INDIAN CLAIMS COMMISSION

INQUIRY INTO THE 1907 SURRENDER CLAIM OF THE FISHING LAKE FIRST NATION

PANEL

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PART I

INTRODUCTION

On March 2, 1995, the Indian Claims Commission (ICC) agreed to conduct an inquiry into the rejected claim of the Fishing Lake First Nation.[1] The claim concerns the surrender of 13,170 acres of land from Fishing Lake Indian Reserve (IR) 89 on August 9, 1907. The surrender was approved by Governor in Council and the sale of the land was sanctioned on September 7, 1907.

The First Nation first submitted its claim to the Minister of Indian Affairs on April 23, 1989.[2] It argued that the claim should be validated under the federal government's Specific Claims Policy as a breach of lawful obligation on the following grounds:

1. That the alleged surrender on August 9, 1907, was null and void as having been obtained,
   a) through duress and undue influence,
   b) as an unconscionable agreement, and

2. That the alleged surrender on August 9, 1907 was null and void having been obtained without strict compliance with provisions of the *Indian Act*.

3. That the Crown breached its trust or fiduciary obligations in obtaining the alleged surrender.[3]

The claim was rejected on February 12, 1993. In his letter rejecting the claim, Jack Hughes, Research Manager for the Department of Indian Affairs and Northern Development (DIAND), stated that "the Federal position . . . is that the claim fails to establish an outstanding lawful obligation to the Fishing Lake Indian Band as defined in the Specific Claims Policy."[4]

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1 Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission (ICC), to Chief and Council, Fishing Lake First Nation, and to the Ministers of Justice and Indian and Northern Affairs, March 3, 1995 (ICC file 2107-23-1).

2 Fishing Lake Band, Band Council Resolution, April 23, 1989 (ICC Documents, p. 521).

3 Fishing Lake Band Land Claim: Legal Submission, delivered by Balfour Moss Milliken Laschuk & Kyle, Barristers and Solicitors (ICC Documents, p. 531).

4 Jack Hughes, Research Manager, Specific Claims West, to William J. Pillipow, February 12, 1993 (ICC Documents, p. 653).

In response to Canada's rejection of the claim, the First Nation submitted a supplemental submission on September 29, 1994.[5] It updated each of the issues raised in the First Nation's original submission, and it addressed the new issue of "misrepresentation." The First Nation contended that "the Crown negligently misrepresented the circumstances surrounding the surrender by failing to properly advise the First Nation members and as a result the First Nation agreed to the Alleged Surrender of 1907."[6] On January 31, 1995, the First Nation submitted a second supplemental submission, which raised another new issue. The First Nation argued that the consent required under Treaty 4 had not been obtained prior to the separation of the Fishing Lake, Nut Lake, and Kinistino Reserves and the surrender of 13,170 acres from Fishing Lake IR 89.[7] Canada reviewed both the First Nation's supplemental submissions, and on June 14, 1995, Mr Hughes advised the First Nation that "as a result of this review we are not prepared to alter our preliminary position that the evidence and submissions are insufficient to establish that a lawful obligation exists on the part of the Federal Crown ('Canada') with respect to the 1907 surrender of a portion of Fishing Lake Reserve No. 89 (the "Reserve')."[8]

At about the same time as the First Nation began submitting its supplemental arguments to the Minister of Indian Affairs, it also asked the Commission to review Canada's rejection of its claim.[9] At the request of a First Nation, the Commission can conduct an inquiry into a rejected specific claim pursuant to the *Inquiries Act*. The Commission's mandate to conduct inquiries states, in part:

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5 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 688-795).

6 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, September 29, 1994 (ICC Documents, pp. 756-57).

7 Supplemental Submission, Fishing Lake Band Specific Land Claim: 1907 Surrender, January 31, 1995, tabled at ICC Planning Conference, February 2, 1995 (ICC file 2107-23-1).

8 Jack Hughes, Research Manager, Prairie Specific Claims, to Chief Michael Desjarlais and Counsel, June 14, 1995 (ICC file 2107-23-1).

9 Stephen M. Pillipow to Commissioners, Indian Claims Commission, October 13, 1994, enclosing, *inter alia*, Fishing Lake First Nation, Band Council Resolution, September 28, 1994 (ICC file 2107-23-1).

> 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:
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> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister . . . [10]

Pursuant to this mandate, the Commission has developed a unique inquiry process. In it the parties are brought together at various stages to discuss the claim and to clarify the issues, evidence, and respective legal positions. The Commission encourages a full and open discussion of issues and exchange of documents, and all this work is done with the assistance of representatives from the Commission. The parties are asked to explain their positions on the claim and, as much as possible, plan the inquiry on a cooperative basis.

During the course of this particular inquiry, the First Nation had an opportunity to submit new evidence and arguments, which ultimately caused Canada to reconsider the rejection of the First Nation's claim and to offer to accept it for negotiation – an offer the First Nation has accepted. Canada's willingness to revisit its past legal opinion was a response, at least in part, to the constructive dialogue between the parties and the flexible nature of the Commission inquiry process.

We wish to emphasize that, in view of the parties' decision to enter into negotiations, no further steps have been taken by the Commission to inquire into the First Nation's claim. We make no findings of fact. This report, which contains a brief summary of the First Nations claim and the chronology of events leading up to Canada's decision, is simply meant to advise the public that the First Nation's claim has been accepted for negotiation under the Specific Claims Policy.

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[10] 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.

