Indian Claims Commission

ANNUAL REPORT 1996-1997

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Letter of Transmittal

Indian Claims Commission

Commission des revendications des Indiens

TO HIS EXCELLENCY
THE GOVERNOR GENERAL IN COUNCIL

MAY IT PLEASE YOUR EXCELLENCY

In 1996/97, the Indian Claims Commission released nine reports on claims. Seven of these reports dealt with completed inquiries. Two reports were released on claims accepted by the Government of Canada as a result of the Commission's inquiry process. As of this writing, two other inquiries have been completed and the reports are in progress. Over the past year 45 claimants have had files before the Commission, which are in various stages of the process.

The year 1996/97 has been a productive one for the Indian Claims Commission and this report provides a summary of our major achievements and activities in relation to specific claims. We began the year concerned about the lack of progress of efforts to reform the Specific Claims Policy and process. We are encouraged that over the past year we have seen a renewed commitment among all parties to deal with these pressing issues. To that end, we offer five recommendations to improve the resolution of First Nations' claims in both the immediate and long term. First, the Specific Claims Policy should be amended so that claims based on a breach of fiduciary duty fall within the Policy. Second, we are once again recommending the creation of an independent claims body with the authority to make binding decisions. Our recommendation provides some broad outlines of the form and function of such a body. Our third recommendation is that alternatives to monetary compensation be explored in claims settlements when agreed to by all parties. Fourth, we recommend increasing the resources devoted to specific claims resolution.

Finally, the Commission recommends the removal of the Specific Claims Policy directive which states that specific claims must be at least 15 years old before being reviewed by the Department of Indian Affairs and Northern Development. This directive came to light during our involvement in the Sturgeon Lake First Nation Agricultural Lease claim, and our recommendation flows from that experience

It is with pleasure that we submit our Annual Report for 1996/97.

Yours truly,

Daniel Bellegarde
Co-Chair

James Prentice
Co-Chair

October 1997

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Message from the Commissioners

It has been an interesting year at the Indian Claims Commission, a year which almost saw the demise of our organization. In June of 1996, we formally announced that the ICC would cease to accept new claims for inquiry as of August 31, 1996, and that we would resign as Commissioners at the end of the fiscal year. We recommended that the ICC be wrapped up by March 31, 1997.

This was admittedly a drastic step, but it was triggered by real concerns. As Commissioners, we were deeply worried that a lack of progress by the federal government and First Nations in reforming claims policy was having a negative effect on our ability to function as a fair and effective review body. When we began our work in 1991, Canada and the Assembly of First Nations (AFN) had committed to jointly reviewing and reforming specific claims policy. The ICC was established to have an interim and limited role in reviewing rejected claims. It was expected by all parties that parallel efforts would be made by the government and the AFN to address the need for a permanent independent claims body with a mandate sufficiently broad to be effective.

However, from 1992 to 1996, there was no apparent progress on establishing a permanent review body or on reforming policy. The ICC's limited mandate could not address many of the concerns inherent in the specific claims policy and process. This fact became increasingly apparent as the ICC dealt with more claims. As a result of our experiences over the last five years, we are convinced that fairness in the claims process cannot be achieved until a more effective claims policy is established. It is our sincere belief that, at the very minimum, fair process should be the hallmark of any policy that purports to resolve longstanding claims justly and honourably.

First Nations have participated in the ICC's claims review process with the expectation that reports on claims rejected by government would receive fair and timely attention. However, this has not been the case; the majority of the ICC reports to government received a limited or no reply from Canada (14 reports requiring a response are still awaiting one from Canada). By the end of fiscal year 1996/97, the Commissioners were frustrated by the lack of response to our work and the lack of commitment to reform. We did not in good conscience feel that we could continue to maintain that the ICC review process was an effective one for First Nations.

It was clear that we were not the only ones troubled by the situation. A user survey conducted by Anne A. Noonan and Associates (completed November 1996) indicated a great deal of support for the ICC's work, but noted the same concerns about the claims process in general. A review of the Indian Claims Commission and the specific claims system was conducted by Concorde Inc. between September and November 1996. In its recommendations the Concorde report echoed many of those found in the ICC's annual reports. In particular, it reflected a need for a constructive review of the specific claims policy and the development of an independent claims body with more

sweeping authority. The report specifically recommended that the Commission should continue its work with an improved mandate while these reform efforts were underway. (Both the user survey and Concorde report are summarized later in this Report.)

In this past year, 1996/97, certain developments have encouraged the continuation of the ICC's work. First, Canada and the AFN resumed joint discussions on policy reform in February 1997. Second, the Commissioners met with representatives of the federal government and the AFN to discuss their concerns. Canada and the AFN reconfirmed their commitment to policy reform and to the creation of a permanent claims body. Both parties also acknowledged that the ICC's experience and insight would be valuable in these discussions. Third, Canada committed itself to responding to the ICC's reports as a priority and in a timely manner, noting however that our reports raised many complex and difficult policy issues.

Given these developments, the Commission felt that it was important to continue the ICC inquiry process pending the establishment of a new claims process. Although limited in its role, the ICC still represents the only review process independent of government. In the last year the ICC has facilitated the negotiations between Canada and First Nations on a number of claims. It is also working on a pilot project with Canada and the Michipicoten First Nation on new ways to resolve multiple claims. (See ICC Activities for 1996/97.)

The challenges and achievements of 1996/97 have convinced us that there is value in the ICC's work and that there is great potential for continued cooperative progress. We are committed to assisting the parties into the next stage and to developing a truly fair, effective, and cost-efficient claims process that will benefit all Canadians

Commission's Recommendations to Government, 1996/97

Recommendation 1

"Confirm breach of fiduciary duty as a 'lawful obligation'"

The Specific Claims Policy, which provides that Canada will recognize claims disclosing an outstanding "lawful obligation" owed by the federal government to Indian bands, should be amended to provide expressly that claims based on a breach of fiduciary duty fall within the ambit of an outstanding lawful obligation.

Clarification of the scope of the Specific Claims Policy is critical to the future resolution of specific claims and to the legitimacy of the Commission's efforts. Currently, the Specific Claims Policy states that Canada will recognize those claims made by Indian bands which disclose an outstanding "lawful obligation." The Policy describes a "lawful obligation" as any obligation "derived from the law."

The Policy provides that a "lawful obligation" may arise in any of the following circumstances: (i) the non-fulfilment of a treaty or agreement between Indians and the Crown; (ii) a breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder; (iii) a breach of an obligation arising out of government administration of Indian funds or other assets; and (iv) an illegal disposition of Indian land. The Policy also provides that, beyond lawful obligation, the government is prepared to

Indian Treaty #9 Commission, Long Lake, Ontario, 1905
National Archives of Canada, PA59549

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acknowledge claims that are based on: (i) the failure to provide adequate compensation for reserve lands taken or damaged by the federal government or any of its agencies; and (ii) fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government where that fraud can clearly be demonstrated.

When a claim made under the Policy is rejected by the federal government, the ICC's mandate is to inquire into and report on whether the claimant has a valid claim for negotiation. Most often, the ICC is called upon to inquire into whether the federal government owes an outstanding lawful obligation to a claimant. The ICC has interpreted the scope of the term "lawful obligation" to include obligations arising as a result of breaches of fiduciary duty by the Crown. The reports of the ICC on the 'Namgis First Nation's claims relating to Cormorant Island and the McKenna-McBride Applications review the ICC's interpretation of "lawful obligation" under the Policy. As noted by the ICC in the McKenna-McBride Applications report, "a claim falls within the Specific Claims Policy if (1) it is based on a cause of action recognized by the courts; (2) it is not based on unextinguished aboriginal rights or title; and (3) it alleges a breach of a legal or equitable obligation which gives rise to a claim for compensation or other relief within the contemplation of the Policy."

In the Policy's preamble to the definition of "lawful obligation" it states that the government's objective with respect to specific claims is "to discharge its lawful obligation as determined by the courts." The Policy was released in 1982 - prior to the landmark decision of the Supreme Court of Canada in *Guerin v. The Queen*. Canada's highest court has clarified that the Crown's fiduciary relationship with First Nations can create a distinct source of legal obligation. Such a fiduciary relationship may arise in the context of the Policy's four examples or circumstances of "lawful obligation," reviewed above, or a fiduciary obligation may arise independent of those circumstances. The ICC is of the view that regardless of the circumstances giving rise to a fiduciary duty owed by the federal government to an Indian band, any breach of fiduciary duty falls within the scope of "lawful obligation" under the current version of the Policy and therefore is subject to inquiry by the ICC.

However, the ICC believes that clarification of the Policy to include breaches of fiduciary duty expressly within the scope of "lawful obligation" is a crucial step to foster confidence, certainty, and legitimacy in the resolution of specific claims.

Recommendation 2

"Create an independent claims body with authority to make binding decisions"

Canada and First Nations should create an independent claims body with legislative authority to make binding decisions with respect to the Crown's lawful obligations towards First Nations and with respect to fair compensation when those obligations have been breached.

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Canada and First Nations should create an independent claims body with legislative authority to make binding decisions with respect to the Crown's lawful obligations towards First Nations and with respect to fair compensation when those obligations have been breached. Given the urgent need for reform in this area, this is the third consecutive Annual Report in which the ICC

recommends the establishment of an independent claims body with the necessary powers and authority to resolve the massive backlog of First Nations' claims against Canada in a fair, just, and cost-effective manner.

Unfortunately, the ICC's own effectiveness has been compromised by the slow or absent responses from government to our reports. Of the 27 inquiry reports submitted to Canada by the ICC, only 13 have received a substantive response from government, either through acceptance for negotiation or outright rejection based on legal principles.

In our last Annual Report we stated that a "response to Commission reports" by the federal government was critical to the efficacy of the inquiry process. Although progress is being made with the Assembly of First Nations and Canada through the Joint Task Force on Claims Policy Reform, we reiterate this point and suggest the solution to this situation is the immediate creation of an independent claims resolution body.

When a claim is rejected by the federal government, the only redress available to a First Nation is to request an inquiry before the ICC or to commence litigation. Neither are suitable alternatives to negotiation. The government has the power to reject claims in the first instance based on its Policy, and, after a full inquiry is conducted into the claim and a recommendation made, the government is not obliged to act. Effectively, the government acts as both judge and advocate. This is an obvious and intractable conflict of interest.

It is absolutely essential, therefore, for any independent claims body (or "ICB") to have sufficient authority to adjudicate claims and to make binding decisions. In the event that Canada believes a result before this new independent claims body is wrong in law, it may have recourse to the courts in the form of a judicial review or statutory appeal based on administrative law principles. In the first instance, however, specific claims should be resolved by a specialized ICB capable of effectively resolving specific claims having special regard to the unique relationship between First Nations and Canada, historical realities, and the law. In light of the importance Canadians place upon the settlement of First Nations' legitimate grievances and the overwhelming need to develop processes which seek to achieve justice and fairness in the negotiation of specific claims, this issue warrants special consideration by the federal government in its review of the existing policy and process. The creation of an ICB would not only promote fairness in negotiations and expedite the resolution of long-standing grievances but it would also help to repair the fractured relationship which exists between Canada and First Nations.

The following suggestions are made for an ICB:

- *Binding authority* - Many of the problems confronted by the ICC (i.e., lack of response to reports, lack of credibility in the eyes of some observers) stem from the non-binding nature of our recommendations. There are three possible approaches to resolving specific claims disputes: (i) the courts (inherently adversarial in nature; frustration in the courts can lead

to direct confrontation and extreme measures; limitations and evidence issues frustrate legitimate historical grievances); (ii) a Commission with non-binding authority (like the ICC, whose effectiveness hinges on political will and the government's commitment to the process); or, (iii) a revamped commission or independent claims body (ICB) with some degree of binding authority to make decisions regarding liability of the Crown and compensation. The first two options have been tried and have proven themselves less than ideal. The ICC, the federal government, and the AFN seem to be in agreement that any new claims body must have some degree of binding authority.

- *Legislative authority* - Any ICB should be established by an Act of Parliament and ratified by the Chiefs of the AFN. This will ensure legitimacy in the process and help ensure subscription to the principles of fair claims resolution. It is also important for Canada to consider whether such an ICB should be given jurisdiction concurrent with the jurisdiction of the superior courts of the provinces.

- *Independence* - Independent decision making is crucial to ensure confidence in the resolution of claims. Appointments to the ICB should be made jointly by Parliament and the AFN. A judicial review mechanism to the federal courts is preferable for questions of jurisdiction. However, the unique evidentiary and historical issues surrounding claim resolutions should not be subject to judicial review. A specialized and independent claims body will be expert in evaluating evidentiary and historical issues and this expertise should be deferred to by the courts.

- *Adoption of previous ICC Reports and recommendations* - Any ICB should be granted the power to adopt the recommendations of the ICC, in whole or in part, as binding and to make any further inquiries necessary to determine alternatives for compensation or restitution. Because of the lack of government response to the ICC's reports, the ICC believes that its recommendations should be adopted by any newly created ICB.

