioners might seek as to the position and argument of the parties. We would like to take this opportunity to thank counsel for the quality of their written material. As a result, no clarification was required.

THE ISSUE

The Orders in Council establishing this Commission dated July 15, 1991 and July 27, 1992 provide as follows:

AND WE DO HEREBY advise 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 of the applicable criteria.

The Commissioners are further directed:

. . . to submit their findings and recommendations to the parties involved in a specific claim where the Commissioners have conducted an inquiry and to submit to the Governor in Council in both official languages an annual report and any other reports from time to time that the Commissioners consider required in respect of the Commission's activities and the activities of the Government of Canada and the Indian bands relating to specific claims. . .

The issue is whether the terms of reference as set out in our Orders in Council mandate the Commission to conduct an inquiry into Canada's requirement of an absolute surrender in this claim.

Canada submits that the mandate of this Commission is limited to inquiring into and reporting on which of the enumerated criteria set out in Canada's Specific Claims Policy are applicable in the negotiation of a claim. Therefore, because the enumerated criteria do not expressly refer to surrenders or releases as a condition of a settlement agreement, Canada argues that this Commission is not entitled to conduct an inquiry into this claim.

RULING

We have read the materials submitted by the parties, and considered the caselaw and the submissions regarding statutory interpretation. We are not persuaded that we need do anything other than examine the plain wording of our Orders in Council and give effect to their ordinary meaning.

In our view the mandate of this Commission must be read as a whole, including the Orders in Council, their recitals, and the supplemental mandate that several Ministers of Indian Affairs and Northern Development have recognized. If this is done then it is clear that the mandate of this Commission is remedial in nature and that its purpose is to provide a process to independently review the application of the Policy by Canada to individual claims.

We also have a mandate to report on the activities of this Commission and the activities of the Government of Canada and the Indian Bands relating to specific claims. Our mandate is then both very broad, allowing us to report on almost any topic relating to specific claims, and very specific, permitting us to inquire into the details of a particular specific claim.

The supplementary mandate of this Commission is best set out in the Primrose Lake Air Weapons Range Report, Cold Lake First Nations Inquiry and Canoe Lake Cree Nation Inquiry, a Report of this Commission dated 17 August 1993, at page 183:

During the period when revisions to the original mandate of the Commission were still under discussion, the Indian Affairs Minister, the Honourable Tom Siddon, wrote to National Chief Ovide Mercredi of the Assembly of First Nations in the following terms:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.¹

¹ The Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, 22 November 1991.

The Claimants in this matter have requested that this Commission examine whether Canada may demand an absolute surrender as part of a settlement of a claim under the Policy. The Orders in Council for this Commission mandate us, on the basis of the Policy, to "inquire into and report on ... which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria".

In our view one cannot meaningfully determine "which compensation criteria apply in negotiation of a settlement" unless one examines the proposed settlement agreement in its totality. In other words, before one can address whether the compensation criteria applied by Canada were appropriate, one must determine what Canada is offering the compensation for (ie. compensation for the loss of reserve lands, compensation for loss of use, extinguishment of aboriginal title, etc.).

This Commission was faced with a similar objection from the Government of Canada in the Athabasca Denesuline Inquiry. That objection was somewhat different as that Inquiry was based on the rejection of the Bands' specific claim, not on compensation criteria. On May 7, 1993, this Commission released its ruling on the objection of Canada to the mandate of this Commission to hold that Inquiry.

In the Athabasca ruling, this Commission ruled that in order to proceed with an Inquiry we need not be satisfied that the facts of the case fall squarely within the Policy. Rather, the ruling states in part:

In our view, the Commission must, at this juncture, examine the circumstances of the case and need only be satisfied that:

4. The claim has been advanced before this Commission by the Claimants as a matter still in dispute; and
5. The Claimants have an arguable case that their claim falls within the Policy.

(Points 1., 2. and 3. dealt with the issue of rejection, as opposed to compensation criteria.)

We adopt the same approach to the determination of the threshold question in this case, noting that this is a compensation criteria matter, not a rejection matter. Therefore, in the present case, we must examine the circumstances of the case and need only be satisfied that:

1. The claim has been accepted for negotiation;
2. The Claimant disagrees with the Minister's determination of the applicable criteria;
3. The claim has been advanced before this Commission by the Claimant as a matter still in dispute; and
4. The Claimant has an arguable case that the Minister has incorrectly determined the applicable criteria.


The Commissioners take the view that these requirements have been met and that the Commission has properly embarked upon this Inquiry.

As in the Athabasca Ruling, to determine that the claim falls outside the mandate of this Commission at this point would be premature. The very purpose of the Inquiry is to decide whether or not the Minister has correctly determined the applicable criteria, something that we will do when we have heard all of the evidence, listened to the people of Lax Kw'alaams, heard oral submissions, and properly concluded this Inquiry.

Canada submits that the mandate of this Commission is limited in the present circumstances to an examination of the enumerated criteria set out in the guidelines of the Policy only. In our view this is the very question that we must decide in the course of the Inquiry itself.

For the INDIAN CLAIMS COMMISSION


Roger Augustine
Commissioner


Carole Corcoran
Commissioner


James Grentice, O.C.
Commissioner

APPENDIX D

SPECIFIC CLAIMS POLICY – COMPENSATION CRITERIA

The following criteria shall govern the determination of specific claims compensation:

- 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.
- 2) Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.
- 3) (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
(ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.
- 4) Compensation shall not include any additional amount based on "special value to owner," unless it can be established that the land in question had a special economic value to the claimant band, over and above its market value.
- 5) Compensation shall not include any additional amount for the forcible taking of land.

- 6) Where compensation received is to be used for the purchase of other lands, such compensation may include reasonable acquisition costs, but these must not exceed 10% of the appraised value of the lands to be acquired.
- 7) Where it can be justified, a reasonable portion of the costs of negotiation may be added to the compensation paid. Legal fees included in those costs will be subject to the approval of the Department of Justice.
- 8) In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.
- 9) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.
- 10) The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.
- 11) Where a claim is based on the failure of the Governor in Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current, unimproved value of the land, but on any damages the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Governor in Council and by reason of such delay.

INDIAN CLAIMS COMMISSION

THE YOUNG CHIPEEWAYAN INQUIRY

**into the Claim Regarding
Stoney Knoll Indian Reserve No. 107**

PANEL

**Commissioner Carole T. Corcoran
Commissioner Daniel Bellegarde
Commissioner James Prentice, QC**

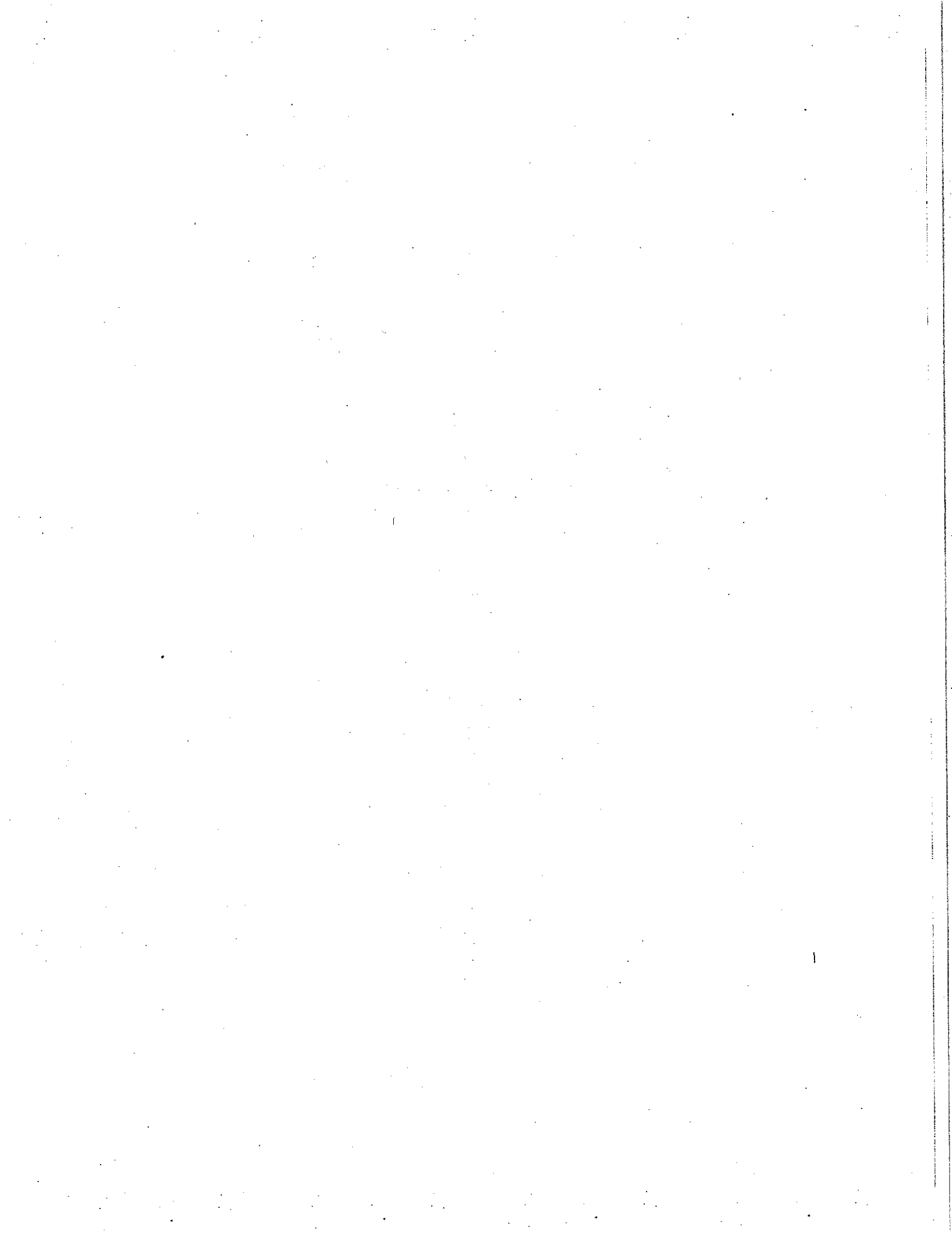
COUNSEL

**For the Young Chipeewayan Claimants
James Griffin, QC / Albert Angus**

**For the Government of Canada
Bruce Becker / Bruce Hilchey**

**To the Indian Claims Commission
Kim Fullerton / Kirk Goodtrack**

DECEMBER 1994



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PART I

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Claims Commission was established on September 1, 1992, at which time a Commission¹ was issued under the Great Seal setting out the mandate. The mandate of the Commission includes:

that our Commissioners on the basis of Canada's Specific Claims Policy . . . inquire into and report upon:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; . . .

This is an Inquiry into a claim that was rejected by the Minister of Indian Affairs in 1985. The claimants² refer to themselves collectively as the Young Chipeewayan Band. Their claim relates to the process surrounding the transfer of administration and control of the Stoney Knoll Indian Reserve No. 107, which once existed in central Saskatchewan, and which they allege was taken in 1897 without a surrender or other lawful authority. Map 1 depicts Stoney Knoll Reserve and other First Nations in the area.³

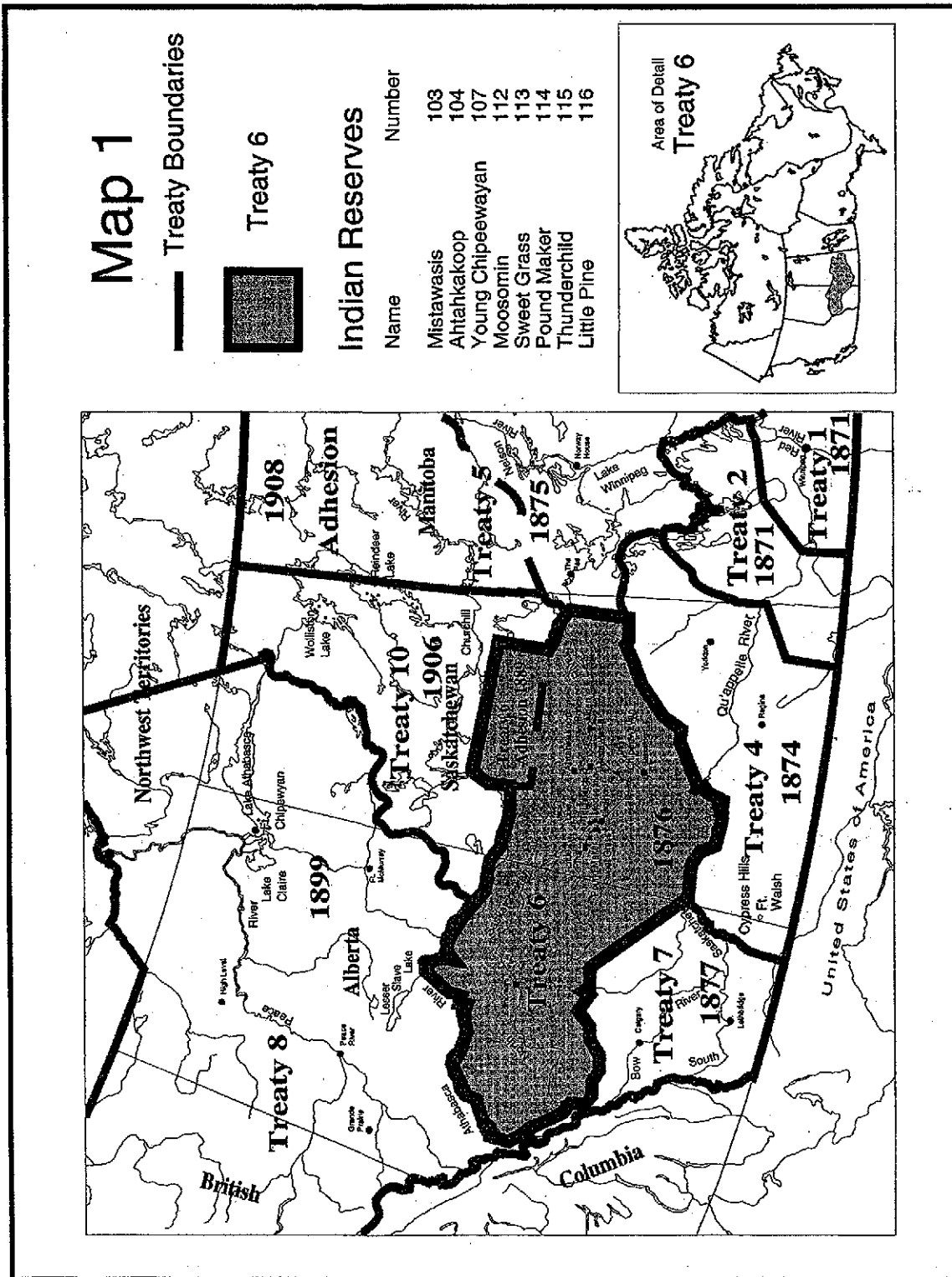
On June 17, 1982, "Chief Alfred Snake," on behalf of the Young Chipeewayan Band⁴ and the other claimants, wrote to John Munro, then Minister of Indian

¹ 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 (ICC Exhibit 1).

² The individual claimants are Alfred Snake, Lola Okeewehow, Benjamin Weenie, Leslie Angus, Don Higgins, and Larry Chickness. Appendix C provides a detailed analysis of the relevant treaty paylists and oral testimony on the issue of descendancey.

³ Compilation of data from Dominion of Canada Map Showing Indian Reserves, published in the 1891 Department of Indian Affairs Annual Report, and Canada Indian Treaties, published by the Department of Energy, Mines, and Resources, *The National Atlas of Canada*, 5th ed. (Ottawa 1991), MCR - 4162.

⁴ The spelling of "Chipeewayan" has changed since 1876. The claimants currently spell the name as "Chipeewayan"; therefore, this spelling will be used throughout this report.



and Northern Affairs, requesting that he examine this specific claim.⁵ The claim was rejected on September 11, 1985; David Crombie, Minister of Indian Affairs, wrote to Chief Alfred Snake advising that, according to the legal opinion from the Department of Justice, "there is no legal basis for your claim alleging an illegal disposition of I.R. 107."⁶

The Commission has also been provided with a draft letter dated March 25, 1985, from Richard Berg, senior claims analyst of the Department of Indian Affairs' Specific Claims Branch, to James Griffin, counsel for the claimants, in which Canada's reasoning appears to be set out:

I am writing to confirm that we have obtained a legal opinion from the Department of Justice in the Young Chipeewayan claim. They have carefully reviewed the evidence and the arguments submitted by you and are of the view that Canada has no outstanding lawful obligations in this matter.

Very briefly we have been advised by the Department of Justice, that it is its view on the basis of the facts presented, that the Young Chipeewayan Band had entirely ceased to exist by the 1889 annuity payments at the latest. They advise that interest in an Indian reserve is a communal interest, not an individual interest. In order to have an interest in a particular reserve, an individual must be a member of the band interested in that reserve. If the band ceases to exist, the communal interest ceases to exist and as a result there is no longer a reserve, as described by the *Indian Act* . . .⁷

On March 15, 1985, the claimants filed a statement of claim in the Federal Court of Canada, Trial Division, seeking, among other things, an order declaring that Canada owed a fiduciary duty to them and that Canada had breached that duty, as well as damages. In the alternative, an order was sought declaring that the purported surrender of the Stoney Knoll⁸ Indian Reserve No. 107 was void *ab initio*. On January 17, 1992, the Government of Canada filed a statement of defence denying that the claimants are descendants of Band members of the original Young Chipeewayan Band. That action is currently being held in abeyance.

On February 23, 1993, James Griffin, on behalf of the claimants, wrote to the Indian Claims Commission requesting as "comprehensive and thorough examination as in the opinion of the Indian Claims Commission is necessary to reveal

⁵ Alfred Snake to John Munro, Minister of Indian and Northern Affairs, June 17, 1982 (ICC Documents, p. 722).

⁶ David Crombie, Minister of Indian Affairs and Northern Development, to Alfred Snake, September 11, 1985 (ICC Documents, p. 823).

⁷ Richard Berg, Senior Claims Analyst, Specific Claims Branch, Department of Indian and Northern Affairs, to James Griffin, Counsel for the Claimants, March 25, 1985 (ICC Documents, p. 818).

⁸ The claimants currently spell the name "Stoney Knoll"; therefore, this spelling has been used throughout this report.

all relevant circumstances.”⁹ On June 30, 1993, Harry S. LaForme, then Chief Commissioner of the Indian Claims Commission, wrote to Alfred Snake, advising that the Commissioners had agreed to conduct an Inquiry into this rejected claim.¹⁰

Outstanding Business

This Commission is bound to follow the provisions of the Specific Claims Policy as defined in the 1982 booklet entitled *Outstanding Business*. The policy recognizes specific land claims disclosing a “lawful obligation”:

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.¹¹

ISSUES

This Commission was asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation, as defined in *Outstanding Business*, to the group of individuals who today consider themselves to be the “Young Chipeewayan Band.” Specifically, the claimants allege that in 1897 their reserve was taken without a lawful surrender, as required by section 38 of the *Indian Act*, RSC 1886, c. 43. The parties defined the issues to be addressed in the Inquiry as follows:

- 1 Are any of the claimants descendants of the original Young Chipeewayan Band?
- 2 If so, are the claimants entitled to bring this claim on behalf of the Young Chipeewayan Band?
 - a) Who constitutes the Young Chipeewayan Band?

⁹ James Griffin to Indian Claims Commission, February 23, 1993 (ICC Exhibit 2).

¹⁰ Harry S. LaForme, Chief Commissioner of the Indian Claims Commission, to Alfred Snake, Chief of the Young Chipeewayan Band, June 30, 1993 (ICC Exhibit 3).

¹¹ Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy, Specific Claims* (Ottawa: DIAND, 1982) [hereinafter *Outstanding Business*], 20.

-
- b) Does the Young Chipeewayan Band exist today?
c) If no, when did it cease to exist?
- 3 Is the 1897 Order in Council valid?
- a) Was it necessary to obtain a surrender from the Young Chipeewayan Band?
- 4 Would participation in recent Treaty Land Entitlement settlements disentitle the claimants from raising this claim?

THE INQUIRY

On June 30, 1993, the then Chief Commissioner Harry S. LaForme sent notices of the Inquiry to the parties.¹² On January 18 and 19, 1994, a community session was held in Saskatoon, Saskatchewan, where the Commission heard 15 witnesses from various communities in the vicinity. Oral submissions were heard from counsel for the parties on February 24, 1994, in Saskatoon.

The relevant historical evidence examined by the Commission included information gathered at the community session at Saskatoon; the documentation submitted by the parties; the parties' written and oral submissions; and the balance of the record of this Inquiry. Some 1200 pages of documents have been reviewed by this Commission. The summary of the details of the process and the formal record is attached as appendices A and B to this report.

GENERAL HISTORY

The Treaty

On August 23, 1876, Chief Chipeewayan and four headmen (Naa-poo-chee-chees, Wah-wis, Kah-pah-pah-mah-chatik-way, and Kee-yeu-ah-tiah-pim-waht) signed Treaty 6 at Fort Carlton, on behalf of the Chipeewayan Band. The population of the Chipeewayan Band was then 84 people, comprising 19 families. By Treaty 6, some 121,000 square miles of land was acquired by the Government of Canada and, in exchange, Canada agreed to certain terms, including the obligation to set aside reserves according to the formula set out in the treaty. Treaty 6 states, in part:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves

¹² Harry S. LaForme, Chief Commissioner of the Indian Claims Commission, to Alfred Snake, June 30, 1993 (ICC Exhibit 3).

shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the Bands here represented, in extinguishment of all claims heretofore preferred.¹³

The treaty also provided for measures to ease the transition to an agriculturally based economy, including assistance in times of famine or pestilence:

It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; also, two spades per family as aforesaid; one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. . . .

It is further agreed between Her Majesty and the said Indians . . . [t]hat in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.¹⁴

The Band

In 1876, the Chipeewayan Band received, pursuant to the treaty, a \$12 payment for each man, woman, and child. A reserve was surveyed three years later in

¹³ Treaty 6, p. 3, August 23, 1876 (ICC Documents, p. 492).

¹⁴ Treaty 6, p. 4, August 23, 1876 (ICC Documents, p. 492).

1879 by George Simpson, Dominion Land Surveyor.¹⁵ When Chief Chipeewayan passed away in 1877, his son, Young Chipeewayan, became the hereditary Chief of that First Nation. Consequently, the First Nation and the Department of Indian Affairs adopted the son's name as the proper name for the First Nation.

The 1870s, 1880s, and 1890s, however, were difficult years. The Chipeewayan Band was one of many bands not able to sustain themselves while awaiting the implementation of treaty assistance during their economic and cultural transition to farming. The rapid disappearance of the buffalo,¹⁶ disease,¹⁷ and climatic hardship¹⁸ forced them to move continually in their search for sustenance. The circumstances under which the Chipeewayan Band originally left Stoney Knoll were described by Albert Snake in 1955 at a meeting convened specifically to record his recollections of the events surrounding the loss of the reserve. The summary¹⁹ of that meeting reveals the circumstances facing the Band during that period, and the Band's subsequent attempt to return to the reserve. It states in part:

My grandfather, Chief O'chippeywan and his people left their reserve because he was afraid they would have a hard winter with nothing to eat. They were not getting provisions as promised by the treaty, and the same to be given by the Indian Agent. When my grandfather signed the treaty, he was promised . . . a new way of life and that was to know how to farm and to receive a grant of farming implements. This would help his people to get started on farming. Food was also promised to my grandfather while his people were on a process of learning how to farm for their living. My grandfather waited for all this and there was no sign of any coming when we left our reserve. My grandfather wanted to pursue his old way of making his living and that was by hunting. It was about towards fall that we left our reserve. We started our journey along the Saskatchewan River and on to the prairies. We went as far as to the United States border, but we never crossed the line. I remember that hunting was successful and we had lots to eat. We moved on to the place called Maple Creek and there we stayed for the winter. I remember also that my grandfather and the men did some trapping of fur bearing animals and did well on that. . . . So we didn't starve that

¹⁵ George A. Simpson, Dominion Land Surveyor, to Lindsay Russell, Surveyor General, 5 February 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Report of the Department of Interior for the year ended 30 June 1879," App. No. 9. Simpson's report read in part: "On the 18th of September I began the survey of a Reserve at the Stone Indian Knoll, ten miles south-west of Carlton House, and upon its completion left for Winnipeg. . . . (ICC Documents, p. 527).

¹⁶ See footnote 53, below.

¹⁷ See footnote 54, below.

¹⁸ James F. MacLeod, "North-West Mounted Police Force - Commissioner's Report, 1879," Canada, Parliament, *Sessional Papers*, 1880, No. 4, Part III (ICC Documents, p. 1173A).

¹⁹ The summary further explains that it was in the spring that Chief Chipeewayan and the mother of Albert Snake passed away. Since the 1877 Chipeewayan treaty playlist discloses that Chief Chipeewayan had passed away sometime before, we can assume that the above recollection relates to 1877.

winter. It was . . . towards spring when sickness came upon us and quite a few passed away, one of them was my grandfather the chief. My mother was one of the women who passed away. Her name was O-ma-mees.²⁰

The minutes then go on to describe the original attempt to return to Stoney Knoll Reserve:

I asked him if he can remember when winter was over if there was an effort made by the people of his grandfather to come back to their reserve, Stoney Knoll Indian Reserve #107. His answer, "All I can remember [is that] it was only [the] two of us, I and my grandmother . . . my father - [Espin-hic-cakitoot] left the encampment before we left for the reserve, but I didn't know where he went until I heard after I was about 18 years old that he was living with [the] Thunderchild people on their reserve, and he remarried there." [I then asked him w]hat happened to the rest of your grandfather's people and why was [it] that they didn't go back to your reserve like you and your grandmother did? His answer, "I heard my grandmother say that they didn't want to go back to the reserve because they [no longer had] . . . a leader." . . . [H]e and his grandmother went back to their reserve, but due to extreme hardship they had to go somewhere else. His story as follows - "I and my grandmother left our encampment at Maple Creek with a hope that others would follow, but they never came. We were travelling with two horses . . . We made it back on the reserve, but of course nobody was there. My grandmother decided that we would go where we can find Indians . . . so that we can get help. . . We went around by Fort Carlton, [and] there we met a métis by the name of Arcand. . . [He] told my grandmother that my sister and her husband, whose last name was Cardinal, were living at the place called Snake Plain, within the vicinity of Mistawasis and Attakacoop Indian reserves. The métis man also told my grandmother that there was a fight between the police and mixed with métis and Indians, which to my childish mind I understood that there was a fist fight or some kind of struggle between the two parties. It was quite some time later that I heard there was much blood shed and many were killed. . . My grandmother upon hearing . . . where we can locate my sister . . . changed her mind and so we went along with the métis man, to go to my sister for the help we needed so much, instead of going to some other Indians."²¹

The minutes then describe Albert's attempts to regain control of Stoney Knoll Reserve many years later:

[Albert] was about 21 years old when he rode . . . back to . . . see his reserve, and that was about in the spring while seed planting was in full swing. He found white people working and farming his reserve. When he went back to Snake Plain, he asked some elderly men

²⁰ Minutes taken at the Sandy Lake Reserve, February 12, 1955. Present were Baptiste Gaudry, Mrs. B. Gaudry, John Snake, Albert Snake, Harry Bighead, and Alfred Snake. All were related to Albert Snake, either by marriage or blood, except Harry Bighead (ICC Documents, pp. 663-65).

²¹ See footnote 20 (ICC Documents, pp. 665-67).

what he should do to get his reserve back. One of [them] told him that his reserve was given to him and his grandfather's people by the terms of Indian treaty, and it's still an Indian reserve. I asked him if he tried to make an effort in retaining his reserve. His answer, "I tried everything I could. I went over [to] Thunderchild reserve, to see my father Espim-ik-caki-toot, and have tried to get him to support me in getting our reserve back, but he was not interested. He liked it better [on] Thunderchild reserve. To see Indian Agents was useless. I [got] nowhere with them. How can I get them to help me since they were the people to give my reserve to the white people?" . . . I asked him . . . about his age, if he was . . . about 9 years old when his grandfather and his people left their reserve . . . his answer, "I could have been a little younger, about 8 years old."²²

The treaty paylists provide support for this conclusion regarding the movement of the Young Chipeewayan Band members, in that the remaining Young Chipeewayan Band members received their annuity payments in separate locations from year to year. For instance, in 1877, 162 Indians from 28 families collected their annuities under the Chipeewayan treaty payroll. The list shows that sickness was then prevalent in the Indian communities in this part of Saskatchewan and that, during the spring of that year, Chief Chipeewayan was among the many Indians who passed away.²³

The treaty paylists for the Young Chipeewayan Band from 1879 to 1885 disclose two significant facts. First, the Indians were paid annuities at one of Battleford, Fort Walsh (Maple Creek), or Jack Fish Creek. Second, the number of Indians paid under the Young Chipeewayan treaty paylists dwindled from 52 Indians from 25 families in 1879 to 18 Indians from two families in 1885.

By 1883, it was becoming clear to departmental officials that the Young Chipeewayan Band had not settled on the Stoney Knoll Reserve²⁴ and that they were continuing to search for food elsewhere. In a letter dated November 15, 1883, L. Vankoughnet, Deputy Superintendent General of the Department of Indian Affairs, wrote to Sir John A. Macdonald, Superintendent of Indian Affairs and Prime Minister of Canada, advising him of this fact:

At Fish Creek there are three Reserves belonging respectively to Moosimin, Thunderchild, and Young Chippewayan. None of these except Moosimin appear to be settled on their own Reserves. Thunderchild and Young Chippewayan being also on Moosimin's Reserve: The two latter having recently returned from the south with their followers. The Commissioner thought it better to put them upon Moosimin's Reserve but both are dissatisfied and expressed

²² See footnote 20 (ICC Documents, pp. 669-71).

²³ 1877 Chipeewayan's Band treaty payroll (ICC Documents, p. 26).

²⁴ Indians are not required by law to settle on the reserve surveyed for them.

themselves so to the undersigned. Thunderchild stating that he considered the work he did on Moosimin's Reserve of no value to himself or Band, as it was on another Chief's land. . . .²⁵

The Riel rebellion occurred in 1885, and at the time the Young Chipeewayan Band was considered to have taken some part in that insurrection. Harsh measures were launched against those nations participating, or suspected of participating, in the 1885 Rebellion by the Department of Indian Affairs. Annuity payments were withheld to offset the damages caused by the rebellion, and the Young Chipeewayan Band did not receive annuity payments for 1885. Some evidence was presented by counsel for the claimants disputing their alleged participation in the rebellion. Canada did not challenge this evidence.

By 1888, the Department of Indian Affairs no longer identified the Young Chipeewayan Band as a separate band. No separate treaty payroll was maintained for the Young Chipeewayan Band, and, although the 1888 Thunderchild treaty payroll identified Young Chipeewayan himself as being from the Young Chipeewayan Band,²⁶ the payroll also notes that he was no longer paid in his capacity as Chief.²⁷ Keeyewwahkapimwaht, however, was paid at Poundmaker's Reserve in his capacity as headman of the Young Chipeewayan Band until 1888.²⁸

The Transfer of Stoney Knoll Reserve

In 1888, it was discovered that the surveying and subdividing of townships in Saskatchewan in 1883²⁹ had not even taken into account the existence of Stoney Knoll Reserve. Consequently, in order to identify the reserve on township maps, Stoney Knoll Indian Reserve No. 107 was located and resurveyed.³⁰ On May 17, 1889, the reserve was confirmed by Order in Council PC 1153.³¹

²⁵ L. Vankoughnet, Deputy Superintendent General, Department of Indian Affairs, to Sir John A. Macdonald, Superintendent of Indian Affairs, November 15, 1883, National Archives of Canada [hereinafter NA], RG 10, vol. 3664, file 9834 (ICC Documents, pp. 528-32).

²⁶ He is identified as such until 1889.

²⁷ 1888 Thunderchild Band treaty payroll (ICC Documents, p. 37).

²⁸ 1888 Poundmaker's Band treaty payroll (ICC Documents, p. 157).

²⁹ Topographical Surveys Branch, Department of the Interior, to E. Deville, Surveyor General, December 10, 1897, NA, RG 15, vol. 724, file 390906 (ICC Documents, p. 602).

³⁰ "Annual Report of the Department of Indian Affairs for the year ended 31st December 1888," Canada, Parliament, *Sessional Papers*, 1889, No. 16, Part I, pp. 189-90 (ICC Documents, pp. 1180c-80d), includes the report by John C. Nelson, surveyor, to the Superintendent General, dated July 10, 1888. The report states, in part:

The reserve was surveyed in 1879 and posts were planted at the corners. Some years after, when the sub-division of townships was extended to this district, the reserve appears to have been overlooked, and passed into the sub-divided lands.

The survey of this reserve is level to undulating, and slopes slightly towards the Saskatchewan. The portion near the river is watered by several small creeks; but in the southern part, water is found only in a few ponds. The soil is of first class quality. There are no large hay meadows, but on the uplands, the herbage is rich. The principal topographical feature is Stony Knoll, a prairie elevation, wooded on the northern slopes, and situated in the centre of the reserve. Along the river-front the banks are well wooded with poplar, and a few hummocks of spruce occur in the ravines.

³¹ ICC Documents, p. 540.

Canada's increasing desire to settle the west put good-quality agricultural land in high demand. On October 12, 1895, the Dominion Lands Office wrote to the Minister of the Interior, advising that Stoney Knoll Indian Reserve No. 107 would make prime land for settlement:

Re Indian Reserve of Chief "Young" "Chippewayan" - near Carlton and of "Chakastapasin" on South branch of Saskatchewan

As instructed by you on the occasion of your visit here, I have the honour to draw your attention to the desirability of taking immediate steps towards opening out for settlement the very fine tracts of land covered by these Reserves, as they have never been occupied by the Indians for whom they were set apart. With reference to the first mentioned Reserve no trouble or expense need be incurred in opening it out for settlement other than is incidental to the selection of another reserve in lieu thereof, as it was originally subdivided into Sections and included in townships 43 and 44, Range 5 West of the 3rd Meridian.³²

The subsequent correspondence between the Departments of Indian Affairs and the Interior focused on the procedure to be adopted and the legal conditions they had to meet. On November 9, 1895, Hayter Reed, Deputy Superintendent General of Indian Affairs, wrote to A.H. Burgess, Deputy Minister of the Interior, outlining the position they intended to adopt. The letter referred to the necessity of procuring a surrender from the Young Chipeewayan Band and states in part:

With regard to the Indians of Young Chippewayan Reserve, the question presents itself as to whether the fact of their having been rebels in 1885, and having left the Country after the rebellion would not afford sufficient and reasonable grounds for dispossessing them of such rights as they originally had to the Reserve. As to such of them as have since returned they are in the same position as the Indians of Chekastapasin Band in so much as they have all become amalgamated with or merged in other Bands with the members of which they enjoy equal privileges. If the matter can be dealt with by Order in Council, there are reasons which would seem to make the adoption of that method preferable to an endeavour to obtain surrender.³³

On December 18, 1895, John Hall, Secretary, Department of the Interior, replied to Reed's letter, advising that the Minister of the Interior for his part did not wish the Department of Indian Affairs to obtain a surrender from the Indians, since he was of the opinion that one was not required under the circumstances.

³² J. McTaggart, Agent, Dominion Lands Office, to Thomas Daly, Minister of the Interior, October 12, 1895, NA, RG 15, vol. 724, file 390906 (ICC Documents, p. 554).