PART II

HISTORY OF THE CLAIM

The Yellow Quill Band adhered to Treaty 4 on August 24, 1876, at Fort Pelly, North-West Territories.[11] Chief Yellow Quill and two headmen, Kenistin and Ne-Pin-awa, signed the adhesion, which, through Treaty 4, provided that reserves would be set aside for the Indians "of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families . . ."[12]

FISHING LAKE RESERVE SURVEYED

In September 1881, John C. Nelson, Dominion Land Surveyor, surveyed reserves for the Yellow Quill Band at Fishing Lake and Nut Lake. The reserve at Nut Lake was made up of 10,342 acres and was described by Nelson as "highly suitable for the production of barley and potatoes, and the lake abounds with fish and foul."[13] After completing the survey at Nut Lake, Nelson proceeded to Fishing Lake, "where some families of Yellow Quill's band had already settled,"[14] and surveyed a reserve of 22,080 acres. The location of this reserve was also suitable for farming, he reported, the soil being very rich and there being plenty of good timber.[15] The reserves at Fishing Lake and Nut Lake were confirmed by Order in Council on May 17, 1889, and were withdrawn from the operation of the

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[11] Canada, *Indian Treaties and Surrenders* (Ottawa 1891; facsim. repr. Toronto: Coles, 1971), vol. 1, no. 135, 320-21 (ICC Documents, p. 6).

[12] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), Cat. No. Ci 72-0466 (ICC Documents, p. 2).

[13] John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 132 (ICC Documents, p. 20).

[14] John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 133 (ICC Documents, p. 21).

[15] John C. Nelson, Dominion Land Surveyor, to Superintendent General of Indian Affairs, January 10, 1882, Canada, Parliament, *Sessional Papers*, 1882, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1881," 133 (ICC Documents, p. 21).

Dominion Lands Act on June 12, 1893.[16] A third reserve, containing 9638 acres, was surveyed in 1900 "in the locality which [the Kinistino] Indians have for sometime occupied,"[17] and confirmed by Order in Council on October 22, 1901.[18]

RESERVE LANDS OPENED FOR SETTLEMENT

Soon after the last reserve was surveyed, the Canadian Northern Railway Company applied for and was granted a right of way over a portion of the Fishing Lake reserve. Then in 1905 the company requested that the northern end of the Fishing Lake Reserve be opened for settlement.[19] Frank Oliver, the new Superintendent General of Indian Affairs, advised his Deputy, Frank Pedley, of the company's request and sought information on the subject. James Campbell, a departmental employee, recommended a surrender of a portion of the reserve: "[T]he best policy, in the interests of all concerned, would apparently be to induce [the Indians] to surrender the Fishing Lake Reserve, and take an equivalent in land at Nut Lake or some other northern point. . . . Probably a surrender could be readily obtained as these Indians have apparently more than the usual aversion to contact with white men."[20]

Acting on Campbell's recommendation, Oliver sought the help of the Reverend John McDougall of Calgary "to do special work for the Department in negotiating the surrender of portions or the whole of certain Indian reserves."[21] Part of this "special work" included negotiating the surrender at Fishing Lake.

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16 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 30-31); Order in Council PC 1694, June 12, 1893 (ICC Documents, pp. 32-34).

17 D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, National Archives of Canada [hereinafter NA], RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 119).

18 Order in Council PC 1898, October 22, 1901 (ICC Documents, pp. 38-39).

19 Frank Oliver, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 3, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 64).

20 James J. Campbell, Department of Indian Affairs, to Deputy Minister, Department of Indian Affairs, July 20, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 68).

21 Frank Oliver, Superintendent General of Indian Affairs, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 3, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 69).

Around the same time that the Reverend Dr McDougall was hired, the Department of Indian Affairs had the Kinistino, Fishing Lake, and Nut Lake reserves taken out of the distant Touchwood Hills Agency. Kinistino reserve was placed under the Duck Lake Agency and the remaining two were placed under the Pelly Agency.[22] This transfer, in addition to easing travel for the Indian agents, had the effect of making Inspector W.C. Graham responsible for both Fishing Lake and Nut Lake.[23]

SEPARATION OF THE BANDS AND THE SURRENDER

Frank Pedley then instructed the Reverend Dr McDougall to seek the surrender of the Fishing Lake Reserve. Pedley also instructed McDougall on the matter of per capita cash distributions to the band:

> Under the provisions of section 70 of the [Indian] Act, as re-enacted by section 6, Chap. 34, Vic. 61, you will observe that not more than 10% of the proceeds of any lands surrendered, as may be agreed upon at the time of surrender, can be paid to the members of the band, and the remainder of the proceeds of sale shall be placed to the credit of the Indians, and the interest thereon paid to them from time to time.[24]

It is possible that McDougall met with the Indians at Fishing Lake as early as October 9, 1905; however, the only evidence on record to indicate such a meeting is a telegraph message from Indian Agent H.A. Carruthers dated October 7, stating that "Rev McDougall meets Indians here to-day I accompany him west to fishing lake reserve on ninth."[25] It is clear that McDougall did meet with the Indians of Fishing Lake the following summer on July 16, 1906. His report of this meeting offers no indication of the position of the Indians on the matter of surrender. His letter does reveal,

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[22] James J. Campbell, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, August 22, 1905, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 72). In March 1907, however, the Fishing Lake Reserve was returned to the supervision of the Touchwood Agent: *see* Frank Pedley, Deputy Superintendent General of Indian Affairs, to Secretary, Department of Indian Affairs, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 143).

