

**INDIAN CLAIMS COMMISSION**

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

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**PANEL**

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Commissioner Carole T. Corcoran**

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**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,<sup>1</sup> 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.<sup>2</sup>

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 5 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

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<sup>1</sup> 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.

<sup>2</sup> "The spelling of Tsimpsean is one of a number of variants: Tsimshian, Chimseyans, Chymshean, Chimpsain, Shimshyans, Simseans, Simpsian, Tsimsean, Tsimseyans, Tsimsheans, T'simpshean, 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.

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 the same basis.<sup>3</sup> 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*<sup>4</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> *Indian Act, 1880*, SC 1880, c. 28, s. 37.

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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.<sup>5</sup>

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 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

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

demanding an absolute surrender of the Surrendered Lands from the Lax Kw'alaams Band as a condition to settlement.

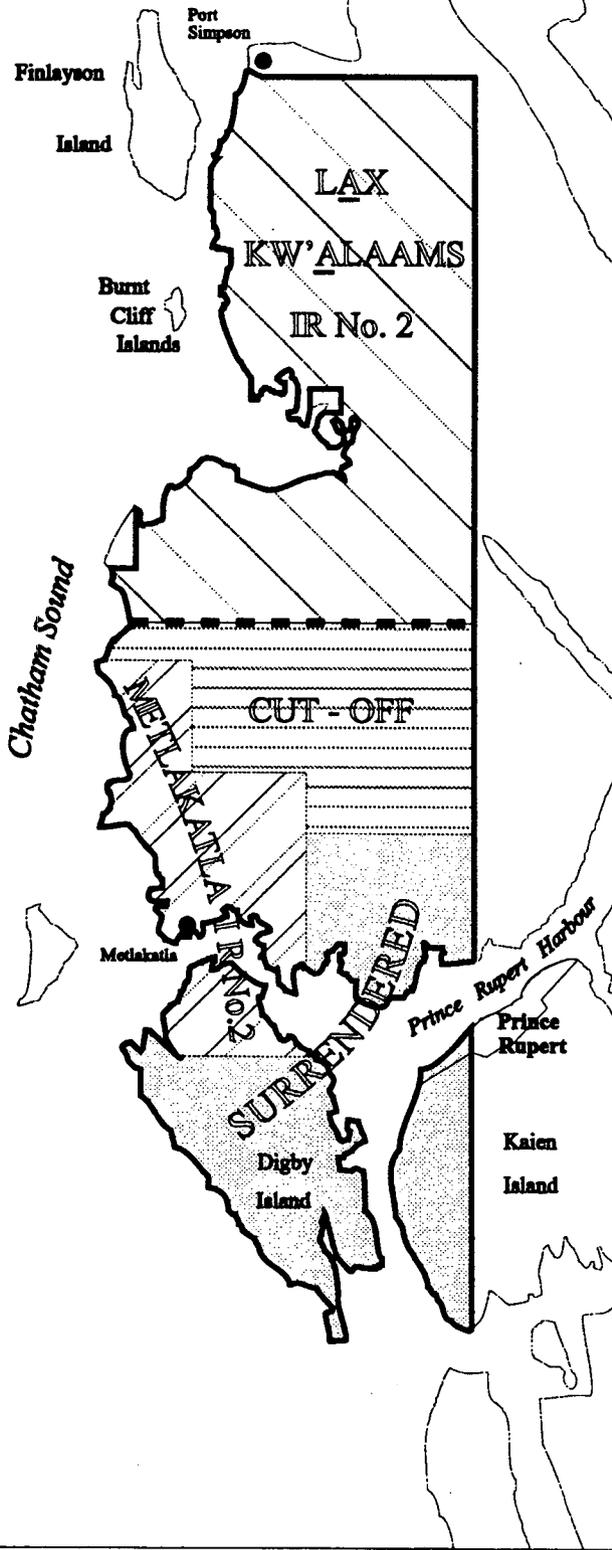
A second map on page 6 of this report shows the traditional lands of the Tsimpsean peoples as asserted by the Allied Tsimshian Tribes.<sup>6</sup> These areas are shaded grey. The territories used and occupied by each of the nine tribes are designated and marked by reference to the tribe(s) that occupied 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.