³³ H. Reed, Deputy Superintendent General of Indian Affairs, to A.H. Burgess, Deputy Minister of the Interior, November 9, 1895, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, pp. 557, 558).

On February 3, 1896, A.E. Forget, Indian Commissioner, wrote to Hayter Reed, raising the issue of attempting to trace the Young Chipeewayan members in order to transfer the members formally to other bands pursuant to the recently enacted section 140 of the *Indian Act*. The letter refers to the fact that:

the few remaining members of the Band had dispersed throughout the Battleford Reserves and that it would be a most difficult matter to trace them, and that further – their title to land in the Reserve originally surveyed for the “Young Chippewayan” was practically extinguished by their claims to land in the Reserves of other Bands with whom they had since amalgamated, having been duly recognized.

In view of this fact and that the difficulty which presented itself in 1884 of tracing these persons must necessarily have been greatly augmented by the passage of a further period of eleven years, I would ask whether the Department regards it as absolutely necessary that the enquiry be proceeded with and *formal transfers obtained*.³⁴

Hayter Reed responded on February 8, 1896, that “under the circumstances it is probably hardly worth while to make any great exertion to trace the members of the Band of Young Chippewayan.”³⁵

The issue of transferring administration and control of the Young Chipeewayan Reserve to the Department of the Interior was raised by A.E. Forget, Indian Commissioner, in a memorandum to Sir Clifford Sifton, Superintendent General of Indian Affairs, on April 3, 1897, in an attempt to finally resolve this question. The memorandum states, in part:

...
The undersigned, however, is unable to show that such transfers to other bands in any way obviates the necessity for taking a surrender as required by Sec. 38 of the Indian Act, as enacted by Sec. 1 Chap. 35, 58, 59. Vic.

As to Stoney Knoll Reserve generally known as Young Chippewayan’s reserve, number 107, I think nothing should hinder its being thrown open for settlement . . . Although set aside for the use of Indians it was never then settled by them. The members took part in the rebellion in '85 and most of them left the country at the time and such who remained in the country or returned since, have amalgamated themselves with other bands.³⁶

Finally, on May 3, 1897, Sir Clifford Sifton, Superintendent General of Indian Affairs, wrote to the Governor General in Council requesting his authority in

³⁴ A.E. Forget, Indian Commissioner, to H. Reed, Deputy Superintendent General of Indian Affairs, February 3, 1896 (ICC Documents, p. 566). Emphasis added.

³⁵ H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).

³⁶ A.E. Forget, Indian Commissioner, to Sir Clifford Sifton, Superintendent General of Indian Affairs, April 3, 1897 (ICC Documents, p. 580).

“relinquishing title” to the reserve and “restoring” it to the Department of the Interior. The request was honoured and on May 11, 1897, Order in Council PC 1155³⁷ was issued transferring control of the Stoney Knoll Indian Reserve No. 107 from the Department of Indian Affairs to the Department of the Interior. The grounds which Sifton had cited in his report for transferring control of the reserve were simply incorporated into the Order in Council:

EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 11th May, 1897.

On a Report, dated 3rd May, 1897, from the Superintendent General of Indian Affairs stating that the Indian Reserve 107, containing thirty square miles, situated at Stony Knoll . . . set apart by Order-in-Council of 17th May 1889 for Chief Young Chippewayan and his band, has never been taken possession of nor occupied by them.

The Minister further states that the members of the Band took part in the rebellion of 1885, and for the most part left the country thereafter, while such as remained or have since returned have become amalgamated with other Bands.

The Minister, therefore, recommends that authority be granted for the relinquishment by the Department of Indian Affairs, and resumption by the Department of the Interior of the control of the lands comprising the said Reserve No. 107.

The Committee advise that the requisite authority be granted.³⁸

In a letter dated April 14, 1897, J.D. McLean, Acting Secretary of the Department of Indian Affairs, wrote to the Department of Justice to inquire as to the legal implications of the transfer of the Stoney Knoll reserve.³⁹ The response came three days after the Order in Council. On May 14, 1897, E.L. Newcombe, Deputy Minister of Justice, responded to McLean, on the legal implications of transferring the reserve. The legal opinion touches upon the very issues before this Commission. The letter states, in part:

you asked for an opinion as to whether or not the Crown can resume possession and dispose of a certain Indian Reserve in the North West Territories without first obtaining a surrender from the Indians under section 38 of the Indian Act (57-58 Vic. c. 32, s.3), the circumstances of the case being that the reserve has for a good many years past been abandoned by the members of the band for which it was set apart, and that such members, or as many of them as can be traced, have been formerly transferred at their own request to other bands which have consented to receive them into membership.

³⁷ ICC Documents, p. 585.

³⁸ Order in Council PC 1185 (ICC Documents, p. 585).

³⁹ J.D. McLean, Acting Secretary, Department of Indian Affairs, to the Department of Justice, April 14, 1897, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, p. 581).

As at present advised I do not think that the land in question can, in view of the provisions of the sections referred to, be sold or otherwise alienated until the same has been released or surrendered in the manner provided by the Act. The section positively forbids, subject to certain exceptions, which have no application to the present case, the sale, alienation or lease of any reserve or portion of a reserve without such release or surrender.

There does not appear from your statement of the facts to have been anything amounting to a dissolution of the band. As to the members said to have been transferred to other bands, I do not find any express authority for such transfer in the Statutes, and there may be some question as to the legal effect of what has taken place, but in the absence of further information on the subject, I do not think that the lands in the reserve are relieved in the hands of the Crown from the trust in favour of the band, so far as these members are concerned, or that the Crown is dispensed as to them from compliances with Section 38 before disposing of such lands. Then it seems from your statement that there are other members of the band who have been traced, and therefore [may not have] been transferred to other bands.⁴⁰

It is clear that none of the people associated with Stoney Knoll Reserve, whether members, former members, or their descendants, were consulted with respect to the transfer of the reserve. Over the next few years, the land formerly comprising Stoney Knoll Indian Reserve No. 107 was deeded out to private purchasers.

Transfers to Other Bands

In the years between 1876 and 1897 the individuals who had been members of the Young Chipeewayan Band lost touch with one another. In fact, several of their descendants testified that they had not met until this claim was initiated. Although the historical record before the Commission was not complete, it would appear that most Young Chipeewayan Band members joined other bands. It is unclear to the Commission what happened to the others, but it seems likely that some migrated to the United States.

Those who migrated to other bands were greeted in some cases with general acceptance and in others by mere tolerance. In one instance, Albert Angus asked the interpreter to explain the meaning of a Cree word in order to illustrate that not all the Young Chipeewayan people were met with full acceptance:

I wonder if you could ask the interpreter how he would interpret the word "pukositaw" which is the word Mrs. Gaudry used as the nature of her relationship with Sandy Lake Band.

— Albert Angus

⁴⁰ E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87). For section 38 of the *Indian Act*, see footnote 46. Section 38 permitted Canada to lease reserve land without a release or surrender only in the case where it was for the benefit of the Indians. In 1898, the *Indian Act* was further amended to allow Canada to dispose of wildgrass and dead or fallen timber on reserves without first obtaining consent from the Indians.

Pukositaw would be surviving according to the generosity of that community. That would be my interpretation, and that was the nature of her relationship, to clarify that. She said they survived by the goodwill of the people in the community, you could say.⁴¹

– Mr. Fine Day

Albert Snake described his relationship with the Ahtakakoop Band in the summary recorded at the February 12, 1955, meeting.

I asked him then how come [it] is that he is now a member of Ahtakakoop Band. His answer, "I remember one day there was a treaty day for Mistawasis and Ahtakakoop Indians. My grandmother and myself were called up at the table where Indian Agents and a police were sitting. Indian Agent, whose name I don't remember, told my grandmother that we both can stay on Ahtakakoop reserve and since then I have been living in Ahtakakoop reserve.

I have never been admitted by the Ahtakakoop Indians to join them in their band membership. Many remarks have been made by them that I don't belong in their membership and I don't blame them. Indian Agents forced me and my grandmother to live on Ahtakakoop reserve.⁴²

Others were voted into membership and accepted. At the Inquiry, Eugene Weenie's experiences were related as follows:

He says that he was never confronted by anybody about his residency there but it was a well-known fact that his father had been voted into the band membership. When he was 18 years old he was voted into membership in the Sweetgrass Band.⁴³

– Eugene Weenie

For some, there were degrees of acceptance:

A lot of the people from Young Chipeewayan Band went to different reserves and some of us were fortunate that we got accepted and we were able to – as people from Young Chipeewayan, we were able to get in the council and vote and, you know, become regular members. But there was always a background, back – come election the subject was brought up, this person doesn't really belong on this reserve. So it was used in politics . . . like you have to prove . . . that you are a member from the reserve.⁴⁴

– Leslie Angus

⁴¹ ICC Transcripts, vol. 1, pp. 72-73 (Mr. Albert Angus and Mr. Fine Day).

⁴² Minutes taken at the Sandy Lake Reserve on February 12, 1955 (ICC Documents, pp. 662-71).

⁴³ ICC Transcripts, vol. 1, pp. 110-11 (Eugene Weenie).

⁴⁴ ICC Transcripts, vol. 1, p. 161 (Leslie Angus).

The treaty paylists disclose that, in 1888, one of the headmen, Shooting Eagle, was the last Indian to be identified as a member of the historical Young Chipeewayan Band. Thus, by 1889, all the individuals who had ever received treaty payments as a member of the Young Chipeewayan Band had either died, been transferred to the treaty paylists of other First Nations, or had disappeared. It is also evident that the Young Chipeewayan Band did not at any time use or occupy Stoney Knoll Reserve in any meaningful way. It is difficult to fault the members of the Young Chipeewayan Band for these facts, given the tragic circumstances of the times.

It should be noted that all the "transfers" of the Young Chipeewayan Band members to other bands were "informal," in the sense that the members were simply moved from one treaty paylist to another, since it was not until 1895 that the *Indian Act* was amended, by the addition of section 140, to permit formal transfers of members from one band to another.

ANALYSIS AND CONCLUSIONS

The Nature of the Claim

Counsel for the claimants submit that the provisions of Treaty 6,⁴⁵ together with sections 38 and 39 of the relevant *Indian Act*,⁴⁶ required the consent of the Young Chipeewayan Band as a precondition to the disposition of the Stoney Knoll Indian Reserve No. 107 by Canada. Therefore, it is argued, when Canada transferred control of that reserve from the Department of Indian Affairs to the Department of the Interior, the government breached both the treaty and the *Indian Act*. As a result, the claimants submit, Indian Reserve No. 107, or its value, continues to be held for the benefit of the members of the Young Chipeewayan

⁴⁵ See footnote 13.

⁴⁶ Section 1 of the *Indian Act*, SC 1895, c. 35, amended section 38 of the *Indian Act*, RSC 1886, c. 43, to state:

No reserve or portion of a reserve shall be sold, alienated or leased until the same has been released or surrendered to the Crown for the purposes of this Act; provided that the superintendent general may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without the same being released or surrendered.

Section 39 of the *Indian Act*, RSC 1886, c. 43, states:

No release or surrender of a reserve, or portion of a reserve, held for the use and benefit of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

- (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General, but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question: . . .

Band. As support for this argument, the claimants refer to the opinion contained in the May 14, 1897, letter from E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, cited above.⁴⁷

Counsel for Canada does not dispute that the government transferred administration and control of Indian Reserve No. 107 without a surrender in 1897. However, Canada argues that the Young Chipeewayan Band had ceased to exist as a collective entity before 1897. Therefore, it is submitted that the government was free to transfer and dispose of the land without the necessity of obtaining a surrender pursuant to the *Indian Act*.

Issue 1: Are Any of the Claimants Descendants?

1 Are any of the claimants descendants of the original Young Chipeewayan Band?

This first issue was conceded by Canada at the outset of the community session on January 18, 1994. At that time Canada agreed that the Higgins and Chickness families are in fact descendants of members of the original Young Chipeewayan Band:

It is Canada's position that two families among the Claimants can establish that they are descended from individuals who are members of the Young Chipeewayan Band, being those Claimants whom are lineal descendants of Kee yew wah ka pim waht (Chickness family), and Oo see che kwahn (Higgins family). Canada denies that any of the other Claimants are descended from anyone who was ever a member of the Young Chipeewayan Band.⁴⁸

The Commission heard a great deal of evidence from the claimants regarding the descendency of the remaining families. Given the other findings that we make, and the fact that Canada has conceded Issue 1, we do not find it necessary to make further findings with respect to descendency.

Issue 2: Are the Claimants Entitled to Bring This Claim?

2 If so, are the claimants entitled to bring this claim on behalf of the Young Chipeewayan Band?

- a) Who constitutes the Young Chipeewayan Band?*
- b) Does the Young Chipeewayan Band exist today?*
- c) If no, when did it cease to exist?*

⁴⁷ E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87).

⁴⁸ ICC, Submissions on Behalf of the Government of Canada, February 17, 1994, p. 4.

We observe that the Specific Claims Policy clearly contemplates claims by a band or bands, and not claims by individuals. Guidelines 1 and 2 of the Policy state:

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

- 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.⁴⁹

Therefore it is our view that the claimant must be a "band" in order to advance a claim under the Specific Claims Policy.

Are the Claimants a Band?

The fundamental determination for this issue is whether the claimants are a band as that term is used within the Specific Claims Policy. As set out above, *Outstanding Business* clearly requires that the claimant be a band or a group of bands. The Policy does not afford individuals or groups of individuals redress unless they are a "band" within the meaning of the Policy.

Canada argues that the crucial question is whether the claimants are a "band" within the meaning of the *Indian Act*. Canada argues that this group of claimants are not a band. Mr. Becker summarizes the Specific Claims Policy as follows:

The Specific Claims Policy as set out in *Outstanding Business* is replete with references to "band" claims, and claims by individuals are not mentioned nor, in our submission, contemplated.⁵⁰

Claimants' counsel argue that the historical Young Chipeewayan Band continues to exist and that these claimants today represent that "band." This argument is advanced on two bases. First, it is submitted that the claimants are all descendants of the original members of the Young Chipeewayan Band and that they therefore constitute the Band today. Second, it is submitted that a traditional form of band membership continues to survive among the claimants and that, quite apart from whatever status these individuals may or may not have under the *Indian Act*, they continue to constitute a band at common law. It is also asserted that Alfred Snake is recognized by the claimants as the hereditary Chief of this "band."

⁴⁹ *Outstanding Business*, 30.

⁵⁰ ICC, Submissions on Behalf of the Government of Canada, February 17, 1994, p. 2.

In support of their argument, counsel for the claimants rely upon treaty paylists and oral history to establish descentance of the claimants. All claimants also asserted that they recognize Alfred Snake as their hereditary Chief.⁵¹

The Indian Act

In our view, it is the definition of a “band” under the *Indian Act* that is most relevant to the Specific Claims Policy. Since 1876 the various *Indian Acts* in place have, from time to time, prescribed comprehensive legislative regimes which have applied, *inter alia*, to the administration of Indian reserve lands and moneys. It is clear from a reading of *Outstanding Business* that this legislative framework is the foundation upon which the Specific Claims Policy is constructed.

Between the time that the first comprehensive *Indian Act* was enacted in 1876 and 1951, the statutory definition of “band” and “Indian” remained relatively consistent in the legislation. The relevant sections of the *Indian Act*, SC 1876, c. 18, are:

1. The term “band” means *any tribe, band or body of Indians* who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible: the term “the band” means the band to which the context relates; and the term “band,” when action is being taken by the band as such, means the band in council. [Emphasis added.]
2. The term “Indian” means –
 - First* Any male person of Indian blood reputed to belong to a particular band;
 - Secondly*, Any child of such person;
 - Thirdly*; Any woman who is or was lawfully married to such person: . . .

These definitions remained intact, without substantial amendment, until 1951. The 1951 *Indian Act*, SC, c. 29, introduced a significant new feature to the administration of the Department of Indian Affairs. While treaty paylists had previously been used to identify band members, in 1951 band lists were introduced. The clear objective was to maintain a comprehensive register of all band members. Rules were defined relating to how Indians were to be registered.

In 1982 the Canadian Charter of Rights and Freedoms was enacted, and as a result the *Indian Act* was amended to reflect the intent and wording of the Canadian Charter. Although the definitions of “band” and “Indian” remained unchanged, those entitled to be registered as such underwent significant legislative

⁵¹ Appendix C provides a detailed analysis of the relevant treaty paylists and oral testimony on the issues of the descendants and whom they recognize as the hereditary Chief.

amendment in 1985. We do not believe that any of these amendments affect the determination of this issue.

The legislative regime of the current *Indian Act* recognizes bands as structured legal entities, with the ability to elect officials and act through them. Once elected, the Chief and band councils may exercise administrative⁵² and quasi-judicial⁵³ powers in specific areas associated with the band's members, property, and funds.

In common parlance the words "band," "tribe," and "body" all imply a group living as a community, a communal group. A glance into a dictionary or an encyclopedia confirms this usage. For example, the *Canadian Encyclopedia* states: "A band is the term used to describe a community of Indians residing on one or more reserves, but some Indian bands have no reserves," and, "[i]n the NWT and the Yukon, where a few reserves have been established, the bands have been gathered into communities known as settlements . . ." ⁵⁴

"Tribe" is defined in the *Oxford American Dictionary* as "a racial group (especially in a primitive or nomadic culture) living as a community." The *Shorter Oxford* defines it as: "Tribe, a group of people forming a community and descent from a common ancestor." "Body" is defined by the *Oxford American Dictionary* as a "group or quantity of people . . . regarded as a unit." The *Shorter Oxford* says "a collective mass of persons or things."

In our view the term "band" within the meaning of the *Indian Act* clearly refers to a body of Indians who live as a collective community under the auspices of that legislation. Descendancy alone is not sufficient to give rise to the legal existence of a "band." We would observe that it is not possible to prescribe rigid *indicia* which need always be present for a group of individuals to constitute a "band," as the factors relevant to this question may vary from case to case.

It is, however, extremely clear to us that the claimants who seek redress before this Commission are not a "band" within the meaning of the *Indian Act* or the 1982 Specific Claims Policy. Today, the only *indicia* that link these individuals as a "band" are descendancy and the subject matter of this specific claim. In our view, these are not sufficient.

It is also clear that the genealogical or descendancy argument itself has significant limitations. The extensive genealogical data put before us make evident that two of the claimant families are direct descendants of Young Chipeewayan Band members. As set out under Issue 1, those two families, Higgins and Chickness,

⁵² Section 81 illustrates the administration powers, in that it lists specific areas that band councils may regulate and monitor.

⁵³ Section 81(r) provides that a band council may enact provisions imposing fines where its members contravene its by-laws.

⁵⁴ Harvey A. McCue, "Indian Reserve," *The Canadian Encyclopedia* (Edmonton: Hurtig Publishers, 1985), 871.

are acknowledged by Canada to be direct descendants of Young Chipeewayan Band members. However, it is also clear that all the claimant families, except the Higgins family, have intermarried with members of other Saskatchewan bands, so that today it must fairly be acknowledged that they are equally the descendants (and in some cases at present members) of other bands.

The history of the dispersal of the Young Chipeewayan Band was chronicled before this Commission in considerable detail. As a result of disease, climatic hardship, and the rapid disappearance of the buffalo, the membership of the Band diminished owing to death and to the migration of individuals and families to larger, established bands elsewhere in Saskatchewan. This historical pattern was not restricted to the Young Chipeewayan Band. At the Inquiry, the following exchange occurred between James Griffin and expert witness Professor James Miller:

- Q. And dealing with that period of time, 1876, immediately before and after, what are you able to tell us of the situation particularly as it related to the Indians of the Fort Carlton area?
- A. It was . . . a very difficult time for the Aboriginal peoples in this region . . . The imminent collapse of the buffalo economy, upon which they depended so heavily, greatly worried them and indeed was a major factor in bringing them to support the making of treaty.⁵⁵

At the Inquiry, Professor Miller responded to Commissioner Corcoran's question relating to the reasons for a band's movement:

- A. There are a couple of general or environmental factors that have to be taken into account. I think they are extremely important. One I've referred to several times, and that is the rapidly diminishing resource base, food resources. The other to which I haven't referred here to is fairly widespread and destructive disease. Even diseases which were not necessarily fatal amongst Euro-Canadians, such as measles, were tremendously devastating in the Plains region in the 1880s and 1890s, and generally throughout the annual reports of Indian Affairs and the Mounted Police reports in these years there are many references to very severe loss of life in the region, generally through disease and especially measles. That's another general reason for moving.⁵⁶

⁵⁵ ICC Transcripts, vol. 2, pp. 275-76. These remarks are also supported in the "Report of the Department of the Interior for the year ended June 30, 1878," Canada, Parliament, *Sessional Papers*, 1879, No. 4 (ICC Documents, p. 1173G).

⁵⁶ ICC Transcripts, vol. 2, pp. 291-92. This evidence is further supported by the minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 662, 663, 664, 665).

This view is corroborated by the Young Chipeewayan treaty paylists from 1879 to 1885. As discussed earlier, the paylists disclose that the number of Indians annually paid annuities dwindled from 52 Indians in 25 families to 18 Indians in two families. By 1889 no one is identified as a Young Chipeewayan Band member.

In determining whether these claimants can bring a claim pursuant to the Policy, the threshold question is whether or not the Young Chipeewayan Band members ceased to function as a collectivity – as a “tribe,” “band,” or “body of Indians.” This is a very difficult question to answer. As the historical review indicates, the dissolution of the Band occurred gradually over a period of several years and not as a single decisive act. There is evidence of dispersion of Young Chipeewayan Band members even at the time of treaty signing in 1876. Certainly, by 1889 the Band had ceased to exist in fact, and had also, ceased to have any legal existence under the *Indian Act*.

The Common Law

Are the claimants assisted by the common law meaning of a “band”? Neither the parties, nor Commission counsel, have been able to point us to any Canadian authority that would assist us in understanding whether a “band” can have a common law existence, separate and distinct from the licensure of the *Indian Act*. Jack Woodward, in *Native Law*, indicates that the origin of the *Indian Act* concept of a “band” flows from a recognition that “when the settlers came, the land was already occupied by self-governing aboriginal people. Each of the original self-governing groups became a band.”⁵⁷ Furthermore, Woodward points out that these bands were pre-existing political and social entities that were not merely “creatures of statute.” Although bands are regulated by the *Indian Act* regime, they do not necessarily owe their existence to that legislation. Woodward goes on to suggest that the question of whether a body of Indians is a “band” is a question of fact that must be determined prior to the determination of other substantive issues in a lawsuit. In this case it is a question of fact that must be resolved with respect to the particular history of the Plains Cree.

Band membership was often based upon a loose association of families, and it was not uncommon for families to migrate and to join other bands. David Mandelbaum's *The Plains Cree* provides this account of the basis for band divisions:

The Bands of the Plains Cree were loose, shifting units usually named for the territory they occupied . . . Individuals, and even whole families, might separate from their group to follow another chief.

⁵⁷ Jack Woodward, *Native Law* (Toronto: Carswell, 1990).

The most important consideration in the demarcation of band divisions was that all the members of a band lived in the same general territory. The prestige and power of the leading chief was also an important factor in the cohesiveness of a band. An influential leader attracted more families and held their allegiance better than a weaker man . . . [Chiefs Black Bear and *Tcimaskos*, or Poundmaker, were cited as examples of influential chiefs.]

Kinship ties were operative in the transfer of band allegiance. A family which, for some reason, was dissatisfied with its neighbours, went to camp with relatives in another band. Young men travelled among the various bands a good deal and often married into and settled with a group distant from their own. *But every band had a stable nucleus composed of the close relatives of the chief, who would not ordinarily leave his group.*

Acceptance into band membership was a simple matter. Any person who lived in the encampment for some time and who travelled with the group soon came to be known as one of its members. Newcomers were ordinarily able to trace kinship with several people in the band and so established their status. When kinship ties were tenuous or non-existent, marriage into the band usually furnished an immigrant with the social alliances necessary for adjustment to the course of communal life. *Thus the numbers of each band were constantly augmented by recruits from other bands of Plains Cree, or from other tribes.*⁵⁸

In the case of Young Chipeewayan, the disappearance of the buffalo, the influx of settlers, and the onset of disease were all factors contributing to the migration of the Young Chipeewayan Band members to other bands. Furthermore, there is also evidence to suggest that the death of Chief Chipeewayan, Young Chipeewayan's father, was contemporaneous with the migration of members to other bands. It is possible that kinship ties with other bands and Young Chipeewayan's leadership qualities were also factors which led to the mass migration.

A recent Australian case law is of some guidance in this matter. In *Mabo v. Queensland* the plaintiffs asserted that when the Crown assumed sovereignty over certain islands in 1879, aboriginal title over those islands continued to survive. In arriving at his decision, Justice Brennan attempted to provide some guidance regarding native title. Brennan J stated:

Secondly, Native title, being recognized by the common law (though not as a common law tenure), may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence, whether proprietary or personal and usufructuary in nature and whether possessed by a community, a group or an individual. . . . Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. *But so long as the people remain as an identifiable community living under its laws and customs, the*

⁵⁸ David Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study*, Canadian Plains Studies 9 (Regina: Canadian Plains Research Center, University of Regina, 1979), 105-6. Emphasis added.

communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.⁵⁹

The significance of this passage for our purposes is that it recognizes a tribe as a collective, cohesive, and identifiable community. In our view a "band," as that term is used in common law, is a body of individuals who exist as a collective, cohesive, and identifiable community. Once again, however, for the reasons noted previously, the evidence put before us falls far short of establishing that *these claimants* are an identifiable community living today, or indeed at any time previous, as a collectivity.

When one considers the customs and traditions of the Plains Cree people and the particular facts of this claim, it would appear that Young Chipeewayan ceased to constitute a band in any real sense of the word by 1889. The facts seem to suggest that by 1889 everyone from Young Chipeewayan had either transferred to other bands in the area (and were paid treaty on the paylists of those bands) or had moved to the United States. To use the terminology adopted by Mandelbaum, there was an absence of any "stable nucleus" of the Chief and his relatives, which would lend credence to the view that the Young Chipeewayan Band continued to exist by 1889. Had the majority of the Young Chipeewayan Band transferred to another band and continued to maintain their identity as a community under the leadership of their chief, we might have reached a different conclusion.

Conclusions

On the basis of the above analysis, based on the *Indian Act* and the common law, the claimants are not a Band. Therefore, under the Policy, they are not entitled to submit a specific claim. Even though the Policy has been administered correctly with respect to *this* claim, we feel compelled to make further suggestions and recommendations, dealing with Issues 3 and 4, based upon what has become known as our "supplementary mandate."

⁵⁹ *Mabo v. Queensland* [1992] 5 CNLR 1 (Aust. HC) at 51. Emphasis added.

PART II

THE COMMISSION'S SUPPLEMENTARY MANDATE

The Commission's mandate was broadened in a letter dated October 13, 1993, by the Minister of Indian Affairs, Pauline Browes, to the then Chief Commissioner, Harry LaForme. The letter states, in part:

I would make three observations on the federal government's proposed approach to recommendations made by the commission. Briefly, (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly *but the outcome was nevertheless unfair* . . .⁶⁰

This broader mandate was previously recognized by Tom Siddon, Minister of Indian Affairs and Northern Development, in a letter to Ovide Mercredi, National Chief of the Assembly of First Nations, dated November 22, 1991:

If, in carrying out its review, the Commission concludes that the policy was implemented correctly *but the outcome is nonetheless unfair*, I would again welcome its recommendations on how to proceed.⁶¹

In our view, this is precisely the type of circumstance which necessitates additional comment by this Commission with respect to Issues 3 and 4.

ISSUE 3: THE VALIDITY OF THE 1897 ORDER IN COUNCIL

3 *Is the 1897 Order in Council valid?*

a) *Was it necessary to obtain a surrender from the Young Chipeewayan Band?*

⁶⁰ See Appendix D. Emphasis added.

⁶¹ See Appendix E. Emphasis added.

We feel that it is necessary to examine this issue from two distinct perspectives:

- 1 Was it necessary to obtain a surrender under the *Indian Act*?
- 2 Was it necessary to obtain the consent of the Indians under Treaty 6?

Indian Act

As we found under Issue 2, the Young Chipeewayan Band had effectively dispersed and disbanded by 1889 or earlier. Although the Band ceased to exist in any real sense of the word, it still remains to be considered whether a surrender was required under the *Indian Act*, and, if so, from whom?

Prior to Canada's transferring control of the reserve in 1897, government officials considered the necessity of procuring a surrender and reasoned that, since all the remaining Young Chipeewayan Band members had transferred to surrounding bands, or moved to the United States, a surrender was not legally necessary.⁶² Counsel for the claimants asserted that Canada acted improperly in transferring the reserve without taking a surrender, and that it had two alternatives open to it. First, Canada could have traced the former members of the Young Chipeewayan Band by using the treaty paylists and by procuring a surrender from each of them. In support of this option, counsel refers to the procedure adopted by Canada in the case of the Chekastapasin Band. Second, it is submitted that, in the event that tracing the former Young Chipeewayan Band members was impossible, Canada could have amended the legislation specifically to permit a transfer without a surrender on these facts. Counsel for the claimants argued strenuously that, given the absence of a formal process enabling Canada to resume control of Indian Reserve No. 107, Canada had no lawful authority to transfer control of the reserve.

In this matter Canada appeared to be relying on a newly enacted provision of the *Indian Act*. During the late 19th century, the Department of Indian Affairs used treaty paylists as an instrument to transfer all the historical Young Chipeewayan Band members from the Young Chipeewayan treaty paylist onto other bands' treaty paylists. No legal authority existed at that time authorizing the Department of Indian Affairs to transfer Indians from one band to another. In 1895, the *Indian Act* was amended to deal with the issue of such transfers for the first time. Section 140 provided that an Indian could be transferred to another

⁶² H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).

band, if the absorbing band and the Superintendent General of Indian Affairs formally assented to the transfer. Section 140 of the *Indian Act* states:

When by a majority vote of a band, or the council of a band, an Indian of one band is admitted into membership in another band, and his admission thereinto is assented to by the superintendent general, such Indian shall cease to have any interest in the lands or moneys of the band of which he was formerly a member, and shall be entitled to share in the lands and moneys of the band to which he is so admitted; but the superintendent general may cause to be deducted from the capital of the band of which such Indian was formerly a member his per capita share of such capital and place the same to the credit of the capital of the band into membership in which he had been admitted in the manner aforesaid.

The provisions of the 1886 *Indian Act* as set out in section 39(a) provide that only residents of the reserve or persons interested in the reserve are eligible to vote at a meeting where the government is seeking to obtain a surrender of a reserve. If all the members of a band had been *formally* transferred to other bands pursuant to section 140, then no one would be left with an interest in the reserve and, therefore, no surrender would be possible under the *Indian Act*.

The members of the Young Chipeewayan Band had been informally transferred to other bands, prior to section 140 coming into force in 1895, by Indian Affairs officials simply putting their names on the treaty paylists of the bands with which they were residing. There is no evidence before us that Canada ever did effect formal transfers of the members of Young Chipeewayan. Indeed, the real issue to the Department of Indian Affairs at the time was not whether a *surrender* was required (they believed it was not), but, rather, whether it was necessary to effect *formal transfers* of the former Band members prior to transferring control of the reserve to the Department of the Interior.

A.E. Forget, the Indian Commissioner in Regina, wrote to the Deputy Superintendent General in Ottawa, Hayter Reed, on February 3, 1896, seeking instructions on this point:

the few remaining members of the Band had dispersed throughout the Battleford Reserves . . . it would be a most difficult matter to trace them, and . . . further – their title to the land in the Reserve originally surveyed for the “Young Chippewayan” was practically extinguished by their claims to land in the Reserves of other Bands with whom they since amalgamated, having been duly recognized.

In view of this fact and that the difficulty which presented itself in 1884 of tracing these persons must necessarily have been greatly augmented by the passage of a further period of eleven years, *I would ask whether the Department regards it as absolutely necessary that the enquiry be proceeded with and formal transfers obtained.*⁶³

Reed responded five days later:

under the circumstances it is probably hardly worth while to make any great exertion to trace the members of the Band of Young Chippewayan . . .⁶⁴

The following letter from Reed to the Superintendent General, dated January 26, 1897, dealing primarily with the Chekastapasin Band, suggested that a surrender was unnecessary because the Band members had abandoned the reserve to take up membership in other bands:

I beg to state that, the Indian owners having abandoned the reserve some ten or twelve years ago, the late Minister decided the control thereof should revert to the Department of the Interior, holding that, by the *formal transfer* of the Indians concerned to other bands where they enjoy equal privileges and rights, including that to share in the reserve as the original owners, they had ceased to be members of the Chekastapaysin Band; and consequently that no necessity existed for getting a surrender from them, which would otherwise be required to enable the reserve, including the timber thereon, to be disposed of by the Crown. Nonetheless, to prevent the possibility of dissatisfaction on the part of the original members, or of trouble arising as to title, it was thought advisable to ask them for a surrender . . .⁶⁵

In April 1897 this issue had been presented to the Minister of Indian Affairs for a decision.⁶⁶ To assist in this regard, J.D. McLean, the Acting Secretary of the Department of Indian Affairs, sought a legal opinion from the Department of Justice with respect to Young Chipeewayan and another reserve, Chekastapasin, which Indian Affairs also hoped to transfer to the Department of the Interior without taking a surrender.⁶⁷

Having concluded that it would be "difficult" to trace the members of Young Chipeewayan to effect formal transfers, Canada decided to transfer control of the

⁶³ A. Forget, Indian Commissioner, to H. Reed, Deputy Superintendent of Indian Affairs, February 3, 1896, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, p. 566). Emphasis added.

⁶⁴ H. Reed, Deputy Superintendent General of Indian Affairs, to A. Forget, Indian Commissioner, February 8, 1896 (ICC Documents, p. 567).

⁶⁵ H. Reed, Deputy Superintendent General of Indian Affairs, to the Superintendent General, January 26, 1897 (ICC Documents, p. 575). Emphasis added.

⁶⁶ Acting Secretary of Indian Affairs to Minister of Indian Affairs, April 1897, NA, RG 10, vol. 6663, file 109A-3-1 (ICC Documents, pp. 581-82).

⁶⁷ Acting Secretary of Indian Affairs to Deputy Minister of Justice (ICC Documents, p. 583).

reserve to the Department of the Interior by way of Order in Council PC 1155 on May 11, 1897, without formal transfers in place, and without the benefit of the legal opinion from the Department of Justice.

The legal opinion from E.L. Newcombe, the Deputy Minister of the Department of Justice, is dated three days after the Order in Council transferring Stoney Knoll Reserve, and would appear to be directed primarily to the facts of Chekastapasin:

As at present advised I do not think that the land in question can, in view of the provisions of the sections referred to, be sold or otherwise alienated until the same has been released or surrendered in the manner provided by the Act. The section positively forbids, subject to certain exceptions, which have no application to the present case, the sale, alienation or lease of any reserve or portion of a reserve without such release or surrender.

There does not appear from your statement of the facts to have been anything amounting in a dissolution of the band. *As to the members said to have been transferred to other bands, I do not find any express authority for which such transfer in the Statutes*, and there may be some question as to the legal effect of what has taken place, but in the absence of further information on the subject, I do not think that the lands in the reserve are relieved in the hands of the Crown from the trust in favour of the band, so far as these members are concerned, or that the Crown is dispensed as to them from compliances with Section 38 before disposing of such lands. Then it seems from your statement that there are other members of the band who have been traced, and therefore [may not have] been transferred to other bands.⁶⁸

The legal opinion would appear to be inaccurate with respect to the lack of authority to transfer members to other bands, since section 140 had been enacted in 1895 to provide precisely such authority.