[23] J.D. McLean, Secretary, Department of Indian Affairs, to David Laird, Indian Commissioner, Department of Indian Affairs, August 26, 1905, NA, RG 10, vol. 3935, file 118537/1 (ICC Documents, p. 73).

[24] Frank Pedley, Deputy Superintendent General of Indian Affairs, to Reverend John McDougall, August 29, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 75).

[25] H.A. Carruthers, Indian Agent, to Department of Indian Affairs, October 7, 1905, NA, RG 10, vol. 4020, file 280470/2 (ICC Documents, p. 77).

however, the implementation of a proposed amendment to the *Indian Act* under which the Department could now offer 50 per cent of the anticipated proceeds of sale as inducement to the surrender.[26]

Acting towards securing the surrender at Fishing Lake, Pedley notified Agent Carruthers of a second meeting between McDougall and the Indians, planned for July 31, 1906. Pedley telegrammed Agent Carruthers to "[s]end word at once to Indians to assemble on that date without fail. This must be attended to without fail."[27] This telegram was received on the evening of July 28 by Indian Agent Fred Fischer, who sent a message to a local man in Wadena to notify the Indians at Nut Lake and Fishing Lake of McDougall's impending visit.[28] In advance of this meeting, Pedley had forwarded to McDougall the forms of surrender for a portion of the Fishing Lake Reserve, amounting to 14,080 acres, and a cheque for $7000.[29] Reverend McDougall took these with him to the Fishing Lake Reserve.

McDougall's visit to Nut Lake on July 31, 1906, met with little success as "[o]n their [his and the Agent's] arrival at Wadena it was found the Nut Lake Indians had already left their reserve. Fishing Lake Reserve was therefore visited on the 1st. instant, but only a few Indians were on the reserve."[30] McDougall arranged for a meeting with the Indians at Fishing Lake on August 2, 1906, to discuss the surrender. His proposal was rejected. The reasons were provided by Indian Commissioner Laird in a report to Ottawa on August 7, 1906:

> A meeting was arranged for the following day [August 2, 1906], when Dr. McDougall fully explained to the Indians their connection with the Nut Lake and

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[26] Reverend John McDougall to J.D. McLean, Secretary, Department of Indian Affairs, July 17, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 104-06).

[27] Frank Pedley, Deputy Superintendent General of Indian Affairs, to H.A. Carruthers, Indian Agent, July 27, 1906 (ICC Documents, p.108).

[28] Fred Fischer, Acting Indian Agent, to Frank Pedley, Deputy Superintendent General of Indian Affairs, July 31, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 111).

[29] Frank Pedley, Deputy Superintendent General of Indian Affairs, to Reverend John McDougall, July 28, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 109).

[30] David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, August 7, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 112).

> Kinistino Indians. The Indians refused the surrender on the condition that the Nut Lake and Kinistino Bands share equally with them in the proceeds received from the sale of the surrendered part of their reserve. They claim that the three bands each look upon their own reserves as their distinct property, and besides they have nothing in common in their intercourse with each other.[31]

In his report of the meeting, McDougall recommended that "these People be considered as three distinct Bands."[32] This recommendation was considered by the Department in a memorandum dated September 19, 1906, to Pedley from Accountant Duncan Campbell Scott (who later became Deputy Superintendent General for Indian Affairs). Scott reported that "[t]he association of these Bands was purely fortuitous and there is no insurmountable obstacle to their separation if the feeling between the Indians of Nut and Fishing Lakes is as the Commissioner represents in his letter of the 7th August."[33] He continued: "Without unnecessary argument, but taking a short cut toward a settlement, I would propose that as the Kinistino Indians have the just proportion to their numerical strength of the lands under Treaty, they be designated and considered a separate Band . . ."[34] Scott recommended that at the upcoming annuity payments, the chief men of the three Bands meet together, in the presence of the Indian Commissioner or other authorized official, to sign a document fixing their reserves at their current acreages. He stated that "[t]his will have the result of varying the Treaty and might be accepted by Order-in-Council in the usual way. It might be well, as the Kinistino Indians signed the original adhesion to Treaty at the same time as the other Band, to have their Chiefs also sign the Instrument."[35]

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[31] David Laird, Indian Commissioner, to Secretary, Department of Indian Affairs, August 7, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 112).

[32] Reverend John McDougall to Frank Pedley, Deputy Superintendent General of Indian Affairs, [August 10, 1906], NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 116).

[33] D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 119).

[34] D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 119-20).

[35] D.C. Scott, Accountant, to Deputy Superintendent General of Indian Affairs, September 19, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 120).

In November 1906 the Department informed the Reverend Dr McDougall of Scott's views and requested his opinion. In his reply, McDougall rejected the "proposed method of settlement" put forward by Scott. He explained:

> They [the Indians] consider themselves as three distinct Bands and from what I could learn on the ground strongly resent the idea of your Department that they still form portions of one Band. They say they never were one Band, are not now and seemingly never intend to be. If . . . these Indians are still due 6.3 square miles of land if the Department so thought fit this area might be attached to the Nut Lake Reserve thus giving a more proportionate reserve to these Nut Lake Indians, but taking them as they now are, I would deal with each one of these three Bands individually without calling their loyalties or requiring of them any formal acceptance of such a division. Why seek to divide those who on their own showing were never united.[36]

Ignoring the views expressed by Dr McDougall, the Department set out to finalize the land allotments provided to Nut Lake, Fishing Lake, and Kinistino under Treaty 4 on the understanding that the three bands would then be considered separate and distinct and that each band would have exclusive rights to its own reserve.[37]

In March 1907, Inspector W.M. Graham was instructed to carry out the task of separating the Nut Lake, Fishing Lake, and Kinistino Bands and was provided with the "separation agreement" prepared by the Department.[38] Once the separation agreement had been signed, Graham was to arrange for the surrender of 13,170 acres from the Fishing Lake Reserve; the Department agreed to advance 10 per cent of the proceeds from the surrendered lands for distribution among the Indians

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[36] Reverend John McDougall to Deputy Superintendent General of Indian Affairs, November 23, 1906, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 127-28).