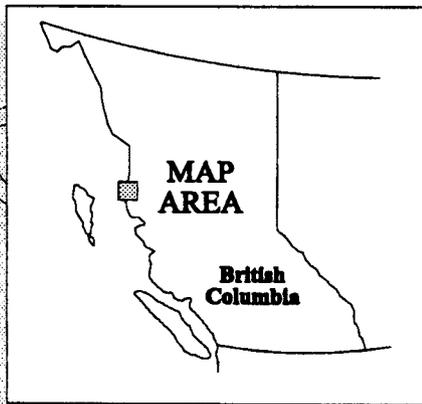
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<sup>6</sup> The traditional territories as asserted by the Allied Tsimshian Tribes were set out in a map tendered by the Lax Kw'alaams Band during the community sessions on March 15, 1994 (ICC Exhibit 10).

# LAND TRANSACTIONS AFFECTING TSIMPSEAN IR No. 2



-  Tsimpsean IR No. 2 prior to division
-  1888 O'Reilly Division Line:  
Lax Kw'alaams Band received northern 22,087 acres and  
Metlakatla Band received 35,655 acres
-  13,567 acres surrendered  
by Metlakatla Band in 1906  
("Surrendered Lands")
-  10,468 acres cut - off by  
McKenna-McBride Commission  
in 1916 ("Cut-Off Lands")
-  Present Lax Kw'alaams IR No. 2
-  Present Metlakatla IR No. 2





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**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 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.<sup>7</sup> 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 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.<sup>8</sup> The Commission was not asked to, and did not, make any ruling with respect to the

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<sup>7</sup> 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.

<sup>8</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, p. 6.

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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.

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**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; . . .<sup>9</sup>

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

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<sup>9</sup> 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).

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.<sup>10</sup>

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 . . .<sup>11</sup>

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*).<sup>12</sup> 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

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<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> 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*].

the Commission would conduct an inquiry into this matter.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> Counsel for Canada contend 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

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<sup>13</sup> 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.

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

<sup>15</sup> 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.

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

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."<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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."<sup>20</sup>

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

<sup>18</sup> Ibid., p. 7.

<sup>19</sup> 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.

<sup>20</sup> Supplementary Submissions on Behalf of the Government of Canada with respect to the Mandate of the Indian Claims Commission, December 13, 1993, p. 4.

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 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,

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compensation for loss of use, extinguishment of aboriginal title, etc.).<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

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 . . ." <sup>24</sup> What we have endeavoured to do in this inquiry is to examine the settlement agreement in its totality and to consider

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

<sup>22</sup> 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.

<sup>23</sup> *Outstanding Business*, p. 30.

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

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.<sup>25</sup> 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.

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<sup>25</sup> 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").<sup>26</sup> 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.<sup>27</sup> The entire area of Tsimpsean IR No. 2, as it was

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<sup>26</sup> ICC Exhibit 17.

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

<u>Tribe</u>	<u>Simooygit / Sem a'gidem</u>	<u>Current Holder of Name</u>
Gitwilgiots	Simooygit Shashaak	Harold Dudoward
Gitzaxlaal	Simmooygit Niisho'at	Arnold Brooks
Gitsees	Simooygit Niis-yahanaat	Lawrence Helin
Ginaxangiik	Simooygit Xhaghass	Fred Dudoward, Sr.
Gitnadoiks	Simooygit Niiswex	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

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

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 Gitwilkseba were extinct by this time).<sup>29</sup>

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

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<sup>28</sup> The Claim (ICC Exhibit 17), p. 7.

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

land around the Prince Rupert Harbour area and extending far up the Skeena River. The map on page 6 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."<sup>30</sup> Mr. Lawrence Helin, Simooygit Niis-yahanaat 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.<sup>31</sup> Simooygit Niis-yahanaat 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 the present site of *Lax Kw'alaams* was also referred to by Simooygit Niis-yahanaat as "the cradle of our civilization."<sup>32</sup>

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<sup>30</sup> ICC Transcripts, vol. 1, p. 26, March 15, 1994.

<sup>31</sup> *Ibid.*, p. 43.

<sup>32</sup> 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

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."<sup>33</sup>

### **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

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Transcripts, vol. 1, pp. 36-39, March 15, 1994).

<sup>33</sup> 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.

on Vancouver Island.<sup>34</sup> However, during the mid-1850s the colony abandoned this policy of entering into treaties as the means of obtaining title to Indian lands.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

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:

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<sup>34</sup> 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 Maori 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).