- *Power to validate claims for negotiation* - Validation of claims is currently conducted by Canada. The validation process should be transferred from Canada to an ICB to allow for a less complicated and lengthy negotiation process. In contrast to the current system, which promotes legal wrangling and a costly infrastructure, an efficient ICB could permit the limited resources available for specific claims resolution to be used for settlement purposes.

- *Breaking impasses* - An ICB will provide an effective method to break deadlocks in the specific claims process. The use of mediation and other dispute resolution mechanisms have proved to be effective. The courts are an inappropriate forum for the resolution of specific claims for well-documented reasons. An ICB will allow for the effective resolution of claims while balancing the need for a specialized body to review the unique circumstances of specific claims.

Recommendation 3

"Alternatives to monetary compensation"

Amend and clarify the mandate of the ICC and the Specific Claims Policy in order to allow the Commission to recommend alternatives to monetary compensation for breach of lawful obligations.

The current Policy pre-dates the creation of the ICC and is silent with respect to whether the ICC can make recommendations suggesting alternatives to simple monetary compensation. Although the meaning of the term "compensation" can be disputed, it would be preferable that the mandate of the ICC and the Policy are clarified. A former Minister of the Department of Indian Affairs and Northern Development indicated that the ICC should be given a broader mandate in this respect. We support this suggestion and recommend that serious consideration be given to fostering more constructive methods of restitution.

Often monetary compensation is not an appropriate method to make amends for breaches of lawful obligations. The specific claims process needs to take a more forward-looking approach to solving problems in First Nations' communities. There should be compensation for damages where appropriate, but a claim settlement need not be exclusively monetary. Claims settlements could be designed to achieve a variety of goals which address the long-term needs of the community, in particular economic development. The ICC could craft recommendations that require economic development partnerships to be built into claims settlements (where all parties agree, of course). This could include initiatives with government, initiatives with the business community of

Fond du Lac at Treaty Time, 1914, Fond du Lac, Saskatchewan
Photo by F.J. Alcock, Geological Survey of Canada, No. 28523

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the area, and other development opportunities. A number of First Nations have entered into resource management agreements with private corporations and governments. Often these agreements contain provisions for aboriginal employment. A limited number of agreements actually provide for a First Nation equity interest in projects. Subject to party consensus, the ICC could promote such progressive initiatives as an alternative to the money judgment mentality of the current process.

Recommendation 4

"Increased resources devoted to specific claims resolution"

The Specific Claims Branch and Department of Justice require more resources that can be devoted to ICC inquiries.

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A number of ICC concerns relate to the lack of adequate resources at the Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), to assist in and respond to the ICC's inquiries. First and foremost, increased resources are required to enable DIAND and the Department of Justice to respond to the many inquiries before the ICC and the various recommendations that have not received any substantive response. Second, these resources are required to enable the departments to respond to the backlog of specific claims and to ensure that the ICC's inquiries can proceed in an expeditious fashion. Third, resources will be required for the government to settle claims, to participate in mediation and facilitation, and to enable the ICC to work proactively with the various government departments on claims' issues

We laud the efforts of officials we have worked with in the Department of Indian Affairs and Northern Development and the Department of Justice. However, their diligence is consistently undermined by their lack of resources. We hope this state can be remedied.

Recommendation 5

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The Department of Indian Affairs has imposed a 15-year wait before a First Nation's grievance will be reviewed under the Specific Claims Policy. This rule arises out of its interpretation of the Policy as "intending the application of the program's resources to the processing of claims that are based on long standing historical grievances, rather than those that are recent in nature."

Citing this practice, the Department refused to review the Sturgeon Lake First Nation Agricultural Lease claim, based on events occurring in 1982, under the Specific Claims Policy until after March 1, 1997. This practice is detrimental in that it places an arbitrary "waiting period" before claims can be accepted. Participants with knowledge of events may not be available 15 years later, or documents may be lost. As well, it can promote unnecessary litigation, if the courts are used as an alternative to the claims process, (the courts representing a more costly, time-consuming and adversarial option). It also has the potential to increase the costs of settlements, if the value of land and the dollar appreciate over time.

Response to Last Year's Recommendations

The Commission made three recommendations to the Government of Canada in its 1995/96 Annual Report. Although there has been no formal response from the government on these recommendations, we can offer the following comments and observations on recent developments relating to land claims policy reform and the work of the Commission.

Recommendation 1

"The creation of an Independent Claims Body"

Canada and First Nations should establish an Independent Claims Body empowered to settle the legitimate historical grievances of First Nations with regard to land and other issues.

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There has been significant progress in this area during the last year and there is cause for optimism that an independent claims body will finally be created to adjudicate claims and resolve disputes in a neutral, objective, and fair process. Last September, Canada and the Assembly of First Nations (AFN) retained Concorde Inc. to conduct an independent review of the Indian Claims Commission and its effectiveness under the current policy and process (see Page 18 for details on Concorde's review). Concorde recommended the establishment of "a permanent, independent quasi-judicial" body to commence operations by March 31, 1999. In the interim, Concorde recommended a number of initiatives that would improve the overall effectiveness of the Commission under the present policy while these broader reform discussions would take place between the AFN and Canada.

Big Bear's Camp, Maple Creek, June 6, 1883
Photo by G.M. Dawson, Geological Survey of Canada, No. 467

The response to Concorde's recommendations was positive. Shortly after the report's release, the Hon. Ron Irwin, Minister of Indian Affairs and Northern Development, wrote to Grand Chief Ovide Mercredi on October 23, 1996, confirming his government's commitment to claims policy reform and the establishment of an independent claims body through joint dialogue with the AFN. Minister Irwin also agreed to appoint a Chief Commissioner and Commissioner to fill existing vacancies on the ICC to improve its effectiveness as an interim body.

In light of Canada's renewed commitment in this area, a Joint First Nations – Canada Task Force on Claims Policy Reform was created in the spring of 1997 to begin the formidable task of developing a new independent dispute resolution process that would eliminate the conflict of interest created by Canada judging claims against itself. This joint process for policy review and development provides Canada and the AFN with a forum to discuss openly a wide range of issues and to generate creative options for the creation of an independent claims body that is both fair and effective. The details of how the body will operate, how it will be structured, and whether it will have the powers and authority to make binding decisions are matters that remain to be negotiated between First Nations and Canada. The Commission commends Canada and First Nations for this joint initiative and is prepared to offer its support and technical expertise in whatever form the parties consider appropriate.

Recommendation 2

"Response to Commission Reports"

Canada should respond in a timely and appropriate fashion to ICC inquiry reports, past, present, and future.

Despite the progress of the Joint Task Force on Claims Policy Reform, Canada has still not responded to most of the Commission's reports in which it was recommended that Canada enter into negotiations with the First Nation. Therefore the Government must develop immediately an effective protocol for the timely response to Commission reports to ensure that there is at least some measure of fairness towards First Nations under the existing policy and process. As we said in last year's Annual Report, "Canada's failure to provide a prompt and fair response to our reports . . . undermines the effectiveness of the process and creates the impression that Canada is not sincere in its commitment to resolve First Nations' claims."

When Canada established this Commission in 1991, the general assumption was that Commissioners did not need the power to make binding decisions because First Nations and Canada would accept their recommendations in good faith. This was a valid assumption at the time because the parties agreed to appoint jointly Commissioners who were chosen because of their abilities to provide a neutral and objective assessment of claims on their merits. Instead, Canada has shown an alarming tendency to agree with the Commission's

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recommendations only when they favour the Crown but to disagree – or simply to fail to respond – when the Commission favours the First Nation's position on a claim. Since the honour of the Crown is at stake in all matters relating to treaties and to its relationship with First Nations, we feel that Canada is morally, if not legally, bound to act on the Commission's recommendations unless there are justifiable grounds not to do so. This concern should not be taken lightly; Canada's failure to respond favourably to the recommendations of an independent body that it has created simply compounds the sense of injustice and unfairness felt by so many First Nations' communities today. Until the legitimate grievances of the past have been settled, it will be difficult for Canada to build real partnerships with First Nations because they have little reason to place any trust or faith in our political and legal institutions. This must change and we seek the government's prompt response to this recommendation.

Recommendation 3

"Mediation and alternative dispute resolution"

Canada should use the existing mediation mandate of the Commission to facilitate the resolution of claims.

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Mediation can be provided or arranged for by the Commission, with the consent of a First Nation and Canada, to advance negotiations at any stage of the specific claims process. Mediation is a flexible tool and can take any number of forms, depending on the particular goals and objectives of the parties and the nature of the issues involved. With the assistance of skilled and experienced mediators, issues can be discussed openly, impasses broken, and claims settled. Furthermore, open discussion among equal participants in a consensual process can help promote a healthy dialogue and a better understanding and relationship among the parties.

Over the course of the last year, Canada has demonstrated a greater willingness to explore the possibility of mediation, where a First Nation has requested the assistance of the Commission. As a result, the Commission has seen a moderate increase in mediation activity since its last Annual Report (see Mediation and Facilitation in Appendix C for details). Mr. Robert F. Reid, a former Justice of the Supreme Court of Ontario and the Commission's Legal and Mediation Advisor, brings a wealth of experience to our mediation team and has been assisting Canada and First Nations as a mediator in three specific claims. The Commission has also been providing process facilitation in an additional three claims (i.e., a form of mediation where the facilitator serves as a neutral chair to monitor negotiations and to encourage open and effective communication between parties to help resolve issues before they become insurmountable obstacles to settlement).

Experience has proven that the presence of a skilled and impartial member of the Commission's mediation team can provide real and tangible benefits to the parties in interest-based negotiations by reducing the likelihood of conflict and increasing the efficiency of the process. Despite the modest achievements of the Commission over the last year, it is important for First Nations, Canada, and the Commission to continue to seek opportunities for the use of alternative dispute resolution mechanisms in the specific claims process to achieve settlements in a fair, timely, and efficient manner.

ICC Activities for 1996/97

CARRYING OUT THE MANDATE

Inquiries and Reports

The following represents an overview of the various claims and files currently before the Indian Claims Commission. Since its inception, the Indian Claims Commission has issued reports on 27 inquiries and 1 mediation. For more detailed information on the reports and claims listed here, see Appendices A, B and C.

Overview:

27	Completed inquiries and reports
1	Mediation report
2	Reports in progress
25	Inquiries in various stages of process
8	Inquiries in abeyance or closed
9	Claims in mediation/facilitation
12	Claims settled or accepted for negotiations

Special Initiatives in Mediation / Facilitation

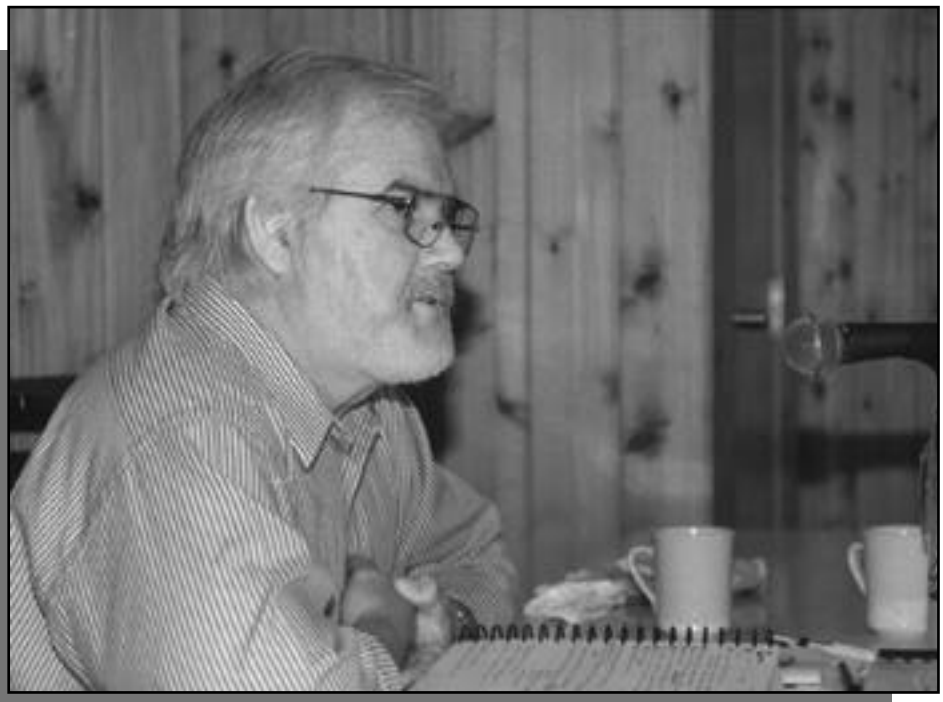
This year, the Indian Claims Commission is involved in two special initiatives which relate to our mediation and facilitation services.