[37] Frank Pedley, Deputy Superintendent General of Indian Affairs, to David Laird, Indian Commissioner, December 11, 1906, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 129-31).

[38] Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.A. Orr, Lands & Timber Branch, March 19, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 142), and Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, March 20, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 146).

when the surrender was signed.[39] Graham accepted his instructions; however, rather than await the cash advance, Graham wrote to the Secretary of the Department, J.D. McLean, asking "to have the sum of $10,000.00 placed to my credit as it will be necessary to make a cash payment at the time of taking the surrender."[40] McLean replied that the Department agreed to forward Graham $10,000.[41]

In June 1907, unsure of what Graham's instructions had been regarding the separation of the three bands, Assistant Indian Commissioner McKenna in Winnipeg asked him to advise "promptly what arrangements have been made as to the submitting of the proposition to the Indians. A question has arisen as to the rights of individual Indians in the matter upon which it may be necessary to further instruct you."[42] The question that had arisen concerned the "rights of individual Indians to elect as to the reserve upon which they will reside and the band in which they will be paid."[43] Mr McKenna provided the following example:

> for instance, one Kah-ka-qua-nape, who appears to have been living on the Fishing Lake Reserve, presented himself for payment at Nut Lake claiming that he always received his money there. Mr. Agent MacArthur refused to pay him. This Indian was last paid in 1903, but the paylists do not show at what point he was paid. [44]

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[39] Frank Pedley, Deputy Superintendent General of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, March 20, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 146).

[40] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, April 22, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 148).

[41] J.D. McLean, Secretary, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, May 11, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 150).

[42] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, June 15, 1907, NA, RG 10, vol.3561, file 82/1 (ICC Documents, p. 155).

[43] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, June 17, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 156).

[44] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to J.D. McLean, Secretary, Department of Indian Affairs, June 17, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 156).

In his response to the Indian Commissioner, Graham reiterated his instructions first to "effect a separation of the Indians on these three Reserves," after which he was to take a surrender at Fishing Lake.[45] A few weeks later he wrote to McLean expressing some concern over Assistant Commissioner McKenna's intervention in the matter: "I thought my instructions regarding these land surrenders were to come from the Department and not from two sources, to make confusion."[46] He explained his view of his instructions:

> I am first to get a separation of the Kinistino, Nut Lake and Fishing Lake Bands, allowing each to hold the reserves they are now residing upon. Then I return to Fishing Lake and ask them for a surrender of part of their reserve and if they agree to surrender I take it, and pay the Indians of Fishing Lake only.[47]

In an effort to clarify matters after receiving Graham's letter, Secretary McLean wrote Assistant Commissioner McKenna: "If the question that has arisen is the one referred to in your letter of the 17th June last . . . addressed to the Department it does not affect the surrender or separation of these Bands in any way as it is a question of the payment of annuity money, which is governed by the rules pertaining to such, - i.e. - that where the annuitant resides there shall he be paid."[48]

In reply, McKenna explained that Indian Agents MacArthur and Murison had encountered some difficulties in making payment to Kahkaquanape. At the annuity payment, Kahkaquanape claimed to belong to the Nut Lake Reserve and presented himself for payment there. The Indians of Nut Lake refused to recognize him as "belonging" to their reserve. Agent Murison then raised the point that, "as the three reserves were held in common, the Indians living upon the Nut Lake Reserve had no right to refuse admittance thereto to Kahkaquanape. [Agent Murison] stated that his

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[45] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to David Laird, Indian Commissioner, June 19, 1907, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, p. 157).

[46] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 4, 1907 (ICC Documents, p. 160).

[47] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 4, 1907 (ICC Documents, p. 160).

[48] J.D. McLean, Secretary, Department of Indian Affairs, to J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, July 10, 1907, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, p. 162).

information was that some of the Indians did not live continuously on one reserve and were paid some years at one point and some years at another."[49] Assistant Commissioner McKenna went on to state:

> I wrote Mr. Inspector Graham for the simple purpose of ascertaining whether he was so instructed as to admit of his dealing with such a question, and as to whether on the breaking up of this band into three parts the members would have any right of election as to where they would reside. . . . I feared that the question raised by Mr. Agent Murison might occasion difficulty in the negotiations which Mr. Graham is to carry out, and if his instructions do not cover the point, that it would be well to have him instructed as to the Department's position upon the question.[50]

There is no evidence in the historical record for this inquiry to suggest that the issue raised in this passage was ever considered again by the Department. In fact, the "Principal men" of Nut Lake affixed their marks to an agreement recognizing them as a separate band on July 27, 1907, followed by the "Principal men" of Kinistino on July 31. One week later, on August 7, the "Principal men" of Fishing Lake affixed their marks to this agreement.[51]

Two days later, on August 9, 1907, Inspector Graham secured the surrender of 13,170 acres from the Fishing Lake Band.[52] Upon surrender, Graham paid each Indian at Fishing Lake $100.[53] Nine members of the Fishing Lake Band affixed their marks to the surrender document.[54] In Graham's report to Secretary McLean on August 21, 1907, he explained that the Indians at Fishing Lake were "not at all anxious to sell":

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[49] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 15, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 163).