<sup>35</sup> The last treaty to be entered into during the colonial period was the Salequun 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).

<sup>36</sup> 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).

<sup>37</sup> See ICC Exhibit 13, p. 1.

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.<sup>38</sup>

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 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

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

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of State for the Colonies.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup>

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

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

<sup>40</sup> ICC Exhibit 13, p. 1; Bartlett, *Indian Reserves*, p. 35.

<sup>41</sup> 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).

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.<sup>42</sup>

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."<sup>43</sup>

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

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<sup>42</sup> R.W. Scott, Acting Minister of Interior, to Governor General in Council, November 5, 1875 (ICC Documents, p. 38); ICC Exhibit 16, tab 2.

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

1878.<sup>44</sup> 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."<sup>45</sup> Indeed, Sproat's comment was prophetic; it was not until 1992 that the British Columbia government formally acknowledged the existence of aboriginal title.

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

Around 1880 Peter O'Reilly succeeded the retiring Sproat as Indian Reserve Commissioner.<sup>46</sup> 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.<sup>47</sup>

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<sup>44</sup> ICC Transcripts, vol. 1, p. 54, March 15, 1994.

<sup>45</sup> ICC Exhibit 13, p. 2.

<sup>46</sup> ICC Transcripts, vol. 1, p. 54, March 15, 1994.

<sup>47</sup> 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.

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."<sup>48</sup> 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"<sup>49</sup> -- 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."<sup>50</sup> At Metlakatla they "asked for the Peninsula for themselves, & their brothers at Simpson."<sup>51</sup> The area of land requested by the Chiefs to be set aside as reserve is depicted on the map on page 6 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

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<sup>48</sup> 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).

<sup>49</sup> 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).

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

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

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 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.<sup>52</sup>

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.<sup>53</sup>

### **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

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<sup>52</sup> 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).

<sup>53</sup> 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.

particulars."<sup>54</sup> 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.<sup>55</sup>

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."<sup>56</sup> Eventually, on November 2, 1886, the government dispatched HMS *Cormorant* to the area to enforce the survey and to arrest a number of Indians who were preventing it from being completed.<sup>57</sup>

Sandra Littlewood suggested that this event proved to be too much for the Tsimpsean people to tolerate. She testified that the arrests at Metlakatla compounded the effect of a court case in August 1886, in which five Metlakatla

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<sup>54</sup> ICC Transcripts, vol. 1, p. 86, March 15, 1994.

<sup>55</sup> *Ibid.*, p. 87.

<sup>56</sup> 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).

<sup>57</sup> 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 gunboat 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).

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."<sup>58</sup> 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.<sup>59</sup>

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 Tsimpsean 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."<sup>60</sup> 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

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<sup>58</sup> ICC Transcripts, vol. 1, p. 89, March 15, 1994.

<sup>59</sup> The Claim (ICC Exhibit 17), p. 25.

<sup>60</sup> 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).

the land belongs to the Indians it is a very different thing. We cannot do that."<sup>61</sup>

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."<sup>62</sup> The instructions provided to Commissioners C.F. Cornwall 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.<sup>63</sup>

The Commissioners reported that the Metlakatla Band wanted "a line drawn north of Metlakatlah [sic], defining their reserve from the Fort Simpsons'."<sup>64</sup> 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

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<sup>61</sup> Ibid., p. 262 (ICC Documents, p. 150).

<sup>62</sup> 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. 415 (ICC Documents, p. 158).

<sup>63</sup> 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. 416 (ICC Documents, p. 157).

<sup>64</sup> The Claim (ICC Exhibit 17), p. 27.

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*<sup>65</sup> 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.<sup>66</sup>

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."<sup>67</sup> 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 Auckland replied, "We have talked it over, and we all agree."<sup>68</sup> Beyond this

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<sup>65</sup> *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.

<sup>66</sup> Peter O'Reilly to Superintendent General of Indian Affairs, October 4, 1888, NA, RG 10, vol. 3776, file 37373-2 (ICC Documents, p. 218).

<sup>67</sup> The Claim (ICC Exhibit 17), p. 25.

<sup>68</sup> *Ibid.*, p. 26.

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.<sup>69</sup>

Before O'Reilly departed, Wallace put these closing words to him:

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<sup>69</sup> 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]).