It is interesting to note that Canada did obtain a surrender from the "original" members of the Chekastapasin Band. It would appear that it did so because the members of Chekastapasin were more easily traced and because of receiving this legal opinion from the Department of Justice. It may also be because members of the Chekastapasin Band refused to be transferred formally pursuant to section 140 if it meant giving up their claim to their reserve.⁶⁹ It should also be noted that the actions of Canada with respect to the Chekastapasin Band are at present the subject matter of litigation and a specific claim.

Having found that the Young Chipeewayan Band ceased to exist as a "band" for the purposes of the *Indian Act* or in the common law by 1889 at the latest, we must consider the question of whether Canada was still obligated, pursuant

⁶⁸ E.L. Newcombe, Deputy Minister of Justice, to J.D. McLean, Acting Secretary, Department of Indian Affairs, May 14, 1897 (ICC Documents, pp. 586-87). Emphasis added.

⁶⁹ R.S. McKenzie, Indian Agent, to A.E. Forget, Indian Commissioner, May 18, 1896, NA, RG 10, vol. 6663, file 109A-3-1, pt. 1 (ICC Documents, pp. 570-71).

to the *Indian Act*, to trace the former members of the Band to obtain a surrender from them.

We find that Canada could not have complied strictly with the surrender provisions of the *Indian Act*, even if it had chosen to follow this course of action. Section 39(a) of the *Indian Act*, RSC 1886, c. 43, provides that only Indians habitually residing on or near and interested in the reserve are eligible to vote at a meeting where the government is seeking to obtain a surrender of a reserve.

39. No release or surrender of a reserve, or portion of a reserve, held for the use and benefit of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:

- (a) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General, *but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question . . .* [Emphasis added.]

As the Band had ceased to exist by 1897, it is difficult to see how Canada could have complied with the surrender provisions of the *Indian Act*, because no one was entitled to vote at the Band meeting by virtue of the residency requirements. There is no provision that allows Canada to trace former band members and include them in the voting process, and it is arguable that, even if Canada had invoked such a process, the surrender would have been deemed invalid by virtue of the residency requirements.

The *Indian Act* is silent with respect to the legal consequences of a factual dissolution of a band. Section 140 is of no assistance in this case, as Canada chose not to utilize it by not seeking formal transfers. In particular, the *Indian Act* gives no guidance on what to do when a reserve has been set aside for a particular band and that band has ceased to exist under these peculiar circumstances. However, Treaty 6 does provide guidance on this issue.

Treaty 6

The relevant provisions of Treaty 6, which deal with the setting aside of reserve lands and the subsequent sale thereof, are as follows:

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands . . . and other reserves for the benefit of the said Indians, *to be administered and dealt with for them* by Her Majesty's Government of the Dominion of Canada . . . that

the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof . . .

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government *for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained* . . . ⁷⁰

Treaty 6 clearly requires the prior consent "of the said Indians entitled thereto," before reserve lands "may be sold or otherwise disposed of." It warrants emphasis that it is *not* the consent of the "band" that is required under the treaty. The issue then becomes: Who were "the Indians entitled thereto" with respect to Stoney Knoll Reserve No. 107 when Canada unilaterally transferred administration and control of the reserve to the Department of the Interior in 1897?

The Commission is of the opinion that all former members of the Young Chippewyan Band alive in 1897 were the Indians *entitled under the treaty* to Stoney Knoll Reserve No. 107. Chief Chipeewyan and four headmen signed Treaty 6 at Fort Carlton on August 23, 1876, on behalf of the Chipeewyan Band. The treaty contains an undertaking from Her Majesty the Queen to set aside reserves for the Indians who signed the treaty. This undertaking was fulfilled with respect to the Chipeewyan Band when an Order in Council was passed on May 17, 1889, setting aside Indian Reserve No. 107.⁷¹ This reserve was set aside pursuant to the treaty for these Indians. The treaty is clear that the reserve land so set aside cannot be "sold or otherwise disposed of" without their consent. The treaty makes no mention of the effect of a dispersal of the band or the effect of a treaty Indian residing on a reserve set aside for other treaty Indians. The requirement of consent is absolute and unqualified.

As a result, the consent of the former Band members was required *under the treaty* for the transfer of Stoney Knoll Reserve No. 107. Notwithstanding the provisions of the *Indian Act*, the treaty required that their consent be "first had and obtained."

This finding is supported by the decision of the Federal Court of Canada, Trial Division, in *The Queen v. Blackfoot Band of Indians et al.* In that case the court had to determine who were the parties to Treaty 7 in order to determine how

⁷⁰ See footnote 14. Emphasis added.

⁷¹ Order in Council PC 1151 (ICC Documents, p. 540).

distributions were to be made under the ammunition clause. The wording of Treaty 7 is similar to the wording of Treaty 6. The court found:

It is clear from the preamble that the intention was to make an agreement between Her Majesty and all Indian inhabitants of the particular geographic area, whether those Indians were members of the five bands or not. The chiefs and councillors of the five bands were represented and recognized as having authority to treat for all those individual Indians. The Treaty was made with people, not organizations.

... It was Indians, not bands, who ceded the territory to Her Majesty ... and it was to Indians, not bands, that the ongoing right to hunt was extended ... The cash settlement ... and treaty money ... were payable to individual Indians, not to bands. The reserves ... were established for bands, and the agricultural assistance ... envisaged band action, but its population determined the size of its reserve and amount of assistance.⁷²

On the facts of this case, we are of the opinion that the transfer of Stoney Knoll Reserve No. 107 was done in contravention of the terms of Treaty 6. Not only does Treaty 6 require the consent of "the Indians entitled thereto" before a reserve can be sold, it also requires that if the land is sold, or otherwise disposed of, then it be done "for the use and benefit of the Indians entitled thereto." In our view, there is, therefore, a lawful obligation owing under the treaty to account for the proceeds of the disposition of the reserve.

Accounting for the Proceeds of Disposition

As set out above, the *Indian Act* is silent with respect to the facts of this Inquiry, in that it gives no guidance with respect to a reserve that has been set aside for a band that has subsequently dispersed. We have found that Canada could not have complied with the surrender provisions of the *Indian Act*, owing to the technical residency requirements, but that alone does not determine the issue before us. The consent of the Indians "entitled thereto" was required, under the terms of the treaty, before a reserve could be sold or otherwise disposed of. Canada, therefore, breached the terms of Treaty 6 by transferring Stoney Knoll Reserve No. 107 to the Department of the Interior without first obtaining the consent of the surviving former members of the Young Chipeewayan Band. There is no conflict between the *Indian Act* and the treaty on this point. Although the *Indian Act* is silent, the treaty is quite specific about first obtaining the consent of the Indians "entitled thereto."

⁷² [1982] 3 CNLR 53, [1982] 4 WWR 230.

The treaty also imposes an obligation that the lands be sold for the use and benefit of the Indians entitled thereto. This did not happen in this case. There is no evidence to support the proposition that either the former members of Young Chipeewayan Band or the absorbing bands received any benefit whatsoever from the sale of Stoney Knoll Reserve No. 107.

In our view Canada had a lawful obligation to account for the proceeds of disposition in one of two ways: (1) to ensure that the absorbing bands received additional reserve lands based on the treaty formula with respect to the number of members absorbed; or (2) to ensure that the absorbing bands received a pro rata distribution of the proceeds of the sale of Stoney Knoll Reserve No. 107. The evidence is clear that a pro rata distribution did not take place. The evidence is not clear if any of the absorbing bands received additional reserve lands as a result of absorbing the Young Chipeewayan members.

With respect to (2) above, after 1895 the Superintendent General of Indian Affairs had a discretion under section 140 of the *Indian Act* to pay a per capita share of a former band's capital to the band that had taken in the new member. It is not apparent from the historical record why the Department of Indian Affairs declined to exercise this discretion in favour of the absorbing bands with respect to the Young Chipeewayan Band members who were transferred, other than that it would have been "difficult" to do so and that the transfers were "informal."

By transferring control of the lands, Canada was unjustly enriched, the First Nations of Saskatchewan were disadvantaged, and the terms of Treaty 6 were not fulfilled, if Canada did not account for the proceeds of disposition in one of the two ways set out above.

Treaty 6 provided, among other things, that the Crown would set aside one square mile of reserve lands for each family of five for the mutual use and benefit of the band. There can be no doubt that the Crown originally satisfied this condition of the treaty with respect to the Young Chipeewayan Band. However, Canada's subsequent conduct involving a unilateral decision to transfer Stoney Knoll Reserve No. 107 without consent or compensation was a breach of Treaty 6.

In *R. v. Taylor and Williams*, the Ontario Court of Appeal made the following comments regarding the nature and extent of treaty rights:

In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved . . . Mr. Justice Cartwright emphasized this in his dissenting reasons in *R. v. George* . . . where he said:

We should, I think endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such manner that the

honour of the Sovereign may be upheld and Parliament *not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.*⁷³

The language employed by the court has been quoted with approval by many courts, including the Supreme Court of Canada in *R. v. Sparrow*:

In our opinion *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s. 35 (1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.⁷⁴

RECONSTITUTING THE YOUNG CHIPEEWAYAN BAND

Although the possibility of reconstituting the Young Chipeewayan Band has not been formally raised before this Commission, this would certainly represent an alternative which could be explored. We would ask Canada, the absorbing bands, and the claimants to consider whether it is practical to reconstitute the Band pursuant to section 2(1)(c) of the *Indian Act*, RSC 1985, c. I-5.⁷⁵ Throughout the past century, some Indian bands were no longer recognized⁷⁶ by Canada as sustaining themselves as a collective and identifiable entity. Consequently, where Canada caused⁷⁷ or found that band members had generally dispersed,⁷⁸ amalgamated with other bands,⁷⁹ or enfranchised,⁸⁰ it deleted the band from its records.

⁷³ *R. v. Taylor and Williams* (1981), 34 OR (2d) 360 at 367 (Ont. CA). Emphasis added.

⁷⁴ [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] CNLR 160.

⁷⁵ Section 2(1)(c) states:

2(1) In this Act,
"band" means a body of Indians

(c) declared by the Governor in Council to be a band for the purposes of this Act; . . .

⁷⁶ The *Indian Act* provides no express authority defining a process or method by which a band may be dissolved. Also, the common law provides no assistance in this regard.

⁷⁷ We make no comment on the extent of Canada's liability where it can be demonstrated that the band did not voluntarily consent to its demise.

⁷⁸ The plight of the Young Chipeewayan Band is an excellent illustration of this point.

⁷⁹ Throughout the late 19th century, in an effort to homestead the west, Canada actively procured surrenders from bands and amalgamated them into one band. This point can be illustrated by citing two examples: (1) during the 1890s to 1900s, two Assiniboine Bands, Pheasant Rump and Ocean Man, were amalgamated with a Cree Band, White Bear. They were collectively known as the Moose Mountain Bands; (2) Chief Luckyman signed Treaty 6 and a reserve was never confirmed for that Band. They were placed onto the Little Pine Band reserve.

⁸⁰ The Mitchell Band in Alberta illustrates this point. During the late 1950s, the adult members of the Mitchell Band entirely enfranchised. Their reserve was subdivided and title to each parcel of land was assigned to the families of the Band. A corporation was created and held the mineral rights, in trust, for the benefit of the enfranchised Band members.

Since then, however, many of those bands have reassembled and asserted their identity as separate and distinct bands to Canada. For various reasons, many of those bands have been relisted as bands by Canada.

There are at least two known examples of reassembled bands in Saskatchewan: the Moose Mountain Bands and the Luckyman Band. On November 23, 1989, the Luckyman Band and Canada entered into an agreement that would confirm a reserve for the Luckyman Band. On January 30-31, 1986, the White Bear First Nation and Canada entered into an agreement, reconstituting three historical bands and allocating funding to them for the purpose of purchasing lands to be reinstated as reserve lands.

CONCLUSIONS

It is our view Canada was obligated to obtain the consent of the former members of Young Chipeewayan, pursuant to Treaty 6, before transferring control of Stoney Knoll Indian Reserve No. 107 to the Department of the Interior.

To allow the lands contained in Stoney Knoll Indian Reserve No. 107 to be sold by Canada, without providing the absorbing bands with some form of compensation in terms of lands or money for the additional members received, would be to allow an injustice by way of unjust enrichment. Such a result would lead to the situation contemplated by the Supreme Court of Canada in *Mitchell v. Peguis Indian Band*, where the court said:

it would be highly incongruous if the Crown, given the tenor of its treaty commitments, were permitted . . . to diminish in significant measure the ostensible value of the rights conferred.⁸¹

Issue 4: The Treaty Land Entitlement Agreement

4 Would participation in recent Treaty Land Entitlement settlements disentitle the claimants from raising this claim?

With respect to Issue 4, we note that Canada, the Province of Saskatchewan, and many Saskatchewan First Nations entered into a comprehensive Treaty Land Entitlement Agreement in 1992. There was little evidence led with respect to this issue and not much given by way of oral argument. In our view, those bands able to establish a historical shortfall of land, as a result of absorbing former Young Chipeewayan Band members, should pursue those claims within the 1992

⁸¹ [1990] 2 SCR 85 at 136, 71 DLR [4th] 193 at 230, [1990] 3 CNLR 46 at 60 [La Forest J].

Treaty Land Entitlement Agreement. If any such bands are not signatory to the 1992 agreement, a separate specific claim, based on treaty land entitlement, may still exist.

The question of whether any of the absorbing bands today have an outstanding treaty land entitlement claim to reserve land necessarily depends upon the particular facts and circumstances relative to each band. That task is beyond the scope of this Inquiry.

PART III

FINDINGS AND RECOMMENDATIONS

The parties framed the issues before this Commission as set out in Part II of this Report. Issue 1, dealing with descendancy, was conceded by Canada at the outset of this Inquiry. Therefore we have not dealt with this issue in depth and make no findings with respect to descendancy other than to note that Canada concedes that the claimants from the Higgins and Chickness families are descendants of members of the historical Young Chipeewayan Band. Details of the genealogy of the claimants as presented to this Commission are set out in Appendix C.

Issue 2 was restated by us as a threshold question: Are the claimants a Band? This Commission is bound to follow the provisions of the Specific Claims Policy as defined in the 1982 booklet entitled *Outstanding Business*. That Policy clearly contemplates claims by a band or a group of bands, and not claims by individuals.

We have found these claimants are not a "band" within the meaning of the *Indian Act*. Today the only *indicia* that link these individuals as a "band" are descendancy and the subject matter of this specific claim. It is evident from the extensive genealogical evidence put before us, and it has also been acknowledged by Canada, that the Higgins and Chickness families are direct descendants of Young Chipeewayan Band members. However, it is also clear that all the claimants, save and except for the Higgins family, have intermarried with members of other Saskatchewan Bands, such that today it must fairly be acknowledged that they are equally the descendants of members of other bands.

We have found the Young Chipeewayan Band ceased to function as a collectivity, or as a "tribe," "band," or "body of Indians," at least by 1889, when the last individual was paid treaty under the Young Chipeewayan payroll. In our view, the historical evidence indicates that the Young Chipeewayan Band members began dispersing soon after the date of the signing of Treaty 6, and that the treaty paylists disclose that the dissolution of the Band occurred gradually over time and not as a single decisive act.

No Canadian authority was proffered by counsel as to the common law meaning of a "band." However, a recent Australian case makes passing reference

to the indicia of a "tribe." In *Mabo v. Queensland* [1992] 5 CNLR (Aust. HC), Brennan J referred to the beneficiaries entitled to assert native title when he was defining native title. He recognized a "tribe" as a collective, cohesive, and identifiable community. We find *these claimants* are not an identifiable community living today, or indeed at any time previous, as a collectivity.

Based on the above findings, we make the following recommendation:

RECOMMENDATION 1

The Policy does not allow for the validation of this claim brought by these claimants, as they are not a Band.

As set out in Part II, the mandate of this Commission includes what we refer to as "The Commission's Supplementary Mandate." We have been invited by the Government of Canada to make recommendations on how to proceed where the Commission finds that the Policy was implemented correctly, but the outcome was nonetheless unfair. In our view, this is precisely the type of circumstance which necessitates additional comments by this Commission.

As we found in Part II, although Canada could not have complied with the surrender provisions contained in the *Indian Act* at the time, Canada failed to comply with the terms of Treaty 6, by failing to secure the consent of the former Young Chipeewayan Band members prior to transferring Stoney Knoll Reserve No. 107 to the Department of the Interior by Order in Council in 1897. This results in a lawful obligation on the part of Canada to account for the proceeds of disposition of that reserve to those Bands that absorbed the former members of Young Chipeewayan between the signing of Treaty 6 in 1876 and the transfer of the reserve in 1897.

In our view, to the extent that the bands absorbing former Young Chipeewayan Band members suffered a treaty land entitlement shortfall, Canada could be obligated to recalculate the reserve land allotment, for those absorbing bands, to conform with the formula embodied in Treaty 6. Alternatively, it may well be Canada's obligation under Treaty 6 to allocate that total land comprising Indian Reserve No. 107, on a pro rata basis, to the absorbing bands. The evidence is clear that a pro rata distribution did not take place. The evidence is not clear if any of the absorbing bands received additional reserve lands as a result of absorbing the Young Chipeewayan members.

We note that Canada, the Province of Saskatchewan, and many Saskatchewan First Nations entered into a comprehensive Treaty Land Entitlement Agreement in 1992. In our view, those bands able to establish a historical shortfall of land, as a result of absorbing former Young Chipeewayan Band members, should pursue those claims within the 1992 Treaty Land Entitlement Agreement. If any such bands are not signatory to the 1992 agreement, a separate specific claim, based on treaty land entitlement, may still exist.

Regardless of how this matter is approached and finally resolved, we are firmly of the opinion that Canada should not be unjustly enriched as a result of the misfortune of the Young Chipeewayan Band and the generosity of those bands that absorbed the Young Chipeewayan members. It is contrary to the spirit, intent, and wording of Treaty 6, which promised that reserve lands would only be taken for the benefit of treaty Indians, not for the benefit of Canada.

RECOMMENDATION 2

The issues surrounding the transfer of Young Chipeewayan Band members to the treaty paylists of other First Nations need to be explored in detail by Canada and the various First Nations that absorbed members of the Young Chipeewayan Band, on a case-by-case basis, including the effects, if any, of the 1992 Treaty Land Entitlement Agreement, to ensure that the provisions of Treaty 6 are honoured.

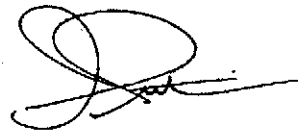
For the Indian Claims Commission



Carole T. Corcoran
Commissioner



Daniel Bellegarde
Commissioner



James Prentice, QC
Commissioner

December 1994

INDIAN CLAIMS COMMISSION PROCEEDINGS

APPENDIX A

YOUNG CHIPEEWAYAN INQUIRY

- 1 **Commissioner's acceptance to conduct Inquiry** June 30, 1993
- 2 **Notice sent to parties** June 30, 1993
- 3 **Planning conference** October 15, 1993

The planning conference was held in Toronto, Ontario. Representatives from the alleged Young Chipeewayan Band, Canada, and the Indian Claims Commission were invited and attended on October 15, 1993. The issues discussed included: the mandate of the Commission, hearing dates, translation, consolidation of documents, procedural and evidentiary rules, the scope of the Inquiry, legal argument, and other matters related to the conduct of the Inquiry.

- 4 **Community session** Saskatoon, Saskatchewan January 18-19, 1994

On January 18 the Commissioners heard from 15 witnesses from various communities in the vicinity. They were:

Chief Alfred Snake	Amy Standingwater
Harry Michael	Elizabeth Standingwater
Elizabeth Gaudry	Chief Barry Ahenakew
Lola (Louise) Gabriella Okeeweehow	Chief Eugene Anaquod
Joanne Mary Gude	Douglas Bird
Benjamin Johnson Weenie	Leslie Angus
Eugene Weenie	Joseph Albert Angus
Kelly Chickness	

On January 19 the Commissioners heard from two expert witnesses: Barbara Shanahan and Professor James Miller.

5 Oral submissions: Saskatoon, Saskatchewan

February 24, 1994

6 Formal record

The formal record in the Young Chipeewayan Inquiry consists of the following materials:

- Documentary record (5 volumes of documents, 1 addendum, 1 index)
- Young Chipeewayan transcripts from the community session (2 volumes)
- Written submission of counsel for the claimants and Canada
- Transcripts of oral submissions (1 volume dated February 24, 1994)
- Book of authorities
- Exhibits tendered at the Inquiry
- Report of the Commission.

The above represents the complete formal record of this Inquiry.

APPENDIX B

PROCEDURES OF THE YOUNG CHIPEEWAYAN INQUIRY

Carole T. Corcoran, chairperson, called the session to order and invited an elder to open the meeting with a prayer. Benjamin Weenie made some introductory comments. Commissioner Corcoran briefly explained the role of the Commission and the scope of the Inquiry. Commission counsel tendered copies of documents relating to the mandate of the Commission into the formal record. A Cree interpreter, Wesley Fine Day, was provided to enable the elders to give information and to follow the proceedings in their own language.

Witnesses from surrounding communities were called and assisted by Commission counsel. They were not sworn in or asked to affirm their evidence under oath. All questions of them were asked through Commission counsel, with the Commissioners reserving the right to interject at any time. Other counsel who wished to raise questions were asked to put them in writing. The questions were given to Commission counsel, who would then direct the questions to the witness. Witnesses were not subject to cross-examination.

Direct questioning of expert witnesses was conducted by the counsel calling the witness. The witnesses were not sworn in or asked to affirm their evidence on oath. They were briefly asked to provide their qualifications to give opinion evidence. The other counsel were given an opportunity to cross-examine.

The Commissioners did not adopt any formal rules of evidence in relation to the community information or documents they were prepared to consider.

APPENDIX C

EVIDENCE ON ISSUES OF DESCENDANCY AND CHIEFTAINSHIP

CHIEFTAINS OF THE YOUNG CHIPEEWAYAN BAND

Chief Chipeewayan and Young Chipeewayan

Alfred Snake claims: (1) that he is a descendant of Chief Young Chipeewayan; (2) that Young Chipeewayan was a band member of the Young Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Snake and Standingwater families was filed as exhibit 4 at the inquiry. A revised copy is attached as figure 1.

On August 24, 1876, the Chipeewayan Band received its first treaty annuity payments.¹ The 1876 treaty payroll reveals that Chief Chipeewayan was paid \$73, comprising a one-time payment of \$12 for each member of his family for taking treaty, and \$25 for himself as chief. At that time, the treaty paylists indicated that he had two wives and one son.

In 1877 Chief Chipeewayan passed away, and it is not disputed that he was succeeded by his son, Is-pim-ik kah-kee-toot² or Young Chipeewayan.³ The 1877 treaty payroll reveals Young Chipeewayan was paid for two wives and two girls,⁴ and by 1878 Young Chipeewayan was Chief and was paid for having three wives and three children.⁵

In 1879 the Chipeewayan Band was paid at Battleford. The 1879 treaty payroll⁶ shows a woman has left Young Chipeewayan and he was paid \$55: \$25 as Chief and \$5 each for two wives, one son, and three daughters. The treaty payroll says

¹ 1876 treaty annuity payroll for Chipeewayan's Band: 1 Chief, 4 headmen, and 79 Indians were paid (ICC Documents, p. 25).

² The spelling of Is-pim-ik kah-kee-toot has changed since 1876. This spelling is the one currently used by the First Nation and therefore will be used throughout this report.

³ Since Alfred Snake is claiming to be the descendant of Young Chipeewayan, the remaining descendants of Chief Chipeewayan are irrelevant for the purposes of establishing lineal descent and consequently will not be explored at this time.

⁴ 1877 Chipeewayan's Band treaty payroll (ICC Documents, p. 26).

⁵ 1878 Chipeewayan's Band treaty payroll (ICC Documents, p. 27).

⁶ 1879 Chipeewayan's Band treaty payroll (ICC Documents, p. 28).

nothing about what happened to the woman who left Young Chipeewayan. There is no evidence to determine what happened to her and whether she took with her any children. From 1880 to 1887,⁷ the treaty paylists show no significant changes in the Young Chipeewayan family except two births and a death. In 1885 the treaty paylist⁸ does not show where the Band was paid, but it does indicate Band members were paid.

In 1888 the Young Chipeewayan Band was no longer paid under a separate entry, rather members were paid under other treaty paylists. In 1888 Young Chipeewayan was paid as number 102 under the Thunderchild treaty paylist.⁹ From 1888 to 1908, Young Chipeewayan was paid as number 102 under the Thunderchild Band. Young Chipeewayan was not paid in the capacity as Chief of a Band, and during that time the size of his family fluctuates.¹⁰

In 1899 Young Chipeewayan was paid \$15: \$5 for himself, one boy, and a girl. The notation in the remarks column of the 1899 treaty paylist for the Thunderchild Band states "Boy to man and paid as No. 146 this Band."¹¹ Number 146 has not been identified.

The Thunderchild treaty paylist records no significant changes to Young Chipeewayan's family from 1900 to 1908. Two notations in the remarks column of the 1905 and 1908 paylist explain the reason for a reduction in his family. The 1905 paylist states: "Boy to man & paid as No. 152 this Band."¹² Number 152 has not been identified. The 1908 paylist states: "Girl to woman & paid with her husband as No. 148 this Band."¹³ Number 148 has not been identified.

To summarize, Chief Chipeewayan and his three headmen signed Treaty 6 in 1876. In 1877 Chief Chipeewayan passed away and was succeeded by his son, Is-pim-ik kah-kee-toot or Young Chipeewayan. There are two significant

⁷ In 1887 the treaty paylist discloses that one of his daughters married a man from the Thunderchild reserve. The notation in the remarks column for the Young Chipeewayan Band states: "1 daughter married No. 86 Thunderchild."

⁸ 1885 Young Chipeewayan's Band treaty paylist (ICC Documents, p. 34).

⁹ 1888 Thunderchild Band treaty paylist (ICC Documents, p. 37).

¹⁰ In 1897 there is no explanation why Young Chipeewayan's wife was no longer accounted for. However, there is an explanation for the reduction in the number of girls. The notation in the remarks column of the 1897 treaty paylist for the Thunderchild Band states: "Girl married to number 86." Number 86 has not been identified.

¹¹ 1899 Thunderchild Band treaty paylist (ICC Documents, p. 48). Generally, treaty annuity numbers were given to Indian children at the discretion of the Indian agent. The generally accepted rule was that Indian children were paid annuities under their family number until they were married or reached the age of majority, at which time they received their own number. While the age of majority varied from province to province, it was generally accepted that the age of majority was 21 years old. In the case of an orphan, he or she would receive their treaty annuity number at an earlier age. See Bennett McCardle, *Indian History and Claims: A Research Handbook*, 2 vols. (Ottawa: Indian and Northern Affairs Canada, 1983), I: *Research Projects*, 149.

¹² 1905 Thunderchild Band treaty paylist (ICC Documents, p. 54).

¹³ 1908 Thunderchild Band treaty paylist (ICC Documents, p. 57).

revelations relating to Young Chipeewayan and the treaty paylists. First, \$25 was paid to the individual recognized as Chief. Second, a written record reveals some characteristics regarding the family history of treaty band members.

With regard to Chieftainship, the treaty paylists demonstrate that Young Chipeewayan was paid in his capacity as Chief until 1888. From that year forward, the Young Chipeewayan Band members were no longer paid under a separate entry but rather were paid under other treaty paylists. Young Chipeewayan was paid as number 102 under the Thunderchild treaty payroll from 1888 to 1908.

With regard to family history, the 1879 treaty payroll for Chipeewayan's Band reveals that a woman left Young Chipeewayan. There is no indication of what happened to her and whether she kept any children she had with Young Chipeewayan. Although there are deaths and births in Young Chipeewayan's family, no son or daughter becomes old enough to receive a treaty number until 1897. In 1897 Young Chipeewayan's daughter marries number 86 of the Thunderchild Band. The 1899 and 1905 Thunderchild treaty paylists expressly identify male children of Young Chipeewayan. However, the paylists submitted do not identify the children by name.

Albert Snake

There is no dispute that Chief Alfred Snake¹⁴ is the son of Albert Snake. To simplify matters, Albert Snake's history will be examined. The disputed issue is whether Albert Snake was the son of Young Chipeewayan. The treaty paylists for the Young Chipeewayan and Thunderchild Bands do not reveal a lineage from Young Chipeewayan to Albert Snake.¹⁵

On February 12, 1955, a meeting was held with six individuals present.¹⁶ The purpose of the meeting was to reduce to writing the oral history of Albert Snake. Harry Bighead¹⁷ took the minutes of the meeting. In that document, Albert Snake states his relationship to Chief Chipeewayan and Young Chipeewayan. He states:

I was about nine years old when my grandfather, Ochippeyan, the Chief, advised his people to leave the reserve for the winter.

...

¹⁴ Treaty No. 286 of the Sandy Lake Band (ICC Exhibit 5).

¹⁵ In fact, the treaty paylists for the Young Chipeewayan and Thunderchild bands do not disclose or refer to Albert Snake as either being paid annuity payments, or transferred to or from another reserve.

¹⁶ Minutes taken at the Sandy Lake Reserve, February 12, 1955. Present were Baptiste Gaudry, Mrs. B. Gaudry, John Snake, Albert Snake, Harry Bighead, and Alfred Snake. Except Harry Bighead, everyone was related to Albert Snake by either marriage or blood. (ICC Documents, p. 671).

¹⁷ Harry Bighead and Harry Michael are the same person. Michael is his father's given name.

It was about towards spring when sickness came upon us and quite a few passed away, one of them was grandfather, the Chief. My mother was one of the women who passed away. Her name was O-ma-mees. . . . My father's name was Espim-hic-cak-itoot. To translate this from cree to english, 'somebody who calls from the sky.'¹⁸

His explanation for the distinction between his surname and Chipeewayan was due to Cree culture and religious administration. The 1955 minutes state, in part:

It was during the summer when I and my grandmother were called up for baptism by Reverend Hines and were both baptised on the same day. They gave her the name, Emma, while mine was Albert. . . . It may sound silly to you, but it has been and I think is still the same with some Indians even in this generation that no mother-in-law will name her son-in-law at any time for the respect of her son-in-law and the son-in-law will do the same at any time. Therefore, when my grandmother was asked the name of my father, she refused to name him. But I had to have a last name and so Reverend Hines and others who were in attendance of mine and my grandmother's baptism gave me a name – Snake, because at the time I was living at Snake Plain and so they thought of naming me after that place, but they made it shorter just Snake.¹⁹

Counsel for the claimant submitted two certificates of baptism, one for Albert Snake²⁰ and one for his grandmother, Emma Snake.²¹ On August 10, 1884, the Reverend John Hines baptised an orphan²² by the name of Albert and his grandmother, Emma, at St Mark's Church, Asissippi Mission. The certificate of baptism for Albert Snake shows his date of birth as 1875.²³

The first mention of Emma Snake on the treaty paylists found by Ms Shanahan,²⁴ the researcher retained by Canada in this matter, was on that for 1885. In that year Emma was paid as number 118 with the Mistawasis Band at Snake Plain.²⁵ A notation in the remarks column of the 1885 Mistawasis treaty payroll states: "Not paid last year very old with grandson from Plain."²⁶ There are no changes noted in the Mistawasis treaty paylists until 1889²⁷ when the grandson had become old enough²⁸ to receive his own treaty number.

¹⁸ Minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 662, 663, 664, 665).

¹⁹ Minutes taken at the Sandy Lake Reserve, February 12, 1955 (ICC Documents, pp. 668, 669).

²⁰ Certificate of baptism for Albert Snake from Diocese of Saskatchewan (ICC Exhibit 6).

²¹ Certificate of baptism for Emma Snake from Diocese of Saskatchewan (ICC Exhibit 7).

²² He was baptized as an orphan and the names of his parents were not recorded.

²³ The date is further corroborated in the 1955 minutes.

²⁴ Barbara Shanahan was trained as a clinical psychologist and worked in the area of psychological research. Since 1989 she has been carrying out social and historical research.

²⁵ 1885 Mistawasis Band treaty payroll (ICC Documents, p. 59).

²⁶ Ibid.

²⁷ 1889 Mistawasis Band treaty payroll (ICC Documents, p. 63). In 1889 the remarks column of the Mistawasis treaty payroll notes: "Boy draws under No. 133."

²⁸ See footnote 11, above.

The 1890 Mistawasis treaty payroll²⁹ discloses that Emma Snake had passed away and that Albert Snake received his treaty annuity payment. In that year, Albert was paid on the Ahtahkakoop treaty payroll³⁰ as number 126. There are no changes to the Ahtahkakoop treaty payroll regarding Albert Snake until 1894 when he married. For the period 1894-1916, the Ahtahkakoop treaty payroll reveals that Albert Snake had one wife and that there were some births and deaths in his family. In 1916 the Ahtahkakoop treaty payroll identified the name "Alfred" as a newborn boy.³¹ In 1916, Albert Snake had one wife,³² two boys, and one girl. The older boy has not been identified. At the Inquiry, Alfred Snake gave evidence that his older brother passed away without leaving any offspring.³³ The older girl has been identified as Elizabeth Gaudry.³⁴

Currently, each claimant recognizes Alfred Snake as the hereditary Chief. Although some expressed their reasons in terms not normally characteristic of "hereditary chieftainship," others gave their reasons on the basis of a blood line.

Q. Who do you recognize as being the hereditary chief?

A. Alfred. Mr. Alfred Snake.

Q. Could you tell the Commissioners why you recognize him as being hereditary chief of the Young Chipeewayan Band?

A. Well I believe he deserves it and I think he's all right to be our chief. I'm having no complaints.

Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band, other than Alfred Snake?

A. Not really.³⁵

— Lola Okeewehow

Q. Who do you recognize as being the hereditary chief of the Young Chipeewayan Band?

A. Alfred Snake.

Q. Could you tell the Commissioners why?

A. That's what a lawyer had told me.

²⁹ 1890 Mistawasis Band treaty payroll (ICC Documents, p. 64). The notation in the remarks column is: "To Ticket No. 126 Ahtahkakoop."

³⁰ 1890 Ahtahkakoop treaty payroll (ICC Documents, p. 67). The notation in the remarks column of the 1890 Ahtahkakoop treaty payroll states: "From Ticket No. 133 Mistawasis."

³¹ 1916 Ahtahkakoop treaty payroll (ICC Documents, p. 90). In the remarks column is found the notation: "Alfred born Feb. 7."

³² After his first wife passed away, Albert Snake married Rose Bird. There were no offspring as a result of that marriage; Rose Bird brought some children into the marriage (ICC Transcripts, vol. 1, p. 138).

³³ ICC Transcripts, vol. 1, p. 27.

³⁴ At the Inquiry, Elizabeth Gaudry gave evidence she was 91 years of age (ICC Transcripts, vol. 1, p. 65).

³⁵ ICC Transcripts, vol. 1, pp. 78, 79 (Lola Okeewehow).

Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?

A. No.³⁶

– Kelly Chickness

Q. Who do you recognize as being the hereditary chief of Young Chip?

A. She says Alfred is probably the – in her understanding the current leader is Alfred.

Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?

