Landmark

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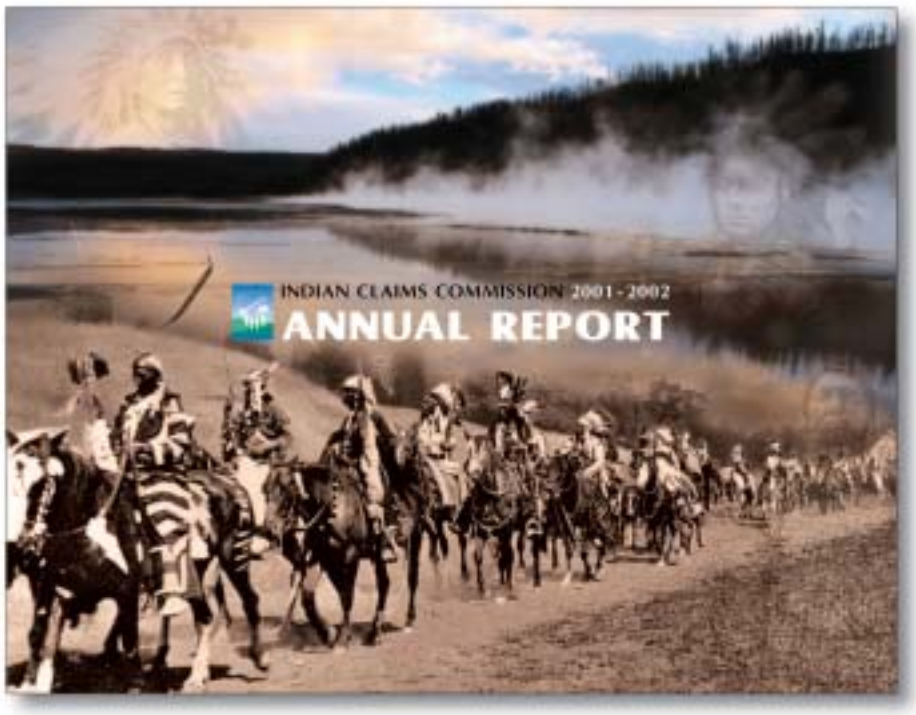
Annual Report Calls For Improvements To Research Funding System



A procession of Blackfoot graces the cover of the ICC's 2001-2002 Annual Report.

The Indian Claims Commission's (ICC) *2001-2002 Annual Report*, tabled in the House of Commons on May 7, 2003, says improvements need to be made to the manner in which Indian and Northern Affairs Canada (INAC) provides funding to First Nations for research to support their specific claims.

PHIL FONTAINE RESIGNS – RENÉE DUPUIS APPOINTED CHIEF COMMISSIONER

(SEE PAGE 4)

"I have heard the elders say that when the terms of the treaties were deliberated the smoke from the pipe carried that agreement to the Creator binding it forever. An agreement can be written in stone, stone can be chipped away, but the smoke from the sacred pipe signified to the First Nation peoples that the treaties could not be undone."
Ernest Benedict, Mohawk Elder
Akwesasne, Ontario
June 1992

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ICC FAST STATS - APRIL 2001 – MARCH 2002

- Involved in 20 ongoing inquiries
- Provided mediation services in 17 ongoing claims;
- 12 of these went to formal negotiations between the First Nation and the federal government, 3 were pursued as pilot projects, and 2 started the planning conference stage
- Published 3 inquiry reports
- Published 1 mediation report

From its creation in 1991 to the end of the 2001-2002 fiscal year, the ICC had completed 55 inquiries, 25 of which were either settled or accepted for negotiation.

In its sole recommendation, the ICC says the mandate of INAC's Research Funding Division must be revised to ensure that clear and precise funding criteria are established and communicated to First Nations. It also recommends that First Nations be treated fairly when applying for research funds and that the Division provide written reasons clearly explaining how its funding criteria guidelines have been applied whenever First Nations are denied funding.

