

**ATHABASCA DENESULINE SPECIAL REPORT
ON THE TREATY HARVESTING RIGHTS
OF THE FOND DU LAC, BLACK LAKE AND
HATCHET LAKE FIRST NATIONS**

**Commission Co-Chair Daniel J. Bellegarde
Commission Co-Chair P.E. James Prentice, QC**

November 30, 1995

**Indian Claims
Commission**

**Commission
des revendications
des Indiens**

November 30, 1995

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development
Room 583, Confederation Building
House of Commons
Ottawa, Ontario
K1A 0A6



The Honourable Allan Rock
Minister of Justice
Room 448, Confederation Building
House of Commons
Ottawa, Ontario
K1A 0A6

**RE: SPECIAL REPORT ON TREATY HARVESTING RIGHTS
OF THE ATHABASCA DENESULINE**

The Athabasca Denesuliné bands of northern Saskatchewan (consisting of the Fond du Lac, Black Lake, and Hatchet Lake Bands) are signatories to Treaties 8 and 10. Since the signing of these treaties in 1899 and 1907, the Denesuline have consistently asserted that they have rights to hunt, fish and trap throughout their traditional territories which extend beyond the treaty boundaries into the barren lands located north of the 60th parallel.

In December, 1993, the Indian Claims Commission completed an inquiry into this matter and issued a report recommending that Canada formally recognize and protect the treaty harvesting rights of the Athabasca Denesuline throughout their traditional territories. To date, Canada has not recognized these treaty rights and continues to assert that the Denesuline surrendered their aboriginal rights outside the treaty boundaries when they signed Treaties 8 and 10. Although Canada has initiated discussions between the Denesuliné and their Inuit neighbours (who have rights in the same area pursuant to the Nunavut Settlement Agreement), these discussions have broken down. Unless the parties can reach a negotiated resolution of this dispute, it appears inevitable that the Denesuliné will pursue costly and protracted litigation in an effort to obtain formal recognition of their treaty rights.

Pursuant to the terms of reference of the Indian Specific Claims Commission, as set out in Orders in Council P.C. 1991-1329 and 1992-1730, the Commission is pleased to submit this special report to the Ministers of Indian Affairs and Justice to assist in the legal review of the Athabasca Denesuliné claim for formal recognition of treaty harvesting rights north of the 60th parallel. The following information is offered to the Ministers to assist them in making an



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informed decision on a matter of considerable importance to the Athabasca Denesuliné and the Government of Canada.

We hope that this information assists in your review of the Athabasca Denesline claim to treaty harvesting rights. If we can be of any further assistance in this matter, please do not hesitate to contact us.

Yours truly,



Daniel Bellegarde
Co-Chair



P. E. James Prentice
Co-Chair

cc. Chief and Council
Fond du Lac First Nation

Chief and Council
Black Lake First Nation

Chief and Council
Hatchet Lake First Nation

Vice-Chief John Dantouze
Prince Albert Grand Council

Chief Blaine Favel
Federation of Saskatchewan Indian Nations

Mr. George Thompson
Deputy Minister of Justice

INDIAN CLAIMS COMMISSION

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INTRODUCTION

In December 1993, the Indian Claims Commission concluded its inquiry into the Athabasca Denesuliné's claim for formal recognition of treaty harvesting rights north of the 60th parallel.¹ Although the facts presented did not technically disclose a specific claim because there was no claim for compensation or damages, the Commission nevertheless concluded that the Denesuliné have treaty rights to hunt, fish and trap north of the 60th parallel and recommended that Canada formally recognize the existence of these rights to ensure that they are afforded full constitutional protection as existing treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982*.

The Minister of Indian Affairs provided a formal response to the Commission's report in a letter to the Co-Chairs dated August 5, 1994. Minister Irwin stated that although the traditional harvesting activities of the Denesuliné were protected under Article 40 of the Nunavut Agreement, "we have seen nothing in the Commission's report which would make the Government of Canada change its view that the claimant bands do not have, under Treaties 8 and 10, treaty rights in the Nunavut Settlement Area."² In subsequent correspondence with the Athabasca Denesuliné, Minister Irwin reiterated Canada's position on the legal effect of the blanket extinguishment clauses in Treaties 8 and 10.³

Despite Canada's position on the treaties, Minister Irwin agreed to appoint the Hon. Jack Anawak M.P. to facilitate negotiations between the Denesuliné and Inuit on future harvesting activities in the Keewatin district of Nunavut. Canada initiated a dialogue between the Denesuliné and Inuit in March, 1994 but in July, 1994 the Keewatin Inuit Association withdrew from the discussions stating that

¹ The Claim Area is depicted in Map 1 (Appendix A).

² Hon. Ronald A. Irwin to Indian Specific Claims Commission, August 5, 1994 (Appendix B).

³ In a letter from Hon. Ronald A. Irwin to Vice-Chief John Dantouze, P.A.G.C. dated May 11, 1995, the Minister states that Canada recognizes that the Denesuliné used, and continue to use, land in the Keewatin area for harvesting purposes but stated that "the treaty area, and any treaty rights to hunt, fish and trap that the bands have under the treaties, are limited to lands below the 60th parallel." It is not clear whether Minister Irwin intended to suggest that the Denesuliné have no treaty rights to hunt, fish and trap in the portion of Treaty 8 which lies above the N.W.T. and borders the south shore of Great Slave Lake (Appendix C).