A. No.³⁷

– Elizabeth Gaudry

Q. Who do you recognize as being the hereditary chief?

A. Well we signed that affidavit stating that Alfred Snake was the hereditary chief, back in '85, and put it into court.

Q. Why do you recognize him as being the hereditary chief?

A. Well he established this line of our family that in our customs and traditions we still go by that, we don't go by the Indian Act. And that he was his direct descendant or his descendancy comes from the direct line of the chiefs and that's the way we had it in '84.³⁸

– Benjamin Weenie

Q. Who do you recognize as being the hereditary chief and why?

A. Alfred Snake, because since I know him he's been working on this Chipeewayan Reserve. He used to come over there at the reserve to see my mother about it, talk to her about it.

Q. Are you aware of anyone else claiming to be the hereditary chief of the Young Chipeewayan Band?

A. No, just Alfred.³⁹

– Amy Standingwater

In summary, there is no dispute that Chief Alfred Snake is the son of Albert Snake. The disputed issue is whether Albert Snake was the son of Young Chipeewayan.

BAND MEMBERS

General

The remaining claimants belong to five families. Each family's Band membership is being challenged on one or more of three grounds: (1) that of descendancy; (2) that the alleged original ancestor was not a Young Chipeewayan Band

³⁶ ICC Transcripts, vol. 1, p. 117 (Kelly Chickness).

³⁷ ICC Transcripts, vol. 1, p. 67 (Elizabeth Gaudry).

³⁸ ICC Transcripts, vol. 1, p. 95 (Benjamin Weenie).

³⁹ ICC Transcripts, vol. 1, p. 121 (Amy Standingwater).

member; and (3) that an ancestor had acted in such a manner that he or she became disentitled to claim membership to the Young Chipeewayan Band. Families that Canada challenges on the basis of descendancy include Okeeweehow and Angus. The family being challenged on the basis that the alleged original ancestor was not a Young Chipeewayan Band member is Weenie. All the families are being challenged on the basis that their ancestor acted in such a way as to disentitle them to be Young Chipeewayan Band members.

Lineage

Okeeweehow

Lola Gabriella Okeeweehow claims: (1) that she is a descendant of Okeeweehow; (2) that she was a member of the Young Chipeewayan Band; and (3) that she is entitled to bring this claim. A genealogical chart for the Okeeweehow family was filed as exhibit 15 at the Inquiry. A revised copy is attached as figure 2.

The 1876 Chipeewayan treaty payroll shows Ookeewahaw and a woman were admitted to treaty with the Chipeewayan Band. In that year he was paid \$24 as number 11,⁴⁰ a one-time \$12 payment⁴¹ for himself and for the woman. Ookeewahaw was paid \$10 with the Chipeewayan Band until 1879. In each year there were minor changes to his name: the spelling of the name changes from Ookeewahaw in 1876, to Ookeeweehow in 1878, to Ookeewehow in 1879 on the Chipeewayan treaty payroll. The 1879 Chipeewayan treaty payroll⁴² reveals Ookeewahow was paid, as number 12, the sum of \$15: \$5 for himself, his wife, and a boy child. The 1879 Chipeewayan treaty payroll was the last entry for Okeewahow. No record has been located of Okeewahaw's movements for the years 1880, 1881, 1882, 1883, and 1884.

In 1885 the name "Okewehow" appears on a Piapot treaty payroll.⁴³ He was paid \$10 as number 121: \$5 for each of himself and his mother, wife of "the Magpie." A notation in the remarks column of the 1885 Piapot treaty payroll for Okewehow states: "Drew with No. 43 in /84 draws now with his mother widow of the Magpie No. 153 paysheet 1883."⁴⁴ Again there are minor changes to the

⁴⁰ 1876 Chipeewayan treaty payroll (ICC Documents, p. 234).

⁴¹ The \$12 payment relates to the terms agreed to in Treaty 4.

⁴² 1879 Chipeewayan treaty payroll (ICC Documents, p. 237).

⁴³ 1885 Piapot treaty payroll (ICC Documents, p. 245).

⁴⁴ 1885 Piapot treaty payroll (ICC Documents, p. 245). The 1884 Piapot treaty payroll for number 43 identifies the payee as Maud, "The woman who went through." The notation in the remarks column reads: "Married Okeeweehow of this Band. She formerly belonged to the Chacachess Band No. 18." The 1883 Piapot treaty payroll for number 153 identifies the payee as Little Magpie. Little Magpie was initially paid in 1881 with the Piapot Band. The notation in the remarks column for Little Magpie states: "Balance of Family on Prairie."

name Okeewehow. The spelling of the name changes from Okewehow in 1885, to Okeewehow in 1899, to Okeewehow in 1920.

The factual issue in dispute is whether Ookeewahaw of the Chipeewayan Band in 1879 is one and the same person as Okewehow on the 1885 Piapot treaty payroll. There is no dispute that Okewehow of the Piapot Band is the father of Joseph Norman Okeewehow⁴⁵ and that Lola Gabriella Okeewehow⁴⁶ is his daughter from his marriage to Gabriella Dubois.⁴⁷

Although Lola Gabriella Okeewehow testified at the inquiry that she knew her grandfather, Okeewehow, she was not able to provide information germane to the disputed issue:

Q. Did you know your grandfather?

A. Yes, I did.

Q. How old were you when he passed away?

A. Five years old . . . He was a tall man, very tall and very nice man.

Q. The spelling of Okeewehow changes in the records, is Norman Okeewehow the son of Ookeewahaw, could you clarify that?

A. I don't know . . .⁴⁸

— Lola Okeewehow

Ms Barbara Shanahan was retained by Canada to confirm or deny the genealogical history asserted by the claimants. Ms Shanahan tendered a report⁴⁹ of her analysis and conclusions which was based solely upon treaty payroll research, concluding as follows:

On the documentary evidence there is no rational basis to believe that the Oo kee wa haw who was admitted to treaty with the Young Chipeewayan Band with his wife in 1876 is one and the same person bearing the same name who died on the reserve of the Musquopecting Band in 1933 as a member of that Band. There is no plausible or compelling reason to think that the Oo kee wa haw of the Young Chipeewayan Band, being a married person with a child paid under his own number as a member of the Band until 1879 would have any reason to want to spend the next six years of his life as a member of Piapot's Band and to be paid under the annuity number of his father, The Magpie. Therefore it must follow there existed two different persons bearing the same name.

⁴⁵ 1928 birth certificate of Lola Gabriella Okeewehow (ICC Documents, p. 894). Norman Okeewehow was born around 1898 at Maple Creek, Saskatchewan. The certificate lists father as Norman Joseph Okeewehow, residing at the Muskowpetung Indian Reserve. The certificate identifies him as Cree, 30 years old, and born at Maple Creek, Saskatchewan. This information is consistent with the 1898 Piapot treaty payroll (ICC Documents, p. 258). It shows that two boys were born to Okewehow and one survived.

⁴⁶ Treaty number 645 of the Muskowpetung Band.

⁴⁷ 1922 marriage certificate of Joseph Norman Okeewehow and Gabriella Dubois (ICC Documents, p. 1071).

⁴⁸ ICC Transcripts, vol. 1, p. 76 (Lola Okeewehow).

⁴⁹ Filed as Exhibits 30 and 31 at the Inquiry (ICC Documents, pp. 1-488).

On this basis Lola Okeewehow cannot be said to be a descendant of a member of the Young Chipeewayan Band.

Further, and in any event, even if the Oo kee wa haw in question was, as claimed by the Plaintiffs, a member of the Young Chipeewayan Band, he ceased to be a member of that Band when he joined Piapot's Band. By 1897 he had been a member of Piapot's Band for at least 12 years during when he accepted to be paid, and was paid, under his father's ticket in the annuity lists of the latter Band.⁵⁰

At the Inquiry, Ms Shanahan specified that, *based upon the treaty paylists, no established connection* existed between Ookeewahaw of the 1879 Chipeewayan Band and Okewehow on the 1885 Piapot treaty payroll. She conceded that her conclusions were based solely on the treaty paylists and she did not carry out any further research, for example, in church records.⁵¹

Angus

Leslie Angus claims: (1) that he is a descendant of Pahpahmootaywin; (2) that Pahpahmootaywin was a member of the Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Angus family was filed as exhibit 22 at the Inquiry. A revised copy is attached as figure 3.

The 1876 Chipeewayan treaty payroll does not include the name "Pahpahmootaywin." It was not until 1877 that this name first appears on the payroll, as number 22.⁵² In that year he was paid \$68: a one-time payment of \$12 each for taking treaty, and a \$5 annuity payment each for himself, a wife, and two boys. However, the 1878 and 1879 the Chipeewayan treaty paylists⁵³ do not include the name Pahpahmootaywin, nor does a search of the treaty paylists for reserves in close proximity to the Chipeewayan Band disclose the name. No documents were submitted demonstrating the descendancy of Pahpahmootaywin to the Angus family.

At the Inquiry, Leslie Angus⁵⁴ testified that his parents were Harry Angus and Julia Tootoosis. They were married 56 years ago and both are still alive.⁵⁵ Harry Angus has always lived on the Thunderchild reserve; Julia Tootoosis is currently 89 years of age. Leslie Angus also testified that Julia's parents were John Tootoosis and Mary Louise Favel and that both had lived on the Poundmaker reserve.

⁵⁰ Report on the descendants of the Young Chipeewayan Band as particularized in the statement of claim in the case of *Alfred Snake et al. v. The Queen*, January 15, 1992 (ICC Documents, p. 21, 22).

⁵¹ ICC Transcripts, vol. 2, pp. 221-22 (Barbara Shanahan).

⁵² 1877 Chipeewayan treaty payroll (ICC Documents, p. 142).

⁵³ 1878 and 1879 Chipeewayan treaty payroll (ICC Documents, p. 27, 28).

⁵⁴ Treaty number 371 of the Thunderchild Band.

⁵⁵ ICC Transcripts, vol. 1, p. 143 (Leslie Angus).

Joseph Albert Angus⁵⁶ testified that Mary Louise Favel's father was Basil Favel, Jr; but that her mother's name was unknown. Basil Favel Jr's father was Basil Favel Sr, and his mother was Watchusk. Joseph Albert Angus further testified that Watchusk's father was Pahpahmootaywin; her mother's name was unknown.

Joseph Albert Angus accepted that exhibit 22 was factually correct in that Pahpahmootaywin had three daughters. However, the 1877 Chipeewayan treaty paylist shows Pahpahmootaywin as having two sons. Commissioner Bellegarde questioned Joseph Albert Angus:

- Q. Just referring to . . . 1877 Chipeewayan Band pay list. Pahpahmootaywin is number 22 on this list and it seems that he has, of course, himself, his wife and two boys, and no girls are mentioned on the pay list. And yet at the ancestral line and living descendants there are three daughters and no mention of any boys?
- A. Right. I did have the occasion to research this and I have not completed my research in this area, but I traced Basil Favel as to when he married Watchusk, Basil Favel, Senior, that is. And he was formerly a member of the Bob Tail Band before moving to Little Pine and then, subsequently, to Poundmaker. Now in 1878, the first time I was able to locate him, he already had a wife so at that extent of my research it did not yet say that his wife, when he started getting paid with her, came from which band, so there is still some research for me to do in this respect. I'm aware of that.⁵⁷

The disputed issues are whether Pahpahmootaywin was a member of the Chipeewayan Band, whether Pahpahmootaywin had a daughter Watchusk, and whether Watchusk had children.

Albert Angus also gave evidence regarding Young Chipeewayan's definition of its membership:

I can only answer that from my knowledge of custom in the Cree tradition, as opposed to what the specific definition might have been with respect to the Chipeewayan Band. I had the occasion to speak with my late uncle, John Tootoosis, (John Tootoosis is the brother of my mother, Julia.) From as a young man he was my mentor about family history, tradition and politics. . . . [O]n . . . one occasion I travelled with him to Frog Lake from Poundmaker Reserve . . . And I took the occasion to ask him questions about Indian tradition. Initially, it was not a discussion with respect to definition of bands . . . it started off with a discussion if there was such a thing as capital punishment in the tradition of our culture and he said there was. There was, and he gave me an example of the kind of crime against a nation it would be where capital punishment might be invited. He said that it was with respect to violation of Indian law concerning band membership and on an occasion where people left the reserve without the permission of the warrior society, as would be sanctioned by the chief, they would be immediately chased and the warriors would have the authority to try

⁵⁶ Treaty number 424 of the Thunderchild Band. He is Leslie Angus's younger brother.

⁵⁷ ICC Transcripts, vol. 1, p. 154 (Joseph Albert Angus).

and persuade him to come back to the band and, if that person refused, they would then shred all their clothes, and if they still refused, kill their means of transportation, which was usually horses, and if they still refused they would just shoot him on the spot. Now I asked him why this was so. He said that was the law of membership, that the only exceptions there would be if people were to leave for the purposes of hunting and there had to be permission to leave band membership.⁵⁸

Mr. Angus advised that this information was corroborated in the book entitled *Voices of the Plains Cree* by Edward Ahenakew. The relevant portions of the book were filed as exhibit 23 at the Inquiry.

Weenie

Benjamin and Eugene Weenie claim: (1) that they are descendants of Mahchanchekoss; 2) that Mahchanchekoss was a member of the original Chipeewayan Band; and (3) that they are entitled to bring this claim. A genealogical chart for the Weenie family was filed as exhibit 18 at the Inquiry. A revised copy is attached as figure 4.

It is not until 1882 that the name "Mahchanchekoss" appears in the Young Chipeewayan treaty payroll.⁵⁹ A notation in the remarks column of the 1882 Chipeewayan treaty payroll list states: "Paid at Walsh in '81." However, the 1881 Fort Walsh treaty payroll⁶⁰ for the Chipeewayan Band members does not include the name "Mahchanchekoss."

The name does appear on the 1883 treaty payroll for Strike Him on the Back Band. In that year he was paid \$10 as number 76: a \$5 annuity payment each for himself and a boy. In 1884 Mahchanchekoss was recorded as number 78 with the Little Pine Band and he remained with them until his death in 1892. For the years 1886-88, the Little Pine Band treaty lists reveal that one boy and two girls of Mahchanchekoss's five children moved to the United States. No historical evidence was submitted identifying the three children or where they live today. The remaining two children have been identified as Mary or Betty, and Weenie Manon. There is no dispute that Benjamin and Eugene Weenie are descendants of Weenie Manon, and that he was a descendant of Mahchanchekoss.⁶¹ The disputed issue is whether "Mahchanchekoss" was a member of the Chipeewayan Band.

⁵⁸ ICC Transcripts, vol. 1, pp. 145-47 (Joseph Albert Angus).

⁵⁹ 1882 Young Chipeewayan treaty payroll (ICC Documents, p. 93). He was paid \$20 as number 11: a \$5 annuity payment for each of himself, his wife, one boy, and one girl.

⁶⁰ In 1881 the Young Chipeewayan Band was paid at Fort Walsh as "stragglers" (ICC Documents, p. 30).

⁶¹ At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC, Transcripts, vol. 2, p. 260):

Q. I see. So it is acknowledged that he's the ancestor of the Weenies?

A. Yes.

Higgins

Donald Higgins claims: (1) that he is a descendant of Oosechekwahn; (2) that Oosechekwahn was a member of the original Chipeewayan Band; and (3) that he is entitled to bring this claim. A genealogical chart for the Higgins family was filed as exhibit 28 at the Inquiry. A revised copy is attached as figure 5. Mr. Higgins was not present to give evidence at the Inquiry. However, treaty paylists were filed with the Commission and his genealogy can be traced.

The 1876 Chipeewayan treaty payroll shows that Oosechekwahn and a woman were admitted to treaty with the Chipeewayan Band. In that year he was paid \$24 as number 18:⁶² a one-time payment of \$12 for taking treaty, for each of himself and his wife. He continued to be paid annuity payments as a member of the Chipeewayan Band until his death in 1886.⁶³

In 1886, 1887, and 1888 his widow and six children were paid under his annuity number with the Young Chipeewayan Band.⁶⁴ In 1889 Oosechekwahn's widow was paid as number 111 of the Thunderchild Band. She was paid \$25: a \$5 annuity payment for each of herself, one boy, and three women. The notation in the remarks column states: "10 Young Chipeewayan. 2 boys dead. 3 girls women."⁶⁵ From 1889 until she passed away in 1896, Oosechekwahn's widow was paid with the Thunderchild Band as number 111.

The Thunderchild treaty payroll for 1890 contains the following notation in the remarks column: "1 woman 'Emma Apistatim' withdrawn."⁶⁶ There is no dispute that Emma Apistatim married Peter Higgin in that year.⁶⁷

The disputed issue is whether "Oosechekwahn's widow" continued to remain a member of the Chipeewayan Band despite having been paid with the Thunderchild Band from 1889 to 1896. Further, Canada submits that Emma

⁶² 1876 Chipeewayan treaty payroll (ICC Documents, p. 387).

⁶³ 1886 Young Chipeewayan treaty payroll (ICC Documents, p. 397). The 1886 Young Chipeewayan treaty payroll shows that Oosechekwahn's widow was paid \$35: a \$5 annuity payment for each of herself, three boys, and three girls.

⁶⁴ 1886, 1887, and 1888 Young Chipeewayan treaty paylists (ICC Documents, pp. 397-99).

⁶⁵ 1889 Thunderchild treaty payroll (ICC Documents, p. 400).

⁶⁶ 1890 Thunderchild treaty payroll (ICC Documents, p. 401).

⁶⁷ At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 227):

A. My genealogical work concurs with the band's geneology. It – the woman Emma Apistatim who married Peter Higgins . . . was the daughter of Oo See Che Kwahn, Moving Stone, who was a member of the Young Chipeewayan Band.

Apistatim withdrew from treaty and consequently lost her membership. There is no dispute that Donald Higgins is a descendant of Oosechekwahn.⁶⁸

Chickness

The Chickness family claims: (1) that they are descendants of Keeyewwahkapimwaht; (2) that Keeyewwahkapimwaht was a member of the original Chipeewayan Band; and (3) that they are entitled to bring this claim. A genealogical chart for the Chickness family was filed as exhibit 19 at the Inquiry. A revised copy is attached as figure 6.

Keeyewwahkapimwaht signed Treaty 6 in his capacity as headman of the Young Chipeewayan Band. The 1876 Chipeewayan treaty payroll shows that Keeyewwahkapimwaht was paid \$99 as number 5: \$15 in his capacity as headman and a one-time \$12 payment for taking treaty for each of his wife, two boys, and four girls. He received annuity payments with the Chipeewayan Band until 1880. Although in 1881 Keeyewwahkapimwaht was paid as number 172 of the Piapot Band, a remark in Piapot's treaty payroll shows that he was recognized as a headman of the Chipeewayan Band, and in 1882 Keeyewwahkapimwaht was again paid under the Young Chipeewayan treaty payroll, this time as number 2.

During the years 1883-87 he⁶⁹ appears on the Poundmaker treaty payroll under the name Shooting Eagle, and was paid under numbers 66 and 67, in his capacity as a headman of the Young Chipeewayan Band. In 1885 Shooting Eagle was not paid because he was considered a rebel.

In 1888 "Keokapamot" was paid as number 67 of Poundmaker's Band. The treaty payroll shows he was paid \$30: \$15 in his capacity as headman, and a \$5 annuity payment for each of his wife and two girls.

In 1889 Keokapamot was again paid as number 67 of Poundmaker's Band but this time he was only paid \$15: a \$5 annuity payment for each of himself, a wife, and one girl. (The remarks column shows one girl has married number 149.)

⁶⁸ At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 241):

Q. Yes. So that with regard to these various groups of people, I take it it's established at the outset that the Chickness family and the Higgins family are descendants?

A. They are descendants, yes.

Q. Yes. And, of course, that involves the numbers which are shown on the family trees which you have looked at?

A. Yes.

⁶⁹ The parties agree that Keeyewwahkapimwaht, Shooting Eagle, and Keokapamot refer to the same person.

The significance of this entry is that Keokapamot was no longer paid in his capacity as headman. The treaty payroll for Poundmaker's Band reflects no significant changes to Keokapamot until 1896. In 1896 a girl married number 124. There is no dispute that number 124 is Harry Chickness. Further, there is no dispute that the Chickness family are descendants from Harry Chickness and Keokapamot's second daughter.⁷⁰ The disputed issue is whether Keeyewwahkapimwaht's daughter continued to remain a member of the Chipeewayan Band following her marriage to number 124 of the Poundmaker Band.

⁷⁰ At the Inquiry, the following exchange occurred between Mr. Griffin and Barbara Shanahan (ICC Transcripts, vol. 2, p. 241):

Q. Yes. So that with regard to these various groups of people, I take it it's established at the outset that the Chickness family and the Higgins family are descendants?

A. They are descendants, yes.

Q. Yes. And, of course, that involves the numbers which are shown on the family trees which you have looked at?

A. Yes.

Figure 1
DESCENDANTS OF CHIEF CHIPEEWAYAN

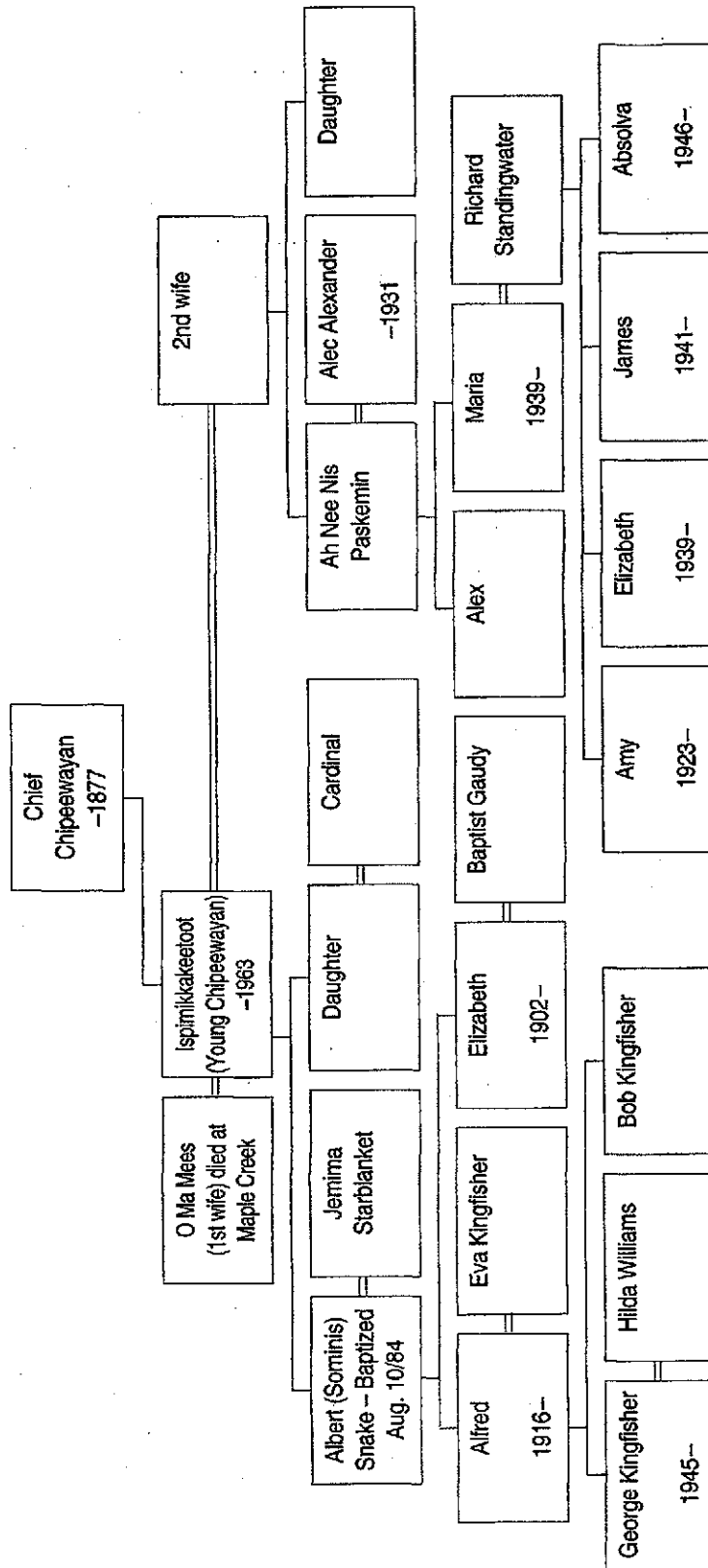


Figure 2
DESCENDANTS OF OO KEE WA HAW

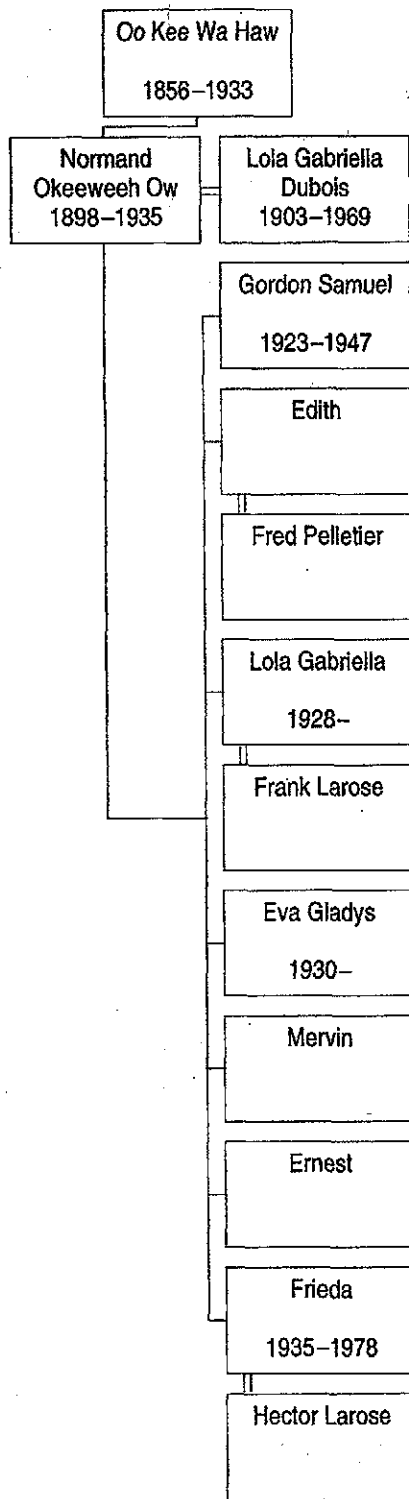


Figure 3
DESCENDANTS OF PAH PAH MOO TAYWIN #22 (WALKING MAN)

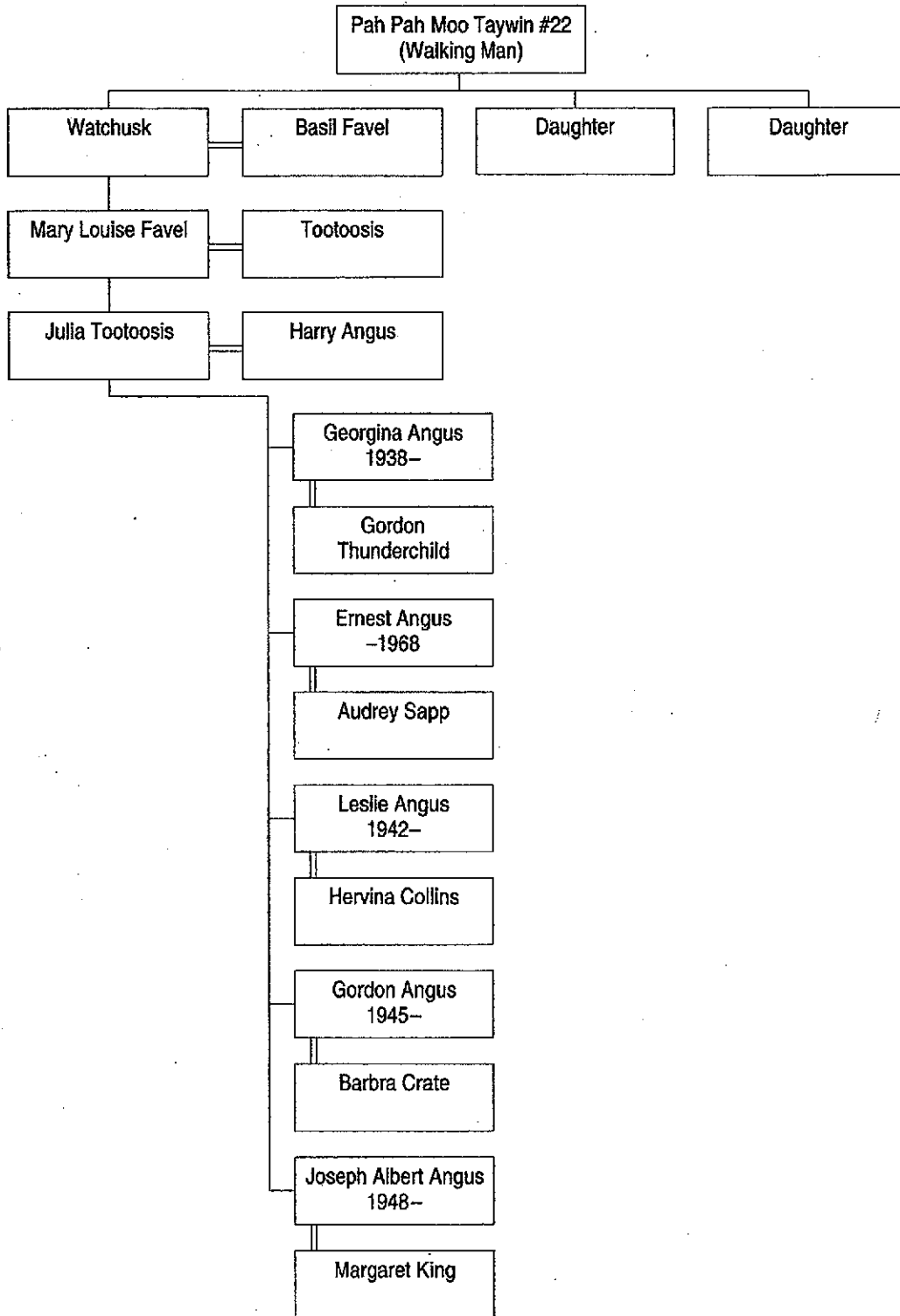


Figure 5
ANCESTORS OF HIGGINS

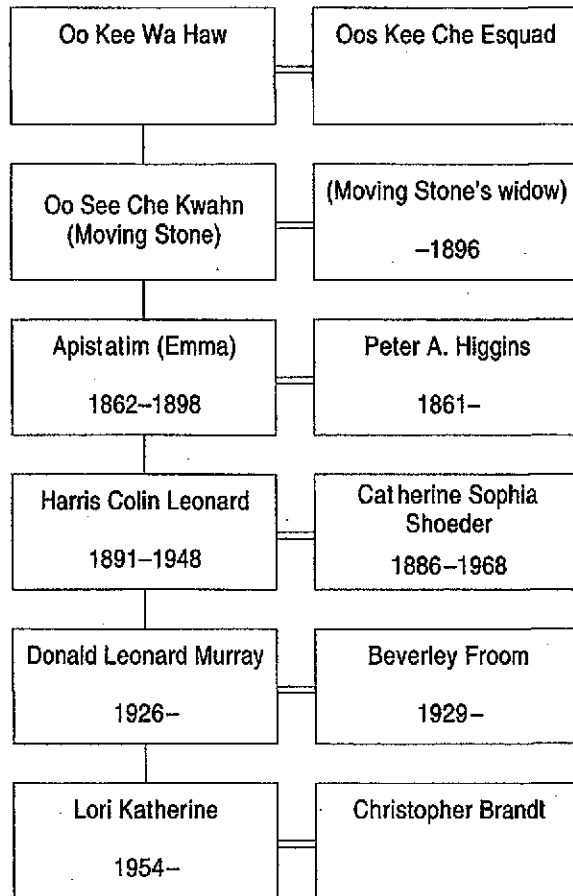
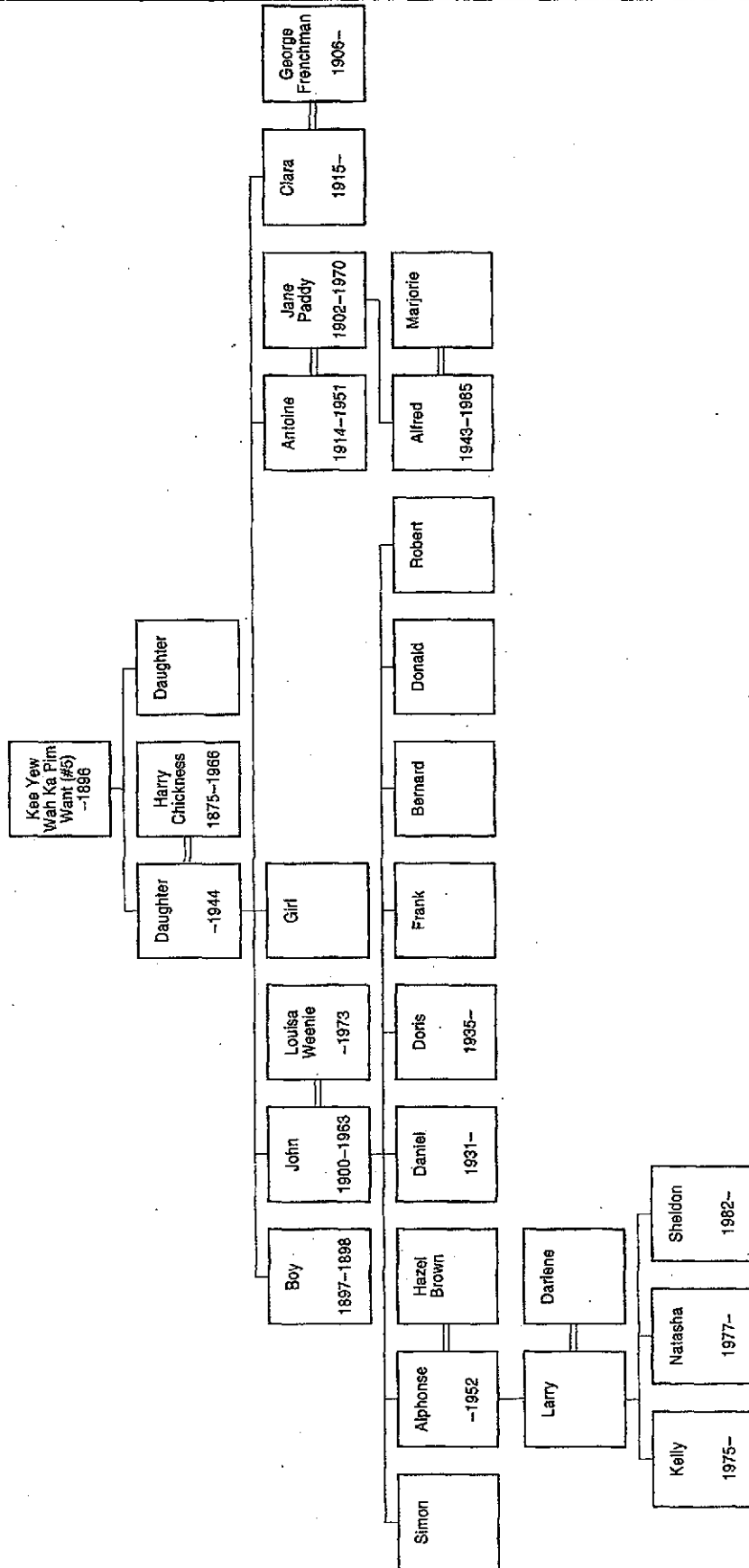


Figure 6
DESCENDANTS OF KEE YEW WAH KA PIM WANT #5 CHIPEWYAN BAND



APPENDIX D

C52749

OCT 13 1993

Mr. Harry S. LaForme
Chief Commissioner
Indian Claims Commission
1702 - 110 Yonge Street
Toronto, Ontario
M5C 1T4

Dear Mr. LaForme,

Thank you for your letter of August 16, 1993 and the Indian Claims Commission report entitled: "Primrose Lake Air Weapons Range".