Fishing Lake First Nation Facilitation, Saskatchewan

The first project involves the Fishing Lake First Nation in Saskatchewan. In 1907, approximately 13,170 acres of land were surrendered from the Fishing Lake Reserve. The First Nation submitted a claim to Canada on April 23, 1989, challenging the validity of the surrender because of non-compliance with the requirements of the *Indian Act*. It also maintained that the government breached its trust or fiduciary obligations owed to the First Nation in obtaining the surrender.

The claim was rejected by Canada on February 12, 1993. Supplemental arguments were prepared by the First Nation in 1994 and 1995. Both were rejected by Canada. About the same time that the supplemental submissions were prepared, the First Nation requested that the Indian Claims Commission review Canada's rejection of its claim.

During the initial stages of the ICC's Inquiry process, the parties are encouraged to discuss openly and to review their relative positions and the circumstances leading to the inquiry. During this initial stage, Canada reconsidered its rejection and offered to accept the claim for negotiation. The Fishing Lake First Nation accepted this offer. In December 1996, the First Nation and Canada



Commissioner Roger J. Augustine at Community Session

invited the Indian Claims Commission, under its mediation mandate, to continue as a facilitator in the negotiation process.

The Fishing Lake Claim is unique in that the parties have agreed to hire one set of consultants to conduct land appraisals and loss-of-use studies that will form the basis of the negotiations. Traditionally, both parties conduct their own research in support of their bargaining positions; this practice has in the past, led to protracted and adversarial negotiations. With the assistance of the ICC, the parties have worked together in a spirit of cooperation to develop joint terms of reference for the consultants researching the claim.

The terms of reference were finalized in early March 1997. The ICC has been requested to perform the role of coordinator in the study phase of the negotiation process. The concept of facilitation worked very well in avoiding delays and unnecessary disagreements in getting the research underway.

Over the summer of 1997, the consultants will be completing their studies for submission in early fall to both the First Nation and Canada. Negotiations are expected to commence in the winter and spring of 1997-98. The Commission, acting as chair, is pleased to have been able to contribute to the rapid progress in the initial stages of the negotiation process. The parties have been working together to solve problems and create solutions with the assistance of the ICC. The Fishing Lake 1907 Surrender Claim negotiations serve as an example of the way in which a neutral third party can help foster cooperation between potential disputants.

The Michipicoten First Nation Pilot Project, Ontario

The second project involves the Michipicoten First Nation, located near Wawa, Ontario. On October 29, 1996, the First Nation submitted a proposal to Minister Irwin to develop jointly a process for timely and just resolution of a number of outstanding specific claims. The suggested process was unique in that it proposed joint historical research, joint identification of issues, coordinated legal research, and joint presentation of submissions to the Department of Justice (if required). The approach is very much consistent with the recommendations made in the Concorde report (see page 18) for facilitated negotiations during the claims process from beginning to end.

After preliminary discussions with Michipicoten's legal counsel, a meeting was arranged with the parties on December 13, 1996, to discuss details of the Pilot Project proposal. Upon reviewing the relative merits of third party-assisted negotiations, the parties asked the Commission to act as a facilitator for the process. In January 1997, the Commission sponsored a meeting of the parties, their counsel, and a research consultant to discuss developing joint terms of reference for research into some nine claims and drafting of a negotiation protocol agreement.

On March 25, the Michipicoten Pilot Project Protocol Agreement was signed by the parties and the Commission. Since that time, the research consultant has been researching the various claims and has prepared a rolling draft historical report for regular review by the Pilot Project team.

Michipicoten Pilot Project Team and Community members

The Commission, at the request of the parties, produced a newsletter to inform band membership and concerned parties about the Pilot Project. The newsletter will help lift the veil of secrecy that unfortunately is characteristic of the current claims process. Additionally, the First Nation and Canada are hoping to develop a joint set of guidelines for the collection of oral evidence and they have invited the Commission's input in developing a framework for a proposed community session in Michipicoten. This concept is also an innovation in that, typically, oral traditions have not been utilized in the claims process.

The Michipicoten Pilot Project represents a new phase in the ongoing dialogue between Canada and First Nations. The Pilot Project is an innovative attempt to create a fair and efficient resolution process for the Michipicoten First Nation's historical grievances and will serve, it is hoped, as a template for future claim negotiations. The Commission believes that process facilitation and mediation are helping to bridge the gap between Canada and First Nations that has existed for years. The Michipicoten Pilot Project represents a test of that principle, one that is proving successful.

OTHER ACTIVITIES

Noonan Report (ICC User Survey)

The Indian Claims Commission uses a unique process for conducting its inquiries into specific land claims. The process respects the dignity of all parties involved, and focuses on non-adversarial, non-confrontational methods for resolving disputes. Generally, Commissioners feel the process has proven effective. They decided to commission a professional user survey to confirm (or to deny) that this view was shared by the ICC's clients.

The survey was conducted by Anne A. Noonan Associates, and their report was delivered on November 12, 1996. It documents the results of the informal

Canoeing from the Michipicoten River Village to the Hudson's Bay Post, circa 1920. *Michipicoten Heritage Committee*

survey of organizations and individuals central to the specific land claims process, including claimant First Nations, their legal counsel, and officials from the federal government. The idea was to learn from their experiences and to document their insights, opinions, and suggestions.

The survey questionnaires measured the ICC's performance in terms of satisfaction levels, inquiry structuring and delivery, communications, and respect for traditions. In each category, 70 per cent of the First Nations respondents gave the ICC a rating of "agree" or above. ("Agree" means the respondent agreed with the ICC's approach in each specific area. The scale for responses ranged from "strongly agree" to "strongly disagree.") The ratings of the ICC's structuring and delivery and its respect for traditions were over 90 per cent (agree or above). Satisfaction with performance was rated at 71 per cent, and communications at 74 per cent.

Commissioners are pleased to note that, on balance, the feedback on the ICC's performance was very positive. The results show that the ICC's inquiry process is well received, the ICC's work is valued by participants, and overall satisfaction levels are very high. Over 80 per cent of responses indicated an overall agree or above rating, with almost 40 per cent being strongly agree. If we look only at First Nations responses, the ICC received an 81 per cent agree or above rating, with 34 per cent in the strongly agree category.

Respondents noted that improvements need to be made to the overall claims process. The non-binding nature of the ICC's recommendations remains a central concern. Respondents stated that the ICC's inquiry process raises expectations for timely and fair settlements, yet the ICC's recommendations are often simply just another step in an excessive and frustrating federally designed process. Echoing Commissioners' statements, respondents called for an independent body with binding authority for dispute resolution.

The second major concern was the role of the Department of Justice as "judge and jury" in the claims process, and the perceived federal bias against First Nations' claims. Both seem to skew the process in the government's favour, creating a conflict of interest. The ICC has long been aware of both of these concerns, and has set forth recommendations aimed at eliminating these problems. It is hoped that negotiations leading to any new independent claims body will take these concerns into account.

Concorde Report (An Independent Review of the Indian Claims Commission)

In July 1996, the Indian Claims Commissioners informed the Prime Minister and the Grand Chief of the Assembly of First Nations that they intended to terminate their work on March 31, 1997. Commissioners were particularly concerned that reform of the existing claims policy and process was not progressing, and there were no efforts in place to create a permanent, independent body to review claims.

Canada and the Assembly of First Nations (AFN) shared some of these same concerns. As a first step, it was agreed that a review of the Indian Claims Commission and the specific claims settlement process was in order (the Specific Claims Policy was about to undergo reform, so it was not part of this review). The time-frame for this review was brief — from September 9, 1996, to November 7, 1996. Ottawa-based Concorde Inc. was mandated to conduct the review. Concorde specializes in alternative dispute resolution and is the secretariat for the Canadian International Institute for Applied Negotiation.

The Concorde report assesses and evaluates the Commission's effectiveness as an interim body and makes recommendations aimed at developing a more effective claims resolution process. The report is based on an extensive review of documents, a broad survey of cases the ICC has dealt with, a case study of six representative inquiries conducted by the ICC, a review of the cases of rejected claims that could have come to the ICC but did not, and interviews and group sessions with key informants (ICC Commissioners, officials at the Department of Indian Affairs and Northern Development, the AFN, Department of Justice, and the Privy Council Office). In addition, the authors observed an ICC community session, an international comparative study was conducted, and an informal claims settlement process co-design exercise was held using a focus group.

The report sets forth a number of observations and conclusions which form the basis of its recommendations. As quoted from the report, the seven major recommendations are:

1. That Canada and the AFN commit to a firmly fixed period of Indian claims policy and process reform. The period should be two years, ending on March 31, 1999 at which time a permanent, independent quasi-judicial Indian Claims Resolution Commission will have been established and will commence operation. . . .

2. That the existing Indian Specific Claims Commission's mandate and authority be extended and expanded by Order in Council effective April 1, 1997 to March 31, 1999 and that its name be changed to the Indian Claims Resolution Commission in anticipation of the establishment of an independent tribunal and to reflect significant modifications in practice recommended in this Review. . . .

3. That the Indian Claims Resolution Commission be funded for the fixed two year term and that appointment of Commissioners and other administrative and staffing initiatives be established for a two year term, as appropriate.

4. That there be appointed a complement of seven Commissioners, six of whom would be part-time and one of whom would be appointed jointly by the AFN and Canada.

5. That the Commission and Canada immediately establish protocols and administrative procedures for sending, receiving, and responding to Commission reports so that the process is orderly, timely, respectful of each other's administrative requirements and directed at the overall objective of serving the goals of access to justice for Bands who appeal to the Commission.

6. That a Tri-partite Operations Committee be established with representation from DIAND, the AFN, and the Commission to meet on a regular basis to establish, maintain and improve administrative and technical procedures facilitative of the cost-effective resolution of claims.

7. That the Annual Report of the Commission be presented to Canada and the AFN in a joint session convened by the Privy Council Office, at which time senior political and policy representatives and their senior and policy officials will review and discuss the report with the Commission.

The second recommendation makes reference to a model to be adopted as the next step in developing a new specific claims settlement process. The model places a renewed Commission at the front end of the claims process to ensure neutrality and achieve cost-effective resolution of claims. The report suggests the model could take effect on April 1, 1997, and work for a fixed two-year period. During this time, the AFN and Canada would work to reform the existing policy and process, with the goal of establishing an independent body with some degree of binding authority - an Indian Claims Resolution Commission - on April 1, 1999.

The Concorde report was welcomed by the parties, and discussions continue on the report's recommendations. Some of the suggestions are already being implemented. In many ways, the Concorde report endorsed the procedures put in place by the ICC as a foundation to build a new claims resolution process.

Regional Conferences on Policy Reform

Two conferences were held in the summer of 1996 on land claims policy reform with First Nations of Quebec, Labrador, and Manitoba. First Nations of Quebec and Labrador met with the Commission in Montreal on June 18 and 19 for a conference entitled "First Nations of Quebec and Labrador Policy Forum on Land Claim Issues." The purpose was for the First Nations to discuss their concerns and problems regarding the existing policy. Commissioner Aurélien Gill of the ICC asked delegates to share their ideas on what could be done to reform successfully the existing land claims policy and process. Vice-Chief Ghislain Picard of the AFN echoed Commissioner Gill's request and added that the land claims situation in Quebec is unique in Canada because of the diversity of claims.

The Assembly of Manitoba Chiefs (AMC) hosted a conference in Winnipeg on July 17 and 18 titled "Responsibility, Restitution, and Repayment: A Just Resolution of Indigenous Land Rights." Manitoba First Nations and the ICC were in attendance. Special guests included an official delegation from the Republic of South Africa, which was there to present information on its new approach to land claims since the end of apartheid. Grand Chief Phil Fontaine of the AMC stated the conference objective was to deal with the issue of a national policy on land rights and the claims process and to hear from the South African delegation.

Although First Nations attending the conferences addressed their unique concerns, some general themes emerged:

- In the interest of fairness and justice, the inherent conflict of interest in the process cannot continue.
- The Department of Justice and the Treasury Board have a powerful influence on the process.
- There is no appropriate alternative to litigation, outside of the claims policies and process.
- The present policy and process is outdated and does not take into account more recent developments in aboriginal and treaty rights defined by relevant court decisions.
- The roles of the provinces and third parties need to be addressed in a new policy.
- A new policy and process should be non-adversarial, flexible, and respectful of First Nations' cultures and their sacred connection to the land; it should emphasize negotiation and mediation over expensive tribunals and litigation processes.

The Indian Claims Commission On-Line

In February 1996, the Indian Claims Commission joined the on-line community. The Internet is proving to be an effective tool for reaching the broadest possible audience; for a minimal cost, information can be sent literally around the world. This was a medium that the ICC wanted to utilize. The ICC website (www.indianclaims.ca) is a spot to highlight the latest activities of the ICC; provide information about the Commission, our caseload of claims, and our claims process; and to make available our reports and publications. There is also a page of links to other relevant sites. We plan to have many of our inquiry reports available for downloading by April 1997.