[50] J.A.J. McKenna, Assistant Indian Commissioner, Department of Indian Affairs, to Secretary, Department of Indian Affairs, July 15, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 164).

[51] Separation Agreement executed between the Fishing Lake, Nut Lake, and Kinistino Band, August 7, 1907, NA, RG 10, vol.6704, file 121A-3-2 (ICC Documents, pp. 167-69).

[52] Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72).

[53] Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72); Record of payments made by W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, August 12, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 176-85).

[54] Surrender instrument and related documents, August 9, 1907 (ICC Documents, pp. 170-72).

> I left the Agency on July 20th . . . On the way up I stayed two days at Fishing Lake while the Treaty payments were being made, but I did not say anything to the Indians about surrendering their reserve, until I had dealt with the Indians of Nut Lake and Kinistino. . . .

Graham then explained that he obtained the agreement to separate from the Indians at Nut Lake and Kinistino before going on to Fishing Lake. He arrived at Fishing Lake on August 6, 1907.

> The following day [August 7, 1907] I called the Indians together and explained to them that the Nut Lake and Kinistino Indians had relinquished all claim to the Fishing Lake Reserve, which was not theirs, and asked them if they were willing to relinquish their claims to Nut Lake and Kinistino reserves, which they agreed to do. I then asked them to surrender a portion of the Fishing Lake reserve, which was now theirs. I was surprised to find that they were not at all anxious to sell and it was two days before they agreed to sell. In fact, I had given up hope of getting the surrender, till just before starting for home a number of the Band came over and said they were willing to sign the surrender. A meeting was called and the whole Band voted for the surrender.[55]

On August 30, 1907, Frank Oliver submitted the surrender to the Governor in Council for approval, recommending that authority be given for the disposition of the land according to the terms of the surrender.[56] The Governor in Council approved the surrender and sanctioned the proposed sale of the land by Order in Council dated September 7, 1907.[57] Most of the land was sold at three public auctions in 1909 and 1910.

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[55] W.M. Graham, Inspector, Indian Agencies, Department of Indian Affairs, to Secretary, Department of Indian Affairs, August 21, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, pp. 186-89).

[56] Submission to the Governor in Council, August 30, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 191).

[57] Order in Council, September 7, 1907, NA, RG 10, vol. 6704, file 121A-3-2 (ICC Documents, p. 192).

PART III

ISSUES

The issues for this inquiry were framed as follows:

I Was there a valid surrender on August 9, 1907, of some 13,170 acres of the Fishing Lake Reserve No. 89?

1) Did the Crown obtain the surrender:
   a) as a result of duress;
   b) as a result of undue influence;
   c) as a result of unconscionable agreement; or
   d) as a result of negligent misrepresentation.

2) Did the Crown when obtaining the surrender comply with the surrender procedures required by the *Indian Act*?

3) Did the Crown have any trust or fiduciary obligations in relation to the surrender of 1905 from the First Nation, and if so, did the Crown *fulfil* those trust or fiduciary obligations when it obtained the surrender?

4) Did the provisions of Treaty 4 require the Crown to obtain the consent of the Indians entitled to the Fishing Lake Reserve, prior to disposing of some 13,170 acres of the reserve, and if so was that consent obtained?

II If the evidence is inconclusive by any of the previous issues, which party has the onus of proof?[58]

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[58] Grant Christoff, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow and Kim Kobayashi, June 16, 1995 (ICC file 2107-23-1).

PART IV

THE INQUIRY

A planning conference was held on February 2, 1995, in Saskatoon, Saskatchewan, with representatives of the Fishing Lake First Nation, Canada, and the Commission in attendance. The planning conference is an informal meeting convened by Commission staff shortly after the inquiry begins. It was devised by the Commission to involve the parties to a claim where practicable in planning the inquiry, and also as a means of settling claims whenever possible without the need for a full inquiry. In this inquiry, representatives of the parties, with their legal counsel, met with the Legal and Mediation Advisor for the Commission to review and discuss the claim, identify the issues raised by the claim, and plan the inquiry on a cooperative basis.

Following this first meeting, Commission staff visited the Fishing Lake First Nation on April 10, 1995, to prepare for the more formal community session, which was held on July 27, 1995. During the community session, elders and other members of the First Nation have an opportunity to present historical evidence from their oral tradition, including evidence that may not be admissible in a court of law, directly to the Commission panel conducting the inquiry. The session is generally held in the First Nation community, if facilities are available, and is attended by representatives of Canada, the First Nation, and the Commission. Out of respect for the elders, and in recognition of the cultural values of First Nations, elders and community members who address the Commissioners are not required to testify under oath, nor is cross-examination permitted.