As Minister of Indian Affairs and Northern Development, it is my pleasure to respond to your report on behalf of the Government of Canada.

I would like to make three observations on the federal government's proposed approach to recommendations made by the commission. Briefly, (1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair; and (3) I would expect to refer to the Joint First Nations/Government Working Group on Specific Claims, those recommendations where follow-up would require a change in the existing Specific Claims Policy. This is the approach of the Government of Canada.

.../2

As you note in your letter, in preparing the report, the commission reviewed over 6,600 pages of documents, 12 volumes of transcript, as well as other studies and reports over a 10-month period. The commission's report is now the subject of active study within the federal government. Given the importance of the case, I have asked that a formal reply to the report be made available for my review within the next two to three months.

I share the satisfaction you and your fellow commissioners must feel about the release of this important first report.

Yours sincerely,

Original signed by
PAULINE BROWES
A signé l'original

Pauline Browes

c.c. The Honourable Pierre Blais, P.C., M.P.
c.c. The Honourable Tom Siddon, P.C., M.P.
c.c. The Honourable Jean Corbeil, P.C., M.P.

APPENDIX E

NOV 22 1991

MIN. CHRONO
DM CHRONO
DM PENDING
SR. ADM CHRONO
SR. ADM PENDING
PA
SCB CHRONO
SCB PENDING
WESTLAND

Mr. Ovide Mercredi
National Chief
Assembly of First Nations
47 Clarence Street
Suite 300 - Atrium Building
OTTAWA, Ontario
K1N 9K1

Dear Chief Mercredi:

As you will know, I met on November 12, 1991 in Vancouver with Mr. LaForme and Chiefs Wendy Grant and Clarence Jules to discuss matters arising from meetings of the Chiefs Committee on Specific Claims in Winnipeg on November 6 and 7. It was unfortunate that you were unable to attend but, since the issues dealt with there were ones which you have raised in your correspondence with the Government of Canada, I am writing directly to you.

I want to deal with three issues: the wording of the Order-in-Council establishing the Specific Claims Commission and its terms of reference, the role of the Commission in fulfilling its mandate and in relation to the Order-in-Council, and, finally, future changes to the policy and the involvement of the Joint Working Group in those changes.

First, it is quite correct to say that the elaboration of policy criteria in the Order-in-Council does not use the exact wording set out in the policy booklet Outstanding Business. I have attached our comparison of the expressions set out in the two documents.

In our view the adjustments to the wording in the Order-in-Council served to reduce the Policy to precise terms of reference for the Commission. While I could elaborate here, my preference is to have you or your officers arrange to meet with officials from my department to discuss any

...2

particular concerns. I suggest that your office contact Mr. Rem Westland, Director General, Specific Claims Branch, to arrange a convenient time for such a discussion if that is your wish. I would add that these matters speak to the day-to-day operations of the Commission, and would therefore welcome its participation in a meeting of this sort.

The policy as set out in that Order-in-Council is essentially the pre-existing policy but with some important adjustments which were proposed following discussions with Chiefs. These changes included removal of the bar against pre-Confederation claims and creation of the Indian Specific Claims Commission. Significant additional funding was provided as part of the same change in policy but this does not properly belong as part of the Order-in-Council. Other important changes are likely in future, a subject to which I will return below.

With reference to the second issue, in fulfilling its mandate, I expect the Commission will examine cases referred to it and recommend whether a correct implementation of the current Specific Claims Policy would have led to the outcome proposed by the Specific Claims Branch officials. I have said previously and will say again that I expect to accept the Commission's recommendations within the Policy.

If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed. If the implementation of the Commission's recommendations would require a change to the existing Specific Claims Policy, I assume that the question would be referred to the Joint Working Group.

This leads directly to the third issue. It is not my expectation that the existing policy will be fully satisfactory and I am concerned that when we set out to further amend it, we do so on the basis of solid experience and full consultation.

My hope is that the Joint Working Group will now be the body which provides much of the advice to the Government of Canada on what further changes are required. I hope it will do so not just in the abstract, but also with regard to the particular examples of claims which cannot be dealt with under the Specific Claims Policy as it exists.

...3

INDIAN CLAIMS COMMISSION PROCEEDINGS

- 3 -

In concluding I want to be very clear that what the Joint Working Group might advise and conclude is entirely up to its members. I assure you that the government representatives will be there with an open mind about how the Specific Claims Policy could be improved upon, replaced, or supplemented. I want to stress, furthermore, that I believe the initiatives we have already launched have every potential to improve the implementation of the existing Specific Claims Policy without compromising in any way the objective of reviewing the policy so that it better meets the goals of Indian people and bands.

It is important, however, to get moving on all the new initiatives as soon as possible. I hope my comments in this letter will help to ease your concerns and those of some of the chiefs with whom you are consulting.

Yours sincerely,

Original signed by
Original signé par
TOM SIDDON

Tom Siddon, P.C., M.P.

GENERAL\WESTLAND\018\ma

ANNEX :

EXISTING SCB POLICY VALIDATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
1. The non-fulfilment of a treaty or agreement between Indians and the Crown;	1.1 non-fulfilment of a treaty or agreement between Indians and the Crown;
2. A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.	1.2 breach of an obligation arising from the Indian Act or in other statutes concerning Indians or the regulations thereunder;
3. A breach of an obligation arising out of government administration of Indian funds or other assets.	1.3 breach of an obligation arising from the Government of Canada administration of Indian funds or other assets;
4. An illegal disposition of Indian land.	1.4 illegal disposition of Indian land;
5. Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority;	1.5 failure to provide compensation for reserve lands taken or damaged by the Government of Canada or any of its agencies under authority ; and
6. 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.	1.6 fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the Government of Canada , in cases where the a fraud can be clearly demonstrated.

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
<p>1. As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles.</p>	<p>2.1 as a general rule, a claimant band shall be compensated for the losses it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations as a consequence of the breach by the federal government of its lawful obligations above, based on legal principles;</p>
<p>2. Where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case.</p>	<p>2.2 where a claimant band can establish that certain of its reserve lands were taken or damaged under legal authority to legal authority, but that no compensation was ever paid, the band shall be compensated by the payment of the value of these lands at the time of the taking or the amount of the damage done, whichever is the case;</p>

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
<p>3. (i) Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.</p>	<p>2.3 a) where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated where by the return of these lands or by payment of the current, unimproved value of the lands, and</p>
<p>3. (ii) Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.</p>	<p>b) compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. where in every case the loss shall be the net loss;</p>

EXISTING SCB POLICY COMPENSATION CRITERIA	ORDER-IN-COUNCIL P.C. 1991-1329
<p>8. In any settlement of specific native claims the government will take third party interests into account. As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed.</p>	<p>2.8 in any settlement of specific Indian claims the Government of Canada will take into account third party interests and as a general rule, the Government of Canada will not accept any settlement which will lead to third parties being dispossessed;</p>
<p>9. Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect to the same claim.</p>	<p>2.9 any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect of the same claim;</p>
<p>10. Where a claim is based on the failure of the Governor-in-Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current unimproved value of the land but on any damage that the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Governor-in-Council and by reason of such delay.</p>	<p>2.10 where a claim is based on the failure of the Governor in Council to approve a surrender or the taking of land under the Indian Act, compensation shall not be based on the current unimproved value of the land, but rather on any damage that the claimant might have suffered between the period of the said surrender or forcible taking and the approval of the Governor in Council and by reason of such delay;</p>

<p>EXISTING SCB POLICY COMPENSATION CRITERIA</p>	<p>ORDER-IN-COUNCIL P.C. 1991-1329</p>
<p>11. The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.</p>	<p>2.11 the criteria set out above are general in nature and the actual amount that compensation offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant, as for example, where there is a degree of doubt that lands are reserve lands, the degree of doubt will be reflected in the compensation offered;</p>

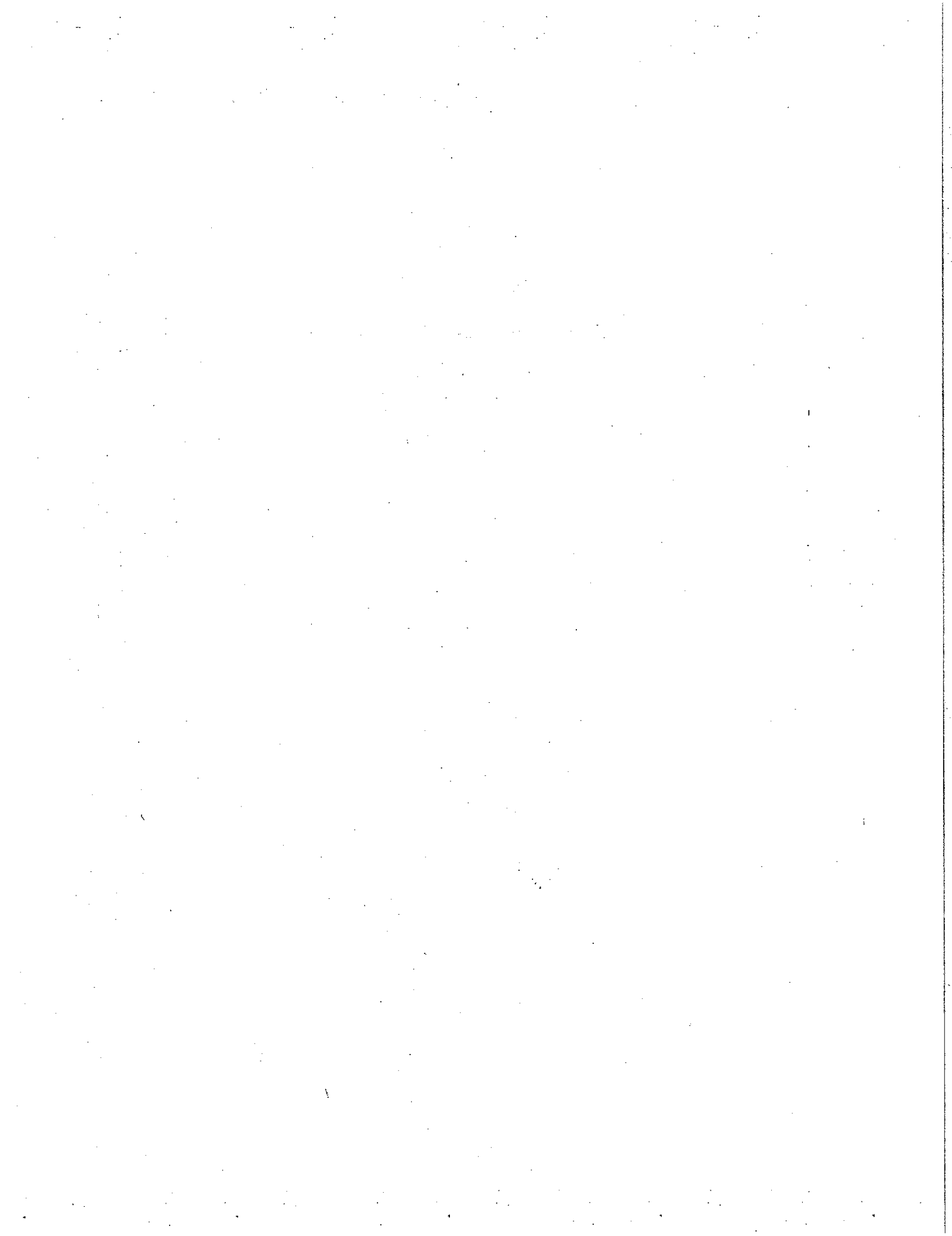
INDIAN CLAIMS COMMISSION

**Report on the Inquiry
into the Claim of the**

MICMACS OF GESGAPEGIAG FIRST NATION

To Horse Island

DECEMBER 1994



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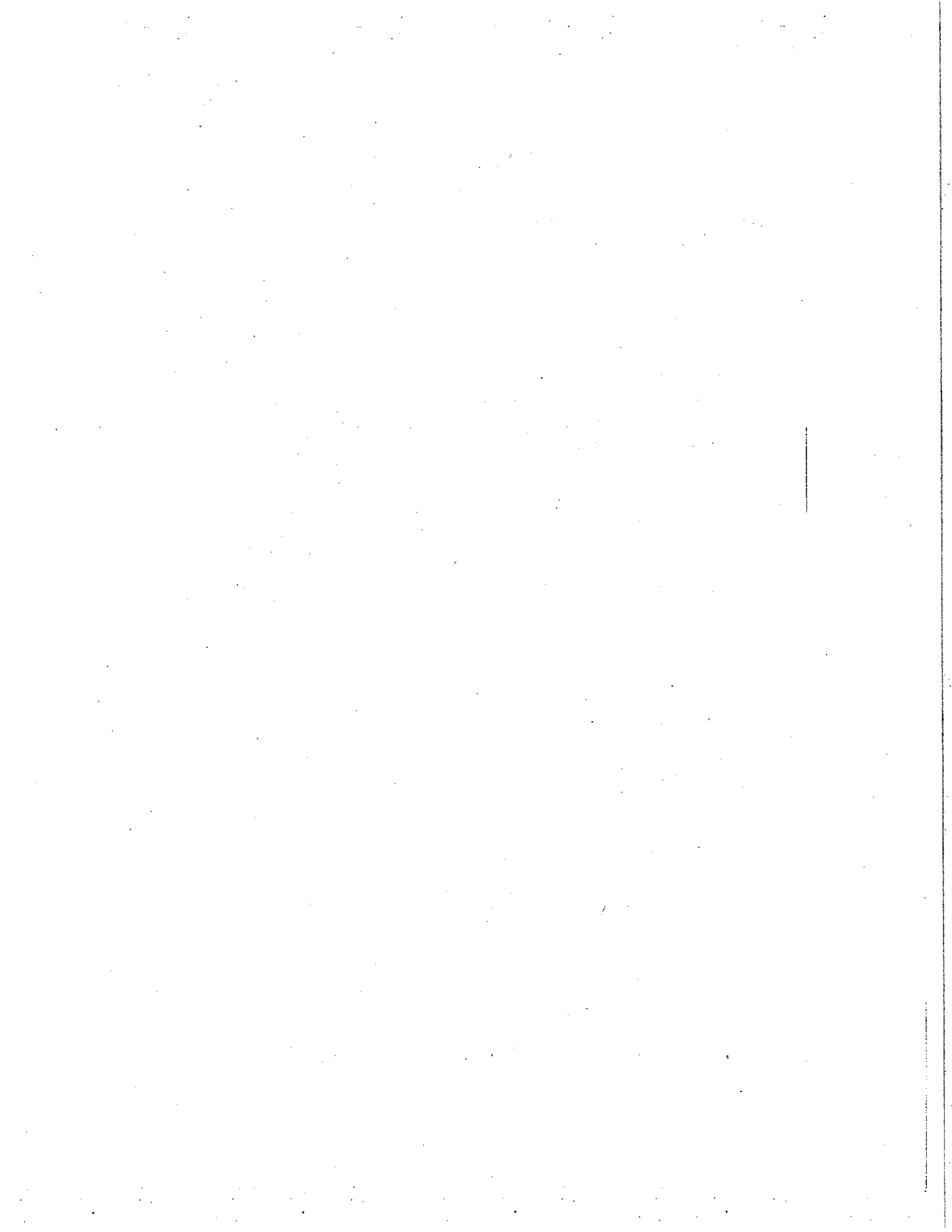
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THE COMMISSION MANDATE

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Claims Commission (ICC) was created as a joint initiative after years of discussion between First Nations and the Government of Canada about how the widely criticized process for dealing with Indian land claims in Canada might be improved. It was established by an Order in Council dated July 15, 1991, appointing Harry S. LaForme, former commissioner of the Indian Commission of Ontario, as Chief Commissioner, and became fully operative with the appointment of six Commissioners in July 1992.

Its mandate to conduct inquiries under the *Inquiries Act* is set out in a commission issued under the Great Seal of Canada, which states:

... 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 upon:

- (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 of the applicable criteria.

Thus, at the request of a First Nation, the ICC can conduct an inquiry into a rejected specific claim. (The government differentiates between "comprehensive" and "specific" claims. The former are claims where no treaty exists between Indians and the federal government. The latter are claims for breach of treaty obligations, or where a lawful obligation of Canada's has been otherwise unfulfilled, such as breach of an agreement or the *Indian Act*, and includes claims of fraud. This artificial distinction, which was apparently created for institutional convenience, has led to difficulties and has been modified to some extent.)

Although the Commission has no power to accept or force acceptance of a claim rejected by the government, it has the power to review the claim and the

reasons for its rejection thoroughly with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission sees fit to do so, it may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

The Commission's mandate is actually threefold. In addition to conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the Commission is authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement. The proceeding reported on here began as an inquiry, but it was the Commission's mediation function that led to its disposition.

PLANNING CONFERENCES

The Commissioners' terms of reference give them broad authority to choose how they proceed. They may "adopt such methods . . . as they may consider expedient for the conduct of the inquiry." In choosing procedures, they have adopted a policy of flexibility and informality, and have sought to have the parties involved as much as is practicable in planning the inquiries.

To this end, the planning conference was devised. It is a meeting convened by Commission staff as soon as possible after an inquiry begins. Representatives of the parties, who usually include legal counsel, meet informally with representatives of the Commission to review and discuss the claim, identify the issues it raises, and plan the Inquiry on a cooperative basis.

This procedure is typical of mediation, and planning conferences are thus a form of mediation. They have been welcomed by both claimants and the government. The Commission's experience to date is that they can be very fruitful. Misunderstandings can be cleared up. Failures of communication – frequently the cause of misunderstandings – can be rectified. The parties are given an opportunity, frequently for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly developing law.

The planning conference is sometimes an ongoing process. In some Inquiries there have been as many as four or five meetings. Even if they do not lead to a resolution of the claim and a further, sometimes lengthy, inquiry process is necessary, the conferences clarify issues to make that process more convenient,

expeditious, and effective. Planning conferences have led to the acceptance of a previously rejected claim; to the revelation that a claim thought to have been rejected had, in fact, been accepted; to the reopening of negotiations on a claim on which the government had closed its file; and to the reconsideration of a previously rejected claim.

THE CLAIM

A BRIEF HISTORY OF THE CLAIM

The Micmacs of Gesgapegiag* have claimed Horse Island, located close by their reserve, since non-Indians began settling the area. The modern history of the claim begins in 1986, and the Indian Claims Commission first became involved early in 1993. Because the government agreed to consider the claim on its merits as a result of the first planning conference, the Commission made no findings in this Inquiry. This summary is based on the statement of historical research filed by the claimant in the specific claims process (see Appendix A).

Horse Island lies at the mouth of the Cascapedia River, which flows south through Quebec's Gaspé Peninsula into the Baie des Chaleurs. For over two centuries, the Micmacs of Gesgapegiag have claimed it, without success, as their own. The 500-acre island is about three miles long and one-and-a-half miles wide and is located approximately one mile from the mouth of the river. Now covered with scrub, it was once heavily forested. Poplar, cedar, pine, and particularly maple, described as late as 1896 as a "magnificent maple sugar bush," grew there in apparent abundance.

The Band's claim to ownership is based on traditional usage: in the words of one of its many petitions to governmental officials and others, it is "our ancestral heritage." Ancestors of the present claimants lived around the Baie des Chaleurs before the arrival of Europeans. In the late 18th century, Indian claims were asserted to hunting and fishing rights on the Cascapedia River and to exclusive occupation of its banks. By at least 1784, Micmac families had begun to establish permanent settlements on the Cascapedia River. Over the years their numbers increased. (A census taken in 1825 showed that 112 Micmacs were living in Gesgapegiag Indian Reserve.)

From an early date, these people began producing maple sugar on Horse Island, ultimately establishing as many as 14 camps for this purpose. The "juice of the maple" became an important source of income. In a petition sent on behalf

* Formerly known as the Maria Indian Band

of the Micmacs residing in Restigouche and Cascapedia to Governor General Lord Aylmer in 1834 to protest the cutting of "acres of maple trees" by whites on Horse and other islands, this industry and its importance were vividly described:

The annual harvest of the sugar maple on the said islands produces thousands of pounds of sugar which enables the said tribe to procure, each spring, articles essential for its plantations and other necessities; with the sale of this sugar to the whites who, in Restigouche, do not exploit this industry.

The petition went on to say that if the sugar industry was wiped out it "would force most of the families of the tribe to live [a] miserable existence a good part of the year."

This petition reflected an earlier letter, sent in 1833 by the missionary working at Maria and Gesgapegiag Mission, to the Archbishop of Quebec concerning the depredations to the industry caused by "strangers" cutting down trees. The island was also ideally situated for intercepting salmon and sea trout going up the river to spawn.

Apparently attracted by these resources, by the turn of the century an ever-increasing number of non-Indian settlers began to request title to land along the shores of the Baie des Chaleurs. Land title in the Gaspé was haphazard and confused, and in 1819 the government of Lower Canada created the Gaspé Land Commission with a mandate to regularize the system of land tenure and to ensure that settlers received clear title to the land. Claims in the Baie des Chaleurs area began to be filed in 1820. In that year, one Azariah Pritchard requested title to some 300 acres of the northern part of Horse Island, about half the island. Five years later, the Land Commission granted him title. Whether the Micmacs settled along the Cascapedia were aware of the Land Commission's activities is unknown. Given their numerous petitions and entreaties for confirmation of their entitlement by way of letters patent or a title deed, it is unlikely that they would have sat idly by and watched the loss of the lands they claimed. It is clear, however, that they gave no consent to grants to white settlers.

In 1830 the Micmacs of Gesgapegiag submitted the first of many petitions and entreaties to the Governor of Lower Canada and others asserting their right to ownership of Horse Island and requesting confirmation of it. Lord Aylmer's secretary responded to the first of these petitions on the Governor's behalf:

... I am desired to request that you will assure them that he would be sorry to deprive them of any advantage they have hitherto derived from the fisheries and juice of the maple on the Islands alluded to in their Petition.

You will also please inform them that his Lordship is not aware of the existence of any ground for their apprehension of their being deprived of these advantages, and that he will always be disposed to receive favourably any representation connected with their welfare...

In 1833 a second petition was submitted requesting a title deed to the islands in the Restigouche and Cascapedia Rivers. In the same year, Father Louis-Stanislas Malo, the missionary at the Maria mission, wrote a letter (to which we have already referred) to the Archbishop of Quebec requesting his intervention on the Micmacs' behalf:

If the limits of this letter permit, I again seek your solicitude to call upon his Excellency concerning certain islands on the Restigouche and Cascapedia rivers the exclusive use of which the present governor has granted to the savages in a letter which I have in hand; and which certain strangers have deteriorated by establishing themselves there and cutting maple trees; the sugar which the savages tap is the principal, and I dare say, the only resource they have each spring on which to survive and that can be used to procure something to plant . . .

In August 1834, a third petition was sent to Lord Aylmer on behalf of the Micmacs residing in Restigouche and Cascapedia. It requests a title deed in order to prevent any further destruction of the sugar maple on the island. It refers to the letter from Lord Aylmer's secretary, and again stresses the importance of the maple sugar industry for the Micmacs:

In the final analysis, the tribe does not wish to inconvenience your Excellency by requesting new privileges or favors, but request only a title deed which would put into effect Your wishes and orders expressed in the above mentioned letter . . .

In spite of these requests, affirmations, and protests, William McDonald, a crown lands agent, received orders in 1837 to sell the southern part of Horse Island at public auction. Father Malo, apparently unaware that the northern half had been sold, wrote another letter on behalf of the Micmacs, this time to the Commissioner of Crown Lands, John Davidson, urgently requesting him to intervene in the sale of the island. The call went unheeded and the land (comprising the southern half) was sold.

Again the Micmacs of Gesgapegiag petitioned. In 1846 they sent a vehement grievance over the sale of their ancestral lands to strangers to the Commissioner of Crown Lands, Denis-Benjamin Papineau, claiming they had never consented to the sale of the island. It affirms:

That we consider our rights and privileges to the said Island as derived from our forefathers in time immemorial, should be preferable to those who have come in latterly, intruding

upon our ancient inheritance; destroying our sugaries; and depriving us of maple juice which bounteous nature had bestowed upon us for our maintenance.

That your Petitioners who have been brought up in the wilderness, and cherished in the bosom of innocence, knew not how to take any precaution against those intruders at the time of the distributing of those lands; but depended principally upon our faithful guardian the Government, to defend our sacred rights, and protect us as British subjects, in the enjoyment of those privileges which nature had bestowed on us.

Papineau met with the Micmacs and reportedly expressed his anger that the island had been sold, but said that he could do nothing about it. The petition was, however, forwarded to the Governor General, whose response was as follows:

[he] regrets that the Island in question should have been sold, but he has not the power to cause a restitution, as it appears, upon enquiry that the sale has been regular and legal.

In the 50 years following this dismissal, non-Indian settlers continued to acquire grants for lots on Horse Island. Throughout that time, the Micmacs of Gesgapegiag maintained that they had been in possession and occupancy of Horse Island since time immemorial, and by virtue of the *Royal Proclamation of 1763*.

In 1896 the Reverend J. Gagné, missionary and agent working in Maria, sent a letter to Indian Affairs. It told the story of a settler who had been cutting down timber on Horse Island 40 years before and had been ordered to stop by the Chief at that time. According to the letter, a tattered patent was produced as proof of Micmac ownership of the land, and the man ceased his lumbering. This patent had been given to the constituency's Member of Parliament to be replaced. However, the new patent was never received and the old patent never returned.

No meaningful response was ever made to the Micmacs' repeated claims to exclusive use and occupation of Horse Island. The intrusion of settlers continued unabated, and the sugar industry was completely destroyed.

THE CLAIM IN THE SPECIFIC CLAIMS PROCESS

Although the claim was not actively pursued after the Governor's expression of regret, it was never abandoned. In April 1986 the Micmacs of Gesgapegiag submitted a claim to Specific Claims East/Central Branch of the Office of Native Claims, Department of Indian Affairs and Northern Development (DIAND), regarding Horse Island. The claim again asserted that the claimant First Nation continued to hold a legal interest in the island based on occupation and use of the land since time immemorial. Breach of the Crown's fiduciary obligation to the First Nation

was alleged on the grounds of the land grants and the eventual alienation of the entire island.

The Micmacs of Gesgapegiag therefore claimed for damages incurred as a result of the breach, for the loss of use and enjoyment of the island, and the loss of the substantial economic benefits derived from the maple sugar and fishing industries.

A year and a half after the claim was submitted, it was rejected as not falling within the specific claims policy which barred pre-Confederation claims. *Outstanding Business, A Native Claims Policy*, the pamphlet issued by DIAND in 1982 as Canada's official guide to specific claims policy, specified:

No claim shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor.

On its face, the claim arose before Confederation in 1867. In a letter dated October 7, 1988, to the then Chief of the Micmacs of Gesgapegiag, Douglas Martin, a representative of Specific Claims East/Central referred to the pre-Confederation bar and placed on the Band the onus of demonstrating that the federal government had assumed responsibility. The letter went on to say:

In our view, this responsibility has not been clearly established. Given the basic weakness of the claim I would suggest that your band council carefully review the report and documentation with your advisors, and decide whether you agree with me that the claim does not fit within the limits of the specific claims policy. If you agree that the claim is not one which can be dealt with under our policy, I recommend that we suspend the claim from any further consideration.

No explanation was given as to why the onus fell on the Band. Given that the government was probably in a better position than the Band to establish whether there had been an assumption of responsibility for the claim, laying it on the Band seems questionable. The result was, however, that the Micmacs of Gesgapegiag had reached a dead end. No further attempt to pursue the claim through the Specific Claims Process is recorded.

However, in April 1991, five years after the claim was originally submitted, Canada changed its specific claims policy by removing the pre-Confederation exclusion. In its pamphlet *Federal Policy for the Settlement of Native Claims* (published by DIAND in 1993), the government referred to the change, stating:

The 1982 guideline restricting acceptance for negotiation of pre-Confederation claims was revoked. . . . As with all other specific claims pre-Confederation claims must still demonstrate a lawful obligation of the government.

This change in policy led to some confusion. It appears that on January 13, 1993, Specific Claims East/Central advised Chief Martin that the federal government would be willing to consider the Horse Island claim once again. However, this was understood to be confined to the so-called fast-track procedure for claims having a value of less than \$500,000. On January 19, 1993, the Band turned to the Indian Claims Commission to request a review of the rejection of its claim.

On June 30, 1993, Harry S. LaForme, then Chief Commissioner of the Indian Claims Commission, informed the Gesgapegiag First Nation Chief and council that the ICC had agreed to conduct an Inquiry into the Horse Island claim. However, because of impending elections at Gesgapegiag, official agreement for the ICC to proceed was put on hold until a new Chief was elected.

The public announcement of the Commission's involvement apparently led to further discussions between Specific Claims East/Central's representatives and the Band. In July the former informed the Band that, if it wished the ICC to proceed with an Inquiry, the claim could not proceed in the Specific Claims Process. The letter informing them of this read: "When a claim is under review by the ICC, the Specific Claims East/Central Directorate will not pursue any aspect of the claim."

Faced with these alternatives, the Chief and council informed the Commission in early August that they wished the Inquiry to proceed. With the ICC's formal involvement in the claim reconfirmed, the next step was for the Commission to set up a planning conference.

THE COMMISSION'S INQUIRY INTO THE CLAIM

THE PLANNING CONFERENCE OF 23 SEPTEMBER 1993

A planning conference was held on September 23, 1993, at the Commission's Toronto office. Chief Bernard Jerome, Band administrator Clement Bernard, and the Band's legal adviser met with legal counsel representing Canada; Commission representatives conducted the meeting.

The major items for discussion were the basis for rejection of the claim and significance of the removal of the pre-Confederation bar. If the bar was the basis for the claim's rejection, did not the removal of the bar remove the government's objection? Was there still some impediment to the claim's being considered on its merits? If there was none, the claim could no longer be treated as a rejected claim and the Commission would have no mandate to proceed with it.

The discussion led to agreement that the claim could no longer be regarded as rejected and could now be considered on its merits. In a letter sent shortly thereafter to the Chief, the Specific Claims Directorate confirmed that it would "resume our review of the Horse Island claim through the specific claims process." The claim would not, however, go to the back of the line. Counsel for the Department of Justice had indicated at the planning conference that his review of the merits of the claim should take no more than four to six weeks after he had received all the relevant material.

THE RESULT

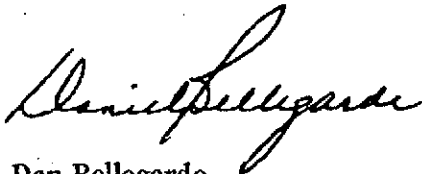
We observed earlier that the planning conference process provides an opportunity for clearing up misunderstandings and rectifying failures of communication between a claimant band and the government in the Specific Claims Process. This case is an example. One hundred and sixty-three years after the first petition to the Governor, and after eight fruitless petitions and entreaties between 1830 and 1896 and an apparently failed attempt by way of the Specific Claims Process, the claim of the Micmacs of Gesgapegiag was finally going to be considered on its merits.

RECOMMENDATION

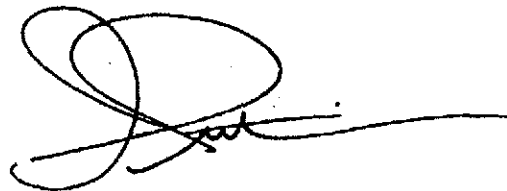
The confusion over the lifting of the pre-Confederation bar might have been avoided had communications between the First Nation and DIAND been better. We understand that, after the bar was lifted, DIAND referred claims that had been rejected because of the bar back to the Department of Justice for reconsideration. Yet, rejected claimants were not notified of this change.

In order to avoid the confusion which occurred here, we recommend that the Department of Indian Affairs and Northern Development write to all those whose claims were rejected because of the pre-Confederation bar informing them that, if they wish their claim reconsidered, they should notify the department.

FOR THE INDIAN CLAIMS COMMISSION



Dan Bellegarde
Commissioner



James Prentice, QC
Commissioner

December 1994

INDIAN CLAIMS COMMISSION PROCEEDINGS

APPENDIX A

HORSE ISLAND CLAIM

HISTORICAL AND LEGAL ANALYSIS

Presented to the Maria Band Council by
Fred Isaac and Rita Dagenais
March 1986

INTRODUCTION*

The Horse Island claim relates to an Island situated approximately a mile and a half from the mouth of the Grand Cascapedia River in the county of Bonaventure. Its official name today is Horse Island, although the Micmacs of the region have historically referred to it as Long Island or Dale Island. The Island's acreage is approximately 500 acres.

Historical literature reveals that the Micmac Indians on the North Shore of the Baie des Chaleurs occupied and used the Island for maple sugar production. They had constructed fourteen sugar camps on the island; the annual harvest produced thousands of pounds of maple sugar that was sold commercially. This industry enabled the Indians to procure agricultural supplies and other necessities of life.

The dispute over the ownership of Horse Island began with its settlement by non-Indians in the late eighteenth century. In 1825, approximately 300 acres on the north portion of the Island was adjudicated to Azariah Pritchard by the Gaspé Land Commission. The southern portion remained Crown lands until 1837 when it was sold to non-Indians by the Commissioner of Crown Lands. For a period of over one hundred years, the Micmacs claimed exclusive use and enjoyment of Horse Island. They systematically petitioned various Crown representatives, protesting against the encroachment by the whites. Despite the assurances from

* This research paper was prepared for the Micmacs of Gesgapegiag, Maria Indian Reserve, by Fred Isaac and Rita Dagenais in March 1986. The historical section of the paper is reproduced here by permission of the Band; the legal analysis is not included.

the Governor General that the Indians would not be deprived of their rights on the island, the intrusion by local settlers continued unabated and eventually the sugar industry was completely destroyed.

It is abundantly clear from the archival documentation that the Micmacs never consented to the granting of land on the Island nor to its eventual sale. On the contrary, they vehemently protested these transactions over a very long period of time. Although the Micmacs were able to generate some sympathy from government officials, no meaningful action was ever taken. Instead, the convergence of interest between the government and the prominent local settlers conspired to entrench a status quo which, still today, cries out for redress.

HISTORICAL ANALYSIS

Following the British conquest of New France in 1760, the British established a clear policy of recognizing and affirming the traditional land rights of the Indian people. The first document implementing this policy is the Articles of Capitulation which were drawn up in 1760 by Governor Vaudreuil at Montreal and, for the most part, acceded to by the British commander in North America, General Jeffrey Amherst. Article XL reads, in part:

The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chose to remain there, they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaries.

This document clearly applied to the then-existing colony of Quebec and confirmed the Indians's right to possess their lands. There is some controversy among historians and legal experts as to whether this article actually determined "territorial rights" of the Indians or simply assured them the right to remain unmolested upon their lands. It is clear, however, that this document assured the Indians they would not be disturbed in the occupation and use of their lands.

The second and most important document is the Royal Proclamation of 1763. This constitutional document established the government for the territories acquired from France following the Treaty of Paris. It also defined the new British policy in respect to Indians and their lands. The Indian policy was new in the sense that it dealt with newly acquired territories and in that it contained more definite provisions than had previously characterized British policy on Indian affairs. Otherwise, the provisions of the Royal Proclamation relative to Indians are essentially a mere continuation of the policies which the British had established in the 1750s in the New England colonies.