This means you can get your own copy of ICC reports at the click of a button. The site will continue to evolve, as we will always be on the watch for improvements and upgrades.

If you have access to the Internet, be sure to stop by our site. Since opening, the ICC site has logged over 1000 visitors. This is a great start that has exceeded our expectations. We realize that not everyone has Internet access, and we will continue to make our information readily available through mail, fax, and the regular lines of communication.

PLANS FOR 1997/98

Prairie Land Surrenders Project

More than one hundred surrenders of Indian reserve land were taken in the Prairie provinces between the late 1890s and 1930. The Indian Claims Commission has been asked to conduct inquiries into the rejection of several Prairie surrender claims from this period. Many of these claims raised the same types of arguments about the validity of surrenders. First Nations often allege non-compliance with *Indian Act* surrender procedures, duress, undue influence, unconscionability, negligent misrepresentation, lack of informed consent, and breach of fiduciary obligations in the taking of the surrender itself and in the management and administration of the land and the proceeds after surrender. In addition, First Nations have also alleged fraudulent conduct on the part of government officials.

To obtain a clearer picture of the context of these surrender claims, the Commissioners decided that supplementary historical research should be conducted. Dr. Peggy Martin-McGuire was retained by the Commission to produce a report on prairie surrenders from 1896 to 1911.

Research was conducted between June and September, and writing for the report was done between October and December 1996. It is currently in the production stage, and should be available in its final version shortly. The report provides a general historical context for the taking of surrenders with sections on dominion lands policies, railway development, treaties, and Indian Affairs legislation prior to 1896. The activities of land colonization companies are then examined, followed by a year-by-year chronology from 1896 to 1911. The report then gives the core of the historical surrender data, detailing the demand for the surrenders, the taking of surrenders, and their terms and implementation. Sections containing information about the key people and groups involved and the structure of the Department of Indian Affairs, as well as a bibliography of secondary sources are also included.

The report will assist the Commission in addressing the surrender claims that come before it, but more importantly, it will help build a greater understanding about this crucial period in First Nations' history.

Oral Evidence Policy Development

All First Nations have a strong oral tradition. Since most First Nations did not use the written word as the basis for retaining their collective histories, oral tradition has been used since time immemorial as the medium through which history, values, and collective knowledge has been passed from one generation to the next. The oral tradition remains alive and well in many First Nations' communities and, in some cases, remains the primary method for transmitting the community's collective experiences across generations.

The Commission has recognized from the beginning that an important part of the inquiry process was going into First Nation communities to hear first hand about the residents' personal recollections and the First Nation's oral history of the events in question.

At present, the Commission's process of collecting this information is formal to a certain degree, but some modifications have been made to allow for greater participation on the part of the First Nation. The First Nations' leadership, Commissioners, Commission counsel, and legal counsel for both parties are present to hear from the witnesses. Simultaneous interpretation is available when the Elders choose to speak in their traditional language. The Elders typically provide information about the claim in their own words, and then follow-up questions are posed to them by the Commission counsel and Commissioners. If either of the parties have questions for the witnesses, they are relayed to the Commission counsel and they pose the questions on their behalf. This was considered necessary to ensure that the Elders are not subjected to the adversarial nature of cross-examination, while still allowing for all relevant questions.

Two main issues arise for the Commission when First Nations' Elders present their testimony on land claims, treaties, and the community's history. The first relates to how the information is collected from community members and it raises two questions: Is the Commission collecting the information in the most effective manner possible? and Is the Commission collecting the information in the most culturally sensitive manner possible?

The second issue relates to what weight should be attributed to the information provided by the Elders for the purposes of determining what the facts are in relation to claim. The difficult question of weighing the evidence relates to how the Commissioners can assess the information collected and use it to supplement the documentary record when deliberating on a land claim. To complicate the matter further, there may be cases where First Nations' testimony is at complete odds with the documentary record and concerns have been raised by the parties about the reliability of both sources of information.

In summary, the basic question facing the Commission is, How can and how should the Commission make use of the various oral traditions of First Nations in its inquiry process to settle longstanding grievances over specific claims?

A study is being commissioned to look into these questions in order to assist the Commission in developing a set of practical guidelines for the collection, use, and assessment of oral evidence.

Developing an Accessible Database for Specific Claims Research

One of the recommendations in the third-party review of the Commission (the Concorde report), which was endorsed by all parties, is that the Commission build a land claims database. This database will make it easier to access research on specific claims in Canada. Much of this information is currently available, but it is not housed in one publicly accessible and searchable database. The Department of Indian Affairs and Northern Development maintains statistical or indicator data on claims filed and in process, but it is only available on its internal systems. The Indian Claims Commission maintains data on its process, research, and reports and provides significant access through its website. Still other sources, such as the National Archives, store information that has not yet found its way into databases for easy access.

The challenge of this project is to develop a database which brings all this information together in an organized, logical, and readily accessible manner. One possibility is using the Internet. The key issues that have to be considered are copyright and the right of First Nations' to keep active research data private.

Partnerships for mutual benefit and reduced costs are being explored. The Commission expects to have a database pilot project up and running within the year.

CONCLUSIONS

Despite the unusual circumstances of 1996/97, the ICC's activities have highlighted many complex and difficult issues that will require significant time and resources for government to address. Nonetheless, many of the issues raised have been outstanding for decades and most assuredly will not go away. One thing that is abundantly clear to us is that aggrieved First Nations are passionately committed to having their claims addressed. Therefore, it is necessary for government to find a way to deal with the present claims and the increasing numbers of new claims that arise every year. The Fishing Lake and Michipicoten examples demonstrate how willingness, flexibility and a joint commitment to problem-solving can facilitate effective discussion.

As our knowledge and experience in claims settlements improves, we continue to seek better ways to assist the parties in reaching mutually acceptable agreements. The projects planned for 1997/98 will assist all parties by providing independent research and information for joint and expeditious review of claims. As part of its commitment to fairness in claims review, the ICC will continue to advocate and support Canada and the AFN in their efforts in the coming year.

Appendices

APPENDIX A

STATUS OF CLAIMS AS OF MARCH 31, 1997

OVERVIEW

Overview of Inquiries and Mediation / Facilitation

27 Completed inquiries and reports
1 Mediation report
2 Reports in progress
5 Inquiries in various stages of process
8 Inquiries in abeyance or closed
9 Claims in mediation / facilitation
12 Claims settled or accepted for negotiations

INQUIRIES

Completed Inquiries and Reports (27)

Athabasca Denesuline [Aboriginal and Treaty Harvesting Rights] SK
Buffalo River Band [Primrose Lake Air Weapons Range] SK
Canoe Lake Cree Nation [Primrose Lake Air Weapons Range] SK
* Chippewas of Kettle and Stony Point First Nation [1927 Surrender] ON
Chippewas of the Thames [Muncey Land Claim] ON
Cold Lake First Nation [Primrose Lake Air Weapons Range] SK
* Fishing Lake First Nation [1907 Surrender] SK
Flying Dust First Nation [Primrose Lake Air Weapons Range] SK
Fort McKay First Nation [Treaty Land Entitlement] AB
Homalco Indian Band [Aupe IR No. 6 and 6A] BC
Joseph Bighead Band [Primrose Lake Air Weapons Range] SK
* Kahkewistahaw First Nation [Treaty Land Entitlement] SK
* Kahkewistahaw First Nation [1907 Surrender] SK
Kawacatoose First Nation [Treaty Land Entitlement] SK
Lac La Ronge Indian Band [Treaty Land Entitlement] SK
Lax Kw'Alaams First Nation [Railway lands/surrender] BC
* Lucky Man Cree First Nation [Treaty Land Entitlement] SK
* Mamaleleqala'Qwe'Qwa Sot'Enox Band [McKenna-McBride Applications] BC
Micmacs of Gesgapegiag Band [Horse Island] QC
* Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits] AB
* Moosomin First Nation [1909 Surrender] SK
Nak'azdli First Nation [Aht-Len-Jees IR No. 5] BC
'Namgis First Nation [Cormorant Island Claim] BC
* 'Namgis First Nation [McKenna-McBride Applications] BC
Sumas Indian Band [IR No. 6 Railway Right-of-way] BC
Waterhen Lake First Nation [Primrose Lake Air Weapons Range] SK
Young Chippewyan Band [Unlawful Surrender] SK

* Reports released in 1996/97.

Mediation Reports (1)

Roseau River Anishinabe First Nation [Treaty Land Entitlement] SK

Reports in Progress (2)

Eel River Bar First Nation [Eel River Dam] NB
Sumas Indian Band [1919 Surrender of IR No. 7] BC

Inquiries in Various Stages of Process (25)

Athabasca Chipewyan First Nation [IR No. 201 - WAC Bennett Dam] AB
Bigstone Cree Nation [Treaty Land Entitlement] AB
Carry the Kettle Band [1905 Surrender] SK
Carry the Kettle Band [Cypress Hills Reserve] SK
Chippewa Tri-Council [Collins Treaty] ON
Chippewa Tri-Council [Coldwater Narrows Reservation] ON
Cote First Nation No. 366 [1905 Surrender] SK
Cowessess First Nation [QVIDA - Flooding] SK
Cowessess First Nation [1907 Surrender] SK
Duncan's Indian Band [Wrongful Surrender] AB
Friends of the Michel Society [Band Enfranchisement] AB
Gamblers First Nation [Treaty Land Entitlement] MB
Kahkewistahaw First Nation [QVIDA - Flooding] SK
Long Plain First Nation [Loss of Use] MB
Moose Deer Point First Nation [Recognition of Pottawatomi Rights in Canada] ON
Muscowpetung First Nation [QVIDA - Flooding] SK
Nekaneet First Nation [Entitlement to Treaty Benefits] SK
Ocean Man Band [Treaty Land Entitlement] SK
Ochapowace First Nation [QVIDA - Flooding] SK
Pasqua First Nation [QVIDA - Flooding] SK
Peguis First Nation [Treaty Land Entitlement] MB
Piapot First Nation [QVIDA - Flooding] SK
Sakimay First Nation [QVIDA - Flooding] SK
Standing Buffalo First Nation [QVIDA - Flooding] SK
Walpole Island First Nation [Boblo Island] ON

Inquiries in Abeyance or Closed (8)

Alexander First Nation [1905 Surrender] AB
Blood Tribe/Kainaiwa [Akers Surrender 1889] AB
Clearwater River Dene Nation [Treaty Land Entitlement] SK
Key Band [1909 Surrender] SK
Sturgeon Lake First Nation [Agricultural Lease] SK
Sturgeon Lake First Nation [1913 Surrender] SK
Walpole Island First Nation [Anderdon Township] ON
Walpole Island First Nation [Pelee Island] ON

Mediation / Facilitation

Claims in Mediation / Facilitation (9)

Fishing Lake First Nation [1907 Surrender] SK
Michipicoten First Nation [Pilot Project] ON
Mistawasis First Nation [1911, 1917 and 1919 Surrenders) SK
Osoyoos Indian Band [J.C. Haynes Specific Claim] BC
Roseau River Anishinabe First Nation [1903 Surrender] SK
Salt River First Nation [Treaty Land Entitlement] NWT
Squamish First Nation [Capilano IR No. 5 - Bouillon Claim] BC
Thunderchild First Nation [1908 Surrender] SK
Treaty 8 Tribal Corporation [Treaty Land Entitlement] NWT

Claims Settled or Accepted for negotiations (12)

\# Canoe Lake Cree Nation [Primrose Lake Air Weapons Range] SK - Accepted
\# Chippewas of the Thames [Muncey Land Claim] ON - Settled
\# Cold Lake First Nation [Primrose Lake Air Weapons Range] SK - Accepted
\# Fishing Lake First Nation [1907 Surrender] SK - Accepted
* Little Black Bear Band [1928 Surrender] SK - Settled
\#* Micmacs of Gesgapegiag [Highway Claim] QC - Settled
\# Mikisew Cree Nation [Treaty Entitlement to Economic Benefits] AB - Accepted
\# Nak'azdli First Nation [Aht-Len-Jees IR No. 5] BC - Accepted
Peguis First Nation [Treaty Land Entitlement] MB - Accepted
\#* Roseau River Anishinabe First Nation [Treaty Land Entitlement] SK - Settled
Squamish First Nation [Capilano IR No. 5 - Bouillon Claim] BC - Accepted
Washagamis First Nation [IR 38D] ON - Accepted

* Claims settled with assistance of ICC Mediation/facilitation
\# ICC report released

Appendix B

SUMMARY OF COMPLETED INQUIRY REPORTS 1996/97

In 1996/97 the Commission released nine reports into completed inquiries. A summary of the findings and recommendations made by the Commission in each report is set out below.