"there is no need for further deliberations on the issue of land overlap" with the Denesúliné.⁴ The position of the Inuit is that they will not enter into an overlap agreement or co-management arrangement with the Denesúliné unless and until Canada, or the courts, formally recognize that the Denesúliné have existing treaty rights in the Nunavut Settlement Area.⁵

In light of the Inuit refusal to negotiate with the Denesúliné, Vice-Chief Dantouze appealed to the Commission to help resolve this impasse stating that "We will never abandon our struggle to have our Inherent and Treaty rights, throughout our traditional homeland, recognized by Canada and our aboriginal neighbours."⁶ On June 26, 1995 the Denesúliné met to consider their options. Although the Denesúliné decided to continue efforts to obtain recognition of their treaty rights through negotiations, it is clear that they are prepared to proceed with their action in the Federal Court if these negotiations prove futile.⁷

ANALYSIS

In the interests of assisting Canada in its legal review -- and minimizing the risk of costly and protracted litigation -- the Commission offers the following summary of its report and recommendations into the Athabasca Denesúliné claim to treaty harvesting rights north of 60 and a brief supplementary legal analysis on the merits of the claim. For a more detailed examination of these issues, please refer to the Commission's report into the Athabasca Denesúliné Inquiry dated December 21, 1993.⁸

⁴ Resolution of the Keewatin Inuit Association, undated.

⁵ Letter of Understanding between Tungavik Federation of Nunavut and Athabasca Denesúliné, June 1, 1993 (Appendix D).

⁶ Vice-Chief Dantouze to Commissioner Corcoran, ICC, June 19, 1995.

⁷ See "Chronology of Events" relating to the Denesúliné's efforts to obtain recognition of their treaty harvesting rights (Appendix E).

⁸ *Athabasca Denesúliné Inquiry into the Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations* [hereinafter *Athabasca Report*], [1995] 3 Indian Claims Commission Proceedings (ICCP) 3.

Summary of Commission's Report

The Denesúliné have a special relationship with their traditional territories and the "barren lands" which are located on the open tundra almost entirely north of the 60th parallel. The Denesúliné often referred to themselves as the "Ethen-eldeli" or "caribou-eaters" and it is on the barren lands that the caribou are most plentiful. According to historical and anthropological evidence, the caribou "was of overwhelming importance, ... structuring their seasonal cycle, seasonal distribution, socioterritorial organization, and technology; it was the focus of religious beliefs and oral literature."⁹ Accordingly, the very identity and existence of the Denesúliné people is inextricably linked to the barren lands and their pursuit of the caribou herds.

Both Canada and the Inuit acknowledge that the Denesúliné hunted, fished and trapped on lands north of the 60th parallel since time immemorial and that they continue to do so today. Moreover, anthropological evidence confirms that the Denesúliné historically used and occupied the barren lands because many of the lakes and rivers in that area have Dene place names as opposed to Inuit names.

On July 25 and 27, 1899, predecessors of the Black Lake and Fond du Lac Bands signed adhesions to Treaty 8. On August 22, 1907, the forefathers of the Hatchet Lake Band 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 "throughout the tract surrendered as heretofore described."

The Crown's main purpose for entering into the treaties was to obtain a surrender over specified tracts of lands. 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 Denesúliné were extremely apprehensive about signing the treaties because they feared their traditional way of life based upon hunting, fishing, and trapping would be

⁹ *Athabasca Report*, [1995] 3 ICCP 3 at 24.

curtailed. After several days of negotiations, the Denesuliné agreed to sign only after 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 Denesuliné agreed to sign the treaty only after the Treaty Commissioners promised that "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 Denesuliné were ever expressly limited to the geographic area defined by the metes and bounds descriptions in the treaties. Nor were they informed that the blanket extinguishment clause in the treaties was intended to extinguish their rights to hunt, fish and trap north of 60. The Denesuliné understood that the treaties protected their rights to hunt, fish, and trap throughout all of their traditional territories, without regard to the metes and bounds descriptions in the treaties.

After the treaties were signed, the Denesuliné 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 Denesuliné. However, the Department of Indian Affairs, and other federal departments, promoted and encouraged the claimants' harvesting activities in the NWT. The government of Canada, almost without exception, defended their exercise of these traditional rights and stated that any interference with these rights effectively "contravenes the treaty." The Denesuliné continued to believe they had treaty rights to hunt, fish and trap north of the 60th parallel until 1989 when Canada advised them, for the first time, that their rights to their traditional lands north of 60 had been surrendered pursuant to the blanket extinguishment clauses in the treaties.

Based on the evidence before the Commission, which was not disputed, we found that the Denesuliné have existing treaty rights to hunt, fish and trap throughout their traditional territories and that these rights are not limited to the strict boundaries of the treaties. The evidence is clear that the Denesuliné would not have deliberately surrendered rights to their traditional territory in return for harvesting rights over a smaller area contained in the treaty boundaries because they lived primarily in the barrens 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.