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.<sup>70</sup>

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 timber for various fishing-related purposes had been acknowledged, and their fishing and hunting places on the Skeena had been set aside.<sup>71</sup>

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.<sup>72</sup> 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

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<sup>70</sup> The Claim (ICC Exhibit 17), pp. 28-29.

<sup>71</sup> 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).

<sup>72</sup> The Claim (ICC Exhibit 17), pp. 30-32.

them more land than they had asked for in 1881.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup>

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 5 illustrates this division. In their 1979 claim submission, the Port Simpson Band alleged that the 1888 division was

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<sup>73</sup> 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).

<sup>74</sup> The Claim (ICC Exhibit 17), p. 39.

<sup>75</sup> *Ibid.*, pp. 41-42.

unfair. Census figures for 1889 (no figures were available for 1888) 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.<sup>76</sup>

### **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.<sup>77</sup>

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

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<sup>76</sup> Ibid., pp. 42-44.

<sup>77</sup> Ibid., pp. 46-47.

company to the federal Crown for a price of \$7.50 per acre.<sup>78</sup>

The surrender was confirmed by federal Order in Council on September 21, 1906.<sup>79</sup> 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.<sup>80</sup>

Because all the Surrendered Lands were located south of the 1888 dividing line in the Metlakatla Reserve, the Department of Indian Affairs neither consulted 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.<sup>81</sup>

### **The McKenna-McBride Commission (1916)**

In 1912 J.A.J. McKenna was appointed by the federal government as a special

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<sup>78</sup> *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).

<sup>79</sup> Order in Council, September 21, 1906 (ICC Documents, p. 281).

<sup>80</sup> The Claim (ICC Exhibit 17), pp. 47-48.

<sup>81</sup> *Ibid.*, p. 49.

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.<sup>82</sup>

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."<sup>83</sup> 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

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<sup>82</sup> Excerpt taken from Justice McEachern's judgment at trial of *Delgamuukw v. B.C.*, [1991] 3 WWR 97 at 326 (BCSC).

<sup>83</sup> 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.

dated July 29, 1938.<sup>84</sup>

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.<sup>85</sup>

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.<sup>86</sup>

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<sup>84</sup> Ibid., pp. 37-38.

<sup>85</sup> Ibid., pp. 36-37.

<sup>86</sup> The Claim (ICC Exhibit 17), p. 49.

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.<sup>87</sup>

In 1916 the Commission's Minute of Decision formally provided for Tsimpsean IR No. 2 to be reduced by 10,468 acres.<sup>88</sup> The Minute of Decision stated that the remaining 33,707 acres of the reserve were confirmed as "Tsimpsean Indian Reserve No. Two (2), of the Tsimpsean Tribe, Port Simpson and Metlakatla Bands . . ."<sup>89</sup> The Commission's decision was ultimately confirmed by parallel legislation of the provincial and federal governments in 1923 and 1924.<sup>90</sup>

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

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<sup>87</sup> Ibid., pp. 50-51.

<sup>88</sup> *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).

<sup>89</sup> The Claim (ICC Exhibit 17), p. 52.

<sup>90</sup> 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.

decision. There is no evidence that a reply to its petition was ever received.<sup>91</sup>

### **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.<sup>92</sup> 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 . . ." <sup>93</sup>

### **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.<sup>94</sup>

On June 28, 1991, the British Columbia Claims Task Force presented its

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<sup>91</sup> The Claim (ICC Exhibit 17), p. 54.

<sup>92</sup> 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).

<sup>93</sup> *Ibid.*, p. 3.

<sup>94</sup> *Ibid.*, p. 4.

report, making 19 recommendations for the Province of British Columbia, the Government of Canada, and the First Nations of British Columbia to enter into a new era of treaty negotiations.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup> Professor Foster summed up these developments by stating that

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<sup>95</sup> 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.

<sup>96</sup> *The Report of the British Columbia Claims Task Force*, June 28, 1991 (ICC Documents, p. 376).

<sup>97</sup> ICC Exhibit 13, pp. 4-5. In May 1993, Bill 22, also known as the *Treaty Commission Act*, was enacted and proclaimed.

"[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."<sup>98</sup>

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 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.<sup>99</sup>

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.<sup>100</sup>

#### **CLAIM OF THE PORT SIMPSON BAND**

The 1979 specific claim of the Port Simpson Band is based on the Band's

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<sup>98</sup> Ibid., p. 5.