Chippewas of Kettle and Stony Point First Nation [1927 Surrender], Ontario

This inquiry dealt with the surrender and sale of 81 acres from the Kettle Point Indian Reserve in southwestern Ontario. The Chippewas of Kettle and Stony Point claimed that the surrender was invalid, and that the Crown was negligent and in breach of its fiduciary obligations towards the First Nation throughout the surrender process.

The surrender meeting, held in March 1927, was attended by A.M. Crawford who wished to purchase the land at a price of $85 per acre. He paid members of the First Nation a "bonus" of $5 to vote and told them they would get another $10 later. After the surrender was obtained, Crawford had difficulty raising the funds to purchase the land. The First Nation filed a number of protests, as it had expected payment to follow shortly after the surrender vote. The Department of Indian Affairs appeared to cancel the deal on two separate occasions. After the second cancellation, an offer to purchase the property was made on behalf of John A. White, a salesman, for $118 per acre. The First Nation was never informed of this higher offer. Instead, a deal was brokered between Crawford and White in which White withdrew his offer and the two became joint purchasers at the original price of $85 per acre. They then sold just over half the land for $300 per acre.

In its final report, released in March 1997, the Commission felt obliged to take into account that the 1927 surrender was also the subject of a court case. Since the Ontario Court (General Division) and the Ontario Court of Appeal both upheld the validity of the surrender, the Commission concluded that the surrender was valid and unconditional. However, the Commission noted that the courts did not rule on the issue of breach of fiduciary duty.

The Commission found that the Crown had both pre-surrender and post-surrender fiduciary duties towards the First Nation and that it breached those duties. Crawford's "flip" of the land for $300 per acre after purchasing it for $85 per acre demonstrates that the surrender was an exploitative transaction. The Crown had an obligation to inquire into the market potential of the land and to satisfy itself that it made good sense for the First Nation to sell the land to Crawford for $85 per acre. It failed to do so, and by consenting to an exploitative transaction it breached its pre-surrender fiduciary duty. The Crown also breached its post-surrender duty to the First Nation by failing to disclose

White's higher offer and by failing to seek the First Nation's direction on how to proceed. Finally, the Crown breached its fiduciary duty by ignoring an implied term of the surrender that the transaction close in a timely manner and by allowing the transaction to close two years after the surrender.

Fishing Lake First Nation [1907 Surrender], Saskatchewan

At issue in this inquiry was the surrender of 13,170 acres of land from Fishing Lake Indian Reserve (IR) 89 on August 9, 1907. The Fishing Lake Reserve and two others, Nut Lake and Kinistino, were set aside for members of the Yellow Quill Band under the terms of Treaty 4. In 1905 the Canadian Northern Railway Company requested that the northern end of the Fishing Lake Reserve be opened for settlement. The Indians at Fishing Lake initially refused to surrender the land because, according to the Indian Commissioner, they did not want the Nut Lake and Kinistino Bands to share equally with them in the proceeds received from the sale of the land. In response, the Department of Indian Affairs had the Indians at Fishing Lake, Nut Lake, and Kinistino sign an agreement recognizing them as three separate bands. The Department then secured the surrender of 13,170 acres from the Fishing Lake Band.

When the First Nation first submitted its claim to the Minister of Indian Affairs in 1989, it argued that the alleged surrender was null and void because it was obtained through duress and undue influence, it was an unconscionable agreement, and it was obtained without strict compliance with the *Indian Act*. It also contended that the Crown breached its trust or fiduciary obligations in obtaining the alleged surrender. The First Nation later added two new arguments; namely, that the Crown negligently misrepresented the circumstances surrounding the surrender, and that the consent required under Treaty 4 had not been obtained prior to the separation of the three reserves and the surrender of 13,170 acres from Fishing Lake IR 89. Canada did not accept any of these arguments and rejected the claim.

The First Nation asked the Commission to review the rejection of its claim. During the course of the Commission's inquiry, legal counsel for the First Nation discovered that at least one (and possibly three) of the individuals who signed the surrender document in 1907 was not 21 years of age. He also argued that the affidavit certifying the surrender was not properly sworn according to the statutory standards in place at the time. After reviewing the additional evidence and submissions provided by the First Nation, Canada reconsidered its position and offered to negotiate the First Nation's claim. The First Nation accepted Canada's offer and asked the Commission to act as a facilitator for the negotiations. The Commission released its report into this inquiry in March 1997.

Kahkewistahaw First Nation [Treaty Land Entitlement], Saskatchewan

This inquiry dealt with the issue of outstanding treaty land entitlement for the Kahkewistahaw First Nation of southern Saskatchewan. The First Nation claimed that Canada had not fulfilled its obligation under Treaty 4 to set aside reserves equal to 128 acres for each member of the First Nation.

Kahkewistahaw adhered to Treaty 4 in 1874, and, in the ensuing seven years, surveyors were sent out on three separate occasions to survey a reserve for the First Nation. In 1876, an area of 41,414 acres was surveyed but the First Nation never settled on the surveyed land, and thus never accepted this land as its reserve. In 1880, Kahkewistahaw requested that a reserve be surveyed for his people but, although evidence indicates that survey work was done, no plan of survey has ever been located. In 1881, two areas were surveyed for the First Nation resulting in two reserves, totalling 46,816 acres. They were eventually confirmed by Order in Council in 1889 and provided sufficient land for 365 people under the Treaty 4 formula of 128 acres per person. The complicating factor in this inquiry was the fluctuating population of the First Nation in the years following the signing of Treaty 4. According to the treaty annuity paylists, the number of people paid with Kahkewistahaw grew from 65 in 1874 to 266 in 1876 and 430 in 1880, before falling sharply to 186 in 1881.

The dispute between Canada and the First Nation centred on the appropriate date for calculating the First Nation's treaty land entitlement and the appropriate treaty annuity paylist to use as the starting point in calculating that entitlement. In its final report, released in November 1996, the Commission stated that, as a general principle, a band's population on the date of first survey should be used to calculate treaty land entitlement. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has occurred. The first survey can be identified by determining whether the reserve was surveyed or located in conformity with the treaty, and whether the survey or allotment was acceptable to Canada and to the band. The Commission also stated that the treaty annuity paylist provides useful information regarding a band's population at date of first survey, but it is simply a starting point for determining the band's population for treaty land entitlement purposes; all available evidence that tends to establish or disprove the membership of certain individuals in the band should be considered and weighed. The appropriate "base paylist" to use as a starting point for calculating a band's treaty land entitlement is the one which provides the most reliable objective evidence of the band's population at the date of first survey.

In this case, the Commission found that the 1881 survey was the true "first survey" for Kahkewistahaw and that the most reliable objective evidence of Kahkewistahaw's population at the date of first survey was the 1881 paylist, subject to adjustments for absentees and "late additions," such as new adherents to treaty and transferees from landless bands. Using the 1881 base paylist as the starting point, the evidence showed that Kahkewistahaw had a population of 186 at the date of first survey, together with 70 absentees and arrears, for a preliminary total of 256. Since Kahkewistahaw received enough land for 365 people, the Commission concluded that the First Nation had failed to establish that the Government of Canada owed an outstanding lawful obligation to provide land to the First Nation under treaty.

Kahkewistahaw First Nation [1907 Surrender], Saskatchewan

This inquiry concerned the surrender of 33,281 acres from the Kahkewistahaw First Nation's reserves in 1907. The surrender amounted to almost three-quarters of the First Nation's original land-base of 46,816 acres, and the land that was left for the First Nation was almost completely unsuited for cultivation. The Kahkewistahaw First Nation claimed that the surrender was invalid because of the presence of duress, undue influence, and negligent misrepresentation, and because the surrender bargain was unconscionable. It also alleged that the surrender was invalid because the Crown failed to comply strictly with the requirements of the *Indian Act*, breached its fiduciary obligation to the First Nation by the manner in which it obtained the surrender, and violated a requirement of Treaty 4 by failing to obtain the consent of all Kahkewistahaw members interested in the reserve.

The surrender took place in January 1907, in the middle of winter, when the First Nation had been weakened by illness and hunger. In addition, Chief Kahkewistahaw - who had adamantly opposed earlier surrender offers - had recently died, and the First Nation was still without a leader. In these circumstances, the Inspector of Indian Agencies arrived at the surrender meetings with cash in hand, determined to obtain a surrender, and promising immediate payment of a portion of the estimated purchase price if the First Nation agreed. Even so, the First Nation rejected the surrender by a vote of 14 to 5 at the first surrender meeting. Five days later, however, the First Nation reversed its decision and accepted the surrender by an 11 to 6 majority.

In its final report, released in February 1997, the Commission concluded that the 1907 surrender was valid and unconditional because there was technical compliance with the *Indian Act*. However, the Commission also concluded that the Crown owed pre-surrender fiduciary obligations to the First Nation and that it breached those obligations. It found that, in procuring the surrender, the Crown's agents engaged in "tainted dealings" by taking advantage of the First Nation's weakness and lack of leadership to induce its members to consent to the surrender. Moreover, the First Nation effectively ceded or abnegated its decision-making power to or in favour of the Crown with respect to the surrender, but the Crown failed to exercise that power conscientiously and without influencing the outcome of the surrender vote. Finally, the Governor in Council had an opportunity to prevent the surrender, which was clearly foolish and improvident and constituted exploitation, and failed to do so.

Lucky Man Cree Nation [Treaty Land Entitlement], Saskatchewan

In this inquiry, the Lucky Man Cree Nation claimed that the Government of Canada had not fulfilled its obligation under Treaty 6 to set aside sufficient reserve land for the use and benefit of the First Nation. The only issue before the Commission was the appropriate date for calculating the First Nation's population for treaty land entitlement purposes.

After adhering to Treaty 6 in 1879, Lucky Man and his followers did not immediately select reserve land. Although Lucky Man indicated in 1880 that

he wished to locate near Battleford, Saskatchewan, he continued to hunt for buffalo in southern Saskatchewan and the United States, and showed no inclination to settle on a reserve. In 1882 the bands of Lucky Man and other Chiefs arrived at Fort Walsh after an unsuccessful hunt. Lucky Man requested a reserve at Big Lake east of Fort Walsh, but the government was adamant that the Cree move north to the areas set out in Treaty 6. By 1883 the Lucky Man and Little Pine Bands were camped near Battleford, but no formal survey of a reserve was done. It was not until 1887 that Indian Reserve (IR) 116 was surveyed "For the Bands of Chiefs 'Little Pine' and 'Lucky Man.'" The First Nation did not receive a reserve of its own, however, until 1989. In November of that year, the First Nation and Canada entered into a Settlement Agreement under which the First Nation agreed to surrender its interest in IR 116, and Canada agreed to set apart 7,680 acres of land as a reserve for the use and benefit of the First Nation.

In its final report issued in March 1997, the Commission concluded that, as a general principle, the most reasonable interpretation of Treaty 6 is that an Indian band's treaty land entitlement should be based on its date of first survey population, unless there are unusual circumstances that would otherwise result in manifest unfairness. Canada and the band must reach a "meeting of the minds" or consensus with regard to the specific lands to be set apart for the band's use and benefit. The completion of a survey and the band's acceptance of the reserve provide conclusive evidence that both parties have agreed to treat the surveyed land as an Indian reserve for the purposes of the treaty. Although "settling down" is not a condition precedent to establishing a reserve, a band may, by settling down, give a strong indication of the location in which it wants its reserve to be surveyed. In this case, the appropriate date for calculating the First Nation's treaty land entitlement population was the date of first survey of IR 116 in 1887.

The Commission noted that, under the Settlement Agreement of 1989, the Lucky Man Cree Nation surrendered its interest in IR 116 in exchange for its current reserve. By agreeing to this settlement, the First Nation did not, however, agree that its treaty land entitlement should be based solely on its 1980 population of 60, nor did it forgo its right to seek additional compensation in lieu of additional treaty land.

Mamaleleqala Qwe'Qwa'Sot'Enox Band [McKenna-McBride Applications], British Columbia

The claim of the Mamaleleqala Qwe'Qwa'Sot'Enox Band centred on several unsuccessful applications for reserve lands made to the McKenna-McBride Commission in 1914. As discussed below in the summary for the McKenna-McBride Applications claim of the 'Namgis First Nation, the McKenna-McBride Commission was established in 1912 and empowered, subject to approval from the federal and British Columbia governments, to adjust the acreage of Indian reserves in British Columbia. It met with representatives of the Mamaleleqala Band in June 1914, at which time the Band submitted 12 applications for additional reserve lands. Some of these applications included

old village sites. During the McKenna-McBride hearings, however, the Mamaleleqala learned for the first time that many of the lands it sought for reserve status had been alienated through the granting of provincial timber leases and licences. These alienations were granted despite the fact that leases and licences were prohibited over Indian settlements under the provisions of the provincial *Land Act*. After meeting with the Mamaleleqala, the Commission met with the Indian Agent, W.M. Halliday, to obtain his recommendations on the Band's applications. He recommended a grant of 5 acres in each of the Lull Bay, Hoeya Sound, and Shoal Harbour areas, 400 to 500 acres on Swanson Island, and all of Compton Island. The Commission ultimately allowed only one of these applications - Compton Island. The remaining applications were rejected because they contained areas that were already alienated. An additional 2.17 acres were subsequently allotted in the Shoal Harbour area, following a review of the Commission's report by W.E. Ditchburn and J.W. Clark.