Accordingly, the Commission found that the Denesúliné have treaty rights in their traditional territories and that Canada must, at a minimum, formally recognize the existence of these treaty harvesting rights and seek to ensure that they are protected and fulfilled within the meaning of section 35(1) of the *Constitution Act, 1982*.

Legal Analysis

During the course of our inquiry, the Commission relied heavily upon the contemporaneous statements made by the parties during the treaty negotiations as evidence that the parties did not intend to extinguish Denesúliné harvesting rights in their traditional lands. Given the importance of this land to the Denesúliné, it is inconceivable that they would have agreed to sign the treaty if they had been informed that the effect of the blanket extinguishment clause was that they were surrendering their rights to hunt, fish and trap in the barren lands north of 60.

Legal counsel for both parties made extensive submissions on whether oral assurances made by the Treaty Commissioners during the negotiations and the subsequent conduct of the parties should be considered by the Commission to assist in interpreting the treaties. Canada submitted that while the historical context may be relevant, the oral assurances of the Treaty Commissioners constituted extrinsic evidence which should not be used to interpret the terms of a treaty. Extrinsic evidence can be used only where the wording of the treaty is ambiguous or would lead to a result which is manifestly absurd: *Horse v. R.*¹⁰. The Denesúliné submitted that, where the interpretation of a treaty is involved, the general principle established by the courts is that the broad historical context should be considered as an aid to interpreting the treaty: *R. v. Taylor and Williams*¹¹ and *R. v. Sioui*¹².

The Commission considered this evidence because: (1) the Specific Claims Policy directs the Commission to consider all relevant historic evidence without

¹⁰ *Horse v. R.*, [1988] 1 SCR 187, 2 CNLR 112.

¹¹ *R. v. Taylor and Williams*, 1988 34 OR (2d) 360 (Ont. CA).

¹² *R. v. Sioui*, [1990] 1 SCR 1068, 3 CNLR 127.

regard to technical rules of admissibility; and (2) as a matter of legal principle, it was necessary to consider the broad historical evidence of the treaties because there was a patent ambiguity on the face of the treaty. Based on the wording and construction of the treaties, it is not clear whether the clause which guaranteed rights to hunt, fish, and trap applies only to those lands contained within the metes and bounds description or whether it also applies to all land surrendered by the Denesúliné, including that part of their traditional territory which lies outside the treaty boundaries in the Northwest Territories.¹³

In light of these conflicting interpretations, the Commission considered the broad historical context and concluded that the parties did not intend to extinguish the rights of the Denesúliné to hunt, fish and trap north of 60 when Treaties 8 and 10 were signed. Such an interpretation is not consistent with what the Denesúliné were told by Canada's representatives and would lead to an absurd result, namely, that the Denesúliné would have knowingly surrendered their rights to hunt caribou in the barren lands because this would have undermined their very survival. It must be remembered that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."¹⁴

Even assuming that the treaties are not ambiguous and that Canada's interpretation of the written terms supports their argument, there is a secondary question of whether it would be unconscionable for Canada as a fiduciary to rely upon such a narrow interpretation of the treaties. During the negotiations for Treaty 8, Canada's representatives assured the Denesúliné that "they would be as free to hunt and fish after the treaty as they would be if they never entered into it."¹⁵ This is consistent with the evidence of Denesúliné elders who said that the Treaty Commissioners assured them that for "as long as the sun shines, as long as

¹³ The essence of the claimant's argument is that if the effect of the blanket extinguishment clause is to extinguish the Denesúliné's aboriginal title to all of their traditional lands, the treaty harvesting rights clause applies to all lands surrendered by the Denesúliné and is not limited to the treaty boundaries.

¹⁴ *Nowegijick v. The Queen* [1983], 1 SCR 29 at 36 (per Dickson J.).

¹⁵ *Athabasca Report*, p. 24. Similar statements were made by the Treaty Commissioners during the negotiation of Treaty 10: *Athabasca Report*, p. 33.

the rocks do not move, these rights would last forever . . ."¹⁶ The Supreme Court of Canada in *Guerin v. The Queen*¹⁷ held that it would be unconscionable for a fiduciary to rely upon the terms of a written document where oral assurances to the contrary have been made to the Indians. In *Guerin*, Mr. Justice Dickson expounded on the Crown's obligations in a case relating to the surrender of a reserve for lease as a golf course:

. . . the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.¹⁸

This statement is applicable to the facts in this case. In our view, it would be unconscionable for the Crown to rely upon such a narrow and technical interpretation of the treaty in the face of compelling and uncontroverted evidence that the Treaty Commissioners assured the Denesúliné that their harvesting rights would be respected for "as long as the sun shines and the rivers flow". To use the words of Madame Justice Wilson in *Guerin*, "Equity will not permit the Crown in such circumstances to hide behind the language of its own document."¹⁹

Other Considerations

In correspondence between the Denesúliné and Minister Irwin, it has been suggested that it is not necessary for Canada to recognize treaty rights north of 60 in order for the Inuit and Denesúliné to enter into overlap agreements. Canada has stated that Article 40 of the *Nunavut Act* provides protection to the Denesúliné Bands who "may harvest wildlife for personal, family or community consumption

¹⁶ *Athabasca Report*, p. 35 (excerpt from testimony of Jimmy Dzeylion).