According to the *Annual Report*, the Division—a part of INAC's Specific Claims Branch—lacks sufficient resources to fulfill its responsibilities to First Nation claimants. More often than not, it points out, research funds run out well before the end of a given year.

Many First Nations do not have the financial resources to do the research necessary to mount an effective claim. Research funding is therefore imperative if a First Nation making a claim is to have access to justice.

It should be remembered that, in establishing the ICC, Canada provided First Nations with an alternative to the courts for resolution of their specific land claims. At that time, Canada made it clear this would be a funded process, a measure designed to lend credibility to the process and instill confidence in it.

The *Annual Report* outlines the Commission's concerns about how the Research Funding Division responds to requests for funding. The Commission is particularly troubled by instances in which the Commission has authoritatively interpreted its mandate to proceed with an inquiry under the *Inquiries Act*, only to have the Division refuse funding to a First Nation claimant. This refusal effectively prevents First Nations from participating in the inquiry process – a process that, in the letters of rejection it sends to First Nation claimants, Canada describes as an alternative to litigation.

During 2001-2002, the Commission published three inquiry reports. A highlight of the year was settlement of a claim by Saskatchewan's Mistawasis First Nation, which received $16.3 million in compensation for damages and losses stemming from an illegal surrender of its land almost a century ago. The ICC published its report on the claim in March 2002.

In June 2001, the Commission was pleased to learn that Canada had accepted for negotiation a claim by the Chippewas of the Thames First Nation in southwestern Ontario. The ICC's report on this pre-Confederation claim was issued in March 2002. Known as the "Clench Defalcation", the claim involves the misappropriation of money from the sale of land, surrendered in 1834 by the First Nation, by the agent responsible for selling the land.

In December 2001, the Commission released its report on the claim by the Esketemc First Nation of British Columbia that the federal government had disallowed or reduced three reserves that had been set aside for the band. The Commission found that, in so doing, Canada had breached its fiduciary obligations to the ancestors of the present-day Esketemc First Nation.

In addition to the three inquiry reports, in March 2002 the Commission published a mediation report on the Fishing Lake First Nation's 1907 Surrender Claim. The *Annual Report* expresses pride in the role played by the

ICC in the successful negotiation of this claim. The Commission's inquiry process afforded the First Nation the opportunity to submit new evidence and arguments that ultimately caused Canada to accept the claim for negotiation. Following Canada's acceptance, both parties agreed to have the Commission act as facilitator in the ensuing negotiations.

The *2001-2002 Annual Report* is available on-line at www.indianclaims.ca. If you wish a copy sent by mail, call (613) 947-3939 or e-mail: mgarrett@indianclaims.ca.

After signing the land claim agreement, Chief Darryl Watson of the Mistawasis First Nation in Saskatchewan, presents INAC Minister Robert Nault with a traditional figurine, June 12, 2001.
Photograph by Lawrence Johnston

CLAIMS IN INQUIRY

Blood Tribe/Kainaiwa (Alberta) – Big Claim

Conseil de bande de Betsiamites (Quebec) – Highway 138 and Betsiamites Reserve

Conseil de bande de Betsiamites (Quebec) – Bridge over the Betsiamites River

Cowessess First Nation (Saskatchewan) – 1907 surrender – Phase II

Cumberland House Cree Nation (Saskatchewan) – Claim to IR 100A

James Smith Cree Nation (Saskatchewan) – Chakastaypasin IR 98

James Smith Cree Nation (Saskatchewan) – Peter Chapman IR 100A

James Smith Cree Nation (Saskatchewan) – Treaty land entitlement

Nadleh Whut'en Indian Band (British Columbia) – Lejac School

Opaskwayak Cree Nation (Manitoba) – Streets and Lanes

Pasqua First Nation (Saskatchewan) – 1906 surrender

Paul Indian Band (Alberta) – Kapasawin Townsite

Roseau River Anishinabe First Nation (Manitoba) – 1903 surrender

*Sandy Bay Ojibway First Nation (Manitoba) – Treaty land entitlement

Siksika First Nation (Alberta) – 1910 surrender

*Stanjikoming First Nation (Ontario) – Treaty land entitlement

Stó:lo Nation (British Columbia) – Douglas reserve

Sturgeon Lake First Nation (Saskatchewan) – 1913 surrender

Taku River Tlingit First Nation (British Columbia) – Wenah specific claim

U'Mista Cultural Society (British Columbia) – The Prohibition of the Potlatch

Williams Lake Indian Band (British Columbia) – Village site

Wolf Lake First Nation (Quebec) – Reserve lands

** in abeyance*

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New Chief Commissioner At ICC