In its final report, released in March 1997, the Indian Claims Commission found that the Band had Indian settlements in the areas of Lull Bay, Hoeya Sound, Shoal Harbour, and Knight's Inlet, and that Canada, through its Indian Agents, had a fiduciary obligation to protect those settlements from unlawful encroachments. Under the *Land Act*, applicants for leases and licences were required to publish a notice in the British Columbia Gazette and in the local newspaper before the leases and licences could be granted. The Indian Agents should have monitored the notices and, if any of the leases or licences were likely to interfere with an Indian settlement, they should have entered an objection. Therefore, the ICC concluded that Canada, through its Indian Agents, breached its fiduciary obligation to the Band in respect of those leases and licences that covered Indian settlement lands and were gazetted during the tenure of the Indian Agents. This meant that the Band had a valid claim for negotiation for a minimum of 5 acres and 2.83 acres in the Lull Bay and Shoal Harbour areas respectively, and for some of the Band's settlement lands in the Knight's Inlet area.

The ICC also found that Agent Halliday had certain responsibilities prior to, during, and after the McKenna-McBride hearings. Prior to the hearings, he had a fiduciary obligation to prepare the Band for the McKenna-McBride process by providing basic information and advice. The evidence indicated that he failed to do so and, since additional lands were reasonably required by the Band and other unalienated lands were available which the Band could have applied for, the ICC concluded that the Band had a valid claim for negotiation as a result of Agent Halliday's conduct prior to the McKenna-McBride hearings.

Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits], Alberta

The Mikisew Cree First Nation of northeastern Alberta (previously known as the Fort Chipewyan Cree Band) claimed that, under Treaty 8, there was an existing and outstanding lawful obligation on the part of Canada to provide economic benefits to the First Nation. Pursuant to the terms of Treaty 8 (signed by representatives of the First Nation in 1899), the Crown agreed to set aside reserves for those bands desiring reserves. It also agreed to supply various

economic benefits such as agricultural tools and implements, livestock, and seed (sometimes referred to as the "cows and ploughs" entitlement). No reserve lands were set aside for the First Nation until an agreement was reached between Canada and the First Nation in 1986. In addition, the First Nation has no record that it ever received the economic benefits promised under the treaty, except for an annual allocation of ammunition.

The First Nation first submitted its claim to the Minister for Indian Affairs and Northern Development in January 1993. Three years later, the First Nation had not received a definite answer from the Department of Indian Affairs and Northern Development as to whether its claim would be accepted for negotiation. As a result, in February 1996, the First Nation asked the Commission to conduct an inquiry into its claim. It argued that the Department's conduct and delay were tantamount to a rejection of the claim. Canada took the position, however, that the Commission had no authority to consider the matter, since the First Nation's claim had not been rejected.

In a letter dated November 18, 1996, the Commission responded to the preliminary question of its authority to conduct the inquiry. The Commission was of the view that Canada had sufficient time to determine whether an outstanding lawful obligation was owed to the First Nation, and that the lengthy delay was tantamount to a rejection of the claim for the purposes of the Commission's authority to proceed with the inquiry under its terms of reference. On November 20, 1996, the Commission received word that Canada had accepted the claim for negotiation. Accordingly, the inquiry was suspended and the Commission released its report in March 1997.

Moosomin First Nation [1909 Surrender], Saskatchewan

This inquiry dealt with the surrender of Moosomin Indian Reserves 112 and 112A in central Saskatchewan on May 7, 1909, in exchange for a reserve farther north, near Cochin, Saskatchewan. The Moosomin First Nation claimed that the surrender was invalid because the Band's consent to the surrender did not comply with the requirements of the *Indian Act* and the Crown did not fulfil its fiduciary obligatons in relation to that surrender.

Between 1902 and 1907, local settlers and politicians petitioned the Department of Indian Affairs to have the rich agricultural lands in the Moosomin Reserve on the North Saskatchewan River near Battleford opened up for settlement, but the Moosomin Band had twice emphatically refused to surrender any of these lands. In January 1909, a letter of petition, purporting to represent the views of 22 members of the Moosomin Band, proposed the surrender of the reserve on certain terms. Curiously, not a single member of the Band actually signed or affixed his mark to the document as an expression of their intention to surrender the reserve. This letter prompted local clergymen and Indian Affairs officials to renew their efforts to secure a surrender of both of the Band's reserves on less favourable terms. Indian Agent Day went to the Moosomin Reserve on May 7, 1909, with $20,000 in cash to be distributed to the Band if it agreed to surrender.

In this third and largely undocumented attempt by Canada to obtain the surrender, Moosomin Band members purported to surrender 15,360 acres of the best agricultural land in Saskatchewan in exchange for a reserve that the Department itself later described as hilly, stony, and practically useless. Even though the Department's records are replete with information on virtually every other subject involving the Band, there is a complete absence of any details from Agent Day about any surrender meeting, of any discussions, or of a record of the votes cast.

Oral submissions were heard on this inquiry on September 24, 1996, at which time Canada advised that it had not formulated any position in the inquiry and, therefore, would not be providing written or oral submissions to the Commission. Canada was provided extra time to prepare, but the new deadline passed and the Commision remains without any written or oral submissions from Canada on the merits of this claim. Every reasonable opportunity was afforded to Canada to meet its obligation to assist this Commission fully in its deliberations.

In its final report, released in March 1997, the Commission concluded that Canada breached its fiduciary obligations in securing the surrender of the Moosomin reserve lands because the Crown failed to respect the Band's decision-making autonomy and, instead, took advantage of its position of authority and unduly influenced the Band to surrender its land. Crown officials deliberately set out to use their positions of authority and influence to completely subordinate the interests of the Moosomin Band to the interests of settlers, clergymen, and local politicians, who had long sought the removal of the Indians and the sale of their reserves. The surrender was pursued in the face of consistent statements from the Band that it did not wish to give up its land; the intentions and wishes of the Band were ignored. The Crown failed to meet its fiduciary duty to exercise its power and discretion in a conscientious manner. Finally, the evidence is clear that the Governor in Council gave its consent under section 49(4) of the *Indian Act* to a surrender that was foolish, improvident, and exploitative, both in the process and in the end result. The Crown's failure to prevent the surrender under these circumstances amounted to a breach of fiduciary duty.

'Namgis First Nation [McKenna-McBride Applications], British Columbia

The 'Namgis First Nation, on the west coast of British Columbia, claimed that Canada's officials were negligent and in breach of their fiduciary obligations to the First Nation during the McKenna-McBride reserve creation process in the early 1900s. The McKenna-McBride Commission, with representatives from both the federal and the British Columbia governments, was established in 1912 to settle a number of disputes over Indian lands and Indian affairs generally in British Columbia. It was empowered, subject to approval from the two levels of government, to adjust the acreage of Indian reserves in the province. As part of its operations, the Commission travelled throughout British Columbia meeting with representatives from the various tribes and bands. It met with representatives from the 'Namgis First Nation in June 1914. At that

time, the First Nation presented seven applications for additional reserve lands. Included in these applications was a request for 100 acres in the area around Woss, three large islands in the Plumper Island group, and all of the islands in the Pearse Island group. Following the Commission's meeting with the First Nation, it met separately with the Indian Agent, W.M. Halliday, to obtain his recommendations on the First Nation's applications. He recommended a maximum allowance of 100 acres in the Plumper Island group, and 50 or 60 acres in the Pearse Island group. He refused to endorse the First Nation's application for 100 acres around Woss. The Commission later discovered that some of the land recommended by Agent Halliday was alienated and unavailable for allotment as an Indian reserve. He was asked if he wished to reconsider some of the applications he had originally rejected. He recommended that the First Nation be given all the Pearse Islands, except the large island lying to the southwest of the group. The Commission ultimately ordered the creation of two new reserves: Ksui-la-das Island, the southwesterly island of the Plumper group, containing an area of approximately 70 acres; and Kuldekduma Island, the most northerly of the Kuldekduma or Pearse group, containing an area of approximately 60 acres. It rejected the application for the area around Woss on the ground that it was "not reasonably required." The four remaining applications of the First Nation were rejected because they contained areas that were already alienated.

In its final report released in February 1997, the Indian Claims Commission found that Agent Halliday had certain responsibilities prior to, during, and after the McKenna-McBride hearings. During the McKenna-McBride hearings, he had a fiduciary obligation to provide reasonable and well-informed recommendations to the Commission. In order to inform himself of the First Nation's *bona fide* land requirements, Agent Halliday should have consulted with the First Nation and made other appropriate investigations. The ICC was of the view that, if Agent Halliday had consulted with the First Nation before making his recommendations to the McKenna-McBride Commission, he would have discovered that all three of the Plumper Islands and all of the Pearse Islands were actively used by the First Nation and were of importance to them. Therefore, a reasonable person acting in good faith would have recommended for reserve status all the islands requested by the First Nation. A reasonable person also would have recommended the area around Woss, since it was unclear whether the land sought in one of the First Nation's other applications was available for reserve purposes and the area around Woss was an old village site, important for food gathering and trade, and significant in terms of 'Namgis culture and traditions. The ICC was mindful, however, that the McKenna-McBride Commission was unwilling or unable to recommend lands that were already alienated. The ICC therefore found that the First Nation had a valid claim in relation to the Plumper Islands because the lands were "open and available," but that further research was necessary to determine whether the lands around Woss and in the Pearse Island group were unalienated and available during the McKenna-McBride process.

APPENDIX C

SUMMARY OF CLAIMS AS OF MARCH 31, 1997

INQUIRIES

Alexander First Nation [1905 Surrender], Alberta

This claim deals with a large portion of the Alexander Reserve surrendered in 1905, under questionable circumstances, and allegedly in breach of the Crown's fiduciary responsibility to the First Nation. At the first planning conference, the parties decided that further research might clarify their respective positions and allow them to reach agreement. This inquiry was closed pending further notice from the First Nation.

Athabasca Chipewyan First Nation [IR No. 201 - W.A.C. Bennett Dam], Alberta

The claimant alleges that BC Hydro's construction of the W.A.C. Bennett Dam on the Peace River has affected the flow levels on the Athabasca River, thereby damaging the lands, waters, and environment of Indian Reserve (IR) 201. The First Nation submits that the dam has had an adverse impact on the First Nation's economy and that the Crown failed to take proper steps to prevent or to mitigate the damage caused to the reserve. A planning conference took place on May 17, 1996, a community session was held in October 1996, and a second community and expert session was held on November 27, 1996. The parties are currently working to define the issues that will be the subject of the Commission's inquiry report.

Indians Arriving for Treaty, Fort Chipewayan, Alberta, 1914
Photo by A.J. Alcock, Geological Survey of Canada, No. 28494

Bigstone Cree Nation [Treaty Land Entitlement], Alberta

The claimant alleges that the Crown owes it additional reserve land under Treaty 8. At issue is the appropriate date for calculation of the claimant's treaty land entitlement, the categories of individuals entitled to be counted, and the fiduciary, legal, equitable, or other obligations of the Crown in the implementation of its treaty obligations. A planning conference took place on July 25, 1996, and a community session was held in Desmarais, Alberta, on October 29, 1996. Additional community sessions will be scheduled in the near future.

Blood Tribe/Kainaiwa [Akers Surrender 1889], Alberta

This claim relates to the surrender of 440 acres of reserve land in 1889. The claimant contends that, in taking the surrender, the Crown breached its fiduciary obligation to the Tribe and failed to comply with the requirements of the *Indian Act.* The claimant also raises allegations of unconscionability, undue influence, negligent misrepresentation, and duress. The claim is currently in abeyance at the request of the claimant, pending the finalization of its negotiations with Canada on another aspect of the claim.

Carry the Kettle Band [1905 Surrender], Saskatchewan

The Band claims that a surrender of 5,760 acres of the Assiniboine reserve in 1905 is invalid because, first, no record of the Band membership vote was taken by the Department of Indian Affairs, and, second, there is insufficient evidence regarding the outcome of the surrender meeting. The claim is currently in the oral argument stage.

Carry the Kettle Band [Cypress Hills Reserve], Saskatchewan

The claimant alleges that land north of Cypress Hills, comprising 340 square miles, was established as a reserve for the Band, and that the Crown subsequently took the land without following the surrender provisions of the *Indian Act.* Two planning conferences were held on November 21, 1996, and March 11, 1997. A pre-hearing conference is planned to settle the issues in the inquiry, to be followed later by a community session.