¹⁷ *Guerin v. R.*, [1984] 2 SCR 1075 at 1088, 70 DLR (4th) 385.

¹⁸ *Guerin*, at 409.

¹⁹ *Guerin*, at 354.

and may trap wildlife within areas of the Nunavut Settlement Area which they have traditionally used and continue to use for those purposes . . ."²⁰ Although we appreciate that Article 40 may provide some level of comfort to the Denesúliné, it is important to observe that the harvesting rights granted under this agreement are not on the same legal footing as existing aboriginal or treaty rights which have constitutional protection under section 35(1) of the *Constitution Act, 1982*. If that is the case, the harvesting activities referred to in Article 40 are not protected by the rigorous justificatory standard for regulation set out in *R. v. Sparrow*²¹ and can be unilaterally extinguished by a simple Act of Parliament or by the parties to the Nunavut Agreement.

We accept that Canada may have legitimate concerns about the implications of recognizing Denesúliné treaty rights in the Nunavut Settlement Area. However, the formal recognition of treaty rights in the Nunavut area would not be counter to the terms of the Nunavut Agreement signed with the Inuit because Article 40 contemplates that other First Nations may have pre-existing treaty or aboriginal rights in the same area. Therefore, if Canada recognizes the existence of Denesúliné treaty rights in the NWT, the Inuit have stated that they are prepared to enter into negotiations with the Denesúliné to provide for the joint ownership of lands; the sharing of wildlife and other benefits; and joint participation in wildlife management, land use planning, impact assessment and water management.²²

The Commission recognizes Canada's efforts to facilitate bilateral negotiations between the Inuit and Denesúliné but it appears that meaningful discussions on an overlap agreement will not commence until Canada or the courts have confirmed that the Denesúliné have treaty rights which stand on the same legal footing as the rights of the Inuit under the Nunavut Act. Furthermore, Canada's active participation in these discussions is critical because it is doubtful that the Inuit and Denesúliné have the legal capacity to enter into a bilateral agreement to define the nature and extent of Denesúliné treaty harvesting rights as

²⁰ *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada*, Article 40.5.2.

²¹ *R. v. Sparrow*, [1990] 1 SCR 1075.

²² Letter of Understanding between Tungavik Federation of Nunavut and Athabasca Denesúliné, June 1, 1993 (Appendix D).

only the federal government can enter into "land claim agreements" with the Denesúliné for the purposes of section 35 of the Constitution Act, 1982.

Our assessment of the matter suggests that recognition of Denesúliné harvesting rights in their traditional territories would not give rise to any major implications for the following reasons. First, any questions or uncertainty regarding the extent of the Denesúliné traditional land use area can be clarified in an overlap agreement between Canada and two aboriginal groups with co-existing aboriginal and treaty rights. Second, recognition of Denesúliné treaty harvesting rights outside the treaty boundaries is confined to the specific facts of this case and is not intended to create a precedent of general application to other First Nations. Third, the formal recognition of Denesúliné treaty rights to hunt, fish and trap north of 60 could be achieved by executing a simple agreement which expressly states that such rights are recognized and affirmed for the purposes of section 35(1) of the *Constitution Act, 1982*.

In the event that the parties are unable to reach a negotiated settlement of this matter, litigation appears to be inevitable because this is a matter of principle and fundamental importance to the Denesúliné people. Before resorting to litigation, which is expensive, protracted, and an unnecessarily adversarial method of resolving grievances between First Nations and the Crown, we encourage the Denesúliné, Inuit and Canada to explore every possible avenue to resolve this outstanding dispute in a manner that accommodates the competing interests and concerns of all interested parties.