On June 3, 2003, Phil Fontaine resigned as Chief Commissioner of the Indian Claims Commission to contest the position of National Chief of the Assembly of First Nations, an office he previously held from 1997 to 2000. He was appointed Chief Commissioner of the ICC by Prime Minister Jean Chrétien in August 2001.

"I have been pleased to be a part of the work of the ICC over the last two years. I would like to thank the staff of the Commission for their support, both for me and for the work of the Commission," Mr Fontaine said.

Phil Fontaine.
Photograph by Patrice Laroche

ICC Chief Commissioner Renée Dupuis.

Renée Dupuis was appointed as the ICC's new Chief Commissioner on June 10, 2003, by Prime Minister Jean Chrétien. Mme Dupuis, a lawyer from Quebec City, has been a Commissioner of the ICC since March 28, 2001. During her career, Mme Dupuis has focussed largely on human rights and specifically on the rights of Canada's aboriginal peoples. She has authored numerous books and articles, and lectured extensively on human rights, administrative law and aboriginal rights. She is a graduate in law from the Université Laval and holds a master's degree in public administration from the École nationale d'administration publique.

Alexis First Nation Report Issued

The ferry located at the narrows of Lac Ste Anne, Alberta was often used to transfer goods to and from the Alexis First Nation.
Glenbow Archives NA-4022-1

In a report issued in March 2003, the ICC recommended that the federal government accept for negotiation a claim by the Alexis First Nation involving the federal Crown's grants of three rights of way to Calgary Power (now TransAlta Utilities) on the Band's reserve during the 1950s and 1960s.

The First Nation alleged that the Government of Canada failed to protect the Band's interests in each of the three transactions. The ICC concluded that Canada owes an outstanding lawful obligation to the Alexis First Nation, which is located about 60 kilometres northwest of Edmonton, Alberta.

The first right of way, granted in 1959, concerned an electrical distribution line that served the Alexis Day School on the reserve. The Band was promised jobs to clear the land, but received no compensation for the right of way. The second distribution line right of way, granted in 1967, extended from the 1959 line south to a location outside the reserve and was initially intended to serve cottages on the south shore of Lac Ste Anne at West Cove. It also brought electricity to the houses on the Alexis reserve. The Band received $195 in compensation for the right of way. Both the 1959 and 1967 distribution line permits were granted pursuant to the *Indian Act*, and both permits required Band Council consent.

In 1969, Calgary Power received a permit from the Crown for a right of way to build a high voltage transmission line across the reserve, serving only communities outside the reserve. It was approved through the corporation's enabling legislation and the expropriation provisions in the *Indian Act*. The Band was not required to provide consent but did pass a Band Council Resolution agreeing to the terms of the transaction. The Band received a one-time lump sum payment of $4,296 in

This map shows the placement of Calgary Power's electrical transmission lines across the Alexis First Nation.

compensation, and band members were promised jobs clearing the right of way.

In October 1999, the First Nation submitted a claim for breach of statute, treaty, and fiduciary duty to the federal government. Receiving no response, the First Nation requested that the ICC conduct an inquiry into its claim, arguing that the government's lack of response amounted to a rejection. In April 2000, the Commission found that delays by Canada were tantamount to a rejection and, because of this, it had jurisdiction to review the claim. In January 2001, the federal government completed its review and informed the First Nation that the claim was rejected.