Chippewa Tri-Council [Collins Treaty], Ontario

The Chippewa Tri-Council claims that lands covered by the "Collins Treaty" of 1785 were never properly surrendered and should never have been included in the 1923 Williams Treaty. The Council also claims that the Crown failed to compensate the Chippewa Nation for the loss of its land, hunting, fishing, and trapping rights. Planning conferences were held on November 4, 1996, and January 15, 1997.

Chippewa Tri-Council [Coldwater-Narrows Reservation], Ontario

This claim involves the surrender of the Coldwater-Narrows Reservation that was set aside in 1830 and surrendered under the 1836 Coldwater Treaty.

The claimant maintains that the surrender in 1836 was inconsistent with the instructions set out in the *Royal Proclamation of 1763*, and that proper compensation was never received for the loss of the reserve. Planning conferences were held in November and December 1996

Chippewas of Kettle and Stony Point First Nation [1927 Surrender], Ontario

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in March 1997.

Clearwater River Dene Nation [Treaty Land Entitlement], Saskatchewan

The claimant alleges that the Crown owes it additional reserve land under Treaty 8. The file is currently closed at the request of the First Nation.

Cote First Nation No. 366 [1905 Surrender], Saskatchewan

This claim relates to the sale of lands surrendered by the Cote First Nation in 1905. The claimant alleges that the Crown breached its fiduciary duty to the Band by failing to sell the land at the agreed price. The claimant also questions the Crown's management of the moneys, both in terms of capital and interest, generated by the sale of the surrendered land. Two planning conferences were held in July and September 1996. The parties agreed that a community session was not necessary, but requested that an information session take place in the community.

Cowessess First Nation [QVIDA - Flooding], Saskatchewan

Cowessess First Nation is a member of the Qu'Appelle Valley Indian Development Authority (QVIDA), an association of eight Saskatchewan First Nations (the other QVIDA First Nations are listed separately in this section). The First Nations allege that they are owed compensation for the flooding and degradation of 14,000 acres of unsurrendered land on various reserves, from the extensive damming of the Qu'Appelle River system, allowed by the Crown in breach of its fiduciary duty to the Bands. Community sessions were held in September and October 1996. Oral arguments are expected to take place in June 1997.

Cowessess First Nation [1907 Surrender], Saskatchewan

The claimant alleges that a surrender of reserve land in 1907 is invalid owing to its non-compliance with the *Indian Act.* The claimant also argues that the surrender was an unconscionable bargain and that the Crown breached its fiduciary duty to the First Nation. A planning conference was held on October 24, 1996.

Duncan's Indian Band [Wrongful Surrender], Alberta

This claim relates to the 1928 surrenders of Indian Reserves 151 and 151B to 151H, near Peace River, which the Band argues were null and void owing to non-compliance with the *Indian Act.* A pre-hearing conference is planned for April 1997.

Eel River Bar First Nation [Eel River Dam], New Brunswick

The claimant alleges that inadequate compensation was negotiated for the abrogation of treaty harvesting rights in 1963 when the nearby town of Dalhousie dammed the Eel River, causing loss of clams, eels, salmon, and other resources, which devastated both the First Nation's subsistence and commercial economy. Further, the First Nation claims that Canada improperly handled the expropriation of access lands and the ratification process. A community session was held on April 23, 1996, and oral arguments were heard on February 20, 1997. The final report of the Commission is in progress.

Fishing Lake First Nation [1907 Surrender], Saskatchewan

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in March 1997.

Friends of the Michel Society [Band Enfranchisement], Alberta

The claimant contends that the enfranchisement of many original Band members in 1928 and again in 1958 was illegal and improper. The Commission is asked to consider whether the descendants of the Michel Indian Band, who are members of and represented by the Friends of Michel Society, are members of or entitled to be members of an Indian Band as that term is used within the Specific Claims Policy. A community session was held in December 1996. Oral arguments are scheduled to take place in April 1997.

Gamblers First Nation [Treaty Land Entitlement], Manitoba

The claimant alleges that the Crown owes it additional reserve land under Treaty 4. A planning conference took place on June 14, 1996, followed by a community session and oral arguments in November 1996.

Kahkewistahaw First Nation [1907 Surrender], Saskatchewan

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in February 1997.

Kahkewistahaw First Nation [Treaty Land Entitlement], Saskatchewan

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in November 1996.

Kahkewistahaw First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Key Band [1909 Surrender], Saskatchewan

The Band argues that the Crown breached its lawful and beyond lawful obligations in 1909 in obtaining the surrender of 11,500 acres of its reserve. The claim is closed pending further notice by the Band that it is prepared to proceed with the inquiry.

Long Plain First Nation [Treaty Land Entitlement Loss of Use], Manitoba

The First Nation claims compensation for loss of use of lands that it was entitled to under treaty but which it did not receive until 1994. Planning conferences were held on December 9, 1996, and February 14, 1997. The parties have agreed to exchange written submissions and then provide a submission to the Commission. A community session is not required but oral arguments will be scheduled.

Lucky Man Cree Nation [Treaty Land Entitlement], Saskatchewan

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in March 1997.

Mamaleleqala Qwe'Qwa'Sot'Enox Band [McKenna-McBride Applications], British Columbia

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in March 1997.

Mikisew Cree First Nation [Treaty Entitlement to Economic Benefits], Alberta

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in March 1997.

Moose Deer Point First Nation [Recognition of Pottawatomi Rights in Canada], Ontario

The claimant asserts that it has been wrongfully deprived of the use of land in view of British promises made to the Pottawatomi in the 1830s. A planning conference took place on August 30, 1996. No community session was required. The file remains active.

Moosomin First Nation [1909 Surrender], Saskatchewan

The claimant alleges that the Crown wrongfully induced the surrender of more than 14,700 acres in 1909, failed to comply with the strict requirements of the *Indian Act*, and conducted the sale of the surrendered lands unfairly. Oral arguments were heard on September 24, 1996, and the final report of the Commission is in progress.

Muscowpetung First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

'Namgis First Nation [McKenna-McBride Applications], British Columbia

For information on this claim, see the section entitled Completed Inquiry Reports and the Commission's final report, released in February 1997.

Nekaneet First Nation [Entitlement to Treaty Benefits], Saskatchewan

The claimant alleges that the Crown failed to provide treaty benefits to the First Nation and its members during the period extending from 1883 to 1968. In

particular, the claimant contends that the Crown failed to provide farm implements, equipment, and supplies; program and other funding; and annual payments. The First Nation also claims that the Crown failed to establish a reserve for the First Nation between the signing of Treaty 4 and 1913. A planning conference was held on November 21, 1996.

Ocean Man Band [Treaty Land Entitlement], Saskatchewan

The claimant alleges that the Crown owes the Ocean Man Band an additional 7,680 acres of reserve land under Treaty 4. At issue is the appropriate date for calculation of the claimant's land entitlement according to the treaty formula. A planning conference was held on June 19, 1996. This claim is currently in the oral argument stage of the process.

Ochapowace First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Pasqua First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Peguis Indian Band [Treaty Land Entitlement], Manitoba

The claimant alleges that the Band is owed over 22,000 additional acres under Treaty 1 to meet its treaty land entitlement (TLE). During the initial planning conferences, the 1907 surrender of St Peter's reserve was also discussed. The parties agreed to work on the surrender claim while keeping the TLE claim alive. They also agreed that the Band would submit the surrender claim and Canada would review it in a timely manner. Subsequently, the parties decided that it was necessary to receive a decision on the status of the surrender claim before the TLE inquiry could proceed. Therefore, the inquiry was placed in abeyance pending Canada's review of the surrender claim. On February 3, 1997, the Band was informed that the Specific Claims Branch was prepared to recommend that the surrender claim be accepted for negotiation. A fifth planning conference has been scheduled for April 1997 to discuss the TLE claim.

Piapot First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Sakimay First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Standing Buffalo First Nation [QVIDA - Flooding], Saskatchewan

See Cowessess First Nation [QVIDA - Flooding].

Sturgeon Lake First Nation [Agricultural Lease], Saskatchewan

At issue in this claim is whether the Crown breached its lawful obligation to the First Nation by failing to comply with the provisions of the *Indian Act* when it leased land on Sturgeon Lake Reserve in 1982. A planning conference was held on July 11, 1996. During a conference call on December 6, 1996, representatives of the Crown proposed that the First Nation resubmit its claim on March 1, 1997, at which date the claim would fall within the 15 year time limit set out in Specific Claims Policy on historical claims.

Sturgeon Lake First Nation [1913 Surrender], Saskatchewan

The claimant alleges that a surrender of its reserve lands in 1913 is invalid because a majority of eligible voters did not participate in the surrender vote. A planning conference was held on November 22, 1996. The claim is currently in abeyance pending the completion of Canada's confirming research and review of the claim.

Sumas Indian Band [1919 Surrender of Indian Reserve No. 7], British Columbia

The Band maintains that the Crown is in breach of its fiduciary or trust obligations in connection with its role in the 1919 surrender and sale of the entire Sumas Indian Reserve (IR) 7. Also at issue are the validity of the surrender and the compliance with surrender procedures under the *Indian Act.* A combined community session/oral argument was held in April 1996. The final report of the Commission is in progress.

Walpole Island First Nation [Anderdon Township], Ontario

The First Nation claims that the terms of its surrender of 300 acres of land in Anderdon Township, Ontario, in 1848 were never fulfilled and that funds from the land sale were not credited to its account. To their original claim submission, the claimants added a further allegation which led to resubmission of the claim. This file is now closed.

Walpole Island First Nation [Boblo Island], Ontario

This claim concerns the alleged surrender of Boblo Island in 1786. A planning conference was held on July 12, 1996. The parties subsequently agreed to undertake joint research. The community session was waived by the parties, and the inquiry was to proceed with the oral arguments which will take place in 1997.

Walpole Island First Nation [Pelee Island], Ontario

The claimant alleges that Pelee Island was never formally surrendered and, if it was, compensation was never paid to the members of the Walpole Island First Nation. Canada agrees that the island was never formally surrendered, but argues that the claim falls outside the scope of the Specific Claims Policy. A planning conference was held on July 12, 1996. The claim is currently in abeyance at the request of the First Nation.

Mediation and Facilitation

Fishing Lake First Nation, Saskatchewan

See Special Initiatives, page 14, for details.

Michipicoten First Nation, Ontario

See Special Initiatives, page 16, for a description of the Pilot Project.

Mistawasis First Nation [1911, 1917, and 1919 Surrenders], Saskatchewan

The claimant alleges that surrenders in 1911, 1917, and 1919 are null and void because they were obtained by undue influence, they were a breach of the Crown's fiduciary duty to the First Nation, they were obtained without compliance with the *Indian Act,* and they were an unconscionable bargain. The claim is currently in abeyance at the request of the First Nation.

Osoyoos Indian Band [J.C. Haynes Specific Claim], British Columbia

In January 1996, the First Nation wrote to the Commission requesting a review of compensation negotiation costs in the J.C. Haynes Claim. The parties had reached an impasse on the costs issue. The Commission offered its mediation services to the parties in order to assist them in resolving this matter. The ICC met with the parties as an impartial observer at the end of the last fiscal year, as they tried to reach some understanding about the progress of the claim. In May 1996, discussions stalled again and the ICC continued throughout this year to make efforts to assist the parties in restarting the process.

Roseau River Anishinabe First Nation [1903 Surrender], Manitoba

The claimant alleges that the Crown is in breach of both its fiduciary and its Treaty 1 obligations in connection with its persistent initiation of the surrender of 12 square miles of reserve land, as well as its questionable handling of the auctioning of individual lots. In November 1996 the parties agreed to conduct tripartite (Canada, First Nation, and ICC) research. The terms of reference for the joint research project were finalized in February 1997.

Salt River First Nation [Treaty Land Entitlement], Northwest Territories

In 1992, Canada accepted an outstanding lawful obligation to fulfil the First Nation's treaty land entitlement claim. The First Nation became dissatisfied with the progress of negotiations with Canada and, in February 1996, requested mediation by Justice Robert Reid of the ICC. However, in May 1996, Canada rejected this proposal. The Commission is kept informed of the situation.

Squamish First Nation [Capilano Indian Reserve No. 5 - Bouillon Claim], British Columbia

This claim concerns the alleged pre-emption of Squamish Capilano Indian Reserve 5 in the 1880s. After the Commission's inquiry process commenced, the Minister of Indian and Northern Affairs accepted the claim for negotiation under Canada's Specific Claims Policy. The ICC was initially requested in 1995 to assist the parties in negotiations and continues to meet with them.

Thunderchild First Nation [1908 Surrender], Saskatchewan

In November 1996, the parties agreed to continue negotiations with third-party assistance from the ICC. The claim is currently being actively mediated by the ICC's legal and mediation advisor, Justice Robert F. Reid and deals with Compensation Criteria 3 of the Specific Claims Policy relating to compensation for loss of use. Initial meetings took place in January 1997, and are planned to continue.