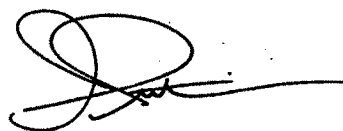
RECOMMENDATION

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

For the Indian Claims Commission



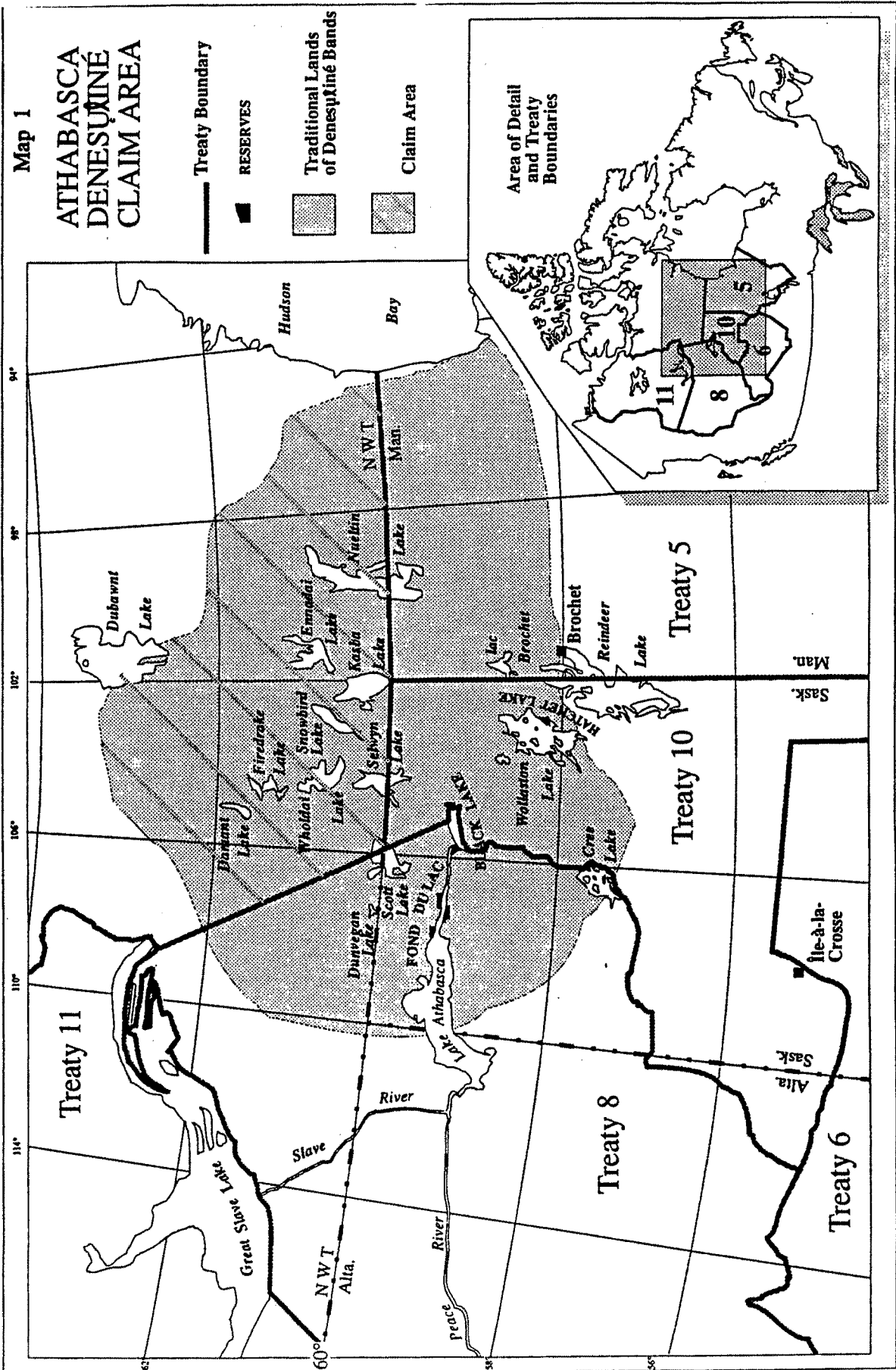
Daniel J. Bellegarde
Commission Co-Chair



P. E. James Prentice, QC
Commission Co-Chair

November 1995

APPENDIX A



APPENDIX B

AUG
AOUT - 5 1994

Co-chairmen
Indian Specific Claims Commission
1701 - 110 Yonge Street
TORONTO ON M5C 1T4

Dear Messrs. Prentice and Bellegarde:

This is in response to a letter dated December 21, 1993 from the Indian Specific Claims Commission concerning its report entitled *Athabasca Denesuline Inquiry*.

As mentioned in the letter, in preparing the report, the Commission reviewed over 2,300 pages of documents, held an information-gathering session at Fond du Lac, Saskatchewan, and heard 18 elders from three claimant First Nations of Fond du Lac, Black Lake and Hatchet Lake. I compliment you and the Commission on the attention given to this matter.

It is interesting to note that the Commission recommends that the matters at issue in this case could only be resolved outside the Specific Claims Policy. This coincides with the preliminary assessment of the Government of Canada, which was that the issues, as presented by the claimant bands, and the remedy sought, fall outside the scope of the Specific Claims Policy.

The Commission has recommended that the claims of the First Nations be addressed by way of administrative referral, and I quote:

"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 negotiations of the claimant's grievance pursuant to that process."

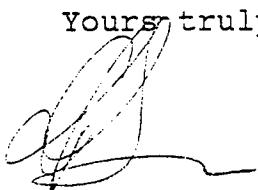
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While the Government of Canada agrees that the Athabasca Denesuline residing in northern Saskatchewan may continue their traditional harvesting activities in the Nunavut Settlement Area, and indeed, these activities have been safeguarded under article 40, parts 1 and 5, of the Nunavut Land Claims Agreement, we have seen nothing in the Commission's report which would make the Government of Canada change its view that the claimant bands do not have, under Treaties 8 and 10, treaty rights in the Nunavut Settlement Area.