The Royal Proclamation recognized the rights to Indians throughout British North America to unceded lands in their possession. The basic design of the Proclamation was to create a large area of land "reserved" to the Indians as their hunting grounds and to prohibit all private purchases of Indian lands in this territory. This "Indian Territory" was established outside the borders of the colonies of Quebec, East and West Florida, and the territory of the Hudson's Bay Company.

Within the colonies, the basic causes of friction with the Indians were the frequent instances of fraudulent purchases of Indian lands by whites. In response to this, the Proclamation established a detailed procedure for the purchase of Indian lands lying within the colonies. The Royal Proclamation allowed for the purchase of Indian lands within the limits of a colonial government, but the sale could only be initiated by the governor, acting for the purchaser, and at a public meeting of the Indians called for that purpose. Paragraph 4(a) of Part IV states:

And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities in the future, and to the End that the Indians may be convinced of Our Justice, and determined resolution to remove all reasonable Cause of Discontent,

We do . . . strictly enjoin and require, that *no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians*, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, *any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively*, within which they shall lie . . . [Our emphasis]

This clause prohibited the direct purchase of Indian lands by private interests; the land had to be first ceded by the Indians to the Crown for the purpose of sale. The informed consent of the Indian tribe had to be obtained before any lands were sold. Horse Island, lying within the boundaries of the colony of Quebec, was undoubtedly subject to the protection of this provision.

This policy of protecting Indian lands within the colony of Quebec is further reflected in the instructions sent to the governors of Quebec by the Lords of Trade (Executive Council of the British Parliament). The first set of Instructions sent to Governor Murray in 1763 specified:

61. And you are to inform yourself with the greatest Exactness of the Number, Nature and Disposition of the several Bodies or Tribes of Indians, of the manner of their Lives, and the Rules and Constitutions, by which they are governed or regulated. *And You are upon no*

Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess; but to use the best means You can for conciliating their Affections, and uniting them to Our Government, reporting to Us, by Our Commissioners for Trade and Plantations, whatever Information you can collect with respect to these People, and the whole of your Proceedings with them.

Whereas We have, by Our Proclamation dated the seventh day of October in the Third Year of Our Reign, *strictly forbid*, on the pain of Our Displeasure, *all Our Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations of Indians*, with whom We are connected, and who live under our Protection, *without Our especial Leave for that Purpose first obtained*; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the Indians as depend upon your Government be carried on in the Manner and under the Regulations prescribed in Our said Proclamation. [Our emphasis]

The Instructions sent to Governor Carleton in 1775 reiterated the importance of following the procedures set out in the Royal Proclamation relating to the alienation of Indian lands:

41. That no private person, Society, Corporation or Colony be capable of acquiring any Property in Lands belonging to the Indians, either by purchase of, or Grant, or Conveyance from the said Indians, excepting only where the lands lye within the limits of any Colony, the soil of which has been vested in proprietors, or Corporations by Grants from the Crown; in which Cases such Proprietaries or Corporations only shall be capable of acquiring such property by purchase or Grant from the Indians.

43. *That no purchases of Lands belonging to the Indians, whether in the Name and for the Use of the Crown, or in the Name and for the Use of the proprietaries of Colonies be made but at some general Meeting, at which the principal Chiefs of each Tribe, claiming a property in such Lands, are present . . .*

The 1760 Articles of Capitulation, the Royal Proclamation of 1763, and the instructions to the Quebec governors in 1763 and 1775 clearly reaffirm the inherent land rights of the Indian people in Quebec. We will examine how these land rights apply to the particular case of Horse Island.

In pre-contact times, the Micmacs of Restigouche occupied a large territory on the south and north shores of Baie des Chaleurs in the provinces of Quebec and New Brunswick, from Gaspé Bay to River Miramichi. The principal summer encampments of the Restigouche band were on the south shore of the Restigouche River, in New Brunswick, and it remained so until the mid-eighteenth century. The Gaspé Peninsula was used by the band as hunting and fishing grounds.

In 1765, the extent of the territory claimed by the Restigouche Indians was described as follows by Chief Joseph Claude: "all the rivers which are on the north

shore of this river belong to the said savages of Ristigouche as well as those on the south shore in Miramichy and on the north shore of Baie des Chaleurs from the Ristigouche to Cascapediaque which they have customarily inhabited."¹

By 1784, 4 or 5 Indian families were settled on the Cascapedia River, one family claiming the sole right of fishing in that river.² In 1811, more families left the Ristigouche area to establish themselves at Cascapedia.³ According to an 1825 census, 112 Micmacs were residing on the Cascapedia River at that time.⁴

In a petition dated June 27, 1780, three Micmac Chiefs from Restigouche (Ganon, Ainagnich and Condo) claimed exclusive hunting and fishing rights on the Restigouche and Cascapedia Rivers as well as exclusive enjoyment of the lands situated along these rivers. This petition, addressed to Lieutenant Governor Cox, states:

Whereas it was His Excellency pleasure the Governor in Quebec to grant us the lands and River of Restigouche as our property for us and our children forever . . . Therefore we desire your Excellency would debar these inhabitant from hunting or fishing in the River Restigouche, Novele, Caskepeja and Pagemkihe. Not to build houses on either of these rivers without liberty granted by us . . .⁵

In May of 1786, Lt. Governor Hope instructed Deputy Surveyor General John Collins to proceed with the survey of the Baie des Chaleurs area. The survey of the great Cascapedia River was ordered in response to a request for 1000 acres of land on the river by Robin, Pipen, and Co. Hope's instructions clearly stipulate that granting of this quantity of land should not in any way interfere with the prior rights of the Acadians or Indians.⁶

In order to regularize land tenure in the Gaspé District, the government of Lower Canada instituted the Gaspé Land Commission in 1819. This board, comprised of local citizens appointed as commissioners, was mandated to receive and adjudicate all land claims in the area. The legislation authorizing the Commission was adopted in 1819 and the claims in the Baie des Chaleurs area were filed beginning in 1820. In the preamble of the statute it is stated that the law is passed

¹ Census of the Government of Montreal and Three Rivers, in *Report of the Archivist of the Province of Quebec, 1936-1937*, 116. Our translation.

² Lieut. Gov. Nicholas Cox to Gov. Haldimand, August 16, 1784, National Archives of Canada [hereinafter NA], MG 21, Add. Mss. 21,862, A773, B202.

³ Mgr J.-O. Plessis, Journal of the apostolic voyages . . . in 1811 and 1812, *Revue d'histoire de la Gaspésie* VI, no. 1, 41.

⁴ Census Return, September 30, 1825, NA, Census C-718, pp. 2254-55.

⁵ Petition from three Chiefs of Restigouche to Lieut. Governor Cox, June 27, 1780, NA, MG 21, Add. Mss. 21,877, A777, B217.

⁶ Instructions from Lt. Governor Hope to John Collins, Deputy Surveyor General, May 31, 1786, NA, RG 10, vol. 329, pp. 636-40, *Third Report of the Bureau of Archives for the Province of Ontario*, 1905, 373-74.

“ . . . with a view to secure the Inhabitants of the said District, in the possession and enjoyment of their lands which in the most instance have, from a wilderness been cleared and improved to an advanced state of Agriculture, and whereas it is expedient to secure such persons in the possession and enjoyment of their lands in the said Inferior District of Gaspé as have in good faith cleared and improved the same.”

The purpose of the Commission was to regularize the haphazard system of land tenure in the Gaspé Peninsula and to ensure that the settlers received clear title to the land. Up until this time, land was acquired in a number of ways: location tickets and grants, lots accorded to participants in government-sponsored settlement efforts and, most contentiously, by simple squatting.

This latter process was a very common means of establishing claims to land during this period. All categories of land claimants were obliged to present their claims to the Gaspé Land Commission: the Micmacs were therefore forced to claim lands on their traditional territory alongside all the other settlers in the area.

On July 29, 1820, a retired military officer residing in New Richmond, Azariah Pritchard, formally laid claim to certain lands on Horse Island:

Claim by Azarish Pritchard senior and Azarish Pritchard Junior of New Richmond, for the following lots of land that is to say . . . also an Island commonly called Horse Island in the Great River Cascapedia at about half League from the mouth of the said river claimed by the Said Azariah Pritchard Senior. Opposition by Denis Kafurgy of the Township of Hamilton for five lots of land on Horse Island above mentioned consisting of fifty acres each lots commencing at the south extremity and running from thence Northward, the opposant having as he alleges cleared and made great improvement thereupon.⁷

There is no documented evidence to indicate that the Micmacs residing at Cascapedia filed a claim for Horse Island before the Commission, nor that they opposed the claim submitted by Pritchard. Only one opposition was presented to the commissioners by a Dennis Kafurgy who claimed five lots on the southern part of the Island. This claim was not retained by the Commission.⁸

The decision of the Gaspé Land Commission was rendered on March 21, 1825. Pritchard was granted approximately 300 acres on the northern part of Horse

⁷ Gaspé Land Commission - Claim by Azariah Pritchard, Sr, July 29, 1820, NA, RG 1, L7, p. 26.

⁸ Gaspé Land Commission adjudication to Azariah Pritchard Sr, March 21, 1825, NA, RG 1, L7.

Island, comprising lots A to E. This land grant comprised more than half the total territory of the Island. The southern part of Horse Island remained Crown lands.

The Minutes of the adjudication hearing read as follows:

The several lots of land above mentioned and described are claimed by the said Azarish Pritchard, Esquire, and Azariah Pritchard Junior, having been duly published in the Canada Gazette . . . the Commissioners . . . having received satisfactory proof of the possession, occupation, and right of the said Azariah Pritchard, to the said several lots so by him claimed (those for which opposition have been ruled always excepted) Do accordingly adjudge and declare the claim . . . to be good and valid . . . And with respect to the said lots for which opposition have been fyled none of the parties having used due diligence to bring the same to a hearing, the Commissioners are unable to determine to whom the said lots should by right and in justice so pertain.⁹

The statute establishing the Gaspé Land Commission enabled persons aggrieved by the decisions of the Commission to file an appeal. According to Section X, such persons must give notice of appeal within 12 calendar months following the decision and must produce a sum of money not exceeding thirty pounds.

It is uncertain whether the Micmacs settled on the Cascapedia were aware of the adjudication process or of the appeal mechanism. Official public announcement of the claims filed before the Commission was given by way of 3 published notices in the *Quebec Gazette*. Obviously, such information was not readily accessible to the Indians.

It is clear, however, that the Micmacs had not consented to the granting of parcels of Horse Island to white settlers. During the years following the adjudication by the Gaspé Land Commission, the Indians systematically petitioned the government for exclusive possession of the Islands on the Cascapedia.

One such petition for possession of the Islands on the Restigouche and Cascapedia Rivers was sent to Lord Aylmer in 1830. The exact date of the petition is not known as the petition itself has not been located. It is referred to, however, in a letter from Lord Aylmer to the Micmacs dated November 20, 1830. This letter was drafted by J.B. Glegg, Secretary to Lord Aylmer, and addressed to M. Thibaudeau,

⁹ Ibid.

Member of Parliament for Bonaventure county. The important extract of this letter is reproduced below:

1830 Nov. 20 Response from Lord Aylmer to Micmacs petition re. possession of Islands on the Restigouche and Cascapedia Rivers.

Castle St. Louis, Quebec,
20 November 1830

Sir:

I am commanded by his Excellency lord Aylmer to acknowledge the Receipt of the memorial delivered by you into my hands from the Micmacks Indians inhabiting lands in this neighbourhood of Restigouche and New Richmond, and I am desired to request *you will assure them that he would be sorry to deprive them of any advantage they have hitherto derived from the fisheries and juice of the maple on the Islands alluded to in their Petition.*

You will also please to inform them that his lordship is not aware of the existence of any ground for their apprehension of their being deprived of these advantages, and that he will be always disposed to receive any representation connected with their welfare which they may conceive it necessary to address to him.¹⁰ [Our emphasis]

One year later, on November 24, 1831, the Secretary to Lord Aylmer wrote to John Davidson, the Deputy Surveyor General for the Province of Quebec. This letter was in reference to "an enclosed petition of some Micmac Indians, praying for Letters Patent for certain Lands in their possession." The particular tribe is not named, nor are the lands in question specified. The Governor inquires as to the cause of the delay in forwarding this patent and wishes to be informed of any reason why the Indians should *not* be granted the patent. (Our emphasis.)¹¹

It is reasonable to assume that Lord Aylmer was referring to the petition sent to him in 1830 by the Micmacs regarding the Islands on the Restigouche and the Cascapedia Rivers. The tone of this letter certainly suggests that the Governor was in favour of granting the letters patent to the Micmacs in question.

There appears to be some confusion as to if and when this patent was ever granted to the Micmacs. Three years later, the Micmacs sent another petition to Lord Aylmer, requesting a title deed to the islands situated in the Restigouche

¹⁰ Response from Lord Aylmer to Micmacs' petition, November 20, 1830, Archives de l'évêché de Gaspé, Tiroir no. 65, Restigouche. A copy of this document was sent with a letter of Louis-Stanislas Malo, February 9, 1837, Québec, Ministère de l'Énergie et des Ressources, dossier 24866/16.

¹¹ Craig to Deputy Surveyor General, November 24, 1831, Archives nationales du Québec (hereinafter ANQ), John Davidson papers, E21, 359, IB12-4303B.

and Cascapedia Rivers.¹² Some sixty years later, archival documents indicate that the Micmacs were, indeed, in possession of a patent to Horse Island.¹³

On December 2, 1833, the missionary working at the Maria mission, Father Malo, wrote to the Archbishop of Quebec, Bishop Signay, requesting his intervention in regards to the Micmac claims to the islands on the Restigouche and Cascapedia rivers. Referring to a letter in his possession, Malo states that the governor had granted exclusive use of these islands to the Indians. In all probability, he is referring to the letter written by Lord Aylmer on November 20, 1830. Malo's letter is particularly informative as it refers to the importance of the maple sugar industry to the Micmac Indians. This letter states in part:

If the limits of this letter permits, I again seek your solicitude to call upon his Excellency concerning certain islands on the Ristigouche and Cascapedia rivers to which the present governor has granted exclusive use to the savages in a letter which I have in hand; and which certain strangers have deteriorated by establishing themselves there and cutting maple trees; the sugar which the savages tap is the principal, and I dare say, the only resource they have each spring on which to survive and procure something to plant . . .¹⁴

On August 3, 1834, a joint petition was sent to Lord Aylmer from the Micmacs residing in Restigouche and Cascapedia. This petition goes into further detail about the economic benefits derived from the maple sugar industry and once again makes reference to the fact that Lord Aylmer had granted them exclusive possession of the islands on the two rivers. In this petition, Horse Island is referred to as Dale Island. In order to prevent further destruction of the sugar maple on the Island, the Indians request a title deed be granted to them. The petition is reproduced below:

That from time immemorial the said tribe possessed in the Restigouche River, certain islands whose plans are presently in the possession of Joseph Hamel, surveyor, who prepared the survey last November, and in the Cascapedia, *an island commonly known as Dale Island to which Your Excellency has confirmed exclusive enjoyment to the said tribe, in a letter a copy of which is enclosed here-in.* [Our emphasis]

The annual harvest of the sugar maple on the said islands produces thousands of pounds of sugar which enables the said tribe to procure, each spring, articles essential for its plantations and other necessities; with the sale of this sugar to the whites who, in Restigouche,

¹² Petition to Lord Aylmer from the Micmac tribe established at Restigouche and Cascapedia, August 3, 1834, NA, RG 10, vol. 88, pp. 35433-35.

¹³ Rev. J. Gagné, priest and agent at Maria, to Reed, Deputy Supt. General of Indian Affairs, April 16, 1896, NA, RG 10, vol. 2844, file 173,288, part O, C-11285.

¹⁴ Louis-Stanislas Malo to Bishop Signay, December 2, 1833, Archives de l'archidiocèse de Gaspé, Tiroir no. 65, Ristigouche. Our translation.

do not exploit this industry. That the said islands, because of the spring waters which partially submerge them – at times totally – are of little value to the whites, apart from pastures which are plentiful on the shores of the Restigouche River.

That in contravention of the wishes and orders of Your Excellency, who does not wish to see the Indians of the said tribe disturbed in the enjoyment of the sugar maple, have dared to cut acres of maple trees and have refused to stop their enterprise, thereby threatening to destroy the sugar industry whose loss . . . would force most of the families of the tribe to live miserable existence a good part of the year, which would certainly be contrary of the good intentions always shown by Your Excellency to the said tribe.

In the final analysis, the tribe does not wish to inconvenience Your Excellency by requesting new privileges or favors, but request only a title deed which would put into effect Your wishes and orders expressed in the above-mentioned letter.

Therefore, Your petitioners humbly request that Excellency grants to the tribe a lease or any other title judged appropriate to the said islands. . . .

Signed
 Francois Condo
 Louis Stanislas Malo Missionary
 (?) Jacquelin
 Joseph Labeauve
 Antoine Evebun
 Mathieu Caplan
 Etienne Dedum¹⁵

In 1837, an agent of Crown lands, William McDonald, received orders to sell Horse Island at a public auction. This information is provided in a letter dated February 9, 1837, and signed Father Malo. The letter was addressed to John Davidson, who, by this time, had been appointed Commissioner of Crown Lands. Father Malo urgently requested the Commissioner of Crown Lands to intervene before the island was sold. Malo was apparently unaware that only the southern part of the island, which had remained Crown land, was up for sale.

Obviously, this urgent call went unheeded, as the island was indeed sold and John Davidson was in all likelihood the person to have ordered the sale in the first place. Father Malo's letter refers to a letter from Lord Aylmer to the Micmacs, assuring them that the government had no intention of selling or granting any island in the province. This letter in its entirety is reproduced below:

This part of the micmac tribe established in Cascapedia, New Richmond, having learnt that William McDonald, your agent of Crown lands in the district of Gaspé intends to proceed immediately after his return from Quebec to the sale of an island known as Horse shoe

¹⁵ Petition to Lord Aylmer from the Micmac tribe established at Restigouche and Cascapedia, August 3, 1834, NA, RG 10, vol. 88, pp. 35433-35.

Island or Dale Island situated in the Grand Cascapedia river, has requested and authorised me as their missionary to represent their interests by writing you on his subject. Accordingly, I take the liberty to respond to this petition concerning this island as well as two other islands on the Restigouche River presented by the deceased Dolard Thibaudeau in November 1830 to Lord Aylmer which I have the honor of including the reference herein. I regret that I am not in possession of this petition and cannot send you a copy, thereby saving you the trouble of searching for it at the Castle.

... Based on the best information that I have been able to obtain, the said islands could only be useful to the said savages for use of their sugar maples (apart from the small amount of hay which we could produce); the overflow from the spring waters which submerges them each year, renders them uninhabitable. Furthermore, the surrounding lands which are soon to be sold, the said savages will not be able to obtain sugar maples elsewhere and will thereby be deprived of their principle resource which the government of her Majesty certainly does not have the intention of taking away from them. In response to a petition posterior to the one already referred to and requesting the granting of the said islands, his Excellency has stated to the said savages that the government of her Majesty wasn't in the least deposed to alienate, by fragmenting or granting any island in this province and will reserve for itself exclusive ownership; a fact which Mr. McDonald, your agent, is obviously not aware of. Sir, in the event that you judge appropriate to honor me with a response, please forgive me for requesting that you must send it to me as soon as possible; seeing that Mr. McDonald intends to sell the said island at the public auction as soon as he returns from Quebec.

(signed) Louis Stanislas Malo, priest¹⁶

In August of 1846, the Micmacs vehemently protested the sale of Horse Island in a petition addressed to the then Commissioner of Crown Lands, D.B. Papineau. This petition clearly indicates that the Indians had never consented to the sale of the Island; they were simply ignorant of the procedures to take to prevent the distribution of their lands to white settlers. The petition reads:

To the Honorable D.B. Papineau,
Commissioner of Crown Lands for Canada East:

The Humble petition of the undersigned Indians of New Richmond and Maria. Most respectfully therewith: That your petitioners consider themselves aggrieved by reasons of Long Island in the river Grand Cascapedia being taken from us partly and now parcelled out to persons whose principles are to traffic, on lands, to monopolize, if possible, the whole country into their own hands.

That we consider our rights and privileges to the said Island, as derived from our forefathers in time memorial, should be preferable to those who have come in latterly, intruding

¹⁶ Louis-Stanislas Malo, priest of Carleton, to John Davidson, Commissioner of Crown Lands, February 9, 1837, Québec, Ministère de l'Énergie et des Ressources, dossier 24866/16. Our translation.

upon our ancient inheritance; destroying our sugaries; and depriving us of the maple juice which bounteous nature had bestowed upon for our maintenance.

That your Petitioners who have been brought up in the wilderness, and cherished in the bosom of innocence, knew not how to take any precaution against those intruders at the time of the distributing of those lands; but depended principally upon our faithful guardian the Government, to defend our sacred rights, and protect us as British subjects, in the enjoyment of those privileges which nature had bestowed

That our petitioners earnestly beg their case to be taken into your serious consideration; and to restore us the said Island, now erroneously called Horse Island which we and our ancestors always held up fourteen sugar camps . . .¹⁷

On September 21, 1846, the Micmac chiefs of Restigouche met with Commissioner Papineau to discuss the sale of Long Island. At that meeting, Papineau stated that he was angry that the Island had been sold, but was unable to remedy the situation as the sale took place prior to his being named Commissioner of Crown Lands.¹⁸

Acting on the request of the Indians, Colonel D.C. Napier, Department of Indian Affairs, forwarded a copy of their August 1846 petition to the Office of the Governor General. The Governor General responded that he "regrets that the Island in question should have been sold, but he has not the power to cause a restitution, as it appears, upon enquiry that the sale has been regular and legal."¹⁹

This official response from the government did not appease the Micmac Indians, who continued to strongly protest the sale of Horse Island. Fifty years after the Governor General's statement, Father Gagne, a missionary and agent working in Maria, wrote to the Deputy Superintendent General of Indian Affairs on behalf of the Micmacs. This letter, dated April 16, 1896, indicates that the Micmacs were in possession of a "patent" to Long Island some 40 years previous. The exact nature of this instrument is not clear. It may have been, indeed, a letters patent, or perhaps a location ticket. We have been unsuccessful to date in locating this document. In any event, it appears that this "patent" was handed over to a Member of Parliament who promised to have it replaced by a new one. Father Gagne writes:

I have the honour to inform you of a matter of great importance to the Micmacs of my agency. The Chief, Louis Jerome, who is 57 years of age, tells me that formerly the Indians owned an Island in the Great Cascapedia called "Long Island." Then one day about 40 years ago a man named David Tozer set to work to cut down the timber on this island. He had already cut two acres when then chief Jean Baptiste Martin, accompanied by the present chief, at that time 17 years of age, went to find Tozer, who was still cutting, and they ordered him

¹⁷ Petition no.173, August 4, 1846, NA, RG 10, vol. 2844, file 173,288, C-11285.

¹⁸ E.N. de Lorimier to Colonel D.C. Napier, Indian Affairs, Montreal, September 21, 1846, NA, RG 10, vol. 2844, file 173,288, part O, C-11285.

¹⁹ Civil Secretary's Office to Lt. Colonel Napier, October 12, 1846, NA, RG 10, vol. 2844, file 173,288.

to cease working on the island, which was the property of the Indians. *Jean Baptiste Martin, in order to prove to Tozer that the Indians owned this island, showed the patent, and the latter abandoned his work. [Our emphasis.]*

At this patent was somewhat mutilated, it was shown one day to Mr. John Hamilton, of New Carlisle, then Member of Parliament. Mr. Hamilton, on seeing this old paper all torn, said to the chief Jean Baptiste Martin, "give me this old patent; I will send it to the Government so that a new patent may come back to you"; but this new patent was never received.

About seven years after he had been made to stop cutting and leave the island, Tozer came back to it, burned the timber and began to sow. The Indians, always timid and careless, did protest more. Then when it was seen that Tozer was not molested, other white men, attracted by the richness of the soil, came and made clearings there. This island is about 3½ miles long and measures a mile and a half at its greatest width. There are elm, poplar, cedar, pine, and maple trees growing on it. I am informed that there is some magnificent maple sugar bush there. This island, which is on three miles of the Reserve, is today of very great value on account of its prodigious fertility in hay and as it is crossed by the Baie des Chaleurs Railway, near a station and the factory of John Nadeau. If I had this island, it is very certain that I should not be willing to sell it for \$25,000.

As I believe that my chief Louis Jerome, has given me a true account of the facts (he says that he can swear to it) I pray that you will take this matter into your serious consideration and have enquiries made into the smallest detail in order to find out when and by whom this island was granted to the Micmacs of Maria; and if it should be discovered that my Indians are truly the owners of this island, that you will take all necessary means to put them again in possession of the rich domain that has been snatched from them.²⁰

The Deputy Superintendent simply replied that the Island had been sold by the Department of Crown Lands many years ago and referred to the Governor General's response of October 12, 1846. He also indicated that the government was not disposed to listening to their claims, since the present reserve of Maria constituted sufficient compensation for all their land claims:

I may add that the Micmac Indians of Restigouche have received their present Reserve in the Township of Mann and Maria in satisfaction of their claims to other lands and the Department regrets that it can at this late date, reopen the question as to their claims to further land.²¹

The government position that whatever impropriety had been involved in the sale of Horse Island had been fully compensated by the establishment of the Restigouche and Maria reserves is highly questionable. It must be remembered that, long before the sale of Horse Island, the Micmacs had claimed 530 acres of

²⁰ Rev. J. Gagne to H. Reed, Deputy Superintendent of Indian Affairs, Ottawa, April 16, 1896, NA, RG 10, vol. 2844, file 173,288, part O, C-11285.

²¹ Deputy Superintendent General of Indian Affairs, to Rev. J. Gagne, Maria, May 18, 1896, NA, RG 10, vol. 2844, file 173,288, part O, C-11285.

land at Indian Point on the Cascapedia River.²² This area was later to be designated as reserve land. It is obvious that this land was not granted in order to compensate the Indians for the loss of the Island.

The Restigouche Micmacs were granted 9,600 acres of reserve land pursuant to a statute passed in 1851 (14-15 Vict., c. 106). This law reflected a new general policy establishing Indian reserves throughout Lower Canada. It was, therefore, legislation of general application. The illegal sale of Horse Island cannot be "compensated" for by a simple addition of land under unrelated legislation of general application. In any event, the Micmacs would certainly have had to give their explicit consent to such an arrangement. As shall be discussed in Chapter II, the sale of the island constituted an illegal act which must be rectified on its own merits.²³

CONCLUSION

There are a number of important archival documents which have not as yet been located. These include the Micmac petition sent to Lord Aylmer in 1830, relating to the Islands on the Restigouche and Cascapedia Rivers. The land patent referred to by Father Gagne in 1896 would also be very useful. We have attempted to trace John Hamilton's correspondence in this matter, but were informed by the Quebec National Archives that most of the correspondence by Members of Parliament has been lost.

Based on the archival documentation available to us, several key conclusions can be rendered in regards to the Horse Island claim. First of all, there is no evidence whatsoever that the Micmacs, at any point in time, ever ceded their rights to the Island. This cession would have had to be made to the Crown at a special meeting of the Indians assembled for that purpose. This strict procedure was obligatory under the Royal Proclamation and the Royal Instructions given to the Governor of Quebec.

It is also abundantly clear that the Micmacs had never consented to the land grants accorded by the Gaspé Land Commission and to the eventual sale of the rest of the Island in 1837. All archival documents clearly indicate that the Indians were vehemently opposed to these transactions. For over a period of one hundred years, the Micmacs systematically petitioned officials of the Crown for the exclusive use and enjoyment of Horse Island. The persistence of the Micmac protests must be strongly emphasized.

²² Notes of Alex McNeil, surveyor, September 1, 1820, Archives de l'évêché de Gaspé, Tiroir no. 65, Ristigouche.

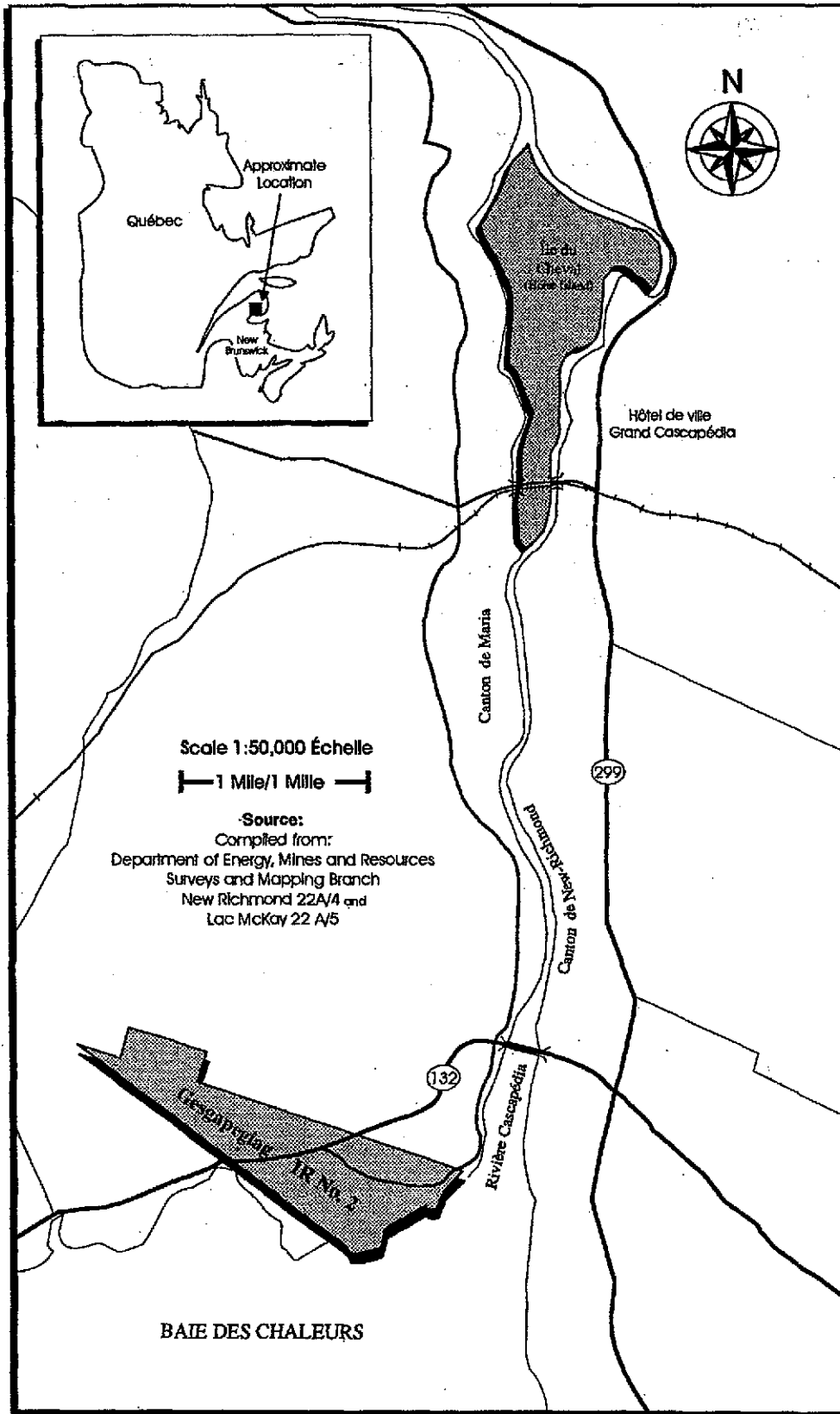
²³ Chapter II of this document included legal analysis, which is not reproduced in this appendix.

Another key element is Lord Aylmer's letter dated November 20, 1830, in which he assures the Indians they would not be deprived of their use of the maple trees on the Island. This letter is often referred to in later petitions and correspondence as granting exclusive use of the island to the Micmacs.

It is also clear that a number of government officials questioned the validity of the sale of Horse Island. When the Micmacs met with the Commissioner of Crown Lands, D.B. Papineau, in 1846 to discuss the matter, he stated that he was angry about the sale but could do nothing to remedy the situation. Lord Aylmer responded that he also regretted the sale of the Island but added that the sale had been "regular and legal." It is certainly possible that all standard procedures had been respected in regards to the actual sale, but this does not remedy the legal defect caused by the fact that the Indians had not consented to the sale.

It appears that the sale of the southern portion of Horse Island had been ordered by the Commissioner of Crown Lands, John Davidson. However, it is clear that he did not have the legal authority to do so, as the Micmacs had not ceded their rights to the Island. The transaction was therefore null and void, as was the granting of the lands to Azariah Pritchard by the Gaspé Land Commission in 1825.

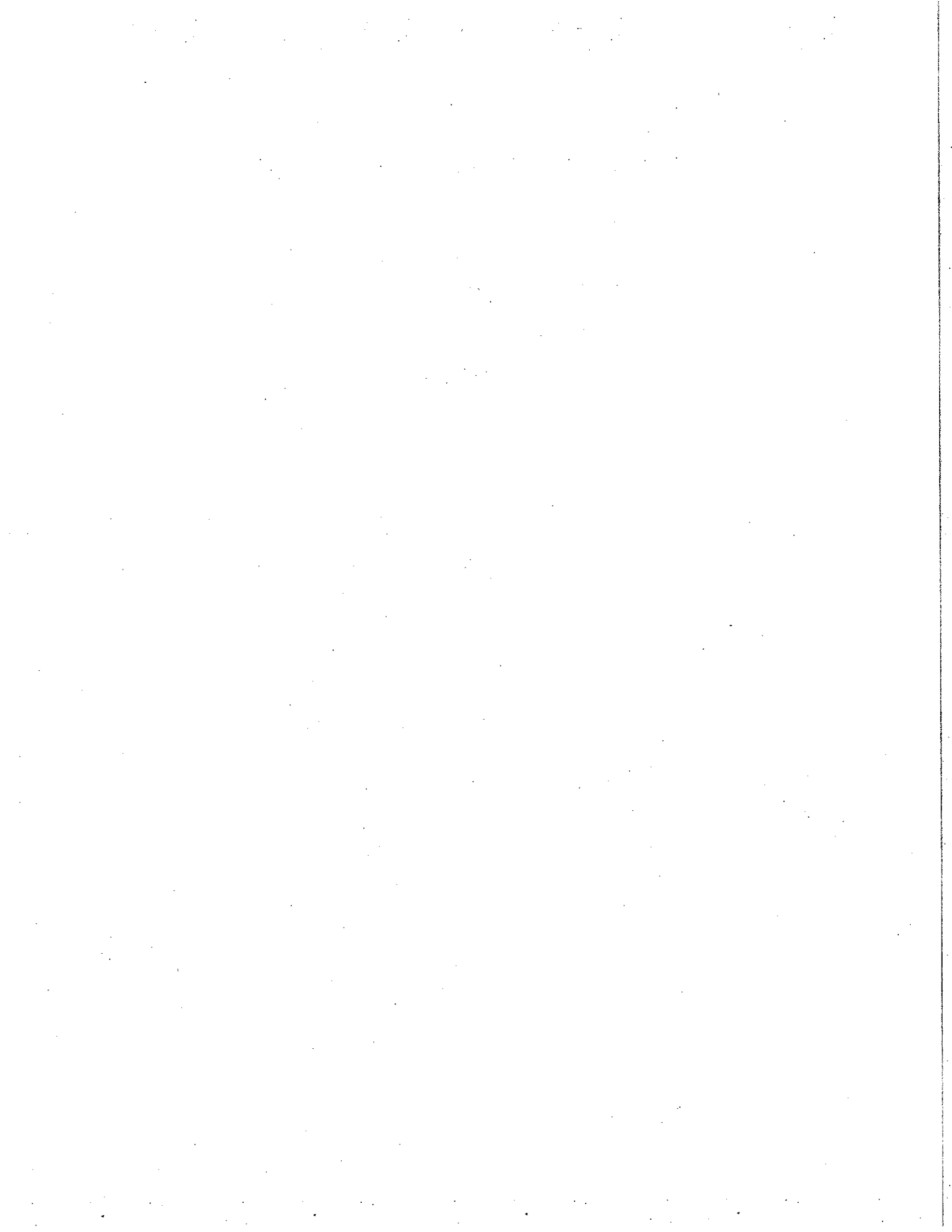
INDIAN CLAIMS COMMISSION PROCEEDINGS



INDIAN CLAIMS COMMISSION

**Report on the Inquiry
into the Claim of the
CHIPPEWAS OF THE THAMES
Muncey Land Claim**

DECEMBER 1994



PREAMBLE TO CHIPPEWAS OF THE THAMES "MUNCEY" REPORT, APRIL 20, 1995

Since 1974, the Chippewas of the Thames First Nation has pursued a resolution of the "Muncey Claim." Owing to its persistent efforts, a Proposed Settlement Agreement was negotiated with Canada and ratified by the First Nation's membership on January 28, 1995, ending the dispute over the 192 acres wrongfully alienated in 1831.