Treaty 8 Tribal Corporation [Treaty Land Entitlement], Northwest Territories

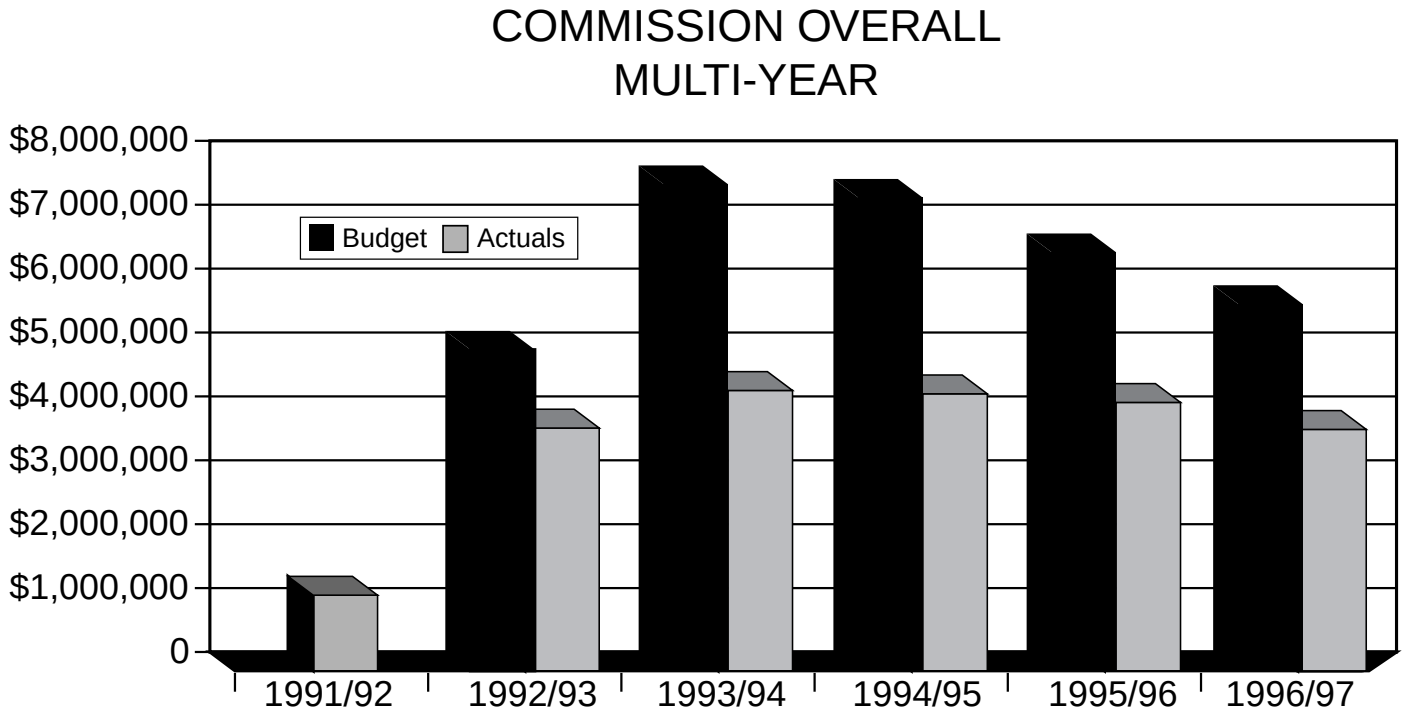
Canada accepted the Treaty 8 Tribal Corporation's treaty land entitlement claim for negotiation in 1992. The ICC was requested to assist the parties in developing a protocol agreement for negotiations. Throughout 1995, negotiations continued between Canada and the First Nations of the Treaty 8 Tribal Council with the assistance of an ICC mediator. In February and March 1996, the negotiations reached a roadblock. The closing of western offices of Specific Claims further complicated the issue. The Commission made several attempts to revitalize negotiations during the spring and summer of 1996. In September 1996, the ICC met with Specific Claims to determine when a new negotiator might be assigned and discussions re-commence. The Commission continues to monitor the situation.

APPENDIX D
OPERATIONAL OVERVIEW

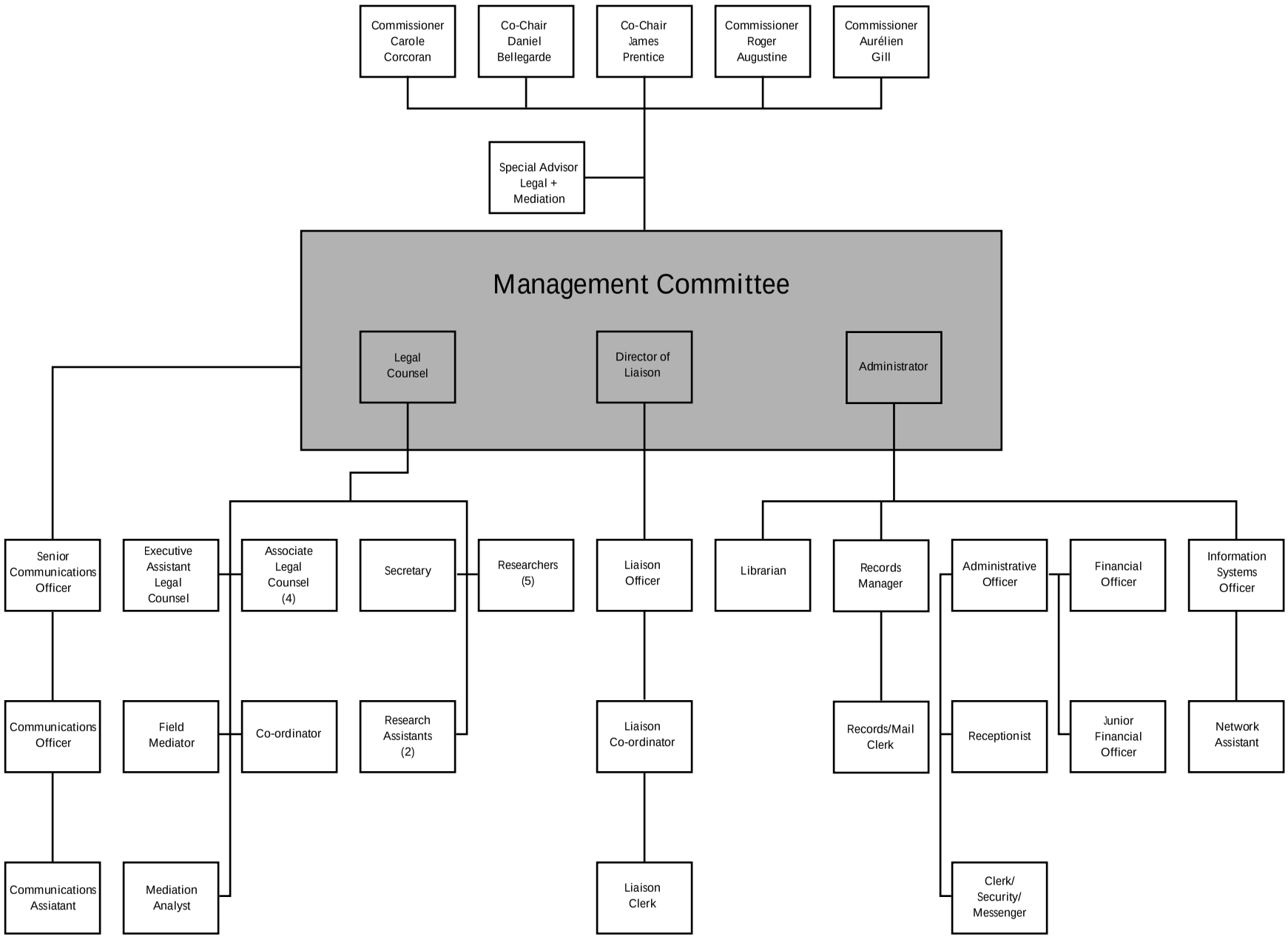
The Commission maintains a staff of 40 people. The Commission has a Management Committee, consisting of its Administrator, Commission Counsel, and Director, Liaison, which oversees the operations of the Commission. This committee reports to the Co-Chairs and, with their strategic direction, provides day-to-day management of the organization.

FINANCE

The Commission continues to focus on prudent fiscal management practices. The graph below represents the amounts budgeted and the amounts expended by the Commission since its inception. In 1996/97, the Commission only expended $ 3.8 M against an approved budget of $ 5.7 M for an additional savings of approximately $ 1.9 M. The total accumulated savings since the beginning of the Commission now represents some $11.8 M.



INDIAN CLAIMS COMMISSION



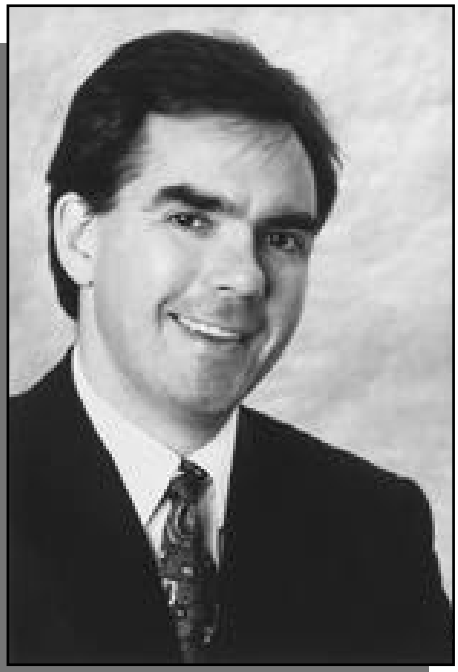
APPENDIX E

THE COMMISSIONERS

Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in Southern Saskatchewan. From 1981 to 1984, he worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. From 1984 to 1987, Mr. Bellegarde was president of the Saskatchewan Indian Institute of Technologies. Since 1988, he has held the position of first vice-chief of the Federation of Saskatchewan Indian Nations. He was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

Co-Chair P.E. James Prentice, QC, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr. Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

Co-Chair Daniel J. Bellegarde



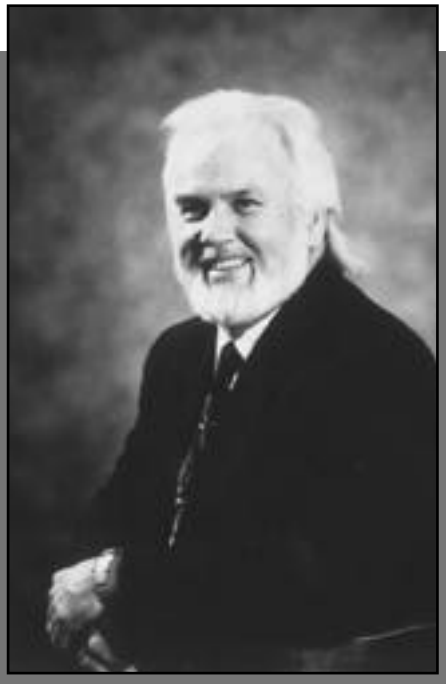
Co-Chair P.E. James Prentice, QC

Roger J. Augustine is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected President of the Union of NB-PEI First Nations in 1988 by the Chiefs of the 16 Band Territories in both provinces and completed his term in January 1994.

He is currently President of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products and Chairman of the EFP Environment and Communications Advisory Committee. He is past chairman of the Aboriginal Business Circle for the Bank of Montreal, President of Black Eagle Construction, Vice Chairman for the First Phoenix Fund Company Ltd., Board of Directors, past chairman of the Micmac Maliseet Development Corporation, and advisor to several companies and government agencies.

In February 1996, Mr. Augustine was appointed a Director to the National Aboriginal Economic Development Board by the Federal Department of Industry. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. Mr. Augustine was appointed as a Commissioner to the Indian Claims Commission in July 1992.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs. Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She has served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner of the British Columbia Treaty Commission from 1993 to 1995. Mrs. Corcoran was appointed as a Commissioner to the Indian Claims Commission in July 1992.



Commissioner Roger J. Augustine

Commissioner Carole T. Corcoran

Commissioner Aurélien Gill

Aurélien Gill is a Montagnais from Mashteuiatsh (Pointe-Bleue), Quebec, where he served as Chief for nine years. He has helped found many important Aboriginal organizations, including the Conseil Atikamekw et Montagnais, the Conseil de la Police amérindienne, the Corporation de Développement Économique Montagnaise, and the National Indian Brotherhood (now the Assembly of First Nations). Mr. Gill served as Quebec Regional Director in the Department of Indian Affairs and Northern Development, and is a member of the National Aboriginal Economic Development Board. Mr. Gill serves as a member of several boards, including the Board of the Université du Québec à Chicoutimi and on the board for the Northern Engineering Centre at the Université de Montréal. He is a member of the Environmental Management Boards for the federal government and for the Province of Quebec. In 1991, he was named to the Ordre national du Québec. Mr. Gill was appointed Commissioner of the Indian Claims Commission on December 8, 1994.