I have asked my Parliamentary Secretary, Mr. Jack Anawak, to meet with all Aboriginal parties interested in this matter, to see if practical solutions can be found to the concerns of the Athabasca Denesuline. Mr. Anawak's discussions include the Inuit, from whom the Commission did not hear, who of course represent the other significant user group of these lands. Mr. Anawak advises me that he had a preliminary meeting with representatives of the Saskatchewan and Manitoba Dene and Inuit in March 1994, which culminated in a Resolution of Understanding declaring the desire of the Dene and Inuit to continue their discussions with the objective of reaching understandings and agreements. In the meantime, the Denesuline's traditional harvesting activities continue to be safeguarded under Article 40, parts 1 and 5, of the Nunavut Land Claims Agreement.

I believe that the exercise being conducted by Mr. Anawak also constitutes an appropriate response to the recommendation of your Commission's Report on the Athabasca Denesuline Inquiry, which was to have this matter addressed in processes other than the specific claims process.

Yours truly,



Ronald A. Irwin, P.C., M.P.

c.c.: The Honourable Allan Rock, P.C., M.P.
Mr. Jack Anawak
Chief George Fern
Chief Daniel Robillard
Chief Joe Tsannie

APPENDIX C

MAY 11 1995

Mr. John Dantouze
Vice Chief
Prince Albert Grand Council
First Nation Governments of Saskatchewan
P.O. Box 2350
PRINCE ALBERT SK S6V 6Z1

Dear Mr. Dantouze:

This is in response to your letters of September 20, 1994 and March 16, 1995 raising a number of important concerns which the Denesuline Bands in northern Saskatchewan and Manitoba would like the Government of Canada to address.

After thoroughly considering the various issues presented in your correspondence, I have prepared the following comments which I trust will be of assistance to the Denesuline people. As a starting point, I would like to acknowledge the frustrations you express regarding the apparent impasse, preventing continued discussions between the Denesuline and the Inuit of Keewatin. I share your frustration and disappointment at the lack of progress, over the past months, in working out practical solutions to the concerns of the Denesuline. In particular, I am most disappointed by the apparent unwillingness of the Keewatin Inuit Association (KIA) to continue discussions.

As you are aware, it was with the highest expectations that I originally asked my Parliamentary Secretary, Mr. Jack Anawak, to meet with representatives of the Denesuline and Inuit peoples in an effort to facilitate understanding and agreement on future harvesting activities in the Nunavut Settlement Area of the Northwest Territories. In this regard, I was most encouraged by the initial meetings chaired by Mr. Anawak in March 1994, that resulted in a Resolution of Understanding between the Denesuline and the Inuit resolving to "continue with discussions" with the objective of "reaching understandings and agreements." This resolution

Canada

".../2

was, of course, in addition to the earlier Letter of Understanding signed by the Dene and the Inuit in June 1993. However, as you accurately acknowledge, there has been little progress made since the KIA passed a resolution taking the position that there is no need for further "deliberations" or "negotiations" with the Dene pertaining to overlap issues. In an effort to resolve this impasse, you request action on the part of the Government of Canada to help bring the Inuit back into the discussion process.

In response to your request, I would like to assure you that I fully support your efforts to resume discussions with the Inuit. It has been my firm belief throughout our work together, that practical ways to safeguard Denesuline harvesting activities in the Northwest Territories, will only be achieved through the joint efforts of the Aboriginal peoples using the Keewatin lands. To assist in overcoming the present impasse, on February 1, 1995 I wrote to Mr. Kusugak, President of Nunavut Tunngavik Inc. urging the Inuit to give serious consideration to resuming the dialogue with the Denesuline. In this letter (copy attached), I pointed out that the opportunities available through continuing discussions with the Denesuline are likely to outweigh the risks that accompany uncertain, protracted and costly litigation. In particular, I emphasized that resuming discussions could provide opportunities for the two Aboriginal peoples to develop mutually acceptable approaches for the future management of the harvesting resources. Above all, I urged the Nunavut Tunngavik Inc., as well as the Nunavut Wildlife Management Board, to become directly involved in the discussion process being facilitated by Mr. Anawak.

Although I have not yet received a response to my letter to Mr. Kusugak, I still hope that the Nunavut Tunngavik Inc. and the Nunavut Wildlife Management Board can provide the Denesuline with important, alternate forums for discussion not presently available with the KIA.

You conclude that the only "productive" basis for commencing discussions with the Inuit, is a recognition by the Government of Canada of the "rights of the Athabasca Denesuline in the N.W.T." For the sake of certainty, I would like to set out below the Crown's position on this matter.