After hearing the information provided at the community session on July 27, 1995, oral submissions were scheduled for January 31, 1996. Oral submissions are one of the last stages in the Commission inquiry process. It is at this point that lawyers for the First Nation and Canada present written and oral arguments on the facts and the law. The Commissioners then prepare a formal report outlining their findings and recommendations. In this case, however, approximately six weeks before the date set for the oral submissions, legal counsel for the First Nation notified Canada and the Commission, that it had recently come to his attention that at least one (and possibly three) of the individuals who signed the surrender document in 1907 was not 21 years of age.[59] This was a

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[59] Stephen Pillipow to Kim Kobayashi, Department of Justice, December 21, 1995 (ICC file 2107-23-1).

potentially important point because, under the *Indian Act* in force at the time, the surrender had to be "assented to by a majority of the male members of the band of the full age of twenty-one years."[60]

A conference call involving representatives of Canada, the First Nation, and the Commission was convened on January 9, 1996, to discuss this new information. It was agreed during the conference call that counsel for the First Nation would provide Canada with a review of the information by January 16, 1996, and that Canada would then be given an opportunity to conduct its own confirming research. As a result, it was agreed that the oral submissions would be postponed.[61] They were subsequently rescheduled for March 26, 1996.[62]

Another conference call was convened on March 12, 1996, following the completion of Canada's research. Canada maintained its position that it was prepared to proceed to the oral submissions stage of the inquiry process. Counsel for the First Nation advised that he intended to rely on *The Judicature Ordinance* in force in 1907 to argue that the affidavit certifying the surrender was not properly sworn according to the statutory standards in place at the time.[63] A week later, during a conference call on March 19, 1996, the parties agreed to adjourn the oral submissions again so that Canada could reconsider its legal opinion.

On May 7, 1996, Jack Hughes, Research Manager for DIAND, advised the Chief and Council of the First Nation that, "[a]s a result of a further and extensive review of the additional evidence and submissions provided in support of the Fishing Lake First Nation's 1907 surrender claim," the Department was prepared to recommend that the claim be accepted for negotiation under the Specific Claims Policy. He continued:

> This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion

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60 See *Indian Act*, RSC 1886, c. 43, s. 39(a); *Indian Act*, RSC 1906, c. 81, s. 49(1).

61 Kathleen N. Lickers, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Kim Kobayashi, and Bruce Becker, January 9, 1996 (ICC file 2107-23-1).

62 Kathleen N. Lickers, Associate Legal Counsel, Indian Claims Commission, to Stephen Pillipow, Kim Kobayashi, and Bruce Becker, February 5, 1996 (ICC file 2107-23-1).

63 Stephen Pillipow to Kim Kobayashi, Department of Justice, March 12, 1996 (ICC file 2107-23-1).

> of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*.[64]

On June 17, 1996, counsel for the First Nation informed the Commission that the First Nation had provided a Band Council Resolution to Mr Hughes, "indicating that the First Nation [was] prepared to proceed with the negotiations of a settlement of the Claim and directing Specific Claims to immediately proceed with the recommendation to the Minister that the First Nation's Claim be accepted for negotiation."[65] The claim was formally accepted for negotiation on August 27, 1996.[66]

The Commission's role in the process normally would have ended as soon as the First Nation's claim was accepted for negotiation. However, on September 30, 1996, counsel for the First Nation wrote to the Commission and asked if it would consider acting as a facilitator for the negotiations.[67] The Commission responded that it "would be pleased to provide a facilitator for these negotiations if Canada [was] also in agreement that the Commission's involvement would be of assistance in these negotiations."[68] Canada subsequently agreed to have the Commission facilitate the negotiations. Facilitation focuses almost entirely on matters relating to process. As "keeper of the process," the Commission is expected to chair the negotiation meetings and assist by producing an accurate record of the negotiations, following up on undertakings, and consulting with the parties to establish agreed upon agendas, venues, and times for meetings.

In the negotiation of this claim, the Commission has been asked to assist the parties as a neutral chair. Although the Commission is not at liberty to discuss the nature of the negotiation, we

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64 Jack Hughes, Research Manager - Prairie Provinces, to Chief Michael Desjarlais and Council, May 7, 1996, included in Kim Kobayashi, Counsel, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, May 28, 1996 (ICC file 2107-23-1), and included at Appendix B.

65 Stephen M. Pillipow to Kathleen N. Lickers, Indian Claims Commission, June 17, 1996 (ICC file 2107-23-1).

66 John Sinclair, Assistant Deputy Minister, Claims and Indian Government, Department of Indian and Northern Affairs Canada, to Chief Michael Desjarlais, August 27, 1996, included in Stephen M. Pillipow to Kathleen N. Lickers, Indian Claims Commission, September 10, 1996 (ICC file 2107-23-1), and included at Appendix C.

67 Stephen M. Pillipow to Ron Maurice, Indian Claims Commission, September 30, 1996 (ICC file 2107-23-1).

68 Ron S. Maurice, Commission Counsel, Indian Claims Commission, to Stephen M. Pillipow, October 4, 1996 (ICC file 2107-23-1).

can say that the parties, as represented by the Fishing Lake First Nation and the Department of Indian Affairs, respectively, have worked cooperatively to establish a protocol for the ensuing negotiations and we are confident that this Accord will assist the parties to arrive at a mutually acceptable resolution to the claim.

FOR THE INDIAN CLAIMS COMMISSION

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

Roger J. Augustine
Commissioner

Dated this 27 day of March 1997

APPENDIX A

FISHING LAKE FIRST NATION 1907 SURRENDER CLAIM INQUIRY

1	Decision to conduct inquiry	March 2, 1995
2	Notice sent to parties	March 3, 1995
3	Planning conference	February 2, 1995
4	Community and expert session	July 27, 1995

The Commission heard from the following witnesses: Chief Michael Desjarlais, Stella Nanequewetung, Eva Desjarlais, Helen Paquachan, Nora Kayseas, Grace Wahweaye, Andrew Slippery, Lawrence Desjarlais, Phillip Slippery, Ned Smoke, Wilson Desjarlais, Lawrence Wahpepiness. Expert evidence was heard from Larry Krakalovich.