Throughout the years of negotiation between the Chippewas and Canada, many attempts had been made to resolve the dispute. In an open letter to the membership of the Chippewas of the Thames before the ratification, Chief Del Riley explained that "the primary reason why the land claim was rejected was that the previous Land Claim settlement offer[s] contained an absolute surrender clause which would surrender Treaty and Aboriginal rights within our reserve borders..." Negotiations broke down in 1991 over a stalemate on the surrender issue. The First Nation turned to the Indian Claims Commission (ICC) in 1992 in an attempt to revive discussions on the Muncey Claim. The ICC would come to play a pivotal role in facilitating the eventual resolution of this historical grievance.

Initially, the ICC's requests to attempt to have the dispute resolved through mediation were met with some opposition by Canada. The Commission's former Chief Commissioner, Harry LaForme, announced in November 1993 that it would conduct an inquiry since mediation no longer appeared viable. The Commission's inquiry process begins with an informal meeting of the parties, or planning conference, at which the most relevant aspects of the claim are discussed. These planning conferences are chaired by former Justice Robert F. Reid, the Commission's legal and mediation advisor.

Both the First Nation and Canada arrived at the first meeting not knowing what to expect. As discussions commenced, it became apparent that there was a mutual commitment to honesty and fairness. The relaxed atmosphere of the planning conference allowed for free-flowing discussion between the parties, and much was accomplished at this first meeting. By day's end, Canada had agreed to reconsider its position on the absolute surrender clause that had been the cause of so much frustration to the First Nation.

At a subsequent planning conference, the government announced that it would no longer require an absolute surrender as part of a negotiated settlement. This set the stage for the commencement of formal negotiations for a new Proposed Settlement Agreement. Both parties chose to have the Commission remain involved during this next stage. Ron Maurice, associate legal counsel for the ICC, was asked to provide his services to facilitate the negotiations.

The renewed spirit of cooperation continued in the negotiation meetings. In addition to dropping its request for the absolute surrender, Canada agreed to provide additional compensation in recognition of the time that had passed since its last offer in 1987. The federal government raised its offer from \$2.5 million to \$5.4 million. The agreement also enabled the First Nation to re-acquire those lands that had previously been alienated. The agreement provides the First Nation with up to ten years to purchase lands wrongfully alienated in 1831 and now in the possession of third parties and to have those lands returned to reserve status.

In addition to the Proposed Settlement Agreement, an unprecedented Land Claim Trust Agreement was negotiated, ensuring that the First Nation would manage the settlement moneys through its own appointed land claim trustees. These moneys could be invested for the benefit of the First Nation to assist in future economic development and to provide the necessary financial resources to purchase alienated land.

In his thoughtful and precise open letter to the community, Chief Del Riley stated his case for the acceptance of both the Settlement Agreement and the Land Claim Trust Agreement. He wrote, "I would encourage every band member of voting age to consider the positive things we can make happen in our community, if the referendum should pass." The Chief and Council arranged for three information sessions to ensure that the membership was provided with all the facts needed to make an informed decision.

The Proposed Settlement Agreement and the Land Claim Trust Agreement were overwhelmingly ratified by the membership on January 28, 1995. The final results of the Settlement Agreement vote were 226 for and 47 against, and the results of the Land Claim Trust Agreement vote were 198 for and 74 against. The Chippewas of the Thames' long quest for justice has finally been rewarded, and the Indian Claims Commission is pleased to have played a role in this success.

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INDIAN CLAIMS COMMISSION PROCEEDINGS

THE COMMISSION MANDATE

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Indian Claims Commission (ICC) was created as a joint initiative after years of discussion between First Nations and the Government of Canada about how the widely criticized process for dealing with Indian land claims in Canada might be improved. It was established by an Order in Council dated July 15, 1991, appointing Harry S. LaForme, former commissioner of the Indian Commission of Ontario, as Chief Commissioner, and became fully operative with the appointment of six Commissioners in July 1992.

Its mandate to conduct inquiries under the *Inquiries Act* is set out in a commission issued under the Great Seal of Canada, which states:

... 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 upon:

- (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 of the applicable criteria.

Thus, at the request of a First Nation, the ICC can conduct an inquiry into a rejected specific claim. (The government differentiates between "comprehensive" and "specific" claims. The former are claims where no treaty exists between Indians and the federal government. The latter are claims for breach of treaty obligations, or where a lawful obligation of Canada's has been otherwise unfulfilled, such as breach of an agreement or the *Indian Act*, and includes claims of fraud. This artificial distinction, which was apparently created for institutional convenience, has led to difficulties and has been modified to some extent.)

Although the Commission has no power to accept or force acceptance of a claim rejected by the government, it has the power to review the claim and the

reasons for its rejection thoroughly with the claimant and the government. The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission sees fit to do so, it may recommend to the Minister of Indian Affairs and Northern Development that a claim be accepted.

The Commission's mandate is actually threefold. In addition to conducting inquiries into rejected claims and into disputes over the application of compensation criteria, the Commission is authorized to provide mediation services at the request of the parties to a specific claim to assist them in reaching an agreement. The proceeding reported on here began as an inquiry, but it was the Commission's mediation function that led to its disposition.

PLANNING CONFERENCES

The Commissioners' terms of reference give them broad authority to choose how they proceed. They may "adopt such methods . . . as they may consider expedient for the conduct of the inquiry." In choosing procedures, they have adopted a policy of flexibility and informality, and have sought to have the parties involved as much as is practicable in planning the inquiries.

To this end, the planning conference was devised. It is a meeting convened by Commission staff as soon as possible after an inquiry begins. Representatives of the parties, who usually include legal counsel, meet informally with representatives of the Commission to review and discuss the claim, identify the issues it raises, and plan the inquiry on a cooperative basis.

This procedure is typical of mediation, and planning conferences are thus a form of mediation. They have been welcomed by both claimants and the government. The Commission's experience to date is that they can be very fruitful. Misunderstandings can be cleared up. Failures of communication — frequently the cause of misunderstandings — can be rectified. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly developing law.

The planning conference is sometimes an ongoing process. In some inquiries there have been as many as four or five meetings. Even if they do not lead to a resolution of the claim and a further, sometimes lengthy, inquiry process is necessary, the conferences clarify issues to make that process more convenient, expeditious, and effective. Planning conferences have led to the acceptance of a previously rejected claim; to the revelation that a claim thought to have been rejected had,

in fact, been accepted; to the reopening of negotiations on a claim on which the government had closed its file; and to the reconsideration of a previously rejected claim.

In this particular Inquiry, after the planning conferences took place, negotiations that had been broken off were reopened, and shortly after the parties reached agreement in principle.

THE CLAIM

A BRIEF HISTORY OF THE CLAIM

The modern history of the "Muncey" land claim begins in November 1974, when the Chippewas of the Thames Indian Band, located on Caradoc Reserve, wrote to the federal government asserting its claim to two lots of land in Caradoc Township, amounting to 192 acres, on which the village of Muncey is located. The claim goes back to 1831, when these lots were patented, despite agreements between the Band and the Crown in 1819 and 1820 in which the land was part of what was set aside for the Band. The Band's claim was rejected late in 1975 but, in a letter dated June 15, 1983, the Honourable John Munro, Minister for Indian Affairs and Northern Development, reversed the decision made eight years before and accepted the "Muncey" claim.

The long history of this claim is described in detail in the Historical Background, which was prepared by Kevin Thrasher, a member of the Commission's Research Group (see Appendix A).

Negotiations commenced shortly after Mr. Munro's letter was issued and continued until January 1987, when an Agreement in Principle was reached. That agreement did not, however, end the matter. As the Historical Background reveals, the proposed agreement was rejected in a referendum vote in January 1988. A second referendum was held in February; this time the ballot box was stolen. A third vote was held in April. Again, the agreement was rejected.

Then began a long struggle to have the negotiations reopened. In May 1988 Chief Ether Deleary, with the support of the Indian Commission of Ontario, proposed to William McKnight, then Minister of Indian Affairs, that negotiations be reopened. The Minister refused to reopen them on the ground that the government's offer had been "fair and reasonable."

The Band continued its efforts to have the negotiations reopened throughout 1988 with the support of the Indian Commission of Ontario and the Chiefs of Ontario. The Chief offered alternative proposals. All were rejected. The government closed the file.

The Band persisted. Ultimately, in early 1990, the government offered to reconsider its decision, but only if certain conditions, to be contained in a Band Council Resolution, were met. Negotiations on this proposal continued throughout 1990. A further Band Council Resolution was drawn up recommending acceptance of the government's offer, notwithstanding that it was unfair, as "the best result that can be achieved in the circumstances." This proposed settlement was eventually put to a referendum vote in June 1991, but was rejected.

The Band turned to the Indian Claims Commission for help, and discussions began in the spring of 1992 between Chief Delbert Riley and Chief Commissioner Harry S. LaForme (now the Honourable Mr. Justice LaForme of the Ontario Court of Justice). Mr. LaForme suggested mediation as the most effective way in which the Commission might assist the parties. The Band agreed. In November, Mr. LaForme wrote to the Deputy Minister for Indian Affairs and Northern Development, Mr. Dan Goodleaf, to propose it. In rejecting the proposal the following month, Mr. Goodleaf wrote: "I am advised that, with respect to the mandate of the Indian Specific Claims Commission, the process of mediation does not apply to a situation where best efforts have been made by the parties, where a settlement agreement has been concluded, and where final ratification of the proposed settlement agreement resulted in a rejection of the agreement by the membership."

This view was contrary to the Commission's understanding of its mediation function, which is wholly unqualified in the Commission's terms of reference. Mediation, in the Commission's view, is never more appropriate than when the parties have reached an impasse. However, without the consent of both parties, the Commission is unable to perform its mediation function. Although the Band desired mediation, and the Commission was willing to furnish it, the government's refusal prevented it.

The Band thereupon requested the Commission to embark on an inquiry. On November 9, 1993, Mr. LaForme informed the government that the Inquiry had commenced.

THE COMMISSION'S INQUIRY INTO THE CLAIM

THE PLANNING CONFERENCES, JANUARY-JUNE 1994

The first step to be taken was a planning conference. It was held in Toronto on January 7, 1994. Representatives of the parties, with their legal counsel, met in the Commission's offices in Toronto. Under the Commission's direction, discussion soon focused on the reason for the Band's repeated rejection of the proposed settlement. It became clear that, while the Band had expressed several grounds of objection in its request for an inquiry, the principal ground remained the government's demand for an unqualified surrender of all Indian title to or interest in the wrongly alienated lands.

The government's offer had included provision for repurchasing lands in the illegally alienated territory and setting them aside as reserve land for the Band. Band members had difficulty in understanding why they must surrender and abandon all interest in what they regarded as their land, particularly when the government proposed that the same lands be repurchased and set aside as reserve.

In the course of the discussion, Band representatives mentioned that the present owners of the alienated lands were willing to sell and make it available for the Band. This information appeared to have been unknown to the government. Commission representatives suggested that, in the light of this development, the demand for a surrender appeared unrealistic. Again they proposed mediation of the claim.

Government representatives agreed to consider the proposal, and the conference was adjourned for a month. A second planning conference, to explore the prospects for mediation, was held on February 18. At the outset, government counsel announced that the government had withdrawn its demand for an absolute surrender. Counsel went on to request that the Commission suspend the Inquiry to permit the parties to attempt to negotiate a settlement.

Chief Riley proposed that the Commission remain involved, given the difficulties of the past and the fact that, owing to the Commission's involvement, the major obstacle to acceptance of the claim had been removed. Other aspects of the government's compensation offer required discussion and resolution, which, in

Chief Riley's opinion, could better be accomplished with the Commission's continued involvement. The Commission offered, as part of its mediation function, to assist the parties in their compensation negotiations, but pointed out that the express consent of both parties was required. Government counsel undertook to seek instructions.

It was contemplated, however, that the parties would commence negotiations bilaterally and would call on the Commission only if they ran into difficulty. The parties therefore agreed to meet in late February or early March to begin negotiations. The possibility of the parties' being unable to reach agreement led to the scheduling of a further planning conference for March 22.

The parties were not only unable to reach agreement, but were unable to agree on dates for the proposed meeting. The third planning conference therefore went ahead in Toronto as scheduled. The parties' inability to arrange a meeting was addressed. The parties requested the Commission to remain involved. A further planning conference was scheduled for April 11.

Again, the parties were unable to meet, and the fourth planning conference therefore was held as scheduled. The Band had been concerned about the basis on which the government was prepared to negotiate settlement. At this conference, government counsel produced a letter, dated April 8, written to Chief Riley by Mr. John Sinclair, Assistant Deputy Minister, Claims and Indian Government, DIAND, confirming that "Government has reviewed the claim" and stating that "I am prepared to reopen the claim for settlement based on the following . . ." Mr. Sinclair's proposal for settlement was then set out in detail. It reflected the earlier agreement, proposed that it be updated in light of the passage of time, and concluded with the statement: "Canada has determined that a surrender will not be required for the settlement of this claim."

At the conclusion of the planning conference, the claimants' counsel asked Mr. Sinclair for some clarification of aspects of the proposal. Subject to this clarification, the claimants agreed the proposal formed a satisfactory basis for negotiations. It thus appeared that the parties were well on their way to settlement. Nevertheless, Chief Riley requested again that the Commission continue to participate in the settlement negotiations. The Commission agreed to monitor the negotiating sessions, which would now be necessary between the parties, and to perform a mediation function if a further impasse arose. After seeking specific instruction, government counsel shortly afterwards informed the Commission of its willingness to have the Commission continue as proposed. Mr. Ron Maurice, the Commission's associate counsel assigned to this Inquiry, was designated, with the parties' consent, to perform this function.

THE RESULT

Mr. Maurice acted as chair of the two intense negotiating sessions that followed. The parties met first at the Band offices in Muncey, Ontario, on June 7. The second session, held at the Commission's Toronto office on June 27, concluded with the signing of an Agreement in Principle.

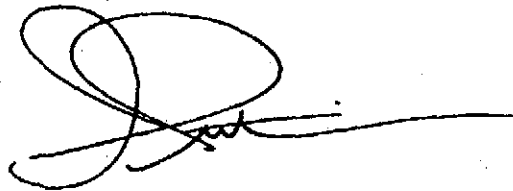
The role of the Commission had been to bring the parties together in an informal setting and to discuss the claim and its history in the Specific Claims Process. The aim was to get to the crux of the problem and settle it without the need for a full and formal inquiry. With the cooperation of the parties and their legal counsel, this objective was realized in a period of six months (from the rejection of the Commission's proposal for mediation in December 1993 to June 1994).

The Commission is pleased that it has been able, in a few months, to assist the parties to reach agreement on a claim that had been actively pursued for almost 20 years.

FOR THE INDIAN CLAIMS COMMISSION



Daniel Bellegarde
Commissioner



James Prentice, QC
Commissioner

December 1994

APPENDIX A

CHIPPEWAS OF THE THAMES MUNCEY LAND CLAIM: HISTORICAL BACKGROUND

INTRODUCTION*

The Chippewas of the Thames Indian Band submitted a claim to the Office of Native Claims at the Department of Indian and Northern Affairs on February 7, 1980. The Band alleged that "192 acres of land, on which the Village of Muncey is situated, were unsurrendered reserve land illegally patented in 1831. . . ." Specifically, the area in question was composed of "Broken Lots 12 and 13, Range V South of Longwoods Road Caradoc Township, Middlesex County, Ontario. . . ." ¹ Eventually, the Chippewas of the Thames would seek damages for their unsurrendered interest in these lands. Their claim would become known as the "Muncey Land Claim."

This essay is devoted to a brief review of the historical facts that formed the basis of the claim that was submitted by the Chippewas of the Thames Band. The federal government accepted that claim for negotiation on June 15, 1983. Since that time, there has been no real dispute between the parties as to the facts that were derived from the various historical reviews completed during the submission process. Some of this research was used in drafting this Historical Background and was augmented by our own research and analysis into the matter. The events that led to the eventual collapse of the negotiation process with the federal government are also visited. It was the final rejection of the government's offer on June 1, 1991, that resulted in the Chippewas of the Thames turning to the Indian Claims Commission.

* This Historical Background is based on the documents submitted to the Indian Claims Commission by the parties as part of their documentary submission, as well as parties' correspondence with the Commission. The documents sometimes provided complete archival or file references, and where available these are included here. All documents can be referenced from the Commission's records by date.

¹ Indian Affairs, Memorandum concerning the Muncey Claim, Claim Summary Sheet, February 7, 1980.

THE MUNCEY LAND CLAIM

BEFORE THE PROVISIONAL AND FORMAL AGREEMENTS

Although it is impossible to determine the exact date at which time the Chippewa people first inhabited southern Ontario, it is generally accepted that they began to settle there at the beginning of the 18th century.² "Settled" is a relative term in the case of the Chippewas as they were a hunter/gatherer-based culture and, consequently, they tended to move often, following local environmental changes (i.e., seasonal changes, game population fluctuations, etc.).

During the Seven Years' War in the 18th century, the Chippewas of the Thames had, with other Ojibwa nations, formed a loose alliance with the French against the British. In 1760, after the defeat of the French in Canada, the *Articles of Capitulation* were signed, and certain guarantees were made by the British to the Indian allies of the French. Article 40 provided: "The Savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they chuse to remain there . . ."³ Despite these reassurances, the Ojibwa's peaceful relationship with the British remained tenuous for some time after the French defeat. The Ojibwa did not see the French defeat as their own loss. They certainly did not accept the British Crown's assertion that it had achieved the right to govern them by the British conquest of the French.

The period after the Seven Years' War was marked by several conflicts between the Ojibwa and the British. Chippewa warriors from the Thames participated as part of an Ojibwa confederacy in many of the confrontations with the British. These battles are often collectively referred to as "Pontiac's War" and effectively drew to a close in July 1764 when peace talks were held at Fort Niagara.⁴ The British produced a Wampum Belt at this meeting which symbolized the "commencement of peaceful trade and the treaty ending the half century of war between the English and France's Indian allies."⁵ The commitments made by the British Crown at Niagara reiterated the terms of the 1763 *Royal Proclamation* which formally protected Indian territories from unlawful encroachments:

it is just and reasonable, and essential to our interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected, or who live under

² Peter S. Schmaltz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991), 5.

³ *Articles of Capitulation*, Article XI, as translated by Adam Shortt and A.G. Doughty in *Documents Relating to the Constitutional History of Canada . . .* (Ottawa, 1907), and reprinted in *Documents of the Canadian Constitution, 1759-1915* (Toronto: Oxford University Press, 1918), 12.

⁴ Olive P. Dickason, *Canada's First Nations* (Toronto: McClelland and Stewart, 1992), 184.

⁵ Schmaltz, *Ojibwa of Southern Ontario*, 77.

our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been ceded to, or purchased by us, are reserved to them, or any of them, as their hunting grounds. . . .⁶

British officials saw the enactment of this proclamation as a means by which they could deal with the increasing pressure on land and hopefully correct some of the "frauds and abuses" committed against the aboriginal peoples of Canada.⁷ It was important for the British to maintain peace with the Indians as they were at the time a most valued military ally. In order to assure regulation of Indian land sales, the Crown also mandated in the 1763 *Royal Proclamation* that all purchases of said lands would occur through its offices:

In order, therefore, to prevent such irregularities for the future, and to the end, that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent; We do with the advice of our Privy Council, strictly enjoin and require that no private person do presume to make any purchase from the said Indians, of any lands reserved to the said Indians within those parts of our Colonies where we thought proper to allow settlement; but that, if at any future time, any of the said lands, the same shall be purchased only for us, in our name, at the same public meeting or assembly of the said Indians to be held for that purpose, by the Governor or Commander in Chief of our Colonies, respectively: within the limits of any proprietary government, they shall be purchased only for the use and in the name of such proprietaries, comfortable to such directions and instructions as we or they shall think proper to give for that purpose. . . .⁸

As long as competition for land remained light in southern Ontario, the Crown was content to leave unmolested the Indian Bands who were living there. At the time of the *Royal Proclamation*, this competition was indeed light but, as time passed, more white settlers moved into the area.

By the early 19th century, it was apparent that the government would finally have to deal with the question of Indian land in southern Ontario. During a brief period following the 1763 *Royal Proclamation*, large land tracts were obtained from the Indians, usually in exchange for a single distribution of goods paid at the time of sale, the amount of which was determined by band population or acreage.⁹ The distribution of the goods that were exchanged in payment for the land was

⁶ *Royal Proclamation* of October 7, 1763, RSC 1970, App. 2.

⁷ *Ibid*

⁸ *Ibid*

⁹ Treaty No. 2, with "Chiefs of the Ottawa, Chippawa, Pottowatomy and Huron Indians Nations of Detroit," May 19, 1790, Canada, *Indian Treaties and Surrenders* . . . , 2 vols. (Ottawa: Queen's Printer, 1891; repr. Saskatoon: Fifth House Publishers, 1992-93), vol. 1: *Treaties 1 to 138*, 1-3.

usually facilitated through the chiefs of the particular bands involved in the transaction.¹⁰ However, by the end of the War of 1812, the method of payment had become somewhat more refined and complex.

Annuity payments became the accepted norm for acquiring Indian land. An annuity, in this context, constituted a payment of goods made to the appropriate band based on its population at the time the transaction was completed. Subsequent to the initial transaction, annual payments, or "annuities," would be made in goods based on the amount originally specified. The amount was usually fixed at the time of the initial transaction and would not increase if the band population grew in following years. A primary consideration in the adoption of this policy was the fact that the Crown was interested in alleviating pressure on the British Imperial Treasury. They favoured an extended method of paying for Indian land through annuities of goods as opposed to the abrupt outlay of funds that were required in a lump-sum payment.

By 1818 there was sufficient interest in the southwestern part of Ontario to warrant the government's approaching the local indigenous people to discuss the sale of their land. The Indians came to be viewed as an obstacle to the impending European settlement of the area. One of the bands that was approached was the ancestor of today's Chippewas of the Thames. On October 16, 1818 (according to some evidence), the Chippewas of the Thames, the St. Clair, and the Chenail Escarte Bands met in council with the local Indian Superintendent, John Askin, to discuss the surrender of a large tract of land running from the Thames River along Lake Huron to a point to the north of Sable River and extending back as far as the Grand River Tract near Brantford.¹¹ The Indians decided that they would sell their land, but stipulated that the Crown would first have to meet certain conditions. One of these conditions was that several areas described by the Indians would be reserved for their exclusive use.¹²

The actual purchase of the land did not take place at the above-mentioned meeting, and became a somewhat protracted affair. While the surrender of the large tract of land was discussed in generalities at the first meeting, the details had yet to be formalized. There are no clear indications as to the reason for the government's decision to purchase the area described in the 1818 meeting in two separate transactions. Nevertheless, Askin met first with the Chippewas of the Thames and later with the Chippewas of Chenail Escarte and the other groups in a subsequent meeting.

¹⁰ *Ibid.*

¹¹ Minutes of a Council at Amherstberg, October 16, 1818, National Archives of Canada (hereinafter NA), MG 19, F1 (Claus Papers), pp. 95-96.

¹² *Ibid.*

A provisional agreement was first drawn up with the Chippewas of the Thames in March 1819 for the formal surrender of a section of land that was referred to as the "Long Woods Tract," but shortly afterwards there were complications.¹³ (See Provisional Agreement No. 21 for a description of the territory intended for surrender.) In return for the sale of its land, the Thames Band agreed to annuity payments based on its population at the time of the sale, and the reservation of the land it had previously selected. However, the Crown later objected to that portion of the agreement specifying payment of the annuities in money. The Crown ordered a renegotiation of the agreement so that the provision regarding payment in money could be replaced with a provision for "payment in goods."¹⁴ This resulted in Provisional Agreement No. 280½, negotiated on May 9, 1820.¹⁵ The provisional agreements contained much of the same wording, including the Band's reservation of two sections of land: one on the north shore of the River Thames as stated in the agreements; the other located near the source of the Big Bear Creek "where the Indians have their improvements."¹⁶ These provisional agreements were formalized by Confirmatory Agreement No. 25, signed on July 8, 1822.¹⁷ It is important to note that the confirmatory agreement did not provide for the reservation of lands as stated in the two provisional agreements, and instead asked that the Chippewas of the Thames should "surrender to His said late Majesty and His successors, without limitation, or reservation, all that parcel or tract of land lying on the northerly side of the River Thames . . ."¹⁸ It is clear, on the other hand, that the confirmatory agreement meant to quote the terms of the provisional agreement: ". . .Whereas by a certain provisional agreement entered into on the ninth day of May, in the year of Our Lord one thousand eight hundred and twenty . . . it was agreed," and hereafter the surrender reiterates the terms of the provisional agreements but leaves out those parts that contained allowances for the two reservations.¹⁹ (See agreements for a full description of the lands in question.)

13. Chippewas of the Thames Indian Band, Provisional Agreement No. 21, March 9, 1819, Canada, *Indian Treaties and Surrenders*, vol. 1, 48.

14. William Claus, Indian Superintendent, Indian Affairs, to – Hillier, October 7, 1820, NA, RG 8, vol. 263, pp. 104-05.

15. Chippewas of the Thames Indian Band, Provisional Agreement No. 280½, May 9, 1820, Canada, *Indian Treaties and Surrenders*, vol. 2: *Treaties 140-280*, 281-82.

16. *Ibid.*

17. Chippewas of the Thames Indian Band, Confirmatory Agreement No. 25, July 8, 1822, Canada, *Indian Treaties and Surrenders*, vol. 1, p. 58.

18. *Ibid.*

19. *Ibid.*

JOHN CAREY SETTLES AT THE MUNCEY SITE

In the 1820s, the circumstances that directly gave rise to the Chippewas of the Thames' Muncey Land Claim began to unfold. John Carey was teaching school in Westminster before he moved to the banks of the Thames River.²⁰ Carey was first introduced to the Band known as the Munceys when they set up camp near his school in Westminster sometime in the early 1820s.²¹ On May 27, 1825, the Reverend Peter Jones, Brother Alvin Torrey, and John Carey, along with another brother named Kilburn (who acted as their guide), set out for Muncey Town.²² Muncey Town was actually two places at that time, Upper Muncey and Lower Muncey, which were separated by some three to seven miles. Carey had made some previous visits to Muncey Town in order to inquire as to whether the Band might permit him to establish a school where it was settled. He hoped he might administer English religion and education to Band members, but was unable to obtain the permission of the Chiefs and council on those occasions.²³ However, on his May 27th visit, two Band Chiefs, George Turkey and Wesbrook, agreed to Carey's proposals, and, within the year, he had commenced construction of his school.²⁴ These Chiefs were situated at Upper Muncey.²⁵ The Munceys at this time were settled at least partly within the territories denoted in the provisional and confirmatory agreements made with the Chippewas of the Thames some years earlier.

The Muncey Band members were not Chippewas. They were descended from a branch of the Lenape or Delaware people, and in the 18th and 19th century were referred to by the Ojibwa as the "Grandfathers." The Ojibwa believed that the Delaware peoples had inhabited an area where they themselves had once lived, centuries earlier. They were not traditional inhabitants of the Thames River but, nevertheless, had moved there for whatever reasons in the period preceding John Carey's interest in the area.

The Munceys and the Chippewas of the Thames had a long association together. The Chippewas' cultural history was based on hunting and fishing, while the Munceys had a farming tradition. It was only natural that they should develop a mutually beneficial economic relationship with each other. Chippewas were able to trade fish and animal products for Muncey agrarian products and vice versa. Despite this relationship, the Chippewas of the Thames would later conflict with the

²⁰ Alvin Torrey, "Diary," May 25, 1825, p. 106.

²¹ *Ibid.*

²² Peter Jones, "The Journal of Reverend Peter Jones," May 17, 1825, NA, RG 10, vol. 43, reel C-11013, pp. 25-26.

²³ *Ibid.*, p. 30.

²⁴ *Ibid.*

²⁵ *Ibid.*, 30 May 1825, pp. 26-27.

Munceys over land. The nature of the Chippewas of the Thames' claim against the Munceys was described in a Petition of Right submitted on May 21, 1894, to the Exchequer Court of Canada on behalf of the Chiefs and councillors of the Thames Band:

18. Said Muncey Indians after being granted the said land by said Chippewas Indians of the Thames entered into possession of the same and settled thereon, and received many accessions to their Band from relatives coming over from the United States and from Indian members of other Bands received into membership by said Muncey Band; till, in the course of years, and long after the grant aforesaid by your suppliants, said Muncey Indians not regarding the limits of the land given them by said Chippewas Band of the Thames, [?] boundaries of their said Reserve, so given [?] aforesaid by your Suppliants, squatted on land outside their said boundary and belonging to the said Chippewas of the Thames . . .²⁶

The reserve that the Chippewas refer to in this petition as being the land that they had granted to the Munceys for their use was bounded by the Dolson and Bear (now Hogg's) Creeks. It extended back from the edge of the River Thames approximately one mile and was approximately one square mile in area. The Muncey "grant" was some three miles removed from the village of Upper Muncey.

SURVEY OF THE CARADOC RESERVE AND CAREY'S SCHOOL SITE

On March 2, 1827, the Surveyor General, Thomas Ridout, wrote to the Attorney General, John B. Robinson, and notified him of the discrepancies he had discovered between the descriptions of land set out in the provisional and confirmatory agreements, and an actual survey of the land made by the Chippewas that had been recently submitted to him. He writes:

... you will perceive, Sir, that the present description differs materially from that, upon which the Provisional Agreement was made as to the number of acres in the Tract, which I can only account for by supposing that the contents of the whole tract first projected to be purchased were inadvertently included, instead of that part only which forms the subject of the present purchase. . . .²⁷

However, the lands that were described in the two provisional and one confirmatory agreements were not surveyed by the Crown until 1829. In the time between the signing of the confirmatory agreement and the Crown survey, John

²⁶ Chippewas of the Thames Indian Band, Petition of Right Submitted to the Exchequer Court of Canada, May 21, 1894, NA, RG 10, vol. 8010, file 471/3-11-1.

²⁷ Thomas Ridout, Surveyor General, John B. Robinson, Attorney General, March 2, 1827, Archives of Ontario (hereinafter AO).

Carey had already established a school at the Muncey site and had commenced teaching. He had done so before obtaining any patent on the land.

In January of 1829, the petition of John Carey for a patent on the Muncey Village site was placed before the Executive Council of Upper Canada at York for its consideration. While the minutes of that meeting reflect the fact that Carey's proposition was considered favourably, no patent was issued at that time.

Mahlon Burwell, the Deputy Provincial Surveyor, began the Crown survey of the Chippewas Reserves, as laid out in the three agreements, in 1829. He journeyed to Muncey in October of that year and met with Carey. Burwell's survey notes described Carey's school area and the amount of improvements that had been carried out on the lands:

[Tuesday, October 27, 1829] – Travelled by the Lower Munsee village and went to the house of Mr. John Carey, Missionary teacher to get some information as he could give respecting the object of my mission. He is not now teaching but ready to resume his duties when required. Has a improvement say 30 acres on his lot . . . [Wednesday, October 28, 1829] Went accompanied by Mr. John Carey. Visited the school and house and clearing at the School House. Went around the Point to see if there were improvements – travelled back at their middle . . . a path to the School House in order that I might see every vestige of clearing and tarried again Mr. Carey's . . .²⁸

Complications relating to competing land interests within the previously selected reserve tracts became apparent during the execution of the Burwell survey.

Thomas Ridout passed away in 1829, and William Chewett became the new Surveyor General. In a letter of January 14, 1829, to Zachariah Mudge, secretary for the Governor General, Chewett raised the issue of potential conflicts arising out of competition for plots of land within the surveyed boundaries of Chippewas Reserves.²⁹ As was the practice at the time, the surveyor would often receive a portion of the completed survey in consideration for his efforts. Four and a half per cent of the total amount of acreage that Burwell surveyed for the government was relegated to pay for his services.³⁰ The late Mr. Ridout, together with Burwell, had located several tracts within the Caradoc Reserve as parcels that would pass to the ownership of Burwell for his completion of the survey.³¹ This represented some 981 acres.³² Chewett relayed these facts to Mudge in the hopes that the

²⁸ Mahlon Burwell, Deputy Provincial Surveyor, Survey notes recorded on site, October 27, 1829, AO.

²⁹ W. Chewett, Surveyor General, to Zachariah Mudge, Secretary to the Governor General, January 14, 1829, Ontario, Ministry of Natural Resources Archives (hereinafter MNR Archives), Letterbooks.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

Governor General instead might persuade Surveyor Burwell to accept land that lay to the east of the reserve as his payment, in order to avoid possible confrontations. Burwell's selections were not the only lots that were located within reserve tracts.

Twenty-two hundred acres had been set aside for a government-controlled land speculation company, the Canada Company, and an additional 3200 acres had been designated as Clergy Reserves. Chewett was in favour of restoring these lands to their intended state, commenting in a letter of May 21, 1830:

... Also 150 Acres located to John Carey under an OC of the 29th Jan 1829 which has not been described.

...
(...) of the said Crown reserves, 2200 Acres were delivered over to the Canada Commiss.rs on the 23rd April 1823 by the late Surv.r General and also sixteen Clergy reserves being 3200 Acres making altogether 7731 Acres the greater part of which will have to give place to the aforesaid Provisional agreement of the 9th May 1820 wherein the Chippewas have reserved to themselves 17,860 Acres in two separate tracts. . . .³³

On February 19, 1831, Carey put forth another petition for patent to the Lieutenant Governor and Council of Upper Canada. At that time he had still not received the patent that he had applied for in 1829. Unlike Carey's previous application, this one addressed the issue of the location of his settlement in relation to the Chippewas Reserve.³⁴ The petition reads in part:

That on application for a Patent, your petitioner is informed by the Acting Surveyor General that his location cannot be described without further order from Your Excellency the same being within a reservation by the Indians and a recent survey of the said reservation being lately submitted to, and now before Your Excellency. . . .³⁵

Despite this fact, the Executive Council took the view that Carey had established the school house and cultivated the land around the school site before any reservation was made:

The Council met from adjournment and took up the following Petition of John Carey setting forth that by an order in Council dated 23rd January 1829, he was granted the Broken Lots No. 12 and 13 in the 5th range, south of the Long Wood Road in the Township of Caradoc

³³ W. Chewett, Acting Surveyor General, to Zachariah Mudge, Secretary to the Governor General, May 21, 1830, MNR Archives.