The Government of Canada recognizes that the Denesuline Bands in northern Saskatchewan (Fond du Lac, Black Lake and Hatchet Lake Bands) and in northern Manitoba (Northland and Churchill Bands) used, and continue to use, the Keewatin area north of the 60th parallel for harvesting activities. Any Aboriginal

rights these Bands may have had to hunt, fish or trap in the Northwest Territories were surrendered at the time of the signing of the treaties and/or adhesions to the treaties (Treaty 5, 8 and 10). Upon a proper reading of the treaties, Canada maintains that the treaty area, and any treaty rights to hunt, fish and trap that the Bands have under the treaties, are limited to lands below the 60th parallel. As such, any harvesting rights the bands may have under the treaties do not apply in, or extend to, the Northwest Territories. Although the Denesuline have neither treaty nor Aboriginal rights north of the 60th parallel, the Government of Canada does recognize that the harvesting activities of the Denesuline are protected by article 40 (parts 4.2 and 5.2) of the Nunavut Land Claims Agreement (NLCA). In particular, the agreement provides that the members of the Bands "may harvest wildlife for personal, family or community consumption, and trap wildlife within areas of the Nunavut Settlement Area which they have traditionally used and continue to use for those purposes, on a basis equivalent to Inuit"

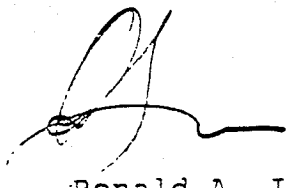
You state that the present impasse with the Inuit can only be resolved by Canada recognizing Denesuline "treaty rights" and "Aboriginal rights" in the Northwest Territories. This is a conclusion I do not share. I believe that it is important for the Denesuline and the Inuit to continue discussions in order to achieve a better understanding of the new wildlife management regime under the NLCA. It is only through such discussions that one can determine the various ways in which the Nunavut regime does, or does not, safeguard the harvesting activities of the Bands. While Canada does not accept the Denesuline legal position on the existence of Denesuline treaty or Aboriginal harvesting rights in Nunavut, there could be useful discussion between the Denesuline and the Inuit to clarify, at a practical level, how Denesuline harvesting activities will be accommodated in the new wildlife management system. Such a dialogue between the Denesuline and the Inuit could include the creation of mutually acceptable protocols for co-management that parallel co-management regimes being developed south of the 60th parallel. Also, such a dialogue could explore various arrangements regarding where and when members of the two Aboriginal peoples will exercise permissible harvesting activities. In addition, such discussions could be very useful in explaining to the Denesuline the various changes brought to the wildlife management regime since the agreement was approved by Parliament. In this regard, I suggest that the Nunavut Wildlife Management Board would be a valuable source of information for the Denesuline.

You clarify that the Denesuline are prepared to "re-activate" their court challenges should the option of continuing the discussions be rejected by the Inuit. As you are aware, litigation is a slow and costly process. The outcome may produce losers, as well as winners, and may not provide real or effective solutions for either the Denesuline or the Inuit. For this reason, I believe that the discussion table, rather than the court room, is a more expeditious forum for the achievement of mutually acceptable and lasting solutions.

Despite the delays and set backs experienced by those involved in the "Anawak process," I still hold the belief that the Dene and Inuit can resolve this dispute through agreements between their respective peoples. To assist in this process, I offer my continuing support for Mr. Anawak's efforts in facilitating discussion and understanding between the Denesuline and Inuit people.

I trust that the above comments are of assistance in responding to the important matters raised in your letters. To ensure that Mr. Anawak is aware of the matters discussed in our recent correspondence, I will be forwarding copies of your letter and my response to him.

Yours truly,



— Ronald A. Irwin, P.C., M.P.

Encl.

c.c.: Mr. Jack Anawak, M.P.

APPENDIX D

Letter of Understanding

June 1, 1993

Vice-Chief John Dantouze,
Denésuliné First Nation,
Prince Albert Tribal Council

Dear Chief Dantouze,

I appreciated the opportunity to meet with you and other Saskatchewan Denésuliné representatives this morning.

Based on our discussions I would like to reiterate the position of the Inuit of Nunavut on a number of topics of mutual interest and concern:

1. the Inuit of Nunavut recognize that Saskatchewan Denésuliné have traditionally used and continue to use certain lands north of the sixtieth parallel based on their Treaty or Aboriginal rights.

2. the Inuit of Nunavut have included Part 5 of Article 40 of the Nunavut Final Land Claim Agreement in an effort to provide some recognition of traditional and current use of certain lands within the Nunavut Settlement Area by Saskatchewan Denésuliné

3. the Inuit of Nunavut restate that sections 40.1.1 and 40.1.2 provide some legal protection against any application or interpretation of the Nunavut Final Land Claim Agreement in a way that prejudices any treaty or aboriginal rights of the Saskatchewan Denésuliné north of the sixtieth parallel

4. the Inuit of Nunavut acknowledge that Saskatchewan Denésuliné are fully entitled to invoke the protection of sections 40.1.1 and 40.1.2 of the Nunavut Final Land Claim Agreement

5. the Inuit of Nunavut agree not to amend, except by written agreement with the Saskatchewan Denésuliné, sections 40.1.1, 40.1.2 and Part 5 of Article 40 of the Nunavut Final Agreement in relation to Saskatchewan Denésuliné

6. the Inuit of Nunavut restate that section 40.1.3 and 2.13.1 of the Nunavut Final Land Claim Agreement allows an expeditious



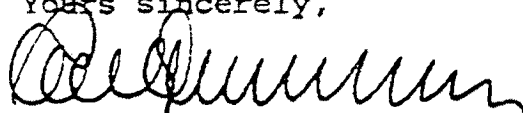
method of amendment of the Nunavut Agreement in the event there is agreement on more detailed overlap arrangements outside the judicial process