<sup>99</sup> ICC Transcripts, vol. 1, pp. 29-30, March 15, 1994.

<sup>100</sup> See written argument by Harry Slade (counsel for the Lax Kw'alaams Band), pp. 11 and 12.

allegation that the 1888 division of Tsimpsean IR No. 2 into two reserves was illegal. The basis of the claim is that, when British Columbia confirmed Tsimpsean 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 Tsimpsean 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.<sup>101</sup>

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.<sup>102</sup> Not only was there

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<sup>101</sup> The Claim (ICC Exhibit 17), p. 22.

<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup>

The Port Simpson Band put forth the following three proposals for settlement:

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<sup>103</sup> The Claim (ICC Exhibit 17), p. 35.

<sup>104</sup> *Ibid.*, pp. 54-57.

<sup>105</sup> *Ibid.*, pp. 57-60.

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.<sup>106</sup>

#### 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

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<sup>106</sup> Ibid., pp. 61-62.

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Bands was required for the surrender of that portion of the reserve.<sup>107</sup>

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*<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup>

In a letter from Joanne Kellerman, Canada's legal adviser, to Harry Slade

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<sup>107</sup> Indian Affairs Minister David Crombie to Chief Leonard Reece, April 15, 1985 (ICC Documents, p. 352).

<sup>108</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, [1984] 6 WWR 481, [1985] 1 CNLR 120 (SCC).

<sup>109</sup> *Outstanding Business*, pp. 30-31. The compensation criteria listed in the policy are set out in Appendix D of this report.

<sup>110</sup> 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.

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.
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. . . .<sup>111</sup>

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

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<sup>111</sup> Kellerman to Slade, December 5, 1985 (ICC Documents, pp. 356-57).

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."<sup>112</sup> 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 of Treasury Board Submission, order-in-council and other instruments required; ratification by Canada of the settlement agreement; transmittal of funds to the band."<sup>113</sup> 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

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<sup>112</sup> 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).

<sup>113</sup> Manfred Klein to Harry Slade, August 30, 1991 (ICC Documents, p. 445).

\$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.<sup>114</sup>

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 lend 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

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<sup>114</sup> Draft Specific Claim Settlement Agreement, September 27, 1991 (ICC Documents, p. 449).

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to the Specific Claim Settlement Agreement . . .<sup>115</sup>

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 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*."<sup>116</sup>

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.<sup>117</sup>

Mr. Klein responded on December 11, 1992:

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<sup>115</sup> Geoffrey Moyses, Ministry of Attorney General, to Harry Slade, November 13, 1992 (ICC Documents, p. 472).

<sup>116</sup> Draft Specific Claim Settlement Agreement, November 20, 1992, Paragraph 4.2 (ICC Documents, p. 485).

<sup>117</sup> ICC Documents, p. 497.

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.<sup>118</sup>

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.<sup>119</sup>

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

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<sup>118</sup> Manfred Klein to Harry Slade, December 11, 1992 (ICC Documents, p. 499).

<sup>119</sup> Ibid. (ICC Documents, p. 500). ISCC or Indian Specific Claims Commission refers to the Indian Claims Commission.

requirements" over which the Minister of Indian Affairs has no power or discretion.<sup>120</sup>

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 within 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 Tsimpsian Nation, the Tribes or the Tsimpsian 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 Tsimpsian Nation or the Tribes of the Tsimpsian 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.<sup>121</sup>

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

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<sup>120</sup> Ibid. (ICC Documents, p. 499).

<sup>121</sup> 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).

by the reserve allotment.<sup>122</sup> 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*."<sup>123</sup> 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.<sup>124</sup>

Further requests by the Band to bring the matter to the direct attention of Minister Siddon were rejected by Canada.<sup>125</sup> 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.<sup>126</sup>

Any prospect for mediation was ended by Mr. Klein's letter to Mr. Slade

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<sup>122</sup> Attached as Appendix D of letter from Slade to Henderson, April 15, 1993 (ICC file 2109-02-1, vol. 1).

<sup>123</sup> Manfred Klein to Harry Slade, January 22, 1993 (ICC Documents, p. 504).

<sup>124</sup> 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).

<sup>125</sup> 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).

<sup>126</sup> Lax Kw'alaams Band Council Resolution, dated January 26, 1993 (ICC Exhibit 1).