³⁴ John Carey, Petition to Sir John Colborne, Lieutenant Governor of the Province of Upper Canada, February 19, 1831, NA, RG 10, vol. 2021, file 84292.

³⁵ Ibid.

and has performed the settlement duty thereon, that on application for a patent he is informed by the Acting Surveyor General that his location cannot be described without further order the same being within a reservation by the Indians, and a recent survey of the said Reservation being lately submitted to and now before His Excellency, and pray in that the Acting Surveyor General may be authorized to issue his description to him for said lands.

The Petitioner having been located before any Reservation was made, and having made large improvements on his land it is recommended that he receive the King's Patent for the same.³⁶

Shortly thereafter, John Carey finally received the patent he had applied for. The letters patent for 161 acres in Lot No. 12 were issued on April 26, 1831, and the letters patent for 32 acres in Lot No. 13 were issued on June 24, 1831.³⁷

AFTER THE PATENTS

John Carey's patents on Lots 12 and 13 represent somewhat of an anomaly in the history of the Caradoc Reserve. The cases referred to by Mr. Chewett in the previously mentioned correspondence, where locations for land were offered to various parties within the reserved tracts, were all eventually restored to the Chippewas of the Thames Band and the trespassing parties offered sites outside the Caradoc Reserve. Nothing was ever done about the Carey land holdings, despite the fact that the government was made aware that the Chippewas of the Thames were not satisfied that the issue had been resolved. This fact was clearly evident in the 1894 Petition of Right filed on behalf of the Chippewas of the Thames.

This document along with identifying the dispute over land that was occupied by the Munceys (see previous reference to the petition), also singled out the issue of the Carey patents as a matter of contention. In reference to Carey's school site, the petition stated in part:

Your Suppliants or their predecessors or ancestors never surrendered said lands belonging to them and granted by His said Majesty out of said lands so held in trust by him for your Suppliants to said Carey, nor have they ever approved of the sale, nor consented to said patent being issued to said Carey, and by virtue of the illegal and wrongful issue of said Patent, Your Suppliants have since the date of the issue of the said patent been deprived of the use of said lands, without any recompense being made therefor. . . .³⁸

³⁶ Executive Council Committee, Minutes of meeting in which application from John Carey for a patent was considered, February 19, 1830, NA, RG 10, vol. 2021, file 84292.

³⁷ Letters patent issued to John Carey for Lots 12 and 13, April 26, 1831, and June 24, 1831, respectively, AO, RG 1.

³⁸ Chippewas of the Thames Indian Band, Petition of Right Submitted to the Exchequer Court of Canada, May 21, 1894, NA, RG 10, vol. 8010, file 471/3-11-1.

The final chapter of the early history of the Muncey claim drew to a close in 1896 when a Board of Arbitrators made a determination on a claim tabled by the Chippewas of the Thames. The Board had been established to provide a "final and conclusive determination of certain questions that had arisen or might arise in the settlement of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec . . ." ³⁹ Although not specifically mentioning the facts of the claim it was referring to, the Board of Arbitrators recommended that, in regards to the claim made by the Dominion of Canada on behalf of the Chippewas of the Thames et al. against the provinces of Ontario and Quebec, "we do award, order, and adjudge that the claim be dismissed. . . ." ⁴⁰ Almost one year later, another report concurred with the findings of the arbitrators. The document entitled, "Claim on Behalf of the Chippewas of the Thames in respect of Carey Farm," reviewed the arbitrators' findings:

. . . though the matter is not very clear it would seem to have been decided by the Board of Arbitrators on their dismissal of that case.

It does not appear to us that the Dominion had any case, for the Carey Farm was a free grant under regulations of 6th July 1804, made on the authority of the Lieutenant Governor in Council on the ground of "the petitioner having been before any reservation was made and having made large improvements on his land," and in view of the fact that the setting aside of the reserve was then before the Lieutenant Governor . . . ⁴¹

Nevertheless, the Chippewas of the Thames remained committed to seeing the question of the Carey lots dealt with to their satisfaction.

RESURGENCE OF THE MUNCEY CLAIM

On November 26, 1974, the Chippewas of the Thames Indian Band wrote to the federal government to assert its claim to the two lots where the village of Muncey is now located and where John Carey originally was issued patents. The Band informed the government of Canada that, from that day forward, "the village of Muncey would be treated as Reserve land. . . ." ⁴² On December 8, 1975, Judd

³⁹ Board of Arbitrators, Findings of a Board of Arbitrators set up to resolve outstanding disputes between the Dominion of Canada and the Governments of Ontario and Quebec, June 20, 1896, NA, RG 10, vol. 2546, file 111,834-1.

⁴⁰ Ibid.

⁴¹ Rimmer and McKenna, Report to Indian Affairs, March 20, 1899, NA, RG 10, vol. 2545, file 111,834, part 1.

⁴² Vaughan Albert, Chief, Chippewas of the Thames Indian Band, to Judd Buchanan, Minister of Indian Affairs, November 26, 1974.

Buchanan, who was Minister of Indian and Northern Affairs at the time, responded to the Chippewas of the Thames rejecting their claim to Muncey Village:

It would appear that the land was legally patented to John Carey under authority of an Order in Council dated February 19, 1831, as a Free Grant following the regulations of July 6, 1804; that no surrender was required from the Band since the land granted to John Carey in 1831 never formed part of the Reserve. . . .⁴³

Thus began the modern history of the Muncey Claim.

The Band also consulted with provincial authorities as to the status of the Village of Muncey. The province consequently wrote to Minister Buchanan to inform him of its desire to see the standing issues resolved. It took the position that since the federal government has the responsibility for "Indians and lands reserved for the Indians. . .," it would be looking for the federal government to take the initiative in settling the matter.⁴⁴ The Ministry of Indian and Northern Affairs restated its opinion on the rejection of the claim on several occasions after its original reply; similarly, the Band continued to insist that it would treat the village of Muncey as reserve land.

In 1979, the Union of Ontario Indians prepared research for the Chippewas of the Thames on the Muncey Claim. In April of 1980, the Indian Commission of Ontario (ICO) announced to the federal government that it had been requested by the Union of Ontario Indians, on the behalf of the Chippewas of the Thames Band, to become involved in the review of the Muncey Claim. At that time, the ICO asked the government to state its position regarding the Muncey Claim and its acceptance into the ICO claims resolution process.⁴⁵ Indian and Northern Affairs agreed to have the Muncey Claim submitted to the ICO resolution process. Eventually, the ICO produced a Consolidated Statement of Facts on March 17, 1981.

Early in 1982, the Office of Native Claims requested a legal opinion from the Department of Justice concerning the "Chippewas of the Thames Band *Claim to Lots 12 and 13, range 5, Caradoc Township*. . . ."⁴⁶ Specifically noted in that request was that:

The claim was filed in 1979 and is being reviewed with the assistance of the Indian Commission of Ontario. The historical research on the claim has been completed

⁴³ Judd Buchanan, Minister for Indian and Northern Affairs, to Vaughan Albert, Chief, Chippewas of the Thames Indian Band, December 8, 1975.

⁴⁴ D. McKeough, Minister for Treasury, Economics, and Intergovernmental Affairs, to Judd Buchanan, Minister for Indian and Northern Affairs, March 25, 1976.

⁴⁵ Gary L. Carsen, Claims Advisor, Indian Commission of Ontario, to Murray Inch, Director, Indian Affairs, April 21, 1980.

⁴⁶ Author not identified, Memo to Maria Bryant, Legal Services, Office of Native Claims, July 9, 1982.

to the satisfaction of all concerned and we are now in a position to secure legal advice. . . .⁴⁷

On March 1, 1983, the Office of Native Claims received an opinion from the Department of Justice, admitting that there was a lawful obligation on the Crown for breach of the surrender agreements completed between 1819 and 1822 with the Chippewas of the Thames Band.⁴⁸ The Band was informed that the Office of Native Claims was prepared to recommend to the Minister of Indian and Northern Affairs, John Munro, that the claim should be accepted for the purpose of negotiating a settlement. The Honourable John Munro then wrote to Chief Ether Deleary of the Chippewas of the Thames Indian Band:

while I cannot agree with your proposition that these lots are unsurrendered Indian land under the Royal Proclamation of 1763, I can agree that a lawful obligation has been demonstrated for breach of an agreement which the Crown concluded with your band between 1819 and 1820. On this basis, I am very pleased, on behalf of the Government of Canada, to accept your claim as eligible for negotiation in accordance with the provisions of the federal government's specific claims policy. . . .⁴⁹

The Muncey Claim had moved into the negotiation stage.

NEGOTIATIONS, OFFERS, AND REFERENDUMS

In October of 1983, negotiations for a proposed settlement of the Muncey Claim began between the federal government and the Chippewas of the Thames Band. At a preliminary meeting held on October 27, 1983, the parties agreed to have Mr. George Carsen of the Indian Commission of Ontario appointed as the chairman of all future negotiation meetings.⁵⁰ It was also agreed that the ICO would record the minutes of all future meetings.⁵¹ By September of 1984, the Chippewas of the Thames Band provided its initial proposal for settlement to the Government

⁴⁷ Ibid.

⁴⁸ George Da Pont, Senior Claims Analyst, Specific Claims Branch, to Monique Plante-Boyd, Negotiator, Specific Claims Branch, March 14, 1983.

⁴⁹ John Munro, Minister of Indian and Northern Affairs, to E.E. Deleary, Chief, Chippewas of the Thames Indian Band, June 15, 1983.

⁵⁰ Indian Commission of Ontario, Minutes of negotiation meeting between the Chippewas of the Thames Indian Band and the federal government's negotiators, October 27, 1983.

⁵¹ Ibid.

of Canada in the form of a "working paper rather than a formal proposal"; it summarized the bases of the settlement proposal in the following terms:

Stated simply, the elements of compensation in either case consist of:

- 1] Delivery of the land itself (specific performance): or of the present value of the land, plus whatever it would cost today to acquire that land:
plus
- 2] Compensation for any damage that has been done to the land since 1825;
plus
- 3] Compensation for the fact that the Chippewas of the Thames did not have use of the land since 1825. . . .⁵²

The Chippewas of the Thames also suggested that the federal government could settle the claim through a series of one-time payments based on the relative value of the various component factors of the claim. These included: \$29,928,422 for the loss of agricultural use of the land; \$3,398,126 for the loss of use of the land used to grow and harvest black walnut trees; \$80,000 for the loss of the use of the land and adjacent waters used for the purpose of hunting and fishing; \$300,000 for damages caused by the construction of railway trestles, power lines, etc.; \$47,000 for the removal of gravel from the land.⁵³ In addition, the Chippewas of the Thames wished to have the land returned to the Band's possession.

The federal government reviewed the Band's position and responded with its own evaluation of the claim in a letter on November 23, 1984. The government based its valuation of the claim on five factors summarized in the following extracts:

1. The Land: As explained, we do not perceive that specific performance, that is return of the actual land is a viable option. Therefore, for the land the Government is proposed to offer \$486,000.00 . . .
2. The Gravel: . . . the Government will offer \$47,000.00 . . .
3. For Agricultural Loss of Use: The Government is prepared to offer \$500,000.00 . . .
4. For Walnut Trees and Walnuts . . . value will be added subsequently for these items pending receipt of expert advice . . .
5. For Hunting, Fishing, and Trapping . . . these losses are individual losses as opposed to Band losses and are therefore not compensable under Specific Claims Policy. . . .⁵⁴

⁵² Chippewas of the Thames Indian Band, Proposal for the settlement to the Government of Canada, September 1, 1984.

⁵³ *Ibid.*, p. 20.

⁵⁴ Derek Dawson, Negotiator, Specific Claims Branch, to E.E. Deleary, Chief Chippewas of the Thames Indian Band, November 23, 1984.

Negotiations between the federal government and the Chippewas of the Thames continued for several years after these first proposed settlements. In all, there were 13 negotiation meetings held between October 27, 1983, and January 29, 1987, when an agreement in principle was finally reached.⁵⁵

The settlement proposal was put to a vote before the Chippewas of the Thames Band membership in the form of a referendum on January 23, 1988. The draft settlement contained a provision for the Band to surrender:

absolutely to Canada all of its rights and interests in Broken Lots 12 and 13, Range V, south of the Longwoods Road, Caradoc Township, County of Middlesex, province of Ontario and releases and forever discharges Canada, its Servants, agents and successors and all other persons from claims past, present and future in connection with the original Treaty promise made by the Crown that those lands be reserved for the Band and in connection with the patenting of these lands in 1831 and any dealings with those lands up to the effective date of this Agreement. . . .⁵⁶

The Statement of Results of Vote records that, of 390 eligible voters, 168 cast their votes and, of this number, 124 voted in favour of the settlement and 44 voted against it with no spoiled ballots.⁵⁷ Because of the low voter turnout at the first vote, the Chippewas of the Thames Band requested in a Band Council Resolution (BCR) on February 1, 1988, that a second referendum be held.⁵⁸ This second referendum was scheduled for March 12, 1988, at the Thames Band Office.

The Department of Indian Affairs wrote to Chief Ether Deleary of the Chippewas of the Thames Band on March 15, 1988, to report that "it is our Headquarters' view that the second Referendum vote was incomplete due to the theft of the Ballot box. . . ."⁵⁹ As a consequence of this unfortunate circumstance, the government asked that the Band submit another BCR setting the date for a third referendum to be held on April 30, 1988. On the occasion of this referendum, there were 400 eligible voters, 208 of whom voted, with 51 voting in favour of the draft settlement and 156 voting against the draft.⁶⁰ There was 1 spoiled ballot.⁶¹

⁵⁵ Gail Hinge, Senior Claims Analyst, Indian and Northern Affairs, to Derek Dawson, Negotiator, Department of Indian and Northern Affairs, April 27, 1987.

⁵⁶ Indian Affairs and Northern Development, Copy of the Draft Settlement Agreement to be voted on in referendum, December 16, 1987.

⁵⁷ Lynn Ashkewe, Electoral Officer, Lands, Revenues and Trusts, Statement of Results of Vote, January 23, 1988.

⁵⁸ Chippewas of the Thames Indian Band, Band Council Resolution, February 1, 1988.

⁵⁹ Lynn Ashkewe, Superintendent, Lands, Revenues and Trusts, to Ether Deleary, Chief Chippewas of the Thames Indian Band, March 15, 1988.

⁶⁰ Lynn Ashkewe, Electoral Officer, Lands, Revenues and Trusts, Statement of Results of Vote, April 30, 1988.

⁶¹ Ibid.

Chief Ether Deleary cited the following reasons as being the likely cause for the Chippewas of the Thames' rejection of the draft settlement:

... why the offer was rejected by the membership:

- A. Concern over the surrender of title and rights
- B. A process to return the original land to Chippewas of the Thames First Nation
- C. Compensation for loss, use and benefit were inadequate
- D. Some conditions were too vague or restrictive within the agreement. . .⁶²

Chief Deleary recommended to William McKnight, Minister for Indian and Northern Affairs, that, in view of his membership's rejection of the proposal, negotiations should resume with a view to resolving the above-mentioned issues. Chief Deleary also contacted the ICO in order that it might also write to the federal government to discuss the possibility of reopening negotiations. Commissioner Roberta Jameison of the ICO then wrote to William McKnight to ascertain his position on the Muncey Claim. The Minister, however, refused to re-enter negotiations, commenting in a letter to Chief Deleary:

The department understands you wish to re-open negotiations to obtain higher compensation from Canada and less stringent conditions upon the band for final settlement. However, the claim was examined in detail at the highest levels within the department and the final settlement offer of two million six hundred and ninety-three thousand three hundred and fifty dollars (\$2,693,350) is deemed to have been reasonable and fair. The conditions required of the band with respect to reserve creation and surrender of land subject to the claim are quite usual under the specific claims policy. . . .

In conclusion, the department regrets to inform you that under the specific claims policy of the federal government, your claim will not be considered for re-negotiation. . . .⁶³

The Chippewas of the Thames, with the support of the Chiefs of Ontario and the ICO, continued to press for a negotiated settlement throughout 1988. The federal government responded on various occasions by reiterating its intention to keep the Muncey file closed. On August 23, 1988, Chief Deleary wrote to the Minister of Indian and Northern Affairs proposing that the terms of the previously negotiated settlement would be acceptable to the Band if the government's demand for an outright surrender was dropped. Instead, a surrender would

⁶² Ether Deleary, Chief, Chippewas of the Thames Indian Band, to William McKnight, Minister for Indian and Northern Affairs, May 1, 1988.

⁶³ Bill McKnight, Minister of Indian and Northern Affairs, to Ether Deleary, Chief, Chippewas of the Thames Indian Band, May 24, 1988.

not be required until five years after a new referendum.⁶⁴ This five-year period would allow the Chippewas Band to reacquire as many of the non-Indian interests in Lots 12 and 13 as possible, and, at the end of the five years, these land acquisitions would be considered "unsurrendered" and confirmed as Indian Reserve by the Government of Canada.⁶⁵ This proposal too was rejected by the government.

During informal discussions with the federal government in early 1990, the Chippewas of the Thames Band together with the ICO again requested that the Specific Claims Branch reopen negotiations with the hope of having the absolute surrender requisite dropped in favour of a provision for a "delayed surrender." Some peripheral changes in the previously negotiated settlement were also tabled. After these discussions, Specific Claims Branch informed Commissioner Harry LaForme of the ICO that they would pass the Band's recommendations to a higher level if the Band would in turn meet certain demands. The Band was asked to commit in the form of a BCR to the following stipulations:

1. An undertaking by the band that these are the last changes to be put forward to the settlement agreement.
2. An undertaking by the band that it will not put forward substantive changes to the settlement agreement.
3. A clear statement from the band that should substantive changes be put forward by the band it clearly understands that the federal government will abandon all further discussions on this claim. . . .⁶⁶

The ICO transmitted the revised draft settlement together with Specific Claim's demands to the Chippewas of the Thames. On July 3, 1990, the Band drafted a BCR request to have the Minister of Indian Affairs and Northern Development call a referendum on the proposed settlement agreement concerning Broken Lots 12 and 13 in Range 5, Caradoc Township. As to the waiver request from Specific Claims, the Band Council drafted a second BCR, conditionally recommending the acceptance of the proposed settlement to the Band but on these terms:

The Council of the Chippewas of the Thames First Nation hereby resolves:

1. That this Council, while recognizing the fundamental unfairness of the existing claims policies and practices of the Government of Canada as well as the insufficiency and

⁶⁴ Ether Deleary, Chief, Chippewas of the Thames Indian Band, to Bill McKnight, Minister of Indian and Northern Affairs, August 23, 1988.

⁶⁵ Ibid.

⁶⁶ Derek Dawson, Negotiator, Specific Claims, to Harry LaForme, Commissioner, Indian Commission of Ontario, March 14, 1990.

unfairness of the proposed settlement agreement, is nevertheless willing to recommend its acceptance to the People of the Chippewas of the Thames First Nation, since it represents the best result that can be achieved in the circumstances. . . .⁶⁷

On September 4, 1990, the Band was informed by the Minister that it would be contacted on when a future referendum could be held.⁶⁸ A referendum was eventually scheduled for June 1, 1991. In this the final referendum that was held on the settlement of the Muncey Claim, there were 460 eligible voters, with 100 turning out to vote, 27 in favour, 69 against, and 4 spoiled votes.⁶⁹ The Chippewas of the Thames had refused to accept the proposed settlement.

⁶⁷ Chippewas of the Thames Indian Band, Band Council Resolution, July 3, 1990.

⁶⁸ Tom Siddon, Minister of Indian and Northern Affairs, to Del Riley, Chief, Chippewas of the Thames Indian Band, September 4, 1990.

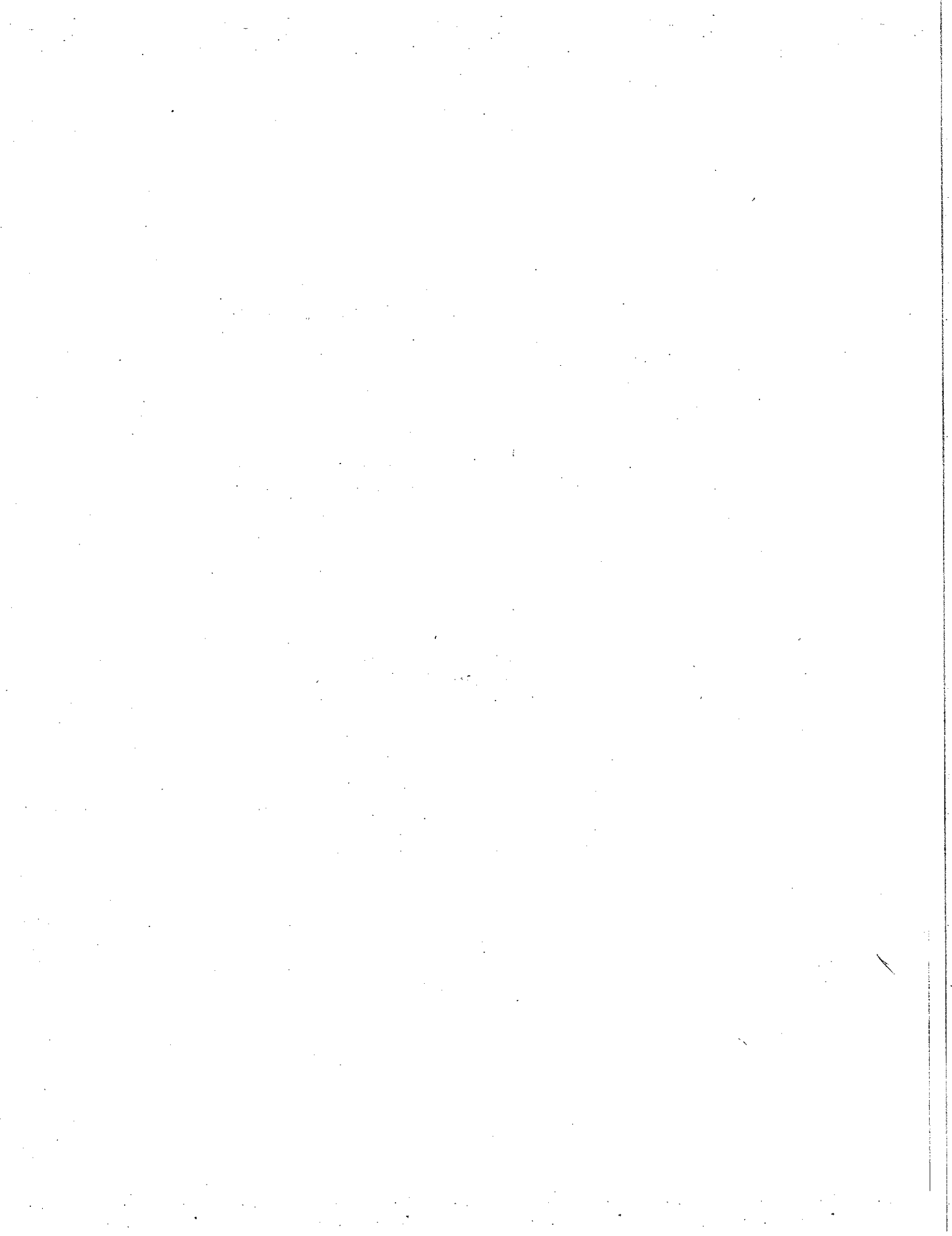
⁶⁹ Ron French, Indian Affairs and Northern Development, Memorandum on vote results, June 11, 1991.

RESPONSES

Re: Cold Lake and Canoe Lake
(Primrose Lake Air Weapons Range) Inquiries
Ronald A. Irwin, Minister of Indian Affairs and Northern Development,
to James Prentice and Daniel Bellegarde, Co-Chairs,
Indian Claims Commission, March 2, 1995
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Re: Young Chipeewayan Inquiry
Ronald A. Irwin, Minister of Indian Affairs and Northern Development,
to Daniel J. Bellegarde, Commissioner, Indian Claims Commission,
February 23, 1995
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Re: Micmacs of Gesgapegiag Inquiry and
Chippewas of the Thames Inquiry
Ronald A. Irwin, Minister of Indian Affairs and Northern Development,
to Dan Bellegarde and Jim Prentice, Co-Chairs, Indian Claims
Commission, March 1, 1995
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Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

Without Prejudice

MAR - 2 1995

James Prentice, Q.C.
Daniel Bellegarde
Co-Chairs
Indian Specific Claims Commission
Suite 400, 427 Laurier Ave. West
OTTAWA ON K1P 1A2

Dear Mr. Prentice & Mr. Bellegarde:

I am writing concerning the report of the Indian Specific Claims Commission (ISCC) on the claims of the Cold Lake First Nations and Canoe Lake Cree Nation regarding the establishment of the Primrose Lake Air Weapons Range (PLAWR). As I indicated in earlier correspondence, the report raised many significant and complex issues. After much careful consideration, I am now responding to your report on behalf of the Government of Canada.

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

In reviewing the ISCC Report, the Government of Canada continues to believe that there has been no breach of treaty or fiduciary obligations that would qualify these claims for acceptance under the Specific Claims Policy. However, in light of the unusually severe impacts which the establishment of the PLAWR had on these two

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communities, I am writing to the chiefs of the Cold Lake First Nations and the Canoe Lake Cree Nation offering to initiate negotiations to achieve a settlement. The settlement would be aimed at improving the economic and social circumstances of these two First Nations and to resolve the claims and grievances of the First Nations in relation to the creation of the PLAWR. Copies of my letter to the chiefs are attached.

I would like to commend the Commission for this informative report. I hope that the Cold Lake First Nations and Canoe Lake Cree Nation and the Government of Canada can work cooperatively on this initiative.

Yours truly,

A handwritten signature in black ink, appearing to read "R. Irwin". The signature is written in a cursive style with a large initial "R" and a long horizontal stroke at the end.

Ronald A. Irwin, P.C., M.P.

c.c.: The Honourable David Collenette, P.C., M.P.

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

FEB 23 1995

Commissioner Daniel J. Bellegarde
Indian Specific Claims Commission
Enterprise Building
427 Laurier Avenue West, Suite 400
P.O. Box 1750, Station "B"
OTTAWA ON K1P 1A2

Dear Commissioner:

On behalf of the federal government, I am replying to the report on Canada's rejection of the Young Chipeewayan claim. First, I thank you for the report. I note that your findings support Canada's conclusion on the ineligibility of this claim under the Specific Claims Policy.

With regard to the second recommendation, I am advised that the Young Chipeewayan members who joined other First Nations in the 1880s would likely have been eligible to be counted as landless transfers for the purpose of settling treaty land entitlement (TLE) claims of those First Nations under the 1992 Saskatchewan TLE Framework Agreement.

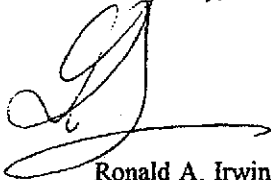
To verify this conclusion, and also to determine if your second recommendation could have a bearing on other First Nations in some other way, I understand the Federation of Saskatchewan Indian Nations has sent the Specific Claims Branch and the Research Funding Division of my department a proposal for funding the costs of research, analysis and meetings with affected First Nations. The proposal is presently under review.

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would like to clarify some of the observations of the Commission in the body of your report concerning the use of a Date of First Survey (DOFS) shortfall to determine whether a TLE claim can be accepted for negotiation and settlement. Canada's position is that it has an outstanding TLE legal obligation only if a claimant First Nation did not receive sufficient land, based on a DOFS population comprising its base payroll, absentees and arrears. This is the threshold test for an outstanding legal obligation with regard to TLE claims. Other categories such as landless transfers, late adherents and so on, may be considered only where a DOFS shortfall has been established and then only if the settlement negotiations have brought these categories into play as in the 1992 Saskatchewan Framework Agreement.

Again, congratulations on concluding your report on the Young Chipeewayan claim and thank you for your recommendations on the subject.

Yours truly,

A handwritten signature in cursive script, appearing to read 'R. Irwin', with a long horizontal flourish extending to the right.

Ronald A. Irwin, P.C., M.P.

Minister of Indian Affairs
and Northern Development



Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

MAR - 1 1995

Mr. Dan Bellegarde
Mr. Jim Prentice
Co-chairs
Indian Claims Commission
427 Laurier Avenue West, Station "B"
OTTAWA ON K1P 1A2

Dear Messrs. Bellegarde and Prentice:

This is to acknowledge receipt of the reports on the Micmacs of Gesgapegiag Inquiry - Claims to Horse Island, and the Chippewas of the Thames Inquiry - Muncey Land Claim, issued by the Commission in December 1994.

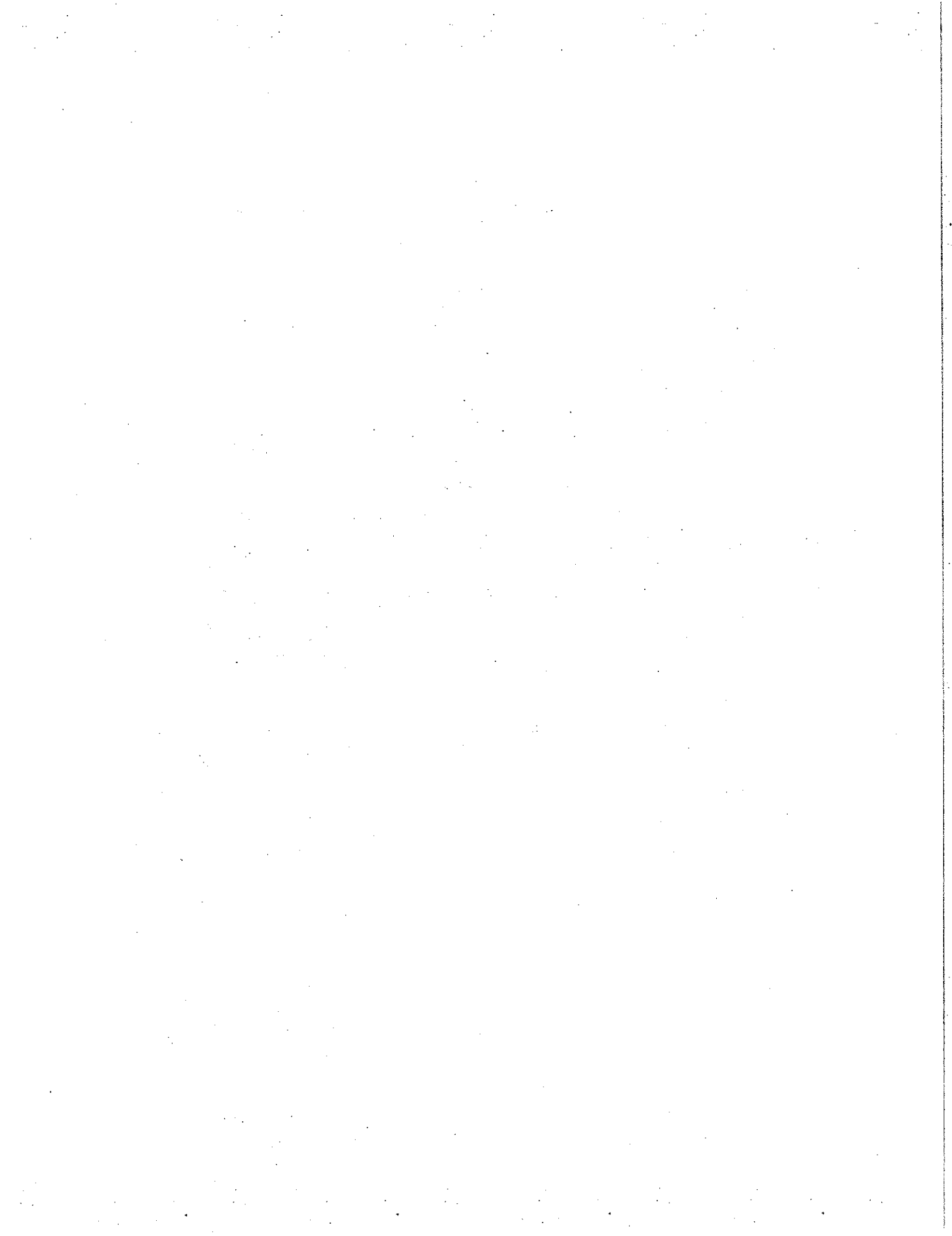
You may be interested to know of the progress which has been made in resolving these two claims. On the Muncey land claim, the members of the Chippewas of the Thames First Nation voted on January 28, 1995 to accept the settlement agreement. On the Horse Island claim, the Micmacs of Gesgapegiag have asked that it be held in abeyance pending the decision of the Supreme Court of Canada in a related case.

I am pleased to learn that the progress on these claims is due, in large measure, to the advice your Commission provided.

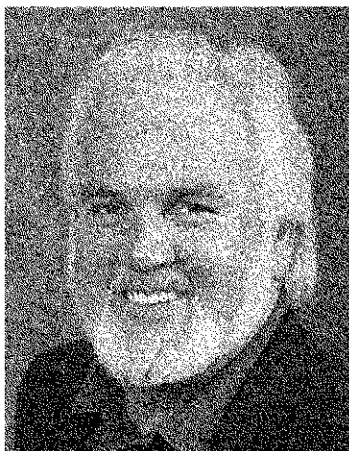
Yours truly,

Ronald A. Irwin, P.C., M.P.

Canada



THE COMMISSIONERS



Roger J. Augustine, a MicMac, has been Chief of the Eel Ground First Nation of New Brunswick since 1980; he served as president of the Union of New Brunswick-Prince Edward Island First Nations from 1988 to January 1994. Chief Augustine is active in promoting economic development among First Nations peoples, and is chairman of the Aboriginal Business Circle, and founder and chairman of the Micmac Maliseet Development Corporation and the Eagle Board Trust. He has been honoured for his efforts in founding and fostering the Eel Ground Drug and Alcohol Education Centre, as well as the Native Alcohol and Drug Abuse Rehabilitation Association.



Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation situated in Southern Saskatchewan. From 1982 to 1984, Mr. Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, he was president of the Saskatchewan Indian Institute of Technologies. Since 1988 he has held the position of first vice-chief of the Federation of Saskatchewan Indian Nations. On March 17, 1994, he was appointed Co-Chair of the Indian Claims Commission.



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



Aurélien Gill, a Montagnais of Mashteuiatsh (Pointe-Bleue), Quebec, graduated from Université Laval with a degree in education. A teacher, he served as the founding president of the Conseil Atikamekw et Montagnais before becoming Chief of the Mashteuiatsh (Pointe-Bleue) Montagnais community. He helped found the Institut culturel et éducatif Montagnais, the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (today the AFN), among other associations. Mr. Gill also held positions within the federal government, including Director General, Quebec Region, Indian and Northern Affairs Canada. In 1991, he was named to the Ordre national du Québec.



P.E. James Prentice, QC, is a lawyer with the Calgary firm of Rooney Prentice. He has an extensive background in land matters, including his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that resulted in the Sturgeon Lake Indian Claim Settlement of 1989. He also has experience in the administrative law field, having served as legal counsel on many land acquisition, expropriation, arbitration, and valuation matters in Alberta since 1981. From 1985 to 1992, Mr. Prentice chaired a quasi-judicial tribunal in Alberta. On March 17, 1994, he was named Co-Chair of the Indian Claims Commission.