5	Canada's offer to negotiate	August 27, 1996
6	Content of formal record	

The formal record for the Fishing Lake First Nation 1907 Surrender Claim Inquiry consists of the following materials:

- documentary record (4 volumes of documents and annotated index)
- 43 exhibits
- transcripts (1 volume)
- correspondence among the parties and the Commission

The report of the Commission and letter of transmittal to the parties will complete the record for this inquiry.

APPENDIX B

Indian and Northern Affairs Canada / Affaires indiennes et du Nord Canada

WITHOUT PREJUDICE

Chief Michael Desjarlais and Council
Fishing Lake First Nation
P.O. Box 508
Wadena, Saskatchewan
S0A 4J0

Dear Chief Desjarlais and Council:

Re: Fishing Lake First Nation - 1907 Surrender Claim

As a result of a further and extensive review of the additional evidence and submissions provided in support of the Fishing Lake First Nation's 1907 surrender claim, we are pleased to advise you that we are prepared to recommend to our Minister the acceptance of this claim for negotiation under the Specific Claims Policy as set out in this letter.

This recommendation is based upon the First Nation's submission that an outstanding lawful obligation on the part of the federal government ("Canada") exists within the meaning of the Specific Claims Policy with respect to the 1907 surrender of a portion of the Fishing Lake Reserve No. 89 (the "Reserve Lands"). In particular, this recommendation is made on the basis of the First Nation's allegation that the Reserve Lands were not surrendered in accordance with the requirements of the *Indian Act*.

The criteria governing the determination of compensation under the Specific Claims Policy are outlined on Schedule "A" attached to this letter. For the purposes of this claim, compensation will generally be guided by compensation criteria 1, 3, 8, 9 and 10.

On the basis of compensation criteria 3 and 8, compensation will likely consist of a cash payment to compensate the band for its loss of the Reserve Lands. Where it can be established, compensation may also include an amount based upon the net loss of use. In this regard, Canada is not prepared to accept the approach taken and the conclusions reached in the report by Dr. Schoney, "An Economic Assessment of the Loss of Fishing Lake Surrendered Lands" as a basis for determining net loss of use.

Compensation criterion 9 provides that any compensation paid shall take into account amounts already paid with respect to the claim. Therefore, amounts and consideration received as a result of the surrender of the Reserve Lands will be taken into account in determining compensation.

Compensation criterion 10 recognizes that the compensation criteria are general in nature and that "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". In our view, a considerable degree of doubt exists with respect to the strength of the claim in light of the factual evidence available to support the claim. In determining the amount of compensation offered,

compensation criterion 10 will be applied to the extent of as much as 50% to reflect this degree of doubt.

Finally, in the event that a final settlement is reached, Canada will require a formal surrender of the Reserve Lands pursuant to the *Indian Act* and a release and indemnity from the Band with respect to the Band's claim.

The recommendation that this claim be accepted for negotiation is not to be interpreted as an admission of liability on the part of Canada. In the event that a settlement is not reached and litigation ensues, Canada reserves the right to plead all defences available to it including but not limited to limitation periods, laches, and lack of admissible evidence.

If the Band decides that it wishes to proceed with negotiations, we will then take steps to obtain a formal acceptance of this claim for negotiations under the Specific Claims Policy from our Minister. If you wish to discuss Canada's position in more detail before a final recommendation is made to the Minister, or to discuss the next steps in the process, please let us know. I can be reached at (604) 666-8733.

Yours truly,

Jack Hughes
Research Manager - Prairie Provinces

cc: Stephen Pillipow - Via fax (306) 665-3411
Kim Kobayashi, Department of Justice

SCHEDULE A

Excerpt from *Outstanding Business: A Native Claims Policy*

Compensation

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.

SCHEDULE A (cont'd)

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.

APPENDIX C

APPENDIX C

Indian and Northern Affairs Canada
Assistant Deputy Minister

Affaires indiennes et du Nord Canada
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

AUG 27 1996

WITHOUT PREJUDICE

Chief Michael Desjarlais
Fishing Lake First Nation
P.O. Box 508
WADENA SK S0A 4J0

Dear Chief Desjarlais:

Fishing Lake First Nation Specific Claim - 1907 Surrender

On behalf of the Government of Canada, and in accordance with the Specific Claims Policy, I am pleased to accept for negotiation the Fishing Lake First Nation's specific claim concerning the 1907 surrender of a portion of the Fishing Lake Indian Reserve No. 89.

For the purposes of negotiations, Canada accepts that the Fishing Lake First Nation has sufficiently established that Canada has a lawful obligation within the meaning of the Specific Claims Policy, in respect to the First Nation's allegation that the reserve lands were not surrendered in accordance with the requirements of the *Indian Act*.

The criteria governing the determination of compensation are set out in the Specific Claims Policy booklet, "*Outstanding Business*". For the purposes of this claim, compensation will generally be guided by compensation criteria 1, 3, 8, 9 and 10.

While it is recognized that the Fishing Lake First Nation disagrees with the application of compensation criterion 10, Canada is prepared to accept the claim for negotiation on the understanding that compensation criterion 10 will be applied in determining any compensation offered. Our negotiator will be instructed to consider all relevant factors raised by the First Nation at the negotiating table in determining the extent to which criterion 10 will be applied in any offer of compensation.

.../2

Canada

The steps of the claims process which will be followed hereafter include: conclusion of a negotiating protocol accord; negotiations toward a settlement agreement; drafting a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to the Access to Information and Privacy legislation in force.