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 . . .<sup>127</sup>

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."<sup>128</sup> 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.

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<sup>127</sup> Manfred Klein to Harry Slade, February 19, 1993 (ICC Documents, p. 517).

<sup>128</sup> Slade to LaForme, March 4, 1993 (ICC file 2109-02-1, vol. 1).

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**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.

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**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.<sup>129</sup> 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.<sup>130</sup>

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.

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<sup>129</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, p. 8.

<sup>130</sup> *Outstanding Business*, p. 24 (ICC Documents, p. 348).

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 form of release is an absolute surrender under section 38(1) of the *Indian Act*.<sup>131</sup> 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

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<sup>131</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, p. 8.

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.<sup>132</sup>

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.<sup>133</sup> Mr. Becker, however, submitted that a simple contractual release does not achieve finality of settlement because the terms and 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.<sup>134</sup>

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<sup>132</sup> 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.

<sup>133</sup> ICC Transcripts, vol. 2, p. 185, March 16, 1994.

<sup>134</sup> 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

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.<sup>135</sup>

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

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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.

<sup>135</sup> 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.

be required as a condition of settling the claim but that they considered the form of the release to be open to negotiation.<sup>136</sup> 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 essential 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.<sup>137</sup>

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. . . ." <sup>138</sup>

An earlier draft of the agreement contemplated a "surrender," whereas this draft extended the effect of the surrender by adding the word "absolute" throughout.<sup>139</sup> While section 38(1) of the *Indian Act* provides for an absolute

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<sup>136</sup> ICC Transcripts, vol. 1, p. 136, March 15, 1994.

<sup>137</sup> Draft Specific Claim Settlement Agreement, September 27, 1991 (ICC Documents, p. 447).

<sup>138</sup> *Ibid.*, p. 447.

<sup>139</sup> ICC Transcripts, vol. 1, p. 143, March 15, 1994.

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.<sup>140</sup>

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.<sup>141</sup> 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 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.<sup>142</sup>

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

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<sup>140</sup> 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 (ICC Documents, p. 499).

<sup>141</sup> ICC Transcripts, vol. 1, p. 130, March 15, 1994.

<sup>142</sup> ICC Exhibit 18.

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."<sup>143</sup> 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  
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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.<sup>145</sup> Mr. Slade countered that Canada's demand for a surrender went beyond an incidental effect because Canada's stated intention was to extinguish

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<sup>143</sup> *Outstanding Business*, p. 30 (ICC Documents, p. 349).

<sup>144</sup> Harry Slade to Ken Clancy, January 22, 1993 (ICC Documents, p. 506).

<sup>145</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, p. 9.

aboriginal interests in the Surrendered Lands.<sup>146</sup> With respect, we do not accept Mr. Becker's argument. The purpose of this provision in the policy 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.

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<sup>146</sup> ICC Transcripts, vol. 2, p. 230, March 16, 1994.

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.<sup>147</sup>

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 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*.<sup>148</sup> Furthermore, the *Lax Kw'alaams* Band asserts that its membership is not co-

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<sup>147</sup> ICC Transcripts, vol. 1, p. 129, March 15, 1994.

<sup>148</sup> *Ibid.*, p. 13.

extensive with membership in the Tsimpsean tribes.<sup>149</sup> 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.*<sup>150</sup>

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

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<sup>149</sup> 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).

<sup>150</sup> Lax Kw'alaams Band, Draft Outline of Argument, n.d., pp. 13-14. Emphasis added.

who is an eligible voter for the purposes of obtaining a surrender of aboriginal title.<sup>151</sup>

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.<sup>152</sup>

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

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<sup>151</sup> 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.

<sup>152</sup> [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."

right."<sup>153</sup>

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.<sup>154</sup> 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.<sup>155</sup>

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, 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.

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<sup>153</sup> *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.

<sup>154</sup> *Delgamuukw and Sparrow*.

<sup>155</sup> ICC Transcripts, vol. 2, p. 169, March 16, 1994.

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.<sup>156</sup> 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 Tsimpsean 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

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<sup>156</sup> Ibid., p. 190.

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 Tsimpsean 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.<sup>157</sup>

In the recent BC Court of Appeal decision of *Delgamuukw v. British Columbia*,<sup>158</sup> 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*.<sup>159</sup>

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<sup>157</sup> ICC Transcripts, vol. 1, p. 28, March 15, 1994.