The ICC found that during the 1950s and 1960s the Alexis First Nation was vulnerable due to the conditions on the reserve and the Band's unequal bargaining position with Calgary Power. The reserve was described as being without electricity, roads and infrastructure. Employment prospects were grim as there was little economic development within the First Nation, and the leaders of the community lacked formal education and a knowledge of English.

It is against this backdrop of vulnerability that the nature and scope of Canada's fiduciary obligation to protect the best interests of the Band was assessed.

In the 1959 and 1967 grants for rights of way, the ICC found that because of the direct, ongoing benefit of electricity the Band received from the transactions, the informed consent of the Band, and the absence of any evidence that compensation for the 1967 line was inadequate, Canada had no further duty to try to obtain better terms for the Band.

The focus of the claim, however, was Calgary Power's construction in 1969 of a transmission line across the reserve, for which the Band received a lump sum payment. The transaction did not provide an ongoing benefit to the First Nation. The First Nation claimed that Canada failed to achieve fair and reasonable value for Calgary Power's use of reserve land under the 1969 agreement, resulting in a continuing loss of revenue until the late 1990s, when the First Nation began collecting tax revenue from the corporation.

ICC Chief Commissioner Phil Fontaine said that the ICC's findings led it to a number of conclusions that supported the First Nation's claim: "As our report indicates, the Crown failed to prevent an improvident or exploitative arrangement. In applying the test used in the *Apsassin* case of the reasonable person managing his own affairs, we concluded that the Crown would not have made such a deal for itself in 1969, given its knowledge that a one-time lump sum payment was inadequate compensation for a long-term interest in reserve land. In addition, we found that, in this case, the Crown had an ongoing duty to take steps to recoup the losses under the expropriation agreement by assisting the First Nation to implement its taxation authority, if necessary collecting tax revenues from Calgary Power on the First Nation's behalf."

Members of the Commission panel of inquiry into the Alexis First Nation's claim included Commissioners Roger J. Augustine, Daniel J. Bellegarde, and Sheila G. Purdy.

The ICC Addresses The Senate On *The Specific Claims Resolution Act*

On June 11, 2003, Chief Commissioner Renée Dupuis and Commissioner Daniel J. Bellegarde presented the ICC comments on the *Specific Claims Resolution Act* before the Senate's Standing Committee on Aboriginal Peoples. The act establishes the new Canadian Centre for the Independent Resolution of First Nations Specific Claims, which will provide for the filing, negotiation, and resolution of specific claims, and will eventually replace the Indian Claims Commission.

Recently appointed Chief Commissioner of the ICC, Renée Dupuis (centre) presented the Commission's comments on bill C-6 to the Senate's Standing Committee on Aboriginal Peoples. Also present to assist Mme Dupuis in answering the Senators' questions, are Commissioner Daniel J. Bellegarde (left) and Commission Counsel Kathleen Lickers (right).

As an independent body charged with inquiring into and assisting in the mediation of specific claims which have been rejected by Indian and Northern Affairs Canada, the ICC must preserve its neutrality and objectivity in regard to issues between Canada and First Nations. The Commission remains focussed on creating a process of resolving specific claims in a manner which is ethical, rational and fair to all parties. With this in mind, the Commissioners outlined the strengths and weaknesses of the proposed bill.

"The bill has some positive qualities, including the creation of a completely independent tribunal; the emphasis on alternative dispute resolution; the inclusion in the legislation of fiduciary obligation; the inclusion of oral history in the claims process; and a mandatory review process. However, the bill is flawed

The ICC will continue to conduct business as usual, addressing claims currently before it without causing inconvenience or disruption to First Nations claimants.

The Specific Claims Resolution Act *is being discussed by the Senate's Standing Committee on Aboriginal Peoples in one of its last steps to becoming a law.*

by some problematic elements. These include portions of the bill where the principles of independence, the authority to make binding decisions, access to justice, the primacy of fiduciary obligation and a review process which is not, on its face, inclusive of all parties, are found wanting."