All negotiations are conducted on a "without prejudice" basis. Canada and the tribe acknowledge that all communication, oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

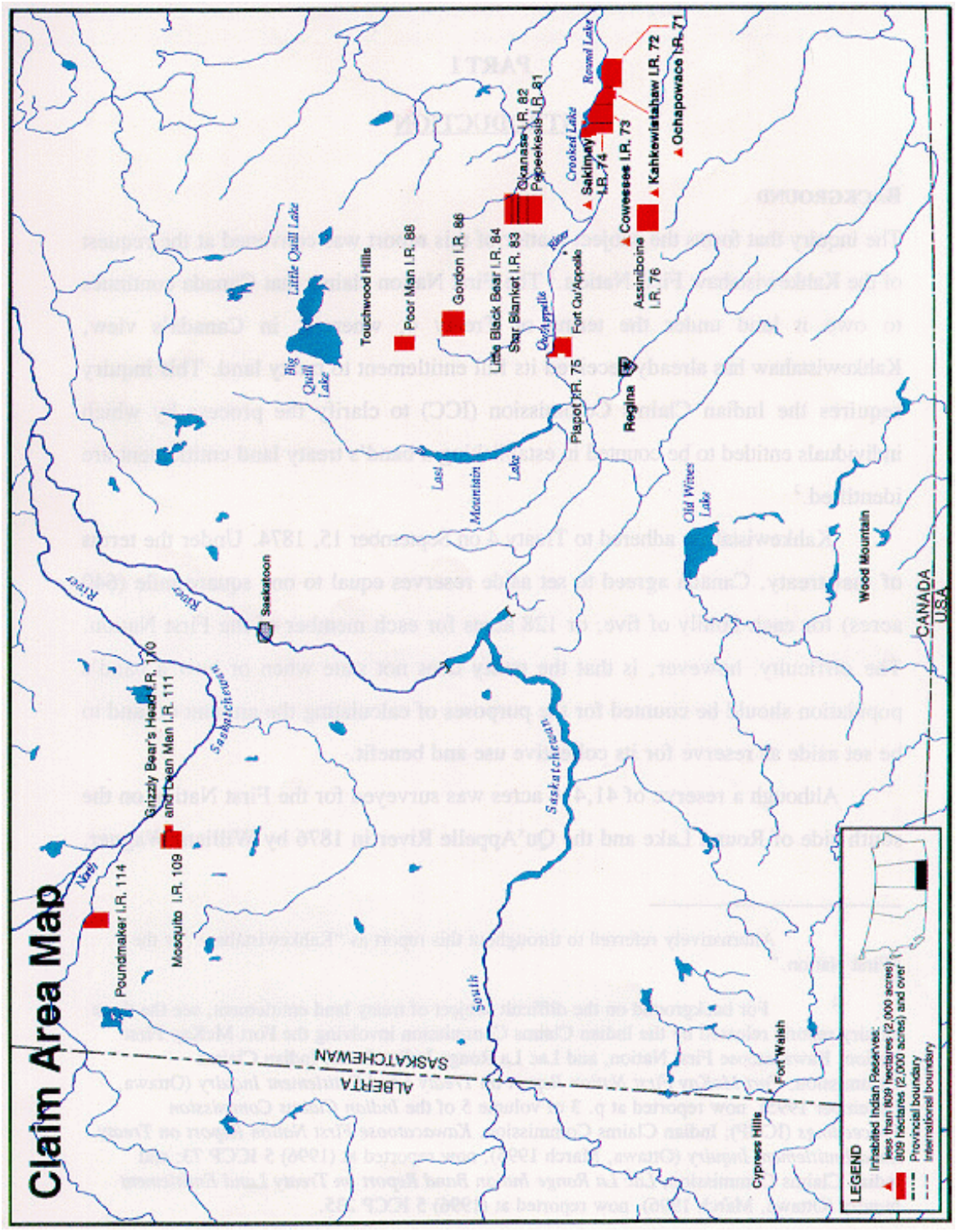
The acceptance of the claim for negotiation is not to be interpreted as an admission of liability or fact by Canada. In the event that no settlement is reached and litigation ensues, Canada reserves the right to plead all defenses available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from the Fishing Lake First Nation ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from the First Nation.

A negotiator from the Specific Claims Branch will be designated to work with you in resolving this claim. I send my best wishes and I am optimistic that a fair settlement can be reached.

Yours sincerely,

John Sinclair
Assistant Deputy Minister
Claims and Indian Government


Claim Area Map
Poundmaker I.R. 114
Grizzly Bear's Head I.R. 110
and Lean Man I.R. 111
Mosquito I.R. 109
North Saskatchewan River
South Saskatchewan River
Saskatoon
Little Quill Lake
Big Quill Lake
Touchwood Hills
Poor Man I.R. 88
Gordon I.R. 86
Little Black Bear I.R. 84
Star Blanket I.R. 83
Okanase I.R. 82
Peepeekesis I.R. 81
Crooked Lake
Round Lake
Sakimay I.R. 74
Cowessess I.R. 73
Kahkewistahaw I.R. 72
Ochapowace I.R. 71
Qu'Appelle River
Fort Qu'Appelle
Last Mountain Lake
Pasqua I.R. 75
Regina
Assiniboine I.R. 76
Old Wives Lake
Wood Mountain
CANADA
USA
SASKATCHEWAN
ALBERTA
Cypress Hills
Fort Walsh
LEGEND
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Provincial boundary
International boundary