7. in the event that the Government of Canada is prepared to recognize that the Saskatchewan Denésuliné have treaty rights in the Nunavut Settlement Area or to enter into negotiations on Saskatchewan Denésuliné rights in the Nunavut Settlement Area, or in the event that such rights are recognized in the judicial process, the Inuit of Nunavut shall participate in negotiations in good faith, which negotiations shall include negotiations on the following topics:

- a) provisions for the continuation of harvesting by the Saskatchewan Denésuliné and Inuit in all areas traditionally and currently used, occupied by them, regardless of land claims agreement boundaries;
- b) identify areas of exclusive or equal, joint or overlapping use and occupancy between the Saskatchewan Denesuline and Inuit to provide for:
 - i) joint ownership of lands;
 - ii) sharing of wildlife and other benefits;
 - iii) joint participation in regimes for wildlife management, land use planning, impact assessment and water management;

8. the Inuit of Nunavut support the efforts of the Denésuliné of Saskatchewan to obtain a fair and full hearing of their assertions of treaty and aboriginal rights in the NWT by Canada.

Yours sincerely,



Paul Quassa
President

On this basis, the Saskatchewan Denésuliné withdraw any opposition to the immediate ratification of the Nunavut Final Land Claim Agreement, including the enactment of legislation by Parliament.



Vice-Chief John Dantouze

APPENDIX E

Chronology of Events

1970s - negotiations commence between Canada and NWT Dene Nations after *Paulette* decision acknowledges existence of land rights;

1970s - Denesúliné agree not to pursue treaty land selection in NWT on assurance that Dene Nations would respect their treaty rights and traditional territory;

1989 - Canada rejects Denesúliné claim on grounds that they surrendered aboriginal rights north of 60th parallel;

1991 - Minister of Indian Affairs reaffirms position on rejection but assures Denesúliné that their traditional harvesting activities would be protected in any Nunavut or Denedeh agreements;

1992 - Statement of Claim filed in Federal Court seeking declaration of existing aboriginal or treaty rights; injunction proceedings to postpone ratification of Nunavut Agreement failed but action remains in the courts; ICC agreed to conduct inquiry in December, 1992;

1993 - Denesúliné appear before Standing Committee on Aboriginal Affairs and attempt to delay passage of *Nunavut Act*;

June 1/93 - Letter of Understanding between Inuit and Denesúliné in which Denesúliné agree to withdraw opposition to *Nunavut Act* and Inuit agree to negotiate revisions to the settlement agreement if Canada recognized Denesúliné treaty rights within Nunavut area or such rights are recognized through judicial process;

December 1993 - Commission finds that the Denesúliné have existing treaty rights to hunt, fish and trap outside the treaty boundaries north of 60 and throughout their traditional territories; although this did not constitute a specific claim because Denesúliné harvesting activities had not been infringed upon, ICC recommended that Canada formally recognize and protect Denesúliné treaty harvesting rights;

January 1994 - Jack Anawak M.P. appointed to facilitate negotiations between Inuit and Denesúliné to reach a resource management agreement within Nunavut (ie. overlap agreement);

March 1994 - joint Inuit, Manitoba, Denesúliné meeting in Churchill, Manitoba;

August 5/94 - Minister Irwin formally responds to Commission's recommendations stating that Denesúliné rights were surrendered under the treaties and "we have seen nothing in the Commission's report that would make the Government of Canada change its view";

August 1994 - Keewatin Inuit Association rejects any "further negotiations on the issue of land

overlap" and terminates negotiations with Denesúliné on grounds that all land claim negotiations must be finalized with the Government of Canada;

September 1994 and March 1995 - Denesúliné urge Minister to recognize treaty rights as only option available to re-open negotiations with Inuit;

May 11/95 - Minister Irwin reiterated that any aboriginal rights to hunt, fish and trap north of 60 were surrendered under Treaties 5, 8 and 10 and that Denesúliné harvesting activities are protected under Article 40 of *Nunavut Act*; despite Inuit withdrawing from negotiations, Minister Irwin continued to encourage parties to negotiate resource management agreements to protect Denesúliné interests;

June 26/95 - Denesúliné elders meet in Fond du Lac to explore options and possibility of litigation in light of impasse; sought commitment from FSIN to support litigation if necessary;

July 21/95 - meeting between Vice-Chief Dantouze and Jack Anawak M.P.; Mr. Anawak acknowledged that the Denesúliné traditionally used and occupied lands in the Nunavut Settlement Area but the legal advice provided to the Minister of Indian Affairs from the Department of Justice is that any aboriginal rights they had to that area were surrendered under the treaties;

August 23/95 - meeting between Vice-Chief Dantouze and Minister Irwin who agreed to request that Justice review their legal position on the rights issue; if Justice changes its position, he agreed to appoint a federal negotiator on this matter to enter into discussions on harvesting rights;

September 12/95 - FSIN Chief Blaine Favel and Vice-Chief Dantouze met with Justice Minister Alan Rock who agreed to review the matter with the Assistant Deputy Minister of Justice.