The new Centre that will be created by the bill will consist of two separate bodies, a commission and a tribunal. The commission will facilitate negotiated settlements using mediation, negotiation and other means of dispute resolution. The commission will provide these services for all claims, regardless of the potential amount of the claim. The second body, the tribunal, will be a quasi-judicial body able to make final decisions on the validity of claims and compensation that did not reach a negotiated settlement. There will be a $7 million cap on the settlements of claims referred to the tribunal. If a First Nation does not wish to go to the tribunal with its claim, it will still be able to take its case to the courts.

The details of the transition from the ICC to the new Centre will have to be worked out once the bill has received Royal Assent. In the interim, the ICC will continue to conduct business as usual, addressing claims currently before it without causing inconvenience or disruption to First Nations claimants.

Coldwater-Narrows Claim Accepted For Negotiation Mid-Inquiry

On May 8, 2003, the Indian Claims Commission issued its report on a claim by the Chippewa Tri-Council that dates back to the early 19th century. The Tri-Council consists of the Beausoleil First Nation, the Chippewas of Georgina Island First Nation and the Chippewas of Mnjikaning (Rama) First Nation.

The federal government has accepted the claim for negotiation under the Specific Claims Policy. The ICC report states that the Commission has suspended its inquiry into the claim, since both Canada and the First Nations have agreed to enter into negotiations.

Speaking on behalf of the Commission, ICC Chief Commissioner Phil Fontaine said that he was pleased with the outcome to date: "We wish the parties well in their negotiations towards a settlement." Although an inquiry was ultimately avoided, the panel assigned to the claim consisted of Commissioners Roger J. Augustine, Daniel J. Bellegarde and Renée Dupuis.

The claim involves the surrender of the Coldwater-Narrows Reservation to the Crown, the Chippewa Tri-Council alleges that the reservation had never been properly surrendered to the Crown. It also alleges that the 1836 treaty purporting to surrender the land had not been understood by the Chippewas of Lakes Huron and Simcoe, who believed that the treaty would secure their title to the reserve. The claim maintains that the transaction amounts to a breach of the Crown's fiduciary duty to the Chippewa Tri-Council.

Between 1830 and 1832, the three Chippewa First Nations settled on the reserve which was approximately 10,000 acres in size. It was a narrow strip of land, approximately 14 miles long by 1.5 miles wide, along an old portage route between the Narrows of Lake Simcoe and Matchedash Bay on Lake Huron. Two of the First Nations, under Chiefs Yellowhead and Snake, settled in a village at Lake Simcoe; the other First Nation, under Chief Aisance, settled at Coldwater, near Lake Huron.

Over the next six years, the First Nations constructed a road (which ultimately came to be Ontario Highway 12) over the old portage route between the two villages and cleared the land along the road for farming. Schools, houses, barns and mills were also built at the two villages.

The claim was submitted to Canada in November 1991 and was rejected in April 1996. In August 1996, the

Chippewa Tri-Council asked the ICC to conduct an inquiry into the rejection. As part of its inquiry process, the ICC chaired the planning conferences. Additional research was conducted over the next two years and a fresh legal opinion was completed by the Department of Justice. In July 2002, Canada officially accepted the claim for negotiation.

As a result of the ICC's involvement in the process, each of the three First Nations requested the Commission to provide mediation/facilitation services for the negotiation of the claim.

In accordance with the Specific Claims Policy, any settlement that is reached will not lead to the expropriation of private property and no third parties will be dispossessed through this process.

The Chiefs of the Chippewa Tri-Council (L to R), Chief Paul Sandy, Chief Sharon Stinson Henry, and Chief William McCue pose for photos after the announcement on August 9, 2002, that their claim will be accepted for negotiation.