<sup>158</sup> [1991] 3 WWR 97 (BCSC), varied [1993] 5 WWR 97, 104 DLR (4th) 470 (BCCA).

<sup>159</sup> At 124 and 492.

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.<sup>160</sup>

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*."<sup>161</sup> The enactment of laws respecting the management of Indian reserve lands flows from the exercise of federal legislative jurisdiction.<sup>162</sup> The protection afforded by this Act flows from the federal Crown's legislative jurisdiction over Indian reserve lands.

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<sup>160</sup> 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.

<sup>161</sup> Submissions on Behalf of the Lax Kw'alaams Band, p. 10.

<sup>162</sup> In 1868 Canada passed *An Act providing for the organisation 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.

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.<sup>163</sup> 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.*<sup>164</sup>

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.<sup>165</sup> 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

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<sup>163</sup> 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).

<sup>164</sup> [1985] 1 CNLR 120 (SCC) at 134. Emphasis added.

<sup>165</sup> 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) [of the *Constitution Act, 1867*] disappeared and the legal and beneficial interest, unencumbered thereby, continued in the Province of New Brunswick."

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 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.*<sup>166</sup>

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:

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<sup>166</sup> [1985] 1 CNLR 120 at 136. Emphasis added.

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 . . .<sup>167</sup>

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.<sup>168</sup>

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 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

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<sup>167</sup> (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 claim 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.

<sup>168</sup> ICC Transcripts, vol. 1, pp. 64-65, March 15, 1994.

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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."<sup>169</sup> It does not follow that an absolute surrender of reserve lands under the *Indian Act* would have any effect on the underlying aboriginal interests that 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. Canada suggests that it may not be possible to expressly exclude aboriginal interests from the surrender clause.<sup>170</sup> 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

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<sup>169</sup> *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*.

<sup>170</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, p. 10.

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 Tsimpsean tribes, are to be surrendered.

### **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.<sup>171</sup> 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

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<sup>171</sup> Ibid.

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.<sup>172</sup>

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.*

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.<sup>173</sup>

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<sup>172</sup> Submissions on Behalf of the Government of Canada, March 11, 1994, pp. 10-11.

<sup>173</sup> [1993] 5 WWR 97 at 128-29, 104 DLR (4th) 470 at 496-97.

This decision underscores the fact that a detailed examination of the history of the Tsimpsean 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 Tsimpsean 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 Tsimpsean 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 essential 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 by including clauses in the agreement respecting release, indemnity, and set-off.<sup>174</sup> 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:

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<sup>174</sup> 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 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 within 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 Tsimpsean Nation, the Tribes or the Tsimpsean 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 Tsimpsean Nation or the Tribes of the Tsimpsean 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.

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.<sup>175</sup>

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."<sup>176</sup>

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

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<sup>175</sup> Draft Specific Claim Settlement Agreement, November 20, 1992 (ICC Documents, pp. 492-93).

<sup>176</sup> Lax Kw'alaams Band, Draft Outline of Argument, n.d., p. 16.

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."<sup>177</sup>

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.

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<sup>177</sup> ICC Transcripts, vol. 2, , p. 231, March 16, 1994.

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**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.<sup>178</sup>

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."<sup>179</sup> 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

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<sup>178</sup> 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 again welcome its recommendations on how to proceed."

<sup>179</sup> See criterion 1 of the Specific Claims Policy at Appendix D to this report.

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.<sup>180</sup>

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 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

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<sup>180</sup> *Outstanding Business*, p. 24 (ICC Documents, p. 348).

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 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 1884.

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.<sup>181</sup>

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<sup>181</sup> ICC Transcripts, vol. 2, p. 244, March 16, 1994.

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.

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 release, 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**

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**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.

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**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.

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**APPENDIX C**

**INDIAN CLAIMS COMMISSION**

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**LAX KW'ALAAMS (PORT SIMPSON) INQUIRY**  
**RULING ON GOVERNMENT OF CANADA OBJECTION**

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**PANEL**

Commissioner Roger Augustine  
Commissioner Carole Corcoran  
Commissioner James Prentice, Q.C.

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**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

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**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.

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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.<sup>1</sup>

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<sup>1</sup> 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 Prentice, Q.C.**  
Commissioner

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**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.