(from page 3)

CLAIMS IN FACILITATION OR MEDIATION

Blood Tribe/Kainaiwa (Alberta) – Akers Surrender

Chippewa Tri-Council (Ontario) – Coldwater-Narrows Reserve

Chippewas of the Thames First Nation (Ontario) – Clench Defalcation

Cote First Nation No.366 (Saskatchewan) – Pilot Project

Fort Pelly Agency (Saskatchewan) – Pelly Haylands Negotiation

Fort William First Nation (Ontario) – Pilot Project

Keeseekoowenin First Nation (Manitoba) – 1906 Lands Claim

Michipicoten First Nation (Ontario) – Pilot Project

Mississaugas of the New Credit First Nation (Ontario) – Toronto Purchase

Moosomin First Nation (Saskatchewan) – 1909 Surrender

*Nekaneet First Nation (Saskatchewan) – Treaty Benefits

Qu'Appelle Valley Indian Development Authority (Saskatchewan) – Flooding

Thunderchild First Nation (Saskatchewan) – 1908 Surrender

Touchwood Agency (Saskatchewan) – Mismanagement

CLAIMS WITH REPORTS PENDING (INQUIRY)

Canupawakpa Dakota First Nation (Manitoba) – Turtle Mountain surrender

Peepeekisis First Nation (Saskatchewan) – File Hills Colony

CLAIMS WITH REPORTS PENDING (MEDIATION)

Standing Buffalo First Nation (Saskatchewan) – Flooding

** in abeyance*

Looking Back

Early Treaties And How Treaty Making Began In Canada

The treaties between First Nations and the Crown are fundamental to the relationship between Canada and its indigenous peoples. As legal documents, these treaties define and regulate legal relationships, borders and land rights, and may include other components such as annuities, medical aid and military alliances.

Commission Counsel, Kathleen Lickers, says the treaties grew out of the unique historical relationship that governed the European powers and aboriginal nations at the point of contact. "There was a recognition of the fact that First Nations had the capacity to enter into a treaty relationship with the Crown, which is precisely why treaties exist. The inherent right of First Nations to sign treaties exists in their relationship with the land, the fact that they had sovereignty in their own land."

First Nations have a long tradition of treaty making, which pre-dates the arrival of Europeans. The Great Law of Peace, for example, was negotiated among the Seneca, Mohawk, Onondaga, Oneida, and Cayuga Nations around 1450 to put an end to warfare and establish common laws. In the early 1700s, the French and the English competed for control of the eastern fur trade, both nations seeking alliances among First Nations. The first formal treaties were made between the English and east coast First Nations and attempted to seal pacts of peace and friendship.

In 1763, in the aftermath of the war between France and Britain in North America, Chief Pontiac of the Ottawa Nation launched an uprising against British forts around the Great Lakes. To ensure peace, King George III issued the *Royal Proclamation of 1763*, which confirmed aboriginal land rights and affirmed that treaty making must precede European settlement.

Large silver medal with Queen Victoria's head, presented to the Chiefs and councillors of Treaty 1, 2, 3, 4, 5, 6 and 7. Photograph by H.N. Awrey/National Archives of Canada/PA123917

Chief Samson Beardy (standing) and Commissioners (seated at the table) during negotiations of Treaty 9 payments at Trout Lake, Ontario, July 1929. National Archives of Canada/PA94969

Ms Lickers says it is important to recognize that there is a difference between treaty rights and aboriginal rights. "Treaty rights do not exist outside of the treaties; they exist because of that legal relationship. Aboriginal rights, aboriginal title, aboriginal rights to hunt and fish are not dependant upon the treaties; they are inherently based upon aboriginal people's use and occupation of the land. They exist whether the Crown chooses to recognize them or not."

In the decades after the *Royal Proclamation*, the British colonial government and First Nations in southern Ontario and Vancouver Island concluded 41 treaties to allow farming, logging, mining and settlement. Half of the Ontario treaties were settled shortly after the War of 1812 to make way for an influx of settlers.

Although many years have passed since the signing of historic numbered treaties, time does not dilute them. Ms Lickers says that as long as the nations that signed the treaties exist, the treaties are in effect. "Treaties, and the obligations, the regulations and the relationship contained within them, were made not only with signatories, but entire peoples and all of the descendants of those peoples. They apply to the Crown as long as it exists, in perpetuity, as they apply to the other side of the relationship, for aboriginals and their descendants, in perpetuity."

Next Issue: The Numbered Treaties.